

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
FADI AL MAQALEH,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 06-CV-01669 (JDB)
)	
ROBERT GATES,)	
Secretary, United States Department of)	
Defense, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS’ REPLY TO PETITIONER’S OPPOSITION TO
RESPONDENTS’ MOTION TO DISMISS FOR LACK OF JURISDICTION**

Respondents respectfully submit this reply brief in response to Petitioner’s Opposition to Respondents’ Motion to Dismiss for Lack of Jurisdiction. In their opening brief, respondents demonstrated that this Court has no jurisdiction to hear the present habeas petition because the petition, filed by an alien enemy combatant detained at Bagram Airfield in Afghanistan, falls squarely within the jurisdiction-limiting provision of the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600 (2006). Respondents also demonstrated that petitioner does not have a constitutional right to habeas relief because under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), aliens detained abroad, who have no significant voluntary connections with this country, cannot invoke protections under the Constitution.

As respondents further demonstrated, the recent decision of the Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S.Ct. 1478 (2007), removes all doubt that the MCA divests federal courts of jurisdiction to review petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants in an overseas military base. Finding *Eisentrager* to be the “controlling precedent”

on the constitutional question, *id.* at 991, the Court of Appeals also held that the MCA does not violate the Suspension Clause because “[p]recedent in [the D.C. Circuit] and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.” *Id.*

In response, petitioner argues that the MCA is inapplicable to him because he has not properly been determined to be an enemy combatant by a “competent tribunal” as he erroneously contends is required by the MCA, and that at a minimum, he is entitled to discovery on that jurisdictional question. He also argues that *Boumediene* – which is now the settled law of this Circuit – is wrongly decided because it conflicts with the earlier-decided decision in *Rasul v. Bush*, 542 U.S. 466 (2004). Further, petitioner devotes significant energy attempting to show that his detention violates the Geneva Conventions.

As discussed below, the concept of “competent tribunal” is irrelevant to the jurisdictional inquiry here because the plain language of the MCA’s jurisdiction-limiting provision requires for its application only that the United States has determined petitioner to be an enemy combatant. The record is clear that that predicate for the statute’s application has been met here. No discovery is necessary, much less any need for this Court to examine military decisions made in the theater of active military operations. Moreover, despite petitioner’s arguments to the contrary, this Court must follow the controlling Circuit precedent of *Boumediene*. Finally, petitioner’s reliance on the Geneva Conventions does not help him. Not only does the MCA explicitly preclude such reliance, but the issue of whether petitioner’s detention violates the Geneva Conventions does not affect the fact that this Court has no jurisdiction to proceed now.

ARGUMENT

I. UNDER THE MCA, THIS COURT HAS NO SUBJECT MATTER JURISDICTION TO REVIEW THE PRESENT PETITION

A. The MCA's Jurisdiction-Limiting Provision Applies As Long As the Alien Habeas Petitioner is "Determined By the United States" To Have Been Properly Detained As An Enemy Combatant.

In their opening brief, respondents demonstrated that this Court has no jurisdiction in this case because § 7 of the MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a).¹ Through the declaration of Colonel James W. Gray, respondents established that the Department of Defense ("DoD") has determined petitioner to be an enemy combatant and is detaining him as such. *See* Gray Decl., ¶ 20 (dkt. #7).² As a matter of background, respondents also described the review process in Afghanistan for determining a detainee's enemy combatant status, which includes review by what is known as the Enemy Combatant Review Board ("ECRB"). *See* Respondents' Mot. to Dismiss. at 6-7 (dkt. #7); *see also* Gray Decl., ¶¶ 11-13.

¹ As respondents further showed (Respondents' Mot. to Dismiss at 11-12), the MCA's jurisdiction-limiting provision extends not only to purely habeas claims, but also to all cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b). Thus, this Court similarly has no jurisdiction over petitioner's conditions of confinement claims. *See Paracha v. Gates*, Nos. 05-5194, 05-5211, 05-5333 (D.C. Cir. April 9, 2007) (ordering the dismissal of Guantanamo detainee's motion relating to conditions of his confinement because the district court lacks jurisdiction to consider these claims under 28 U.S.C. § 2241(e)) (attached as Exhibit 1).

