IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMEDOU OULD SALAHI	)
Petitioner/Plaintiff,	)
v.	) **Civil Action No. 1:05-0569 (RCL)**
BARACK OBAMA, *et al*.,	)
Respondents/Defendants.	)

PETITIONER'S REPLY IN SUPPORT OF HIS MOTION FOR AN ORDER TO SHOW CAUSE

INTRODUCTION

To keep this Court from adjudicating the Defense Department's unlawful denial of a Periodic Review Board hearing to Mr. Slahi, Respondents offer flawed arguments that would roll back judicial review of executive detention at Guantánamo. They urge the Court to adopt a radically narrow limit on its habeas power—a limit the D.C. Circuit has not accepted. They ask the Court to look away as the Defense Department ignores an Executive Order incorporating law-of-war and constitutional requirements of timely periodic review of ongoing detention. They contend the Court should accept their reading of AUMF authority, which incorporates only cherry-picked law of war principles while disregarding critically-important obligations. They assert that Mr. Slahi's constitutional rights under the Suspension and Due Process Clauses are limited despite contrary Supreme Court and D.C. Circuit guidance. Both courts have repeatedly refused to grant the Defense Department the authority it seeks here, and this Court should not endorse Respondents' latest effort to limit the rule of law at Guantánamo.

Respondents try to conceal the weaknesses in their legal arguments against this Court's review of Mr. Slahi's conditions claims under inaccurate factual representations. Almost three years after Respondents asked this Court to unfairly limit Mr. Slahi's right to meaningful habeas review of his initial detention, they now incorrectly assert he is responsible for his own ongoing indefinite detention. Having deprived Mr. Slahi of legal materials and personal property, they argue that no deprivation has taken place because Mr. Slahi can request that items be returned. Respondents' claims directly contradict Mr. Slahi's firsthand evidence of the deprivations the Defense Department has imposed. Mr. Slahi has diligently fought his unlawful detention in this Court, and has fruitlessly sought the return of his legal materials and personal items since the Defense Department seized them. The Court's intervention is now required.

PROCEDURAL HISTORY

Throughout their Opposition, Respondents claim Mr. Slahi's "habeas case has remained dormant, *at his own choosing*, for almost three years now." Opp. 1 (emphasis added); *see also id.* at 16, 23 and 36. This claim is untrue. On October 1, 2012, Mr. Slahi filed a motion for discovery of information he needed to litigate his habeas petition, which the government refused to produce voluntarily. ECF No. 427. On October 31, 2012, Respondents filed their opposition to Mr. Slahi's discovery motion, which they combined with a Cross-Motion for Leave to File a Motion for Expedited Judgment. ECF No. 430. In their opposition, Respondents acknowledged their obligation to produce at least information Mr. Slahi requested, but asked the Court to limit its discovery order to information Respondents relied on in their motion for expedited judgment.

On November 13, 2012, Mr. Slahi filed his opposition and reply. ECF No. 433. Mr. Slahi opposed Respondents' cross-motion for several reasons, including that Respondents were seeking two more opportunities to prove their decade-long detention of Mr. Slahi was lawful when the law afforded them only one. Respondents' two-step process potentially would require Mr. Slahi to defend against the government's allegations twice, which would be unfair and cruel given that Mr. Slahi successfully defended against them already.[1] Mr. Slahi also argued he could not meaningfully respond to Respondents' evidence without the discovery he sought.

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[1] Respondents insinuate that Mr. Slahi is somehow suspect because he "was one of 36 detainees referred for possible prosecution" in 2010. Opp. 9. But Respondents have never charged Mr. Slahi with a crime. Colonel Morris Davis, the former chief prosecutor for the Office of Military Commissions has explained that he was assigned to prosecute Mr. Slahi, but "there was absolutely no evidence that he had ever engaged in any acts of hostility towards the United States. And the conclusion was there was simply nothing that we could charge him with." Inside the U.S. Torture Chambers: Prisoner's Guantánamo Diary Details 12 years of Abuse, Terror, Democracy Now! (Jan 22, 2015), http://www.democracynow.org/2015/1/22/inside_the_us_torture_chambers_prisoners. Colonel Davis's conclusion was "reinforced" by the intelligence community when he "got the briefing at

Both parties' briefing on these issues was complete on December 20, 2012. ECF Nos. 437; 438; 439; 442-443. Mr. Slahi could do nothing else to "pursue" his habeas case until the Court ruled on the pending motions. These motions are still pending.

ARGUMENT

I. THE DEFENSE DEPARTMENT'S FAILURE TO PROVIDE MR. SLAHI A MANDATORY TIMELY PRB HEARING IS SUBJECT TO JUDICIAL REVIEW AND IS UNLAWFUL.

A. This Court Has the Authority to Order the Defense Department to Provide Mr. Slahi a Timely PRB Hearing.

Respondents' claim that this Court lacks habeas jurisdiction over their failure to provide Mr. Slahi timely PRB review of his ongoing detention is based on two faulty arguments. Their primary contention is that the relief Mr. Slahi seeks is "probabilistic"—that is, a PRB hearing would only possibly result in his release—and therefore is not a habeas claim that this Court may adjudicate. But this argument misreads irrelevant—and carefully-limited—Supreme Court and D.C. Circuit precedent addressing only the "core" of habeas, and ignores the D.C. Circuit's decision in *Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) that Guantánamo detainees' statutory habeas claims are not limited to "the historical core of the writ." Respondents also attempt to recast Mr. Slahi's request for a required timely PRB process as a mere procedural question of hearing sequence. But that argument misunderstands the nature of Mr. Slahi' claim: that the Defense Department's over three-year-long failure to provide a PRB hearing is a constructive denial of his right to timely review of his ongoing detention.[2]

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the National Counterterrorism Center and all of the agencies involved agreed that there just wasn't a case to be had against Slahi." *Id.*

