UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZIA-UR-RAHMAN, *et al.*, Petitioners, v. ROBERT GATES, *et al.*, Repondents.	No. 10-cv-320-EGS

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION

Petitioner Zia-ur-Rahman is an Afghan citizen who was seized by U.S. forces from his home in Jalabad during a nighttime neighborhood sweep. Although Mr. Rahman has never been a part of any group engaged in hostilities against the United States or coalition forces, nor has he himself ever engaged in hostilities, he was taken to the U.S. prison at Bagram, where he has been held for more than two years without charge, without access to counsel, and without any judicial review or independent and impartial administrative process through which he can challenge his illegal arrest and detention. Mr. Rahman respectfully submits this opposition to Respondents' motion to dismiss, and seeks the Great Writ from this Court.

Respondents seek to prevent this Court from reviewing the legality of their actions because, they argue, this Court does not have subject matter jurisdiction under the D.C. Circuit's decision in *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). But the factual circumstances at Bagram have changed since *Al Maqaleh* was decided. New evidence significantly changes the jurisdictional balance—as the D.C. Circuit recognized in *Al Maqaleh* that it could—so that the Suspension Clause now applies to Mr. Rahman's petition for three reasons. Each of these reasons supports the extension of habeas rights to Bagram in accordance with the Supreme Court's three-part test articulated in *Boumediene v. Bush*, 553 U.S. 723 (2008): the adequacy of the process for determining a detainee's status; whether the nature and site of the detention is permanent and indefinite; and whether there are practical obstacles to extending the Writ.

First, Respondents have instituted woefully inadequate new procedures to make detention status determinations at Bagram. These procedures have all the same fundamental flaws as the ones the D.C. Circuit identified in *Al Maqaleh*. Respondents do not provide adequate notice of the basis for detention; they bar detainees' access to counsel; they base detention decisions on

secret evidence and do not afford detainees a meaningful opportunity to defend themselves; they deny meaningful review by a judge or truly independent and impartial tribunal. Indeed, the new procedures vest unfettered discretion in the Commander of Bagram's detention operations, including the authority to overturn U.S. military officials' recommendation that a detainee be released. In *Al Maqaleh*, the D.C. Circuit found that the many procedural inadequacies of the Bagram detention review process supported application of the Suspension Clause and detainees' right to habeas relief, and that finding applies with equal force now.

Second, new evidence—including U.S. military officials' own statements—demonstrates that the United States will maintain exclusive control over a unit of the Bagram prison, and that it will continue to hold detainees there indefinitely, even after the remainder of the facility is transferred to Afghan custody. Without this evidence before it, the D.C. Circuit in *Al Maqaleh* found that the United States did not intend to occupy Bagram indefinitely, weighing against the extension of habeas relief in that case. It is now clear that Respondents are creating an indefinite detention prison unit, a twin for the prison at Guantanamo Bay, and habeas review for Bagram prisoners is as necessary as it is for those held at Guantanamo.

Finally, the fact that there are no practical obstacles to habeas jurisdiction at Bagram is amply demonstrated by the 52 Afghan civilian criminal trials that have taken place there since June 2010 with the support of the U.S. military. The D.C. Circuit in *Al Maqaleh* did not have this evidence before it when it held that practical difficulties were the determinative factor preventing extension of habeas rights to Bagram detainees. But habeas proceedings are more flexible and less burdensome than criminal trials, which have stringent evidentiary and procedural requirements. If U.S. military authorities are able to support criminal trials at Bagram, then surely adjudication of Mr. Rahman's civil habeas petition should not pose

obstacles for them. Given this new evidence of trials proceeding at Bagram without practical obstacles, what was a determining factor against habeas jurisdiction should now be a deciding factor for jurisdiction to exist.

The Amended Petition and attached declarations support the conclusion that the Suspension Clause should reach Mr. Rahman, and this Court should hear his petition for the Great Writ. In the alternative, Mr. Rahman is entitled to, and in a separate motion respectfully requests, jurisdictional discovery and a hearing to resolve factual disputes so that this Court has before it the most complete and up to date record.

STATEMENT OF FACTS

I. The Petitioner

Zia-ur-Rahman is a 27-year-old food merchant who lived with his family near Jalalabad, Afghanistan. Am. Pet. ¶¶ 85-87. On December 8, 2008, Mr. Rahman was at home celebrating Eid-al-Fitr, the festival marking the end of the holy month of Ramadan, when he was arrested by U.S. forces conducting a nighttime neighborhood raid. *Id.* ¶¶ 87-91. During that raid, U.S. forces searched approximately 100 homes, and arrested many community members in addition to Mr. Rahman. *Id.* ¶¶ 89-90. When U.S. forces seized Mr. Rahman, they provided no explanation for their actions, nor did they tell his family where he was being taken. *Id.* ¶¶ 91-92.

After his arrest, Mr. Rahman's family tried unsuccessfully to discover his whereabouts. For almost three months they had no idea where he was. *Id.* ¶¶ 93-94. It was only after an ICRC letter arrived that Mr. Rahman's family learned he was being held at Bagram, more than 100 miles away. *Id.* ¶ 94. Although Mr. Rahman's family has been able to visit him, they still do not know why he is being detained. *Id.* ¶ 102.

Respondents have never attempted to justify Mr. Rahman's detention in this court or in any other public forum. In support of Respondents' motion to dismiss, Respondent Harward discloses only that Mr. Rahman's detention has been reviewed by a Detainee Review Board ("DRB") and makes the vague and unsupported assertion that "the criteria for internment have been met and that Petitioner is lawfully detained pursuant to the Authorization for Use of Military Force as informed by the law of war." Declaration of Robert S. Harward ¶ 16 ("Harward Decl.").

Mr. Rahman's Amended Petition alleges that he has never been a part of Al Qaida, the Taliban, or any other groups engaged in hostilities against the United States or coalition forces, nor has he himself ever engaged in hostilities. Am. Pet. ¶¶ 103-105. He has never committed a belligerent act or taken any other actions that might justify his military detention. *Id.* ¶¶ 105. He poses no threat to U.S. or coalition forces. *Id.* ¶ 106. His military detention without charge or trial is utterly without cause.

II. The U.S. detention facility at Bagram

Since 2002, the United States has detained thousands of people at Bagram without access to lawyers, without charge or trial, and without a meaningful process to challenge detention.[1] Am. Pet. ¶ 25. Bagram detainees were held at the Bagram Theatre Internment Facility until December 2009, when all detainees were transferred to a newly-built $60 million facility on the Bagram Airfield known as the Detention Facility in Parwan ("DFIP").[2] Am. Pet. ¶ 26. While conditions at the new facility have improved, the population of detainees held without charge has increased dramatically, from approximately 650 to more than 1550. *See* Shamsi Decl., Ex. D

[1] Conditions at Bagram have at times been horrific. At least two detainees were beaten to death there in late 2002. Declaration of Hina Shamsi, Ex. A ("Shamsi Decl."). Many other instances of abuse have been documented as well. *See* Ex. B; Ex. C ("allegations of detainee abuse have been substantiated").

