[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 09-5265, 09-5266, 09-5277

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

FADI AL MAQALEH, et al.,
Petitioners-Appellees,
v.
ROBERT GATES, et al.,
Respondents-Appellants.

AMIN AL BAKRI, et al.,
Petitioners-Appellees,
v.
BARACK OBAMA, et al.,
Respondents-Appellants.

REDHA AL-NAJAR, et al.,
Petitioners-Appellees,
v.
ROBERT GATES, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

Habeas petitioners in the district court and appellees in this Court are: detainee Fadi Al Maqaleh; Ahmad Al Maqaleh (as Next Friend of Fadi Al Maqaleh); detainee Amin Al Bakri; Muhammad Al Bakri (as Next Friend of Amin Al Bakri); detainee Redha Al-Najar; and Houcine Al-Najar (as Next Friend of Redha al-Najar). In addition, detainee Haji Wazir and Mohammad Sharif (as Next Friend of Haji Wazir) were habeas petitioners in the district court.

Respondents in the district court and appellants in this Court are: Robert Gates, Secretary, Department of Defense; and Barack Obama, President of the United States.

B. Rulings Under Review.

In this appeal pursuant to 28 U.S.C. § 1292(b), the Government seeks review of the ruling issued by Judge Bates on April 2, 2009, in Civil Action Nos. 06-1669, 08-1307, 08-2143, that denied the Government's motion to dismiss the claims of the three detainees at issue in this appeal. The district court's April 2 decision is published at 604 F. Supp.2d 205. On June 1, 2009, the district court certified for appeal its denial of the Government's motion to dismiss, and that ruling is published at 620 F. Supp.2d 51.

C. Related Cases.

In the same opinion denying the motions to dismiss as to the three detainees at issue here, the district court deferred its final ruling with regard to another detainee in a related habeas action, *Wazir v. Gates*, Civ. No. 06-1697 (D.D.C.). The district court ordered further briefing in that case, and then granted the Government's motion to dismiss on June 29, 2009. That ruling is published at 629 F.Supp.2d 63. On August 26, 2009, Wazir filed a notice of appeal from that order. That appeal has been docketed in this Court as No. 09-5303.

The undersigned counsel is aware of no other cases involving substantially the same parties and the same or similar issues, pending before this Court or any other court.

__/s/_____
Robert M. Loeb
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GLOSSARY

AUMF .....Authorization for Use of Military Force

BTIF ……Bagram Theater Internment Facility

ISAF ……..International Security Assistance Force of the North Atlantic Treaty Organization

NATO .....North Atlantic Treaty Organization

SOFA.....Status of Forces Agreement

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BRIEF FOR RESPONDENTS-APPELLANTS

STATEMENT OF JURISDICTION

The detainees in this case invoked the district court's habeas corpus jurisdiction under 28 U.S.C. § 2241. The district court held that Congress had eliminated habeas jurisdiction under Section 2241 with regard to aliens determined by the United States to be "enemy combatants" by enacting Section 7(a) of the Military Commissions Act

of 2006 (Pub. L. No. 109-366, 120 Stat. 2600 (2006)). The court further held, however, that Section 7(a) is unconstitutional as applied to the three detainees here. As respondents explain below, the district court's constitutional ruling is wrong. Thus, the claims should be dismissed for want of subject-matter jurisdiction.

On June 1, 2009, the district court certified the three habeas cases for appeal under 28 U.S.C. § 1292(b). The Government then filed a timely petition to this Court for interlocutory appeal. The Court granted that petition on July 30, 2009. Accordingly, this Court has jurisdiction over the present appeals under Section 1292(b).

STATEMENT OF THE ISSUE

In *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Supreme Court ruled that Section 7(a) of the Military Commissions Act is unconstitutional as applied to long-term alien detainees held by the United States military in the United States naval base at Guantanamo Bay, Cuba, a place where the Supreme Court held that the United States exercises "*de facto* sovereignty." *Id.* at 2253. The district court here extrapolated the reasoning in *Boumediene* to hold that the United States Constitution also guarantees habeas rights to certain aliens detained by United States military forces at a multi-national military facility in Afghanistan, known as Bagram Airfield. The issue posed in these interlocutory appeals is whether the district court erred in extending habeas rights under the United States Constitution to petitioners, who are

non-Afghan aliens allegedly captured outside of Afghanistan and detained by United States military forces at Bagram Airfield.

STATEMENT OF THE CASE

Four individuals being detained as enemies by United States military forces at the multi-national Bagram Airfield military base in Afghanistan brought separate habeas actions in United States federal court challenging the lawfulness of their detention under United States law. The United States moved to dismiss the four actions for lack of subject matter jurisdiction. The district court denied the motions as to three detainees, and then later granted the motion as to the fourth (who is not a party to these appeals). As noted above, the district court certified its ruling denying the motions to dismiss for interlocutory appeal, which this Court accepted.

STATEMENT OF THE FACTS

I. The Pertinent Statutory Provision

In Section 7(a) of the Military Commissions Act, Congress amended 28 U.S.C. § 2241, which defines the habeas corpus jurisdiction of the federal courts. As amended, Section 2241(e)(1) reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Section 2241 also bars federal-court review of any claim that relates "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(2).

II. The Armed Conflict in Afghanistan, the Multi-National Military Base in Afghanistan, and the Bagram Theater Internment Facility.

A. In response to the attacks against the United States on September 11, 2001, Congress enacted the Authorization for Use of Military Force ("AUMF") (115 Stat. 224, 50 U.S.C. § 1542 note). That statute authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF § 2(a).

Under the authority conferred by the AUMF and in accord with the laws of war, the United States is now engaged in ongoing combat operations against the Taliban and al Qaeda, as well as ongoing related efforts to support the sovereignty of the Afghan government. The United States-led military operation in Afghanistan — known as Operation Enduring Freedom — began in October 2001; it is a multi-

national coalition, acting in concert with Afghan forces, seeking to defeat the Taliban and al Qaeda and bring security to Afghanistan. *See* Joint Declaration of the United States-Afghanistan Strategic Partnership (JA 238A).

The fighting in Afghanistan has claimed more than 800 American lives, with 190 in this year alone. Recent months have proved the most deadly as American troops contend with a sharp increase in attacks by Taliban and al-Qaeda militants.[1] In the past six months, the United States has deployed additional American military units to Afghanistan as the battle with the Taliban escalates. Today, there are more than 62,000 American troops serving in Afghanistan, with 6,000 more expected by the end of the year.[2]

As part of the ongoing war in Afghanistan, the United States operates several non-permanent military facilities in that country. The largest is Bagram Airfield, located approximately 40 miles north of Kabul. The United States military, together

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[1] R. Oppel Jr., "A Deadly Month for U.S. Troops in Afghanistan," N.Y. Times, A4 (July 20, 2009) (http://www.nytimes.com/2009/07/21/world/asia/21afghan.html); R, Oppel & S. Rahimi, 39 Afghans and 5 G.I.'s Are Killed in Attacks, N.Y. Times, A13 (Sept. 13, 2009) (http://www.nytimes.com/2009/09/13/world/asia/13afghan.html).

[2] *See* PBS.org, Online Newshour, "Marines Storm Taliban Stronghold Ahead of Election," (http://www.pbs.org/newshour/updates/asia/july-dec09/afghanistan_08-12.html).

with Afghan and multinational forces, conducts a full spectrum of combat operations from Bagram Airfield. JA 64-65.

Taliban and al Qaeda forces have repeatedly attacked Bagram Airfield. For example, in March 2009, a suicide bombing struck the gates of the facility, and, in a separate incident the following day, three rounds fired at the Airfield hit near its perimeter. As part of the same attack, a fourth round hit the Bagram Theater Internment Facility, the detention facility located at Bagram Airfield in which petitioners are housed.[3] Most recently, on June 21, 2009, Taliban fighters fired rockets at Bagram Airfield, killing two American service members and injuring at least six other personnel.[4]

The United States provides overall security at Bagram Airfield, but numerous other nations also have compounds on the base, and each Nation controls access to its respective compound. JA 65, 703. The troops from the various other nations are present at Bagram either as part of the American-led military coalition in Afghanistan, or as part of the separate International Security Assistance Force of the North Atlantic

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[3] *See* Armed Forces Press Service, *Three Injured in Suicide Attack at Bagram* (March 4, 2009) (www.defenselink.mil/news/newsarticle.aspx?id=53322); Bagram Media Center, *Indirect Fire Incident on BAF* (March 6, 2009).

[4] *See* American Forces Press Service, *Bagram Airfield Attack Kills Two U.S. Service Members, Wounds Six* (June 22, 2009) (http://www.defenselink.mil/news/newsarticle.aspx?id=54860).

Treaty Organization ("ISAF"), the mission of which is to support the Afghan government in the maintenance of security in Afghanistan. United Nations Security Council Resolutions 1386 (2001), 1510 (2003), 1833 (2008). There are approximately 38,000 non-U.S troops in Afghanistan assigned to the ISAF, representing 41 other countries.[5] Approximately 20,000 of those ISAF troops, including soldiers from the Czech Republic, Turkey, and New Zealand, are assigned to ISAF's eastern regional command, which is headquartered at Bagram Airfield. *Ibid.*

B. Out of respect for Afghanistan's status as an independent and sovereign nation, the United States entered into the most recent lease with that country in 2006, covering the United States' use of the land and facilities at Bagram Airfield. JA 64-65, 72. Pursuant to the lease, which was entered into "in consideration of the mutual benefits to be derived" by both governments, Afghanistan consigns all facilities and land located at Bagram Airfield "for use by the United States and Coalition Forces for military purposes." JA 72.

The United States, as the "lessee," has "exclusive use" and "exclusive, peaceable, undisturbed and uninterrupted possession" of the premises during the existence of the lease agreement. JA 74. The agreement continues in effect until the

[5] *See* International Security Assistance Force *International Security Assistance Force and Afghan National Army Strength & Laydown* (http://www.nato.int/isaf/docu/epub/

United States determines that it no longer requires use of the facility for military purposes. JA 73. The lease specifically addresses the disposition of additions, fixtures, and structures when the United States leaves the Airfield. JA 74. The lease also states that Afghanistan "is the sole owner of the Premises" and "has the right, without any restrictions, to grant the use of the Premises." *Ibid.*

C. A separate Status of Forces Agreement ("SOFA"), into which the United States and Afghanistan entered in 2003, defines the legal status of United States military forces in Afghanistan, including at Bagram Airfield. That agreement was concluded through an exchange of diplomatic notes between the two countries. JA 79, 83. The agreement recognizes that Defense Department military and civilian personnel "may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities." JA 79. The agreement between the two countries provides, "without prejudice to the conduct of ongoing military operations by the United States," that covered personnel are accorded a status equivalent to that accorded the administrative and technical staff of the U.S. embassy in Afghanistan under the Vienna Convention on Diplomatic Relations. JA 79, 83.

