IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FADI AL MAQALEH, Petitioner, v. ROBERT GATES, Respondents.	)	Civil Action No. 06-CV-01669 (JDB)

REPLY TO PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

In moving to dismiss the present habeas petition filed by an alien detainee captured abroad and held in a U.S. military base in Bagram, Afghanistan, respondents demonstrated that Section 7(a) of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, squarely forecloses this Court's review of the petition under the federal habeas statute. Respondents also showed that the Suspension Clause does not extend to Bagram because the United States exercises no "*de facto* sovereignty" over the military base there, which is a predicate to the Supreme Court's conclusion in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the Suspension Clause applies in Guantanamo Bay, Cuba. And, because Bagram is in a theater of war where the United States is engaged in active hostilities in close partnership with the host nation and multinational forces, extending the privilege of the writ of habeas corpus to alien enemy combatants there would be both impracticable and anomalous.

Petitioner's opposition does not rebut these fundamental facts, and accordingly, this Court should dismiss the present habeas petition.

ARGUMENT

I. SECTION 7 OF THE MCA PRECLUDES THIS COURT'S JURISDICTION

A. Petitioner's Reliance on *Rasul v. Bush* and *Munaf v. Geren* Is Misplaced.

Section 7(a) the MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider" a habeas petition filed by "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant . . ." 28 U.S.C. § 2241(e)(1). Despite this plain language, petitioner argues that under *Rasul v. Bush*, 524 U.S. 466 (2004), and *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the federal habeas statute applies to aliens and citizens alike wherever they are held in the world. Neither *Munaf* nor *Rasul* helps petitioner, however. As respondents explained in their opening brief (at 22), the petitioners in *Munaf* are American citizens, and thus, not only was Section 7(a) inapplicable to bar the court's review of their habeas claims because the section applies only to aliens, but also "habeas jurisdiction can depend on citizenship" alone. *Munaf*, 128 S. Ct. at 2218.

As for *Rasul*, petitioner's extensive reliance on it is misplaced for several reasons. First, the habeas statute as interpreted by *Rasul* has been amended by Section 7(a) of the MCA.[1] As

[1] Petitioner apparently assumes that *Boumediene* has invalidated Section 7 of the MCA *in toto*, reviving the pre-MCA habeas statute as interpreted by *Rasul*. But *Boumediene* effects no such facial invalidation. It addressed only the application of the Suspension Clause to alien detainees held at Guantanamo Bay, and invalidated Section 7 only insofar as it bars federal court review of those detainees' habeas claims. *See Boumediene*, 128 S Ct. at 2240 ("Petitioners present a question . . . relating to the detention of aliens at Guantanamo."). There was no facial challenge in *Boumediene*, which "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In any event, "it is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another," and thus, "the normal rule is that partial, rather than facial, invalidation is the required course." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) (internal quotation marks and citations omitted); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting) (in "as applied" challenges, "the Court invalidates the

Justice Souter observed in *Boumediene*, "[f]our years ago, this Court in *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay . . . . Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, *so that now there must be constitutionally based jurisdiction or none at all*." *Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring). Petitioner has no statutory habeas rights, and this Court's jurisdiction, if any, to review his petition must be based on the Suspension Clause of the Constitution.

Second, even before the enactment of the MCA, the habeas statute as interpreted by *Rasul* did not have worldwide application. Other than in the special circumstances of Guantanamo Bay at issue in *Rasul*, the habeas statute had never been interpreted to apply to foreign nationals taken captive abroad and held in military bases overseas during active hostilities. Through the enactment of the MCA, Congress simply made it absolutely clear that it has no intention to thrust federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas and second-guessing the military's determination as to which captured aliens pose a threat to the United States and its allies.

Third, even if Congress had not amended the habeas status, the logic of *Rasul* would not extend to confer habeas jurisdiction to detention at every military facility that the United States operates throughout the world. *Rasul*'s holding is uniquely based on Cuba's consent to the United States' "plenary and exclusive jurisdiction" over Guantanamo Bay for more than a century. *Rasul*, 524 U.S. at 471. Because the lease agreement between the two governments

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statute, not *in toto*, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds."). Section 7 persists as a limitation on the jurisdiction of this Court in this case.

provided that the United States shall exercise "complete jurisdiction and control" over and within the base, *id.*, that jurisdiction and control brought Guantanamo within the meaning of the habeas statute, particularly its distinctive phrase relating to the power of courts to issue writs of habeas corpus "within their respective jurisdictions." 22 U.S.C. § 2241(a). The Islamic Republic of Afghanistan ("Afghanistan"), in contrast, grants the United States no similar jurisdiction over Bagram. *See* Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus [hereinafter "Mot."] at 19-20; *infra* at Section II.A. *Rasul* simply does not help petitioner.

B. Section 3 of the MCA Is Irrelevant to the Application of Section 7.

Petitioner also argues Section 7 of the MCA is inapplicable to him because he has not been determined to be an enemy combatant by a Combatant Status Review Tribunal ("CSRT") or an "unlawful enemy combatant" by a "competent tribunal," as is allegedly required by Section 3 of the MCA. But Section 3 has no relevance here. That section created a new chapter 47A in Title 10 of the United States Code governing the trial of unlawful enemy combatants by military commission for war crimes. *See* 10 U.S.C. § 948a, *et seq.* In particular, 10 U.S.C. § 948d(c) provides that "a finding by a [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant *is dispositive for purposes of jurisdiction for trial by military commission under this chapter*" (emphasis added). There is no issue of trial by military commission here. Rather, the jurisdictional issue is whether the habeas statute, as amended by Section 7 of the MCA, precludes this Court's review of the present petition. The declaration of Colonel Charles A. Tennison establishes that the Commanding General of Combined/Joint Task Force-101 ("CJTF-101") has determined petitioner to be an unlawful enemy combatant based on the

recommendation of the Unlawful Enemy Combatant Review Board ("UECRB") at Bagram, and that petitioner is properly detained as such. Tennison Decl. (Ex. 1 to Mot. to Dismiss), ¶ 20. The plain language of Section 7 requires no more for its application, and petitioner's suggestion that the Court must first examine whether the UECRB is a "competent tribunal" within the meaning of Section 3 of the MCA is simply wrong.