[2] Except where otherwise indicated, the term "Bagram" is used throughout this brief to refer to the detention facilities at Bagram – that is, the old Bagram Theater Internment Facility or the new Detention Facility in Parwan.

(645 detainees as of September 2009); Declaration of Daphne Eviatar ¶ 7 ("Eviatar Decl.") (approximately 1550 detainees as of February 2011).

The United States has complete and exclusive jurisdiction and control over the Bagram prison and its personnel. Am. Pet. ¶ 28. A lease between the U.S. and Afghan governments explicitly grants the United States "exclusive use," and "exclusive, peaceable, undisturbed and uninterrupted possession" of all facilities and land at Bagram Airfield without interference by the Afghan government. Am. Pet. ¶ 29; Harward Decl., Ex. A ¶¶ 8, 9. The lease can only be terminated by the United States; otherwise it continues in perpetuity. Harward Decl., Ex. A ¶ 4. U.S. personnel at Bagram are subject only to U.S. jurisdiction, cannot be transferred to non-U.S. courts, pay no Afghan taxes, and are governed only by U.S. law. Am. Pet. ¶ 30; Shamsi Decl., Ex. H. at 8.

Although Respondents have declared their intention to transfer portions of the Bagram prison to Afghan government control, they acknowledge that they are constructing a new prison unit that will be used specifically to continue holding individuals in U.S. custody and under U.S. jurisdiction. Declaration of William K. Lietzau ¶ 6 ("Lietzau Decl."). Respondents indicate that this unit "will eventually" be transferred to Afghan custody, but do not specify any time-table. *Id*.

III. The Bagram detention review process

Detainees at Bagram are subject only to U.S. law. Any detention review process they receive is determined by the U.S. military, in its sole discretion. Harward Decl. ¶¶ 7-10. Afghan courts and Afghan law cannot reach Bagram detainees unless the U.S. military decides to transfer detainees to Afghan custody. Harward Decl. ¶ 13; *id.* Ex. C, ¶ 12(n)(3).

Until 2009, and for approximately the first year of Mr. Rahman's detention, Bagram detainees' fate was determined by administrative panels of three U.S. military officers (known as Unlawful Enemy Combatant Review Boards or "UECRB"). *See* Shamsi Decl., Ex. F, at 19. UECRBs had no evidentiary standards or requirements and often made detention decisions based on classified evidence alone. *Id*. Detainees were not told why they were being detained, were prohibited from having counsel, and had no opportunity to confront the allegations against them, to present evidence, or to have members of the community vouch for them. *Id*.

In approximately September 2009, under guidelines put in place in July of that year, the government replaced the UECRBs with a new non-adversarial administrative process, known as Detainee Review Boards ("DRB"). Am. Pet. ¶ 48; Harward Decl. ¶ 9. While the DRBs are a marginal improvement over UECRBs, detainees are still prohibited from access to counsel, and they still may be detained solely or largely based on classified evidence they may not see.

Each DRB is made up of three military officers who may recommend one of five possible outcomes for a detainee's administrative review: continued detention in U.S. custody; transfer to Afghan authorities for criminal prosecution; transfer to Afghan authorities for participation in a reconciliation program, transfer to a third country, or release. Harward Decl., Ex. C, ¶ 12(n)(3). A DRB hearing is held for each detainee every six months. Harward Decl. ¶ 10. Respondent Harward, as Commander of Bagram detention operations, or his designee, then reviews the DRB's recommendation and decides whether to approve, modify, or reject it. Harward Decl., Ex. C, ¶¶ 12(p)(1)(d), 13(a).[3] No standards appear to govern the Commander's exercise of discretion.

[3] Although the Commander may delegate his authority, for ease of reference in these papers, Petitioners refer to the authority exercised either by the Commander or his designee as exercised by the Commander.

Instead of counsel, detainees at Bagram are assigned a U.S. military officer, responsible to the U.S. chain of command, as a "personal representative" ("PR"). Am. Pet. ¶ 49; Harward Decl. ¶ 10; *id.* Ex. C, ¶ 9(e). PRs are not lawyers and are not bound by an attorney's duties of confidentiality, zealous representation, or other ethical obligations.[4] They are bound only by a "non-disclosure policy." Harward Decl. ¶ 11; *id.* Ex. C, ¶ 9(e)(3).

During DRB hearings, detainees are only entitled to evidence that the military determines is "reasonably available." Harward Decl., Ex. C, ¶ 12(i). Without access to outside counsel and investigators, detainees are unable to gather exculpatory evidence. Eviatar Decl. ¶ 11.

The DRB hearings rely extensively on classified evidence. Eviatar Decl. ¶ 13 The detainee is prohibited from seeing such evidence and is excluded from the portion of the hearing at which such evidence is presented. *Id.*; Harward Decl., Ex. C, ¶¶ 9(e)(4), 12(h). Although detainees are initially provided with unclassified summaries of the basis for their detention, Harward Decl. Ex. C ¶ 11, they are not provided with unclassified summaries of evidence that may be before the DRB, or any other substitute means of answering secret allegations against them. Eviatar Decl. ¶¶ 14-15.

It is the Commander of Bagram detention operations, and not the DRB, who makes the ultimate determination regarding the appropriate disposition for each detainee. The Commander has the power to unilaterally reverse the DRB's disposition recommendation. Harward Decl., Ex. C, ¶ 12(p)(1)(d). He also has the unfettered power to change the DRB's assessment, made as part of its recommendation whether the detainee should be detained or released, of the risk a detainee poses. *Id.* Ex. C, ¶ 12(o)(1). Unlike the DRB, the Commander does not hear evidence or testimony.

[4] According to DRB policy, personal representatives receive 35 hours of training before starting their job. *See* Harward Decl., Ex. C, ¶ 10(a). In contrast, the Recorders in DRB proceedings—that is, the individuals charged with presenting the government's evidence to the Board—are JAG lawyers. *See id.* ¶ 9(d).

