IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FADI AL MAQALEH, *et al.*, Petitioners, v. ROBERT GATES, *et al.*, Respondents.	Civil Action No. 1:06-CV-01669 (JDB)
AMIN AL BAKRI, *et al.*, Petitioners, v. BARACK H. OBAMA, *et al.*, Respondents.	Civil Action No. 1:08-CV-01307 (JDB)
REDHA AL-NAJAR, *et al.*, Petitioners, v. ROBERT GATES, *et al.*, Respondents.	Civil Action No. 1:08-CV-02143 (JDB)

MOTION FOR CERTIFICATION OF THIS COURT'S APRIL 2, 2009 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND FOR A STAY OF PROCEEDINGS PENDING APPEAL

Pursuant to 28 U.S.C. § 1292(b), respondents respectfully move this Court to certify for interlocutory appeal its April 2, 2009 Order denying respondents' motions to dismiss the habeas corpus petitions filed by petitioners in these cases and to stay proceedings in this Court during the pendency of that appeal.[1]

[1] This Court's Order of the same date granting petitioner Al-Bakri's motion for security-cleared counsel to access classified information previously submitted to this Court *ex parte*

Petitioners are, respectively, citizens of Yemen, Pakistan, and Tunisia, who are held by the United States at the Bagram Airfield in Afghanistan. This Court held that they are entitled to seek the protection of the writ of habeas corpus based on an application of the multi-factor test articulated in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), for determining whether the Suspension Clause of the Constitution, Art. I. § 9 cl. 2, extended to detainees at Guantanamo Bay. Accepting as true petitioners' allegations that they were captured outside Afghanistan more than six years ago, the Court reasoned that, "[a]side from where they are held, [these] Bagram detainees are no different than Guantanamo detainees." Order at 16. The Court therefore invalidated, as applied to petitioners, § 7(a) of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, which divests this Court of jurisdiction to review habeas petitions "filed by or on behalf of an alien 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)(1).

For the reasons set forth below, this Court should certify interlocutory appeal of its April 2, 2009 Order. That decision "involves a controlling question of law as to which there is substantial ground for difference of opinion," 28 U.S.C. § 1292(b): whether the Supreme Court's decision in *Boumediene* should be read to extend the Suspension Clause for the first time to a theater of war on foreign territory over which the United States exercises neither *de jure* nor *de facto* sovereignty. In addition, "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the Court of Appeals

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contemplates an immediate appeal regarding the jurisdictional issue. As the Court noted, "if respondents appeal this Court's decision denying their motion to dismiss, the classified information will be 'necessary to facilitate meaningful review.'" Order of April 2, 2009 (Civil Action No. 08-1307) at 2 (quoting *Al Odah v. United States*, No. 05-5117, 2009 WL 564310 at *7 (D.C. Cir. Mar. 6, 2009)).

determines that these petitioners cannot invoke the constitutional privilege of the writ of habeas corpus, then this Court would have no jurisdiction to proceed and litigation of these habeas cases will end.

This Court should also stay proceedings pending appeal. The Solicitor General has authorized respondents to seek an expedited appeal of the April 2, 2009 Order in the D.C. Circuit if this Court grants the motion to certify. Also, the President has established, by Executive Order, a deliberative process to address questions concerning Executive detention authority and options. The Task Force will be reviewing the processes currently in place at Bagram and elsewhere, and will make recommendations to the President regarding those processes. If this Court were to proceed with these cases during the pendency of the appeal, the Court would impose serious practical burdens on, and potential harm to, the Government and its efforts to prosecute the war in Afghanistan. Although in this Court's view the burdens of litigating these habeas petitions are not insurmountable, there is no dispute that Bagram Airfield is in a theater of war where the Nation's troops are in harm's way. Responding to these petitions – and to the potentially large number of other petitions filed by Bagram detainees who may now allege that they are similarly situated – would divert the military's attention and resources at a critical time for operations in Afghanistan, potentially requiring accommodation and protection of counsel and onerous discovery. This Court should permit the Government to seek expedited review of that decision in the Court of Appeals before imposing these significant and irreparable burdens and risking the attendant injury to the public interest.