[2] Respondents also incorrectly claim that the relief Mr. Slahi seeks is "entirely unrelated to his habeas petition," and that amendment of the petition would be the "prudent" way to address his claims. Opp. 6 n.3. Mr. Slahi's PRB claim is related to his habeas petition, in which he asserted

Respondents' first argument, that this Court has no authority to order a PRB hearing because it is not guaranteed to result in Mr. Slahi's release, relies on cases that address an irrelevant question: whether certain claims are within the core of habeas and therefore must be "channeled into" habeas petitions or whether, as non-core claims, they may be brought under 42 U.S.C. § 1983. Opp. 14–18 (*citing*, *inter alia*, *Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 662–64 (D.C. Cir. 2013) (explaining "habeas-channeling")). Respondents ask this Court to derive from these irrelevant cases a novel and extreme limit on the federal courts' habeas authority. Both the Supreme Court and the D.C. Circuit have repeatedly rejected any narrow, formalistic reading of the scope of habeas jurisdiction, however.

As a threshold matter, Respondents acknowledge that neither the D.C. Circuit nor the Supreme Court has ever found that claims with a "probabilistic"—rather than certain—custodial outcome are categorically unavailable under the habeas statute. Opp. 14–16. Instead, in the Supreme Court and D.C. Circuit cases Respondents cite, the courts considered only whether probabilistic claims lie at the "'core of habeas corpus,'" because those claims may not be brought in challenges under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005)); *see also Wilkinson*, 544 U.S. at 76

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over a decade ago that his detention was unlawful because he was not provided with the review process required under the Constitution and the AUMF as informed by international law. *See* ECF No. 1 at 15–17 and *compare* Pet. Br. 6–7 (seeking review process mandated under the Constitution and AUMF). It would cause considerable delay and waste judicial resources to require Mr. Slahi to restart his habeas litigation by adding claims based on the most recent iteration of process denied. This motion does not prejudice Respondents (who are able to respond to it fully) and is an appropriate vehicle for the Court to adjudicate both Mr. Slahi's request for a timely PRB hearing and his challenge to the Defense Department's imposition of arbitrary and harsh conditions of confinement. *See* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1195 (3d ed. 2004) ("In practice, many district courts do use show cause orders on applications for preliminary injunctions and in habeas corpus proceedings.").

(addressing, in a non-habeas lawsuit, whether state prisoners may bring a challenge to parole procedures under 42 U.S.C. § 1983 or whether they must seek relief under federal habeas statutes); *Davis*, 716 F.3d at 666 ("[a]dopting *Wilkinson's* habeas-channeling rule" in *Bivens* action by federal prisoner). The Supreme Court has, for decades, carefully limited its holdings in this context to "the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus," making clear that answers to that question do not require it to "explore the appropriate limits" of habeas. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *see also Skinner*, 562 U.S. at 531 (specifying that the Court resolved "only" whether state prisoner's action seeking DNA testing was cognizable under § 1983). Mr. Slahi has no such choice, and these cases are inapposite to the question of this Court's jurisdiction over habeas challenges at Guantánamo. As the D.C. Circuit made clear in *Aamer*, habeas jurisdiction over Guantánamo detainees is in no way limited to "core" habeas claims. *See Aamer*, 742 F.3d at 1030 ("[A]lthough petitioners' claims undoubtedly fall outside the historical core of the writ, that hardly means they are not a 'proper subject of statutory habeas.'" (quoting *Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009)). Because "habeas-channeling" cases "turn[] on whether [a] claim for relief is at the 'core of habeas,'" they cannot be read to delineate the full scope of jurisdiction under the habeas statute, *Davis*, 716 F.3d at 662–63, and thus impose no limits on the Court's jurisdiction here.[3]

[3] Respondents cannot persuasively analogize these decisions to habeas jurisdiction over Guantánamo detainees because 28 U.S.C. § 2241(e) strips courts of jurisdiction over all non-habeas claims relating to detention. Prisoners at Guantánamo cannot raise detention-related challenges through a substitute civil rights claim, and eliminating habeas jurisdiction over those challenges would raise serious Suspension Clause concerns—concerns absent from the cases Respondents cite. *See INS. v. St. Cyr*, 533 U.S. 289, 300 (2001) (rejecting construction of a jurisdiction-limiting statute "that would entirely preclude review of a pure question of law" because it "would give rise to substantial constitutional questions").

Critically, when the Supreme Court considered the full scope of habeas jurisdiction, it rejected an argument similar to the one Respondents advance here. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court addressed whether courts' habeas jurisdiction extended to a non-citizen's claim that the government had failed to provide him the opportunity to be considered for discretionary relief. The INS argued that the non-citizen's claim "falls outside the traditional scope of the writ at common law" because "the writ would not issue where 'an official had statutory authorization to detain the individual'" but "'was not properly exercising his discretionary power to determine whether the individual should be released.'" *St. Cyr*, 533 U.S. at 303. The Court rejected the agency's narrow reading of the habeas power. It observed that noncitizens had for decades raised claims in habeas that did not turn on the lawfulness of initial detention but asserted instead an entitlement to be *considered* for release. *Id.* at 308. Half a century earlier, the Court noted, it had held that "a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law" by refusing to consider a noncitizen for discretionary release. *St. Cyr*, 533 U.S. at 308 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and concluding that "[t]he exercise of the District Court's habeas corpus jurisdiction to answer a pure question of law in this case is entirely consistent with the exercise of such jurisdiction in *Accardi*"). As the Supreme Court made clear, whether an individual is entitled to agency consideration for discretionary release is a legal question well within courts' habeas power, even if release is only a *possible* outcome of agency consideration.