The Commander is not required to provide any explanation for his determinations, and does not do so. *See, e.g.*, Shamsi Decl., Ex. R, S, T (Commander's final action memoranda overturning DRB recommendations without explanation). Recommendations by the DRB and the ultimate detention decision by the Commander are not subject to review or appeal in any forum, judicial or administrative.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR MR. RAHMAN'S HABEAS PETITION

A proper weighting of the jurisdictional factors the Supreme Court identified in *Boumediene v. Bush*—as interpreted by the D.C. Circuit in *Al Maqaleh v. Gates*—compels the conclusion that the Suspension Clause guarantees Mr. Rahman's right to challenge the lawfulness of his detention before this Court.[5] *Boumediene* 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." 553 U.S. 723, 766 (2008). In *Al Maqaleh*, the D.C. Circuit conducted a detailed, fact-bound analysis of these factors. 605 F.3d 84 (D.C. Cir. 2010).[6] Although the D.C. Circuit concluded that the specific allegations in

[5] Petitioners' opposition to Respondents' motion is predicated on Petitioners' entitlement to relief under the Suspension Clause. Petitioners do not, however, waive the argument that this Court retains statutory habeas jurisdiction under 28 U.S.C § 2241. Respondents assert that, following the D.C. Circuit's decision in *Al Maqaleh*, section 7(a) of the Military Commissions Act ("MCA") strips this Court of statutory habeas jurisdiction. Mot. to Dismiss, dkt 15, at 8 ("Gov't Br."); *Al Maqaleh*, 605 F.3d at 94-99. But both Respondents' argument and the D.C. Circuit in *Al Maqaleh* ignore the Supreme Court's holding in *Boumediene v. Bush*, which facially invalidated MCA section 7(a) and struck that provision from the law. 553 U.S. 723, 795 (2008) ("The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e)").

[6] Mr. Rahman does not concede that the D.C. Circuit's decision in *Al Maqaleh* is correctly decided under *Boumediene*. On appeal, he would argue that decision should be distinguished, or overruled en banc.

Al Maqaleh did not tip the scales in favor of *habeas* jurisdiction, it explicitly stated that jurisdiction could exist in different factual circumstances. 605 F.3d at 98-99; *see also*, *Al Maqaleh v. Gates*, No. 06-cv-1669-JDB, dkt. 57 (D.D.C. Feb. 15, 2011) (additional evidence may alter the analysis under *Boumediene*). Those different, and new, factual circumstances now exist in Mr. Rahman's case.

A. The U.S. military's administrative Detention Review Boards are not an adequate substitute for habeas.

Boumediene and *Al Maqaleh* make clear that when applying the first jurisdictional factor in the Suspension Clause analysis, this Court's inquiry should focus on "the adequacy of the process through which [the] status determination was made," and that foreign citizenship and alleged status as an "enemy alien" do not preclude the right to habeas review. *Boumediene*, 553 U.S. at 766-767; *Al Maqaleh*, 605 F.3d at 96.[7]

In assessing whether the process provided by Respondents is an adequate substitute for habeas, this Court must determine whether Mr. Rahman has access to "a rigorous adversarial process to test the legality of [his] detention." *Boumediene*, 553 U.S. at 767. The key elements of an adequate process are: (1) effective notice of "detailed factual allegations"; (2) access to counsel during the proceeding; (3) an adequate opportunity to rebut the government's evidence by introducing evidence on one's own behalf and cross-examining witnesses; and (4) access to an adequate review process. *Id*. (applying as a benchmark procedures offered to petitioners in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)*)*; *see also Al Maqaleh*, 605 F.3d at 97. Respondents' DRB process is not adversarial, let alone rigorous, and it affords none of the

[7] Mr. Rahman's Afghan citizenship and his imprisonment on the basis of a military-determined status (which Mr. Rahman disputes) at Bagram "differ[] in no material respect from the petitioners at Guantanamo who prevailed in *Boumediene*." 605 F.3d at 96. Under *Al Maqaleh* and *Boumediene*, the relevant distinction is between U.S. citizens and aliens—U.S. citizenship weighs strongly in favor of *habeas* rights while non-citizens have no such advantage. *See Boumediene*, at 553 U.S. at 760-61; *Al Maqaleh*, 605 F.3d at 95-96. To the extent that Mr. Rahman's Afghan citizenship is relevant, it is because of the practical obstacles it might create and is addressed in Petitioner's discussion of this third *Boumediene* factor, *infra* at 24-26.

protections necessary to meet constitutional standards.[8] Just as it did in the case of the *Al Maqaleh* petitioners, the first *Boumediene* factor weighs heavily in favor of Mr. Rahman's right to habeas.

(i) DRBs do not provide effective notice of allegations.

In *Boumediene*, the Supreme Court noted that "a bill of particulars that made detailed factual allegations" constituted the kind of notice necessary for wartime detainees to meaningfully defend themselves. 554 U.S. at 767. In contrast, the DRB rules provide only that Bagram detainees receive unclassified summaries of the allegations against them. These summaries may be "cursory", Eviatar Decl. ¶ 15, and are not adequate notice.

(ii) DRBs prohibit Bagram detainees' access to counsel.

Access to counsel is a bedrock requirement for a meaningful adversarial process, but like the Guantanamo CSRTs that the Supreme Court found defective in *Boumediene*, Bagram DRBs prohibit detainees from being represented by lawyers. *Boumediene*, 553 U.S. at 766-67; Harward Decl. ¶¶ 10-11. At Bagram, the government has not even permitted civilian lawyers to meet with, speak with, or otherwise communicate with their clients.[9]

Instead of their own counsel, Bagram detainees are each assigned a "personal representative" ("PR") who is not independent, but is a military officer responsible to the U.S. chain of command. Am. Pet. ¶ 49; Harward Decl., Ex. C ¶ 9(e). PRs are not lawyers, they are

[8] Through most of the first year of Mr. Rahman's detention, the only process in place was review by Unlawful Enemy Combatant Review Boards ("UECRB"). Respondents do not disclose whether a UECRB in fact reviewed the basis for Mr. Rahman's detention by U.S. forces. In any event, in *Al Maqaleh*, the D.C. Circuit analyzed the UECRB process and found it "afford[ed] even less protection to the rights of detainees in the determination of status" than the Combatant Status Review Tribunals at Guantanamo. 605 F.3d at 96. The D.C. Circuit therefore concluded that "while the important adequacy of process factor strongly supported the extension of the Suspension Clause and habeas rights in *Boumediene*, it even more strongly favors petitioners here.'" *Id.* (quoting *Al Maqaleh*, 604 F. Supp. 2d 205, 227 (D.D.C. 2009). The DRBs have the same fundamental flaws as the UECRBs and fall far short of constitutional standards.

[9] Mr. Rahman's counsel have been representing him for more than a year, but, despite requests made through Respondents' counsel, have never been permitted to communicate with him.

not bound by an attorney's duties of confidentiality, loyalty, zealous advocacy, or other ethical obligations, and they have only minimal training.[10] While the DRB rules state that PRs are bound by a "non-disclosure policy," that policy does not guarantee the kind of confidentiality that is required for effective representation.[11]

Although Respondents laud the PR "non-disclosure policy" and a related DRB rule requiring the PR to act "in the best interests of the detainee" as indicia of "greater procedural safeguards," Harward Decl., Ex. C ¶ 9(e), in practice, both rules are grossly inadequate substitutes for the professional obligations that a lawyer owes his or her client. According to an independent human rights lawyer who attended DRB proceedings as an observer last week, "[p]ersonal representatives introduced little or no evidence in the DRBs that I observed. They posed few questions, and the questions that they did ask were not probing. In general, personal representatives did not play a significant role in the conduct of the DRB hearings. A competent lawyer would have been able to advocate much more effectively on behalf of a detainee." Eviatar Decl. ¶ 10.