C. Section 7 of the MCA Is a Valid Exercise of Congress' Powers to Define the Jurisdiction of Federal Courts.

Petitioner raises two wholesale challenges to Section 7 of the MCA, neither of which has any merit. First, petitioner argues that Section 7 violates separation-of-powers principles by "forcing all courts to surrender their Article III power." *See* Pet. Br. at 21. According to petitioner, this Court's failure to assert jurisdiction here would constitute an abdication of its constitutional duty to exercise "independent judgment" and engage in "independent fact-finding." *Id.* at 21, 23. But, of course, the separate branches of our government do not exercise the same power or authority, and "it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 117 (1981) (Brennan, J., concurring); *see also Snyder v. Harris*, 394 U.S. 332, 342-342 (1969) ("If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts."); Constitution, Art. III., §§ 1, 2.

Congress, moreover, is far better situated than the courts to weigh the significant foreign policy and military ramifications of extending federal jurisdiction over claims of aliens held by the military abroad and to address the myriad of factors that might enter the equation. Thus, to the extent that the Suspension Clause does not apply to Bagram, there is no constitutional impediment for Congress to limit judicial review in the fashion it does through Section 7 of the

MCA.

Second, petitioner argues that Section 7 violates the Suspension Clause because its alleged suspension of the writ is permanent. *See* Pet. Opp'n at 23-31. This argument, however, is based on the false premise that the writ applies worldwide, and that Congress enacted Section 7 in order to suspend the writ. As discussed above, the writ has no worldwide application. Respondents also do not contend that Congress intended to suspend the writ, whatever the geographic scope, through the enactment of Section 7. Rather, Section 7 is simply a valid exercise of Congress' power to define the jurisdiction of federal courts. In sum, this Court has no jurisdiction to review petitioner's petition under the federal habeas statute.

II. PETITIONER DOES NOT HAVE CONSTITUTIONAL HABEAS RIGHTS

Just as no statutory habeas jurisdiction exists, the Suspension Clause of the Constitution does not confer jurisdiction on this Court to review the present habeas petition. As respondents set forth in their opening brief (at 18-30), the factors relevant in determining the reach of the Suspension Clause – *i.e.,* the citizenship and status of the detainees and the process for determining their status; the nature of the sites of apprehension and detention; and the practical obstacles to extraterritorial application of the Suspension Clause – establish that the writ does not extend to Bagram. As discussed below, petitioner has not shown the contrary.

A. The Nature of the United States' Presence at Bagram Airfield Establishes That the Suspension Clause Has No Application There.

In *Boumediene*, the Supreme Court extended, for the first time, the Constitutional writ of habeas corpus to a territory over which another country maintains *de jure* sovereignty, *see* 128 S. Ct. at 2262, principally because "the objective degree of control" the United States asserts over Guantanamo Bay indicates, according to that Court, that "Cuba effectively has no rights as a

sovereign" over Guantanamo; rather, "the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory." *Id.* at 2252, 2253. As respondents demonstrated in their opening brief (at 18-23), the United States exercises no similar "*de facto* sovereignty" over Bagram. That and the fact that Bagram Airfield is in a theater of active military hostilities distinguish this case from *Boumediene.*

In response, petitioner disputes the United States' lack of complete jurisdiction and control over Bagram. In fact, according to petitioner, "the degree of U.S. control over Bagram is *greater* than it is over Guantanamo." Pet. Opp'n at 48. Petitioner bases his argument on three erroneous allegations: (1) the United States' accommodation and consignment agreement with Afghanistan regarding Bagram ("Bagram lease") is more favorable to the United States than is the Guantanamo lease, *id.* at 47-48; (2) the United States has "retrofitted the once Soviet-controlled airbase" into a "state-of-the-art Air Force base," thus indicating an intent to permanently occupy the base, *id* at 51, 53; and (3) the United States' Status of Forces Agreement ("SOFA") with Afghanistan evidences the United States' exclusive jurisdiction and control of Bagram when compared with other SOFAs, *id* at 50. As discussed below, petitioner's argument has no merit.

1. The Bagram Lease Does Not Grant the United States "Complete Jurisdiction and Control" over the Military Base.

In seeking to show the United States' alleged indefinite jurisdiction and control over Bagram Airfield, petitioner makes an exhaustive comparison of the Guantanamo and Bagram leases: both grant the rights to exclusive use of the land, to alleged perpetual possession at the United States' discretion, and to occupation with *de minims* or no rental obligation. Petitioner also highlights the fact that the Bagram lease additionally grants the United States the right to

assign the lease as well as a right of reversion. *See* Pet. Opp'n at 48-49.

Petitioner's comparison, however, is superficial. To be sure, the Bagram lease gives the United States the rights to use the Airfield without rent, to assign the lease to a successor nation or organization (such as the NATO), and, in the event the successor decides to vacate the Airfield, to resume its use of the Airfield. *See* Bagram Lease (Ex. A to Tennison Declaration), at ¶¶ 2, 5, 12. And the United States may continue to use the Airfield for military purposes for as long as both governments continue to derive "mutual benefits" from the lease. *Id.* at 1. But those terms have no constitutional import because they say nothing about jurisdiction, as contrasted with the Guantanamo lease, pursuant to which Cuba explicitly consents that the United States shall have "complete jurisdiction and control over" Guantanamo Bay. Although Afghanistan also warrants that United States shall have "exclusive, peaceable, undisturbed and uninterrupted possession without any interruption whatsoever," *id.* at ¶ 9, that type of warranty regarding a lessee's right to possession is typical of any ordinary lease and is not a grant of jurisdiction and control over the leased property.