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pdf/placemat.pdf).

D. Since United States military operations began in Afghanistan in October 2001, United States and allied forces have detained there various individuals who are part of al Qaeda or the Taliban. JA 65-66. The United States military typically screens these suspected enemy forces and releases many of them after a short detention. A small percentage of the thousands of individuals detained have been subject to longer-term detention under the AUMF in accordance with the laws of war. The Department of Defense has found such individuals to be detainable as enemies during the armed conflict and to require longer-term detention because they present a risk of rejoining the fight if released. Those detainees are held at the Bagram Theater Internment Facility ("BTIF"), which is under the command and control of the United States military. *Ibid*.

Today, there are approximately 600 long-term detainees held at the BTIF, including the three detainees in this appeal. The detainees are not held incognito; each detainee is registered with the International Committee of the Red Cross, which regularly visits the detention facility to conduct private interviews with the detainees. JA 66.

Written criteria of the Department of Defense, approved on July 2, 2009, limit the category of individuals who may be detained on a long-term basis by the United States military at the BTIF. Addendum ("Add.") 1-8. Those standards, which are

based on the AUMF, provide that an individual may be held at that facility only if he meets one of the following criteria:

> • Persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks.
>
> • Persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.

Add 3. Even if an individual meets these criteria, the Department of Defense must assess whether detention is required to mitigate the threat the individual poses. If at any time in the process the individual is determined not to satisfy the threshold criteria or to pose a threat insufficient to warrant detention, he will be released. In no event may an individual be detained solely based on "intelligence value." *Ibid*.

E. The Department of Defense conducts regular review processes to determine whether individuals in the detention population at BTIF satisfy these definitions. Those processes have been enhanced under new Defense Department standards that were promulgated on July 2, 2009, and will begin to go into effect after a statutorily required congressional notification period that expires in September 2009.

The standards and procedures that were applicable to the detainees in this case at the time of the district court decision were as follows. U.S. military troops made an

initial determination of detainability when they took control of the individual. JA 66. The detaining combat commander, or his designee, reviewed the field determination within 75 days of the individual's arrival at the BTIF. JA 67. Every six months thereafter, United States military officers reviewed the detainee's status. *Ibid*. The Commanding General at Bagram Airfield could establish review boards to conduct these reviews and to make recommendations. *Ibid*. Those review boards were composed of three United States commissioned military officers who could evaluate a detainee's status based on reasonably available information, including classified intelligence and testimony from individuals who had been involved in the capture and interrogation of the detainee. JA 67-68.

Under the July 2009 Defense Department memorandum, new rules will apply to all detainees at the BTIF, including the detainees here. *See* Add. 1-8. A United States military officer will be assigned as the detainee's "personal representative" who "shall act in the best interests of the detainee" by gathering and presenting information reasonably available in the light most favorable to the detainee. Add. 5, 7-8. All detainees will be provided with interpreters. The new procedures require the commander of the facility to ensure that detainees receive timely notice of the basis of their detention, including unclassified summaries of the supporting facts. Add. 5-7. Military boards reviewing a detainee's status are to follow the procedures set forth in Army Regulation 190-8, as supplemented with additional procedures, including a

reasonable investigation into any exculpatory information the detainee offers and notice to the detainee of the purpose of the hearing, an opportunity to present information, and the right to attend open sessions, testify, and call reasonably available witnesses. Add. 5-7.

III. The Enemy Detainees Here

The three detainees here are being held by the United States military at the BTIF. Each was determined when he was were first brought under military custody, and in subsequent reviews, to be subject to detention as an "unlawful enemy combatant." JA 69, 535G, 707-08.

Redha al-Najar is a citizen of Tunisia, who contends that he was captured in Pakistan in 2002. JA 620. He asserts that he was first in custody at a different location and then moved to Bagram. JA 620.[6]

Fadi al Maqaleh is a Yemeni citizen who claims that he was taken into custody in 2003. His petition asserts, on "information and belief," that he was captured beyond Afghan borders, but does not specify where. JA 16. A sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that al Maqaleh was captured in Zabul, Afghanistan. JA 31G.

[6] In his habeas petition, al-Najar claimed that the "United States Government has notified [him] * * * that it no longer wishes to detain him" (JA 622); the United States has made no such determination.

Amin al Bakri is a Yemeni citizen who alleges that he was captured in Thailand in December 2002. He claims that he was first held in an unknown location for several months and then was moved to Bagram. JA 475-76.

IV. The District Court Proceedings

A. These three detainees filed separate habeas corpus actions against the President of the United States and the Secretary of Defense. JA 12, 471, 615. The Government moved to dismiss for lack of jurisdiction based on Section 7(a) of the Military Commissions Act.

The district court consolidated these case with a fourth case for argument and held a hearing on January 7, 2009. JA 248. Recognizing the change in Presidential Administration, on January 22, 2009, the court invited the Government to state whether it intended to refine the jurisdictional position previously argued. JA 247. The Government informed the district court that it "adheres to its previously articulated position." JA 387.

B. The district court denied the Government's motion to dismiss and held that federal habeas jurisdiction extends to these military detainees in the theater of military operations in Afghanistan. The court examined *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Supreme Court concluded that the constitutional habeas writ did not extend to foreign military detainees held by United States armed forces at an American-controlled prison in Germany in the wake of World War II. Based on its reading of *Boumediene*, however, the district court concluded that the Constitution provides habeas rights to non-Afghan aliens detained in Bagram who claim they had been captured elsewhere. JA 395-449.

The district court first ruled that Section 7(a) of the Military Commission Act eliminated federal statutory habeas jurisdiction over these cases. JA 405-09. The court reasoned that *Boumediene* had invalidated Section 7(a) "only as it applies to Guantanamo specifically" and had not purported to determine the statute's constitutionality as applied to other locations such as Bagram. JA 409. The court noted that "the Supreme Court specifically observed that it might reach a different outcome if the site of detention was someplace other than Guantanamo." JA 408.

The district court then addressed whether the Suspension Clause rendered Section 7(a) unconstitutional in these circumstances. The court derived from *Boumediene* six factors that, in its view, govern the applicability of the Suspension Clause's protections: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ." JA 411. The district court reasoned that *Boumediene* demands that the examination of these factors be conducted on a detainee-specific, individualized basis, rather than as a categorical matter based on the location of detention. JA 411-13.

Applying these factors, the district court ruled that constitutional habeas rights extend to these detainees because they "are virtually identical to the detainees in *Boumediene*." JA 400. Although the court agreed with the Government that "the site of detention at Bagram is not identical to that at Guantanamo Bay," the court concluded that the "objective degree of control" asserted by the United States at Bagram "is not appreciably different than at Guantanamo." JA 400.

The district court also examined whether the United States "has evidenced an intent to stay indefinitely" at Bagram. JA 428. "The court explained that "the United States has declared that it only intends to stay until the current military operations are concluded and Afghan sovereignty is fully restored." JA 428-29. The court acknowledged that this intent distinguishes the Guantanamo context: "Hostilities are ongoing and petitioners have not set forth persuasive evidence suggesting that the United States does not intend to quit Bagram once those hostilities have abated, even though the end of hostilities in Afghanistan remains well in the future." JA 430.

The court further concluded that "the 'practical obstacles' inherent in resolving a Bagram detainee's entitlement to habeas corpus are in some ways greater than those present for a Guantanamo detainee, because Bagram is located in an active theater of war." JA 400. Nonetheless, the court found that "those obstacles are not as great as respondents claim, and certainly are not insurmountable." *Ibid*. The court also held that, because these detainees are not Afghan citizens, "there is no possibility of

friction with the host government because the Afghan government has no interest in their detention." JA 440.

The district court concluded that the factors it identified supported recognition of a constitutional habeas right in these petitioners. JA 448. With regard to the fourth petitioner (Haji Wazir), who is not a party to this appeal, however, the court concluded that the factors weighed against him because he was an Afghan citizen. The court reasoned that, because of his citizenship, the "unique 'practical obstacles' in the form of friction with the 'host' country" were enough to tip the balance of *Boumediene* factors against his claim to habeas review in a United States court. JA 400. The court noted that, although "it may seem odd that different conclusions can be reached for different detainees at Bagram," that was the "predictable outcome of the functional, multi-factor, detainee-by-detainee test the Supreme Court has mandated in *Boumediene*." JA 400-01.

The district court stated that the only remaining question was whether the review process afforded to these detainees rendered habeas proceedings unnecessary. The court said that this was not an issue because "[r]espondents do not claim, nor could they after *Boumediene,* that the process Bagram detainees receive is an adequate substitute for habeas corpus." JA 443. The court thus denied the Government's motions to dismiss as to these detainees.

SUMMARY OF ARGUMENT

Habeas rights under the United States Constitution do not extend to enemy aliens detained in the active war zone at Bagram Airfield in Afghanistan. No court has ever extended the Great Writ so far; the district court's reading of *Boumediene* is wrong. The court therefore erred in declaring Section 7(a) of the Military Commissions Act unconstitutional as applied to these enemy detainees. The court's reading reverses longstanding law, imposes great practical problems, conflicts with the considered judgment of both political branches, and risks opening the federal courts to habeas claims brought by detainees held in other theaters of war during future military actions.

I. The Supreme Court's decisions in *Eisentrager* and *Boumediene* establish three controlling principles. First, the extraterritorial reach of the constitutional right to habeas does not depend solely on formal designations of territorial sovereignty, but rather incorporates a functional analysis of "objective factors and practical concerns" concerning the circumstances of the detention being challenged. Second, in that functional analysis, two considerations are paramount: the nature and duration of the United States presence at the site of detention, and the practical obstacles to permitting the detainee to pursue habeas relief in United States court. Third, the extension of habeas rights to Guantanamo in *Boumediene* rested heavily on the "unique status of Guantanamo" in both of these critical respects. The Supreme Court recognized that it

had never before extended constitutional rights to non-citizens captured and held abroad, but it concluded that a different result was warranted because of the unique confluence of circumstances that renders Guantanamo effectively part of the United States for habeas purposes. In different circumstances, however, where a site of detention does not share the defining attributes of Guantanamo, an enemy alien apprehended and detained by the military overseas in an active war zone at the very least bears an extremely heavy burden before he may sue his captors civilly and require the federal courts to second guess the judgment of both political branches with respect to the reach of habeas jurisdiction.