Respondents' efforts to impose a new limit on this Court's habeas jurisdiction are particularly inappropriate here because Mr. Slahi's challenge arises in the context of his indefinite detention. Both the D.C. Circuit and the Supreme Court have rejected multiple attempts to restrict courts' habeas jurisdiction over challenges brought by prisoners at

Guantánamo, emphasizing that "[h]abeas is not a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." *Aamer*, 742 F.3d at 1030 (quoting *Boumediene v. Bush*, 553 U.S. 723,780 (2008)) (internal quotations omitted); *see also Rasul v. Bush*, 542 U.S. 466, 474 (2004) ("[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *In re Guantánamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 14 (D.D.C. 2012) ("The foundation of the Supreme Court's habeas jurisprudence is that the Great Writ lies at the core of this Nation's constitutional system, and it is the duty of the courts to remedy lawless Executive detention.") (Lamberth, J.).

In an attempt to muster support for their crabbed reading of the habeas statute, Respondents ask this Court to disregard D.C. Circuit precedent and follow a divided Ninth Circuit panel in finding that a "footnote of dicta in *Skinner* redefines the scope of habeas jurisdiction." *Nettles v. Grounds*, 788 F.3d 992, 1011 (9th Cir. 2015) (Murgia, J, concurring in part, and dissenting in part); Opp. 14–17. But the *Nettles* majority *itself* acknowledged that its narrow view of habeas jurisdiction as permitting judicial review only of claims that *necessarily* result in speedier release is incompatible with the D.C. Circuit's decision in *Aamer*. *See Nettles*, 788 F.3d 1005 n.11. The D.C. Circuit has explicitly said that it "has never engaged in . . . formalistic, technical line-drawing" when it comes to the habeas power, *Aamer*, 742 F.3d at 1035, and has never accepted Respondents' extreme interpretation of *Skinner*.

Respondents' second argument against this Court's habeas jurisdiction by recasting Mr. Slahi's request for a timely PRB hearing as a mere administrative sequencing objection also fails. According to Respondents, their representation that Mr. Slahi will at some unspecified future point receive a PRB hearing obviates his habeas claim. Opp. 17 (asserting Mr. Slahi has

made a mere "procedural challenge" to "sequencing procedures and determinations"). On Respondents' theory, it would not matter if they delayed Mr. Slahi's hearing by days or decades—but, of course, it does. Mr. Slahi's claim is that the Defense Department's more than three years of delay is a constructive denial of his right to a timely PRB hearing at which he would show that he poses no threat and his ongoing detention is unwarranted. Pet. Mot. 10–11. Without this hearing, Mr. Slahi's *ongoing detention is unlawful* because it is procedurally deficient, and this claim sounds in habeas. Respondents' analogy to a claim brought under the Administrative Procedure Act, *see* Opp. 17–18, is inapt because Mr. Slahi's "essential claim is that his custody in some way violates the law," and habeas is the proper remedy. *Aamer*, 742 F.3d at 1036. Moreover, Respondents' argument proves far too much: by their logic, the Defense Department could simultaneously "no[t] dispute that Petitioner will receive a PRB hearing" Opp. 17, while setting no timeline at all for even scheduling that mandatory hearing. And if Respondents' argument were accepted, their constructive denial of Mr. Slahi's right to a timely PRB would be unreviewable. This Court's habeas jurisdiction over Mr. Slahi's claim bars that outcome.

B. The Defense Department's Denial of a Timely PRB Hearing is Unlawful.

Respondents argue that the timeliness requirements President Obama mandated in Executive Order 13,492 establishing a PRB process are unenforceable, that the law of war principles incorporated in the AUMF permit ongoing military detention without mandatory review to determine if it is warranted, that the Suspension Clause requires no meaningful review of whether Mr. Slahi's on-going detention is warranted, and that detainees at Guantánamo do not have protected liberty interests under the Due Process Clause. Opp. 19–37. For the reasons set forth below, each of these arguments fails.

i. The Executive Order Requires that Mr. Slahi Be Provided a Timely PRB Hearing.

Both parties agree that "the Executive Order was issued pursuant to the President's powers under the Constitution as well as 'the laws of the United States,' including the AUMF." Opp. 19. As such, the Order has the force and effect of law. *See* Pet. Mot. 9–10. Nevertheless, Respondents attempt to shield the Defense Department's failure to comply with the Order from judicial review by asserting that it "does not create a private cause of action." Opp. 19. But Mr. Slahi is not asking the Court to imply a private cause of action, and none is necessary here. The cases on which Respondents rely are inapplicable in the context of statutory habeas. In *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), for example, the court addressed whether "the executive can create a right of action" or whether that power belonged solely to Congress. 906 F.2d at 750. The court found no need to answer that question because the Executive Order there did not support recognition of "an implied right of action." *Id*.[4]

Here, by contrast, the habeas statute provides a cause of action to prisoners whose jailors fail to comply with legal requirements justifying custody. *See* 28 U.S.C. § 2241(c)(3). As the Supreme Court long-ago made clear, courts may review executive directives under the habeas statute when violation implicates a prisoner's custody. *See In re Neagle*, 135 U.S. 1 (1890) (Attorney General's directive was a "law of the United States" under the habeas corpus statute).[5]

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[4] Respondents cite cases in other circuits that confuse the question of whether a right of action should be implied with the question of whether an Executive Order may be enforced by a private claimant whose cause of action is statutory. *See* Opp. 19–20 (citing *Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995); *U.S. Dep't of Health & Human Servs. v. Federal Labor Rel. Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975)). Although Respondents seize upon these out-of-circuit decisions, the D.C. Circuit has not endorsed their mistake, and neither should this Court.