² In fact, petitioners' enemy combatant status was recently validated again following the ECRB's review on March 1, 2007. *See* Second Declaration of Colonel James W. Gray ["2d Gray Decl."], ¶ 3 (attached hereto as Exhibit 2).

In response, petitioner argues that § 7 is inapplicable here because, he says, its application depends upon whether petitioner's enemy combatant status was determined by a "competent tribunal," *see* Pet. Opp. at 26, and, he further contends, the ECRB is not such a tribunal. As discussed below, petitioner's arguments have no merit.

1. The Concept of "Competent Tribunal" Is Irrelevant to the Application of the MCA's Jurisdiction-Limiting Provision.

Despite petitioner's attempts to define the term "competent tribunal," that term is irrelevant to the application of the jurisdiction-limiting provision of § 7 in the MCA, which requires only that the habeas petitioner be "determined by the United States" to have been properly detained as an enemy combatant or to be awaiting such a determination. References to determination by a "competent tribunal," in contrast, are in § 3 of the MCA, which concerns the trial of unlawful enemy combatants by military commissions for war crimes. Specifically, the term appears in the subsection defining an "unlawful enemy combatant," which is:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);
or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal ["CSRT"] or another competent tribunal established under the authority of the President or the Secretary of Defense.

10 U.S.C. § 948a(1). Section 3 then provides that "a finding by a ["CSRT"] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." 10 U.S.C. § 948d(c). The issue before this Court is

not whether petitioner may be tried by a military commission for war crimes under § 3; rather, the issue is whether the habeas petitioner has been “determined by the United States” to be enemy combatants. Thus, whether the ECRB is a “competent tribunal” within the meaning of § 3 is irrelevant to a determination of whether this Court can exercise jurisdiction to hear this habeas petition under § 7.

2. Petitioner Is Not Entitled to A CSRT for Purposes of Determining His Enemy Combatant Status, Nor Can He Rely On the Geneva Conventions in Invoking this Court’s Jurisdiction.

In arguing that an ECRB is not a “competent tribunal” within the meaning of MCA § 3, petitioner cites to the procedures available in a CSRT, which in turn closely track the procedures used to adjudicate prisoner-of-war status under Article 5 of the Third Geneva Convention, as set forth in Army Regulation 190-8. *See* Pet. Opp. at 24. Petitioner is not entitled to such procedures, however, because there is no mandate in the DTA, or the MCA, that the military conduct CSRTs for enemy combatants that it captures. Indeed, Congress was aware that the procedures used for determining a detainee’s enemy combatant status differ depending on whether the detainee is held at Guantanamo or in Afghanistan or Iraq, and that CSRTs are conducted at only Guantanamo. *See* DTA § 1005 (a) (requiring the Secretary of Defense to submit a report setting forth procedures of “[CSRTs] and Administrative Review Boards . . . that are in operation at Guantanamo Bay” and for determination of the status of aliens in DoD custody in Afghanistan and Iraq). Nevertheless, the MCA’s jurisdiction-limiting provision is written broadly to cover all detainees who have been “determined by the United States” to be enemy combatants or are awaiting such determination. *See* MCA § 7(a).

Nor does Army Regulation 190-8, which implements the Geneva Conventions, *see* AR 190-8 § 1-1(b), or the Geneva Conventions themselves lend petitioner any support. Although