Indeed, the government's own documents reveal that PRs—unbound by duties of loyalty and confidentiality—may act entirely against the interests of a detainee they are assigned to represent. A summary of one DRB hearing obtained through Freedom of Information Act ("FOIA") litigation reveals that during a classified session from which the detainee was excluded, the detainee's PR directly contradicted the detainee's prior testimony in open session, revealed the contents of confidential discussions with the detainee, and explicitly impugned the detainee's credibility and good faith. *See* Shamsi Decl., Ex. P (summary of DRB of Detainee

[10] According to DRB rules, personal representatives receive a mere 35 hours of training before starting the job. In contrast, the Recorders in DRB proceedings—that is, the individuals charged with presenting the government's evidence to the Board—are JAG lawyers. *See* Harward Decl., Ex. C ¶ 9(d).

[11] To the contrary, the DRB rules impose an *obligation* on PRs to disclose "detainee conduct that is fraudulent," without any elaboration on what might be considered "fraudulent." Harward Decl., Ex. C ¶ 9(e)(3).

3273). It is not surprising, therefore, that detainees often have little confidence in their PR and do not trust PRs to act in their interest. *See* Eviatar Decl. ¶ 11 (former detainees told human rights observer that "they did not feel that they were able to trust their personal representatives or to confide in them"). Former Bagram detainees describe PRs as being "of little help to detainees. The personal representatives assigned to these detainees did not gather factual evidence tending to prove a detainee's innocence. At best, personal representatives were able to arrange for family members and village elders to appear at a detainee's DRB hearing as character witnesses." *Id*.

Even well-intentioned PRs may not be effective advocates for detainees because the U.S. military has not provided them with adequate resources or training. Currently, fifteen PRs are assigned to a population of approximately 1,550 detainees. *Id.* ¶¶ 7, 9. With one PR assigned to more than 100 detainees, it is unlikely that PRs are able to conduct adequate investigations or provide meaningful assistance. Because PRs "are not taught the local languages and usually have no prior experience with Afghan culture," *id.* ¶ 18, they are even less able to represent detainees' interests.

Respondents' provision of PRs does not result in the rigorous and adversarial process required by *Boumediene* and to which Mr. Rahman is entitled.

(iii) DRBs do not provide detainees a meaningful or adequate opportunity to rebut evidence.

DRBs are also inadequate because of their heavy reliance on classified evidence presented in closed sessions, and because detainees' access to evidence is restricted to what the U.S. military, in its sole discretion, deems "reasonably available." Harward Decl., Ex. C ¶ 12(i)

In *Boumediene*, the Supreme Court warned against "closed and accusatorial" proceedings, stating that "there is considerable risk of error" in any such process. 553 U.S. at

785 (citation omitted). That warning is entirely borne out in DRB proceedings, in which classified evidence may be the sole or a significant basis for detention decisions. Harward Decl., Ex. C ¶¶ 9(e)(4), 12(h). The U.S. military does nothing to mitigate against the prejudicial effects of secret evidence. Classified evidence used in DRB hearings is "rarely, if ever, redacted, and [is] even more rarely declassified. Apart from an initial cursory summary for detainees of the basis for their detention, it does not appear that the military ever prepares unclassified summaries of classified evidence for use in DRB hearings." Eviatar Decl. ¶ 15.

The risk of wrongful detention based on classified evidence is particularly acute in the case of Afghan detainees, such as Mr. Rahman. An independent lawyer who observed Bagram DRBs confirms that:

> many Afghans held at Bagram are detained by the United States on the basis of false accusations lodged by local adversaries. Disputes between families over issues such as land or past violence are common in Afghanistan . . . These accusations are nearly always classified, and so are withheld from the detainee. As a result, Afghan detainees do not learn the substance of the accusations against them or the identity of their accuser, and have no opportunity to demonstrate that these accusations are false or that the accuser is likely to be motivated by a personal or familial vendetta.

Eviatar Decl. ¶ 18.

Mr. Rahman may be detained on the basis of classified evidence he almost certainly is not able to challenge. The risk of error—and of potentially indefinite detention as a result—"is a risk too significant to ignore," and this factor weighs significantly in favor of a finding of habeas jurisdiction. *Boumediene*, 553 U.S. at 785 (citation omitted).

(iv) The DRB review process is arbitrary and subject to standardless and unilateral military discretion.

The DRB's recommendations and the actions that the U.S. military commander takes in response are not subject to review or appeal in *any* forum whatsoever. By contrast, the decisions of even the Guantánamo CSRTs that the Supreme Court found inadequate in *Boumediene* were

subject to searching review by the D.C. Circuit under the Detainee Treatment Act ("DTA"). Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680 (2005). The D.C. Circuit recognized that judicial review is a necessary check on the fairness of the CSRT process. *See Parhat v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008) (ordering the government either to release the petitioner or to hold a new CSRT because the record lacked information necessary to assess the reliability of evidence). Judicial review is even more necessary for Bagram detainees, who are subject to DRBs with fewer procedural safeguards than the Guantanamo CSRTs. Without judicial review, the Bagram DRBs are a universe unto themselves, subject to no external legal checks whatsoever. The fairness of their procedures and reliability of their determinations are left entirely in the hands of the military officers who run them.

DRBs are also less impartial and more arbitrary than Guantanamo CSRTs because DRB decisions (unlike those of CSRTs) can unilaterally be overruled by the military commander in charge of Bagram detainee operations. Under the CSRT rules, the commanding officer (known as the Convening Authority) has only two options: to approve a CSRT decision, or return it to the CSRT for further proceedings. *See* Shamsi Decl., Ex. O, ¶ g(13)**.** In stark contrast, the Commander at Bagram has nearly unfettered authority to reverse a DRB panel's decision.[12] For example, if the DRB recommends that a detainee be released, or transferred to Afghan custody for prosecution or reintegration, the Commander is empowered to unilaterally reverse that determination and order the detainee's continued detention. In fact, the Commander exercises his authority to overturn DRBs liberally: according to data obtained by the ACLU in response to

[12] The Convening Authority's hands are tied in only one circumstance: where the DRB finds that the evidence does not show that the detainee meets the military's criteria for detention. *See* Harward Decl., Ex. B, at 4; *id*. Ex. C ¶ 12(n). But the DRBs find that nearly every Bagram detainee meets the military detention criteria, according to documents obtained through FOIA. *See, e.g.*, Shamsi Decl., Ex. R, S, T; *see also id.* ¶ 3. In almost every case, the DRB's determination as to whether a detainee should be released, transferred or detained is based not on the threshold criteria, but rather on the DRB's assessment of the threat that the detainee poses. Therefore, in the vast majority of cases, the Commander is free to overrule the DRB's disposition recommendation.