II. Application of *Boumediene* and *Eisentrager* to this case makes clear that constitutional habeas rights do not extend to enemy aliens held at Bagram Airfield.

A. First, the nature of the United States presence at Bagram is fundamentally different from that at Guantanamo. Guantanamo has been under the "complete jurisdiction and control" of the United States for more than 100 years, and United States activities there are not constrained by any other nation or by the host government.

The United States presence at Bagram Airfield, in contrast, is less than a decade old, it exists to serve a highly specific set of purposes — to win the active military conflict against the enemies of the United States and Afghanistan, to support Afghan sovereignty, and to protect Afghan territorial integrity — and the United States is

obligated under the terms of its lease to leave when it concludes that the Airfield is no longer necessary for "military uses." At Bagram, moreover, the United States must be mindful of the sovereignty of Afghanistan, as the host nation, and respectful of the numerous other countries that operate their own military forces out of that facility. United States activity at Bagram Airfield, specifically including detainee affairs, is conducted with a keen eye toward its implications for the sensitive and active diplomatic dialogue between the United States and Afghanistan. Nothing remotely similar could be said about Guantanamo and United States relations with Cuba.

In light of these essential distinctions, the district court erred in holding that detention at Bagram Airfield is not "appreciably different" from Guantanamo with respect to *Boumediene*'s "site of detention" factor. The court gave short shrift to the disparate histories, foundations, and purposes of the two sites. Moreover, the district court's expansion of habeas jurisdiction on the basis of United States military control over the detention facility could potentially extend United States constitutional habeas rights to other locations in the world where the United States might hold detainees in future wars, including locations like Bagram in the midst of the theater of active combat. That highly anomalous result cannot be squared with the great pains taken by the Supreme Court to announce a limited and narrow ruling in *Boumediene*.

B. Second, because Bagram, unlike Guantanamo, is in an active theater of war, and because the United States maintains close cooperation with the Afghan

government on whose sovereign territory the United States military actions and related detentions occur, permitting Bagram detainees to seek release through United States courts would encounter grave practical obstacles. The logistical complications created by civil litigation would divert military officials from their proper focus on the mission of winning the ongoing war. And the intrusion of a United States court adjudicating a habeas petition could cause friction with the host government by interfering with the sensitive diplomatic dialogue that is important to the success of that military mission. Those consequences directly implicate the Supreme Court's warning in *Eisentrager* about the dangerous effect of granting wartime detainees the right to subject the United States military to habeas suits.

III. The district court also erred because it relied on factors peripheral to the *Boumediene* and *Eisentrager* analyses. By distinguishing these detainees from other Bagram detainees based on whether they were Afghan nationals or captured in Afghanistan, the district court essentially deemed dispositive the "citizenship" and "site of apprehension" factors in *Boumediene*. That reasoning finds no support in *Boumediene* or *Eisentrager*, neither of which even focused upon – much less treated as conclusive – the fact that the petitioners in both cases were moved from the site of their capture and, in the circumstances at Guantanamo, detained in a country where they were not citizens. Moreover, this artificial limitation on habeas jurisdiction is unlikely to hold in practice, because detainees may simply allege that they were

captured outside of Afghanistan and use that allegation to surmount the district court's manufactured jurisdictional barrier.

In addition, the court weighed heavily against the Government the perceived inadequacy of the procedures used for reviewing the status of detainees at Bagram Airfield. But those review procedures (which have recently been enhanced) are at most loosely related to the threshold question of whether the constitutional right to habeas corpus extends to aliens detained at Bagram Airfield; the procedures are critical to the legal analysis in this case only if it were determined that habeas does extend to the detainees and the question then arose whether, consistent with the Suspension Clause, the procedures are sufficiently robust. The Court in *Boumediene* did not hold that the exact quantum of procedures was a central factor to be weighed in determining whether the detainee possessed the right to invoke the constitutional habeas jurisdiction of the federal courts in the first place.

STANDARD OF REVIEW

The present appeals present a question of law reviewed *de novo* by this Court. *See Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006).

ARGUMENT

CONSTITUTIONAL HABEAS RIGHTS DO NOT APPLY TO NON-U.S. CITIZENS DETAINED AS ENEMY FORCES AT BAGRAM AIRFIELD IN AFGHANISTAN DURING ACTIVE HOSTILITIES

I. *Eisentrager* And *Boumediene* Establish The Principles That Determine The Extraterritorial Reach Of Constitutional Habeas Rights

Two Supreme Court decisions, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), control the application of constitutional habeas rights outside the United States.

A. *Johnson v. Eisentrager*

In *Johnson v. Eisentrager*, the Supreme Court considered whether 21 German nationals detained by the United States Army as war criminals abroad had a constitutional right to bring habeas petitions in United States courts to challenge their detention. 339 U.S. at 765-66. The case arose in the context of the Allied Forces' post-World War II occupation of Nazi Germany after its defeat in 1945. The occupying forces provided aid and assistance to the reconstruction efforts in Germany. As part of post-war operations, the United States designated a prison in Landsberg, Germany as a military facility to detain war criminals. That prison was placed under the command of the United States Army. *See* Memorandum by Command of Gen. McNarney, Tr. of Record at 44, *Johnson v. Eisentrager*, 339 U.S. 763 (No. 306).

The detainees in *Eisentrager* sought to challenge their detention as a violation of the Constitution. Alleging that they were civilians who had never been associated with the German military forces, the detainees filed federal habeas petitions in April 1948, and their case reached the Supreme Court in 1950. *See* 339 U.S. at 765.

The Court, in an opinion by Justice Jackson, held that the detainees, as enemy aliens detained outside the United States, had no constitutional right to sue in a United States court to challenge their detention. 339 U.S. at 777, 781. The Court noted that the detainees "at no relevant time were within any territory over which the United States is sovereign." *Id.* at 778.

The Court supported its holding by emphasizing the significant consequences and practical difficulties that would result from extending the writ to detainees of the military at the prison in Landsberg, Germany. Although the war had ended before the detainees were captured, the Court reasoned that granting them the right to file habeas suits in United States courts to challenge the authority of their military custodians would "hamper the war effort and bring aid and comfort to the enemy" because, if such a right were recognized, it would be "equally available to enemies during active hostilities as in the present twilight between war and peace." *Id.* at 779.

The Supreme Court emphasized in *Eisentrager* that, in such circumstances, federal habeas proceedings would "diminish the prestige of our commanders, not only with enemies but with wavering neutrals." *Ibid.* The Court explained: "It would be

difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid*. The Court also reasoned that the habeas cases raised serious separation of powers concerns, because it was not "unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

B. *Boumediene v. Bush*

In *Boumediene*, the Supreme Court addressed the question whether aliens captured outside the United States and detained at the United States' long-established site at Guantanamo Bay possessed a constitutional right to challenge their detention through a habeas petition filed in a United States court. 128 S.Ct. at 2240. The Court held that such a right exists. In so doing, the Court did not overrule *Eisentrager*. Rather, the Court distinguished that case by focusing on what the Court described as the "unique status of Guantanamo Bay." *Id.* at 2251.

The *Boumediene* Court concluded that the extraterritorial reach of federal court habeas jurisdiction primarily rests on a functional analysis. The Court held that at least three factors are relevant to that functional approach: (1) the citizenship and status of the detainees and the process for determining their status; (2) the nature of the sites where the detainees were captured and detained; and (3) whether practical

obstacles exist to extraterritorial extension of constitutional habeas rights. 128 S.Ct. at 2259. The analysis in *Boumediene* focused heavily on the latter two factors, and the court concluded based on those two considerations that the circumstances at Guantanamo differed from the World War II detention of aliens in Landsberg, Germany. *Id.* at 2252-59, 2260-62.

With regard to the site of detention, the Court emphasized the unbroken control that the United States has exercised over Guantanamo — control dating back more than a century to Spain's repudiation of sovereignty. *Id*. at 2258. The Court contrasted that history with Landsberg and other locations where the United States "did not intend to govern indefinitely." The Court considered Guantanamo to be unique because it is "no transient possession." Reasoning that the United States exercises "absolute" and "indefinite" control at Guantanamo, the Court concluded that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id*. at 2260-61. Based on that determination, the Court reasoned that a "striking anomaly" would result if the political branches were able to govern such a territory without the constraint of constitutional habeas rights. *Id*. at 2259.

With regard to practical obstacles to extending habeas jurisdiction to Guantanamo, the Court found that, unlike in postwar Germany where the United States was responsible for massive reconstruction and aid efforts and where the

American forces had faced potential security threats from a defeated enemy, at Guantanamo there was no argument that the military mission would be compromised by habeas jurisdiction. 128 S.Ct. at 2261. Similarly, the court emphasized that, because "the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base," there was no indication "that adjudicating a habeas corpus petition would cause friction with the host government." *Ibid.* The Court cautioned that, "[w]ere that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight." *Id.* at 2261-62.

References to Guantanamo's exceptional and unusual character permeated the *Boumediene* Court's analysis of both the nature of the United States presence and the absence of practical obstacles to habeas jurisdiction:

- "the [Guantanamo] detainees * * * are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government" (*id.* at 2262);
- "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States" (*id. at 2261*);
- "in light of the plenary control the United States asserts over the base," it was not apparent that its military mission would be compromised by extending the writ there (*ibid.*);

- "Cuba effectively has no rights as a sovereign" involving Guantanamo (*id*. at 2252);
- "no law other than the laws of the United States applies at the naval station" (*id.* at 2251);
- "Guantanamo Bay * * * is no transient possession" (*id.* at 2261*)*;
- the Guantanamo detention facility is "located on an isolated and heavily fortified military base" where "the United States is, for all practical purposes, answerable to no other sovereign for its acts" (*ibid.*); and
- "[t]here is no indication* * * that adjudicating a habeas corpus petition would cause friction with [Cuba]" (*ibid.*).

