[ORAL ARGUMENT SCHEDULED JANUARY 7, 2010]

CASE NOS. 09-5265, 09-5266, 09-5267

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.
ROBERT GATES, *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 FOR NON-GOVERNMENTAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Certificate As To Parties, Rulings, And Related Cases

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned counsel of record certifies as follows:

(A) **Parties and *Amici*.** To *amici*'s knowledge, all parties, intervenors, and *amici* appearing in this court are listed in the Brief for Appellees, other than Non-Governmental Organizations (People for the American Way Foundation, the Constitution Project, the Rutherford Institute, Reprieve) filing this brief as *amici curiae* in support of Appellees.

(B) **Ruling Under Review.** References to the ruling at issue appear in the Brief for Appellants.

(C) **Related Cases.** References to related cases appear in the Brief for Appellants.

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INTEREST OF *AMICI CURIAE*

Amici People for the American Way Foundation, the Constitution Project, Reprieve, and the Rutherford Institute are non-governmental organizations that have supported habeas rights for non-citizens detained by the United States at Guantánamo Bay.[1] Although *amici* have no first-hand knowledge of how the conditions at Bagram compare to those at Guantánamo, *amici* are familiar with the practicality arguments raised by the Government now and throughout the Guantánamo litigation. *Amici* write to share with this Court two ways in which the experience of the Guantánamo habeas litigation is instructive in this case. *First*, District Judges overseeing the Guantánamo litigation have carefully tailored habeas procedures to accommodate concerns the Government has raised about the practical burdens of extending habeas to individuals captured in the context of overseas combat operations. *Second*, the Guantánamo litigation also demonstrates the importance of habeas review by federal courts, notwithstanding the Government's assurances that it already provides ample administrative procedures to ensure that it is only detaining enemy combatants.

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[1] Appendix A contains a full description of the Interests of *Amici Curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government asserts that "the practical obstacles to permitting the detainee[s] to pursue habeas relief in United States court" must be a "paramount" consideration in this case. Appellants' Br. 18. It claims that conducting habeas hearings for suspected alien enemies captured in overseas combat operations and detained abroad would burden the Executive Branch in a number of ways, including by diverting military resources and disclosing intelligence to the enemy. The Government also suggests that there is little practical need for habeas hearings for the Bagram detainees, because they are all enemies of the United States and the Government already has in place adequate administrative procedures to ensure that accurate determinations are made, thereby avoiding the detention of any individuals over whom the Government lacks detention authority. As described in Part I below, the Government raised remarkably similar arguments throughout the litigation over whether federal courts had habeas jurisdiction for detainees captured overseas and held at Guantánamo Bay.

The parallels between the Government's arguments in this case and in the Guantánamo litigation are significant in two respects. *First*, although every Justice of the Supreme Court recognized the importance of the practical concerns raised by the Government in the Guantánamo cases, the Supreme Court in *Boumediene* nevertheless concluded that those considerations could be mitigated by the district

courts through careful crafting of procedural and evidentiary rules. That judgment has proven to be correct. In the year and a half since *Boumediene* was decided, District Judges in this Circuit have aggressively (arguably too aggressively) accommodated the Government's concerns—by, for example, significantly limiting the ability of detainees to participate in their own hearings, embracing traditionally less reliable sources of information, clamping down on detainees' ability to communicate with their lawyers, shrinking the universe of discoverable documents, and narrowing the Government's obligation to produce exculpatory evidence. *See infra* at II.A.

Second, the Government's arguments concerning the accuracy of its internal processes have not withstood independent judicial oversight. In those Guantánamo habeas cases that have reached the merits to date, District Judges within this Circuit have found insufficient evidence to sustain the detention of 30 of the 38 detainees still in custody at Guantánamo, to say nothing of those long-since released. The Government's arguments are no more convincing now than they have proven to be in *Boumediene* and in the habeas litigation that followed.

To be sure, *amici* do not discount the legitimacy and seriousness of the Government's warnings, now and before, that providing habeas hearings to detainees captured overseas imposes practical burdens on the Executive Branch. Undoubtedly, facilitating habeas hearings for detainees demands time and

resources from the Executive Branch and the military, and in particular from the Government's lawyers. Nonetheless, the post-*Boumediene* litigation has demonstrated that these practical obstacles can be overcome. And the Supreme Court in *Boumediene* ultimately decided that habeas was too significant in protecting the separation of powers within our constitutional system to be rendered subservient to practical considerations, particularly because district courts could be trusted to accommodate the Government's important interests. The work of the District Judges in this Circuit post-*Boumediene* has more than vindicated the Supreme Court's judgment.

ARGUMENT

I. THE GOVERNMENT'S ARGUMENTS AGAINST PROVIDING HABEAS RIGHTS TO APPELLEES REPRISE SIMILAR ARGUMENTS ADVANCED IN THE GUANTÁNAMO LITIGATION

A. The Government Argues Here, As It Did With Respect To Detainees Held At Guantánamo, That There Are Practical Obstacles To Habeas Hearings

Both before the district court and now on appeal, the Government insists that habeas hearings for the appellees will inevitably impose a number of harms on the military and the nation. "[T]he Executive Branch has determined," it writes, that "the practical consequences" of allowing habeas "would indeed be severe."

