IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE (ISN 310), **Petitioner,** **v.** **BARACK H. OBAMA, *et al.*,** **Respondents.**	**Civil Action No. 05-CV-0392 (ESH)**

RESPONDENTS' REPLY BRIEF IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS

Respondents hereby file their Reply Brief in Support of Respondents' Cross-Motion to Dismiss. On May 9, 2014, Petitioner filed Petitioner's Reply in Further Support of Motion for Grant of Habeas Relief in the Form of an Order Requiring the Government to Return Petitioner's Personal Property, and Opposition to the Government's Cross-Motion to Dismiss this Habeas Case ("Petitioner's Opposition Brief"). See ECF No. 361. Petitioner raises a variety of new legal arguments in support of his opposition to Respondents' cross-motion to dismiss. For the reasons described below, Respondents' Cross-Motion to Dismiss should be granted.

ARGUMENT

I. This Case Must Be Dismissed Because Petitioner's Personal Property Claim is Not Cognizable in Habeas.

The only remaining claim in this habeas corpus case is Petitioner's claim for return of personal property. Because this sole remaining claim is not cognizable in habeas, this habeas case must be dismissed. Petitioner, however, argues that his claim for

return of personal property is cognizable in habeas because: the claim flows directly from the fact of his prior detention (citing Aamer v. Obama, 742 F.3d 1013 (D.C. Cir. 2014)); habeas is not a static, formalistic remedy; the Court has broad equitable habeas authority; and the numerous habeas cases cited by Respondents that reject the authority of habeas courts to order the return of property are distinguishable from the circumstances of this case. None of Petitioner's arguments hold water.

As explained in Respondents' initial brief (ECF No. 358) ("Respondents' Opening Brief"), Aamer involved a challenge by a Guantanamo detainee currently in custody to his current conditions of confinement. That case is different than the circumstances here, which involve a former detainee who is seeking an order for the return of personal property. See Respondents' Opening Brief at 10 n.4. As explained in Respondents' Opening Brief, every habeas court decision that we are aware of that has addressed this issue has held that claims for personal property are not cognizable in habeas corpus. See Respondents' Opening Brief at 5-8. Petitioner cites to no case in which a habeas court has held that it has the authority to order the return of personal property, despite the numerous cases, including from this Circuit, that have addressed the issue. The best argument that Petitioner can muster is his allegation that Respondents "cite[] no authority that would prohibit this Court from exercising habeas jurisdiction over Mr. Ameziane's motion for return of his money." Petitioner's Opposition Brief at 13. On the contrary, the Court must have jurisdiction in order to hear a case; Petitioner must demonstrate such jurisdiction exists, see Baker v. England, 397 F. Supp. 2d 18, 22 (D.D.C. 2005); and, here, the Court simply lacks jurisdiction over personal property claims in statutory or common law habeas. See Respondents' Opening Brief at 5-9.

Petitioner incorrectly states that Respondents have merely argued that no court has granted a Guantanamo detainee's request for return of personal property. On the contrary, the reason no habeas court, whether in the domestic prisoner context or otherwise, has awarded such relief is because it is not cognizable in habeas.

The general principle cited by Petitioner that habeas is a flexible and equitable remedy does not overcome the fact that property claims are not, and have never been, cognizable in habeas. The equitable nature of habeas relief cannot extend this Court's jurisdiction nor transform the substantive scope of the writ into something it is not. Cf. Gul v. Obama, 652 F.3d 12, 22 (D.C. Cir. 2011) ("Equity is not a substitute for meeting the requirements of Article III."); see Respondents' Opening Brief at 10 n.5.