[5] This Court's decision in *Ahjam v. Obama*, 37 F. Supp. 3d 273, 280 (D.D.C. 2014), is not to the contrary. In that case, this Court found that the petitioner lacked standing to challenge the

Respondents' other argument and authority also does not help them because contrary to Respondents' claim, Executive Order 13,567 is not devoted solely to the internal management of the executive branch. Opp. 20–22 (arguing that "[a]s a general matter, executive orders are viewed as management tools for implementing the President's policies"). The Order implements the Suspension Clause requirement of meaningful review of law-of-war detention, creates a protected liberty interest in the review procedures it establishes, and recognizes and implements a key legal requirement for detention under the AUMF. Pet. Mot. 11–19. Because the Executive Order sets out the procedures and grounds under which detained individuals must be considered for release, it is very different from the wholly discretionary internal management orders cited by Respondents. *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), for example, concerned whether a cabinet-level Task Force on Regulatory Relief constituted an "agency" under the Freedom of Information Act merely because it had been established by executive order. The D.C. Circuit concluded that executive order was "devoted solely to the internal management of the executive branch" because it "seem[ed] no different than a presidential memorandum delegating certain tasks to the Vice President and to some cabinet officers or to the President's own staff." *Id.* at 1296 n.8. The court came to the same conclusion in *Helicopter Ass'n Int'l, Inc. v. F.A.A.*, 722 F.3d 430, 439 (D.C. Cir. 2013). The executive order in that case, which required agencies to perform cost benefit analyses, explicitly stated that it related only to "the internal management of the Federal Government." Executive Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see*

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transfer prerequisites in the 2013 and 2014 National Defense Authorization Acts because he had not identified any protected right to transfer (as opposed to release). The Court rejected the petitioner's argument that the then-operative Executive Order 13,492, which created a review process for Guantánamo detainees, also created a freestanding right to challenge statutory transfer restrictions. Mr. Slahi's claim concerns the Defense Department's failure to abide by the terms of the Executive Order governing his detention, the question at the heart of his habeas petition; he does not claim that the existence of the Executive Order itself confers standing on him to challenge a wholly different injury.

also Air Transp. Ass'n of Am. v. F.A.A., 169 F.3d 1, 8 (D.C. Cir. 1999) (order explicitly stated it was "only to improve the internal management of the executive branch"). In contrast, Executive Order 13,567 sets out substantive procedures that must be followed to determine whether continued detention under the AUMF serves any lawful purpose. It implements the requirements of the Constitution and international law, as incorporated in the AUMF. *See* Pet. Mot. 11, 18. Respondents' arguments and authority are simply inapplicable in this context.[6]

ii. The AUMF, as Informed by the Laws of War, Requires the Defense Department to Provide Mr. Slahi a Timely PRB Hearing.

Although the Supreme Court has made clear that AUMF-based detention incorporates law of war limitations, Respondents seek to evade its ruling by cherry-picking the law of war principles they find convenient and disregarding the rest. Respondents' interpretation of their obligations under the laws of war renders AUMF detention authority incoherent, directly contradicts law of war norms, and is inconsistent with the Executive Order and the Defense Department's own Law of War manual. A proper reading of each of these authorities makes clear that Mr. Slahi is entitled to a timely PRB hearing as a matter of law.

Respondents spend numerous pages of their brief attacking a straw man, arguing that neither the Third nor the Fourth Geneva Conventions directly govern non-international armed conflicts—a claim that is not in dispute.[7] Opp. 29–37. As Respondents finally must acknowledge, though, the Supreme Court has held that AUMF-based detention incorporates

[6] Respondents' citation to *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004), is particularly inapt. In that case, the D.C. Circuit did not consider—much less decide—whether violations of the executive order at issue were unreviewable. Instead, the court found that the contested claim arose under an environmental statute and the Administrative Procedures Act, and reviewed the merits of the claim.

[7] Non-international armed conflicts include conflicts between a state and a non-state actor. An international armed conflict is a conflict between two or more states. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628–31 (2006).

principles drawn from the Geneva Conventions. Opp. 36 (conceding that "the relevant law-of-war principles cited by the Supreme Court in *Hamdi* were principles drawn from the Third Geneva Convention"); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), (AUMF must be interpreted "based on longstanding law-of-war principles."). Moreover, in the government's own words, "[t]he laws of war include a series of prohibitions *and obligations*, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law," and with respect to AUMF detention authority, "[p]rinciples derived from law-of-war rules governing international armed conflicts, therefore, *must inform* the interpretation of the detention authority Congress has authorized for the current armed conflict." Resp.'s Mem. Regarding Gov't Detention Authority Relative to Detainees at Guantánamo Bay at *1, In Re: Guantánamo Bay Litigation, No. 08-442 (D.D.C. Mar. 13, 2009) (emphases added). Therefore, the only issue before this Court is whether long-standing law-of-war principles require timely review of on-going detention. As Mr. Slahi showed in his opening brief, they do. Pet. Br. 16–18.

Faced with clear Supreme Court authority and their own previous statements that law-of-war principles must inform AUMF-based detention, Respondents cobble together an incoherent theory of their legal authority that boils down to "heads we win, tails you lose." They assert that they may deny Mr. Slahi prisoner-of-war status under the Third Geneva Convention, and all of the protections that accompany it—for example, the right to the same treatment given to U.S. military forces and the right to keep personal effects. At the same time, Respondents claim the right to hold Mr. Slahi until the end of hostilities—a detention authority under the Third Geneva Convention that applies only to prisoners of war. Meanwhile, Respondents attempt to discard the detention review requirements applicable to individuals who are not prisoners of war, which are

found in the Fourth Geneva Convention. *See, e.g.*, Fourth Geneva Convention, art. 43 (any person subjected to security internment "*shall* be entitled to have such action reconsidered *as soon as possible* by an appropriate court or administrative board," and if internment is maintained, "the court or administrative board shall periodically, and *at least twice yearly*," reconsider it) (emphases added). They assert that the Fourth Geneva Convention's review requirements are wholly inapplicable because "[i]t is well settled that individuals who are part of private armed groups are not immune from military detention." Opp. 33 (internal quotations omitted). But this distinction is based on a fundamental misunderstanding of military detention: the Fourth Geneva Convention does not "immunize" from military detention individuals who are not accorded prisoner-of-war status; instead, it sets forth the basis for, and procedures under which, unprivileged belligerents (and all who fall outside of the Third Geneva Convention) may be held for security purposes. As an alleged unprivileged belligerent, Mr. Slahi's detention is closely analogous to security internment under the Fourth Geneva Convention, and its review procedures inform the procedures he must receive under the AUMF. *See also* Pet. Mot. 17–18 (setting out Fourth Geneva Convention's review requirements). Respondents are not free to set aside law of war requirements they deem inconvenient for litigation purposes.[8]