Appellants' Br. 43-44.[2] The Government invoked these same practical consequences as counseling against habeas review in the Guantánamo cases. And, as explained *infra* I.C, the Supreme Court has found these arguments unavailing.

1. The Government contends that habeas review will divert resources from the military mission. The Government first argues that habeas proceedings would "divert the attention of military personnel from other pressing tasks." Appellants' Br. 44 (quotation omitted). In particular, "command and military personnel … would have to spend considerable time facilitating detainee presence for habeas proceedings." *Id.* at 45-46. In addition, habeas proceedings would "divert resources and time from the war effort by obligating military officials to review documents, respond to burdensome discovery requests, and provide declarations." *Id.* at 51. Habeas hearings would also "'require expenditure of funds'" and "'allocation of shipping space, guarding personnel, billeting and rations.'" *Id.* at

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[2] In addition to asserting concrete practical concerns, the Government's brief repeats lengthy quotations from a passage in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), worrying that habeas could be disadvantageous in less tangible ways, *e.g.*, it would "diminish the prestige of our commanders," and be "highly comforting to enemies of the United States." *Compare* Appellants' Br. 25, 52, *with Boumediene* Br. 19-20; *Rasul* Br. 21; *Hamdi* Br. 49 (all quoting the same passage at length).

Here, and throughout this brief, we refer to the Government's briefs on the merits in the Supreme Court by the name of the petitioner in each case. We adopt an analogous practice for the Government's *amici*.

44, 45 (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008), and *Eisentrager*, 339 U.S. at 779).

In earlier litigation, the Government likewise asserted that habeas proceedings would divert the military's time and resources. In *Boumediene*, it argued that Congress "recognize[ed] that detainee litigation was consuming enormous resources and disrupting the operation of the Guantanamo Bay Naval Base." *Boumediene* Br. 5. Its *amici* warned that the "physical removal of soldiers from the battlefield to give evidence in civilian courts" would "deplet[e] our battlefield ranks and undermin[e] the military campaign," and that "habeas rights would place enormous logistical burdens on the military" by requiring it "to coordinate and use overstretched resources to transport soldiers, terrorists, witnesses, and evidence across the globe." Foundation for Defense of Democracies ("FDD") *Boumediene* Amicus Br. 24-25. The Government expressed this concern most succinctly in *Hamdi*: "the military's duty is to subdue the enemy and not to prepare to defend its judgments in a federal courtroom." *Hamdi* Br. 49.

2. The Government asserts that discovery would threaten national security. The Government asserts here that habeas hearings would lead to a "wide range of discovery regarding military affairs and operations," Appellants' Br. 51, and that affidavits or responses to discovery requests from the military "might be

used by our enemies to gather intelligence about American capture operations," *id.* at 52.

The Government and its *amici* in *Boumediene* likewise warned about "the danger that discovery into military operations might intrude on sensitive secrets of national defense." *Boumediene* Br. 55 (internal quotation marks omitted); *see also* FDD *Boumediene* Amicus Br. 19 ("Federal-court litigation threatens our intelligence efforts, and thus our national security, because it affords all parties, including terrorists, the right of discovery" and "thus makes it virtually certain that the Government's most highly sensitive and effective tools will be turned over to al Qaeda and other terrorist networks.").

3. The Government argues that developing factual evidence would be intrusive and onerous. The Government also argues that it would be unworkable to enforce the District Court's holding that the right to habeas corpus turns on whether the detainee was captured within Afghanistan. In its view, determining facts about a detainee's place of capture "would entail the same type of intrusive factual development, onerous discovery, and logistical burdens of litigating habeas corpus on the merits." Appellants' Br. 52; *see also* Special Forces Ass'n Amicus Br. 24-31 (contending that habeas would burden capture operations). This evidentiary fact-finding, the Government contends, "directly implicates the concerns expressed in *Eisentrager* about the ability of aliens to fetter the field

commander by 'call[ing] him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.'" Appellants' Br. 52 (quoting *Eisentrager*, 339 U.S. at 779) (alteration in original).

The Government has noted similar concerns about judicial fact-finding before. In *Hamdi*, it stated that "the acknowledged fact that Hamdi was seized in Afghanistan means that attempting to conduct any evidentiary proceedings concerning the military's enemy-combatant determination would place courts in an untenable position," and warned of the practical difficulties of "[a]ttempting to reconstruct the scene of Hamdi's capture during the battle near Konduz, Afghanistan in late 2001." *Hamdi* Br. 31. The Government's *amici* relayed these concerns in *Boumediene*. As one brief explained, if detainees housed at Guantánamo had habeas rights, then "[a]t the same time they are engaged in conflict with the enemy, American soldiers … would have to document their conduct on the battlefield." FDD *Boumediene* Amicus Br. 24-25. Then, as now, the Government's arguments focused on practical obstacles related principally to the circumstances of capture—*e.g.*, concerns related to collection of evidence or obtaining documents and testimony from military captors—rather than the place of long-term detention. *See, e.g.*, *Hamdi* Br. 31. This is because Guantánamo was

largely populated by flights that originated at Bagram, carrying individuals assertedly captured on the battlefield in Afghanistan.