II. 28 U.S.C. § 2241(e)(2) is Constitutional.

As explained in Respondents' Opening Brief, because Petitioner's property claim is not cognizable in habeas and because this non-habeas claim regards an aspect of his detention at or transfer from Guantanamo Bay, the Court lacks jurisdiction over the claim pursuant to 28 U.S.C. § 2241(e)(2). Respondents' Opening Brief at 9-10. Petitioner argues in his Opposition Brief that 28 U.S.C. § 2241(e)(2) is unconstitutional because it violates Article III of the Constitution by removing all federal court jurisdiction over claims by alien enemy combatants, despite the Court of Appeals having already upheld the constitutionality of 28 U.S.C. § 2241(e)(2) on two occasions in Al-Zahrani v. Rodriguez, 669 F.3d 315 (D.C. Cir. 2012) and Al Janko v. Gates, 741 F.3d 136 (D.C. Cir. 2014) (petition for rehearing pending, No. 12-5017). Petitioner also claims that 28 U.S.C. § 2241(e)(2) violates the Due Process Clause. Petitioner's arguments lack merit.

A. The Court of Appeals Has Addressed the Constitutionality of 28 U.S.C. § 2241(e)(2).

The Court of Appeals has held that 28 U.S.C. § 2241(e)(2) is a valid and constitutional exercise of Congressional power. Al-Zahrani, 669 F.3d at 317-320. Petitioner claims that Al-Zahrani was only addressing whether a remedy, in the form of damages, was available and whether Al- Zahrani's claims were a valid cause of action, and did not actually address the court's jurisdiction. Petitioner's Opposition Brief at 23-24. The Al-Zahrani decision, however, clearly addresses jurisdiction proper. 669 F.3d at 317 ("Because we are satisfied that neither the district court nor this court has jurisdiction over the subject matter of this action due to the jurisdictional bar created by … 28 U.S.C. § 2241(e), we affirm the judgment of dismissal."); Id. at 319 ("this action is excluded from the jurisdiction of this court by the 'plain language' of an Act of Congress."); Id. at 319 ("we uphold the continuing applicability of the bar to our jurisdiction over 'treatment' cases."); Id. at 320 ("we hold that 28 U.S.C. § 2241(e)(2) deprives this court of jurisdiction over appellants' claims.").[1]

The Court of Appeals again upheld 28.U.S.C. § 2241(e)(2)'s constitutionality in Al Janko, 741 F.3d at 145-47. Al Janko, a former Guantanamo detainee, filed a complaint for damages for injuries he alleged that he sustained during his detention at Guantanamo. Al Janko, 741 F.3d at 138. The Court clearly explained the issue at hand: "to decide whether the Congress has conferred authority on the district court to hear his

[1] The Court of Appeals stated that the fact that a damages claim was Al-Zahrani's sole remedy for vindicating his asserted rights did not change the analysis that 28.U.S.C. § 2241(e)(2) is constitutional. Al-Zahrani, 669 F.3d at 320 ("'Not every violation of a right yields a remedy, even when the right is constitutional.'"), (quoting Kiyemba v. Obama, 555 F.3d 1022, 1027 (D.C. Cir. 2009), reinstated as amended by Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010)).

claims and, if it has not, whether the Congress has constitutional authority to withhold jurisdiction." Id. at 139. Similar to the Al-Zahrani case, Al Janko also challenged the constitutionality of 28 U.S.C. § 2241(e)(2). Id. at 145-146. The Court noted that "[t]he class of claims to which section 2241(e)(2) constitutionally applies plainly encompasses … *any* detention-related claims, whether statutory or constitutional, brought by an alien detained by the United States and determined to have been properly detained as an enemy combatant." Al Janko, 741 F.3d at 146, (citing Al-Zahrani, 669 F.3d at 318-319). The Court then concluded its explanation of why 28 U.S.C. § 2241(e)(2)'s withdrawal of jurisdiction was constitutional with the following:

> The Constitution, subject to certain limitations, leaves exclusively to the Congress questions of fairness, justice, and the soundness of policy in the allocation of our jurisdiction. "[T]his court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." [citations omitted]. The Congress has communicated its directive in unmistakable language and we must obey.