Moreover, just as *Boumediene* examined the Guantanamo lease against the backdrop of Guantanamo's unique political history since the close of Spanish-American war and the United States' "complete and uninterrupted control of the bay for over 100 years," 128 S. Ct. at 2258, the Bagram lease must be viewed in the context of the war in Afghanistan and the United States' close partnership with the host government. To begin with, the United States' use of Bagram Airfield was – and continues to be – necessitated by ongoing military operations in Afghanistan. *See* Tennison Decl. ¶ 5. The United States first deployed its military force to Bagram in late 2001 when it began combat action in Afghanistan against al-Qaida terrorists and their Taliban

supporters after the September 11 terrorists attacks. *See id.* Today, military hostilities continue in this area, and more American units along with multinational forces are expected to be deployed there in the coming months due to a sharp increase in attacks by Taliban militants and its al-Qaeda allies. *See* Mot. at 26-27. While it is difficult to predict when military operations in Afghanistan will cease, that by no mean suggests that the United States intends to use the Bagram Airfield permanently. Indeed, the United States has no such intention.

Moreover, any argument that the United States intends to treat Bagram as if it were part of U.S. territory is also belied by the United States' express commitment to help restore and enhance Afghanistan's sovereignty. *See* Tennison Decl. ¶ 2 (the mission of the military force at Bagram, CJTF-101, is to "enhance the sovereignty of Afghanistan," among other things). As explained in a 2005 joint declaration by the Presidents of the United States and Afghanistan, "decades of civil war, political violence, and interference in Afghanistan's internal affairs make Afghanistan's security, sovereignty, independence, and territorial integrity particularly crucial areas for U.S.-Afghan cooperation." *See* Joint Declaration of the United States-Afghanistan Strategic Partnership ["Joint Declaration"] at 1 (attached as Ex. A). The two governments thus formed a strategic partnership to help ensure Afghanistan's long-term security, democracy, and prosperity. *Id.* at 1. In the area of security, for example, the United States' assistance includes helping to "organize, train, equip and sustain Afghan security forces" until such time as Afghanistan has developed its own capacity to undertake that responsibility, and "consult[ing] with respect to taking appropriate measures in the event that Afghanistan perceives that its territorial integrity, independence, or security is threatened or at risk." *Id.* at 2. As for military operations, in addition to leading the Operation Enduring Freedom coalition, the United States

contributes a significant number of troops to the International Security Assistance Force ("ISAF") of the North Atlantic Treaty Organization ("NATO"), a United Nations-mandated force that operates in Afghanistan. Indeed, ISAF's Regional Command East is headquartered at Bagram Airfield, and the commander of CJTF-101 is also the commander of ISAF's Regional Command East. *See* Tennison Decl. ¶ 7.

NATO, too, is committed to enhance Afghan sovereignty. In December 2005 allied foreign ministers agreed to develop a program of cooperation with Afghanistan that "reflects the Alliance's support for Afghanistan's national sovereignty, independence and territorial integrity." *See* Declaration by NATO and the Islamic Republic of Afghanistan, Sept. 6, 2006, at ¶ 1 (*available at* http://www.nato.int/docu/basictxt/b060906e.htm). Similarly, the international community supports the military operations in Afghanistan. United Nation Security Council Resolution 1746, for example, called upon Afghanistan, "with the assistance of international community, including the International Security Assistance Force and Operation Enduring Freedom coalition, in accordance with their respective designated responsibilities as they evolve, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al-Qaida, other extremist groups and criminal activities . . . ." U.N.S.C. Res. 1746 § 25 (2007) (*available at* http://www.unama-afg.org/docs/_UN-Docs/_sc/_resolutions/sc1746.pdf).

The United States' presence at Bagram Airfield is part of this larger picture of cooperation and partnership with the host government.[2] In fact, the two governments

[2] The extent of U.S.-Afghanistan cooperation is substantial. For example, between Fiscal Years 2004 to 2008, Congress authorized a total of $12.3 billion to fund the Afghan Security Forces. *See* Testimony of Director of Congressional Budget Office, *Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism*, Oct. 24, 2007(*available at* http://fas.org/sgp/crs/natsec/rl34531.pdf) at 39, Table 6.

specifically recognize that in order to achieve the objectives of their strategic partnership, "U.S. military forces operating in Afghanistan are to continue to have access to Bagram Air Base and its facilities, and facilities at other locations as may be mutually determined." Joint Declaration at 3. This is no more a relinquishment of Afghanistan's sovereignty in this situation than in Afghanistan's permission for U.S. and coalition forces to conduct appropriate military operations in Afghanistan based on consultations and pre-agreed procedures. *Id.* At bottom, the Bagram lease is predicated on both governments' continuing to derive "mutual benefits" from the lease. Bagram lease at 1. Rather than granting the United States jurisdiction and control over the Airfield, the Bagram lease merely reflects Afghanistan's prerogative as a sovereign to host a friendly military force.

