Nos. 09-5265, 09-5226, 09-5277

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

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

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

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

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

BRIEF AMICUS CURIAE OF RETIRED MILITARY OFFICERS SUPPORTING PETITIONERS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici Curiae* state the following:

(A) PARTIES AND AMICI

Except for *Amici* Retired Military Officers, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Petitioners-Appellees.

(B) RULINGS UNDER REVIEW

The ruling at issue in this appeal is the district court's April 2, 2009 order in *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), in which Judge John Bates determined that certain detainees held at Bagram Air Base in Afghanistan are entitled to petition for writs of habeas corpus.

(C) RELATED CASES

All related cases brought by detainees held at the Bagram Air Base pending in the district court in this Circuit are listed in the Brief for Petitioners-Appellees. Counsel for *Amici* are not aware at this time of any other related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

* Authorities upon which we chiefly rely are marked with asterisks.

INTEREST OF THE *AMICI*

Amici are retired military officers with direct experience in both the legal and practical aspects of military operations. *Amici* share the belief that military detention policies must accord strictly with the rule of law as that law has been interpreted by the U.S. Supreme Court, most recently in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The purpose of this brief is to provide the court with *Amici*'s perspective regarding the practicability of resolving Petitioners' entitlement to the writ of habeas corpus, recognizing that the Court has identified this issue as a key factor in determining whether non-citizens held abroad may avail themselves of this remedy. *Amici* file this brief with the consent of the parties.

Stephen E. Abraham, Lieutenant Colonel (USAR Ret.), served in the United States Army Reserve for more than twenty years, focusing on military intelligence. He has served during both periods of active and reserve duty, including mobilization tours in 1991 and following 9/11, during one of which he served as lead terrorism analyst, Joint Intelligence Center (Pacific). While at the Office for the Administrative Review of the Detention of Enemy Combatants in 2004-2005, he served in support of and on the Combatant Status Review Tribunals that reviewed prior determinations as to whether detainees at Guantánamo Bay were enemy combatants. He received a number of awards and medals during the

course of his military career, including the Defense Meritorious Service Medal. He currently is in private legal practice in Newport Beach, California.

James P. Cullen is a retired Brigadier General of the United States Army Judge Advocate General's Corps with over 26 years of combined active duty and reserve service. He last served as Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. Prior to serving as Chief Judge, he was assigned as Staff Judge Advocate (senior lawyer) for the 77th ARCOM, which was the senior headquarters for soldiers in the New York / New Jersey region of the country including the 800th MP Brigade. Prior to that, he was Commander of the 4th Military Law Center. Following training at the Judge Advocate General's School at the University of Virginia in Charlottesville, Virginia, he served on active duty for several years. General Cullen has received a number of awards and medals during the course of his military career, including the Distinguished Service Medal. He is a shareholder at Anderson Kill & Olick, P.C., in New York City where he heads the construction and real estate development practice.

Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He has also served as Commanding Officer of the Naval Justice School, Commanding Officer of the Naval Legal Service Office, Europe and Southwest Asia, DOD/JCS Representative for Ocean Policy, and Director of Legislation at the Navy Office of

Legislative Affairs. He has received many awards and medals, including the Distinguished Service Medal. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioners-Appellees.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court identified "at least three factors [that] are relevant in determining the reach of the Suspension Clause." *Id.* at 2259. One such factor is an assessment of "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* In this case, as in *Boumediene*, the government argues that providing habeas hearings to Petitioners—non-Afghan citizens who were apprehended outside Afghanistan and then transferred to that country for detention at the Bagram Theater Internment Facility ("Bagram")—would pose several practical obstacles. *Amici* submit this brief to address this claim and to present our view that the government has not shown habeas to be impracticable under the standards set forth by the Supreme Court.

A primary lesson of *Boumediene* is that government claims of practical hardship, standing alone, are insufficient to create a justification for limiting the

reach of the writ. Such claims must be fully substantiated, and they must also support a conclusion that "the military mission at [the detention facility] would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." *Id.* at 2261. These principles reflect the centrality of the writ of habeas corpus in our constitutional scheme and its role in maintaining the separation of powers.

The government has identified three specific practical obstacles that would arise from the process of resolving Petitioners' habeas claims: the diversion of manpower and resources due to responding to discovery requests; the diversion of manpower and resources due to facilitating meetings between Petitioners and counsel; and the diversion of manpower and resources due to facilitating Petitioners' presence at habeas hearings. All three circumstances represent a practical burden on the government to some degree. Nonetheless, the government has not demonstrated that these burdens rise to the level of impeding the military mission at Bagram.