Army Regulation 190-8 does refer to “competent tribunal,” the term as used in that regulation relates to tribunals constituted to adjudicate prisoner-of-war (“POW”) status under Article 5 of the 1949 Geneva Convention *if there is doubt* as to whether the detainee is entitled to POW status.³ See AR 190-8, § 1-6.⁴ Although the Supreme Court left open in *Hamdan v. Bush*, 126 S.Ct. 1749, 2795 n. 61 (2006), whether Article 5 of the 1949 Geneva Convention applies to the armed conflict with al Qaeda, there is no doubt that petitioner is not a prisoner of war. The President had already determined that Taliban or al Qaeda detainees do not qualify as prisoners of war under Article 4 of the 1949 Geneva Convention. See Memo. for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 2 (Feb. 7, 2002), attached as Exhibit 3. That determination is unquestionably correct because these fighters (and indeed, their associated forces) fail to carry arms openly, wear uniforms, have a fixed distinctive sign recognizable at a distance, or conduct their operations in accordance with the laws and customs of war. See 1949 Geneva Convention, Art. 4 (defining prisoners of war and those who would be treated as prisoners of war). Moreover, subsection 1-5(a)(2) of Army Regulation 190-8 provides that prisoners receive the protections of the Convention only “until some other legal status is determined by *competent authority*” (emphasis added), and, as the D.C. Circuit has held,

³ Notably, Army Regulation 190-8 does not purport to provide an all-inclusive definition of an Article 5 tribunal under the Third Geneva Convention.

⁴ AR 190-8, § 1-6 provides:

In accordance with Article 5, GPW [the 1949 Geneva Convention Relative to the Treatment of Prisoners of War], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such times as their status has been determined by a competent tribunal.

the President, in making his decisions regarding the POW status of al Qaeda and Taliban detainees, is such an authority. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *reversed on other ground*, 126 S. Ct. 2749 (2006).

In any event, despite petitioner's significant reliance on the Geneva Conventions as somehow providing this Court with subject matter jurisdiction (which they do not), Congress, in enacting the MCA as a response to *Hamdan*, made clear that the Geneva Conventions are not judicially enforceable by private individuals. Section 5(a) of the MCA provides that "no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States."

Although petitioner argues that § 5(a) is not retroactive (*see* Pet. Opp. at 19), there is no issue of retroactivity. The law, settled since even before the MCA's enactment, is that treaties, such as the Geneva Conventions, are presumed not to create individually enforceable rights. It has long been recognized that a treaty "is primarily a compact between independent nations," *Head Money Cases*, 112 U.S. 580, 597 (1884), and absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194-195 (1888); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. *Head Money Cases*, 112 U.S. at 597. And "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.*; *see also Holmes v. Laird*, 459 F.2d 1211, 1213, 1222 (D.C. Cir. 1972) (denying U.S. soldiers' claims that because the NATO Status of Forces Agreement granted individual members of the armed

forces specific rights, a federal court could adjudicate a claim based upon those treaty rights; holding that “the corrective machinery specified in the treaty itself is nonjudicial”). Section 5 of the MCA simply provides a clear statement of Congress’ intent to continue to follow the norm with respect to treaties, which is to limit enforcement of a treaty to diplomatic and non-judicial processes. Accordingly, the Geneva Conventions cannot lend petitioner any support in this case.

3. DoD Has Satisfied the DTA’s Requirement That It Reports to Congress the Procedures in Operation in Afghanistan for Determining Alien Detainees’ Enemy Combatant Status.

Although conceding that “[u]ndoubtedly, Congress granted the DoD broad latitude in developing the procedures in question,” Pet. Opp. at 24, petitioner accuses DoD of failing to report to Congress the procedures in place in Afghanistan for determining enemy combatant status as required by the DTA. *Id.* at 23-24. This contention has nothing to do with the MCA’s jurisdiction-limiting aspects, but even if it did, petitioner’s accusation would be unfounded.

Section 1005(a)(1)(B) of the DTA requires the Secretary of Defense to submit to Congress: “the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.”⁵ DoD submitted such a report on August 10, 2006.⁶ The unclassified enclosure of the report is attached hereto as Exhibit 4. The relevant procedures set forth in that report were fully discussed in respondents’ motion to dismiss and in the Gray Declaration, *see* Miler Decl.

⁵ Section 1005(d) of the DTA further requires the Secretary to submit, not later than December 31 each year, an annual report on the review process for aliens in DoD custody outside the United States. DoD plans to submit its first annual report by the end of this year.