Al Janko, 741 F.3d at 147, (quoting Wagner v. FEC, 717 F.3d 1007, 1016 (D.C. Cir. 2013) (per curiam)).[2] Therefore, it is clear that the Court of Appeals, both in the Al-Zahrani case and again in the Al Janko case, addressed, and upheld, the constitutionality of 28 U.S.C. § 2241(e)(2) in those cases.[3]

---

[2] The Al-Janko Court also rejected Al-Janko's argument that the fact that he had previously been granted the writ of habeas corpus made the 28 U.S.C. § 2241(e)(2) bar to his claims unconstitutional. The Court of Appeals noted that Al Janko had been determined to be an "enemy combatant" within the terms of § 2241(e)(2) and explained that "[w]hile his successful habeas petition is a factual distinction, it makes no constitutional difference. Jurisdiction, in this context, is the authority of a court to decide a particular class of cases." Al-Janko, 741 F.3d at 146. Likewise, Mr. Ameziane has been determined to be an "enemy combatant" by a Department of Defense Combatant Status Review Tribunal, (see ECF No. 16), and litigating the merits of the case at bar would be pointless because even if Mr. Ameziane were to be granted the writ of habeas corpus, 28 U.S.C. § 2241(e)(2) would still bar his non-habeas personal property claim.

[3] The Ninth Circuit has also held that 28 U.S.C. § 2241(e)(2)'s jurisdictional bar is

B. 28 U.S.C. § 2241(e)(2) Does Not Violate the Fifth Amendment.

Petitioner contends that 28 U.S.C. § 2241(e)(2) violates the Due Process Clause of the Fifth Amendment because it precludes judicial review of claims such as Petitioner's, which he alleges deprives him of property without due process of law. Petitioner's Opposition Brief at 24-28. Petitioner also claims that 28 U.S.C. § 2241(e)(2) violates equal protection principles of the Fifth Amendment because it only applies to aliens, discriminates as to the fundamental right of access to the courts, and effectively applies only to Muslims. Id. For the reasons explained below, these arguments fail.

1. Section 2241(e)(2) Does Not Violate the Due Process Clause.

Petitioner's claim for the return of personal property (specifically the currency that he had when he was captured) is akin to a writ of replevin or a tort claim for conversion or for damages for the loss of his personal property. There is no liberty interest at stake here, and Petitioner has not explained how he has a constitutionally protected property interest in this context. In any event, to the extent that Petitioner claims that his asserted claim implicates constitutional due process, the Court of Appeals has held that unprivileged belligerent aliens detained at Guantanamo, such as Petitioner, do not have constitutional due process rights. See Kiyemba v. Obama, 555 F. 3d 1022, 1026 (D.C. Cir. 2009) ("Kiyemba I"), vacated and remanded, 559 U.S. 131 (2010) (per curiam), reinstated, 605 F. 3d 1046 (D.C. Cir. 2010); see also Al-Madhwani v. Obama, 642 F. 3d 1071, 1077 (D.C. Cir. 2011).

---

constitutional in both the damages context and with regard to a constitutionally based claim for declaratory relief. Hamad v. Gates, 732 F.3d 990, 1003-1006 (9th Cir. 2013); Nashiri v. MacDonald, 741 F.3d 1002, 1009-1010 (9th Cir. 2013). These cases are discussed in more detail below.

2. Section 2241(e)(2) Does Not Violate the Equal Protection Clause.

Petitioner claims that 28 U.S.C. § 2241(e)(2) violates the equal protection principles incorporated into the Fifth Amendment because it applies only to aliens. Petitioner's Opposition Brief at 25-27. Section 2241(e)(2), however, does not violate equal protection, even assuming Petitioner could assert such a claim.

"There are legitimate reasons for Congress to make classifications based on alienage" including Congress's "authority to address the United States' relations with foreign powers and other foreign policy concerns." Hamad, 732 F.3d at 1005 (citing Mathews v. Diaz, 426 U.S. 67, 78-81 (1976)). Alienage classifications made by Congress are reviewed under a rational basis test. Hamad, 732 F.3d at 1005-1006.