2. The United States' Structural Improvements of Bagram Airfield Have No Constitutional Import.

Petitioner further argues that the United States' upgrade of the infrastructures at Bagram indicates its intention to permanently occupy the base. Petitioner then provides a litany of improvements at Bagram, from the construction of a new runway, guard towers, fencing to secure the perimeters, and "permanent" buildings, to the type of concessions on the base, including Burger King, Dairy Queen, and Orange Julius. Pet. Opp'n at 51-54. As petitioner characterizes it, Bagram is "a small city; serving thousands of troops with advanced medical care, housing, sanitation, entertainment, and many of the luxuries of home for the comfort of

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For Fiscal Years 2001 through 2008, funding for Operation Enduring Freedom was $146.4 billion, not to mention another $11.8 billion in foreign aid and diplomatic operations, which include reconstruction, development and humanitarian aid, embassy operations, counter narcotics, initial training of the Afghan army, foreign military sales credits, and Economic Support Funds. *Id.* at 19, 20 note e.

their wives and families." Pet. Opp'n at 53. This expansion, petitioner argues, is contrasted with United States' control over the Landsberg Prison in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the United States already knew that it would transfer the prison back to Germany at the time *Eisentrager* was decided. *Id.* at 54.

Petitioner's argument has no merit. Notably, petitioner mistakenly believes that "wives and families" of U.S. military personnel are present on the base. *See* Pet. Opp'n at 53. Bagram is in a theater of war and no families of the U.S. military are permitted there. This stands in contrast to Guantanamo Bay, where many military dependents live. *See* https://www.cnic.navy.mil/Guantanamo/GTMOFFCS/GTMOFFSC. In any event, the military's choice of durable and sturdy building materials and the quality of the infrastructures at Bagram are of no constitutional import. Military bases are built to meet the needs of the mission and to provide security and support for the personnel deployed to accomplish the mission.[3] The nature of that construction does not speak to the constitutional or statutory jurisdiction of the courts. The United States is waging a war in Afghanistan, and like any on-going war, the United States does not know when it will end. The military fairly has decided to upgrade Bagram Airfield in a manner that will support the on-going military campaign. It is simply illogical to equate the "permanence" of the infrastructures or the amenities provided for the military personnel with an intent to permanently stay at Bagram.

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[3] The U.S. Air Force Base in Tuy Hoa, South Vietnam, for example, was situated on a 4340 acre site (similar in size to Bagram) and cost $52 million to construct in 1966-67. It included concrete runways, air-conditioned computer facilities, roads, water, and sewage facilities, and also "hard facilities" to house and support 4,000 men. *See* Tyley, Jeffrey L., *Project Turnkey: Historical Perspectives and Future Applications*, Air Force Journal of Logistics, at 4-9 (Summer 1987).

3. The United States' Status of Forces Agreement with Afghanistan Effects No Transfer of Jurisdiction over Bagram.

Equally misplaced is petitioner's reliance on the Afghan SOFA. As respondents explained in their opening brief (at 6), to the extent the United States exercises any jurisdiction in Afghanistan, it is pursuant to the two governments' SOFA, which authorizes the United States to exercise exclusive criminal jurisdictional over U.S. personnel in Afghanistan and accords them a status equivalent to that accorded to American embassy administrative and technical staff under the 1961 Vienna Convention on Diplomatic Relations. *See* Ex. 2 to Mot. to Dismiss, at 1, 3. Petitioner argues that the Afghan SOFA establishes the United States' jurisdiction and control at Bagram because its language granting the United States' jurisdiction over U.S. personnel is allegedly stronger than other SOFAs and because Afghanistan also provides accommodation in a number of areas, such as permitting U.S. personnel to enter and exit Afghanistan with U.S. identification and waiving certain taxes and fees. *See* Pet. Opp'n at 49-50.

If petitioner were correct, then U.S. civilian courts would have worldwide habeas jurisdiction over aliens everywhere given the more than 100 SOFAs the United States has with nations around the world. *See* Congressional Research Report for Congress, *Status of Forces Agreement (SOFA): What Is It, and How Might One Be Utilized in Iraq* ("CRS Report"), June 16, 2008, at 3 (*available at* http://fas.org/sgp/crs/natsec/rl34531.pdf). That clearly is not the case, nor is the Aghan SOFA an aberration.

A SOFA is an agreement that provides a legal framework for day-to-day operations of U.S. military force deployed in the territory of a friendly state. *Id.* at 8. It is "a contract between parties" that "may be cancelled at the will of either party," *id.* at 2, and is "in fact, a

manifestation of the full sovereignty of the state on whose territory it applies."[4] In addition to addressing such issues as taxes and fees, use of radio frequencies, driving license requirements, and customs regulations, as does the Afghan SOFA, the most common issue addressed in a SOFA is which country may exercise criminal jurisdiction over U.S. personnel. *See* CRS Report at 2, 8. The jurisdiction could be concurrent, as was common for SOFAs entered before WWII, or exclusive, as is the case with the Afghan SOFA. *Id.*

In the case of exclusive criminal jurisdiction, some SOFAs provide that U.S. personnel are to be afforded a status equivalent to that accorded to the administrative and technical staff of the U.S. Embassy in that country, which, under the Vienna Convention on Diplomatic Relations of April 18, 1961, means that U.S. personnel are granted immunity from local criminal law while in the receiving country.[5] *Id.* at 5, 7. Some others may simply provide that the United States shall have exclusive criminal jurisdiction over U.S. personnel. *See id.* at 2. The 1996 SOFA with Mongolia, upon which petitioner relies, is such an example. *See* Ex. 26 to Pet. Opp'n, Art. X ("United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States Personnel conferred on them by the military laws of the United States").[6] The Afghan SOFA, executed during the United States' on-

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[4] *See U.N. Mandates and Forces Agreements*, Committee Testimony, Statement of Ruth Wedgwood, Feb. 28, 2008, House Foreign Affairs Committee, Subcommittee on International Organizations, Human Rights, and Oversight (*available at* http://www.cq.com /display.do?dockey=/cqonline/prod/data/docs/html/testimony/110/testimony110-000002677852.html@committees&metapub= CQ-TESTIMONY&searchIndex=1&seqNum= 2#testimony).

[5] Examples of those SOFAs include those with Kyrgyz Republic, Jordan, Ethiopia, and Republic of Liberia (attached as Exhibit B).