a FOIA request, the Commander overruled a decision to release or transfer a detainee in favor of continued detention in 65 instances, or 15% of the cases in the sample. Am. Pet. ¶ 64.[13] This discretion is applied overwhelmingly *against* detainees; the vast majority of the Commander's reversals disapproved a DRB recommendation to transfer or release, resulting in continued detention. *Id.*

Not only does the Commander have the power unilaterally to reverse the DRB's disposition recommendation, but he also has unfettered discretion to change the DRB's assessment of the threat the detainee poses, Harward Decl., Ex. C ¶ 12(o)(1), which has the effect of prolonging detention. In addition to recommending a disposition, DRBs are tasked with determining whether each detainee constitutes an enduring security threat ("EST"). *Id.* ¶ 12(o). The government has not disclosed the criteria or standards that it uses to determine if an individual is an EST, but the consequences of any such determination are significant: ESTs can only be released if specific approval is obtained from senior officials in U.S. Central Command. *See id.* Even though the Commander does not participate in the DRB hearings himself, does not have the benefit of viewing live testimony of the detainee and of witnesses, and cannot pose questions of them, he has the discretion to overturn a DRB recommendation that a detainee is not an EST.

There is also a significant risk that the Commander will overturn DRB recommendations and order continued detention not because it is necessary for any legitimate purpose, but because the United States refuses to provide classified intelligence to Afghan authorities in support of

[13] These figures were calculated based on the data in counsel's possession at the time the Amended Petition was filed, which included information about more than 400 DRB determinations. Shamsi Decl. ¶ 4. Since then, however, it has come to counsel's attention that the Department of Defense's disclosures were substantially incomplete due to a database error at Bagram. *Id.* ¶¶ 5-6. Petitioners' counsel now expect to receive from DOD information about approximately 450 more DRB dispositions. *Id.* ¶ 6. This information is to be provided by mid-March 2011. *Id.* If the additional information significantly alters the statistics presented here, Petitioners' counsel will update the court in a supplemental filing.

prosecution. Shamsi Decl., Ex. E, Julian E. Barnes, *U.S. Seeks Role in Afghan Jail*, Wall St. J., Sept. 22, 2010 (reporting, based upon interview with Bagram officials, that up to 40 % of detainees at Bagram may be held "on the basis of classified information that the U.S. can't, or won't, submit to an Afghan court."); Am. Pet. ¶ 82-83.

Strikingly, the Commander is not required to provide any explanation whatsoever for any of his decisions to reverse the DRB's recommendations and findings. *See, e.g.*, Shamsi Decl., Ex. R (final decision memorandum showing that the Commander disapproved the DRB's recommendation to transfer the detainee to Afghan custody twice, in two successive rounds of DRB hearings); *id.* Ex. S (same, in the case of another detainee); *id.* Ex. T (overruling a DRB finding that a detainee was not an enduring security threat). Worse, the DRB rules set out no standards to govern this extraordinary discretion. This nearly unfettered authority, untethered from the DRB hearings themselves, renders the DRB process essentially arbitrary. It is impossible to tell, for example, whether the Commander's final decision—whether it be a reversal or affirmance of a DRB recommendation—is based on the record produced by the DRB, or instead relies on extraneous facts and considerations relayed to the Commander *ex parte* and kept secret from the detainee and his personal representative. The arbitrariness of the Commander's discretion is a grave procedural inadequacy that itself weighs heavily in favor of finding habeas jurisdiction here.

In short, the DRB status determination process at Bagram is woefully inadequate, tipping the scales strongly in favor of petitioner's right to challenge his detention in this Court.

(v) DRB procedures fall short of international law standards applicable to the United States, weighing in favor of habeas jurisdiction.

The inadequacy of DRB procedures—and the concomitant need for habeas review—is further supported by international law standards by which the United States is bound.[14] International law has long formed part of the common law of the United States, and U.S. federal courts routinely look to this body of law as a guide to the proper interpretation of domestic law. In *Johnson v. Eisentrager,* for example, the Supreme Court devoted careful attention to Geneva

[14] Contrary to Respondents' argument, Section 5 of the Military Commissions Act does not bar this Court from considering the Geneva Conventions or other international law in its Suspension Clause analysis. That provision only states that the Geneva Conventions may not be invoked "as a source of rights" in a habeas case. Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631-32 (codified at 28 U.S.C. § 2241 note). Even assuming such a limitation passed constitutional muster and did not violate the separation of powers, Petitioners do not invoke the Geneva Conventions "as a source of rights" here. Rather, Petitioners ask this Court to interpret the rights conferred *by the Suspension Clause* in light of international law. Section 5 of the MCA cannot be construed to limit the legal sources upon which this Court can rely in interpreting the Suspension Clause or any other law. *See* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). This is especially the case where, as here, the government itself asserts that the basis for its detention authority and decisions includes the international laws of war. Harward Decl. ¶ 16 (asserting that Mr. Rahman is "lawfully detained pursuant to the Authorization for Use of Military Force as informed by the law of war").

The government itself has repeatedly urged the courts to rely on the laws of war when interpreting the 2001 Authorization for Use of Military Force. *See* Resp. to Pet. for Reh'g and Reh'g en banc, *Al-Bihani v. Obama*, No. 09-9051 (D.C. Cir. filed May 13, 2010) ("The Government interprets the detention authority permitted under the AUMF, as informed by the laws of war."). In *Al-Bihani v. Obama*, a majority opinion of the Court of Appeals took a sweeping view to the contrary, stating that "the international laws of war as a whole . . . are . . . not a source of authority for U.S. Courts." 590 F.3d 866, 871 (D.C. Cir. 2010). But seven judges of the D.C. Circuit—a clear majority—wrote a concurrence in the denial of en banc review describing that statement as dicta and, in effect, abrogating it. *See Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J. and six others, concurring in the denial of rehearing en banc) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because . . . the panel's discussion of that question is not necessary to the disposition of the merits."). Because the government urges the courts to consider international law when interpreting domestic law—and because the D.C. Circuit refuses to let a judicial statement to the contrary stand—it is remarkable that the government nevertheless argues that this Court is prohibited from consulting the Geneva Conventions and other sources of international law when interpreting the Constitution. There is no such restriction on this Court's interpretive authority.

