UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIN AL BAKRI, *et al.*, ***Petitioners*,** **v.** **GEORGE W. BUSH, *et al.*,** ***Respondents*.**	**Civil Action No. 08-cv-1307 (ESH)** **ORAL ARGUMENT REQUESTED**

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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INTRODUCTION

Petitioner Amin Al Bakri, acting through his Next Friend and father, Mohammed Al Bakri, respectfully submits this Opposition to Respondents' Motion to Dismiss (dkt. no. 6). Petitioner Amin Al Bakri ("Mr. Al Bakri" or "Petitioner") seeks the Great Writ.

Almost six years ago, Mr. Al Bakri, a citizen of a friendly nation, Yemen, was abducted by Respondents during a brief business trip to Thailand—thousands of miles from any battlefield. Since their illegal seizure of Mr. Al Bakri, Respondents have secreted him between various locations known only to them in order to evade their legal obligations under domestic and international law. At their sole discretion, Respondents finally rendered Mr. Al Bakri unlawfully to Bagram Air Base, Afghanistan, where they continue to hold him subject to their complete jurisdiction and control.

Throughout these six years, Respondents have held Mr. Al Bakri virtually incommunicado, without charge, access to counsel, or any legal process through which he can challenge his illegal seizure, detention, and treatment. Respondents now seek to prevent this Court from reviewing the legality of their actions based on no more than their unproven assertion that Mr. Al Bakri is an "unlawful enemy combatant." What is perhaps most bewildering about Respondents' assertion that the Court's exercise of its habeas jurisdiction in this case would "thrust" it into the position of reviewing "the military's conduct of war overseas," Mot. Dismiss 29, is the fact that it is Respondents themselves who snatched Mr. Al Bakri off the peaceful streets of Bangkok, not amidst combat operations in Afghanistan. Respondents' contention—that they can successfully evade this Court's jurisdiction by hiding individuals in their custody at a military prison in close proximity to active hostilities—is deeply at odds with the principles founding our democracy as well as the historical function of the Great Writ.

Above all, the "writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," and "the test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008). To this understanding of the Great Writ's role, Respondents oppose a novel and misguided notion of the "separation of powers." Mot. Dismiss 3. They claim that the separation of powers proscribes any review by U.S. courts of Executive affairs during the current so-called "war on terrorism." Mot. Dismiss 24. But the Supreme Court unequivocally established that "[i]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" related to Executive detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).

Unique among fundamental rights, the Founders secured the individual "privilege of the Writ of Habeas Corpus" in the Constitution rather than deferring it to the Bill of Rights. U.S. Const. art. I, § 9, cl. 2. This is because "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.… '[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'" The Federalist No. 84 (Alexander Hamilton) (quoting 1 William Blackstone, Commentaries *136). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *See also*, *Rasul v. Bush*, 542 U.S. 466, 474 (2004); *Brown v. Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring). No less than the detainees at Guantánamo Bay, therefore, Mr. Al Bakri is entitled to judicial review of the legality of his indefinite and unlawful detention by the United States.

STATEMENT OF FACTS

Petitioner Amin Al Bakri, is a thirty-nine year old Yemeni citizen with a wife and three children. Pet. for Writ of Habeas Corpus ¶ 17 (dkt. no. 1). Prior to 2003, Mr. Al Bakri lived in Sana'a, Yemen, where he was a successful entrepreneur, trading in gemstones and investing in aquaculture. Pet. ¶ 18. In December 2002, while on a five-day business trip to Bangkok, Thailand, Mr. Al Bakri was abducted by agents of the U.S. government and transported to unknown locations. *Id.* at ¶¶ 3, 19-20, 22, 63. Though only Respondents know where Mr. Al Bakri was held during the first six months of his detention, it is likely that he was held in one or more CIA "black sites," where agents of the United States subjected him to torture, including terrorization with dogs, electric shocks, beatings with rifle butts, prolonged suspension, stress positions, and solitary confinement in "dog boxes." *Id.* at ¶¶ 64, 75.

During this time, Mr. Al Bakri's family could only fear the worst. It was not until six months later, when they received a postcard from the International Committee of the Red Cross (ICRC), that his family learned that he was still alive and that the United States held him in custody at Bagram Air Base in Afghanistan. *Id.* at ¶¶ 21, 23, 32. In the face of reports about the deplorable conditions and torture to which detainees in U.S. custody were subjected, they could only imagine the cruel, inhuman and degrading treatment to which Mr. Al Bakri had been subjected. *Id.* at ¶¶ 27, 63-88. In the very same month that U.S. agents abducted Mr. Al Bakri, two detainees at Bagram were tortured to death by U.S. interrogators who had shackled them to the ceiling for days at a time and savagely beat them, and at least 84 other detainees died as a result of similar or worse treatment in U.S. custody at various detention sites worldwide. *Id.* at ¶ 76.

Respondents, who have never provided any justification for abducting Mr. Al Bakri from Thailand and subsequently rendering him unlawfully to Afghanistan, have similarly never offered any proof supporting Mr. Al Bakri's designation as an "unlawful enemy combatant."[1] *Id*. at ¶¶ 28-30. In fact, Respondents have never disclosed any information about Mr. Al Bakri's original detention, when he came into the custody of the U.S. Department of Defense, or when his status as a detainee was first determined.

On July 28, 2008, after nearly six years of detention without charge in Respondents' custody, Mr. Al Bakri filed this Petition for a Writ of Habeas Corpus. In their Motion to Dismiss, Respondents now argue that Mr. Al Bakri, who has never engaged in any hostilities against the United States or its allies, may appeal to no court of law to contest his imprisonment. Prior to Respondents' abduction and extraordinary rendition of Mr. Al Bakri to Afghanistan, he had never even been within a thousand miles of any region in which the United States was engaged in hostilities. *Id.* at ¶¶ 24-25. Despite his unlawful seizure and extended ordeal at their hands, Mr. Al Bakri has cooperated with his captors, to the point that Respondents rely upon his linguistic and mediation skills to resolve disputes between different groups of prisoners and the prison administration, facilitating exchanges in French, English, Urdu, Arabic, and Farsi. *Id.* at ¶ 31.

Respondents allege that they review Mr. Al Bakri's status every six months through an Unlawful Enemy Combatant Review Board (UECRB). Tennison Decl. ¶¶ 11-13. However, during such reviews, Mr. Al Bakri does not have the right to appear before the panel of military officers selected by the Commanding General that will determine his fate. *Id.* at ¶¶ 12-13. In

[1] This raises serious questions about whether Mr. Al Barki's status was, in fact, reviewed at all when the Department of Defense first took him into custody or whether his "enemy combatant" designation is post-hoc. *Compare* Tennison Decl. ¶ 20; Mot. Dismiss 9 (last status determination Jul. 17, 2008 but no indication of initial determination, if any).

fact, by Respondents' own implicit admission, because Mr. Al Bakri's first screening presumably occurred prior to April 2008— given that he was brought to Bagram years before— he was never offered an opportunity to appear before a UECRB at all. *Id.* at ¶ 13. Moreover, the selection of evidence and evidentiary standards are likewise at the discretion of the Commanding General, and Mr. Al Bakri has neither the assistance of counsel nor access to the evidence, if any, considered by the UECRB in determining his status. Respondents concede that these status determination procedures are "administrative in nature and . . . not . . . deemed to create any right, benefit or privilege, substantive or procedural." Letter from Eric Edelman, Under Sec'y of Def. for Policy, to Robert Sensenbrenner, Chairman, House Comm. for the Judiciary (Aug. 10, 2006). Respondents' declarations hardly disguise the unfair and meaningless nature of the procedures afforded Mr. Al Bakri.

The attached Declaration of Jawed Ahmad, *see* Ex. C to Declaration of Ramzi Kassem (hereinafter "Kassem Decl."), confirms Petitioner's assertions regarding his confinement at Bagram and the utter lack of process afforded him over the past six years. Mr. Ahmad, an Afghan journalist in his early twenties, was imprisoned as an "enemy combatant" at Bagram by the U.S. government from October 26, 2007 through September 21, 2008. In that time, he was tortured, was never told why he was being held, was denied access to counsel and to a hearing as well as the opportunity to present abundant evidence of his innocence. Upon his release, Mr. Ahmad was cleared of all charges.

The Bagram Air Base, where Respondents now hold Mr. Al Bakri, is no temporary facility; it is a state-of-the-art *permanent* U.S. military base under Respondents' complete and exclusive control. The diplomatic notes and status of forces agreement that establish the legal basis for the United States' presence in Afghanistan generally, and Bagram specifically, confer

exclusive jurisdiction and control to the United States government. At Bagram Air Base, the United States is obligated to comply with no other nation's laws but its own, and is not subject to the jurisdiction of either the host nation or any of its allies. The United States' legal rights to perpetual jurisdiction and control over Bagram are even more extensive than those over Guantánamo Bay.