Indeed, there is significant evidence to the contrary. The specific burdens identified by the government are functionally indistinguishable from the burdens imposed by resolving Guantánamo detainees' habeas cases—burdens that the Supreme Court found to be manageable in *Boumediene*. While Bagram differs from Guantánamo in that it is located in an active theater of war—a difference that

Amici understand and appreciate—that distinction has no relevance to the particular obstacles identified by the government, as none of these obstacles relate directly to conditions that are present at Bagram but absent at Guantánamo. Moreover, each of the burdens identified by the government is similar to a burden the government has voluntarily shouldered (or proposes to shoulder) at Bagram in a different context. For example, while the government argues that facilitating meetings between detainees and counsel would divert crucial resources, the government regularly facilitates meetings between detainees and other visitors, despite the burden this may entail. Whether imposed by the *Boumediene* decision or adopted as a matter of choice, none of these burdens appears to have compromised the war effort.

The government has also identified a fourth practical obstacle, one that would result not from the burden of the habeas process, but from the consequences of a court-ordered release: friction with the host government of Afghanistan. As with the first three obstacles, the government has not substantiated its claim. The public record and the government's own evidence confirm that the United States already makes unilateral decisions about the disposition of Bagram detainees on a regular basis. Accordingly, providing habeas hearings to Bagram detainees could cause tension with the Afghan government only if that government prefers for the judicial branch to play no role in U.S. decisions about detainees. To the extent

there is any evidence on this point, it weighs in the opposite direction, suggesting that both the Afghan government and the people of Afghanistan believe that Bagram detainees are entitled to more procedural protections than the executive branch has seen fit to give them.

To be clear, *Amici* do not contend that the practical obstacles to extending habeas jurisdiction to Bagram are trivial, or that those obstacles are in every case identical to those posed by providing habeas hearings to Guantánamo detainees. But the government must do more than show the existence of non-trivial obstacles or differences between conditions at Guantánamo and those at Bagram. In the absence of an adequate substitute for habeas corpus, the writ must be available unless the government has shown that habeas proceedings would compromise the military mission. The government has not met that burden.

ARGUMENT

I. *BOUMEDIENE* REQUIRES THE GOVERNMENT TO DO MORE THAN MERELY ASSERT THE EXISTENCE OF PRACTICAL OBSTACLES TO HABEAS REVIEW.

In *Boumediene*, the Supreme Court observed that "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." 128 S. Ct. at 2244. In addition to being a vital protection of individual liberty, the Court noted, "the Framers deemed the writ to be an essential mechanism in the

separation-of-powers scheme." *Id.* at 2246. The writ's importance in the eyes of the Framers, on both counts, can be seen by the fact that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." *Id.* at 2244.

The reach of the writ, with respect to non-citizens detained overseas, is subject to certain limitations outlined by the Court in *Boumediene*. Nonetheless, the "centrality" of the writ within our constitutional scheme at a minimum signifies that it may not be dispensed with lightly. *Id*. Just as allowing the executive branch to dictate the test for determining the writ's scope would undermine the writ's separation-of-powers role, *see id.* at 2259, so would allowing the executive branch to determine the writ's application in a given instance by deferring to its claims without sufficiently rigorous scrutiny.

The Court's analysis in *Boumediene* supports this principle. The Court identified "the practical obstacles inherent in resolving the prisoner's entitlement to the writ" as one of "at least three factors [that] are relevant in determining the reach of the Suspension Clause." *Id*. In analyzing this factor, the Court was not persuaded by the government's assertions that "[h]abeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks." *Id.* at 2261. The Court responded that:

> Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946); *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866). The Government presents no credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And . . . none are apparent to us.

Id. Having identified the core issue as whether "the military mission . . . would be compromised," *id.*, the Court proceeded to carefully probe the practicalities of exercising habeas jurisdiction to determine whether the difficulties involved would be as grave as the government contended. The Court uniformly concluded that, "[u]nder the facts presented here . . . there are few practical barriers to the running of the writ," and "[t]o the extent barriers arise, habeas corpus procedures likely can be modified to address them." *Id.* at 2262.