In Hamad, the Ninth Circuit analyzed the constitutionality of the alienage classification in 28 U.S.C. § 2241(e)(2) as applied to former Guantanamo detainees and concluded that 28 U.S.C. § 2241(e)(2) passes the rational basis review because "Congress's decisions with respect to these detainees are at the core of Congress's authority with respect to 'the conduct of foreign relations, the war power, and the maintenance of a republican form of government,' and thus are entitled to the most deferential judicial review." Id. at 1006 (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 & n.17 (1976)). Additionally, the Court explained that "Congress's decision to focus on alien detainees, rather than citizens, is neither arbitrary nor irrational; it is clearly intended 'to serve Congress' legitimate foreign policy concerns' . . . by ensuring that members of the armed forces are not unduly chilled in conducting," an armed conflict "by concerns about foreign nationals targeting them with damages claims." Hamad, 732 F.3d at 1006 (citations omitted), (quoting U.S. v. Lopez-Flores, 63 F.3d 1468, 1475 (9th

Cir. 1995)).

In Al-Nashiri v. MacDonald, 741 F.3d 1002, 1009-1010 (9th Cir. 2013), the Ninth Circuit again upheld the constitutionality of 28 U.S.C. § 2241(e)(2). Al-Nashiri filed a non-habeas claim seeking relief in the form of a declaratory judgment that a military commission lacked jurisdiction to hear the charges against him. Id. at 1004, 1007. The Al-Nashiri Court rejected the equal protection arguments for the same reasons that the court rejected them in Hamad, and again upheld the constitutionality of 28 U.S.C. § 2241(e)(2). Likewise in this case, because the alienage classification in 28 U.S.C. § 2241(e)(2) has a rational basis, it does not violate equal protection.[4]

Petitioner also claims that 28 U.S.C. § 2241(e)(2) violates equal protection principles because it was intended to apply only to Muslims. Petitioner's Opposition Brief at 27-28. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Petitioner has offered no proof, or even evidence that this statute was enacted with discriminatory intent. The attacks on September 11, 2001 were committed by the armed group al-Qaida, which was in turn harbored by the Taliban regime in Afghanistan. Congress's response to limit the ability of individuals determined to be "enemy combatants" in the conflict against these specific armed groups to file lawsuits in United States courts is hardly evidence of discriminatory intent against Muslims.

[4] Petitioner's allegations regarding violation of his right of access to the courts adds nothing to his equal protection claim. As noted above, alienage classifications made by Congress are reviewed under a rational basis test, and such rational bases exist for § 2241(e)(2).

III. Neither Army Regulation 190-8, Al-Warafi, Nor International Law Authorize this Court to Grant Petitioner's Motion for Return of Property.

Petitioner claims that Al-Warafi v. Obama, 716 F.3d 627 (D.C. Cir. 2013), Army Regulation 190-8 (AR 190-8), and international law support his claim for relief. Petitioner's arguments are misplaced.

A. Al-Warafi Does not Extend Habeas Jurisdiction over Petitioner's Non-Habeas Claim.

As explained in Respondents' Opening Brief, Al-Warafi held that "in a habeas proceeding such as this, a detainee may invoke Army Regulation 190-8 to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody." Al-Warafi, 716 F.3d at 629 (emphasis added). The circumstances in Al-Warafi are clearly distinguishable from the facts presented here. Petitioner has already been released from United States custody and transferred from Guantanamo Bay, so Al-Warafi and AR 190-8 simply cannot be invoked in this non-habeas claim for return of property. Petitioner acknowledges as much when he states in his Opposition Brief that "Al-Warafi did not involve the same issues as Mr. Ameziane's motion." Petitioner's Opposition Brief at 5. Petitioner, however, asks this Court to extend the Al-Warafi holding to the unique circumstances of this case, which are completely different from Al-Warafi and involve a former detainee asserting a non-habeas claim unrelated to the legality of his detention after he is no longer in custody. Petitioner cites to Judge Kavanaugh's concurring opinion in the denial of rehearing en banc in the Al-Bihani case for the proposition that AR 190-8 is a legally binding rule, (see Petitioner's Opposition Brief at 5), but Petitioner neglects to include the earlier discussion in which Judge Kavanaugh explained that when international laws of war are codified into U.S. domestic law, they