Bagram is "the largest U.S. military base in Afghanistan." Mot. Dismiss 3, 26. It has grown from a "glorified city of tents"[2] to a state-of-the-art Air Force base, complete with permanent housing for U.S. soldiers, the recently constructed Craig Hospital and dental clinic,[3] and video-teleconference facilities.[4] It has all the amenities of a facility intended to serve U.S. personnel in the long-term, including "Barber/Beauty, Nail/Spa, Gift Shop, Jewelry, Alterations, Artisan, Gifts, Jewelry, Sports Apparel, Korean Snacks, Engraving, Sports, Coffee, Dairy Queen, Orange Julius, Thai Food, Pizza, Burger King, Phone Center, Tailor, [and] Bazaar," housed in a "3,000 sq. ft. *permanent* building"[5] (emphasis added). The Bagram Theater Internment Facility (BTIF), the prison where Respondents currently hold Mr. Al Bakri, is only a small part of this almost 4,000 acre facility. Pet. ¶¶ 34-62.

SUMMARY OF ARGUMENT

This Court has jurisdiction over Amin Al Bakri's petition for habeas corpus pursuant to the Federal Habeas Corpus Statute, 28 U.S.C. § 2241. The statute provides broadly that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the District Courts, and any Circuit Judge within their respective jurisdictions." 28 U.S.C. § 2241(a). The writ extends

[2] Kent Harris, Buildings Going up at Bagram Air Base as U.S. Forces Dig in for the Long Haul, Stars and Stripes, Mar. 15, 2005.
[3] Press Release, Department of Defense, New Joint Theater Hospital Offers Advanced Care in Afghanistan (Mar. 5, 2007).
[4] *See supra* note 2. Press Release, International Committee of the Red Cross, Afghanistan: Video links between Bagram detainees and families (Jan. 14, 2008).
[5] AAFES, Site Details, http://www.aafes.com/downrange/sites/Bagram.htm.

to any prisoner "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2241(c)(3).

While Congress attempted to limit federal habeas jurisdiction by passing Section 7 of the Military Commissions Act of 2006, Pub. L. No. 109-366 (MCA), the Supreme Court fully restored this Court's jurisdiction under 28 U.S.C. § 2241 in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), which struck down Section 7 of the MCA. Indeed, the Court's jurisdiction now reaches this petition in precisely the way it reached the petitions at issue in *Rasul v. Bush*, 542 U.S. 466 (2004).

In the alternative, the Supreme Court's analysis in *Boumediene* makes clear that denying Mr. Al Bakri habeas rights would violate the Suspension Clause and therefore would be unconstitutional. The Supreme Court identified "at least three factors … relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 128 S. Ct. at 2259. All three *Boumediene* factors in this case demonstrate that the Suspension Clause protects Mr. Al Bakri's petition from dismissal.

First, the current procedures afforded Mr. Al Bakri—a national of a friendly state who was never a combatant of any sort—through the UECRBs at Bagram are even worse than the process deemed inadequate in *Boumediene*. Second, Respondents unlawfully seized Mr. Al Bakri in Thailand, thousands of miles from any battlefield. Indeed, he was nowhere near a battlefield until Respondents abducted him and brought him to Afghanistan. Moreover, the prison in which Petitioner is currently held is in Respondents' exclusive control and jurisdiction.

Finally, this Court's review of the legality of Mr. Al Bakri's detention presents no practical difficulties requiring dismissal because it is Respondents who chose to bring Mr. Al Bakri to Afghanistan in the first place. Whatever negligible burden, if any, review of the legality of Mr. Al Bakri's detention may pose to military operations in Afghanistan is entirely of Respondents' own making.

Respondents claim the right to deprive individuals of their liberty without due process of law by sequestering them on overseas military bases under U.S. jurisdiction and control. This Court's acceptance of Respondents' unsupported assertion that Mr. Al Bakri is an "unlawful enemy combatant" would have grave consequences. Respondents effectively assert that they can abduct individuals anywhere in the world and imprison them indefinitely without charge and that, further, they may hold such individuals incommunicado, without access to counsel, and subject them to torture, all the while remaining immune to review by any court of law. This is contrary to the express intent of the original Habeas Corpus Act of 1679 that no person suffer arbitrary imprisonment "beyond the seas" and it is also prohibited by the United States Constitution. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (noting that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'") (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

At a minimum, this Court cannot properly grant Respondents' motion without first convening an evidentiary hearing and permitting Mr. Al Bakri discovery in order to allow him to dispute the extrinsic jurisdictional facts that Respondents have improperly relied upon in their Motion to Dismiss.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER MR. AL BAKRI'S HABEAS PETITION PURSUANT TO THE FEDERAL HABEAS STATUTE, 28 U.S.C. § 2241

This Court is vested with jurisdiction over Mr. Al Bakri's habeas petition by the federal habeas corpus statute, 28 U.S.C. § 2241, which declares broadly that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a). The provision clearly states that habeas corpus extends to prisoners that are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§2241(c)(1) & 2241(c)(3). Respondents concede that Mr. Al Bakri is in the custody of the United States, and it is plain that the abduction and six-year detention and torture of a prisoner—without a modicum of due process, and with virtually no opportunity for communication with his family, government or counsel—is in violation of "the Constitution or laws or treaties of the United States." *See Rasul v. Bush*, 542 U.S. 466, 484 n.15 (2004).

This Court also has jurisdiction over Mr. Al Bakri's habeas petition under 28 U.S.C. § 1331 because this case arises "under the Constitution, laws, or treaties of the United States." This Court has the power to take all measures "necessary or appropriate" to aid that jurisdiction under the All Writs Act, 28 U.S.C. § 1651, including the power to order limited discovery where necessary.

A. The Supreme Court Has Held that MCA § 7 is Void and Unconstitutional

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court fully restored this Court's jurisdiction pursuant to 28 U.S.C. § 2241. Two years prior, Congress had passed MCA § 7, which purported to amend § 2241 to strip federal courts of jurisdiction over any "writ for 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." MCA § 7, 28 U.S.C. § 2241(e).

In *Boumediene*, the Supreme Court held that "§7 of the Military Commissions Act of 2006 . . . operates as an unconstitutional suspension of the writ." *Boumediene*, 128 S. Ct. at 2240. In plain terms, the Supreme Court held unconstitutional the entirety of MCA § 7 stating that the "law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. §2241(e)." *Boumediene*, 128 S. Ct. at 2275; *see also id.* at 2274 ("MCA §7 thus effects an unconstitutional suspension of the writ."). Despite this clear holding, Respondents argue that some undelineated portion of MCA §7 survived invalidation as a sort of statutory phoenix rising from the ashes. Respondents would have this Court add a caveat to the Supreme Court's decision and hold that *Boumediene* invalidated MCA §7 only "insofar as it applies to certain detainees held at Guantánamo Bay Naval Station." Mot. Dismiss 1-2.

Indeed, *nowhere* in *Boumediene* did the Court describe the invalidation of MCA § 7 as an "as applied" invalidation, nor did it ever limit its unequivocal invalidation of MCA § 7 to the geographic confines of Guantánamo Bay. Instead, the Court described the scope of its inquiry as "the specific question before us: whether foreign nationals, apprehended and detained in *distant countries* during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection." *Boumediene*, 128 S. Ct. at 2248 (emphasis added).[6]

[6] The Government also attempts to argue that "*Boumediene* did not disturb § 2241(e)(1) insofar as it removes jurisdiction over conditions of confinement claims litigated through habeas" and that *Boumediene* did not "disturb the MCA's provision, 28 U.S.C. § 2241(e)(2)." Mot. Dismiss 14 n.8. These contentions are likewise implausible.

Nowhere does the Court in *Boumediene* limit its invalidation to § 2241(e)(1) or any other subdivision of § 7. Instead, at multiple points throughout the decision, the Court plainly states that its holding invalidates § 7 in its entirety. The Court declares that the "law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. §2241(e)." *Boumediene*, 128 S. Ct. at 2275. Further, when describing the law it "identif[ied] as unconstitutional," the Court quotes MCA § 7 *in its entirety*, including MCA §7(b). *Boumediene*, 128 S. Ct. at 2242.

The Government departs from the plain language of *Boumediene* in relying on another passage in which the Court declares that: "In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." *Boumediene*, 128 S. Ct. at 2274. The Supreme Court's decision

Respondents misconstrue *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) in an effort to support their novel interpretation of *Boumediene*'s clear holding. Respondents mistakenly take *Ayotte* to imply that this Court should interpret a Supreme Court decision contrary to its plain language. Instead, *Ayotte* places a more stringent burden on plaintiffs that seek facial, rather than as applied, invalidations—saying nothing as to how courts ought to interpret the plain language of an opinion *after* a case has been decided. Moreover, no opinion, canon, or other doctrine supports a rule of reading cases that have already been decided in the first instance as facial invalidations *against their plain language* to instead be deemed "as applied" invalidations.

The Government's argument cannot survive the plain language and clear meaning of *Boumediene* that MCA § 7 "operates as an unconstitutional suspension of the writ." 128 S. Ct. at 2240. Restoring § 2241 to its previous state, the *Boumediene* Court observed that this statute "would govern in MCA § 7's absence." *Id.* at 2266. This result comports with the long-established rule that when a statute has been invalidated, courts should revert to the procedures established under the prior statutory regime. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871) (disregarding unconstitutional statute divesting court of jurisdiction and reinstating judgment obtained under prior statutory scheme); *accord Armstrong v. United States*,

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not to address "the reach *of the writ*" (emphasis added) has no bearing on § 2241(e)(2), a provision that is expressly limited to *other* (non-habeas) actions, and this passage cannot logically serve as evidence of § 2241(e)(2)'s survival.