The lesson of *Boumediene* is that this Court should not simply rely on conclusory statements that "permitting detainees [at Bagram] to sue their military captors . . . would have serious adverse consequences for the military mission in Afghanistan," that "[t]he discovery obligations of habeas suits would necessarily divert military personnel from their military mission," or that "[t]he possibility of friction [with the host government] is obvious if habeas relief were granted in some cases." Brief for Respondents-Appellants ("Gov't Br.") at 45-47. Rather, it is the government's obligation to demonstrate both why the cited consequences would

follow from habeas proceedings, and that these consequences would "compromise" the "military mission." *Boumediene*, 128 S. Ct. at 2261.

II. THE GOVERNMENT HAS NOT SHOWN THAT PROVIDING HABEAS RIGHTS TO PETITIONERS WOULD COMPROMISE THE MILITARY MISSION BY DIVERTING RESOURCES.

The crux of the government's argument is that providing habeas rights to Petitioners would create an intolerable drain on the time and resources of the military officials currently waging the conflict in Afghanistan. The three specific diversions of resources that the government identifies are: "facilitating detainee presence for habeas proceedings"; "coordinating counsel access to the detainees"; and "divert[ing] military personnel from their military mission" in order to "provide information or testimony in response to a detainee's claims." Gov't Br. at 45-46.

To the extent the government has provided any support for its claims of practical difficulties, it has not shown that the difficulties in question would compromise the military mission. Indeed, many of the cited difficulties are functionally identical to those rejected by the Supreme Court as insufficient to deny habeas to Guantánamo detainees. Other cited difficulties stem from activities that are similar to those the government either currently undertakes at Bagram, or proposes to undertake as part of a new administrative review process appended to the government's brief. If the government has demonstrated by its own conduct

that taking a certain measure is practical in a non-habeas setting, then this Court should not conclude that the same or a similar measure is impractical here.

A. The Government Has Not Shown That Fulfilling the Discovery Obligations of Habeas Would Compromise the Military Mission.

The government argues that "[t]he discovery obligations of habeas suits would necessarily divert military personnel from their military mission, requiring them to prepare and provide information or testimony in response to a detainee's claims." Gov't Br. at 46; *see id.* at 51 (arguing that discovery obligations "would divert resources and time from the war effort by obligating military officials to review documents, respond to burdensome discovery requests, and provide declarations on a broad array of matters"). It supports this argument only with a contention that "the district courts adjudicating Guantánamo petitions have ordered a wide range of discovery regarding military affairs and operations," *id.* at 51, but provides no reference to any such orders. Nor did the government provide any declarations or other evidence below that would enable the court to assess the effect of these discovery orders on actual military operations (for example, by detailing how much time officers stationed in the battlefield have spent providing information in response to discovery requests).

The Supreme Court in *Boumediene*, faced with the same claim, rejected the notion that the discovery obligations posed by habeas proceedings for Guantánamo detainees would create an insurmountable burden on the government. To be sure,

Bagram, unlike Guantánamo, is located in a country where the United States is actively at war. As relevant as that distinction may be in other contexts, however, it does not affect the burden posed by discovery. The concern that military officials located in active theaters of war could be required to devote time and resources to discovery responses applies equally in both settings: given that none of the Guantánamo detainees were captured at Guantánamo, the military personnel with knowledge of the circumstances and reasons for those individuals' detention are as likely to be located in an active theater of war as those who would be required to provide information in the case of Bagram detainees.

Indeed, the government does not contend that discovery requests would be different or more onerous in the Bagram context. To the contrary, the government claims that "the district courts adjudicating Guantánamo petitions have ordered a wide range of discovery regarding military affairs and operations," and expresses concern that "similar discovery orders" would issue in Bagram habeas cases. Gov't Br. at 51. Yet, while the government complains that discovery in the Guantánamo cases has been burdensome, it does not assert that such discovery has compromised the military mission, and *Amici* are unaware of any evidence that this has occurred. Hence, there is no reason to think "similar discovery orders" would have such an effect here.

If anything, the discovery obligations in Petitioners' habeas proceedings would impose *less* of a burden than those the government currently shoulders, without evident damage to the military mission, in the Guantánamo cases. The district court in this case limited its holding to non-Afghans apprehended outside of Afghanistan. The military personnel with direct knowledge of the circumstances of these individuals' detention are correspondingly more likely to be outside the active theater of war. By contrast, many Guantánamo detainees were captured in active hostilities in Afghanistan and transported to Guantánamo Bay for detention. *See, e.g.*, The Guantánamo Docket, N.Y. Times, http://projects.nytimes.com/Guantánamo (assembling information about Guantánamo detainees based on Department of Defense records and other publicly available information). Despite their capture in Afghanistan by U.S. forces—and the corresponding likelihood that military officers in Afghanistan would be involved in responding to discovery requests—the Supreme Court in *Boumediene* authorized those detainees to seek habeas relief. If discovery was deemed practicable in that context, it is *a fortiori* practicable for a subset of detainees apprehended outside the active theater of war.