[6] Although petitioner distinguishes the Mongolian SOFA on the ground it requires the United States to give "sympathetic consideration to a request by the government of Mongolia for a waiver of jurisdiction in cases not involving official duty," *see* Pet. Opp'n at 50 n. 48, that

going military campaign in Afghanistan, has both features, "in recognition of the particular importance of disciplinary control by United States military authorities over United States personnel." Ex. 2 to Mot. to Dismiss, at 3. It is not an aberration.

In any event, whether a SOFA provides concurrent or exclusive criminal jurisdiction over U.S. personnel is of no moment here because a SOFA protects only U.S. personnel deployed to a foreign nation. Since at least 1966, a Department of Defense ("DoD") directive on status of forces policy has required DoD "to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons." DoD Directive No. 5525.1 at § 3 (*available at* http://www.dtic.mil/whs/directives/corres/pdf/ 552501p.pdf). And, it is beyond dispute that U.S. personnel stand on a different constitutional footing than aliens abroad. *See Eisentrager*, 339 U.S. at 769-70; *Munaf*, 128 S. Ct. at 2218.

In sum, petitioner's reading of the Afghan SOFA to imply U.S. jurisdiction and control over Bagram Airfield in particular, and possibly Afghanistan in general, is baseless.[7]

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provision is no different in any other diplomatic negotiation when the host nation requests the United States to waive jurisdiction over U.S. personnel.

[7] Petitioner also attempts to paint Bagram as a place of lawlessness and torture, placing particular reliance on the death of two detainees at Bagram, *see* Pet. Opp'n at 5. Respondents have fully explained in their opening brief that under the MCA, this Court has no jurisdiction to review claims relating to petitioner's treatment or conditions of confinement. *See* Mot. at 14 n.8. Aside from the jurisdictional bar, however, it is worth noting that the military conducted an investigation immediately following the deaths of the two Bagram detainees, and of the 28 soldiers identified with possible culpability, some were tried by court-martial and at least five were found guilty of various offenses related to the deaths. *See* Update to Annex One of the Second Periodic Report of the United States of America to the Committee Against Torture ("Report to U.N. Committee Against Torture"), Oct. 21, 2005, at III.B.3 (*available at* http://www.state.gov/g/drl/rls/55712.htm); *Army completes investigations of deaths at Bagram and forward to respective commanders for action*, Oct. 14, 2004, *available at*

B. The Fact That Petitioner Is an Alien Weighs Against Extending the Privilege of the Writ to Him at Bagram.

As for petitioner's citizenship, petitioner argues that the Suspension Clause applies to him because he is a citizen of a friendly nation and a civilian who allegedly did not take up arms against the United States. Pet. Opp'n at 35. According to petitioner, these alleged facts indicate that his detention violates international humanitarian law, the law of war, and the law of "internal armed conflict." *Id.*

Petitioner's argument can easily be dismissed because it conflates the legality of his detention, which is not before this Court, with the threshold issue of whether petitioner can invoke the Suspension Clause to challenge the Executive's detention of him. On the latter question, it is immaterial that petitioner is a citizen of a friendly nation. Indeed, five of the six *Boumediene* petitioners were Bosnian citizens from Algeria and the sixth, also a native of Algeria, had acquired Bosnian permanent residency. *See Boumediene v. Bush*, No. 06-1195, Br. for *Boumediene* Petrs., at 1-2. Despite the fact that Bosnia is a friendly nation, and is also the petitioners' place of capture, the Supreme Court made no mention of that fact in examining whether the writ extends to Guantanamo Bay. The relevant consideration is that petitioner is a non-U.S. citizen who was captured abroad. Beyond that, the precise geographical coordinates of petitioner's country of citizenship do not affect the constitutional equation.

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http://www4.army.mil/ocpa /read.php?story_id_key=6450. In addition, although irrelevant to the jurisdictional issue before this Court, respondents take issue with many of the allegations contained in the declaration of former Bagram detainee Jawed Ahmad (Ex. 1 to Pet. Opp'n), including his accusation that the United States confiscated $17,000 of cash that was allegedly on his person when he was taken into custody, *see id.* ¶ 24.

C. Petitioner's Place of Apprehension Similarly Does Not Weigh in Favor of the Suspension Clause's Extraterritorial Application.

Petitioner also argues that the place of his capture suggests that the writ should apply to him because United States allegedly plucked him from outside a zone of conflict and took him to Bagram "in order to hide . . . under the cloak of 'war.'"[8] Pet. Opp'n at 56. Petitioner speculates that thousands of individuals from across the world will likely meet the same fate and be detained indefinitely by the United States. *Id.*

Petitioner's attempt to attribute an illicit motive on the part of the Government is unwarranted for several reasons, not the least of which is that it is based on sheer speculation. To begin with, even accepting for the purposes of argument that petitioner was not captured in a zone of active combat, that is no indication of illicit motive. As respondents discussed in the opening brief, Congress' Authorization for Use of Military Force ("AUMF") imposes no geographic limits, but instead authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF § 2(a) 115 Stat. 224, note following 50 U.S.C. § 1542 (2000 ed. Supp. V). The United States is prosecuting a war against an unconventional non-state enemy, whose worldwide network of combatants wear no uniforms and carry no identity cards; are connected by a complex and ever-evolving web of interlinked

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[8] The declaration of Colonel Tennison states that petitioner was captured in Zabul, Afghanistan. Tennison Decl. ¶ 20. Although petitioner alleges that he was not captured in Afghanistan (but does not specify where), that allegation does not change the constitutional analysis, as discussed in this section.

terrorist organizations and cells that operate with great autonomy but take direction from al-Qaida leadership; and reject all laws of warfare. There is no geographic limit as to where the enemy may be hiding or found.