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[8] Respondents' lengthy discussion of POW status and rights is largely beside the point here, although it is alarming that they resuscitate the Bush administration's 2002 determination not to accord prisoner of war status and Geneva Convention protections to individuals even in an international armed conflict, *see* Opp. 31, a decision that opened the door to widespread abuses. Similarly, their reliance on the discredited 2004 Combatant Status Review Tribunal ("CSRT") determinations that Mr. Slahi and all other Guantánamo detainees were "enemy combatants," *see* Opp. 32 n. 22, is irrelevant. The Supreme Court found that the CSRTs subjected detainees to "considerable risk of error in the tribunal's findings of fact." *Boumediene*, 553 U.S. at 785; *see also Aamer v. Obama*, 58 F. Supp. 3d 16, 25 (D.D.C. 2014) (noting "the Obama Administration apparently jettisoned the term 'enemy combatant' years ago . . ."). The only competent tribunal ever to adjudicate Mr. Slahi's legal status based on facts is this Court. *See Salahi v. Obama*, 710 F. Supp. 2d 1, 4 (D.D.C. 2010) (granting habeas petition because Mr. Slahi was neither part of

Respondents' claim that the Supreme Court and Court of Appeals have never held that such AUMF detention authority "is conditioned upon the provision or timing of a periodic review hearing," Opp. 35–36, is notably incomplete. The Supreme Court has never addressed let alone held that AUMF authority permits indefinite detention *without* timely periodic review of individuals, like Mr. Slahi, captured far from any battlefield. Indeed, the Supreme Court has never addressed whether the AUMF detention of individuals like Mr. Slahi is *ever* lawful. *See Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (Breyer, J., concurring in denial of certiorari) (noting Supreme Court has never held that the AUMF and Constitution permit prolonged and indefinite detention of individuals who never fought the United States in Afghanistan).

Respondents' incoherent and self-serving interpretation of the law-of-war principles incorporated in the AUMF also directly contradicts the expert consensus. The law-of-war requirement of prompt periodic review of security detention in a non-international armed conflict is widely acknowledged. As the authoritative International Committee for the Red Cross ("ICRC") states:

> Independent and impartial review of the necessity of internment is the most important procedural safeguard against arbitrary detention. As discussed above, parties to a [non-international armed conflict] may intern persons only for imperative reasons of security. Therefore, it is essential that the necessity of an interment decision be reviewed promptly after it is made, and periodically thereafter if the interment is continued. . . . [I]t is submitted by the ICRC – and widely accepted – that at least an initial review and a six-month periodical review should be provided for.

International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, 877, December 2009, http://www.icrc.org/eng/assets/files/other/irrc-876-expert-

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nor supporting al-Qaida forces), *vacated and remanded*, 625 F.3d 745 (D.C. Cir. 2010) (remanding question of whether Mr. Slahi was "part of" al-Qaida).

meeting.pdf. Moreover, the ICRC and experts recognize that the law-of-war requirement of prompt and periodic review is in addition to, and separate from, the requirement of habeas review to determine if the person may be lawfully detained at all. *Id.* The United Kingdom Court of Appeal recently applied this requirement in finding that the 110-day detention of a suspected Taliban commander by U.K. forces without "periodic review by an impartial and objective authority" was unlawful. *Serdar Mohammed v. Ministry of Defense*, [2015] EWCA Civ 843 at 9.iii, https://www.judiciary.gov.uk/wp-content/uploads/2015/07/serdar-mohammed-v-ssd-yunus-rahmatullah-v-mod-and-fco.pdf.

Even if the law-of-war principles applicable to Mr. Slahi's AUMF detention were strictly limited to Common Article 3 of the Geneva Conventions, as Respondents contend, Opp. 31, he would still be entitled to timely PRB review. Authoritative interpretations of Common Article 3 make clear it requires periodic review of detention. Under customary international humanitarian law, "arbitrary deprivation of liberty is not compatible with th[e] requirement" of humane treatment in Common Article 3. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 99 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99. To ensure that detention is not arbitrary, "both international humanitarian law and human rights law" limit detention unless it is necessary and require "procedures to prevent disappearance and *to supervise the continued need for detention*." *Id.* (emphasis added).[9] The prohibition on arbitrary detention in Common Article 3 is further strengthened by the international human rights law requirements that apply to Mr.

[9] Indeed, the logic of international law here is on all fours with the Due Process Clause: under both, continued imprisonment is unlawful when it is arbitrary and no longer serves a legitimate government purpose. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); *see infra* Section I.B.iii.