What the Supreme Court found unnecessary to address was the question of whether conditions claims may be litigated in the context of a habeas action; this has long been an open question. *See Boumediene*, 128 S. Ct. at 2274; *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself."); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) ("[W]e need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under s 1983."). The Court also expressly asserted that it was able to avoid this question "[i]n view of our holding," thereby indicating that some alternate holding would have required it to address the question, notwithstanding that *Boumediene* itself did not present a conditions claim. *Boumediene*, 127 S. Ct. at 2274. The only holding that could have required the Court to reach the question of conditions claims would be to have left § 2241(e)(2) intact, thereby prompting petitioners to bring conditions claims in habeas. The fact that the Supreme Court expressly avoided this question confirms the Court's plain language invalidating § 2241(e) in its entirety.

80 U.S. (13 Wall.) 154 (1871) (same); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387 (1953) ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction."). *See also Boumediene v. Bush*, 476 F.3d 981, 1011 (D.C. Cir. 2007) (Rogers, J., dissenting) (stating that habeas repeal was unconstitutional, and that proper outcome was to hold that "on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241, et seq.").[7]

After *Boumediene*, 28 U.S.C. § 2241 must be read without the unconstitutional provision added by MCA § 7. Accordingly, Mr. Al Bakri's habeas petition should be treated as if that section of the MCA had never been enacted: it is subject to the normal statutory habeas procedures which set out "a very specific process that the court and parties must follow." *Khalid v. Bush*, 355 F. Supp. 2d 311, 323 n.15 (D.D.C. 2005) (Leon, J.) (citing 28 U.S.C. §§ 2241 *et seq*.).

B. This Court has Jurisdiction over Habeas Petitions Brought by Non-citizens Held in U.S. Custody Pursuant to 28 U.S.C. §2241

Jurisdiction over Mr. Al Bakri's petition exists under 28 U.S.C. §2241, whose plain language states that the writ is available to prisoners held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Years ago, the Supreme Court expressly held that the protections of § 2241 extend to long-term "war on terror" detainees held in the custody of the U.S. government, and that federal courts may protect these rights by exercising jurisdiction over habeas corpus proceedings:

[7] Even assuming partial invalidation, there is no severability clause in the MCA to suggest that remainder of Section 7 should survive. In fact, no part of Section 7 could survive without the rest of the provision. *See generally, Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). Thus, according to *Boumediene*'s plain terms, the entire section is invalid.

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Rasul v. Bush, 542 U.S. 466, 484 n.15 (2004) (quoting 28 U.S.C. § 2241(c)(3)).

Based on its historical analysis that at common law "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the 'exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown,'" *id*. at 482 (citation omitted), the Court emphasized that 28 U.S.C. § 2241 has extraterritorial reach when the U.S. exercises complete control over the territory where the U.S. holds a detainee in custody.[8] *Id*. at 480.

The Supreme Court in *Rasul* emphasized that the touchstone of § 2241 jurisdiction is courts' power to reach the prisoner's custodian. *Id*. at 483-84. In *Rasul*, the Court reaffirmed *Braden v. 30th Judicial Circuit Court of Ky*., 410 U.S. 484, 495 (1973), explaining that "because 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,' a district court acts 'within [its] respective jurisdiction' within the meaning of §2241 as long as 'the custodian can be reached by service of process.' 410 U.S. at 494-495." *Rasul*, 542 U.S. at 478. Respondents do not—and cannot—contest this Court's jurisdiction over Mr. Al Bakri's custodians.[9] In point of fact, Respondents were reached by service of process pursuant to this Court's local rules. As the

[8] In *Rasul* the Supreme Court addressed "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Rasul*, 542 U.S. at 475. As described below, the Bagram Air Base is quite clearly under the plenary and exclusive jurisdiction of the United States.

[9] Nor do Respondents contest that if *Boumediene* invalidated MCA § 7 in holding that "§7 of the Military Commissions Act of 2006 . . . operates as an unconstitutional suspension of the writ," 128 S. Ct. at 2240, then 28 U.S.C. § 2241 would create jurisdiction over this case pursuant to *Rasul.*

Supreme Court held in *Rasul*, "[s]ection 2241, by its terms, requires nothing more."[10] For this reason, § 2241 vests this Court with jurisdiction over Mr. Al Bakri's petition.[11]

II. AMIN AL BAKRI HAS A CONSTITUTIONAL RIGHT TO HABEAS CORPUS

Insofar as Section 7 is understood to survive *Boumediene* in some way, the Supreme Court's analysis inexorably leads to the conclusion that the provision would effect an unconstitutional suspension of the Writ were it to be held to bar jurisdiction over Mr. Al Bakri's petition. The Suspension Clause prohibits Congress from suspending the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9. The Supreme Court identified "at least three factors … relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 128 S. Ct. at 2259. Application of all three factors demonstrates that the Suspension Clause reaches the case of Mr. Al Bakri's detention in Bagram.

A. The Process Provided Mr. Al Bakri Is Inadequate by Any Standard

Mr. Al Bakri is a citizen of Yemen, a nation not at war with the United States, indeed a key regional ally in many respects. He is not nor has he ever been an enemy combatant of any sort. *See* Pet. for Writ of Habeas Corpus ¶¶ 12, 17, 24-25; *see, e.g.,* Treaty of Friendship and Commerce, U.S.-Yemen, May 4, 1946, T.I.A.S. 1535, 1946 U.S.T. LEXIS 407; *see also Rasul*,

[10] What is equally clear under *Rasul* as well as subsequent cases are the factors that are *not* dispositive in assessing whether jurisdiction attaches under 28 U.S.C. § 2241. Such factors include alienage, designation by Respondents as an "enemy combatant," and physical location.

[11] If instead this Court were to accept the Government's invitation to read *Boumediene* to leave the jurisdictional bar under MCA §7 undisturbed, serious constitutional questions would be raised. Under the canon of constitutional avoidance, the Court should read *Boumediene* in a manner that avoids the constitutional questions and difficulties that would be raised by holding that MCA §7 strips jurisdiction over this action. *See, e.g., Rapanos v. United States*, 547 U.S. 715, 737-40 (2006) (plurality opinion of Scalia, J.); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 696-99 (2001); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989); *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

542 U.S. at 476 (noting that unlike the men in *Eisentrager*, petitioners are "not nationals of countries at war with the United States" and that "they deny that they have engaged in or plotted acts of aggression against the United States"). In *Boumediene*, the Court held that "the adequacy of the process through which th[e] status determination was made" was a key factor in determining the reach of the Suspension Clause. *Boumediene*, 128 S. Ct. at 2259. Respondents justify Mr. Al Bakri's continued detention by claiming that he is an "unlawful enemy combatant." Mot. Dismiss 9; Tennison Decl. ¶ 20. But no competent tribunal has judged him to be so and no grounds exist to believe that this designation is not simply arbitrary. The procedures for establishing Mr. Al Bakri's status as an "unlawful enemy combatant" do not pass muster under domestic and international law, Sec. II.A.1, *infra*, nor do they even provide that level of process which the unconstitutional CSRTs extended to detainees at Guantánamo Bay. Sec. II.A.2, *infra*.

1. Domestic and International Law Do Not Recognize Respondents' Status Designation of Mr. Al Bakri

As a threshold matter, Mr. Al Bakri is not, and indeed cannot be an enemy combatant subject to military detention. No law of war authorizes his detention, and in the absence of authorization pursuant to the law of war, no U.S. statute authorizes—and the Constitution and U.S. international law commitments expressly prohibit—his continued detention.

The Supreme Court has recognized that the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), permits, as a matter of U.S. law, the military detention of individuals engaged in hostilities on behalf of Al Qaeda or the Taliban. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). The Supreme Court emphatically limited its holding to the circumstances of an individual captured bearing arms alongside enemy forces in Afghanistan. *Id.* In addition, pursuant to the AUMF—which is itself silent on the issue—detention is

permitted only in accordance with "longstanding law-of-war principles." *Id*. at 521. Under deeply entrenched law of war principles, individuals such as Mr. al Bakri who never took up arms and were unaffiliated with enemy armed forces cannot be treated as "combatants"—they remain civilians. Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Int'l Armed Conflicts art. 50, June 8, 1977, 1125 U.N.T.S. 603. The *Hamdi* plurality stressed that military detention for the duration of hostilities is justified only "to prevent a combatant's return to the battlefield." 542 U.S. at 519. Because Mr. Al Bakri was at all times and remains a civilian—one who was never a battlefield participant to begin with and therefore cannot raise a risk of return to the battlefield—his detention as a "combatant" by the United States does not comply with the laws of war in a crucial regard, nor is it authorized by the AUMF or any other Congressional act.

Further, Mr. Al Bakri's rendition and detention is not authorized by the law of war as no state of armed conflict existed in Thailand in December 2002. Under international humanitarian law, an armed conflict exists "wherever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70; *see also* Int'l Comm. of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, Mar. 2008.[12] Absent a state of armed conflict, had Mr. Al Bakri or any other individual engaged in suspect activities, a possible consequence might have been prosecution under the criminal laws of Thailand, but certainly not detention as an enemy combatant under the law of war. Int'l Comm. of the Red Cross, Official

[12] Available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-70308/$file/Opinion-paper-armed-conflict.pdf.