The Supreme Court recognized in *Boumediene* that it had never before held that aliens detained by our government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. *Id.* at 2262. Nevertheless, given the unique circumstances at Guantanamo, the Court did extend constitutional habeas rights in that situation. *Ibid.*

The Court's emphasis on Guantanamo's unique status thus suggests that where, as here, detainees seek to extend the reach of the Suspension Clause to a location that does not share Guantanamo's defining attributes, and that resembles, instead, the detention facilities the United States has maintained in foreign countries during past wars, petitioners should bear a heavy burden to justify that highly anomalous result.

C. The Constitutional Principles Established by *Eisentrager* and *Boumediene*

Eisentrager and *Boumediene* make clear that "questions of extraterritoriality [of federal habeas jurisdiction] turn on objective factors and practical concerns." *Boumediene*, 128 S.Ct. at 2258. In *Boumediene*, the Court observed that it had adopted such an approach in applying the Constitution to territories, possessions, and bases outside the United States (*id.* at 2252-58), and the Court referred to "practical" considerations and factors concerning habeas rights no fewer than nine times in the key part of its constitutional analysis. *Id.* at 2252-61, 2275.

Moreover, the analyses in *Boumediene* and *Eisentrager* confirm that two factors are paramount: the nature and duration of the United States presence at the site of detention, and the practical obstacles to allowing detainees confined there to bring federal habeas petitions in United States courts to challenge their detention. Those two factors provided the critical distinctions that prompted the Supreme Court in *Boumediene* to conclude that, although habeas jurisdiction did not extend to United States military detainees in Landsberg, Germany, the result should be different for Guantanamo.

This Court should similarly focus on those factors in determining whether the writ of habeas corpus extends to aliens detained by the military at Bagram Airfield in the theater of war. Some of the other factors cited by the *Boumediene* Court, such as

the "status and citizenship of the detainee" or the amount of process the detainee received, were not central to *Eisentrager* or *Boumediene*, and are of little assistance where, as in this case, the detainees are enemy aliens captured and held abroad as part of enemy forces. Neither *Boumediene* nor *Eisentrager* relied on those facts and constitutional habeas jurisdiction could not, under the practical considerations that were critical to *Boumediene,* generally extend to such a class of individuals.[7]

II. Application Of The Critical Factors Underlying *Boumediene* Confirms That Bagram Airfield Is Fundamentally Different From Guantanamo For Purposes Of The Extension of Habeas Rights And The Suspension Clause

Bagram Airfield is fundamentally different from Guantanamo, and closely analogous to the prison in Landsberg, Germany, with respect to the two factors critical to *Boumediene* and *Eisentrager*. *Boumediene* concluded that the United States exercised total, unfettered, and perpetual control over Guantanamo; but the United

[7] In almost every armed conflict in this country's history, military forces have detained enemy combatants during the course of hostilities and in their immediate aftermath without Article III review. For example, in World War I, American forces had custody of approximately 48,000 prisoners of war in France between the 1918 armistice and the treaty of peace in 1920. *See* George Lewis & John Mewha, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945, Dep't of the Army Pamphlet No. 20-213, at 63 (1955). By the end of World War II, United States forces had custody of approximately two million enemy combatants. *See id*. at 244. Many of the detainees were not repatriated for several years after the conclusion of hostilities. *See id.* at 243-45. During these conflicts, only a small fraction of this population was prosecuted and punished for war crimes; the vast majority of detainees were simply held during the conflict.

States presence and control at Bagram are limited, constrained, and temporary in ways akin to *Eisentrager*'s description of Landsberg prison. And *Boumediene* found that adjudicating habeas petitions brought by Guantanamo detainees would not encounter practical obstacles; but with respect to Afghanistan, the adjudication of habeas petitions challenging the authority of the United States military to detain enemy aliens would present exactly the kind of serious threats to the national interest that *Eisentrager* articulated.

A. The Nature of the United States Presence and Control at Bagram Airfield Is Fundamentally Different from That at Guantanamo

1. The History and Duration of the United States Presence And Control at Bagram Contrasts Sharply in Several Critical Ways with the Circumstances at Guantanamo

The *Boumediene* Court cited as a central basis for its finding of "*de facto* [U.S.] sovereignty" over Guantanamo the unique political history of the Guantanamo base and the indefinite duration of the United States presence there. Bagram differs significantly from Guantanamo on both points.

a. As the Supreme Court explained in *Boumediene*, the United States has exercised unbroken control over Guantanamo for more than 100 years. Indeed, Guantanamo was originally carved out of territory over which the United States acted as sovereign for several years. Spain ceded control over the entire island of Cuba to the United States at the end of the Spanish-American War, and in doing so,

specifically "relinquishe[d] all claim [s] of sovereignty * * * and title." *Boumediene*, 128 S.Ct. at 2258 (quoting Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. I, 30 Stat. 1755, T.S. No. 343). "From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory 'in trust' for the benefit of the Cuban people." *Ibid.* (citing, *inter alia*, *Neely* v. *Henkel*, 180 U.S. 109, 120 (1901)).

Shortly after the Cuban Republic was established in 1902, the United States leased from the new Cuban government the 45 square miles of land and coast that comprise Guantanamo. *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. Although the United States recognized that Cuba retained "ultimate sovereignty" over Guantanamo, that agreement provided that the United States would exercise "complete jurisdiction and control over and within" Guantanamo. *Ibid.* In reality, "the United States continued to maintain the same plenary control it had enjoyed since 1898." *Boumediene*, 128 S.Ct. at 2258. Some 30 years later, a treaty made the lease essentially indefinite by providing that the total American control over Guantanamo would extend until the two countries modified the agreement or the United States abandoned the base. *See* Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683. That arrangement remained in effect at the time of the *Boumediene* decision.

Furthermore, the United States has no plans to leave Guantanamo. To the contrary, in addition to maintaining the facility as a fully functioning naval base, the United States has built several community-oriented institutions there. *See* U.S. Navy, History of Guantanamo Bay (https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral).

Based on that history, the Court in *Boumediene* contrasted Guantanamo with Landsberg prison and other foreign locations where the United States "did not intend to govern indefinitely." Guantanamo, the Court explained, is "no transient possession." It is "in every practical sense * * * not abroad," but rather a part of the United States. 128 S.Ct. at 2260-61.

b. The history of Bagram Airfield is fundamentally different from that of Guantanamo. Bagram *is* in every practical sense abroad. The Soviet Union first used the area at Bagram for military purposes when that country invaded Afghanistan in the late 1970s. After the Soviet Union withdrew in 1989, Bagram changed hands numerous times during the decades-long Afghan civil war between the Taliban and the opposing forces of the Northern Alliance. The United States had no presence at Bagram until late 2001, when United States forces began combat actions in Afghanistan against al-Qaeda and the Taliban. JA 64. The United States and Afghanistan executed the most recent lease for Bagram Airfield just three years ago, in 2006. JA 64, 75.

The duration of the United States presence at Bagram Airfield, moreover, is obviously tied to the purpose for which the United States presence was established: to support military operations aimed at defeating the Taliban and al Qaeda and strengthening Afghan sovereignty. *See infra*, 6-7. In contrast to Guantanamo, the United States does not have any plans, or even a desire, to establish a permanent military base at Bagram. Thus, whereas the lease at Guantanamo contemplates no end to the U.S. presence there, the United States is obligated under the terms of the lease at Bagram to leave when it determines that the facility is no longer needed for military purposes.

In this respect, Bagram Airfield resembles Landsberg, Germany. As the district court here recognized, among the key factors distinguishing the prison at Landsberg from Guantanamo was that, at the time of *Eisentrager*, the United States presence at Landsberg prison was "of recent vintage" and the United States "had not planned a long-term occupation of Germany." JA 428. Like the troops stationed at Bagram Airfield, moreover, the U.S. forces then stationed in Germany were present not only to support a military mission but also to "supervis[e] massive reconstruction and aid efforts." *Boumediene*, 128 S.Ct. at 2261. And once its function of housing war criminals was completed in 1958, the United States relinquished control of Landsberg prison, just as the United States intends to relinquish control of Bagram Airfield after completing its mission in Afghanistan.

Bagram has been under the control of the United States for a far shorter time than Guantanamo, and the United States presence there is temporary. Unlike Guantanamo, but like Landsberg prison, Bagram Airfield in Afghanistan is a "transient" facility that the United States "d[oes] not intend to govern indefinitely." 128 S.Ct. at 2260-61**.** These fundamental differences with Guantanamo foreclose any conclusion that Bagram Airfield is effectively part of United States territory.

c. The district court acknowledged that Guantanamo and Bagram Airfield have different histories, but it placed insufficient weight on that critical factor. Contrary to the district court's characterization, the Supreme Court in *Boumediene* did not merely "reference[] the duration of the U.S. presence" at Guantanamo as one among a number of equally important considerations in reaching its conclusion that the base was within the "*de facto* sovereignty" of the United States. JA 438. Rather, the Court's opinion makes clear that the recognition of the "unique status of Guantanamo Bay" in historical context was integral to the Court's decision, and in particular to the separation-of-powers concerns the Court articulated. 128 S.Ct. at 2258-59.

The Court held that Guantanamo was "not abroad" and was "within the constant jurisdiction of the United States" precisely because the United States presence there had originated when the United States governed all of Cuba, had remained deeply ingrained, and was "indefinite" rather than "transient." *Id.* at 2261; *see id.* at 2260-61 (noting that the "Court's holding in *Eisentrager* was * * * consistent with the *Insular*

Cases where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely"). The fact that Bagram Airfield is both a recent and temporary facility that does not share the singular background of Guantanamo therefore strongly supports reversal of the district court's decision.

2. Unlike at Guantanamo, United States Activities at Bagram Are Constrained by the Presence of Multinational Forces

The Supreme Court reasoned in *Boumediene* that because Guantanamo is an "isolated and heavily fortified military base" far removed from any hostilities, "the United States is, for all practical purposes, answerable to no other sovereign for its acts" there. 128 S.Ct. at 2261-62. That description plainly does not apply to Bagram Airfield, which in this important respect much more closely resembles Landsberg prison.

a. Bagram is a large military facility located in the theater of a highly active war zone, in which United States forces are fighting alongside Afghan security forces and troops representing NATO. Various nations have forces stationed at Bagram Airfield. Although the United States guards the Airfield, there are numerous national compounds located within it, and each nation separately controls access to its respective compound. JA 64-65, 703. The multinational forces at Bagram are part of both a coalition led by the United States and of ISAF, which also includes soldiers

from France, the Czech Republic, Turkey, Poland, the United Kingdom, New Zealand, Australia, Italy, Romania, Bulgaria, and Canada. JA 65. The command post for those ISAF forces, with approximately 19,900 troops, is headquartered at Bagram. *See International Security Assistance Force and Afghan National Army Strength & Laydown* (http://www.nato.int/isaf/docu/epub/pdf/placemat.pdf).