4. The Government warns of difficulties with providing access to counsel. The Government now argues that it would be burdened by having to "coordinat[e] counsel access to detainees." Appellants' Br. 46. It argues that video-conference facilities are limited and would be difficult to use in a manner that preserves attorney-client privilege. *Id.* at 50. And it adds that even if video-conferencing were available, "it is highly doubtful that detainees' counsel would not demand face-to-face meetings with their clients." *Id*.

The Government previously expressed concern about allowing those captured overseas and detained at Guantánamo or in the United States to meet with counsel. In *Rasul*, it asserted that "any judicial demand that the Guantanamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to" "important intelligence-gathering operations." *Rasul* Br. 54. It further fleshed out the point in *Hamdi*: "The military has learned that creating a relationship of trust and dependence between a questioner and a detainee is of 'paramount importance' to successful intelligence gathering," and "[t]his

critical source of information would be gravely threatened" if "a right to counsel automatically attaches." *Hamdi* Br. 42-43. [3]

B. The Government Argues Here, As It Did With Respect To Detainees Held At Guantánamo, That There Is No Practical Reason For Habeas Proceedings

The Government also reprises a pair of arguments it made previously that there would be little practical benefit to habeas review. It asserts that exhaustive procedural protections are already provided to the detainees, and that, as a result,

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[3] The Government raised another practical argument against habeas access for Guantánamo detainees, which it does not repeat here. In *Hamdi*, the Government observed that "the general practice of the U.S. military—and the practice called for by [the Geneva Conventions]—is to evacuate captured enemy combatants from the battlefield and to a secure location for detention." *Hamdi* Br. 20. Limiting habeas access to Guantánamo detainees, the Government warned in *Rasul*, "would create a perverse incentive to detain large numbers of captured combatants in close proximity to the hostilities where both American soldiers *and* the detainees themselves are more likely to be in harm's way." *Rasul* Br. 56. For that reason, the Government argued against "drawing an arbitrary legal distinction" between Guantánamo and Bagram detainees. *Id.*

Justice Scalia likewise warned in *Boumediene* that habeas limited only to those detained at Guantánamo Bay would be counterproductive for future detainees, because the Government would be incentivized to hold them, inter alia, in Afghanistan. *See Boumediene*, 128 S. Ct. at 2294 ("Had the law been otherwise, the military surely would not have transported prisoners [to Guantánamo], but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.").

this Court can be reasonably assured that the only individuals still in detention are unquestionably lawfully detained. *See* Appellants' Br. 9-11.

1. The Government asserts that each of the detainees is an enemy. The Government contends that permitting habeas review would be anomalous because "in this case, the detainees *are enemy* aliens captured and held abroad as part of enemy forces." Appellants' Br. 30 (emphasis added). The Government explains that each of the "approximately 600 long-term detainees" held at Bagram meets certain criteria, *e.g.*, that he was "part of, or substantially supported Taliban or al-Qaida forces or associated forces." *Id.* at 9, 10. Put simply: "When the U.S. Government holds someone for an extended period of time at Bagram, it does so of necessity, not because of whim or convenience." *Id.* at 58.

The Government similarly asserted that the detainees held at Guantánamo were all "enemies." In *Boumediene*, it emphasized to the Supreme Court that "each petitioner … has been individually determined to be an actual enemy." *Boumediene* Br. 21 (internal quotation marks omitted). Earlier, the Government explained that the military had determined that each of the then-"about 650 aliens at Guantanamo"—which included "direct associates of Osama Bin Laden; al Qaeda operatives with specialized training … and Taliban leaders"—"is part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." *Rasul* Br. 5-7. The Government

maintained that it detains only those it must, and "[i]ndividuals who are not enemy combatants are released by the military." *Id.* at 6.

2. The Government assures the Court of the sufficiency of the administrative procedures provided to the detainees. The Government argues that under new procedures it introduced at Bagram while this case was on appeal, "the status of each detainee will be reviewed by a board of three neutral, field-grade officers" and that "[e]very detainee will be provided a 'personal representative,' who is 'familiar with the detainee review procedures' and who has access to the information relevant to status determination, including classified material." Appellants' Br. 61-62. Detainees will be permitted to testify, call and question witnesses, and present evidence. *Id.* The standard of proof is a preponderance of the evidence, and the Government will not have a presumption in favor of its evidence. *Id.*

The Government made the parallel claim in *Boumediene* that "Petitioners, along with other enemy combatants being held at Guantanamo Bay, enjoy more procedural protections than any other captured enemy combatants in the history of warfare." *Boumediene* Br. 9. The detainees held at Guantánamo could challenge their status during Combatant Status Review Tribunals (CSRTs) in front of a neutral decision-maker composed of three neutral officers. Each detainee had a personal representative, who had access to classified information. The detainee

could testify and introduce documentary evidence, and call and question witnesses, and the standard was a preponderance of the evidence. *Boumediene* Br. 48-52.