Statement: The Relevance of IHL in the Context of Terrorism, at § 3 (July 7, 2005) ("From [a law of war] perspective, the term 'combatant' or 'enemy combatant' has no legal meaning outside of armed conflict.").[13]

Unless Respondents would contend that since the date of Mr. Al Bakri's transfer to Afghanistan, U.S. Armed Forces have been engaged in a conflict with the Government of that country—a government formally recognized by the United States and headed since June 13, 2002 by U.S. ally Hamid Karzai—then the armed conflict there is necessarily one "not of an international character." Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, [1955] 6 U.S.T. 3316; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006). In such a non-international armed conflict—a conflict not between state parties to the Geneva Conventions—the law of war is silent regarding detention.[14] Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at § 4 ("In non-international armed conflict combatant status does not exist.").

In the absence of authorization under the law of war, Mr. Al Bakri's continued detention is unauthorized by any statute or provision of U.S. law, and violates the Fifth Amendment's prohibition on the deprivation of liberty without due process of law. His continued detention also violates the prohibition on prolonged, arbitrary detention in customary international law and in the International Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171 (ICCPR), which control as a matter of U.S. law in the absence of a contravening act of Congress. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary international law is part

[13] Available at http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.

[14] While the Geneva Conventions neither authorizes nor prohibits detention in non-international armed conflicts, Common Article 3 of the Conventions guarantees the humane treatment of any detainee, regardless of the authority for their detention, and prohibits Respondents' past and ongoing inhumane treatment and torture of Mr. Al Bakri. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (holding Common Article 3 applicable to the armed conflict in Afghanistan).

of U.S. law and controls executive action during wartime in absence of statutory authority). The ICCPR unequivocally prohibits arbitrary detention—that which is not authorized by law. ICCPR art. 9 ("No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."). This prohibition is clearly established as a matter of customary international law. Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."); *see also Palma v. Verdeyen*, 676 F.2d 100, 106 (4th Cir. 1982).

2. The UECRBs Fall Below Even the Inadequate Standards Set by the CSRTs at Guantánamo Bay, Cuba

Respondents have allegedly reviewed Mr. Al Bakri's status through Unlawful Enemy Combatant Review Boards (UECRBs). But the process available at Bagram fails to meet even the unacceptably low standard of the Combatant Status Review Tribunals (CSRTs) at Guantánamo, held by the Supreme Court to "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Boumediene*, 128 S. Ct. at 2260. In assessing the CSRTs, the Supreme Court analyzed the following factors: (i) whether the detainee received effective notice of the factual allegations; (ii) whether the detainee had access to counsel during the proceeding; (iii) whether adequate opportunity existed to rebut the Government's evidence against him; and (iv) whether an adequate review process existed. *Boumediene*, 128 S. Ct. at 2259. When analyzed in light of these factors, the UECRBs at Bagram fall far below the level of process rejected by the Court in *Boumediene*.

According to Respondents' own submission, the UECRB determines the status of a detainee in an initial review within 75 days of confinement. Subsequently it reviews the detainee's status every six months and submits its recommendations to the Commanding

General. Tennison Decl. ¶13. Entirely at his discretion, the Commanding General constitutes the Board of three commissioned officers, and no qualifications are required for them to serve in this capacity. *Id.* They evaluate "reasonably available" information gleaned from the detainee's capture and interrogation. *Id.* Respondents themselves characterizes the UECRBs as merely "administrative in nature," with no obligation to uphold "substantive or procedural" rights. *See* Letter from Eric Edelman, *supra.* Thus, by Respondents' admission, far from affording adequate process, the status determination hearings in Afghanistan fail to provide detainees any meaningful review.

i. The UECRBs Fail to Provide Adequate Notice

Detainees at Bagram do not even receive that quantum of notice already deemed insufficient at Guantánamo Bay. In *Boumediene,* the Court noted that the *Eisentrager* detainees were "charged by a bill of particulars that made detailed factual allegations against them." *Boumediene,* 128 S. Ct. at 2260 (citing 14 United nations War Crimes Commission, Law Reports of Trials of War Criminals 8-10 (1949) (reprint 1997)). In Guantánamo, detainees are given notice of the factual basis for their detention in advance of their appearance before a CSRT. Resp'ts' Br. 49, *Boumediene v. Bush*, 128 S. Ct. 2229, No. 06-1195 and 06-1196 (Oct. 2007). Though never given the full notice provided at Landsberg, Guantánamo detainees are at least guaranteed to know roughly what the government will argue. Guantánamo detainees are also given renewed notice annually, in advance of their appearance before Administrative Review Boards (ARBs), which are charged with reviewing the enemy combatancy determination made by the CSRT. Dep't of Def. Mem., Implementation of Administrative Review Procedures for

Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba, Sept. 14, 2004 (ARB Memorandum).[15]

Respondents concede that Mr. Al Bakri and other detainees in Afghanistan are given no such guarantee. For Bagram detainees, the opportunity to view the factual basis for their detention is contingent on undefined circumstances. Mot. Dismiss 8. According to Respondents, a detainee is given timely notice of the basis of his detention only if operational requirements permit—presumably, a detainee can be kept in the dark as to the nature of the evidence against him indefinitely if circumstances require. *Id.* Moreover, the regulations do not ensure that such notice comes *in advance* of the detainee's hearing, nor do they provide for notification prior to annual reviews. *Id.* As such, the much-heralded (though notably inadequate) notice guarantees afforded Guantánamo detainees are not available to those imprisoned at Bagram.

ii. The UECRBs Provide No Access to Counsel

The absence of counsel represents yet another crucial difference between constitutional process, Guantánamo's inadequate CSRTs, and the even lower standards upheld by the Bagram UECRBs. Access to counsel is a bedrock principle in adversarial common-law tribunals. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (ordering access to counsel because "[t]o say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is 'seriously impaired' [would be] an understatement [as] [t]he circumstances of their confinement render their ability to investigate nonexistent"); *Al Joudi v. Bush*, 406 F. Supp. 2d 13, 21 (D.D.C. 2005) (ordering government to permit greater communication between counsel and clients because "[i]n order to give meaning to the Supreme Court's decision in *Rasul*, . . .

[15] Available at http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf.

procedures must be fashioned, as necessary and appropriate … so that Petitioners have the tools to present their own cases") (internal citations omitted). Indeed, Respondents continue to refuse Mr. Al Bakri access to his counsel. *See* Ex. A to Kassem Decl.

At Guantánamo, the government provides a "Personal Representative" to each detainee to explain the CSRT process and assist him in gathering evidence to demonstrate his innocence. Resp'ts' Br. 51, *Boumediene v. Bush*, 128 S. Ct. 2229, No. 06-1195 and 06-1196 (Oct. 2007). However, the "Personal Representative" explicitly does *not* act as counsel under the CSRT regulations. The *Boumediene* Court already appeared unimpressed by this provision of the CSRT guidelines. *Boumediene*, 128 S. Ct. at 2260 (noting that personal representative "is not the detainee's lawyer or even his 'advocate'"). Nevertheless, that detainees at Guantánamo have access to even inadequate assistance distinguishes Guantánamo once again from the procedures afforded at Bagram, where detainees do not even have access to a "personal representative." In addition, detainees do not have any guarantee of an interpreter at any point during their hearing. Thus, although the UECRBs have recently decided to allow detainees to appear in person (a recent innovation since April 2008, *see* Mot. Dismiss 25, n.12), there is no guarantee that they can either understand the charges laid against them or the evidence, if any, presented to the Board. Not unlike the Guantánamo detainees, Mr. Al Bakri comes from a different legal system and likely has difficulty grasping the nature of the legal processes of a foreign tribunal or the specialized language and standards of its law. *See Al Odah*, 346 F. Supp. 2d at 8 (holding that "it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation" given that they "face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system").

iii. The UECRBs Do Not Afford the Opportunity to Confront and Rebut Evidence

A third and related factor that the Court assessed in *Boumediene* was whether detainees can reasonably rebut the Government's evidence against them. *Boumediene*, 128 S. Ct. at 2261. The high court once again compared the CSRTs to the military tribunals in Landsberg Prison at issue in *Eisentrager*. At Landsberg, defendants "were allowed to introduce evidence on their own behalf and permitted to cross-examine the prosecution's witnesses." *Id*. at 2260. Guantánamo's CSRTs allow for no such measures. A detainee's ability to rebut evidence is "limited by the circumstances of his confinement and his lack of counsel at this stage." *Id*.

Again, the opportunity to rebut evidence at Bagram falls short of even those CSRT procedures which the Supreme Court held were inadequate as a substitute for habeas corpus. At Bagram, detainees may submit evidence only at the discretion of the commanding general. By contrast, at Guantánamo, a detainee has a right to present information relevant to his status designation, to question witnesses summoned to support the government's case, and to present reasonably available witnesses to testify on his behalf. In lieu of the actual appearance of those witnesses, written statements as well as telephonic or video testimony are permitted. *See* Combatant Status Review Tribunal (CSRT) Process at Guantánamo 3.[16]

In addition, the CSRT Reporter is obligated to provide the Tribunal "evidence to suggest that the detainee should *not* be designated as an enemy combatant." Resp'ts' Br. 52, *Boumediene v. Bush*, 128 S. Ct. 2229, No. 06-1195 and 06-1196 (Oct. 2007). An Administrative Review Board (ARB) was "*required* to consider any relevant and reasonably available information concerning the enemy combatant, including information submitted by the enemy combatant." ARB Memorandum, *supra* (emphasis added). There is ample reason to believe that

[16] Available at http://www.defenselink.mil/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf.

the CSRTs and ARBs did not live up to this in practice, but, once again, the Bagram process fails to reach even this theoretical level.[17] According to Respondents, the detaining combatant commander, or his designee, *may* interview reasonably available witnesses if he so chooses, and only if doing so would "not affect combat, intelligence gathering, law enforcement, or support operations." Tennison Decl. ¶12. Thus, the presentation of exculpatory evidence for Bagram detainees is wholly dependent on the discretion of their captors and falls far short of the process allowed under the constitutionally inadequate CSRTs or in the Landsberg tribunals.