⁶ Although the DTA requires that a report be submitted not later than 180 days after the December 30, 2005 enactment of the DTA, DoD received a 60 day extension from Congress to submit the report.

¶¶ 11-13. Those procedures include the authority of the detaining combatant commander to convene, at his discretion, a “panel of commissioned officers to review the available evidence and reach a recommended determination.” *See* Ex. 3 at 3; Gray Decl. ¶ 12. As explained in the Gray declaration, the Commanding General convened such a panel, the ECRB, at Bagram. *See* Gray Decl. ¶ 13. Thus, to the extent petitioner argues that the ECRB is somehow unlawful because DoD allegedly withheld it and other procedures from Congress, the argument is without any foundation.

4. Petitioner Is Not Entitled to Discovery Regarding the Combatant Status Review Procedures in Afghanistan Nor the United States’ Determination of His Enemy Combatant Status.

Petitioner also seeks discovery regarding this Court’s jurisdiction for several purported reasons. First, because respondents have introduced extrinsic facts relevant to the jurisdictional inquiry, and because this Court cannot convert a motion to dismiss for want of jurisdiction into a summary judgment proceeding, petitioner contend that he must be allowed discovery as to those extra-pleading matters. *See* Pet. Opp. at 8-10. Second, petitioner asserts that the jurisdictional issue here requires an examination of the United States’ determination of petitioner’s combatant status and the process that the petitioner actually received, which in turn, petitioner says, requires discovery. *Id.* at 22. Third, petitioner argues that there are factual disputes as to the degree of the United States’ control over Bagram Airfield as compared to Guantanamo Bay, and thus, that he is entitled to discovery on that and other issues discussed in the declarations of Colonel Gray. *See id.* at 15 n. 9.

Petitioner’s arguments are without merit and no discovery is warranted. Contrary to petitioner’s suggestion, this Court would be able to consider extra-pleading materials in

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

Moreover, the D.C. Circuit has held that “[a] plaintiff has no right to discovery in opposing a motion under 12(b)(1),” *Haase v. Sessions*, 835 F. 2d 902, 908 (D. C. Cir. 1987), and the Supreme Court has also held that “[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 295 (1969)). While the court may nevertheless grant discovery to resolve factual disputes necessary to determining the court’s habeas jurisdiction, discovery is inappropriate where, as here, petitioner has no basis for disputing the respondents’ jurisdictional showing. *Cf. Coalition for Underground Expansion*,

333 F.3d at 198 (rejecting plaintiffs' argument that the district court erred in considering a declaration submitted by the defendant on a Rule 12(b)(1) motion without affording the plaintiff an opportunity for discovery, where plaintiff has made no factual allegations which, if substantiated, would establish jurisdiction); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (in a habeas case, "discovery is available only in the discretion of the court and for good cause shown."); Rule 6(a) of the Rules Governing Section 2254 Cases⁷ (requiring leave of court for good cause shown before discovery may be conducted in habeas case by state prisoners).

Here, petitioner has failed to establish good cause for jurisdictional discovery. There is no basis for discovery because this Court clearly lacks jurisdiction under the MCA and *Boumediene*. *Cf. Hicks v. Bush*, No. 02-CV-0299 (CKK), 2007 WL 902303 at *5 (D.D.C. Mar. 23, 2007) ("In *Boumediene*, the D.C. Circuit clearly held that Congress intended to deprive the federal district courts of jurisdiction over 'all cases, without exception, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States since September 11, 2001,' and that Congress did so constitutionally As such, this Court lacks jurisdiction to review Petitioner's habeas petition."). As discussed before, the only factual question relevant to this Court's jurisdiction here is whether petitioner has been "determined by the United States to have been properly detained as an enemy combatant." MCA § 7. The plain language of § 7 indicates that the determination of enemy combatant status (and whether an alien is properly detained pursuant to that determination) is for the United States alone to make.