Finally, Respondents are wrong when they argue that this Court cannot consider international treaties in interpreting Mr. Rahman's rights under the Suspension Clause. U.S. courts can and do appropriately consider all sources of international law relevant to the issues before them, including ratified and non-ratified treaties, declarations, international standards, customary international law, opinions of foreign national courts and international tribunals. What is important to the analysis is not whether the relevant source of international law imposes binding obligations on the United States, but rather whether it has a bearing on the issue before the Court. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 541, 575-78 (2005) (referencing the U.N. Convention on the Rights of the Child, a treaty not ratified by the United States, and other non-binding international instruments to determine the proper contours of the Eighth Amendment proscription of cruel and unusual punishment)

Convention provisions that the petitioners in that case argued were relevant to the existence of *habeas* jurisdiction in their cases. *See Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950); *see also Hamdi*, 542 U.S. at 519-21, 538 (relying extensively on international law to determine both the executive's authority to detain and the detention review process required by the Due Process Clause); *see generally*, Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (collecting and discussing numerous and varied cases in which the Supreme Court has interpreted the Constitution in light of international law); Restatement (Third) of Foreign Relations Law of the United States § 115 cmt. b (1987) ("A state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligations."). In this case, international law informs whether Mr. Rahman has a right to habeas under the Suspension Clause.

The DRB procedures currently in place at Bagram violate international legal standards in at least two ways. First, both the laws of war and human rights law require that detainees be given a meaningful opportunity to challenge their detention before a *court* or, at the very least, before a genuinely independent and impartial administrative tribunal. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 43, Aug. 12, 1949, 75 U.N.T.S. 287 (administrative detention must be "reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining power for that purpose"); Jean Pictet (ed.), Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Convention, 368 (1958) ("[W]here the decision is an administrative one, it must be made not by one official but by a board offering the necessary guarantees of independence and impartiality."); International Covenant on Civil and Political Rights art. 9(4), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) ("Anyone who is deprived his liberty by arrest or detention shall be

entitled to take proceedings before a *court*, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); Jelena Pejic, ICRC Legal Advisor, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflicts and Other Situations of Violence*, 87 Int'l Rev. Red Cross 375, 387 (June 2005) ("ICRC Principles") ("[H]uman rights law and jurisprudence applicable to situations of non-international armed conflict or other situations of violence unequivocally require that challenges to the lawfulness of internment/administrative detention be heard by a court.").

DRBs are no substitute for an independent court or an impartial administrative tribunal because DRB members are not independent of the military chain of command and may therefore be subject to improper command influence. Harward Decl., Ex. C. ¶ 9(a). DRB rules do not prohibit improper command influence on members and DRB members have no protection from adverse consequences if they render decisions of which their senior officers disapprove. *See id.* ¶ 9(a).[15] In addition, the Commander in charge of detention operations at Bagram can unilaterally overturn the recommendations of a DRB panel without any explanation. *See supra* at 14-16. If a Commander has the ultimate say over DRB outcomes, DRBs are by definition not independent. Furthermore, the Commander's decisions do not themselves meet the requirements of impartiality and independence because there are no standards limiting his discretion to approve or reject a DRB recommendation—not even rules prohibiting him from considering new evidence never not put before the DRB. *See supra* at 16; Harward Decl., Ex. C ¶ 12(p)(1)(d).

Second, DRBs fall afoul of the international law principle that detainees be given access to counsel. ICRC Principles, *supra*, at 388 ("The right to effective legal assistance is thus considered to be an essential component of the right to liberty of person."); *see also* Body of

[15] The rules do stipulate that "[i]n order to ensure the neutrality of the review board, no board members will be among those directly involved in the detainee's capture or transfer to the DFIP." Harward Decl., Ex. C ¶ 9(a)(4). But this restriction alone hardly guarantees the impartiality of the DRB.

Principles for the Protection of All Persons Under Any Form or Detention or Imprisonment Principle 17(1), G/A Res. 43/173, U.N. Doc A/RES/43/173 (Dec. 9, 1988) ("UN Principles") ("A detained person shall be entitled to have the assistance of a legal counsel," including the right to communicate with counsel in confidence). Because DRBs do not permit detainees to be represented by counsel at hearings, or even to consult with counsel before hearings, they fail to comply with international standards.

The fact that DRBs fall short of fundamental international legal requirements weighs in favor of habeas jurisdiction.

B. New evidence shows that the U.S. government intends to hold detainees at Bagram indefinitely.

For the Circuit Court in *Al Maqaleh*, the second *Boumediene* factor—the nature of the site where apprehension and detention took place—balanced in favor of the government because "there is no indication of any intent to occupy the [Bagram] base with permanence." 605 F.3d at 97. Under *Boumediene*, this Court should determine the government's intent to maintain *de facto* control over Bagram based on the indefinite nature of its commitment there. 553 U.S. at 768. The second *Boumediene* factor now weighs against the government because new evidence demonstrates that (a) the United States intends to keep exclusive and indefinite control over a unit of the Bagram prison even after the rest of the facility is transferred to Afghan custody, and (b) there are at least three categories of detainees who may be held indefinitely—including, perhaps, Mr. Rahman.

It is uncontested that the United States' leasehold interest in the Bagram base is like its interest in the military base at Guantanamo Bay: at both, the United States has "absolute" and perpetual control and jurisdiction. *Cf. Boumediene*, 553 U.S. at 755 ("[T]he United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over

[Guantánamo Bay].”). At Bagram, as at Guantanamo, the United States has the exclusive right to have and use the base and is guaranteed the “exclusive, peaceable, undisturbed and uninterrupted possession” of it. Harward Decl., Ex. A ¶¶ 1, 9. The United States’ control over Bagram cannot be cancelled by the Afghan government, but rather exists in perpetuity unless “the United States . . . determine[s] that the Premises are no longer required for its use.” *Id.*, Ex. A ¶ 4. As a legal matter, therefore, Bagram stands in the same relationship to the United States as Guantanamo.

Although the government previously told the D.C. Circuit that it would transfer control of the Bagram prison to the Afghan government, in public remarks it has now stated, equally explicitly, that it intends to keep exclusive control of a portion of the prison even after the handover. Lietzau Decl. ¶ 6 (U.S. forces “intend[] to construct at least one additional detainee housing unit . . . during the next year” and “[t]his additional detention capacity will enable U.S. forces to continue to conduct detention operations);[16] Ex. E, Julian E. Barnes, *U.S. Seeks Role in Afghan Jail*, Wall St. J., Sept. 22, 2010 (“The U.S. military is likely to retain control of a portion of its prison [at Bagram] even after it hands formal responsibility to the Afghan government . . . according to the top American Admiral in charge of U.S. detention operations in Afghanistan.”).[17] It is entirely unclear when, if ever, the United States will relinquish control of the new detainee unit it is constructing. What is clear is that the fate of all Bagram detainees,

[16] The new construction is in addition to the tens of millions of dollars the U.S. military has spent on long-term construction projects at Bagram, indicating that it regards the base as “no transient possession,” *Boumediene*, 553 U.S. at 768-69, but rather a long-term investment. Am. Pet. ¶ 31.

[17] Government statements on the timing of the handover constantly shift the goalposts and result only in uncertainty. Early last year, U.S. officials stated that handover of portions of Bagram would begin January 2011. *See* Shamsi Decl., Ex. G. Respondent Harward stated late last year that “he hopes to make the handoff between March and June 2011.” *See* Shamsi Decl., Ex. E. Most recently, the Leitzau Declaration in this case again states that the handover will begin by January 2011. *See* Lietzau Decl. ¶ 3. The January target has passed, but it does not appear that the transition has begun.

including Mr. Rahman, remains within the United States' complete and exclusive control for the indefinite future.