It also is unclear that habeas discovery would impose a greater burden on military field officers than the disclosure that the government says it will undertake under the new, voluntarily adopted Detainee Review Procedures appended to its

brief. Under this set of internal procedures, a detainee must receive, orally and in writing in a language the detainee understands, timely notice of the basis for his confinement, including "an unclassified summary of the specific facts that support" the confinement. Gov't Br. Addendum at 000004. Soldiers and military lawyers, who will have prepared documents justifying the detainee's initial detention and transfer to Bagram, *id.*, necessarily will assist in preparing these summaries as well—just as they would assist a Department of Justice lawyer in preparing the factual return and legal justification to submit in district court habeas proceedings. *See* Case Management Order at 2, *In re Guantánamo Bay Detainee Litig.*, No. 08-mc-0442 (D.D.C. Nov. 6, 2008) (Dkt. 940) ("Guantánamo Habeas Guidelines"). Additionally, the Detainee Review Procedures' provision that "appropriate U.S. military personnel shall conduct a reasonable investigation into any exculpatory information the detainee offers," Gov't Br. Addendum at 000005—an investigation that could require, for example, finding and interviewing witnesses identified by the detainee—may in some cases be more onerous than the habeas requirement regarding exculpatory evidence, which simply requires the government to turn over evidence that is already "in its possession." Guantánamo Habeas Guidelines at 2.

The notion that maintaining and producing information about detainees would compromise the military mission is suspect for another reason. In a typical international armed conflict, the military is required by its own regulations to

collect and maintain scrupulous records about prisoners of war, including information about the detainees' "legal status" and the "circumstances of capture." *Army Regulation 190-8: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Oct. 1, 1997, at 3, 6, www.usapa.army.mil/pdffiles/r190_8.pdf ("AR 190-8"). Some of this information necessarily must be provided by officers in the field, yet the government presumably would not argue that this standard military practice, enshrined in the government's own regulations, interferes with operations. In fact, in a conflict like the current one, where interrogation is an important component of detention, *see* Gray Decl. ¶ 9, the gathering of information about detainees is itself a key part of the military mission. Even apart from determining whether a detainee qualifies as an "enemy combatant," a major priority of the government is to learn exactly what role the detainee plays in the terrorist networks that we are fighting. Operational considerations would thus seemingly require the government to collect and have on hand, at a minimum, the very information the government may be required to produce in a habeas proceeding.[1]

[1] *Amici* on behalf of Appellants, the Special Forces Association (SFA) et al., have argued that this information is unlikely to meet the preponderance of the evidence standard applied by habeas courts. In cataloguing the difficulties of assembling good evidence during "snatch-and-grab" operations, their brief merely underscores the risk that non-combatants could mistakenly be targeted and detained. *See, e.g.*, Corrected Amicus Brief of the SFA et al. at 29 ("[T]he difficulties of identifying a particular enemy fighter may prove insurmountable

B. The Government Has Not Shown That Facilitating Detainee Access to Hearings Would Compromise the Military Mission.

The government argues that providing habeas proceedings for Petitioners would be impracticable because "command and military personnel engaged in an active war zone there would have to spend considerable time facilitating detainee presence for habeas proceedings." Gov't Br. at 45-46. In Guantánamo habeas proceedings, however, no detainee has been physically present at a habeas hearing; instead, detainees have participated exclusively by video conferencing. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 228 (D.D.C. 2009), *subsequent determination sub nom. Wazir v. Gates*, 629 F. Supp. 2d 63 (D.D.C. 2009) ("[Video conferencing] is the process being used in scores of Guantánamo habeas proceedings now taking place in this District Court, in which no Guantánamo detainee has been physically transferred here."). The security burden involved in bringing a detainee from his cell to a special room for video conferencing purposes would be no greater than the burden involved in bringing him to appear before the Detainee Review Board, a right voluntarily granted under the new Detainee Review Procedures. *See* Gov't Br. Addendum at 000005-000006.