C. The Supreme Court Held That District Courts Should Tailor Habeas Review To Protect Constitutional Principles While Alleviating Practical Obstacles

In the face of these arguments, each of the opinions in *Boumediene* expressly recognized the significance of practical considerations. To be sure, some of the Justices concluded that such concerns counseled against providing habeas corpus to the detainees. Chief Justice Roberts, for example, reasoned that Congress had already provided the Guantánamo detainees "adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow." *Boumediene*, 128 S. Ct. at 2289 (Roberts, C.J., dissenting); *cf. id*. at 2294 (Scalia, J., dissenting) (warning about the practical consequences of the Court's decision).

Practical considerations also played a significant role in the majority's opinion. As the Court explained, "we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas 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. "While we are sensitive to these concerns," the Court continued, "we do not find them dispositive. 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." *Id*. at 2261.

The Court stressed that "it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent," *id*. at 2276; that "[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ," *id*., and that "the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible," *id*. As the *Boumediene* majority concluded, "[t]hese and the other remaining questions are within the expertise and competence of the District Court to address in the first instance." *Id*.; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 538–39 (2004) (plurality) ("We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.").

II. THE POST-*BOUMEDIENE* EXPERIENCE SHOWS THAT COURTS CAN ACCOUNT FOR PRACTICAL CONCERNS, WHILE DEMONSTRATING THE VALUE OF HABEAS PROCEEDINGS

A. The Guantánamo Habeas Hearings Show That District Courts Can Properly Tailor The Scope Of Habeas Review To Alleviate Practical Problems

Following the Supreme Court's guidance in *Boumediene*, and in recognition of the fact that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting," *Hamdi*, 542 U.S. at 535 (plurality), the District Court has gone out of its way to craft habeas procedures that accommodate the Government's interests—arguably too far out of its way. These post-*Boumediene* efforts have confirmed what the majority in *Boumediene* predicted: that District Judges are more than capable of tailoring the habeas process to ameliorate practical burdens on the Executive Branch and the military. Although *amici* have differing views as to the merits of each of these specific accommodations, there can be no question that the District Court's post-*Boumediene* efforts have succeeded in addressing the Government's practical concerns. And while habeas review for appellees in this case may pose additional or different practical hurdles, the Guantánamo decisions demonstrate the breadth and extent of obstacles the District Court has already been able to accommodate—and this Court may further articulate any additional accommodations it deems necessary.

1. The District Court has minimized the need to divert time and resources from the war effort. The Government has repeatedly warned that habeas review at Guantánamo might consume significant amounts of military time and resources, *see supra* at I.A.1. Since *Boumediene*, however, the District Court has accommodated these concerns in four significant ways.

First, the District Court has shielded military officials from having "to spend considerable time facilitating detainee presence for habeas proceedings," Appellants' Br. 45-46. Judge Hogan's Case Management Order ("CMO"), which governs the overwhelming majority of habeas cases in the District Court, categorically bars detainees from participating in the classified portion of their hearing—and detainees have no right to participate in the *unclassified* portions either. Rather, judges use "available technological means that are appropriate and consistent with protecting classified information and national security" to "attempt to provide the petitioner with access to unclassified portions of the hearing." *In re Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *4 (D.D.C. Nov. 6, 2008) ("CMO"); *see also Dokhan v. Obama*, 599 F. Supp. 2d 18, 23 (D.D.C. 2009); *Al Aweda v. Bush*, 585 F. Supp. 2d 101, 108 (D.D.C. 2008). Accordingly, it is standard practice to allow detainees to participate in hearings via telephone, *see, e.g.*, *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 36 (D.D.C. 2009); *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008), and to allow them to testify using video

teleconferencing, *see, e.g.*, *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008) ("Petitioners' counsel thereafter put two of the detainees on the stand via video-teleconference from Guantanamo Bay, Cuba."). As Judge Bates observed in this case, video conferencing "is the process being used in scores of Guantanamo habeas proceedings now taking place in this District Court, in which *no* Guantanamo detainee has been physically transferred here." *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 229 (D.D.C. 2009) (emphasis added).[4]

Second, the District Court has significantly limited the extent to which military and intelligence officials themselves are obligated to participate in habeas proceedings. In reliance on the Supreme Court's statement in *Hamdi* that, in limited contexts, hearsay "may need to be accepted as the most reliable available evidence from the Government," 542 U.S. at 533-34 (plurality), the District Court has broadly authorized the use of hearsay statements and thus largely exempted military officials from having to attest to their personal observations. *Khan v. Obama*, 2009 WL 2524043, at *2 (D.D.C. July 31, 2009) (noting that "[t]he Federal Rules of Evidence do not apply strictly in these Guantanamo habeas cases," and that "courts must be flexible in evaluating the evidence presented by

[4] In response to the Government's arguments about the lack of video-conferencing resources at Bagram, *see* Appellees' Br. 37.

the parties"); *see also Al Odah v. United States*, 2009 WL 2730489, *2, *7-8 & n.11 (D.D.C. Aug. 24, 2009) (admitting hearsay and general circumstantial evidence about individuals who used certain travel patterns); *Awad v. Obama*, 2009 WL 2568212, at *4-5 (D.D.C. Aug. 12, 2009) (allowing use of newspaper stories); *Dokhan*, 599 F. Supp. 2d at 22 (generally allowing reliance on hearsay); *Al Aweda*, 585 F. Supp. 2d at 107 (same); *Al Hakeemy v. Bush*, 588 F. Supp. 2d 25, 28 (D.D.C. 2008) (same).