Slahi's on-going detention. Just as Common Article 3 prohibits arbitrary detention, so too does the International Covenant on Civil and Political Rights, to which the U.S. is a signatory and by which it is bound. *See* art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171. Thus international humanitarian and human rights law principles incorporated in the AUMF prohibit arbitrary detention and require timely PRB review.[10]

The Defense Department's own Law of War Manual and Executive Order 13,567 require the PRB review Mr. Slahi seeks and undercut Respondents' arguments against that review. The Law of War Manual states that "all persons not afforded POW status or treatment" are to have "a *prompt* initial review" as well as ongoing periodic review of whether continued detention is appropriate. DoD Law of War Manual § 8.14.2 (emphasis added). It cites the Copenhagen Process on the Handling of Detainees in International Military Operations, which provides that "Security detainees are to have their continued detention reviewed periodically . . . generally every six months." DoD Law of War Manual § 8.14.2 n.99 (quoting Chairman's Commentary to the Copenhagen Process: Principles and Guidelines ¶12.3). Executive Order 13,567 also implements this widely-recognized law of war requirement: it recognizes that "continued law of war detention" is permitted only when it is "necessary to protect against a significant threat to the security of the United States," requires a prompt initial review (within one year of the March 2011 order), and sets out procedures for continued periodic review to determine if detention remains necessary. Exec. Order No. 13,567 § 2. The Defense Department has failed to abide by

[10] Applying these established law-of-war principles, the Inter-American Commission on Human Rights recently emphasized the importance of timely PRB hearings at Guantánamo. Noting that "experts agreed that security detentions must be 'necessary' for 'imperative reasons of security,'" the Commission expressed "concern . . . that it took the PRB more than two years to start with the review proceedings and, as of March 2015, only fourteen cases have been fully reviewed." IACHR, Towards the Closure of Guantánamo, OAS/Ser.L/V/II. Doc. 20/15 (June 3, 2015), http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf.

the fundamental and universally-acknowledged law of war requirement of timely review that is incorporated into the AUMF. This Court should therefore grant Mr. Slahi the habeas relief he seeks to remedy this violation.[11]

iii. The Constitution Requires the Defense Department to Provide Mr. Slahi a Timely PRB Hearing.

Respondents argue that their failure to provide Mr. Slahi with a timely PRB hearing raises no constitutional concerns because, in their view, the Suspension Clause does not require meaningful review of whether Mr. Slahi's ongoing detention serves any legitimate purpose, and the Due Process Clause does not apply at the Defense Department's Guantánamo prison. Opp. 22–29. Respondents' arguments cannot be squared with decisions of the Supreme Court and the Court of Appeals. Even if the Executive Order and AUMF did not independently require that Mr. Slahi be provided with a timely PRB hearing and is not enforceable on its own terms, the Constitution itself entitles Mr. Slahi to meaningful and timely review. In short, the Executive Order implements the review of continued detention that the Suspension and Due Process Clauses and the AUMF require.

Suspension Clause. Respondents rely on *Hamdi* and *Boumediene* to argue against a requirement of prompt PRB review, Opp. 23–26. But taken together, these cases establish that in 2015, the meaningful review required by the Suspension Clause is not possible without reviewing whether Mr. Slahi poses any threat that would justify his ongoing. In both cases, the Supreme Court emphasized that the length of detention at Guantánamo affects both the legal grounds for detention as well as the scope and nature of required review. Therefore, regardless of

[11] Perplexingly, Respondents appear to suggest that "military necessity" authorizes their detention of Mr. Slahi without periodic review. Opp. 30 n.20. Not only is this claim unsupported by the Law of War Manual, it fails as a matter of logic. The Defense Department cannot determine that "military necessity" requires Mr. Slahi's detention when it refuses to provide the process the President has established to determine whether that necessity exists.

whether Mr. Slahi's detention was *ever* authorized under the AUMF (a question separately at issue in this ongoing habeas litigation but not at issue in this motion—*see* Pet. Br. 3–4, 7 n.3), Mr. Slahi has now been subjected to nearly fourteen years of indefinite detention. Certainly at this stage, meaningful review required by the Suspension Clause must include an assessment of whether his detention serves any legitimate function *even if* it were authorized when the U.S. seized him in 2002.

In *Hamdi*, the Supreme Court recognized that detention authority under the AUMF is not static. It upheld the AUMF-based detention until the end of hostilities of an individual who—unlike Mr. Slahi— was an alleged enemy soldier captured on the battlefield in Afghanistan. 542 U.S. at 518–21. However, the Supreme Court took pains to emphasize that *even for these individuals*, the authorization for detention until the end of hostilities "may unravel" if the conflict ceased to bear a resemblance to "the conflicts that informed the development of the law of war." *Id.* at 521.

In *Boumediene v. Bush*, the Supreme Court directly tied the length of detention to the scope and timing of meaningful review under the Suspension Clause, even in a case where the detainees had been held at Guantánamo for half the time that Mr. Slahi has now been imprisoned. Because "six years ha[d] elapsed without the judicial oversight that habeas corpus or an adequate substitute demands," the Supreme Court rejected the government's argument that meaningful review of detention could follow the Defense Department's preferred timeline, in an administrative process established by Congress in the Detainee Treatment Act. *Boumediene*, 553 U.S. at 794. The Supreme Court emphasized that after six years "the costs of delay can no longer be borne by those who are held in custody." *Id.* at 794–95. The Court's decision stands for the principle that the Suspension Clause's requirements are not frozen in time: as indefinite

detention grinds on, the Suspension Clause imposes greater requirements as to both the timing and scope of review of imprisonment. *See id.* (explaining that review requirements increase in the absence of "suitable alternative processes . . . to protect against the arbitrary exercise of governmental power."). After nearly fourteen years of executive detention, the Suspension Clause requires meaningful review of whether Mr. Slahi's detention serves any legitimate purpose, or whether it is an arbitrary exercise of government power.

Respondents further argue that the courts have no role in deciding whether prisoners held indefinitely pose a national security threat, so that the question of whether Mr. Slahi's continued detention serves any legitimate purpose must fall outside the Suspension Clause. *See* Opp. 25–26, 25 n.17. But this Court previously rejected a similar government argument: that habeas courts must accept as conclusive executive judgments as to how long individuals can be held at Guantánamo. *See Al Warafi v. Obama*, No. 09–2368, 2015 WL 4600420 (D.D.C. July 30, 2015) ("[H]abeas rights that lived and died by the unexamined word of the political branches would be fatally flawed.").[12] It should reject that suggestion here, too.