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where the 'witnesses' last saw him crouched behind cover in the dark or with his face covered."). The "preponderance of the evidence" standard guards against such erroneous detentions. If the government's evidence does not reach that threshold—if, based on that evidence, it is more likely that the detainee is *not* an enemy combatant—then there is simply no legal authority to hold the detainee.

The government nevertheless contends that the "availability of secure video telecommunication facilities at Bagram is limited"; accordingly, "diverting those facilities from ongoing military operations to habeas litigation would inevitably compromise the war effort." Gov't Br. at 50. The government provides no further details or any other information about Bagram's telecommunications facilities that would help the Court to understand their current capacity and usage, and no such information was submitted below. In the absence of even the barest factual information regarding the constraints on video conferencing at Bagram, the government cannot offer such constraints as a justification for denying Bagram detainees the Great Writ.

In any event, there is reason to question the government's assertion that "diverting [telecommunications] facilities from ongoing military operations" would "inevitably compromise the war effort." *Id.* The new Detainee Review Procedures expressly provide for the use of video conference facilities in connection with the proceedings of the Detainee Review Boards. Gov't Br. Addendum at 000006 ("[W]itnesses not serving with U.S. Forces . . . . may testify by means of video teleconference, teleconference, or sworn written statement."). Furthermore, the government allows video conference visits between detainees and their family members. *See* Foster Decl. ¶ 6 ("In January 2008, the ICRC announced that the Department of Defense would now permit the families of

Bagram detainees to see their loved-ones via a dedicated video link."); Fisnik Abrashi, *US Allows Families To Visit Detainees at Afghan Military Prison for the First Time in Six Years*, Associated Press, Sept. 23, 2008 ("*First Family Visits*") (reporting that "[m]ore than 1,500 [video] calls were made [in] the last eight months" between Bagram detainees and their families). The government has not claimed, and there is no reason to believe, that these uses of Bagram's video conferencing capabilities have compromised the military mission. Accordingly, the Court should not simply infer—as the government asks it to—that using video conferencing in habeas cases will have that effect.

Finally, even if there were some evidence that existing telecommunications facilities at Bagram are strained to the limit, that problem could not be presumed insurmountable. The military installation on which the internment facility is located, which contains "Burger Kings, Pizza Huts, wireless Internet and a bus system," Paul McLeary, *U.S. Army Enlisted Personnel Run Task Force ODIN*, Aviation Week, Oct. 10, 2009, is in a constant state of upgrade and expansion. In particular, the government has been building "a new, 40-acre detention complex" at Bagram. Eric Schmitt & Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008. The government has cited no military impediment to including additional video conferencing capabilities in this modern, state-of-the-art facility—a facility that will cost "more than $60 million" and is

likely to "hold prisoners overseas for years to come." *Id.* Indeed, in other respects, the government already is taking into account the need to facilitate detainees' communication with those outside the prison. *See id.* (noting that "there will be more space for recreation and family visits" in the new facility).

C. The Government Has Not Shown That Facilitating Counsel Access to Detainees Would Compromise the Military Mission.

The government next hypothesizes that "it is highly doubtful that detainees' counsel would not demand face-to-face meetings with their clients." Gov't Br. at 50. The government's submission, however, provides an inadequate basis to conclude that detainees' attorneys will "demand" face-to-face meetings in significant volume. While the government points to the volume of counsel travel to Guantánamo, counsel surely are less likely to travel frequently to Afghanistan than to Cuba, which is only ninety miles from the United States. Indeed, counsel in this case sought to meet with their clients by phone or video conference rather than in person. Olshansky Decl. Ex. 3 (Letter from Barbara Olshansky to Jean Lin, Trial Attorney in the Department of Justice (Oct. 13, 2008)) ("As you know, I still believe that we should have access to speak with our clients . . . either by telephone or video conference."). Moreover, any "demand" to meet with clients in person would be subject to a process of negotiation and accommodation, just as all aspects of habeas proceedings have been in the Guantánamo cases. A pragmatic exchange between detainees, their counsel, military authorities, and the courts is precisely

what *Boumediene* demands. 128 S. Ct. at 2262 ("To the extent barriers arise, habeas corpus procedures likely can be modified to address them.").