The presence of such a substantial number of allied troops means that there are numerous multi-national actors at Bagram Airfield. Those actors inevitably exert an influence on the conduct of the United States forces in Afghanistan and at Bagram specifically, including on issues relating to detention of enemy forces. The presence of such multi-national representation also renders Bagram manifestly different from Guantanamo, which is staffed entirely by United States troops and other United States personnel, and where there are no coalition or allied forces.

b. The district court's reasoning would open the door to a sweeping expansion of the extraterritorial reach of constitutional habeas jurisdiction. The determination whether constitutional habeas rights apply to a particular location or military installation cannot turn primarily on whether the United States exercises "control" over a detention facility or prison cell where a particular detainee is housed. As respondents pointed out below, and as the district court acknowledged, "the military exercises such control at any military base" where it holds individuals who are captured during the course of hostilities. JA 53, 435.

If the district court's interpretation of the "site of detention" factor in *Boumediene* were correct, then that factor would cease to provide any meaningful limit on locations outside the United States where constitutional habeas rights would extend, because it would support applying the writ to any military facility, including in a war zone, where the United States houses detainees. Such an interpretation cannot be squared with the general principle that the establishment of a military base in foreign territory does not effect a transfer of sovereignty, *de jure* or *de facto*, to the United States. *See United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948); *Holder* v. *Holder*, 392 F.3d 1009, 1020 n.10 (9th Cir. 2004) (recognizing United States air force base in Germany not under United States sovereignty); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) ("A military base is not sovereign territory of the United States."). Nor is it consistent with the deliberately narrow and carefully circumscribed nature of the holding in *Boumediene.*

3. Unlike at Guantanamo, where United States Activities Are Not Constrained by any Relations with Cuba, United States Activities at Bagram Are Constrained by the Relationship with the Government of Afghanistan

The Court in *Boumediene* emphasized that, because "Cuba effectively has no rights as a sovereign" at Guantanamo, that country imposed no practical constraints on United States control over the base. 128 S.Ct. at 2252. In contrast, the interests and concerns of the Afghan government are a major factor in the conduct of United States operations at Bagram, as reflected in the diplomatic character of the relationship between the two countries and the agreements that govern the Airfield. Thus, the district court erroneously minimized the significance of the host nation's influence in evaluating the degree of control the United States exercises at Bagram.

a. The relationship between the United States and the host country at Bagram differs pervasively from that relationship at Guantanamo: The United States is present at Guantanamo *without regard to* the interests of the Castro regime in Cuba, but the United States is present at Bagram *in support of* the interests of the Afghan government. In partnership with the Afghan security forces, the United States military in Afghanistan is fighting a war against the common enemy of the Taliban and al Qaeda.

Moreover, a central purpose of United States military operations in Afghanistan is to support the sovereignty of the Afghan state. That is true both for Operation

Enduring Freedom coalition forces and for U.S. participation in the ISAF. The governments of Afghanistan and the United States have repeatedly expressed their mutual interest in furthering Afghan sovereignty. As the Presidents of the two countries jointly announced in 2005, "decades of civil war, political violence, and interference in Afghanistan's internal affairs make Afghanistan's security, sovereignty, independence, and territorial integrity particularly crucial areas for U.S.-Afghan cooperation." *See* Joint Declaration of the United States-Afghanistan Strategic Partnership, at 1 (JA 238A). Thus, in contrast to Guantanamo, where the sovereignty of Cuba is irrelevant, the "territorial integrity" of Afghanistan is among the very purposes of the United States mission at Bagram.

The United States, coalition, ISAF, and Afghan forces at Bagram have undertaken to bolster Afghan security and governance capabilities not only through direct military action, but also through the same kind of "massive reconstruction and aid efforts" that were deemed important by the Supreme Court in *Eisentrager*. See, *e.g.*, K. DeYoung and G. Jaffe, "*U.S. Ambassador Seeks More Money for Afghanistan Funds Requested For Development*," The Washington Post, A3 (August 12, 2009) ("Spending on civilian governance and development programs [for Afghanistan] has doubled under the Obama administration, to $200 million a month"). Those types of reconstruction and aid programs necessarily bring United States forces into close

contact and cooperation with counterparts in the Afghan government and with the Afghan people.

Consistent with the cooperative nature of the United States presence in Afghanistan, Bagram Airfield is open in ways that Guantanamo is not. Afghan officials are regularly present in Bagram, many Afghan civilians work at Bagram, JA 65, Afghan government representatives have access to Afghan detainees held in the BTIF, JA 66, and Afghan family members can visit detainees held there. Those facts contrast sharply with Guantanamo, where, as the district court recognized, access "is confined to U.S. personnel" with few exceptions. JA 424.

As a practical matter, the constant contact and cooperation with the Afghan government and its people significantly influences United States activities at Bagram. Whereas the United States is free to operate at Guantanamo without concern for the wishes and desires of the Castro regime, the success of the mission at Bagram depends on United States troops and officials acting at all times with due respect for the status of Afghanistan as an independent nation. For that reason, United States operations at Bagram Airfield are conducted with a keen eye toward diplomatic ramifications and with careful consideration of how such operations will implicate Afghan sovereignty. Accordingly, the conduct of United States combat operations, troops, and other personnel, as well as the use of facilities on Afghan soil, are at all times significantly influenced by complex diplomatic considerations that are absent at Guantanamo.

b. The fact that the United States has entered into a bilateral U.S.-Afghan SOFA concerning the status of United States troops stationed in Afghanistan further highlights the influence of the Government of Afghanistan at Bagram Airfield. That agreement not only reflects critical differences between Bagram and Guantanamo but also, by virtue of its very existence, confirms the importance and recent exercise of Afghan sovereignty.

As the district court acknowledged, the existence of a SOFA is itself a "manifestation of the full sovereignty of the state on whose territory it applies." JA 424. That the United States believed it appropriate to enter into such an agreement with Afghanistan illustrates both the existence of, and efforts by the United States to show respect for, Afghan sovereignty. In contrast, Guantanamo is the *only* major United States military base outside the United States where the presence of United States forces is not governed by such an agreement, a fact that reflects the unique status of Guantanamo and the lack of consideration by the United States of the sovereignty of Cuba under the Castro regime.

Due to, *inter alia*, the U.S.-Afghan SOFA, Bagram contrasts with Guantanamo in terms of the legal authority that governs on-base activity. Whereas the Supreme Court found that "no law other than the laws of the United States applies at the naval station" in Guantanamo, *Boumediene*, 128 S.Ct. at 2251, Afghan law applies at Bagram Airfield subject to the potential limitations in the SOFA. Although that

Agreement authorizes the United States to exercise criminal jurisdiction over United States Defense Department military and civilian personnel in Afghanistan without prejudice to the conduct of ongoing military operations by the United States, common crimes committed by Afghan citizens who access the Airfield could be prosecuted by Afghanistan, not the United States, and Afghan law thereby also applies at Bagram.

B. Extending Habeas Jurisdiction to Bagram Airfield, in an Active Theater of War, Would Encounter Grave Practical Obstacles

Bagram is fundamentally different from Guantanamo not only in the nature of the United States presence, but also in the practical consequences of extending the writ. Unlike Guantanamo, which is far removed from any hostilities, Bagram is in an "active theater of war." *Boumediene*, 128 S.Ct. 2261-62. Permitting Bagram detainees to subject the respondents to litigation in federal court would be "impracticable and anomalous." 128 S.Ct. at 2255. Such litigation would present exactly the type of impediments to the military mission, and threats to the national interest, against which the Court in *Eisentrager* warned. In addition, adjudication by a United States court of a habeas petition brought by a Bagram detainee could cause significant friction with the Afghan government. The district court recognized the possibility of such obstacles, but it incorrectly dismissed their significance based on separation-of-powers concerns and its own unwarranted predictions that such obstacles would not, in fact, be serious. In fact, as the Executive Branch has

determined, the practical consequences of extending habeas jurisdiction in the midst of the military build-up and combat in Afghanistan would indeed be severe. Those consequences therefore strongly weigh against extension of constitutional habeas rights to Bagram Airfield.

1. Habeas litigation brought by detainees at Bagram would seriously interfere with United States military operations

a. *Boumediene* noted that "there are costs to holding the Suspension Clause applicable in a case of military detention abroad" because "[h]abeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks." 128 S.Ct. at 2261. Accordingly, the Court stressed that arguments about the burdens and practical obstacles created by habeas proceeding will have particular resonance where a detainee is held "in an active theater of war." *Id.* at 2261-62. That discussion drew upon the recognition that the Supreme Court had earlier found habeas jurisdiction to be inappropriate in *Eisentrager* in part because United States forces there "faced potential security threats from a defeated enemy." *Id*. at 2261.

As explained in detail above, Bagram Airfield is in the middle of an active theater of war. There can be no genuine dispute that, in this critical respect, Bagram is fundamentally different from the "isolated" military base at Guantanamo. One indication of that difference is that, at Guantanamo, there are numerous military

dependents living at the base, as well as two schools and several children's organizations, including the Boy and Girl Scouts. There are no such residents at Bagram. Bagram is a facility geared toward fighting a war raging in the immediately surrounding area and detaining enemy forces as part of that war. Indeed, the conditions at Bagram are significantly more perilous than those that existed in Landsberg when the Supreme Court decided *Eisentrager*, five years *after* the cessation of active hostilities.

b. Because Bagram Airfield is in a theater of combat, permitting detainees there to sue their military captors in distant United States courts would have serious adverse consequences for the military mission in Afghanistan. As the Court in *Boumediene* noted, *Eisentrager* stressed the difficulties of requiring the government, even after the end of active combat, to produce the prisoners in a habeas corpus proceeding. 128 S.Ct. at 2257. The Court recognized that such an order, even in the "twilight between war and peace," *Eisentrager*, 339 U.S. at 779, "would require allocation of shipping space, guarding personnel, billeting and rations and would damage the prestige of our commanders." *Ibid.*

A far greater degree of disruption, distraction, burden, and loss of prestige of the command would result from the extension of habeas rights to the enemy detainees at Bagram. The command and military personnel engaged in an active war zone there would have to spend considerable time facilitating detainee presence for habeas

proceedings, as well as coordinating counsel access to detainees.[8] The discovery obligations of habeas suits would necessarily divert military personnel from their military mission, requiring them to prepare and provide information or testimony in response to a detainee's claims. Those consequences directly implicate the concerns expressed in *Eisentrager*:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Eisentrager, 339 U.S. at 779. Mandating habeas proceedings in this context poses the very types of distractions, diversion of resources, and interference with military operations that led the Supreme Court to reject extension of habeas rights to Landsberg detainees.