⁷ Whether or not the Rules Governing Section 2254 Cases actually apply here, the limitation of discovery in such cases is instructive at least by analogy.

Indeed, any determination that a detainee is an enemy combatant is also a determination that the detainee is “properly detained as an enemy combatant” because it is established that all enemy combatants may be properly detained during armed conflict. *See Hamdi*, 542 U.S. at 520-21; *Ex parte Quirin*, 317 U.S. 1 (1942). Accordingly, once respondents have shown that the United States has determined petitioner to be an enemy combatant, there is no basis for petitioner to dispute that fact, and the jurisdictional inquiry is at an end.

Nevertheless, petitioner argues that he is entitled to examine whether the United States’ determination of his enemy combatant status was properly made. But § 7 does not say that the jurisdictional bar applies only where the alien has been “properly determined” to be an enemy combatant. To the extent petitioner seeks to re-write the statute along those lines, he would make the jurisdiction-limiting provision applicable only after the normal habeas inquiry, and thus render § 7 entirely ineffective. In other words, while § 7 plainly provides that this Court has no jurisdiction to hear a habeas petition challenging the legality of an alien enemy combatant’s detention (or any aspect of the enemy combatant’s detention), petitioner’s revision of the statute would require this Court to address whether his detention is based on a proper determination of his enemy combatant status. Essentially, petitioner is seeking the same relief as would be available if Congress never enacted § 7. That he cannot do.

As for the alleged “factual dispute” regarding the United States’ control over Bagram, the manufacture of such a dispute by petitioner would not entitle him to discovery even if the legal impediments just addressed did not bar it. As discussed in detail in the next sections, the degree of United States’ control over Bagram is irrelevant to the jurisdictional inquiry here because as a statutory matter, application of § 7 of the MCA does not depend on where the alien enemy

combatant is held by the United States. As a constitutional matter, the D.C. Circuit has also held that § 7 does not violate the Suspension Clause when applied to aliens outside the sovereign territory of the United States.

Finally, it is worth noting that the type of discovery petitioner proposes would intrude on the military operations in Afghanistan and entail the very type of litigation found inconceivable by the Supreme Court in *Eisenrager*, 339 U.S. at 779. As Judge Hogan aptly noted recently when dismissing a suit by former detainees in Afghanistan and Iraq against U.S. government officials:

The discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's interrogation and detention policies, practices, and procedures.

In re Iraq and Afghanistan Detainees Litigation, No. 06-0145, – F. Supp. 2d –, 2007 WL 926145, *15 (D.D.C. March 27, 2007).

In sum, petitioner is not entitled to discovery.

B. The Degree of the United States' Control Over Bagram Airfield Does Not Affect the Interpretation of the Habeas Statute Both Before and After the Statute's Amendment.

In their opening brief, respondents showed that even had Congress not amended the federal habeas statute, the logic of the Supreme Court's decision in *Rasul*, would not extend to Bagram. See Respondents' Mot. to Dismiss at 12-14. Unlike Cuba, which has expressly consented to the United States' "complete jurisdiction and control" over Guantanamo, see *Rasul*, 542 U.S. at 471, the Government of Afghanistan has made no similar concession regarding

Bagram. In response, petitioner maintains that *Rasul* is controlling on the statutory question because the United States' control over Bagram Airfield is similar, if not greater, than its control over Guantanamo. *See* Pet. Opp. at 12-17. According to petitioner, as to both Bagram and Guantanamo, the host nation exercises no legal jurisdiction over the base, nor has the host nation entered into a Status of Force Agreement (“SOFA”) with the United States.

Petitioner is wrong. First, his arguments rest on the false premise that the MCA's jurisdiction-limiting provision is inapplicable to him because he allegedly has not been determined by the United States to be properly detained as enemy combatants. In fact, the United States has made such a determination, and the plain language of the amended habeas statute precludes this Court's jurisdiction, wherever petitioner may be detained. *See* MCA § 7. Given that the MCA clearly applies here and that it is also intended to overrule *Rasul* even as to Guantanamo, this Court need not, and should not, reach the issue of the United States' control over Bagram, nor can petitioner advance his case by arguing that Bagram is just like Guantanamo.