In any event, the government's conduct in permitting detainee visits with individuals other than habeas counsel suggests that facilitating visits is not a burden that compromises the military mission. The government allows detainees' family members to enter Bagram and visit their confined relatives. *See, e.g.*, *First Family Visits*, *supra* ("U.S. military spokesman Capt. Scott Miller said the U.S. will now allow routine family visits [at Bagram] at least once a week and possibly more frequently.").[2] In addition, as the government states in its brief, "each detainee is registered with the International Committee of the Red Cross, which regularly visits the detention facility to conduct private interviews with the detainees." Gov't Br. at 9; *see also* Tennison Decl. ¶ 10 ("The ICRC has regular access to [the] facility and conducts private interviews with detainees."). These visits have been occurring since 2002—soon after the United States' initial invasion of Afghanistan and at the height of the war effort. *See First Family Visits*, *supra* ("Red Cross delegates have been visiting Bagram prison since 2002."). The government also facilitates access for Afghan officials to meet with Afghan detainees. *See* Tennison Decl. ¶ 10. Moreover, under the new detainee

[2] U.S. practice in Iraq also is relevant here, given that Iraq is an active theater of war. In 2008, the U.S. military permitted 13,000 visits a month to two detention centers in Iraq. *See First Family Visits*, *supra*.

procedures, Detainee Review Board proceedings themselves will be open to outside non-governmental groups like the Red Cross. Gov't Br. Addendum at 000002 ("[T]he proceedings generally shall be open . . . including to representatives of the ICRC and possibly non-governmental organizations.").

In short, there are multiple contexts in which the government currently allows—or, in the case of the Detainee Review Procedures, proposes to allow—private visits between detainees and visitors. Against that backdrop, *Amici* see no basis for the government's claim that adding another category of private visitors would compromise the military mission.

The government next argues that permitting video conferencing or document exchanges between counsel and detainees would be problematic due to "the need to designate at Bagram wholly separate and walled-off privilege teams to ensure both that the video conferences between the detainee and counsel can be conducted in a manner that preserves attorney-client confidences and that any transmittal of documents from counsel to detainee are handled appropriately." Gov't Br. at 50. Privilege teams, however, are not comprised of field officers who might be pulled away from combat duty by the need to perform privilege review. Given the nature of their duties—reviewing incoming and outgoing detainee legal mail, reviewing notes of counsel meetings, and making classification determinations—these teams are comprised of Department of Defense attorneys, as well as intelligence or law

enforcement personnel, and they are represented in the execution of their duties by attorneys at the Department of Justice. *See In re Guantánamo Detainee Litig.*, 577 F. Supp. 2d 143, 156-63 (D.D.C. 2008) (setting forth the composition of privilege teams and their duties).

Accordingly, privilege teams can—and do—operate outside the active theater of war. In the Guantánamo habeas cases, the privilege team's review of legal mail or notes from counsel's meetings with detainees takes place at a secure facility in the Washington, D.C. area.[3] *See* Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information at 23, *In re Guantánamo Bay Detainee Litig.*, No. 08-mc-0442 (D.D.C. Jan. 7, 2009) (Dkt. 1481) ("Counsel may submit information learned from a detainee to the Privilege Team located at the secure facility in the Washington, D.C., area."); Debra A. Livingston, *Symposium: Secret Evidence and the Courts in the Age of National Security: Panel Report: Issues in Article III Courts*, 5 Cardozo Pub. L. Pol'y & Ethics J. 45, 58 (2006) ("All notes [a detainee's counsel] makes during a visit to her client are sent to a [Sensitive Compartmented Information Facility] in

[3] *Amici* understand that this facility is located immediately outside the District of Columbia in Crystal City, Virginia. *See, e.g.*, Randall T. Coyne, *A Law Professor's Reflections on Representing Guantánamo Detainees*, 1 N.E. U. L.J. 97, 103 (2009) ("These notes are then sent by secure means to a secure facility in Crystal City, Virginia, for review by Department of Defense officials . . . . Counsel must use a government-supplied computer located in the secure facility in Crystal City, Virginia.").

Washington, D.C., often after a long delay."). While the government suggests that on-site privilege teams might be necessary to monitor video conference calls between counsel and detainees, *see* Gov't. Br. at 50, it does not explain why the monitors would need to be located at the detainee's location, rather than the location of counsel.[4] In any event, such live monitoring—as opposed to counsel's submitting notes to the privilege team in D.C. following meetings—has been deemed impermissible in the Guantánamo habeas cases, and presumably would be prohibited here as well. *See In re Guantánamo Detainee Litig.*, 577 F. Supp. 2d at 163 (prohibiting "contemporaneous monitoring or recording" of telephone calls between counsel and detainees); *id*. at 164 (prohibiting monitoring of "oral communications between counsel and the detainees" during in-person visits).