If Congress affirmatively wants to grant such rights in a war zone, it may do so. But in this context, Congress, far from remaining silent, has expressly barred any habeas rights in 28 U.S.C. § 2241(e)(1). The courts should respect that judgment and refrain from extending constitutional habeas rights to aliens held as enemies in the

[8] Guantanamo proceedings provide some indication of that burden: for example, a single detainee there has had nearly 20 counsel visits since 2007.

middle of an armed conflict. The courts of the United States have never entertained habeas lawsuits filed by enemy forces detained in war zones. If courts are ever to take that radical step, they should do so only with explicit blessing by statute, and not import such notions into the 222-year-old Suspension Clause.

c. In terms of practical consequences, Bagram Airfield is different in an additional respect from Guantanamo. In *Boumediene,* the Court emphasized that adjudicating a habeas corpus petition would not cause friction with the host government of Cuba. Resolving petitions brought by Bagram detainees, however, would present exactly that prospect – and, to boot, would do so in a war zone where the United States vitally depends on the support of the host government to fight the enemy. The possibility of friction is obvious if habeas relief were granted in some cases, resulting in the release of detainees into Afghan sovereign territory. As explained above, moreover, the United States has a close and cooperative relationship with the Afghan government with respect to the pursuit of common enemies and the shared objective of supporting Afghan sovereignty and security. An important aspect of that relationship is maintaining ongoing dialogue about military affairs, including the disposition of detainees who are captured as part of the war effort. The intrusion of the external influence of a United States court adjudicating a habeas petition brought by a Bagram detainee could threaten that ongoing dialogue and "upset the

delicate diplomatic balance the United States has struck with the host government." JA 438.

2. The district court erred in minimizing the practical consequences of its decision

Although the district court recognized the possibility that habeas litigation brought by Bagram detainees could interfere with the war effort and create friction with the host government, the court offered a variety of hypotheses that, in its view, would minimize those consequences. None of those predictions is persuasive, and the district court therefore seriously underestimated the adverse effect of its holding.

a. The district court reasoned that concern about the possibility of friction with the host government was misplaced because the court's decision covered only non-Afghan detainees captured outside of Afghanistan. The court declared that, as to detainees of different nationality, "there is no possibility for friction with the host government because the Afghan government has no interest in their detention." JA 440. That conclusion lacks foundation.

The court apparently assumed that Afghan security forces have had or will have no dealings or concerns with detainees who were captured abroad. It further assumed that Afghan officials do not care if the United States brings detainees captured outside the country to Afghanistan, and thus that (as was the case at Guantanamo) United States officials feel unconstrained to do so.

Those assumptions are unwarranted. The Taliban and al Qaeda include non-Afghans. The United States and other governments that are enemies of al Qaeda have an interest in the detention of individuals who act for al Qaeda, regardless of their citizenship or place of capture. The detention of enemy fighters at Bagram Airfield "prevents them from returning to the battlefield and denies the enemy the fighters needed to conduct further attacks and perpetrate hostilities against innocent civilians, United States and coalition forces, and the Government of Afghanistan." JA 65-66. It requires no imagination to foresee friction with the Afghan government resulting from a United States *court* ordering the release of a non-Afghan detainee despite the United States *military's* determination that the detainee was providing assistance to al Qaeda or the Taliban – the enemies against whom the conflict in Afghanistan is being waged. Similar concerns about friction with the host government therefore apply regardless of the detainee's citizenship or place of capture, and the district court erred in speculating otherwise.

b. The district court also concluded that respondents overstated the practical burdens on the war effort resulting from the procedural demands of civil litigation, even in a war zone. The court surmised that the difficulties of facilitating access to private detainee counsel and the movement of detainees could be significantly reduced by "technological advances" such as "[r]eal time video-conferencing" facilities. As

support for that proposition, the court cited the use of such facilities in habeas proceedings initiated by Guantanamo detainees. JA 435-36.

The court's speculation in this regard is wrong. The availability of secure video telecommunication facilities at Bagram is limited; diverting those facilities from ongoing military operations to habeas litigation would inevitably compromise the war effort. That problem would be further compounded by the need to designate at Bagram wholly separate and walled-off privilege teams to ensure both that the video conferences between the detainee and counsel can be conducted in a manner that preserves attorney-client confidences and that any transmittal of documents from counsel to the detainee are handled appropriately. [9]

In any event, even if video conferencing were readily available, that capability would at most ease the burden of producing the detainee in a United States court; it is highly doubtful that detainees' counsel would not demand face-to-face meetings with their clients. Transporting detainees to court is not the only, or even the primary, complication for the military that would result from habeas suits brought by Bagram detainees. Contrary to the district court's view, the experience of the Guantanamo

[9] To provide some sense of the amount of time and resource required, in 2008 alone, the military was required to facilitate more than 1,850 visits between counsel and their detainee clients at Guantanamo.

habeas cases illustrates how the practical burdens of habeas suits expand, increment by increment, as those suits proceed.

To cite one example, the district courts adjudicating Guantanamo petitions have ordered a wide range of discovery regarding military affairs and operations. If similar discovery orders were issued in response to the demands of Bagram detainees, they would divert resources and time from the war effort by obligating military officials to review documents, respond to burdensome discovery requests, and provide declarations on a broad array of matters.

c. The district court predicted that its decision would have minimal impact because "only a limited subset of detainees – non-Afghans captured beyond Afghan borders – will be affected by this ruling." JA 439-440. Such a limit would likely prove illusory in practice. The district court's emphasis on the site of capture provides a strong incentive for detainees to allege that they were apprehended outside Afghanistan, and petitioner Al Maqaleh's case demonstrates that, under the decision below, a bare allegation of capture outside Afghanistan can be sufficient to defeat dismissal on jurisdictional grounds. Al Maqaleh alleged that he was captured outside Afghan borders, and although the Government submitted a sworn declaration of Colonel James W. Gray, Commander of Detention Operations, stating that al Maqaleh was in fact captured in Zabul, Afghanistan, JA 31G, the district court found that it had jurisdiction to hear his case. A proper assessment of the volume of litigation that the

decision below would spawn therefore turns not on the number of detainees at Bagram who actually were captured outside Afghanistan, but rather on the number of detainees at Bagram who are capable of *alleging* that fact.

The burdens would still be severe if, instead of conclusively establishing habeas jurisdiction, a simple allegation of capture outside Afghanistan required the court to resolve the factual dispute between the parties on that point. Litigating the site of apprehension question would entail the same type of intrusive factual development, onerous discovery, and logistical burdens of litigating habeas corpus on the merits. It would necessarily distract active military officers in the field, who would have to review documents, respond to discovery requests, or provide affidavits regarding the circumstances of the apprehension. Such information might be used by our enemies to gather intelligence about American capture operations. The prospect of such burdens directly implicates the concerns expressed in *Eisentrager* about the ability of enemy aliens to fetter the field commander by "call[ing] him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779.

3. In Minimizing the Practical Obstacles Created by its Decision, the District Court Misunderstood the Separation-of-Powers Implications of These Cases

In rejecting the Government's arguments about the practical burdens of litigating habeas petitions brought by Bagram detainees, the district court appeared to

be heavily influenced by concerns that the United States military could use Bagram as a way to manipulate and evade habeas jurisdiction. J.A. 415, 421. The court relied in particular on its interpretation of the discussion in *Boumediene* about the separation-of-powers implications of permitting the Executive Branch to "move detainees physically beyond the reach of the Constitution and detain them indefinitely." JA 421. The court's separation-of-powers concerns were misplaced. Indeed, considerations of the proper institutional roles of each Branch of government cut strongly against the district court's decision.

a. The Supreme Court's separation-of-powers discussion in *Boumediene* followed from, and was tied to, the Supreme Court's recognition of the unique "political history of Guantanamo." 128 S.Ct. at 2258. With respect to Guantanamo, the Court explained, the Government's "disclaime[r] [of] sovereignty in the formal sense of the term" could not control because the historical reality demonstrated that, whatever the formal arrangements, the United States was *de facto* sovereign. The Court reasoned that, were it to look only to the formal status of territory of that kind, the "political branches [could] govern without legal constraint" by "surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States." *Id.* at 2259.

In short, the Court in *Boumediene* rejected as fictional the notion that Guantanamo was not part of the United States in light of its origins at a time when the United States governed the entire island of Cuba and the century-old exercise of jurisdiction over Guantanamo. For the various reasons already stated above, this discussion does not apply to Bagram Airfield, which the United States has used for less than a decade and cannot plausibly be deemed part of the United States as a practical matter. *See* pp. 32-34 *supra*.

The detainees in this case, by their own factual allegations, were captured in locales where there was no habeas jurisdiction and then brought to temporary detention facilities where non-citizen enemy forces have never possessed habeas rights. Yet the district court's decision would impose an artificial constraint on the manner in which the military would ordinarily carry out the war effort, because it would exact a high price for moving a detainee out of the country of capture even when compelling military considerations, such as facilities or logistics, counsel in favor of doing so.

b. Properly construed, the separation-of-powers implications of this case seriously undermine the validity of the district court's decision.

Matters such as the conduct of foreign relations and the war power "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Matthews v. Diaz*, 426 U.S. 67, 81 n.17 (1976).

United States military operations during an active war on foreign land in conjunction with allied multi-national and host-country forces implicate a variety of sensitive foreign affairs, diplomatic, and military considerations for the Executive Branch.