"become part of the domestic U.S. law that federal courts must enforce, assuming there is a cognizable cause of action and the prerequisites for federal jurisdiction are satisfied." Al-Bihani v. Obama, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (emphasis added). As explained above, this claim is neither cognizable in habeas nor otherwise within the jurisdiction of the Court as a result of 28 U.S.C. § 2241(e)(2). There is simply no basis for this Court to extend the Al-Warafi holding to the non-habeas claim of a former detainee who is no longer detained at Guantanamo Bay.

Further, the issue concerning Army Regulation 190-8 presented in Al-Warafi was quite different than the question that Petitioner presents here. The issue in Al-Warafi was a question of classification, i.e., whether Al-Warafi was a type of person (Retained Personnel) who, under the Geneva Conventions, was subject to repatriation as soon as practicable. In this case, by contrast, Petitioner does not present a question of classification similar to Al-Warafi that goes to the legality of his detention and is cognizable in habeas. Rather, Petitioner asks this Court to order the return of personal property, a non-habeas claim. This is a totally different situation than that presented in Al-Warafi, and the Court should decline Petitioner's invitation to expand the holding in Al-Warafi beyond questions of classification because the Court has no jurisdiction over this non-habeas claim. Additionally, were the Court to expand the holding of Al-Warafi in such a manner, it would be delving into areas of national security policy reserved for the Executive. See Liotta Decl. at ¶ 11 (ECF No. 358-1); Respondents' Opening Brief at 18 n.14.

B. Even if AR 190-8 is Applied to Petitioner, it Does Not Authorize Judicial Relief.

Petitioner argues that AR 190-8 and the international law that it implements do not bar a judicial remedy for his claim for return of property, and further argues that AR 190-8 is intended to facilitate the return of a detainee's property. Petitioner's Opposition Brief at 6-7. Petitioner misunderstands the issue. Petitioner is attempting to use AR 190-8, and the international law that it implements, as a basis for authorizing the Court to order the return of impounded money. But as explained above, the Court does not have jurisdiction over this non-habeas claim, and AR 190-8 cannot overcome this lack of jurisdiction. Further, even assuming this Court did have jurisdiction over Petitioner's non-habeas claims, AR 190-8 states that the remedy for claims by former detainees for the return of personal property is a claim with their home country and not with the former detaining power. See Respondents' Opening Brief at 13-14 (citing to the provisions of AR 190-8, international law, and court cases that make clear that former detainees must make such claims to their home country which will in turn resolve the issue with the former detaining power.). AR 190-8 and the international law that it implements make no mention of a domestic judicial remedy for such claims. Because an express remedy for return of former detainee property already exists (see Respondents' Opening Brief at 13-15), even assuming this Court did have jurisdiction over Petitioner's non-habeas claims, it should not imply or create an alternative remedy. Cf. Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) ("where a statute expressly provides a

particular remedy or remedies, a court must be chary of reading others into it"). Thus, AR 190-8 cannot be used as a basis for jurisdiction over this non-habeas claim.[5]

IV. This Case is Moot and Should Be Dismissed Because Any Collateral Consequences of Petitioner's Prior Detention Cannot be Redressed by this Court.

Petitioner again argues that this case is not moot, even though he has been transferred to Algeria, because, according to Petitioner, the Court can order Respondents to return Petitioner's property. Alternatively, Petitioner argues the Court can issue a habeas decision on the merits, presumably finding that Petitioner is not part of al-Qaida, the Taliban, or associated forces, which would, in Petitioner's view, eliminate the Government's basis for holding the money and result in its return. Petitioner's Opposition Brief at 13-15.[6] Petitioner's arguments again fail.