Third, the District Court has accommodated the Government's interest in minimizing the expenditure of military resources to provide detainees' counsel with access to classified information. For instance, Judge Hogan's Protective Order, *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 148 (D.D.C. 2008) ("Protective Order"), calls for the arrangement of only "one appropriately approved secure area for petitioners' counsel's use" to review classified information and documents. And in *Al-Ghizzawi v. Obama*, Judge Bates flatly rejected a Chicago lawyer's request that other areas be established, despite being "sympathetic to plaintiff's counsel and to the strain placed upon her time and resources in traveling from Chicago to the secure facility in Washington, D.C." 2009 WL 481672, at *1 (D.D.C. Feb. 26, 2009).

Fourth, although the District Court generally has been less accommodating of the Government's lawyers, *see, e.g.*, *Bostan v. Obama*, 2009 WL 2516296, at *2

(D.D.C. Aug. 19, 2009) (considering "the burden imposed on the government, *not* on its counsel"), it has not been unsympathetic to the "considerable demands placed on the Department of Justice by the litigation in the numerous Guantanamo Bay detainee cases," *id.* For example, in *Zemiri v. Obama*, 597 F. Supp. 2d 143 (D.D.C. 2009), the District Court granted the Government the full amount of time it had requested to comply with discovery obligations, and it warned counsel to detainees that "a petitioner who requests additional discovery must necessarily decide whether obtaining such discovery outweighs the often inevitable delays that follow," *id.* at 145; *accord Al Bihani v. Obama*, 2009 WL 3049054, at *15 (D.D.C. Sept. 18, 2009) (granting the Government a four-week extension).

2. The District Court has aggressively limited the scope of discovery and adopted various procedures to protect classified information. The District Court has also accommodated the Government by dramatically curtailing the scope of discovery to encompass only information that is "essential to render a habeas corpus proceeding effective," CMO, 2008 WL 4858241, at *2 (citation and internal quotation marks omitted), and by adopting procedures designed to protect national security.

First, the CMO shrinks the universe of discoverable evidence. It obligates the Government to disclose only three narrow categories of information, upon a petitioner's request: "(1) any documents or objects in its possession that are

referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted." *Id*.; *see also Dokhan*, 599 F. Supp. 2d at 20-21 (same); *Al Aweda*, 585 F. Supp. 2d at 105 (same). The District Court has vigorously enforced the boundaries of these categories. *See, e.g.*, *Bin Attash v. Obama*, 628 F. Supp. 2d 24, 32 (D.D.C. 2009) (denying petitioner's discovery request because Government did not specifically rely on the information sought); *Al-Uwaidah v. Bush*, 2009 WL 234341, at *1-2 (D.D.C. Feb. 2, 2009) (rejecting request for jurisdictionally relevant information about petitioner's alleged transfer to Saudi Arabia).

Although the CMO allows "limited discovery beyond" the three categories described above, any such discovery requires a showing of "good cause." CMO, 2008 WL 4858241, at *2. Requests must be "narrowly tailored, not open-ended," and "likely to produce evidence that demonstrates that the petitioner's detention is unlawful." *Id.* These stringent standards preclude "broad requests for discovery akin to requests one would make in normal civil litigation," *Paracha v. Obama*, 2009 WL 2751788, at *1 (D.D.C. Aug. 28, 2009). Thus, as several District Judges have observed, "'[a] discovery request that starts with 'any and all' is almost certainly in trouble,'" *id.* (quoting *Sadkhan v. Obama*, 608 F. Supp. 2d 33, 39

(D.D.C. 2009)) (alteration in original). The cases in the District Court have borne this out. *See, e.g.*, *id.* at *1 (rejecting overly broad discovery request); *Rabbani v. Obama*, 608 F. Supp. 2d 62, 67 (D.D.C. 2009) (same); *see also Al-Khateeb v. Obama*, 2009 WL 2096219, at *1 (D.D.C. June 22, 2009) (partially denying even *specific* discovery requests); *Bin Attash*, 628 F. Supp. 2d at 32, 35 (rejecting request based on "speculation").

Second, the District Court has imposed restrictions that minimize the risk of harm to national security. Just as a detainee is categorically barred from participating in the classified portions of his hearing, *see supra* pp. 16-17, he has no right to review the classified information in the Government's factual return. *See* CMO, 2008 WL 4858241, at *2. And as noted above, in certain circumstances the Government may even rely on classified information without providing it to petitioner's *counsel*. The District Court reviews such information *in camera* to determine whether withholding it is "in the interest of national security," *id.*; *see also Bin Attash*, 628 F. Supp. 2d at 36 (same); *Dokhan*, 599 F. Supp. 2d at 21 (same); *Al Aweda*, 585 F. Supp. 2d at 106 (same). *Amici* are not aware of a single allegation that classified or secret national security information has been revealed to the public or the enemy as a consequence of the post-*Boumediene* habeas hearings.