Finally, guidelines for CRSTs state that a preponderance of evidence standard is used to determine whether a detainee will be classified as an enemy combatant. *See* Combatant Status Review Tribunal Process at Guantánamo 6. Respondents make no statement as to the standard of proof utilized at Bagram or even whether this too falls entirely under the discretion of the Commanding General or his commissioned officers.

iv. UECRBs Cannot Provide Effective Review

The *Boumediene* Court examined the totality of process available in determining that the Suspension Clause applies to detainees at Guantánamo because "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." *Boumediene*, 128 S. Ct. at 2269. In its analysis, the Court looked beyond the CSRTs to an additional layer of limited judicial review of the Tribunals' findings at the Court of Appeals for the District of Columbia Circuit, holding that "[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Boumediene*, 128 S. Ct. at 2269. Referring to its subsequent lengthy treatment of the so-called

[17] The Declaration of U.S. Army Intelligence Corps Lt. Col. (Retired) Stephen Abraham, a former CSRT panel member, Ex. B to Kassem Decl., vividly details the numerous shortcomings of those tribunals in a way that underscores the Bagram tribunals' greater inadequacy given their stronger emphasis on the Commander's discretion and weaker insistence on any search for exculpatory evidence.

DTA review process, the Court held that even "that review process cannot cure all defects in the earlier proceedings." *Boumediene*, 128 S. Ct. at 2260.

Among the many failures were the appellate court's inability to remedy detention, even if it should find facts that justified release; its inability to review the neutrality of original finders of fact; its inability to compel the introduction of exculpatory evidence, even that which reasonable effort could readily bring to light; and its inability to assess anything more than conformity to standards and procedures set by the political branches. *Id.* at 2271-3; *see also* Resp'ts' Br. 49-50, *Boumediene v. Bush*, 128 S. Ct. 2229, No. 06-1195 and 06-1196 (Oct. 2007); DTA § 1005(e)(2)(B-C), 119 Stat. 2742. At best, the final outcome of an appeal of a CSRT's finding merely led to another CSRT, whose composition was again left to the unbridled discretion of the Secretary of Defense. *Boumediene*, 128 S. Ct. at 2274.

Of course, the DTA does not provide for any such judicial review of UECRB determinations. Accordingly, the UECRB can only be inadequate as a form of process, given that a marginally superior CSRT process—one that is, moreover, coupled with a judicial review mechanism altogether absent from the Bagram context—was found insufficient by the Court as an obstacle to the Suspension Clause's application.

B. BAGRAM IS UNDER EXCLUSIVE U.S. JURISDICTION AND CONTROL

The *Boumediene* Court held that objective factors and practical considerations—not *de jure* sovereignty—indicated the reach of constitutional habeas rights. Justice Kennedy identified "the nature of the sites where apprehension and then detention took place" as the second relevant factor. Boumediene, 128 S.Ct. at 2237, 2261. Those same considerations demonstrate that Bagram is in the "absolute and indefinite control" of the United States, 128 S.Ct. at 2237. The United States is not "answerable to its Allies for all activities occurring there," 128 S.Ct. at 2260, and Bagram is in the "constant jurisdiction of the United States." 128 S.Ct. at 2261.

Respondents have already admitted that the "the detention operation at Bagram is under the command and control of the U.S. military." Mot. Dismiss at 22. *See* Tennison Decl. at ¶ 3. The lease with Afghanistan grants the United States exclusive and indefinite use of the Bagram facility, and a status of forces agreement surrenders Afghan control over key aspects of the U.S. presence throughout Afghanistan. Given such wide latitude, the United States has established Bagram as a permanent facility and holds it out as such. The United States thus enjoys at least as much control over Bagram as it does over Guantánamo, and its possession of Bagram is easily distinguishable from Landsberg Prison. Finally, those same factors belie Respondents' argument that practical considerations weigh against the exercise of habeas jurisdiction over Mr. Al Bakri's case.

1) The United States Exercises Complete and Exclusive Jurisdiction and Control Over Bagram.

The Afghan Government has ceded indefinite and exclusive control over Bagram to the United States under the terms of the agreements between the two nations. The lease agreement between Afghanistan and the United States confers "exclusive, peaceable, undisturbed, and uninterrupted possession" of the Bagram Airbase. Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield, Sept. 28, 2006, Tennisson Decl., Ex. A (hereafter "Bagram Agreement") at ¶1. The United States' right to use the land is exclusive, perpetual, and terminable or transferrable only in its sole discretion. *Id.* at ¶¶2, 4, 9, 12.[18] The agreement further guarantees the United States control over Bagram "… without any interruption whatsoever by the HOST NATION or its agents." *Id*. at 9

[18] By contrast, the leases securing U.S. control over Guantanamo contained no such provisions permitting the United States to assign its interest without Cuba's consent. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426, Kassem Decl. Ex. D; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1683, T.S. No. 866, Kassem Decl. Ex. E.

The United States exerts similar control over its personnel and possessions in Afghanistan. The Executive Agreement constituting the Status of Forces Agreement between the United States and Afghanistan cedes Afghan sovereignty over key aspects of the U.S. presence in Afghanistan. *See* Mot. Dismiss at 14; Embassy of the United States, Diplomatic Note delivered to the Afghan Ministry of Foreign Affairs, Sep. 26, 2002, Tennison Decl., Ex. 2; Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, Note, May 28, 2003, Tennison Decl., Ex. A (hereafter SOFA). Within Afghanistan, U.S. personnel enjoy a virtual carte blanche. U.S. personnel are subject only to U.S. criminal jurisdiction, and "[p]ersonnel may not be surrendered to . . . the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States.[19] *Id*. at 20. Afghanistan has ceded core governing functions over U.S. personnel, such as the right to control the entry and exit of U.S. persons in Afghanistan, to inspect vehicles, to regulate construction and development, and to regulate imports and exports. *Id*. at 18.

Respondents argue that U.S. jurisdiction and control over the Bagram Base is "necessarily constrained by the multinational forces there, including … the friendly host nation." Mot. Dismiss at 21. First, the suggestion that the United States is at all restrained by "the friendly host nation" is patently wrong, given the plain language of the lease forbidding Afghanistan from engaging in "any interruption" of U.S. actions in Bagram. Morever, the Supreme Court squarely rejected the argument that a U.S. court may not exercise jurisdiction over a detainee held by U.S. troops pursuant to multinational agreements. *Munaf v. Geren*, 128

[19] Respondents attempt to distinguish Bagram from Guantanamo by suggesting that Afghan nationals who commit crimes at Bagram would be prosecuted in Afghan courts. Mot. Dismiss at 21. Yet this does not distinguish the two facilities at all. Article IV of the July 2 Lease still governing Guantánamo also states that "[f]ugitives from justice charged with crimes or misdemeanors amenable to Cuban Law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities." Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426.

S.Ct. 2207, 2217 (2008). Actual custody under the sole control of the United States exists "when the United States official charged with his detention has the power to produce him," and this suffices for jurisdiction regardless of whether that custody may be viewed as "under the color" of another authority such as a multinational force. *Id.* Under *Munaf*, the relevant question is not whether multinational forces exist in and around Bagram, but whether the United States exercises exclusive jurisdiction and control over those it holds in custody. Respondents do not allege that they had to secure permission from Afghanistan or its other allies to bring Mr. Al Bakri thousands of miles into a zone of potential military conflict nor that they now lack authority, at their sole discretion, to release him.

The United States is presently participating in two forces operating in Afghanistan. The International Security Assistance Force (ISAF) is a multinational force under NATO authorized by the U.N. Security Council. *See* S.C. Res. 1386, P 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (giving the ISAF initial authority for a period of six months to work with the Afghan Interim Authority to maintain security near the Kabul region); S.C. Res. 1776, P 1, U.N. Doc. S/RES/1776 (Sep. 19, 2007) (recent extension of authorization of ISAF in Afghanistan). The second platform for the United States' presence in Afghanistan is Operation Enduring Freedom (OEF), the U.S.-led coalition formed to combat terrorism after September 11th. Both arrangements ensure U.S. command and control over its own forces.

In 2002, ISAF negotiated a military-technical agreement with the Afghan Interim Authority. According to this agreement, any U.S. personnel operating under ISAF are immune from arrest or detention by Afghan authorities; they may not be turned over to any international tribunal without the United States' express consent; and they may not be held liable by either civilians or the Afghan government for damages caused by activity "in pursuit of the ISAF

Mission." Status of Forces Agreements and U.N. Mandates: What Authorities and Protections Do They Provide to U.S. Personnel, Hearing Before the House Subcommittee on International Organizations, Human Rights, and Oversight, 110th Cong. 5-6 (2008) (Testimiony of Jennifer Elsea, Congressional Research Service). *See also* International Security Assistance Force (ISAF)-Interim Administration of Afghanistan Military Technical Agreement, art. IV, Annex A, Sec. 1, 3(10), Jan. 4, 2002, 41 I.L.M. 1032 ("The ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the *exclusive jurisdiction* of their respective national elements") (emphasis added).