---

[5] Petitioner argues that Respondents have waived opposing Petitioner's arguments regarding the 1907 Hague Convention, the Fourth Geneva Convention, and international human rights law because Respondents did not specifically address these arguments in their opposition brief. Petitioner's Opposition Brief at 4. Respondents have not waived any arguments. Respondents' arguments about AR 190-8 and the international law that it implements, including the Geneva Conventions, apply to these arguments of the Petitioner as well. Simply put, Petitioner cites to no provision of international law that contemplates domestic judicial relief for disputes regarding the return of an unprivileged belligerent's personal property impounded by the detaining power. To the contrary, international law does contemplate that such disputes should be raised, if at all, with the former detainee's home country. See Respondents' Opening Brief at 12-15. Petitioner's arguments do not overcome the lack of jurisdiction for his non-habeas claim in this Court.

[6] Petitioner also asks this Court essentially to reject the Court of Appeals' decision in Gul (see Petitioner's Opposition Brief at 14 n.11) in which the Court of Appeals determined that there is no presumption that a former detainee faces collateral consequences sufficient to keep his petition from becoming moot upon his release, and that the former detainee "must instead make an actual showing his prior detention or continued designation burdens him with 'concrete injuries.'" Gul v. Obama, 652 F.3d 12, 17 (D.C. Cir. 2011) (quoting Spencer v. Kemna, 523 U.S. 1, 14 (1998)). The Court further noted that "[a]s no continuing injury is to be presumed …, the burden of

As explained above and in Respondents' Opening Brief, this Court has no jurisdiction over this non-habeas claim, and therefore it should be dismissed. But even absent the statutory jurisdictional bar, the claim is moot because, as explained in Respondents' Opening Brief, the Government's retention of the money that was seized at the time of Petitioner's capture is based on strong national security interests; it does not turn on whether Petitioner has obtained or may subsequently obtain habeas relief. See Respondents' Opening Brief at 16-17; Liotta Declaration at ¶¶ 9-12. Mr. Liotta explained the application of this policy as follows:

> The policy to retain contraband, law enforcement evidence, and currency is uniformly applied to all detainees in Department of Defense custody at Guantanamo Bay. No distinctions are made based on a detainee's status or whether the detainee has sought or obtained habeas corpus relief. Further, no distinction has been made based on the amount of money held by JTF-GTMO in relation to a specific detainee. To the best of my knowledge, no detainees who have been transferred or released by the Department of Defense from Guantanamo Bay have ever been provided with inventoried funds attributable to them upon their departure from the detention facility.

Liotta Decl. at ¶ 12. Thus, this case is moot regardless of how the Court might rule in the future on the merits of the lawfulness of Petitioner's prior detention. A determination on the merits of Petitioner's former detention would not have any effect on DoD's longstanding policy based on national security interests to retain the money that former detainees had at the time of their capture.[7]

---

demonstrating jurisdiction is properly borne by the [petitioners]." This court is bound by the precedent in Gul and thus Petitioner's argument should be rejected.

[7] Petitioner requests discovery and an evidentiary hearing on DoD's policy regarding the retention of money found on Guantanamo detainees, including the questioning of Mr. Liotta if the Court determines that this policy is relevant to the determination of Petitioner's Motion or Respondents' Cross-Motion. Petitioner's Opposition Brief at 2 n. 3. Respondents oppose these requests because they are not relevant to the resolution of

Petitioner also claims that the Government should be judicially estopped from contending now that Petitioner presented a threat that required the retention of his money, when according to Petitioner, the Government previously contended that Mr. Ameziane was not a threat. See Petitioner's Opposition Brief at 15-16. As explained in our September 11, 2013 Response to Petitioner's Motion for Order of Release (ECF No. 319), however, the Guantanamo Review Task Force approved Petitioner for "[t]ransfer outside the United States to a country that will implement appropriate security measures." Guantanamo Review Dispositions, ECF No. 301-1 at 2. The Final Report of the Guantanamo Review Task Force explained the significance of an approval for transfer as it relates to a detainee's threat:

> It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented.