3. The District Court has developed techniques to reduce the intrusiveness of the fact-finding process. The District Court has aggressively accommodated the Government's concern that habeas fact-finding has the potential to be intrusive and onerous. *First*, the District Court has employed flexible evidentiary standards and has routinely allowed reliance upon hearsay evidence, *see supra* at II.A.1, and other traditionally less reliable forms of evidence, *see Al Odah*, 2009 WL 2730489, at *7 n.11 (allowing the Government to rely on the fact that petitioner's travel route to Kandahar had previously been used by those intending to engage in jihad, and rejecting the petitioner's argument that this was "guilt by association"); *Awad*, 2009 WL 2568212, at *4 (allowing reliance on newspaper articles); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 243-44 (D.D.C. 2009) (denying habeas petition on the basis of intelligence and law enforcement reports).

Second, several District Court Judges have relied upon language in *Hamdi* to find that Government evidence should be accorded a presumption of authenticity and accuracy in appropriate circumstances. *See, e.g.*, CMO, 2008 WL 4858241, at *3; *see also Dokhan*, 599 F. Supp. 2d at 21-22; *Al Hakeemy*, 588 F. Supp. 2d at 27-28 (same). Even those judges who have denied these presumptions in particular cases have acknowledged that they would be appropriate if the "'exigencies of the circumstances'" demanded it. *Bostan*, 2009 WL 2516296, at *3 (quoting *Hamdi*, 542 U.S. at 534 (plurality)) (alteration omitted). These presumptions make it less

necessary for military and intelligence officials to appear in Court and testify to the veracity of the Government's documentation.

Third, the District Court has narrowed the Government's obligation to produce exculpatory evidence, limiting it to evidence that is "reasonably available," and construing that phrase to include only "evidence contained in any information reviewed by attorneys preparing factual returns for all detainees" and "evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay." Amended CMO, *In re Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *1 (D.D.C. Dec. 16, 2008); *see Al Hakeemy*, 588 F. Supp. 2d at 27 (same); *Dokhan*, 599 F. Supp. 2d at 20 (same); *see also Bin Attash*, 628 F. Supp. 2d at 34 n.5 ("[T]he Court cannot order the government to conduct a generalized search . . . ."). By restricting the Government's duty to turn over exculpatory evidence to those documents uncovered by Government lawyers while preparing for habeas litigation, the District Court has ensured that *military officials* are not compelled to spend inordinate amounts of time searching for exculpatory materials in their possession.

4. The District Court has circumscribed detainees' access to counsel. Mindful of the Government's concerns that access to counsel would create significant logistical and national security problems, the District Court has put in place several restrictions on access to counsel.

The District Court has reduced the logistical burden on the Government by sharply limiting the ability of detainees to confer with counsel. The Court has instructed counsel for detainees to "cooperate to the fullest extent" with the Government to "reach a reasonable agreement on the number of counsel visits allowed." Protective Order, 577 F. Supp. 2d at 157. Any requests to meet with a detainee must be submitted in advance to the Department of Justice. *Id.* at 158. If counsel believes the Government is unreasonably limiting the amount of visits, counsel's only recourse is to "petition the Court at the appropriate time for relief." *Id.* at 157-58.

This flexible framework preserves the District Court's ability to take account of all relevant circumstances. And it has been applied in a manner that accords significant respect to the Government's interests: critical access-to-counsel hearings have been conducted via video-teleconference, *see Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 319 (D.D.C. 2009) (competency and dismissal-of-counsel hearing); counsel have generally not been provided with a line of communication to detainees during hearings, *see Al Hakeemy*, 588 F. Supp. 2d at 28 (requiring only that "the petitioner's counsel . . . have the opportunity to contact the petitioner by secure telephone on at least *one* occasion prior to presenting its case" (emphasis added)); and counsel have been afforded only a limited right to inquire into the physical and mental health of the detainees they represent, *see, e.g.*, *Tumani v.*

Obama, 598 F. Supp. 2d 67, 70 (D.D.C. 2009); *Husayn v. Gates*, 588 F. Supp. 2d 7, 11 (D.D.C. 2008).

The District Court has also put in place stringent restrictions to accommodate the Government's concern that providing access to counsel might pose a threat to national security. Counsel must hold a security clearance "at the Secret level or higher," and must provide "in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency that granted the clearance." Protective Order, 577 F. Supp. 2d at 157. Counsel is entitled to review classified documents only in the single secured location provided by the Government, *id.* at 148, and may not "disclose to a petitioner-detainee classified information not provided by that petitioner-detainee," *id.* at 150. Mail between a detainee and counsel is reviewed by a Government "privilege team," and various other strictures apply, *id.* at 158-59. Counsel must agree to comply fully with every provision in the Protective Order, and any failure results in complete denial of "access to or communication with detainees," *id.* In addition, the Government may withhold classified information even from counsel "in the interest of national security." *See* CMO, 2008 WL 4858241, at *2.

B. The Post-*Boumediene* Experience Shows The Importance Of Habeas Review

The painstaking lengths to which the District Judges within this Circuit have gone in accommodating the Government's practical concerns in the Guantánamo

cases become all the more striking when juxtaposed against the results of these cases on the merits: In 30 of the 38 habeas cases in which the Government's detention authority has been resolved on the merits, the court has concluded that the evidence adduced is insufficient as a matter of law to justify the detainee's confinement. *See* Chisun Lee, An Examination of 38 Gitmo Detainee Lawsuits, *ProPublica* (updated Sept. 29, 2009), http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722. These decisions have come from the same jurists who once believed that there was "no viable legal theory" on which the detainees could prevail. *See, e.g.*, *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).