A separate OEF Status of Forces Agreement, concluded with the Afghan Interim Authority and the United States, likewise provides the same immunities for U.S. personnel as provided under the ISAF agreements. *See* Elsea Testimony, *supra*, at 5-6. Thus, despite the presence of foreign military forces alongside the United States, the United States specifically secured exclusive jurisdiction and control over U.S. personnel. Respondents alone can and do decide whom it takes into its custody, and it alone decides whom to transport into Bagram.

Exclusive U.S. jurisdiction and control is not the norm under Status of Forces Agreements in foreign countries. For example, the United States has agreed to share jurisdiction in territories it formally occupied as a result of past armed conflict such as Japan, Western Europe, and Korea.[20] The U.S.-Afghan SOFA lacks any elements contained in other SOFA's

[20] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 (entered into force Aug. 23, 1953) (multilateral shared jurisdictional SOFA, secured by treaty). Agreement under Article IV of the Treaty of Mutual Cooperation and Security Facilities and Areas of the Status of Forces United States Armed Forces in Japan, art. XIV, §§1, 8, Jan. 19, 1960, 11 U.S.T. 1661-3 (granting Japan jurisdiction over, *inter alia*, employees of U.S. companies executing contracts in Japan for U.S. forces). Mutual Defense Treaty Between the United States of American and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, art. XXII, Jul. 9, 1966 (entered into force Feb. 9, 1967) 17 U.S.T. 1695 (Korea granted criminal jurisdiction over U.S. personnel with respect to offenses punishable by the laws of Korea).

that might establish shared jurisdiction.[21] Instead, the U.S.-Afghan SOFA confers immunity on Department of Defense personnel and their families from Afghan civil and criminal jurisdiction that might arise in the course of their duties.[22] SOFA at 18, 21, 22-23. This would encompass Mr. Al Bakri's custodians at the Bagram detention facility, since their service there apparently falls within the scope of official DoD duties. Furthermore, "Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel," regardless of whether they enjoy DoD immunity; and that "such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States." SOFA at 20. The SOFA and Bagram Agreement indicate that the United States is the *only* country that has jurisdiction at Bagram Air Base. U.S. courts and laws are the only legal means of challenging detentions on the Base.[23]

[21] When concluding the famous "Lend-Lease" agreements with Great Britain conferring bases in Newfoundland, Bermuda, Trinidad and other locations, the United States reserved exclusive jurisdiction over any offenses of a military nature, but for offenses not of a military nature, it agreed to surrender individuals to the "courts of the Territory." Agreement and Exchanges of Notes Between the united States of American and Great Britain Respecting Leased Naval and Air Bases, art. VIII, Mar. 27, 1941, 55 Stat. 1560., Art. VIII, Kassem Decl. Ex. F. The U.S.-Afghan agreement provides for no such sharing of jurisdiction.

[22] These instruments declare that "United States military and civilian personnel of the United States Department of Defense who 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 … be accorded a status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations." *Id.* The Vienna Convention provides that administrative and technical staff, together with members of their families, are "inviolable" and immune from criminal jurisdiction of the receiving state. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, art. 29, 31, 37(2), Apr. 18, 1961 [1972], T.I.A.S. 7502.

[23] Respondents cite several cases in support of the proposition that "courts have repeatedly recognized that the establishment of a military base in foreign territory does not affect a transfer of sovereignty to the United States," but they bypass the more important issue of U.S. jurisdiction. Mot. Dismiss at 20-21. They invoke *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948) to support the proposition that leased bases acquired from Great Britain "did not and were not intended to transfer sovereignty over the leased areas … to the United States.'" *United States v. Spelar*, 338 U.S. 217, 219 (1949) (quoting *Vermilya-Brown*, 335 U.S. at 380). But the Court actually found in that case that the Fair Labor Standards Act applied extraterritorially because "it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverage to sovereignty." *Vermilya-Brown*, 335 U.S. at 390. The government's other cases refer to child custody disputes arising at an airbase in Germany, are hardly apposite, and pass no judgment on jurisdictional questions. To the contrary, one applied U.S. statutory law. *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) (applying International Child Abduction

2) U.S. Control Over Bagram Is Indefinite and Within Its Sole Discretion

The Supreme Court considered the indefinite nature of U.S. control and jurisdiction over Guantánamo to weigh strongly in favor of the recognition of the Writ for detainees held there. Thus, unsurprisingly, Respondents argue that Bagram is "no more than a transient possession necessitated by war." Mot. Dismiss at 20. But the clear language of the Bagram Agreements specifies no time limits, as the Respondent acknowledges. *Id.* at 19-20. Moreover, the United States enjoys total discretion as to whether and when to cease its exclusive possession. Bagram Agreement, art. 4.

Not only is U.S. control over Bagram indefinite, it is essentially interminable. Respondents urge the Court to conclude that Afghan authorities could terminate the lease if Afghanistan ceases to derive "mutual benefits." Relying on vague, exhortatory language of the preamble to the Bagram Agreement,[24] Respondents argue that the agreement provides consideration of "mutual benefits" "that is not present in the lease with Cuba." *See* Mot. Dismiss at 19; Bagram Agreement, Preamble. But the plain text of the Bagram Agreement itself states that the agreement lacks consideration. *Id.*, at art. 5 ("The HOST NATION makes the premises available … without rental or any other consideration for use of the premises"). Thus, if the contracting parties considered "mutual benefits" to be contractual consideration, as Respondent claims, the plain language denies it.[25]

Remedies Act). The other deferred to the jurisdiction of a U.S. state court to settle a dispute arising on the German airbase. *Holder v. Holder*, 392 F.3d 1009 (9th Cir. 2004).

[24] Vague language invoking unspecified "mutual benefits" is common in other agreements acknowledged to confer exclusive jurisdiction upon the United States. *See, e.g.*, Agreement on Military Exchanges and Visits between the Government of the United States of America and Mongolia, Preamble, Jun. 26, 1996, entered into force Apr. 3, 1998, *avail at* http://www.state.gov/documents/organization/105696.pdf. (predicating agreement upon "Recognizing and Emphasizing … each other's mutual benefit…").

[25] The lease with Cuba is actually more protective of Cuban sovereignty than the Bagram lease. Were the United States to abrogate its agreement to pay Cuba "two thousand gold coins" yearly for the use of Guantánamo, Cuba would have a strong case for evicting the United States for the breach. Treaty between the United States of America and Cuba Defining their Relations, May 29, 1934, (entered into effect Jun. 9, 1934) 48 Stat. 1682, Kassem Decl. Ex. E. No such possibility exists at Bagram.

The lack of consideration paired with the Bagram Agreement's provisions concerning termination and transfer lead to the inescapable conclusion that the United States exerts unchecked control over Bagram. Afghanistan has no right to terminate the agreement, and, as demonstrated above, has no ability to otherwise hold the United States in breach. Bagram Agreement, art. 4 ("The term of this Agreement shall … continue until the UNITED STATES or its successors determine that the Premises are no longer required for its use."). *See also* art. 10 & 11 (setting terms of notice for termination which make reference only to U.S. right of termination). The United States can assign the Bagram base to another state party at its discretion, thus retaining the right to dispose of the property at will and even collect rents. *Id*. at art. 2 & 3. By comparison, United States has no right to assign Guantánamo to any third state party or organization. In fact, any such attempted assignment would constitute abandonment by the United States under the lease, resulting in an automatic reversion to Cuba.

3) Bagram Air Base is a *permanent* facility.

Like Guantánamo, the United States holds Bagram as a *permanent* facility. *See* AAFES, Site Details, *available at* http://www.aafes.com/downrange/sites/Bagram.htm. Far from a "transient wartime necessity subject to the host nation's sovereignty," Mot. Dismiss at 2, the U.S. military has retrofitted an erstwhile decayed and abandoned Soviet airbase—without running water or permanent accommodation—into a small city serving thousands of troops with advanced medical care, housing, sanitation, entertainment, and even many of the luxuries of home. SSgt Oshawn Jefferson, FET Keeps Bagram Improving, Growing, Air Force Print News Today, Dec. 4, 2007, *available at* http://www.dvidshub.net/media/pubs/pdf_2368.pdf. Within this sprawling and expanding facility, the Bagram detention facility has grown from a temporary holding pen for roughly 100 detainees into a prison that now accommodates an estimated 630

individuals.[26] Since late 2002, the Corps of Engineers has awarded nearly $3.5 billion in contracts for projects that support security forces, the Afghan military, the national police, U.S./Coalition Forces, counternarcotics, border management and strategic construction. U.S. Army Corps of Engineers, AED Contracting, http://www.aed.usace.army.mil/contracting.asp. If the United States were to complete *only* the remaining 140 projects described in its Requests for Quotations, development work in Afghanistan would require direct U.S. oversight continuing for a minimum of 7 years. Press Release, Department of Defense, Engineer Team Plans Bagram's Future (Aug. 13, 2008). All this indicates a lasting, permanent U.S. presence in Afghanistan, with Bagram as the center of operations.