Due Process Clause. The Due Process Clause separately requires that Mr. Slahi be provided with a timely PRB hearing. Respondents have no meaningful response to Mr. Slahi's Due Process Clause claims beyond their broad contention that it does not apply at Guantánamo. Opp. 26–29. They do not contest that the Defense Department's failure to consider whether Mr.

[12] The separate question presented in *Hamdi* and *Warafi* of whether hostilities continue in Afghanistan cannot be a proxy for whether Mr. Slahi's indefinite detention is authorized. It is undisputed that Mr. Slahi has never fought the United States in Afghanistan and that he was captured far from any battlefield. Authority for Mr. Slahi's detention, to the extent it exists, must derive from the only legitimate purpose for AUMF detention identified by the Supreme Court: "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. Because Mr. Slahi cannot "return[] to the field of battle" when he was never on the battlefield to begin with, meaningful review of whether his detention serves any purpose requires review of whether he poses any threat to the United States today.

Slahi's on-going detention serves a legitimate purpose 14 years after it began renders the Department's deprivation of his liberty wholly arbitrary. Pet. Mot. 15. Nor do they dispute that the Executive Order creates a liberty interest in a PRB hearing. Pet. Mot. 13–15. And indeed, little could be more contrary to the Due Process Clause's prohibition on arbitrary deprivations, or to the Supreme Court's repeated statement that "[f]reedom from imprisonment . . . lies at the heart of the liberty that Clause protects," *see Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), than Respondents' insistence that they may continue to imprison Mr. Slahi without examining whether his ongoing detention is necessary. Under Respondents' theory, the Defense Department could engage in whatever arbitrary or conscience-shocking abuses the Due Process Clause prohibits, so long as those abuses are inflicted on noncitizens held prisoner at Guantánamo.

Respondents rely on *Rasul* and *Kiyemba* for this argument. *See* Opp. 27–29. But those cases cannot bear the weight Respondents seek to place on them in light of subsequent D.C. Circuit authority. In *Aamer*, the D.C. Circuit evaluated whether the Defense Department's force-feeding of Guantánamo prisoners violated their "liberty interest" to be free from unwanted medical treatment. *Aamer,* 742 F.3d at 1038. The court's analysis rested on its assumption that prisoners at Guantánamo can possess liberty interests protected by the Constitution. If the Court of Appeals agreed with Respondents' overbroad reading of *Kiyemba* as categorically and conclusively foreclosing due process rights at Guantánamo, it would have had no cause to carefully analyze the scope of a right to be free from unwanted medical treatment. *Aamer* must be read as implicitly acknowledging that *Kiyemba* was a decision limited to its facts, where the prisoner claimed the right to transfer into the United States, and did not categorically foreclose all constitutional challenges that sound in due process.

Respondents' argument that the Supreme Court's decision in *Rasul v. Myers* rejected the extension of constitutional rights besides the Suspension Clause to Guantánamo is equally untenable. Opp. 29. As Mr. Slahi showed in his opening brief, in the years since *Rasul*, the D.C. Circuit has continued to consider the impact of additional constitutional protections at Guantánamo. *See* Pet. Mot. 13. That Respondents err in their reading of *Rasul* is demonstrated by their reliance on Judge Henderson's minority view in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014). Judge Henderson wrote separately, arguing that *Rasul* barred extending the Fifth Amendment to Guantánamo and that the Ex Post Facto Clause therefore did not apply to military commissions held there. But a majority of the en banc court in *Al Bahlul* rejected this overbroad reading of *Rasul*, and would have held that the Ex Post Facto Clause applied at Guantánamo if the government had not preemptively conceded the question. *See id.* at 18 n.9.[13]

Both the Suspension Clause and the Due Process Clause protect Mr. Slahi from arbitrary executive detention. Under each, Mr. Slahi is entitled to the PRB hearing he seeks, and the Defense Department's failure to provide that hearing violates the Constitution.

C. This Court Has Jurisdiction to Determine that Mr. Slahi's Detention is Unlawful in the Absence of a Timely PRB Hearing and Order an Alternative Remedy.

Although the Court has the authority to order the Defense Department to provide a timely PRB hearing, *see supra* Section I.A, its jurisdiction over Mr. Slahi's claim that his detention is unlawful in the absence of a timely PRB hearing is not contingent on that specific remedy.

[13] Contrary to Respondents' characterization of this Court's decisions, Opp. 28, the Court has not held that the Due Process Clause does not apply to Guantánamo detainees. In *Rabbani v. Obama*, 76 F. Supp. 3d 21, at 25-26 (D.D.C. Dec. 19, 2014), the Court reserved decision on that question, and went on to consider whether force-feeding at Guantánamo violated detainees' Due Process rights. *Al Wirghi v. Obama*, 54 F. Supp. 3d 44, 47 (D.D.C. 2014) is even further afield: there, this Court held only that "lawfully detained enemy belligerents have no [judicially cognizable liberty] interest in whether or how the President exercises his discretion to transfer detainees." The Court did not discuss, much less reject, any application of due process to Guantánamo.

Respondents do not dispute that this Court has habeas jurisdiction to decide whether the Department has met the legal requirements for continuing to imprison Mr. Slahi. Instead, their objection to the Court's jurisdiction is that the Court cannot order the Defense Department to provide Mr. Slahi a timely PRB hearing. Opp. 18 ("Petitioner's claim does not sound in habeas . . . because it seeks injunctive relief too far removed from habeas' traditional remedy of release"). But even if the Court agrees with Respondents that it cannot order the Department to provide a timely PRB hearing, it has jurisdiction to order Mr. Slahi's release *unless* the Department provides Mr. Slahi that legally-required timely review of his ongoing detention.