Amici do not argue that privilege teams *should* be located in the U.S. There may be reasons, unrelated to military necessity, to locate them on-site if doing so would be practicable. But the government's own practice in the Guantánamo cases contradicts its implication here that privilege teams *must* be located on-site.

[4] Under procedures for telephone calls between detainees and their counsel in the Guantánamo cases—procedures that presumably could be adapted to video conferencing—counsel must participate from a secured habeas work facility, which *Amici* understand to be the facility in Crystal City, Virginia, described above. *See* Procedures for Requesting Classified Telephone Calls with Detainee-Petitioners at Guantánamo Bay (effective Sept. 12, 2008) (on file with counsel).

D. The Detainee Review Procedures Envision an Equal if Not Greater Diversion of Military Manpower.

As noted above, the new Detainee Review Procedures appended to the government's brief contemplate video conferencing, facilitating the presence of detainees at hearings, and the preparation of factual information similar to that in habeas "factual returns." Beyond these specific points, *Amici* note more generally that the Detainee Review Procedures—while an inadequate substitute for habeas corpus for structural reasons unrelated to the expenditure of manpower—involve a diversion of resources that arguably is equal to, if not greater than, the diversion that habeas proceedings would require. Indeed, the Detainee Review Procedures appear to contemplate the engagement of at least five military personnel *beyond* those who would be involved in habeas proceedings, at least four of whom would be on-site at Bagram: the three field-grade officers who constitute the Detainee Review Board, *see* Gov't Br. Addendum at 000004; the commissioned officer assigned to serve as the detainee's personal representative in the proceedings, *see id.* at 000005; and "appropriate U.S. military personnel" tasked with "conduct[ing] a reasonable investigation into any exculpatory information the detainee offers," *id.*—a significant and (if done properly) time-consuming task that would fall to the detainee's counsel in habeas proceedings.

Amici support the adoption of improved administrative review procedures and understand that they operate separately from, not instead of, any habeas

proceedings to which the detainees may be found to be entitled. Our point is a limited one: in light of the central constitutional importance of the writ of habeas corpus, the government may not characterize as insurmountable for habeas purposes practical obstacles that it voluntarily has shouldered for another purpose.

III. THE GOVERNMENT HAS NOT SHOWN THAT PROVIDING HABEAS RIGHTS TO PETITIONERS WOULD CAUSE FRICTION WITH THE AFGHAN GOVERNMENT.

The government claims that "[t]he possibility of friction [with the government of Afghanistan] is obvious" if habeas jurisdiction is extended to Bagram. Gov't Br. at 47. According to the government, "the United States has a close and cooperative relationship with the Afghan government" that includes "ongoing dialogue about . . . the disposition of detainees who are captured as part of the war effort." *Id.* This dialogue would be "threaten[ed]" were a "United States *court*" to become involved. *Id.* at 47, 49 (emphasis in original).

Amici can find no support for the proposition that the government of Afghanistan is averse to giving U.S. courts a role in determining the disposition of Bagram detainees. None of the government's declarations or other submitted materials discusses whether habeas proceedings would cause friction with the Afghan government. *Cf.* Williamson Decl. ¶ 12 (asserting that diplomatic problems would be caused by judicial review of whether Guantánamo detainees'

transfers comport with U.S. obligations not to transfer individuals to countries where they are likely to be tortured).

Moreover, as is evident from the public record, the executive branch of the U.S. government routinely makes decisions about the disposition and treatment of Bagram detainees without the input—and sometimes even against the wishes—of Afghan authorities. In 2005, in the wake of news that two detainees died at Bagram in December 2002 after being abused by U.S. guards, Afghan President Hamid Karzai "denounced the abuse of prisoners and demanded that the United States return to his government all Afghan terrorism suspects currently being held." David E. Sanger, *Bush Deflects Afghan's Request for Return of Prisoners*, N.Y. Times, May 24, 2005, at A12. The United States did not accede to this request. Nor did the U.S. comply when President Karzai again called for the release of Bagram detainees three months ago. *See, e.g.*, Fisnik Abrashi, *Karzai Calls for Release of Detainees; Prisoners' Status Causing Rift With US*, Boston Globe, Aug. 5, 2009, at 3 ("*Karzai Calls for Release*") ("Karzai . . . said that Western forces must release suspected Taliban supporters and fighters held without charge for months and even years."). Indeed, President Karzai sought the release of one of the detainees whose habeas petition was considered by the district court *in this very case*—Haji Wazir—and the U.S. government refused. *See* Meris Lutz, *Seven Years After CIA Abduction, Prisoner Still Held Without Charge*, L.A. Times,