Moreover, not only must courts "presume that the Executive is acting rationally and in good faith," *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (citing *Rinaldi v. United States,* 434 U.S. 22, 30 (1977); *United States v. Armstrong,* 517 U.S. 456, 464-65 (1996)), but *Boumediene* recognizes that the Executive is accorded "substantial authority to apprehend and detain those who pose a real danger to our security." 128 S.Ct. at 2227. In exercising that authority, the military must have the discretion to move enemy combatants it captures to a military base such as Bagram Airfield, which is the largest military base in Afghanistan and has the only theater detention facility in Afghanistan. And under settled law, the military does have such discretion. *See Munaf*, 128 S.Ct. at 2224-25 ("Our constitutional framework 'requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.") (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)); *Matthews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (matters such as the conduct of foreign relations and the war power "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

Furthermore, contrary to petitioner's assertion, the United States has no interest in detaining enemy combatants longer than it is necessary. *See* Declaration of Ambassador Clint Williamson, ¶ 2; Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Sandra L. Hodgkinson, ¶¶ 3-4. (both attached as Ex. C). Since the war in Afghanistan began, the United States has captured, screened and released thousands of individuals. *See* Tennison Decl.

¶ 9, In the first four years of the war in Afghanistan alone, that number was more than 10,000 individuals. *See* Report to U.N. Committee Against Torture, *supra* note 9, at II.A. The United States also has entered into a diplomatic arrangement with Afghanistan whereby a significant percentage of the Afghan detainees at Bagram are expected to be transferred to the Government of Afghanistan, and many already have been transferred. *See* Tennison Decl. ¶ 16.

To be sure, some detainees who are Afghan nationals, as well as some detainees who are nationals of third countries, may remain at Bagram, subject to periodic administrative review, until such time that they are no longer deemed to pose a threat to the United States, coalition forces, or Afghanistan. *Id.* at ¶ 18. But the capture and detention of enemy combatants is a necessary incident of war. *See Hamdi*, 542 U.S. at 518-19 (plurality); *id.* (noting the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States"). As explained in the declaration of Colonel Tennison, the detention of the unlawful enemy combatants at Bagram, "prevents them from returning to the battlefield and denies the enemy the fighters needed to conduct further attacks and perpetrate hostilities against innocent civilians, U.S. and coalition forces, and the Government of Afghanistan." Tennison Decl. ¶ 9. Even though the United States is fighting an unconventional war, the purpose and necessity of detention remains the same.

D. The Process Available at Bagram for Determining Enemy Combatant Status Does Not Counsel in Favor of Extending the Suspension Clause to Bagram.

As for the process for determining petitioner's enemy combatant status at Bagram, petitioner made much of the two-paragraph discussion in *Boumediene* comparing the procedural

protections afforded to the detainees in the CSRT hearings at Guantanamo Bay to those available in the war crime trials of the petitioners in *Eisentrager*. *See Boumediene*, 128 S. Ct. at 2260. *Boumediene* found that because the CSRT procedures are more limited than the *Eisentrager* war crime trials, they fall short of the procedures and adversarial mechanisms "that would eliminate the need for habeas corpus review." *Id.* at 2260. The Court thus proceeded to examine other factors to determine whether the Suspension Clause in fact applies to Guantanamo Bay.[9]

Here, petitioner's extensive comparison of the procedures available at Bagram for determining enemy combatant status with the war crime trial procedures in *Eisentrager* (*see* Pet. Opp'n at 34, 37-46) is irrelevant. This Court need not decide whether the process at Bagram is a constitutionally adequate substitute for habeas review because the Suspension Clause simply does not extend to Bagram. Rather, as respondents discussed in their opening brief (at 25 n.12), practical considerations, such as exigencies of war and the purpose of detention, should guide the examination of the status review procedures available at Bagram.

The declaration of Colonel Tennison explains that the Commanding General of CJTF-101 has established an Unlawful Enemy Combatant Review Board ("UECRB") to review the status of detainees, usually within 75 days of a detainee being in-processed into the Bagram detention facility, and every six months thereafter. Tennison Decl. ¶ 13. The UECRB is a panel

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[9] The Court did not say, however, that the absence of any process in determining the status of a habeas petitioner would necessarily lead to the Suspension Clause's extraterritorial application. Indeed, such a finding would not be warranted given the longstanding principle against the Constitution's extraterritorial application. *See Eisentrager*, 339 U.S. at 782-85 (finding no textual or historical support for Fifth Amendment's extraterritorial application and noting that "such extraterritorial application of organic law would have been so significant an innovation in the practice of government that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view.").

of three commissioned officers who evaluate the detainees' status and make a recommendation by majority vote to the Commanding General or his designee as to detainees' status. *Id.* And despite petitioner's allegations to the contrary, the UECRB reviews information derived from a variety of sources, including information from individuals involved in the capture, interrogation of the detainee, and written statement of the detainee. *Id.* If necessary for a proper review, the Commanding General or his designee may also interview reasonably available witnesses, provided that such interviews would not affect combat, intelligence gathering, law enforcement, or support operations. *Id.* at ¶ 13. If the Commanding General or his designee determines during any of the enemy combatant reviews that a detainee no longer needs to be detained, the detainee is released. *Id.* at ¶ 12. The process has functioned as it should, and since the war began in Afghanistan, the United States has released thousands of individuals pursuant to this review process. *See id*. at ¶ 9. Accordingly, the UECRB process weighs against the application of the Suspension Clause to Bagram.