BACKGROUND

Petitioners are aliens held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan. None of the petitioners are nationals of Afghanistan, and each alleges that he was captured outside Afghanistan more than six years ago. On April 2, 2009, this Court denied the Government's motions to dismiss for lack of subject matter jurisdiction these petitioners' petitions for a writ of habeas corpus, concluding that the writ extends to them. In interpreting *Boumediene*'s multi-factor test for determining the reach of the writ, the Court rejected respondents' argument that the Suspension Clause does not extend outside the United States to a zone of active hostilities such as Bagram. Instead, the Court found that *Boumediene* requires a detainee-by-detainee analysis and concluded that these petitioners are "for all practical purposes, no different than the detainees at Guantanamo" in that they "had no prior connections with [the site of detention] at all" and extending the writ to them would not cause friction with the host nation. Order at 43-44.

The Court held that Bagram was substantially similar to Guantanamo for jurisdictional purposes. Although the Court acknowledged that it "cannot conclude that Bagram, like Guantanamo, is 'not abroad,'" Order at 34 (quoting *Boumediene*, 128 S. Ct. at 2261), the court deemed dispositive what it saw as the military's "near-total operational control" of the military base and its "practically absolute" control over the detention facility itself. *Id.* at 27, 30. The Court therefore found that the differences between Guantanamo Bay and Bagram – such as the presence of non-U.S. personnel at Bagram, the existence of an Afghan Status of Force Agreement, and the absence of any intent to stay indefinitely at Bagram – do not make the

"objective degree of control" the United States exercises at Bagram "appreciably different" from that at Guantanamo. *Id.* at 4.

Finally, the Court concluded that the "practical obstacles" inherent in resolving a Bagram detainee's entitlement to habeas corpus "are not . . . insurmountable." Order at 4. In the court's view, those obstacles are mitigated by technological advances and the fact that these petitioners were not recently captured within Afghanistan. *Id.* at 43. The Court further reasoned that "[o]nly a limited subset of detainees – non-Afghans captured beyond Afghan borders – will be affected by this ruling." *Id.* at 43-44.

ARGUMENT

I. THE COURT SHOULD CERTIFY ITS APRIL 2, 2009 ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

This Court may certify an order for interlocutory appeal if it concludes that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Controlling questions of law include issues that would terminate an action if the district court's order is reversed." *APCC Services, Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 105 (D.D.C. 2003). Thus, decisions resolving issues of subject matter jurisdiction involve a controlling question of law. *See, e.g., Voda v. Cordis Corp.*, 476 F.3d 887, 890 (Fed. Cir. 2007); *United States v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1, 7 (1st Cir. 2005); *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984). In addition, "[t]he impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling." *APCC Services*, 297 F. Supp. 2d at 95-96 (citing *Klinghoffer*, 921 F.2d at 24). In

general, certification under § 1292(b) is appropriate if "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after entry of final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)); *accord American Council of the Blind v. Paulson*, 525 F.3d 1256, 1265 (D.C. Cir. 2008). These standards are met here.

The Court's April 2, 2009 Order presents a "controlling question of law" under §1292(b): whether foreign nationals, who claim to have been captured outside Afghanistan and detained for more than six years at a long-term theater internment facility in Afghanistan, can invoke the constitutional privilege of the writ of habeas corpus. This is a controlling question of law because, if the Court's ruling is reversed, the Court would lack jurisdiction to proceed and the litigation would come to an end.