The capture and detention of enemy forces is "by universal agreement and practice" an important incident of war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004) (plurality opinion) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). This case implicates such sensitive considerations. When it comes to military facilities, unlike Guantanamo, that are truly abroad — particularly those halfway across the globe in an active war zone — courts in the United States exceed their role by second-guessing the political branches about the reach of habeas jurisdiction. And courts particularly overstep institutional bounds when, in direct conflict with Congress' judgment, they selectively provide habeas rights based on the detainees' nationality or locus of capture. Such distinctions may create tensions on a military base and friction with the Government of Afghanistan. To extend habeas rights to nationals of other countries, but not to the citizens of the host country, could raise sensitive foreign policy concerns. Congress determined that habeas was inappropriate regardless of the nationality of the alien detainee; that judgment deserves deference.

c. The district court also erred in ruling that, while constitutional habeas jurisdiction cannot be used to challenge the military's detention of individuals who are captured on the battlefield, it does cover detainees who allege that they were captured

outside Afghanistan and thus, in the district court's view, were not "battlefield" captures.

Courts should defer to the Executive on operational issues relating to conduct of armed conflicts such as defining the geographical bounds of the active theater of combat. *See, e.g., Hamdi*, 542 U.S. at 535 (plurality op.) ("[W]e accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war."). In addition, the district court's definition of the battlefield is without support in the record and inconsistent with the nature of the conflict that has raged in that region. The realities on the ground cannot be squared with an approach under which habeas jurisdiction depends on the national borders of Afghanistan, as the district court suggested. Those borders are porous, and have not been respected by the enemy insurgents; this was especially true when the U.S. efforts in Afghanistan began. Moreover, while in 2001 Afghanistan was the most important locale harboring al Qaeda's terrorist network, that network extended well beyond Afghanistan's national borders. Congress acted consistently with that reality, for the AUMF is not geographically limited to Afghanistan. It is thus unreasonable to expect that all persons captured in the armed conflict authorized by Congress would have been captured within the boundaries of Afghanistan.

The decision as to where to hold the detainees here, who were determined to be properly detained as part of enemy forces and to represent precisely the type of threat

that the AUMF was enacted to address, was first and foremost a military judgment. The military may decide for strategic reasons to consolidate its detainee operations in one or two locations, and it is entirely sensible to select for that purpose a facility that is centrally located to important intelligence and operational activities concerning the enemy. Indeed, for that reason, Bagram historically served as the operational level internment facility in the theater of war for detainees believed to be associated with al Qaeda. To portray it as an effort to avoid federal court jurisdiction is not supported by the record in this case, and ignores the operational context in which these decisions were made.

d. In any event, even if the district court had correctly concluded that the detentions here raise a separation-of-powers issue warranting judicial scrutiny, the court's fears of Executive abuse were not justified.

The United States has no interest in holding detainees longer than necessary. *See* JA 238SS-238DDD. Since the war in Afghanistan began, the United States has captured, screened, and released thousands of individuals. *See* JA 65-66. In the first four years of the war in Afghanistan alone, that number of released individuals totaled more than 10,000. *See* Report to U.N. Committee Against Torture, supra note 9, at II.A. The United States also has entered into a diplomatic arrangement with Afghanistan whereby a significant percentage of the Afghan detainees at Bagram are expected to be transferred to the Government of Afghanistan, and many already have

been transferred. *See* JA 68-69. When the U.S. Government holds someone for an extended period of time at Bagram, it does so of necessity, not because of whim or convenience.

The transfer of these individuals to Bagram Airfield was reasonable under the circumstances because there was a facility at Bagram that could be used to securely detain enemy forces in a manner consistent with the laws of war; the countries where they allege they were captured did not have such facilities. The Afghanistan theater has been the central battlefield in the fight against al Qaeda, and Bagram is the largest military base on that battlefield. The military, at the time of the captures at issue in this case, could properly decide for strategic, logistical, or command and control reasons to consolidate its detainee operations in a few locations, rather than to disperse such operations.

The question of where to hold detainees is foremost a military judgment, based on consideration of operational necessities and of available facilities that could be used to detain enemy forces securely and humanely in a manner consistent with the law of war. The framework used by the district court suggests that detention is anomalous (and access to the Great Writ therefore appropriate) when the military does not construct detention facilities in each country in which military operations are conducted or does not move detainees to a U.S. territory to which habeas extends. To impose either requirement on the military would unnecessarily infringe on the

Executive's discretion in conducting a war, and may cause a loss of operational security and threaten future missions.

III. The District Court Erred In Relying On Peripheral Factors To Support The Extension of Habeas Jurisdiction to Bagram

A. Neither the Site of Apprehension Nor the Citizenship of the Detainees is Relevant, Much Less Dispositive, In This Case

As explained above, the district court held that petitioners were entitled to habeas rights because they (allegedly) were not captured in Afghanistan and are not Afghan citizens. In so holding, the court gave controlling weight to the locus of the capture and the citizenship of the detainees. This approach misreads *Boumediene*.

Boumediene would have been a simple and straightforward case if it were dispositive that the detainee was removed from the site of his apprehension and detained in another country where he was not a citizen. Every detainee at Guantanamo met that description. The Supreme Court, however, did not rely on this as a factor in favor of recognizing constitutional habeas rights. Indeed, the entirety of the Supreme Court's analysis in *Boumediene* of the citizenship of the detainees and the site of their apprehension consisted of the observations that, as in *Eisentrager*, petitioners were not United States citizens, and they were apprehended outside the United States, "a factor that weighs *against* finding they have rights under the Suspension Clause." 128 S.Ct. at 2260 (emphasis added).

Properly construed, the references in *Boumediene* to the detainee's citizenship and site of capture indicate nothing more than that, where the detainee is a U.S. citizen or was caught on U.S. soil, those factors will tend to support habeas jurisdiction. Because neither circumstance is present here, those factors are not relevant to the analysis.

B. The District Court Misconstrued the Adequacy of Procedures Factor

The district court also reasoned that, because the "important adequacy of process factor strongly supported extension of the Suspension Clause and habeas rights in *Boumediene*," the relatively less protective procedures in place at Bagram at the time of that court's decision meant that this factor "even more strongly favors petitioners" in these cases. JA 434.

The district court erred in concluding that the relative degree of procedural adequacy was central to the "balanc[e] of factors" that determined whether constitutional habeas rights extend to Bagram Airfield. JA 431. In *Boumediene*, the Supreme Court evaluated the adequacy of the Defense Department's Combatant Status Review Tribunals procedures primarily to determine whether those procedures could serve as a substitute that would "eliminate the need for habeas corpus review." 128 S.Ct. at 2260. The Supreme Court did not state that the exact quantum of procedures was particularly significant beyond their inadequacy for that purpose.

Accordingly, the district court's finding that the status-determination procedures at Bagram provide less protection to detainees than those at Guantanamo is a finding that does not bear directly on the question of whether constitutional habeas corpus extends to Bagram Airfield; rather that finding would be principally relevant to a question this Court need not address regarding whether such procedures would be an adequate substitute for habeas if such rights were extended to Bagram. The district court erred in giving that factor significant weight regarding whether habeas rights exist at all.

Even if the relative adequacy of status determination procedures were important to determining whether the Suspension Clause applies, the new procedures now in place at Bagram, described *supra* pp. 10-11, address the district court's concerns, and in fact provide more safeguards than the procedures at issue in *Boumediene*. Under those new procedures, the status of each detainee will be reviewed by a board of three neutral, field-grade officers. Add. 4-7. Every detainee will be provided a "personal representative," who is "familiar with the detainee review procedures" and who has access to the information relevant to status determination, including classified material. Add. 7-8. The personal representative will be required to "act in the best interests of the detainee" by assisting the detainee in "gathering and presenting the information reasonably available in the light most favorable to the detainee." Add. 8. All detainees will be provided with interpreters. Subject to certain exceptions, the

proceedings of the three-member board will be open, and detainees will be entitled to attend all open sessions. Detainees will be permitted to testify (but may not be compelled to do so) and to call witnesses, question the Government's witnesses, and present documentary information. Add. 4-6. The board will make its determination using the well-established preponderance of evidence standard, and based on the same fixed definition of enemy status that the Government has recently applied to review of detentions at Guantanamo Bay. Add. 6-7. Prior to the board hearing, the U.S. military will be required to "conduct reasonable investigation into any exculpatory information the detainee offers." Add. 5. And unlike in the CSRT process, the Government's evidence will not benefit from a presumption of validity.

These procedures will occur every six months after an individual is detained, and they will be applied to all approximately 600 detainees at the BTIF, including the petitioners in this case. Add. 4. Thus, to the extent robust status-determination procedures inform the Suspension Clause inquiry, the new procedures in place at Bagram support, rather than undermine, the conclusion that the Suspension Clause does not apply to Bagram Airfield.

* * *

This is the paradigmatic case in which lower courts should tread cautiously in extending a new and unprecedented Supreme Court decision beyond the specific context in which it was announced. As Chief Justice Marshall stated long ago,

"general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used * * *. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 19 U.S. 264, 399-40 (1821).

The *Boumediene* Court recognized the singular nature of its holding. The Court made clear that its decision was dependent on the extraordinary nature of the United States presence at Guantanamo. Even the *Boumediene* petitioners agreed, going to great lengths to convince the Supreme Court that Guantanamo was truly exceptional. Transcript of Oral Argument at 30-31, *Boumediene*, 128 S.Ct. 2229 (No. 06-1195) ("[T]his is in many respects a uniquely straightfoward case. * * * [O]ur national control over Guantanamo is greater than it is over a place in Kentucky."). Petitioners, here, however, would have this Court extend *Boumediene*'s holding much further than the *Boumediene* petitioners advocated, from the peaceful locale of Guantanamo to the war-torn zone of Afghanistan. This Court should resist that unwarranted extension of such a singular precedent.

CONCLUSION

For the foregoing reasons, the district court's ruling finding jurisdiction over the habeas claims asserted by the detainees should be reversed, and these cases dismissed.

Respectfully submitted,

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September 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,868 words (which does not exceed the applicable 14,000 word limit).

__/s/_____
Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2009, I filed and served the foregoing brief with the Court and the following counsel via electronic mail, by operation of the Court's ECF system, and by sending copies by first-class U.S. mail:

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ADDENDUM

~~SECRET~~
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

OFFICE OF THE UNDER SECRETARY OF DEFENSE
2000 DEFENSE PENTAGON
WASHINGTON, DC 20301-2000

POLICY

JUL 14 2009

The Honorable Carl Levin
U.S. Senate
228 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Levin:

(U) Please find enclosed a copy of the policy guidance that the Deputy Secretary of Defense approved on July 2, 2009, modifying the procedures for reviewing the status of aliens detained by the Department of Defense at the Bagram Theater Internment Facility (BTIF) in Afghanistan, and related policy guidance regarding the criteria for assessing the threat such aliens represent, and regarding the authority to transfer and release such aliens from the BTIF. The enhanced detainee review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee as an unprivileged enemy belligerent, the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation. The modified procedures also enhance the detainee's ability to challenge his or her detention.