Second, even if the United States had not determined petitioner to be an enemy combatant, the pre-amended habeas statute was not intended to be, nor has it ever been, extended beyond the United States, except in the unique circumstance of Guantanamo. Bagram is not like Guantanamo, however, other than that neither is a sovereign territory of the United States. The United States' presence at Bagram Airfield is necessitated by the war against al Qaeda, the Taliban, and their affiliates and supporters. *See* Gray Decl. ¶ 5; Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/09/20030919-1.html>. The

United States began combat efforts in Afghanistan in October 2001, and the military continues to fight in this area. As a result of the United States' presence in the area, and contrary to petitioner's representation, the United States did execute a SOFA in 2002 with the Government of Afghanistan regarding the United States' activities in Afghanistan, including Bagram Airfield. *See* Diplomatic Note 202, attached hereto as Exhibit 5. The agreement, effected through an exchange of diplomatic notes, recognizes that United States personnel "may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities." *Id.* at 1. The agreement further ensures, among other things, that such personnel be accorded a status equivalent to that accorded to American embassy administrative and technical staff. *See id.* Importantly, under the SOFA, the United States' jurisdiction in Afghanistan extends only to U.S. personnel:

The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel. The Government of Afghanistan and the Government of the United States of America confirm that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States.

Id. at 3. In other words, common crimes committed by Afghan citizens at Bagram would be prosecuted by the Government of Afghanistan, not the United States, and the Government of Afghanistan in that respect has legal jurisdiction over Bagram.

The lease agreement between the two governments regarding Bagram Airfield is not to the contrary. Far from granting the United States "complete jurisdiction and control" as is the

case in Guantanamo, the Bagram lease is silent about U.S. jurisdiction over the Airfield. While the lease speaks in terms of “exclusive use” and “exclusive, peaceable, undisturbed and uninterrupted possession” of the premises and gives the United States the right to assign the lease, Gray Decl. Ex., 1 at ¶¶ 1, 9, that is no different from an ordinary commercial lease. The lease simply does not give the United States jurisdiction over the Airfield because the issue of jurisdiction is governed by the SOFA. What the lease does warrant is that the Government of Afghanistan “is the sole owner of the Premises and/or has the right, without any restrictions, to grant the use of the Premises” to the United States. *See* Gray Decl., Ex. 1 at ¶ 8. Indeed, consistent with that ownership, the Government of Afghanistan agrees that all claims arising out of the United States’ possession of the premises may be directed to the Government of Afghanistan for processing and payment, if any. *See id.*

As for petitioner’s protestation that the United States has used the Bagram detention facility “as a long-term prison for detainees taken into custody in other countries,” *see* Pet. Opp. at 17, even if true, it does not change the jurisdictional analysis. That petitioner and other enemy combatants captured in Afghanistan (and allegedly elsewhere) have been detained there long term is due to the fact that the war is on-going and the detention is necessary for reasons of military necessity.⁸ As explained in Colonel Gray’s declaration,

The detention of these enemy combatants [at Bagram] prevents them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. and coalition forces. Detention also serves as a deterrent against future attacks

⁸ Although the first amended habeas petition alleges that petitioner has been detained for more than 5 years, the Yemeni detainee whom DoD assumes for purpose of the motion to dismiss to be petitioner was captured in Afghanistan on September 10, 2004. *See* 2d Gray Decl. ¶ 2; *see also* Gray Decl. ¶ 19.

by denying the enemy the fighters needed to conduct war. Interrogations during detention enable the United States to gather important intelligence to prevent future attacks.

See Gray Decl. ¶ 9; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (noting the “weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States;” and “[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again”).