4) Bagram Air Base is qualitatively different from Landsberg Prison.

Although the Supreme Court distinguished Guantánamo from Lansberg Prison in *Boumediene*, the Respondents continues to justify its detention policies by claiming that "Bagram Airfield is more like … Landsberg prison" than Guantánamo. Mot. Dismiss at 20. The *Boumediene* Court found "critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantánamo Bay in 2008." U.S. control over Guantánamo, unlike Landsberg, was absolute and indefinite. *Boumediene*, 128 S. Ct. at 2260. Based in part on these distinctions, the Court held that prisoners held outside the *de jure* sovereignty of the U.S. could be entitled to the Writ; it did not, as Respondents suggest, limit that holding to the unique geographical location of Guantánamo. *Id.*, at 2277. Rather, the Supreme Court delimited *Eisentrager* as applicable to the narrow circumstances present in that case.

The Bagram detention facility bears little resemblance to the specific historical context of Landsberg Prison that justified the holding in *Eisentrager*. The nature and extent of U.S. authority over a sector of occupied Bavaria, where Landsberg Prison was located, was in flux in

[26] Tim Golden, Foiling U.S. Plan, Prison Expands in Afghanistan, N.Y. Times, Jan. 7, 2008.

the years after World War II. As the Supreme Court recognized in *Boumediene*, U.S. control over Landsberg Prison was neither absolute nor indefinite. *Boumediene*, 128 S. Ct. at 2257-58. Well before Germany surrendered, the Allies agreed that "[s]upreme authority in Germany will be exercised, on instructions from their respective governments, by the Commanders-in-Chief of [the Allies], each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the [Control Council]." Agreement on Control Machinery in Germany, Adopted by the European Advisory Commission, art. 1, Nov. 14, 1944, 5 U.S.T. 2062, Kassem Decl. Ex. G. Thus, any power the United States exercised within its zone in Occupied Germany arose from the Allied occupation authority, subject to negotiation and deliberation with the other Allies if the Allied Control Council deemed the matter to "affect Germany as a whole," *id*., or to be an area in which the four Allies needed to "to ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation."[27] *Id*., art. 3(b). The highly charged environment of the early Cold War and the United States' preference for multinational alliances rather than unilateralism led the U.S. to coordinate its operations ever more tightly with the United Kingdom and France.

In contrast, the United States operates the Bagram detention facility under its exclusive, complete, and indefinite military control. The United States answers to no government but its own for what it does there or whom it detains. The agreements governing ISAF or OEF ensure that the United States will not be challenged in this regard by the host nation or its allies.[28] As the headquarters from which the United States stages its Afghan operations, there is no end in

[27] These negotiations took place among the Allied Control Council and subsidiary bodies, composed of officials appointed by France, England, the U.S.S.R., and the U.S., which could only act unanimously. *See* Drew Middleston, *Marshall Urges A Cut In Armies Policing Germany*, N.Y. Times, Mar. 25, 1947, pg. 1. Decisions regarding clemency for those convicted of war crimes at Nuremberg were also made jointly by all four nations. *Mercy Pleas of 16 Nazis Rejected by High Court*, Wash. Post, Oct. 11, 1946, pg. 1.

[28] Petitioners do not dispute that coalition forces exercise jurisdiction over some parts of Afghanistan, but only argue that Bagram and its detention facility are subject to indefinite, exclusive U.S. jurisdiction and control.

sight to its use of the facility. Afghanistan has expressly transferred control over the land on which the Air Base is located to the U.S. alone. *See supra* at II.B.2. Instead of resembling Landsberg circa 1950, the absolute and indefinite U.S. control over Bagram in fact resembles its control over Guantánamo circa 2008, where the Supreme Court recognized the Great Writ.

C. PRACTICAL CONSIDERATIONS DEMONSTRATE THAT JURISDICTION OVER MR. AL-BAKRI'S HABEAS PETITION WOULD BE NEITHER IMPRACTICABLE NOR ANOMOLOUS.

Rejecting the government's sweeping assertion that habeas jurisdiction turned on formal sovereignty, the Supreme Court in *Boumediene* instead held that "[w]hether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Boumediene*, 128 S. Ct. at 2255-56. Respondents argue that extending habeas rights to Mr. Al Bakri will impose insurmountable practical burdens on U.S. forces abroad and potentially disrupt our relations with Afghanistan by compelling his release into that country. Mot. Dismiss at 25-30. But habeas no more demands that the Respondents release Mr. Al Bakri into Afghanistan that it compels the release of detainees at Guantánamo into Cuba. Mr. Al Bakri is not a citizen of Afghanistan, which has expressed no interest in his detention. The sole reason for his detention in Afghanistan is the Respondent's decision to transport him, against his will, from Thailand to Bagram, where the Respondents have held him for almost six years without cause.

This Court should also be clear about the nature of Mr. Al Bakri's incarceration. Whatever investigation led to his abduction did not take place in a "theater of war" any more than Mr. Al Bakri's arrest took place amidst whizzing enemy gunfire. His captors neither stormed nor held any combat position. Acting on information whose veracity has yet to be tested or even alleged, they snatched him off the streets of a peaceable U.S. ally and only then rendered

him, via undisclosed locations, to Bagram. *Compare* Mot. Dismiss at 24 and 25. Withholding process from Mr. Al Bakri is just as arbitrary an exercise of discretion as his rendition into a zone of U.S. military operations in the first place. To permit his continued detention without review would mean that the United States could pick up anyone, anywhere in the world and escape scrutiny merely by sequestering an individual in a foreign military base.

To the extent that anything is known about Mr. Al Bakri's seizure, it more closely resembled a law-enforcement arrest. Contrary to Respondents' allegations that the extension of process to detainees in Mr. Al Bakri's position may "disrupt command missions," Mot. Dismiss at 27, the ordinary trappings of law enforcement routinely accompany U.S. forces in the field. For example, the US Army Criminal Investigation Command (CID) has been organized as a centralized and specialized component of the U.S. Army for over forty years to conduct investigations wherever U.S. military units operate, including special forces. As one of its officers boasts, "[w]hen the need dictates, our paratrooper agents are prepared for airborne deployment directly into the theater of conflict." Statement of Command Sergeant Major Michael Misianowycz, Criminal Investigation Command 'On the Lookout' for Soldiers, 1, Jan. 24, 2006, available at http://www.cid.army.mil/documents/CID_in_the_News/on%20the%20lookout.pdf. CID has authority to investigate felony crimes affecting the Army anytime, anyplace in the world. Thus, the military's investigative capabilities accompany the flag. They are not only considered practical; they are a considered necessary to enforcing the laws of war. *See* U.S. Army Criminal Investigation Command, History, available at http://www.cid.army.mil/history.html. If professionals like CID agents can accompany U.S. special forces into the heat of battle, it seems anomalous for Respondents to protest that insurmountable burdens will result from the requirement to produce evidence and provide

process for individuals, such as Mr. Al Bakir, whom it seizes as part of something resembling a global law enforcement operation.

Respondents position of absolute immunity from judicial review, coupled with the opacity with which it shrouds the arbitrary detention of individuals such as Mr. Al Bakri, threatens the American mission abroad far more than the extension of rights secured by U.S. and international law. In the absence of any judicial oversight, the Bagram detention facility has been the site of numerous gross violations of detainees' rights, including the brutal murder of prisoners.[29] James R. Schlesinger, et al., Final Report of the Independent Panel to Review DoD Detention Operations, August 24, 2004, available at http://www.pbs.org/wgbh/pages/frontline/torture/paper/reports.html (noting the migration of unlawful interrogation tactics from Guantánamo to Afghanistan and Iraq). . Confronted with a U.S. system of lawlessness and brutality, our allies now express reluctance to render detainees to facilities over which the United States exercises exclusive jurisdiction.[30] Airforce Judge Advocate General Charles Dunlap identified U.S. involvement in human rights violations as "literally indistinguishable from conventional military defeats . . . . The reality is Americans have died and will continue to die as an indirect result of this. It energized the enemy, it eroded the Coalition." The Law of Armed Conflict, Air & Space Conference and Technology Exposition 2005, 13 Sep. 2005, available at http://www.afa.org/media/scripts/Dunlap_conf2005.html. It is not the extension of process to

[29] At almost the same time as Mr. Al Bakri's disappearance, two detainees at Bagram were declared dead after suffering "blunt force injuries" at the hands of their captors who shackled them to the ceiling. Tim Golden, *The Bagram File: Revisiting the Case; Years after Two Afghans Died, Abuse Case Falters*, Feb. 13, 2006 N.Y. Times at A1.

[30] Glenn Kessler, Europeans Search for Conciliation with U.S., Dec. 9, 2005, Wash. Post. at A1 (Dutch forces in Afghanistan pressed to set up own detention facilities due to reluctance to render to U.S. custody). The Controversy Over Detainees, Apr. 27, 2007, CBS News, *available at http://www.cbc.ca/news/background/afghanistan/detainees.html* (Canadians opted to turn over detainees to Afghans rather than U.S. detention facilities).

detainees such as Mr. Al Bakri but rather the *lack of process* that threatens our coalition, diverts "attention of military personnel form other pressing tasks," and damages "the prestige of our military commanders at a sensitive time." Mot. Dismiss at 25, 27.