Respondents' carefully worded submissions to this Court, in which they try to avoid putting a timeframe on the expected length of detention operations at Bagram, cannot obscure that those operations are indefinite. The Lietzau Declaration insists that the United States has "no interest in holding detainees longer than necessary." Lietzau Decl. ¶ 10. But this cannot reassure Mr. Rahman, who has already been held for more than two years without an opportunity to protest his innocence before a fair and impartial tribunal in what is already the longest war in U.S. history.[18]

The Lietzau Declaration is also cold comfort in light of the astonishingly broad – and indefinite – detention power it reserves when Mr. Leitzau states that "[t]he United States does not intend to continue to use the DFIP to detain any person pursuant to the Authorization for Use of Military Force . . . beyond the cessation of hostilities with the Taliban, al Qaida, and associated forces." *Id*. Military action against al Qaida and associated forces may well continue outside Afghanistan even after combat operations in Afghanistan end (whenever that may be), and the Lietzau Declaration leaves open the possibility that Bagram will remain open even after the end of hostilities in Afghanistan. Indeed, without contradicting anything they have said in their motion to dismiss and in the Leitzau Declaration, Respondents could continue to hold individuals at Bagram well into the unforeseeable future. This is no mere speculation: the United States has repeatedly made clear that it regards the Authorization for Use of Military Force

[18] Petitioners' counsel have repeatedly requested notice of, and information about, any DRB proceeding for Mr. Rahman, but have been denied. Am. Pet. ¶ 101. Petitioners' counsel do not know whether Mr. Rahman has been designated an EST, is regarded as one of the detainees who "cannot" be prosecuted, or is otherwise unlikely to be transferred to Afghan custody during the handover. *See infra* Section II (seeking jurisdictional discovery on this point). The fact that Mr. Rahman has been detained for over two years makes it more likely than not that he falls into one of the indefinite detention categories for Bagram detainees.

("AUMF") as a warrant not just for war in Afghanistan, but globally, and not just against al Qaida and the Taliban but against others "associated" with those groups. This geographically unbounded war against undefined groups could well last for generations.[19] *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life."). The government's professed commitment not to detain individuals beyond the "cessation of hostilities" is no commitment at all.

Since *Al Maqaleh* was decided, the U.S. government has also publicly disclosed that there are at least three categories of detainees who may be subject to indefinite detention at the new unit the government is constructing. Respondent Harward told the press that "I anticipate having a subset of unilateral U.S. detention operations, including Pakistanis we can't repatriate and enduring security threats." Shamsi Decl., Ex. E.; *see also* Am Pet. ¶¶ 82, 84. In the same interview, Admiral Harward identified the third category of indefinitely detainable individuals as those who cannot be convicted in Afghan criminal court because the United States refuses to share classified intelligence against them. *Id.* ("Such detainees could be . . . held in U.S. custody as a 'continuing security threat,' Adm. Harward said."). [20] Data from the DRBs suggest that,

[19] *See* Opposition to Plaintiff's Motion for Preliminary Injunction, *Al-Aulaqi v. Obama*, No. 10-1469, dkt. 15-1, at 24 (D.D.C. filed Sept. 25, 2010) (stating that the Executive Branch regards Al Qaeda in the Arabian Peninsula, a Yemeni group that did not even exist in its current form when the AUMF was enacted, as within the scope of the AUMF); *see also*, Reply Brief for Respondents-Appellants, *Salahi v. Obama*, No. 10-5087, dkt. 1256441, at 27-31 (D.C. Cir. filed July 21, 2010) (stating that the government believes the authority to detain under the AUMF extends to individuals captured anywhere in the world and extends to individuals who have never taken part in actual hostilities in Afghanistan or elsewhere).

[20] In addition to these three categories, there may be yet other detainees subjected to continued U.S. detention. In an extraordinary statement, the Director of Legal Operations at Joint Task Force 435 (the predecessor entity to the one currently responsible for all U.S. detention operations in Afghanistan) suggested that a Bagram detainee who is transferred to Afghan custody for criminal trial and is subsequently acquitted might nevertheless be

indeed, a large number of Afghans are being held because U.S. officials are not confident that an Afghan prosecution would result in a conviction. *See* Am. Pet. ¶ 83. Military detention is legitimate only to keep fighters off the battlefield, not to preventively detain criminal suspects. *See Hamdi*, 542 U.S. at 518 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."). If the United States is misusing its military detention powers in Afghanistan in this way, a judicial check is crucial.

In sum, the broader factual record available to this Court extinguishes any doubt that the United States intends to hold detainees indefinitely in a wing of the prison at Bagram, weighing strongly in favor of this Court's habeas jurisdiction.

C. New evidence shows there are no practical obstacles to extending the Writ to detainees held at Bagram.

The court in *Al Maqaleh* found that the third factor under *Boumediene*—"practical obstacles"—weighed most heavily against extension of *habeas* rights to petitioners at Bagram because of the difficulties that might arise from requiring military officials to participate in civilian proceedings "in an active theater of war." *Al Maqaleh*, 605 F.3d at 98. These concerns cannot be sustained in light of new evidence that the D.C. Circuit did not have before it in deciding *Al Maqaleh*.

Since June 2010, the U.S. military has been hosting Afghan civilian criminal trials of detainees at Bagram. *See* Shamsi Decl., Ex. L. Fifty-two Afghan civilian criminal trials have taken place in a period of a few months, resulting in 50 convictions. Eviatar Decl. ¶ 6. With the assistance and support of U.S. military personnel, civilian Afghan judges sitting in courtrooms within the Bagram detention facility have been hearing cases against Afghan detainees on charges brought by Afghan prosecutors. *See* Shamsi Decl., Ex. N. Media and human rights

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subject to renewed military detention after acquittal. *See* Shamsi Decl., Ex. F; *see also* Eviatar Decl. ¶ 19 (Bagram detainees may be subjected to continued detention ever after they have been cleared for release).

monitoring groups have been invited by the military to observe the proceedings. *Id.*; *see also* Eviatar Decl. ¶ 6.[21]

There have been no reports that the civilian criminal trials taking place at Bagram disrupt U.S. military operations there. To the contrary, the fact that the U.S. military has voluntarily agreed to host and support these civilian trials—by providing admissible evidence, among other things—powerfully demonstrates that any "obstacles" to civilian process are not inherent in the nature of military operations at Bagram but are, if anything, a matter of administrative inconvenience. It demeans the importance of the Great Writ to deny it to Mr. Rahman on the grounds that it places too many burdens on U.S. military officials, when those same U.S. military officials are inviting and assisting Afghan criminal trials of other Bagram detainees.