E. Practical Considerations Decidedly Tip Against Granting the Privilege of the Writ to Alien Detainees at Bagram.

Respondents demonstrated in their opening brief that there are significant practical barriers for extending the writ to Bagram because Bagram is in a theater of war where the United States is conducting military operations along with its Afghan and multinational partners. Mot. at 28-30. As respondents explained, extending the writ to Bagram would create logistical difficulties and compromise the military's mission in Afghanistan. It likely would also cause friction with the host government (to which the United States expects to transfer a significant number of Afghan detainees in U.S. custody) and implicate a variety of sensitive foreign affairs and diplomatic considerations. *Id.*

Petitioner maintains that only "de minimis practical difficulties" would arise from extending the writ to Bagram because not only are the conditions at Bagram distinct from the "civil unrest" throughout Afghanistan, but the military's mission in Afghanistan is a "far cry" from that in the "turbulent and highly politicized environment" of post-war Germany at issue in *Eisentrager* when the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. *See* Pet. Opp'n at 24, 55, 56, 57. After all, petitioner notes, Afghanistan is only the size of Texas. *See id.* at 55.

Petitioner's assertion of the supposed relative ease in extending the writ to Bagram flies in the face of active military hostilities in Afghanistan. Currently, about 32,000 U.S. troops are in Afghanistan; some 19,000 are part of the U.S.-led Operation Enduring Freedom and another 15,000 work with about 30,000 NATO ISAF troops.[10] The President also recently announced that even more American units will be deployed to Afghanistan in the coming months.[11] It does not matter that Afghanistan is only the size of Texas. It is a theater of war. And Bagram Airfield, a military base from which the United States and multinational forces are actively conducting a military campaign against the Taliban and al Qaida terrorists, is in that theater of war. The military's mission clearly would be compromised if the civilian courts of the United States can review the military's detention of enemy combatants it captures, even as the military is engaged in active combat. This clearly distinguishes Bagram from Guantanamo, which, as the Supreme Court noted in *Boumediene*, is "an isolated and heavily fortified military base" and not

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[10] *See Afghanistan's Solution Primarily Political, Not Military, General Says*, Oct. 1, 2008 (*available at* http://www.defenselink.mil/News/newsarticle.aspx?id=51353).

[11] *See Bush Announces Iraq Troop Cut*, Sept. 9, 2008 (available at http://www.defenselink.mil/news/newsarticle.aspx?id=51083).

"in an active theater of war." 128 S. Ct. at 2261-62.

Petitioner also speculates that because he is not an Afghan citizen, "there is no reason to believe that the Afghan Government would be offended in any way" if the Suspension Clause applies to him. Pet. Opp'n at 57. However, if habeas corpus were made available and relief were eventually ordered in some cases, the release of detainees into Afghan territory could create friction with Afghanistan, regardless of those detainees' citizenship. Moreover, there is no support in *Boumediene*, *Eisentrager*, or the *Insular Cases* for the proposition that the Constitution's extraterritoriality would be dependent on the alien habeas petitioner's nationality or citizenship. Moreover, such a case-by-case analysis, which in this case presumably would also depend on what hostile acts the detainee might have committed against Afghanistan and thus what interest Afghanistan might have in the detainee, is both impractical and anomalous. Furthermore, petitioner's argument ignores the fact that the United States has partnered with both the host government and multinational forces in fighting a non-state enemy. That partnership necessarily constrains the United States' activities in Afghanistan, including Bagram. In assessing the practical barriers to extending the writ to a foreign territory, it is enough that the extension is likely to cause friction with the host government and that the United States is "answerable" to other sovereigns for its acts on the foreign territory at issue. *See Boumediene*, 128 S. Ct. at 2261.

In sum, the practical barriers to extending the writ to Bagram confirm that petitioner cannot invoke the protections of the Suspension Clause.

III. NO JURISDICTIONAL DISCOVERY IS WARRANTED

Petitioner argues that at a minimum, he is entitled to take discovery regarding all disputed jurisdictional facts, including whether he is an unlawful enemy combatant, the degree of control the United States exercises over Bagram Airfield, as well as other matters in the extra-pleading materials introduced in respondents' motion to dismiss. *See* Pet. Opp'n Br. at 15, 17, 19 n. 20. Petitioner also faults respondents for introducing evidence extrinsic to the complaints, citing Fed. R. Civ. P. 12(b)(6)'s standard of review as precluding such introduction.

As an initial matter, contrary to petitioner's suggestion, this Court is able to consider extra-pleading materials in reviewing a motion to dismiss for lack of subject matter jurisdiction. As the D.C. Circuit has explained, one of the "important distinctions between a dismissal pursuant to subdivision b(1) and one under b(6) . . . [is that under b(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action." *Wilderness Soc. v. Griles*, 824 F.2d 4, 16 n. 10 (D.C. Cir. 1987) (quoting 2A J. Moore & J. Lucas, Moore's Federal Practice, ¶ 12.07(2.-1), at 12-45-46 (1986)). In other words, "although a Rule 12(b)(1) motion cannot be converted into a motion for summary judgment as a Rule 12(b)(6) motion can, *see* Fed. R. Civ. P. 12(b), a district court can assure that appropriate extra-pleading materials are consulted in determining the threshold jurisdictional issue." *Id.* Thus, "'where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (quoting *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir.1992)).