Mr. Slahi has demonstrated that his current detention is unlawful so long as the Defense Department deprives him of a timely PRB hearing. His "essential claim is that his custody in some way violates the law, and he may employ the writ to remedy such illegality." *Aamer*, 742 F.3d at 1036. And as the Supreme Court made clear in *Boumediene*, a "habeas court must have the power to order the conditional release of an individual unlawfully detained." 553 U.S. at 779; *see also Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("[F]ederal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court."); *Wolfe v. Clarke*, 718 F.3d 277, 285 (4th Cir. 2013) (requiring state to retry or release petitioner within 120 days). Therefore, if this Court finds that it cannot order a timely PRB hearing, Mr. Slahi respectfully asks the Court to exercise its habeas authority and order his release from unlawful detention unless the Department provides him a PRB hearing within two months.

II. RESPONDENTS CONTINUE TO DEPRIVE MR. SLAHI OF ACCESS TO HIS LEGAL MATERIALS AND THUS TO ACCESS TO THIS COURT.

In their opposition, Respondents do not claim they are entitled to deprive Mr. Slahi of his legal materials; instead, they accuse Mr. Slahi of failing to request the return of those materials.

Opp. at 37-38. But Colonel Heath's assertion that Mr. Slahi has never asked for the return of his legal materials is false, and as of two weeks ago, the Guantánamo administration continues to deny Mr. Slahi access to his legal materials, which it has not returned to him despite multiple requests by Mr. Slahi and three of his counsel.

Respondents' characterize Mr. Slahi's claim as a "misunderstanding" of camp policy based on inaccurate statements of fact in the declaration of Colonel David Heath. Colonel Heath bases his information on what others have told him rather than on his personal knowledge, including of Mr. Slahi's cell. Heath Decl. ¶ 2. In contrast, Mr. Slahi's counsel have personal knowledge of these matters after many visits to him in his cell and their personal interactions with Guantánamo personnel. *See* Declaration of Linda Moreno dated September 11, 2015 ("Moreno Decl."), attached as Exhibit 1, and Declarations of Nancy Hollander and Theresa Duncan, each dated September 11, 2015 ("Hollander and Duncan Sept. 2015 Decls."), attached to Petitioner's Classified Supplement to his Reply.[14] Any "misunderstanding" is on the part of Colonel Heath, not Mr. Slahi and his counsel.

Mr. Slahi and his counsel have repeatedly asked for the return of the legal materials and yet, after ten months, they have not been returned. No Guantánamo official with whom Mr. Slahi or his counsel have spoken about securing the return of these materials explained the process Colonel Heath claims he put in place. And, despite multiple requests that the administration remove legal materials Colonel Heath's staff improperly left with Mr. Slahi months ago, those materials remain in his cell. Moreno Decl., at ¶ 10; *see also* Hollander and Duncan Sept. 2015

[14] Ms. Hollander and Ms. Duncan have filed classified declarations out of an abundance of caution because their declarations respond to—and dispute—many of the allegations in Colonel Heath's classified declaration. They do not believe the Heath declaration is properly classified for the reasons they explain in the Classified Supplement.

Decls. If Colonel Heath has put into the place the process he describes in his declaration, he has failed to explain that process to the people charged with implementing it. This failure has resulted in the ten-months-and-counting denial of access to Mr. Slahi's legal materials.

None of the guards with whom Mr. Slahi and Ms. Moreno recently spoke were aware of the "Detainee Admin" where Colonel Heath claims some of Mr. Slahi's legal materials are being stored. Moreno Decl., ¶ 7. And as the attachment to Colonel Heath's declaration makes clear, Mr. Slahi's legal papers would not fit into the four small bins Colonel Heath describes. Colonel Heath does not explain where the rest of Mr. Slahi's legal papers are being stored or who has access to them, and the list of legal materials does not identify any materials as being stored in bins.[15] Whatever Colonel Heath's intentions may be, the reality is that Mr. Slahi and his counsel have repeatedly requested the return of legal materials to which he is entitled and the removal of materials which were not to be left with him, have repeatedly been told those requests are "pending," and nothing has changed. Respondents' actions and inactions make clear that this deprivation will continue until the Court intervenes.

III. THE DEFENSE DEPARTMENT'S RESTRICTIONS ON MR. SLAHI'S CONDITIONS ARE ARBITRARY AND UNJUSTIFIED.

Respondents offer no legal defense to Mr. Slahi's conditions claims beyond asserting that Mr. Slahi has no right to challenge the severe deprivations his jailors have arbitrarily imposed on him. They fail to put forward any rational reason for the harsh restrictions they have imposed, arguing only that their treatment of Mr. Slahi is beyond review. As described above, this broad claim of unreviewable power cannot be squared with the D.C. Circuit's decision in *Aamer*. *See*

[15] Many of the legal documents previously stored in Mr. Slahi's cell are privileged and are not to be reviewed by Guantánamo personnel. Colonel Heath's declaration and the list of legal materials attached to it raise serious concerns about possible violations of the attorney-client privilege and the protective order governing this habeas case.

Section I.B.iii, *supra* (explaining that *Aamer* demonstrates that the Due Process Clause is not categorically ineffective at Guantánamo).

Respondents' only factual argument is their claim that Mr. Slahi has not been deprived of his personal property because he remains free to request its return. Opp. at 41. But as Mr. Slahi's counsel explained in their declarations, they and Mr. Slahi have repeatedly asked Guantánamo personnel to return his property—including family correspondence, books and gifts from former guards—and the Guantánamo administration has not yet returned them. Respondents' efforts to blame Mr. Slahi for the actions and inactions of the Guantánamo administration fail.[16]

CONCLUSION

For the reasons set forth in Mr. Slahi's Motion to Show Cause and above, the relief he requests should be granted.

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Respectfully submitted,

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[16] The government's claim that certain items found in Mr. Slahi's former cell were contraband is addressed in detail in the classified Hollander and Duncan declarations. Moreover, everything in Mr. Slahi's former cell was given to him by, or approved by, Guantánamo personnel.

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