Aug. 28, 2009, http://latimesblogs.latimes.com/babylonbeyond/2009/08/afghanistan-.html (Haji Pacha Wazir remains at Bagram even though "[t]he Afghan government had cleared him for release"). Despite the Afghan government's efforts to secure Wazir's release, the U.S. government argued below that releasing him pursuant to habeas proceedings would strain relations with the Afghan government.

Just as the U.S. government makes unilateral decisions to continue detention, the government's own evidence indicates that the U.S. government routinely makes unilateral decisions to release detainees. In setting forth a detailed description of the process by which detention decisions are made, Colonel James W. Gray states that "[i]f the detaining combatant commander, or his designee, determines during any of the enemy combatant reviews that a detainee no longer meets the definition of an enemy combatant, the detainee is released." *See* Gray Decl. ¶ 12. There is no discussion anywhere in Col. Gray's declaration of consultation with the Afghan government about the release of particular detainees determined not to be enemy combatants.

Indeed, the government does not actually argue that unilateral decisions about Bagram detainees by the U.S. would harm Afghan relations, or that it has consulted with the Afghan government on each of the 10,000-plus detainees it has released since the armed conflict in Afghanistan began. *See* Gov't Br. at 57.

Instead, it carefully phrases its argument as an objection to unilateral decision-making by U.S. *courts*. Again, however, the government has put forward no evidence that the Afghan government prefers that the executive branch of the U.S. government, rather than the judicial branch, have final say over who qualifies as an "enemy combatant" under the Authorization for Use of Military Force and the law of war.

If anything, there are indications that the lack of due process for Bagram detainees has itself been a source of strained relations between the United States and Afghanistan. President Karzai's calls for release of Bagram detainees have been prompted in part by the practice of indefinite detention without charge. *See Karzai Calls for Release*, *supra*. The Afghan government "has long voiced its concerns about the Bagram detentions," yet the U.S. has blocked the Afghan Independent Human Rights Commission from conducting independent human rights monitoring at the detention facility. Amnesty International, *USA: Government Opposes Habeas Corpus Review for Any Bagram Detainees*, Sept. 16, 2009, at 3 ("[T]he US authorities have not allowed the Afghan Independent Human Rights Commission to interview detainees held at the base without US military monitoring, effectively blocking any independent Afghan monitoring . . . ."). General Stanley McChrystal, in reviewing detention policy in Afghanistan, candidly noted that detention operations "have the potential to become a strategic

liability for the U.S. and [the International Security Assistance Force]" precisely because "the Afghan people see U.S. detention operations as secretive and lacking in due process." *See Commander's Initial Assessment*, Aug. 30, 2009, Appendix F at F-1, reprinted at http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf?hpid=topnews; *see also* Joshua Partlow, *Afghan Hopeful Has Penchant for Details*, Wash. Post, Aug. 15, 2009, at A8 (stating that presidential candidate Ashraf Ghani called for Bagram's closure and reform of Afghan judicial system). In light of this background, it cannot be considered self-evident (as the government urges) that providing judicial oversight of the executive branch's detention decisions will cause friction with the government of Afghanistan.

CONCLUSION

For the foregoing reasons, *Amici* believe the district court's decision should be affirmed.

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

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point Times New Roman font, and contains 6,473 words (which does not exceed the applicable 7,000 word limit).

/s/
Paul M. Smith

CERTIFICATE OF COUNSEL PURSUANT TO D.C. CIRCUIT RULE 29(D)

Pursuant to D.C. Circuit Rule 29(d), Counsel for *Amici Curiae* certifies that a separate amicus brief in support of petitioners-appellees is necessary. *Amici* herein are retired military officers with a unique and valuable understanding of how legal proceedings may bear on the practicalities of military operations. *Amici* are unaware of any other *amicus* brief that brings this perspective to bear, or that shares this brief's particular focus on the relationship between the government's conduct in other areas and its claims in this case.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009, I caused copies of the foregoing brief to be served upon the following counsel for Respondents-Appellants and Petitioners-Appellees via electronic mail, by operation of the Court's ECF system, and via first class mail (for Barbara J. Olshansky):

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