If it is possible for the military to host and assist civilian trials at Bagram, there can be no serious obstacle to habeas proceedings, which place far lower burdens on the government. This is especially true given that habeas proceedings are significantly less onerous than a criminal trial, as evidenced by the Guantánamo habeas proceedings in this Court.[22] This Court has itself seen 57 Guantanamo habeas petitions adjudicated on their merits without requiring the petitioner's physical presence in court.[23] *See* Shamsi Decl., Ex. U. Any burdens created by habeas proceedings would fall on lawyers and administrative personnel and not those responsible for military operations.[24] As the Supreme Court recognized in *Boumediene*, "[c]ompliance with

[21] Bagram is more accessible to non-military personnel than, for example, Guantanamo. Unlike at Guantanamo, the U.S. military permits family members to visit detainees at Bagram. *See* Shamsi Decl., Ex. Y.

[22] For example, *habeas* proceedings permit the introduction of hearsay and any other evidence. The government's burden is also lower: the government must show only that the petitioner was "part of or substantially supporting" the Taliban or Al Qaida—it need not prove the elements of any specific crime—and it is only required to establish this conclusion on a preponderance of the evidence. *See* Case Management Order, *In re Guantanamo Bay Detainee Litig.*, dkt. 940, Misc. No. 08-442-TFH (D.D.C. Nov. 6, 2008).

[23] Bagram detainees have been provided access to a real-time video conferencing facility since 2008. *See* Shamsi Decl., Ex. V.

[24] The U.S. military's own experiences in Iraq show that it is possible to provide detainees with access to counsel and more extensive legal process without disrupting military operations. Detainees at the largest U.S.

any judicial process requires some incremental expenditure of resources," and "civilian courts and the Armed Forces have functioned along side each other at various points in our history." 553 U.S. at 769. In any event, both modern technology and modern habeas procedures are flexible and can be used to minimize any burdens: "[t]o the extent barriers arise, habeas corpus procedures likely can be modified to address them." *Id.* at 770.

Extending habeas jurisdiction to Bagram would enhance the prestige of the U.S. military—with Afghanistan and other allies, with neutrals, and against enemies—not diminish it. The U.S. military has itself acknowledged that fair and transparent process for Bagram detainees serves to promote the war effort. According to Brigadier General Mark Martins, an official in charge of Bagram detention facilities, "Detention, if not done properly, can actually harm the effort . . . . We think transparency is certainly going to help the effort, and increase the credibility of the whole process." Shamsi Decl., Ex. K. Based on interviews with U.S. officials in charge of Bagram, USA Today reported:

> U.S. military leaders believe that running a transparent prison is critical to ending the armed conflict in Afghanistan. They hope the openness will end the Taliban's use of the Bagram prison as a source of propaganda, make it easier to get military intelligence from inmates, and help persuade captured Afghans to reintegrate into the communities by working with coalition forces and the government of Afghanistan.

Shamsi Decl., Ex. L.

Based on the U.S. military's own actions (supporting and holding civilian criminal trials) and its official statements (recognizing the importance of fair process and transparency), there are no practical obstacles to extending habeas jurisdiction in Mr. Rahman's case.

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internment facility in Iraq – holding up to 22,000 detainees – were provided access to both U.S. and Iraqi lawyers for assistance with the status review process there. *See* Shamsi Decl., Ex. W, X.

II. MR. RAHMAN IS ENTITLED TO DISCOVERY OF JURISDICTIONAL FACTS

Mr. Rahman is entitled to discovery and a hearing to allow him to dispute any jurisdictional facts that Respondents challenge. Rule 12(b)(1) requires that in considering a motion to dismiss, the petitioners' allegations "are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005); *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."). Where, as here, Respondents have "challenged the factual basis of the court's jurisdiction . . . the court *must* go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon a motion to dismiss." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (emphasis added). In order to resolve factual disputes, the Court "must give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction,'" *id.* (quoting *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984)). Jurisdictional discovery is especially important in habeas cases where the government responds to a petition not by showing that it is without merit, but instead by challenging the very authority of the courts to inquire into the lawfulness of detention. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 67-69 (D.D.C. 2008) (ordering jurisdictional discovery); *Al Maqaleh v. Gates*, No. 06-cv-1669-JDB, dkt. 57 (D.D.C. Feb. 15, 2011) (jurisdictional discovery concerning Bagram detainees' right to habeas would be appropriately considered in opposition to the government's motion to dismiss). Indeed, the D.C. Circuit has instructed 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." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992).

To support their motion to dismiss, Respondents have raised extrinsic jurisdictional facts that directly contradict the facts in the Petition. Mr. Rahman disputes the alleged facts underlying Respondents' claims, and although Petitioners introduce their own evidence in support of this Court's jurisdiction, the best evidence on each disputed issue is within Respondents' control. Petitioners are entitled to discovery regarding all disputed jurisdictional facts, each of which could affect the outcome of the multi-factor balancing test this Court is required to undertake under *Boumediene*.

Specifically, Petitioners are entitled to discovery on four disputed areas. First, Petitioners are entitled to discovery about the adequacy of the DRB process as a substitute for habeas review. *Compare* Mot. to Dismiss, dkt. No. 15, at 11-14 ("Gov't Br.") (government states that new DRB procedures enhance detainees' ability to challenge detention) *with supra*, at 9-20 (Petitioners' evidence that the DRB procedures are inadequate and risk the illegal detention of innocents). Second, discovery is necessary regarding the government's plans to hold prisoners at Bagram indefinitely. *Compare* Gov't Br. at 8-11 (Respondents contend that the United States does not intend to remain at Bagram "permanently") with *supra*, at 20-24 (Petitioners' evidence showing that the government intends to maintain a detention facility at Bagram indefinitely). Third, and relatedly, Petitioners are entitled to discovery to ascertain the categories of Bagram detainees who may be held indefinitely and whether Mr. Rahman falls into these categories. *Compare* Gov't Br. at 8-11 (government states that it intends to transfer all Bagram detainees to Afghan custody) *with supra* at 23-24 (describing categories of Bagram detainees that government officials state may be held in U.S. custody indefinitely). Finally, Petitioners are

entitled to discovery about the existence of practical obstacles standing in the way of habeas jurisdiction. *Compare* Gov't Br. at 2 (practical obstacles of extending the Writ remain under *Al Maqaleh*) *with supra* at 24-26 (new evidence that over 50 Afghan civilian criminal trials have taken place at Bagram shows lesser practical obstacles to habeas hearings).

Mr. Rahman is entitled to discovery on each of the foregoing disputes in order to air fully the facts necessary for an appropriate balancing of the *Boumediene* and *Al Maqaleh* jurisdictional factors.

CONCLUSION

For the foregoing reasons, this Court should reject Respondents' motion to dismiss or, in the alternative, grant Petitioners' separately filed motion for jurisdictional discovery before ruling on Respondents' motion.

Respectfully submitted,

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