As demonstrated above, application of all three factors to the case of Amin Al Bakri's detention in Bagram demonstrate that the Suspension Clause reaches this case. Failure to allow Al Barki to pursue relief in federal court is an unconstitutional violation of the Constitution because Congress neither properly suspended the Great Writ nor provided for an adequate alternative remedy.[31]

III. PETITIONER IS ENTITLED TO DISCOVERY OF JURISDICTIONAL FACTS BECAUSE RESPONDENTS INTRODUCED EXTRINSIC JURISDICTIONAL FACTS

At a minimum, at this stage in the proceedings, this Court should not deny jurisdiction without first convening a hearing and permitting discovery in order to allow Petitioners to dispute any jurisdictional facts that Respondents challenge. For, this court cannot decide whether Mr. Al Bakri has been "determined by the United States to have been properly detained" as an "enemy combatant" for purposes of MCA § 7 without further factual development.

Rule 12 requires that a motion to dismiss be considered assuming all facts in the pleadings to be true and drawing all factual inferences in the Petitioner's favor.[32] *See, e.g.*, *Doe*

[31] As implicitly conceded by Respondents, Mr. Al Bakri has no adequate alternative to habeas corpus. *Boumediene*, 128 S. Ct. at 2266, requires that at a minimum, an effective substitute to habeas must provide (1) the prisoner a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law. Respondents have subjected Mr. Al Bakri to processes that fail even to reach the standard of the Combatant Status Review Tribunals deemed inadequate by the Supreme Court in *Boumediene*. *See supra* at II.A.2. Mr. Al Bakri has had no opportunity to confront, rebut or present evidence, nor has he appeared before a neutral arbiter or benefited from the assistance of counsel. *See Boumediene*, 128 S.Ct. at 2269-70 (holding that shortcomings of CSRTs require collateral review). And, unlike petitioners in *Boumediene*, Al Bakri is denied altogether *any* right to appeal to any tribunal. There is simply no collateral review of any sort, let alone review sufficient to constitute an adequate alternative to the Great Writ. *Id.* at 2270-71 (finding that DTA review, which afforded circumscribed appeal to D.C. Circuit, to be inadequate substitute).

[32] While Respondents fail to cite any rule under which they bring their motion to dismiss, it is well settled that motions to dismiss habeas corpus petitions brought under 28 U.S.C. § 2241 are governed by the standards of Federal Rule 12. *See* Fed. Rule Civ. Proc. 81(4)*; see also, e.g.*, *In re Guantánamo Detainees*, 355 F. Supp. 2d 443, 453

v. U.S. Dept. of Justice, 753 F.2d 1092, 1102 (D.C. Cir.1985) ("[T]he factual allegations of the complaint must be taken as true, and any ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader."); *Khalid v. Bush*, 355 F.Supp.2d 311, 317 (D.D.C. 2005) ("The Court must accept the well-pleaded facts as they appear in the writ of habeas corpus petition and extend the petitioners every reasonable inference in their favor."); *In re Guantánamo Detainees*, 355 F. Supp. 2d 443, 453 (D.D.C. 2005) ("the Court must accept as true all factual allegations contained in a petition and must resolve every factual inference in the petitioner's favor.") (citing *Sparrow v. United Air Lines, Inc*., 216 F.3d 1111, 1113 (D.C. Cir. 2000)); *Rasul v. Bush*, 215 F. Supp. 2d 55, 61 (D.D.C. 2002) ("[t]he Court must accept all of the Amended Petition's/Amended Complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in Petitioners'/Plaintiffs' favor.").

Ignoring these cardinal principles, Respondents raise extrinsic jurisdictional facts (and quasi facts in the form of conclusory allegations) that are directly contrary to facts stated in the petition. Most centrally, Respondents represent to this Court that Mr. Al Bakri "has been determined to be an unlawful enemy combatant." Mot. Dismiss 13 & Tennison Decl. ¶ 20. They have also alleged that detainees receive a panoply of procedures under the UECRBs that stand in direct contrast with witness statements. Compare Tennison Decl. ¶ 13 (stating that detainees are able to present written statements) and Ahmad Decl. ¶20 (stating that he was never given the opportunity to present exculpatory evidence).

Because Respondents have contested the jurisdictional facts pled in the Petition, Mr. Al Bakri is entitled to take discovery regarding all disputed jurisdictional facts. *See, e.g., Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) ("We have . . . required that plaintiffs be given

(D.D.C. 2005) (applying Federal Rule of Civil Procedure 12); *Rasul v. Bush*, 215 F. Supp. 2d 55, 61 (D.D.C. 2002) (same).

an opportunity for discovery of facts necessary to establish jurisdiction prior to decision of a 12(b)(1) motion."); *Herbert v. National Academy of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992) (noting that "ruling on a Rule 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction") (citing *Collins v. New York Central System*, 327 F.2d 880 (D.C.Cir.1963)); *Urquhart v. American-LaFrance Foamite Corp.*, 144 F.2d 542 (D.C. Cir. 1944) (holding that the district court had erred in refusing to grant the plaintiffs permission to take depositions for the purpose of disproving the allegations in the defendant's affidavit denying jurisdiction). The nonmoving party must be afforded an "'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quoting *Prakash v. American University*, 727 F.2d 1174, 1180 (D.C. Cir. 1984)).

Likewise, this Court may order an evidentiary hearing as to disputed jurisdictional facts, as the Court noted during the parties' telephonic status conference of September 9, 2008, or other through other measures. *See, e.g.*, *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, ... the court may inquire, by affidavits or otherwise, into the facts as they exist.") (citations omitted); *Herbert v. National Academy of Sciences*, 974 F.2d 192 (D.C. Cir. 1992) (noting that "should the trial court look beyond the pleadings, it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties."); *Matthews v. Automated Business Systems & Services, Inc.* 558 A.2d 1175 (D.C. Cir 1989) (noting that "a court may be required to provide a plaintiff with a hearing on the issue of jurisdiction, especially if the

evidence presented in the affidavits is not sufficient, or if 'the facts are complicated and testimony would be helpful.') (citation omitted).

Finally, in cases, such as here, where extrinsic jurisdictional facts have been proffered by Respondents, a court cannot convert a motion to dismiss for want of jurisdiction into a motion for summary judgment. *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp.2d 73, 80 (D.D.C. 2003)("The submission of matters outside the pleadings does not convert a Rule 12(b)(1) motion to one for summary judgment but, rather, permits the court to conduct an independent review of the evidence to resolve factual disputes concerning whether subject matter jurisdiction exists."). Instead, this Court must reject the motion to dismiss and only after discovery may Respondents file a separate motion for summary judgment. *See Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

It is well within the competency and the role of this Court to further develop the jurisdictional facts of this case. Not only is allowing for factual development part of the normal judicial course of action in habeas corpus cases brought under 28 U.S.C. § 2241, but for the Court to grant the motion to dismiss without doing so would be improper. At the least, the Court should allow petitioner an opportunity for discovery and hold an evidentiary hearing as to the disputed jurisdictional facts.

CONCLUSION

For the reasons stated above, this Court should deny Respondents' Motion to Dismiss Mr. Al Bakri's Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief.

DATED: OCTOBER 22, 2008

Respectfully submitted,

____/s/_____
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIN AL BAKRI, *et al.*, ***Petitioners*,** **v.** **GEORGE W. BUSH, *et al.*,** ***Respondents*.**	**Civil Action No. 08-cv-1307 (ESH)** **DECLARATION OF RAMZI KASSEM**

Pursuant to 28 U.S.C. § 1746, I, Ramzi Kassem, certify that the following is true and correct to the best of my knowledge, information and belief:

1. I am counsel for the Petitioners in this case along with my colleagues Hope R. Metcalf, Michael J. Wishnie of the National Litigation Project at Yale Law School and Tina M. Foster and Barbara Olshansky of the International Justice Network. I submit this Declaration in support of Petitioners' Opposition to Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus, filed with this Court on September 15, 2008.

2. A copy of an email exchange between myself and Jean Lin, counsel for Respondents, dated October 7, 2008, is attached hereto as Exhibit A.

3. A copy of the Declaration of U.S. Army Intelligence Corps Lt. Col. (Retired) Stephen Abraham, filed in Al Odah v. Bush, No. 06-1196 (S. Ct.), on November 9, 2007, is attached hereto as Exhibit B.

4. A copy of the Declaration of Jawed Ahmad, filed in Al Maqaleh v. Gates, No. 06-CV-1669 (JDB), is attached hereto as Exhibit C.

5. A copy of the Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426, is attached hereto as Exhibit D.

6. A copy of the Treaty between the United States of America and Cuba Defining their Relations, May 29, 1934, (entered into effect Jun. 9, 1934) 48 Stat. 1682, T.S. No. 866, is attached hereto as Exhibit E.

7. A copy of the Agreement and Exchanges of Notes Between the United Staes of America and Great Britain Respecting Leased Naval and Air Bases, art. IV, Mar. 27, 1941, 55 Stat. 1560, is attached hereto as Exhibit F.

8. A copy of Agreement on Control Machinery in Germany, Adopted by the European Advisory Commission, art. 1, Nov. 14, 1944, 5 U.S.T. 2062, is attached hereto as Exhibit G.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of October, 2008

____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2008, a copy of the foregoing Petitioners' Opposition to Respondents' Motion to Dismiss for Lack of Jurisdiction & Declaration of Ramzi Kassem was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF system.

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