Certification of that controlling question is appropriate because there is substantial ground for difference of opinion about a number of the issues this Court resolved in its April 2, 2009 decision. First, this Court concluded that the United States' control and jurisdiction at Bagram is only "slightly less complete than at Guantanamo." Order at 31. *Boumediene*, however, rested significantly on the Supreme Court's finding that the United States exercises *de facto* sovereignty over Guantanamo Bay and its conclusion that "[i]n every practical sense Guantanamo is not abroad." *See Boumediene*, 128 S. Ct. at 2258-59, 2261. Bagram, in contrast, is in a theater of war on a foreign territory over which the United States has neither *de jure* nor *de facto* sovereignty and at which the United States is answerable to the host nation for its acts.

Second, this Court relied on the Supreme Court's separation-of-powers discussion in *Boumediene* in emphasizing for jurisdictional purposes the significance of the "site of apprehension." *Boumediene*, 128 S. Ct. at 2259. A substantial difference in opinion exists

regarding whether, under *Boumediene*, the place of capture has any import where the petitioner was not apprehended on U.S. soil. The separation-of-powers analysis in *Boumediene*, moreover, followed from and was tied inextricably to Guantanamo's unique history as the functional equivalent of an unincorporated territory of the United States. There is no allegation here that, prior to their detention, the petitioners were apprehended or held in a location where judicial review by an Article III court would have been available. These cases therefore do not raise the prospect that the political branches have sought to "switch the Constitution on or off at will" by manipulating petitioners' place of detention. *Boumediene*, 128 S. Ct. at 2259.

Third, a substantial ground for difference in opinion exists as to whether the Court's ruling encroaches on military judgments about where to detain an individual captured during an ongoing war. In concluding that the writ extends to non-Afghan detainees captured outside Afghanistan, the Court sought to prevent what it perceived as the possibility that the government would seek to manipulate judicial review through its choices about where to hold detainees. But there are many legitimate reasons, having nothing to do with intent to evade judicial review, why the military might detain an individual captured outside Afghanistan in the Bagram Theater Internment Facility, including, for example, the individual's connection to the theater of war. Indeed, while this Court's finding of jurisdiction rested on petitioners' alleged lack of connection to Afghanistan, no record has been developed to support that critical link to the Court's conclusion. Under this Court's ruling, the military will be left with two difficult choices where an individual may be subject to longer term detention: (1) be prepared to provide individualized, fact-bound justifications in an Article III court for its decision to detain at Bagram any non-Afghan individuals captured outside Afghanistan and disclose all the information necessary to defend that

decision; or (2) refrain from capturing a non-Afghan combatant outside Afghanistan, even if capturing him away from the safe havens provided by al-Qaida or the Taliban forces is consistent with the laws of war and in the interest of national security. And, detaining an individual in the country where he is captured is not always going to be an option because the military does not have detention facilities in every country in which it may capture individuals engaged in hostilities against the United States or our allies for a host of practical, political, and other reasons.

Similarly, the military would be unable to move non-Afghan citizens captured across the border in Pakistan to the theater's long-term internment facility at Bagram for security or centralized intelligence gathering reasons unless it is prepared to engage in civil habeas litigation as to those individuals. *See* Statement of the President Regarding New Strategy in Afghanistan and Pakistan (March 27, 2009) (announcing the deployment of a total of 21,000 additional troops to the region "to disrupt, dismantle, and defeat al Qaeda in Pakistan and Afghanistan" and noting that "Afghanistan and Pakistan" will be treated "as two countries but one challenge").[2] Drawing a jurisdictional line at the border of Afghanistan creates a disincentive to move to Bagram individuals captured in Pakistan, where there is neither a temporary screening and processing facility nor a long-term theater internment facility. This jurisdictional line also provides the enemies of the United States an incentive to conduct operations from Pakistan, using it as a safe haven and using the U.S. court system as a tactical weapon.