In any event, as the Supreme Court recognized in *Hamdi*, 542 U.S. at 518-19, the detention of enemy combatants during an armed conflict is a necessary attribute and by-product of war.⁹ It is simply inconceivable that Congress ever intended to thrust federal courts into the extraordinary role of reviewing the military’s conduct of hostilities overseas, second-guessing the military’s determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and in practical effect, superintending the Executive conduct of an armed conflict – even while American troops are on the ground engaged in daily combatant operations. Put differently, the habeas statute, even before its amendment, was not intended to reach aliens detained by the United States anywhere in the world during active hostilities. The MCA now makes absolutely clear that Congress has no such intention, and clarifies that habeas

⁹ Indeed, in World War I, American forces had custody of approximately 48,000 prisoners of war in France between the 1918 armistice and the treaty of peace in 1920. *See* George Lewis and John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep’t of the Army Pamphlet No. 20-213 at 63. By the end of World War II, U.S. forces had custody of approximately 2 million enemy combatants. *See id.* at 244. Many of the detainees were not repatriated for several years after the conclusion of the hostilities. *See id.* at 243-245. And as to both World Wars, only a small fraction of the detainees was prosecuted and punished for war crimes, while the vast majority were simply detained during the conflict.

statute is not intend for the judiciary to exercise jurisdiction in such circumstances.

In sum, even if petitioner had not been determined by the United States to be an enemy combatant, the habeas statute's territorial reach would not extend to Bagram under *Rasul*.

II. PETITIONER CANNOT INVOKE PROTECTIONS UNDER THE CONSTITUTION

A. *Boumediene* Confirms that Petitioner Has No Habeas Rights Protected by the Constitution.

Petitioner next argues that he is entitled to habeas relief under the common law as protected by the Constitution, contending that *Rasul* is controlling on the constitutional question as well, as opposed to *Eisentrager*. That argument, however, is foreclosed by *Boumediene*. *Boumediene* holds that § 7 of MCA, as applied to aliens captured abroad and detained as enemy combatants in an overseas military base outside the sovereign territory of the United States, does not violate the Suspension Clause of the Constitution. 476 F.3d at 988-992. This is so not only because “the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government,” *id.* at 990-91, but also because “[p]recedent in [the D.C. Circuit] and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States,” *id.* at 991.

Specifically, the Court of Appeals recognized *Eisentrager* to be the “controlling precedent,” *id.*, because like the military base in Landsberg, Germany, where the petitioners in *Eisentrager* were held, the United States has no sovereignty over Guantanamo. *Id.* As for *Rasul*, the Court of Appeals noted that “[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States—or in ‘territory over which the United States exercises exclusive jurisdiction and control,’ *Rasul*, 542 U.S. at 475—had a common law .

. . . right to the writ of habeas corpus.” *Id.* at 990 (quoting *Hamdan v. Rumsfeld*, No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006) (Robertson, J.)). “[T]he observation about common law habeas in *Rasul*,” the Court of Appeals noted, “referred to the practice in England, and “[e]ven if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all ‘jurisdiction to hear or consider an application for a writ of habeas corpus’ by a detainee, whatever the source of that jurisdiction.” *Id.* at 988 n. 5 (quoting 28 U.S.C. § 2241(e)(1)).

Here, petitioner does not, and cannot, contend that Bagram is not a sovereign territory of the United States because “‘the determination of sovereignty over an area,’ the Supreme Court has held, ‘is for the legislative and executive departments.’” *Boumediene*, 476 F.3d at 992 (quoting *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)); accord *In re Iraq and Afghanistan Detainees Litigation*, No. 06-0145, – F. Supp. 2d –, 2007 WL 926145, *12 (D.D.C. March 27, 2007) . Nevertheless petitioner insists that he is entitled to invoke protections under the Suspension Clause. According to petitioner, *Boumediene* is wrongly decided. This Court, however, must follow controlling Circuit precedent, as Judge Hogan recently did in *In re Iraq and Afghanistan Detainees Litigation*, No. 06-0145, – F. Supp. 2d –, 2007 WL 926145, *9 (D.D.C. March 27, 2007), when dismissing damage claims against DoD officials by foreign nationals previously detained at Bagram and in military facilities in Iraq. As Judge Hogan held, these aliens have no constitutional rights, and the D.C. Circuit’s decision in *Boumediene* “removes any doubt about whether this Circuit views the Constitution as conferring any rights on nonresident aliens detained abroad.” *Id.* *Boumediene* is the law of the Circuit, and this Court is bound by it. *Cf. Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 49 (D.C. Cir.