Now, deriding some of the Government's arguments as "def[ying] common sense," *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 128 (D.D.C. 2009), and noting in other cases that the Government's evidence reduces to "a mosaic of tiles bearing [murky] images," *el Gharani v. Bush*, 593 F. Supp. 2d 144, 149 (D.D.C. 2009), the district courts have found in the vast majority of cases that the Government's evidence against individual detainees cannot withstand scrutiny. Although any number of cases prove the point, Judge Kollar-Kotelly's ruling in *Al Rabiah v. United States*, 2009 WL 3083077 (D.D.C. Sept. 17, 2009), is instructive. There, the Government relied exclusively on a detainee's confession that, as the court concluded, "even the Government's own interrogators did not believe." *Id*. at *27.

To similar effect, a host of decisions have rejected as proof of a detainee's status statements that are entirely conclusory, equivocal, or speculative. *See, e.g.*, *Ahmed v. Obama*, 613 F. Supp. 2d 51, 57 (D.D.C. 2009); *el Gharani*, 593 F. Supp. 2d at 149; *Al-Adahi v. Obama*, 2009 WL 2584685, at *13-14 (D.D.C. Aug. 17, 2009); *Al Mutairi v. United States*, 2009 WL 2364173, at *13-14 (D.D.C. July 29, 2009); *Boumediene*, 579 F. Supp. 2d at 197.

Courts are reaching these conclusions despite drawing any number of evidentiary inferences in the Government's *favor*. Thus, one District Court Judge denied relief even while observing that the Government's case against that particular detainee was "gossamer thin." *Awad*, 2009 WL 2568212, at *6; *see also id*. ("The evidence is of a kind fit only for these unique proceedings [redacted] and has very little weight."). These are not judges placing a thumb on the detainees' side of the scale, but rather jurists who, even under evidentiary standards too lax to be acceptable in other contexts, are *still* finding the Government's evidence insufficient in the vast run of cases.

In addition, habeas review has allowed judges to assess the substantive definition that the Government has used in determining the scope of its legal authority to detain enemy combatants under the AUMF, as informed by the laws of war. *See Hamdi*, 542 U.S. at 521 (plurality). The Government argued in *Boumediene* that it could detain any "individual who was part of or supporting

Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Boumediene* Br. 63. It has since modified that standard by adding "substantially" before "support." *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (D.D.C. 2009); *see also* Appellants' Br. 9-10 (noting that this is the substantive standard the Government applies at Bagram). After carefully studying the matter, however, numerous District Judges have held that the detention authority claimed by the Government is broader than that permitted by law. *E.g.*, *Hamlily*, 616 F. Supp. 2d at 69 (Bates, J.) (rejecting "the concept of 'substantial support' as an independent basis for detention" and also holding "that 'directly support[ing] hostilities' is not a proper basis for detention"); *Anam v. Obama*, 2009 WL 2917034, at *2 (D.D.C. Sept. 14, 2009) (Hogan, J.); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (Lamberth, C.J.); *Awad v. Obama*, 2009 WL 2568212, at *2 (D.D.C. Aug. 12, 2009) (Robertson, J.); *Al Mutairi v. United States*, 2009 WL 2364173, at *4-*5 (D.D.C. July 29, 2009) (Kollar-Kotelly, J.).[5] These decisions demonstrate that the

[5] *See also al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part) ("[F]or someone to be classified as an enemy combatant: the person must (1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of

Government may well hold in custody at Bagram individuals whom it lacks the statutory authority to detain—whatever the strength of its evidence.

C. The Government's Arguments And The Experience In The Courts Suggest That The Practical Case For Habeas Is In Some Respects Stronger Now Than It Was At The Time Of *Boumediene*

Amici do not discount the effort and resources that would be required of the Executive Branch in giving appellees habeas hearings, and take no position on whether there are any practical considerations for appellees that have no analogue in the Guantánamo cases. Nonetheless, there are some ways in which practical considerations counsel in favor of habeas *more* strongly now than they did at the time of *Boumediene.*

First, the Government's *Boumediene* brief highlights a significant difference between the non-habeas process afforded detainees in that case and the process afforded here. The Guantánamo detainees had a statutory right to challenge their detention in this Court, in a process that "allow[ed] for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations." *Boumediene* Br. at 53. Moreover, the combination of the CSRT and D.C. Circuit review, explained the Government, would prevent "evidence

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the enemy nation or organization."), *vacated sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

procured through torture or coercion" from being used as the basis for detention. *Id.* at 58. This Court's decision in *Parhat v. Gates*, underscores the importance and meaningfulness of that review. 532 F.3d 834, 850 (D.C. Cir. 2008) (following Congress's mandate that it "'engage in meaningful review of the record'"). Because the procedures for detainees held at Bagram do not permit review by this (or any other) Court in *any* circumstances, there is a greater practical value to habeas here.[6]