Fourth, this Court's proper assessment of the practical obstacles inherent in extending the writ to the site of detention – a factor weighed heavily by the Supreme Court in *Boumediene* – is

[2] *Available at* http://www.whitehouse.gov/the_press_office/Whats-New-in-the-Strategy-for-Afghanistan-and-Pakistan/ (last accessed April 10, 2009).

subject to substantial debate. Unlike the Guantanamo detention facility which is "located on an *isolated* and heavily fortified military base" far away from the theater of war, *Boumediene*, 128 S. Ct. 2261-62 (emphasis added), Bagram Airfield is at the center of an area rife with danger.[3] Notably, last year was the deadliest year to date for our troops in Afghanistan since the war began. As the President recently stated, the decision to deploy additional "armed forces into harm's way" in that region was necessitated by the fact that "the situation in Afghanistan and Pakistan requires urgent attention and swift action." *See* Statement by the President on Afghanistan (Feb. 17, 2009).[4] The United States and its allies have a "clear and focused goal: to disrupt, dismantle and defeat al Qaeda in Pakistan and Afghanistan, and to prevent their return to either country in the future." *Id.* The Court's ruling, however, likely would divert the military from this critical mission.

Moreover, although this Court predicted that its ruling would impact only a small number of detainees – *i.e.*, non-Afghans captured outside Afghanistan – the Government anticipates that many detainees will allege that they are situated similarly to these petitioners in order to gain access to an Article III court. Such an allegation appears to be sufficient under this Court's ruling. Regarding petitioner Maqaleh, for example, the respondents have submitted a sworn

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[3] *See, e.g., Three Injured in Suicide Attack at Bagram Airfield*, Press Release (March 4, 2009) (three military contractors sustained injuries in a suicide vehicle, Improvised Explosive Device attack near Bagram Air Field) (*available at* http://www.cjtf101.com/index.php /Press-Releases/Three-inuried-in-sucidie-attack-at-Bagram.html); *Indirect Fire Incident on BAF*, Press Release (March 6,2009) (reporting four indirect fire rounds hitting the vicinity of Bagram Airfield, including one impacting the Bagram Theater Internment Facility) (*available at* http://www.cjtf101.com/index.php/Press-Releases/Indict-fire-incident-on-BAF.html) (last accessed April 10, 2009).

[4] *Available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-Afghanistan/ (last accessed April 10, 2009).

declaration from the Commander of Detention Operations at Bagram, stating that Maqaleh was captured in Afghanistan. *See* Declaration of Colonel James W. Gray, ¶ 2 (dated April 19, 2007) (06-cv-1669, dkt. no. 12). This Court nevertheless accepted as true Maqaleh's bare allegation that he was captured elsewhere and on that ground denied the motion to dismiss. Thus, respondents are faced with the prospect of engaging in habeas discovery concerning place of capture in that case and in all others where non-Afghan detainees make similar assertions. The discovery may require disclosure of sensitive national security information, including about matters such as the presence of other individuals at the scene of capture and the identity of U.S. or foreign forces or entities that conducted the operation. Further, the military may have to alter its conduct of combat operations in the field to account for future litigation in Article III courts, including increased record-keeping of any individual's capture and accounting for potential witnesses that might one day be called upon to attest to the military's operation.

Moreover, insofar as the Court's ruling hinged not only on whether a non-Afghan detainee was captured outside Afghanistan, but on petitioner's assertion that they "had no prior connection with Afghanistan at all" and, accordingly, that "the Afghan government has no interest in their detention," Order at 24, 44, the Court's ruling could invite extensive discovery into whether the individual has sufficient connections to Afghanistan to defeat habeas jurisdiction. A non-Afghan citizen captured outside Afghanistan may have carried out attacks in, or conducted operations from within, Afghanistan, activities that would plainly implicate the host nation's interests. And even if petitioners' only connection to Afghanistan is their detention there, experience in the Guantanamo Bay litigation teaches that discovery concerning the habeas claims of detainees alone will likely intrude into the military's operations at Bagram (not to mention the logistical and

operational difficulties of permitting counsel access either in person or by other means). Proceedings such as these necessarily would divert resources from the military's operation at Bagram. An interlocutory appeal would determine whether such problematic, and likely protracted, proceedings are ever appropriate in an active combat theater.