1987) (“[w]hether or not [a prior case’s] position on this point is correct . . . this panel is bound by that position as the law of the circuit”), *vacated in part on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988).

The D.C. Circuit’s decision in *Omar v. Harvey*, 479 F.3d 1 (2007), relied on by petitioner, is not to the contrary. In that case, the Court of Appeals held that the district court has jurisdiction over a habeas petition filed on behalf of a U.S. citizen being held in Iraq by U.S. forces acting as part of the Multi-National Force–Iraq (“MNF-I”) and who had not been charged or convicted by a non-U.S. court.¹⁰ *Omar* does not involve application of the MCA’s jurisdiction-limiting provision because the habeas petitioner there is a U.S. citizen, and as the Supreme Court long ago noted in *Eisentrager*, “[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar.” 339 U.S. at 770. Petitioner here, of course, is not a United States citizen .

B. Petitioner Has No Due Process Rights That Would Entitle Him to Challenge the Procedures Used to Determine His Enemy Combatant Status.

Given that petitioner has no constitutional rights, this Court need not address whether the enemy combatant status review procedures available in Afghanistan meet constitutional Due Process requirements or whether they constitute an alternative adequate remedy for purposes of the Suspension Clause. Although petitioner complains about the lack of judicial review of the United States’ determination of his enemy combatant status, there is also no constitutional impediment for Congress to limit judicial review in that fashion. *See* U.S. Const. Art. III, § 1;

¹⁰ Compare *Omar with Munaf v. Geren*, No. 06-5324, (D.C. Cir. Apr. 6, 2007) (district court has no power or authority to hear habeas petition by a U.S. citizen held in Iraq by U.S. forces acting as part of MNF-I because the habeas petitioner has been convicted by an Iraqi criminal court).

see also Snyder v. Harris, 394 U.S. 332, 341-342 (1969) (“If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.”); *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 117 (1981) (Brennan, J., joined by Marshall, Stevens, and O’Connor, JJ., concurring in the judgment) (“it is exclusively Congress’ responsibility to determine the jurisdiction of the federal courts”). Congress, moreover, is far better situated than the courts to weigh the significant foreign policy and military ramifications of extending federal jurisdiction over claims of aliens held abroad and to address the myriad of factors that might enter the equation. In enacting the MCA, Congress decided not to grant judicial review to every alien enemy combatant detained by the United States, and did not limit the jurisdictional provisions of that statute to those who have received CSRTs.¹¹ That judgment is not reviewable by this Court in this case.

¹¹ *Cf.* 152 Cong. Rec. S10270-71 (daily ed. September 27, 2006) (statement of Sen. Kyl)(“Because the military, in response to criticism of Guantanamo, started giving everyone at Guantanamo a CSRT hearing, these critics contend, it should be compelled to do so for all future detainees, and for all future wars. . . . This the Armed Services committees and this Congress declined to do. Aside from the fact that these detainees, aliens all, are not entitled to CSRTs or any Article 5 type hearing under the Geneva Convention, it would be absurdly impractical to require the military to provide such hearings in all future conflicts. Consider, for example, the case of World War II. As I mentioned earlier, the United states detained over 2,000,000 enemy combatants during that conflict. How on earth could we possibly expect the military to conduct CSRTs for 2 million people? And how could the DC Circuit be expected to handle 2 million appeals from CSRTs, even under the de minimis facial challenge authorized by the DTA? It is simply inconceivable.”).

CONCLUSION

For the foregoing reasons, this Court should dismiss this petition for want of jurisdiction.

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Respectfully submitted,

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