As for petitioner's alleged entitlement to discovery, the D.C. Circuit has held that "[a] plaintiff has no right to discovery in opposing a motion under 12(b)(1)." *Haase v. Sessions*, 835 F. 2d 902, 908 (D. C. Cir. 1987). The Supreme Court has also held that "'[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.'" *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 295 (1969)). While the court may nevertheless grant discovery to resolve factual disputes necessary to determining the court's habeas jurisdiction, discovery is inappropriate where, as here, petitioner has no basis for disputing the respondents' jurisdictional showing. *Cf. Coalition for Underground Expansion*, 333 F.3d at 198 (rejecting plaintiffs' argument that the district court erred in considering a declaration submitted by the defendant on a Rule 12(b)(1) motion without affording the plaintiff an opportunity for discovery, where plaintiff has made no factual allegations which, if substantiated, would establish jurisdiction); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (in a habeas case, "discovery is available only in the discretion of the court and for good cause shown"); Rule 6(a) of the Rules Governing Section 2254 Cases (requiring leave of court for good cause shown before discovery may be conducted in habeas case by state prisoners).[12]

Here, petitioner has failed to establish good cause for jurisdictional discovery. There is no basis for discovery to determine whether petitioner is properly determined to be an unlawful enemy combatant because to do so would render meaningless the MCA's jurisdictional bar regarding review of the legality of petitioner's detention. The only factual predicate to the

[12] Whether or not the Rules Governing Section 2254 Cases actually apply here, the limitation of discovery in such cases is instructive at least by analogy.

application of Section 7 of the MCA is whether petitioner has been "determined by the United States to have been properly detained as an enemy combatant." MCA § 7. The plain language of § 7 indicates that the determination of enemy combatant status (and whether an alien is properly detained pursuant to that determination)[13] is for the United States alone to make. Were it otherwise, the jurisdiction-limiting provision would be applicable only after the normal habeas inquiry, and petitioner would obtain the same relief as if Congress never enacted Section 7. Accordingly, once respondents have shown that the United States has determined petitioner to be an enemy combatant and is detaining him as such, there is no basis for petitioner to dispute that fact, and the jurisdictional inquiry is at an end.

As for any alleged factual dispute regarding the United States' control over Bagram or matters discussed in Colonel Tennison's declaration, the type of discovery petitioner proposes would intrude on the military operations in Afghanistan and entail the very type of litigation found inconceivable by the Supreme Court in *Eisentrager*, 339 U.S. at 779. As Judge Hogan aptly noted when dismissing a suit by former detainees in Afghanistan and Iraq against U.S. government officials: "[t]he discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries . . . ." *In re Iraq and Afghanistan Detainees Litigation*, No. 06-0145, 497 F. Supp. 2d 85, 105 (D.D.C. 2007).

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[13] Indeed, any determination that a detainee is an enemy combatant is also a determination that the detainee is "properly detained as an enemy combatant" because it is established that all enemy combatants may be properly detained during armed conflict. *See Hamdi*, 542 U.S. at 520-21; *Ex parte Quirin*, 317 U.S. 1 (1942).

Discovery would also seriously intrude into matters such as the conduct of foreign relations and the war power, which have been constitutionally vested in the Executive and "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Matthews*, 426 U.S. at 81 n.17. This is particularly true where, as here, the court is asked to insert itself into the most sensitive of diplomatic matters – to order discovery in a zone of active military hostility regarding the United States presence there. The intrusion likely would significantly compromise the Government's ability to interact effectively with a foreign government (here, a foreign ally with whom the United States has a close partnership in a wide range of areas including military operations) and undermine the President's constitutional authority as Commander-in-Chief.

Presumably, petitioner is proposing to conduct discovery to scrutinize the terms and conditions of the United States' strategic partnership with Afghanistan and how the United States' use of Bagram fits into that partnership. Or perhaps petitioner wants discovery regarding the interpretation and application of the Bagram lease and the two governments' status of forces agreement, or even the scope of the war in Afghanistan and the practicalities of extending the writ to Bagram. But none of those areas is a proper subject of discovery, never mind that virtually all of the jurisdictional facts upon which respondents rely are already matters of public record. *See People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) ("[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch.") (citing *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("pass[ing] judgment on the policy-based decision of the executive" in foreign policy "is not the stuff of adjudication");

Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) ("In situations such as this, '[t]he controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them [the courts] must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations.'") (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383 (1959)). In sum, petitioner is not entitled to conduct discovery.

IV. PETITIONER HAS NO CAUSE OF ACTION UNDER INTERNATIONAL LAW

Finally, petitioner argues that his detention violates international humanitarian laws, treaties, and customary international law, citing, among other things, the Universal Declaration of Human Rights ("Declaration"), the International Covenant on Civil and Political Rights ("ICCPR"), and Common Article 3 of the Geneva Conventions. Pet. Opp'n at 64-68. Petitioner, however, has no cause of action under any of the specific treaties he cites.

The law is settled that a treaty "is primarily a compact between independent nations" and ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 597 (1884); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). If a treaty is violated, this "becomes the subject of international negotiations and reclamation . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. at 597. "Only 'if the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effective of a legislative enactment.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). But "[e]ven when treaties are self-executing

in the sense that they create federal law, the background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Id.* at 1357 n.3 (internal quotation marks and citation omitted). *see, e.g., Holmes v. Laird*, 459 F.2d 1211, 1213, 1222 (D.C. Cir. 1972) (denying U.S. soldiers' claims that because the NATO status of forces agreement granted individual members of the armed forces specific rights, a federal court could adjudicate a claim based upon those treaty rights; holding that "the corrective machinery specified in the treaty itself is nonjudicial").

Here, none of the treaties or international agreements petitioner cites is self-executing, much less contains provisions providing for private causes of action. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-35 (2004) (holding that "[the Universal Declaration of Human Rights] Declaration does not of its own force impose obligations as a matter of international law," and that the ICCPR does not "itself create obligations enforceable in the federal courts"). Petitioner's suggestion that the federal habeas statute functions as the required Congressional enactment to provide for private cause of action for the enforcement of these international treaties and agreements has no basis in law and is simply wrong, particularly given Congress's express intent to the contrary. *See* MCA § 5(a) (codified at 28 U.S.C. § 2241) ("no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States"). Furthermore, it improperly assumes that the federal habeas statute reaches extraterritorially to Afghanistan, when, as discussed before, it does not. *See supra* at II.

CONCLUSION

For the foregoing reasons, this Court should dismiss petitioner's First Amended Habeas Petition for want of jurisdiction.

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