For these reasons, the Court's April 2 Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the Order will materially advance the ultimate termination of this litigation. This motion also presents exceptional circumstances justifying an immediate appeal given the potential impact on the military's mission in an active theater of war. Accordingly, the Court should certify the April 2 Order for interlocutory appeal under 28 U.S.C. § 1292(b).

II. THE COURT SHOULD GRANT A STAY PENDING APPELLATE REVIEW

In light of the weighty issues presented in these cases that must be resolved on appeal, respondents respectfully seek a stay of all proceedings. A stay pending appeal is appropriate where the moving party can show: (1) its likelihood of prevailing on the merits of its appeal; (2) that it will suffer irreparable injury absent the stay; (3) that the [non-moving party] will not be harmed by the issuance of a stay; and (4) that the public interest will be served by a stay. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (*citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Ind.*, 559 F.2d 841, 843 (D. C. Cir. 1977)). Respondents need not meet each of these factors; "[t]he test is a flexible one [and] [i]njunctive relief may be granted with either a high likelihood of success and some injury, or *vice versa*." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Moreover, respondents need not establish "an absolute certainty of success"; instead "[i]t will ordinarily be

enough that the [movant] has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation . . ." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (*quoting Holiday Tours*, 559 F.2d at 844). Under these standards, a stay pending appeal is warranted here.

For the reasons discussed in connection with the request for § 1292(b) certification, respondents have demonstrated a likelihood of success on the merits on appeal. And the likelihood of harm to the Government and to the public interest, which blend together in the unique circumstances here, counsel caution and a stay pending appeal. Many of the practical obstacles inherent in extending the writ to a theater of war discussed above similarly demonstrate the potential harm to the Government and public interest if a stay is not granted. Proceeding with these cases now will involve the Court injecting itself deeply into core military matters, potentially imposing onerous burdens on the Executive in violation of basic separation-of-powers principles. This Court's exercise of jurisdiction over these petitions could also implicate the Executive's ability to succeed in armed conflict and to protect United States' forces.

Similarly, the Court's decision threatens the public interest by sanctioning second-guessing of conclusions that are at the core of the war-making powers – judgments as to the level of activity or association with potential terrorism and other activities that warrant detention of an individual so as to effectively subdue and incapacitate the enemy. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (the "Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them"). A stay to address these separation of powers concerns, as well as the practical burdens, is

appropriate. *See Landis v. North American Co.*, 299 U.S. 248, 256 (1936) (noting propriety of stay in cases "of extraordinary public moment").

Finally, any potential for harm to petitioners in continued detention during appellate proceedings does not outweigh the need for a stay. First, the Government intends to seek expedited appellate review of the jurisdictional ruling in the April 2, 2009 Order. Second, the President has established, by Executive Order, a deliberative process to address questions concerning Executive detention authority and options. *See* Executive Order 13,493: Review of Detention Policy Options, 74 Fed. Reg. 4901 (Jan. 22, 2009). That Executive Order commands the creation of a Special Interagency Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counter-terrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." *Id.* ¶ (e). The Task Force is scheduled to provide preliminary reports to the President and a final report by July of this year. *Id.* In particular, the Task Force will be reviewing the processes currently in place at Bagram and elsewhere, and will make recommendations to the President regarding those processes.

In sum, the extensive harms to the Government and the public interest involved in further proceedings envisioned by the Court in these cases, and the likelihood of respondents' success on the merits of appeal, strongly warrant a stay pending appeal.

CONCLUSION

For these reasons, the Court should certify its April 2, 2009 Order for interlocutory appeal and stay proceedings in the above-captioned cases.[5]

Dated: April 10, 2009

Respectfully submitted,

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[5] Pursuant to local rule 7(m), the undersigned has conferred with petitioners' counsel regarding this motion, and petitioners' counsel indicated that they oppose the motion.