Second, in light of the District Court's efforts to reduce practical burdens, the Government has chosen to abandon one of the "practical obstacle" arguments it emphasized in prior cases: that the federal courts themselves might be overly burdened by habeas proceedings. In its briefing in *Boumediene*, for instance, the Government argued that the "volume and nature of challenges that the detainees have made [in federal courts] have had an impact on the process," *Boumediene* Br. 59-60. The Government's *amici* similarly worried about whether the courts could handle habeas proceedings. *See* FDD *Boumediene* Amicus Br. 30 ("The burden on the federal judiciary of granting such broad habeas rights to enemy combatants

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[6] The DTA illuminates another significant difference between the Guantánamo cases and this one: In *Boumediene*, the Supreme Court had before it a detailed set of procedures that Congress itself had ratified, a point the Government emphasized heavily before the Supreme Court. Here, Congress has not developed or lent sanction to any procedures at all.

would, for the foreseeable future, be substantial; in the case of a major global war in the future, it would be catastrophic."). In light of the successful administration of these issues by judges in this Circuit, the Government appears to have dropped this concern. As a consequence, this Court now knows for certain what the Supreme Court could only hope for in *Boumediene*: that District Courts are fully capable of managing the habeas process and of crafting the habeas process to ameliorate practical obstacles.

CONCLUSION

For the foregoing reasons, the practical considerations the Government raises do not counsel against providing appellees with access to the writ of habeas corpus.

Dated: November 6, 2009

Respectfully Submitted,

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Appendix A: Description of *Amici Curiae*

People For the American Way Foundation (People For) is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has hundreds of thousands of members and supporters nationwide. One of People For's primary missions is to educate the public on our tradition of liberty and freedom, and it defends that tradition, including the fundamental right to challenge the legality of one's detention, through litigation and other means. Accordingly, People For has filed *amicus* briefs before the Supreme Court in other cases involving these issues, including *Boumediene v. Bush*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld*.

The Constitution Project is an independent, nonprofit organization that brings together legal and policy experts from across the political spectrum to promote and defend constitutional safeguards. After September 11, 2001, the Project created its bipartisan Liberty and Security Committee, a blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. The committee develops policy recommendations on such issues as the use of military commissions and U.S. detention policy, and emphasizes the need for all three branches of government to play a role in preserving constitutional rights. In March

2007, the Project issued a *Statement on Restoring Habeas Corpus Rights Eliminated by the Military Commissions Act*. The bipartisan group of over thirty-five signers stated that, while there is a need to detain foreign terrorists to protect national security, "we do not believe repealing federal court jurisdiction over habeas corpus serves that goal. On the contrary, habeas corpus is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values."[7] Since the statement's release, the Project has continuously fought to preserve the Great Writ and ensure that it provides meaningful judicial review by acting as *amicus* in such cases as *Kiyemba v. Obama* and *Boumediene v. Bush*.

Reprieve is a London-based legal services charity founded in 1999 by its current director, Clive Stafford Smith, who practiced capital defense litigation in the United States for 20 years. The chairman is Thomas Bingham, Baron Bingham of Cornhill, the recently retired senior law lord in the United Kingdom. The NGO provides *pro bono* legal assistance to prisoners facing the death penalty (both in the United States and around the world) and also litigates to reunite prisoners held

[7] The Project's Statement and the attendant list of signatories are available at http://www.constitutionproject.org/pdf/MCA_Statement.pdf.

beyond the rule of law with their legal rights. Lawyers from Reprieve have been involved in the Guantánamo Bay litigation from the very start, filing the initial case that led to the Supreme Court's decision in *Rasul v. Bush*, and have to date worked on the cases of at least 80 prisoners held there. Reprieve has also been at the forefront of efforts to bring the rule of law to other secret U.S. detention facilities.

The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 27-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Rutherford Institute has also filed *amicus curiae* briefs in cases dealing with critical constitutional issues arising from the current efforts to combat terrorism. *See, e.g.*, *Munaf v. Geren*, *Hamdan v. Rumsfeld*, and *Rasul v. Bush*.

CERTIFICATE OF COMPLIANCE WITH RULE 29(d)

In accordance with D.C. Circuit Rule 29(d), the undersigned certifies that the accompanying brief is necessary. *Amici* are non-governmental organizations that advocated in this Court and others for habeas rights for detainees held at Guantánamo Bay. Having participated in and studied that litigation, *amici* wish to discuss how that litigation may be instructive in the case at hand. *Amici* are not aware of any other brief in this case that describes in detail (1) the Government's practical-obstacle arguments in the Guantánamo cases, (2) the ways in which the District Court has accommodated those concerns in the aftermath of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and (3) the influence the post-*Boumediene* habeas cases should have on this case.

Dated: November 6, 2009

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), the undersigned certifies that the accompanying brief has been prepared using 14-point typeface, proportionally spaced, with serifs. According to the word processing system used to prepare the brief, Microsoft Office Word 2003, the brief contains 6,980 words, exclusive of the table of contents, table of authorities, glossary, attorney identification, and certificates of service and compliance (which does not exceed the applicable 7,000 word limit).

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009, I caused a true and accurate copy of the Brief of Non-Governmental Organizations' as *Amici Curiae* in Support of Appellees to be served upon the following counsel for the parties via electronic mail, by operation of the Court's ECF system:

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