Final Report – Guantanamo Review Task Force (January 22, 2010) (ECF No. 319, Exhibit 6) (also available at http://www.justice.gov/ag/guantanamo-review-final-report.pdf) at 17. Thus, that Petitioner was approved for transfer does not equate to a determination that he no longer posed any threat. Therefore, Respondents have not

---

the pending motions. As explained in this brief and Respondents' Opening Brief, the Court lacks jurisdiction over this non-habeas claim for personal property filed by Petitioner who has been transferred from U.S. custody, and therefore this case must be dismissed for lack of subject matter jurisdiction and as moot. Further, Mr. Liotta's declaration explains DoD's policy regarding retention of former detainee property, and Petitioner has offered no explanation why any discovery would be material to resolution of his jurisdictionally barred claim.

changed their position during this litigation, and judicial estoppel is not applicable. See Zedner v. U.S., 547 U.S. 489, 504 (2006), (quoting New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001)) (One of the factors for judicial estoppel is that "a party's later position must be clearly inconsistent with its earlier position."). Additionally, the Court of Appeals explained that even "[a]n order granting a detainee's habeas petition would not mean his exoneration, nor would it be a determination he does not pose a threat to American interests; it would mean only that the Government has not proven the detainee more likely than not" satisfied the Authorization for Use of Military Force, ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), detention standard, including being "'part of' a force associated with al Qaeda or the Taliban." Gul, 652 F.3d at 19.[8] As explained in Mr. Liotta's declaration, the Department of Defense mitigates the threat that a detainee released from Guantanamo may pose by not returning any of his financial instruments or currency that might be used to adversely impact the safety and security of the United States. See Liotta Decl. at ¶ 11. Such decisions are the exclusive province of the

[8] Petitioner also argues that DoD's policy on retention of monies of former Guantanamo detainees cannot be analogized, as Respondents suggest, to presence on the No Fly List that was rejected as a collateral consequence by the Court of Appeals in Gul. Petitioner asserts "that the decision to exclude someone from the United States is informed by 'a number of factors' in immigration law, none of which is whether the individual had been detained at Guantanamo and designated as an enemy combatant." Petitioner's Opposition Brief at 17. Petitioner, however, appears to be confusing the No Fly List (49 U.S.C. § 44903(j)(2)(C)(v)), which bars individuals formerly detained at Guantanamo from flights entering the United States, with a separate statute that denies entry into the United States to anyone "who has engaged in a terrorist activity … is a member of a terrorist organization … [or] has received military-type training …." Gul, 653 F.3d at 19-20 (quoting 8 U.S.C. § 1182(a)(3)(B)). In any event, the key point of the analogy is that both the No Fly List and DoD policy on the retention of money of former detainees are not affected by the issuance, or not, of a writ of habeas corpus related to the legality of detention. As the Court of Appeals explained in Gul with respect to the No Fly List, "'any individual who was a detainee held at … Guantanamo Bay' must be included on the No Fly List." Gul, 652 F.3d at 19 (quoting 49 U.S.C. § 44903(j)(2)(C)(v)).

Executive, and judicial intervention in habeas corpus proceedings with respect to such decisions would not be appropriate. Cf. Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.").

Thus, for all these reasons, this case should be dismissed as moot.

CONCLUSION

For the reasons explained above and in Respondents' Cross-Motion to Dismiss, Respondents' Cross-Motion to Dismiss should be granted.

Dated: June 4, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
Civil Division

JOSEPH H. HUNT
Branch Director

TERRY M. HENRY
Assistant Branch Director

/s/ *Daniel M. Barish*
ANDREW I. WARDEN
DANIEL M. BARISH (D.C. Bar No. 448263)
HECTOR BLADUELL
JOSEPH FOLIO
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20530
Tel: (202) 305-8970
Fax: (202) 305 2685
Daniel.Barish@usdoj.gov
Attorneys for Respondents