(U) The modified procedures adopt the definitional framework of detention authority that the Administration first published in a Guantanamo habeas filing on March 13, 2009. Under this framework, the Department of Defense has the authority to detain "[p]ersons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks." The Department of Defense also has the authority to detain "[p]ersons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."

(U) In addition to assessing whether the facts support the detention of each detainee as an unprivileged enemy belligerent under this framework, the modified procedures require detainee review boards to consider each detainee's threat level and potential for rehabilitation and reconciliation. Moreover, these threat assessments will no longer be linked to the criteria for transferring the detainee to Guantanamo.

~~SECRET~~
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

Derived from: Multiple Sources
Declassify on: June 30, 2019

(U) The modified procedures generally follow the procedures prescribed in Army Regulation (AR) 190-8, such as that the proceedings generally shall be open (with certain exceptions including for matters that would compromise national or operational security), including to representatives of the ICRC and possibly non-governmental organizations. Detainees will be allowed to attend all open sessions and call reasonably available witnesses.

(U) Key supplemental procedures not found in AR 190-8 that enhance the detainee's ability to challenge his or her detention include appointment of a personal representative who "shall act in the best interests of the detainee"; whose "good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments)"; and who has access to all reasonably available information (including classified information) relevant to the proceedings. The end result is a process that approximates the process used to screen American citizens captured in Iraq.

(U) The Department of Defense submits this report on its modification of the procedures for reviewing the status of aliens detained by the Department of Defense at the BTIF in conformity with Section 1405(c) of the Detainee Treatment Act of 2005, Public Law Number 109-163, Title XIV. The modification will not go into effect until at least 60 days from the date of this report. In the meantime, it would be my pleasure to discuss the modified detainee review procedures with Members of the Committee or Committee Staff, at your convenience.

Sincerely,

Phillip Carter
Deputy Assistant Secretary of Defense
for Detainee Policy

Enclosures: As stated.

Cc: The Honorable John McCain

Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U)

Authority to Detain and Intern (U)

(U) U.S. Forces operating under Operation Enduring Freedom (OEF) authority are authorized to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection). Additionally, OEF forces are authorized to detain, and to intern at the Bagram Theater Internment Facility (BTIF), persons who meet the following criteria:

- (U) Persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks;

- (U) Persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

(U) Internment must be linked to a determination that the person detained meets the criteria detailed above and that internment is necessary to mitigate the threat the detainee poses, taking into account an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. If, at any point during the detainee review process, a person detained by OEF forces is determined not to meet the criteria detailed above or no longer to require internment to mitigate their threat, the person shall be released from DOD custody as soon as practicable. The fact that a detainee may have intelligence value, by itself, is not a basis for internment.

Capturing Unit Review (U)

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a review by the capturing unit commander, with the advice of a judge advocate, to assess whether persons detained by the unit meet the criteria for detention. This review shall occur prior to requesting a detainee's transfer to the BTIF for internment, and normally within 72 hours of the detainee's capture.

Transfer Request (U)

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a request, by the capturing unit commander, to transfer to the BTIF those detainees the capturing unit commander assesses may meet the criteria for internment. The capturing unit commander shall forward the transfer request to the BTIF commander for review.

Review of Transfer Request (U)

(U) Commander, USCENTCOM, shall further ensure that OEF detainee review procedures include a review by the BTIF commander, with the advice of a judge advocate, to assess whether detainees whose transfer to the BTIF the capturing unit commander has requested meet the criteria for internment. This review shall occur prior to approving a request to transfer a detainee to the BTIF for internment, and normally within 14 days of the detainee's capture.

Initial Detainee Notification (U)

(U) Commander, USCENTCOM, shall ensure that detainees receive timely notice of the basis for their internment, including an unclassified summary of the specific facts that support the basis for their internment. Commander, USCENTCOM shall further ensure that detainees also receive a timely and adequate explanation of the detainee review procedures, including, at a minimum: the fact that the detainee will have an opportunity to present information and evidence to a board of officers convened to determine whether the detainee meets the criteria for internment; the projected dates of the detainee's initial and periodic review boards; and the fact that a personal representative will be appointed to assist the detainee before the review boards. Detainees shall receive such notice and explanation, in writing and orally in a language the detainee understands, within 14 days after the detainee's transfer to the BTIF whenever feasible.

Detainee Review Boards (U)

(U) Commander, USCENTCOM shall ensure that a board of officers reviews all reasonably available information to determine whether each person transferred to the BTIF meets the criteria for internment and, if so, whether the person's continued internment is necessary. These reviews shall occur within 60 days after the detainee's transfer to the BTIF and at least every six months thereafter.

(U) Commander, USCENTCOM shall designate a flag or general officer to serve as the convening authority for review boards.

(U) Review boards shall be composed of three field-grade officers authorized access to all reasonably available information (including classified information) relevant to the determinations of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary. In order to ensure the neutrality of the review board, the convening authority shall ensure that none of its members was directly involved in the detainee's capture or transfer to the BTIF. The senior officer shall serve as the president of the review board. Another, non-voting officer shall serve as the recorder for the board proceedings.

(U) The convening authority shall ensure that a judge advocate is available to advise the review board on legal and procedural matters.

(U) Review boards shall follow the procedures prescribed by AR 190-8, paragraph 1-6.*e.*, as supplemented below:

- (U) The convening authority shall ensure that a personal representative, as described below, is appointed to assist each detainee before the review board.

- (U) Prior to each review board, appropriate U.S. military personnel shall conduct a reasonable investigation into any exculpatory information the detainee offers.

- (U) Review board proceedings shall follow a written procedural script in order to provide the detainee a meaningful opportunity to understand and participate in the proceedings (e.g., similar to the script used in Multi-National Force Review Committee proceedings in Iraq).

- (U) Members of the review board and the recorder shall be sworn. The recorder shall be sworn first by the president of the review board. The recorder will then administer the oath to all voting members of the review board, including the president.

- (U) A written record shall be made of the proceedings.

- (U) Proceedings shall be open except for deliberations and voting by the members and testimony or other matters that would compromise national or operational security if held in the open.

- (U) The detainee shall be advised of the purpose of the hearing, his or her opportunity to present information, and the consequences of the board's decision, at the beginning of the review board proceedings.

- (U) The detainee shall be allowed to attend all open sessions, subject to operational concerns, and will be provided with an interpreter if necessary.

- (U) The detainee shall be allowed to call witnesses if reasonably available and considered by the Board to have relevant testimony to offer, and to question those witnesses called by the review board, subject to any operational or national security concerns. Relevant witnesses serving with U.S. Forces shall not be considered reasonably available if, as determined by their commanders, their presence at the review board would affect combat or support operations. In these cases, written statements, preferably sworn, may be substituted and considered by the review board.

The president of the review board shall determine whether witnesses not serving with U.S. Forces are reasonably available. At the discretion of the president of the review board, such relevant witnesses may testify by means of video teleconference, teleconference, or sworn written statement, if it would not be feasible for the witness to testify in person.

- (U) The detainee shall be allowed to testify or otherwise address the review board.
- (U) The detainee may not be compelled to testify before the review board.
- (U) The detainee shall be allowed to present reasonably available documentary information relevant to the determination of whether the detainee meets the criteria for internment and/or whether the detainee's continued internment is necessary.
- (U) Following the hearing of testimony and the review of documents and other information, the review board shall determine whether the detainee meets the criteria for internment, as defined above. The review board shall make this determination in closed session by majority vote. Preponderance of the evidence shall be the standard used in reaching the determination.
- (U) If the review board determines that the detainee does not meet the criteria for internment, the detainee shall be released from DoD custody as soon as practicable. If the review board determines that the detainee does meet the criteria for internment, the review board shall recommend an appropriate disposition to the convening authority. The review board shall make this recommendation in closed session by majority vote. Possible recommendations are as follows:
  - (U) Continued internment at the BTIF. Such a recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.
  - (U) Transfer to Afghan authorities for criminal prosecution.
  - (U) Transfer to Afghan authorities for participation in a reconciliation program.
  - (U) Release without conditions.
  - (U) In the case of a non-Afghan and non-U.S. third-country national, possible recommendations may also include transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

- (U) The review board's recommendations regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society.

  - (U) In assessing threat, the review board shall further assess whether the detainee is an Enduring Security Threat, as defined in separate policy guidance regarding detainee threat assessment criteria and transfer and release authority at the BTIF. "Enduring Security Threat" is not a legal category, but rather an identification of the highest threat detainees for purposes of transfer and release determinations, as discussed below.

  - (U) In assessing potential for rehabilitation, reconciliation, and eventual reintegration into society, the review board shall consider, among other things, the detainee's behavior and participation in rehabilitation and reconciliation programs while detained by OEF forces. Information relevant to the assessment of potential for rehabilitation, reconciliation, and eventual reintegration into society may not be available for purposes of the detainee's initial review, but should be considered as it becomes available.

- (U) A written report of the review board determinations and recommendations shall be completed in each case.

(U) The recorder shall prepare the record of the review board within seven working days of the announcement of the board's decision. The record will then be forwarded to the first Staff Judge Advocate in the BTIF's chain of command.

(U) The record of every review board proceeding resulting in a determination that a detainee meets the criteria for internment shall be reviewed for legal sufficiency when the record is received by the office of the Staff Judge Advocate for the convening authority.

(U) Whenever possible, detainees shall receive notice of the results of their review boards, in writing and orally in a language the detainee understands, within 7 days after completion of the legal sufficiency review.

Personal Representative (U)

(U) The personal representative shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary.

(U) The personal representative shall be appointed not later than 30 days prior to the detainee's review board. The detainee may waive the appointment of a personal representative, unless the detainee is under 18 years of age, suffers from a known mental illness, or is determined by the convening authority to be otherwise incapable of understanding and participating meaningfully in the review process.

(U) The personal representative shall act in the best interests of the detainee. To that end, the personal representative shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee. The personal representative's good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments).