IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE, Petitioner,	:	
v.	:	Civil Action No. 05-392 (ESH)
BARACK OBAMA, *et al.*, Respondents.	:	

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 Djamel Ameziane, by and through his undersigned counsel, respectfully submits this memorandum (1) in reply in further support of his motion for an order granting habeas relief in the form of an order requiring the government to return his personal property, and (2) in opposition to the government's cross-motion to dismiss his habeas petition. Mr. Ameziane's motion should be granted and the government's cross-motion should be denied.

Preliminary Statement

Mr. Ameziane has filed a motion to get his money back because the government has unreasonably withheld it since his transfer five months ago. It may not seem like a large sum, but it is his life savings and he needs it in order to survive in Algeria – to purchase food and clothing, and support other basic human needs. In its opposition brief, the government does not dispute that it left Mr. Ameziane utterly destitute, with virtually nothing but his prison uniform; that it has the money at issue, including approximately £700 (GBP); and that the money is his

personal property. The government also concedes that the money was not withheld as contraband or law enforcement evidence, or based on his alleged conduct. In addition, the government does not seriously dispute that the return of Mr. Ameziane's money upon transfer is contemplated by domestic law, the laws of war, and human rights law, or that the Court has equitable habeas authority to fashion a practical remedy as law and justice require here.

The government claims that it has withheld Mr. Ameziane's money pursuant to a purported policy that the Defense Department applies to all Guantánamo detainees without distinction. The government concedes that the policy is not the subject of any formal Defense Department issuance, but has failed and refused to provide other information about it, including whether or where it is memorialized, what it actually says, whether or when or how it was adopted and by whom, whether exceptions to the policy exist or have been made previously, and whether it has the force of law.[1] Indeed, it is unclear whether an agency rule or policy actually exists, or whether this is merely a self-serving determination (or perhaps a litigation position) offered for this particular case by a Defense Department official who seems to believe that all Guantánamo detainees are potentially dangerous terrorists because they were held at Guantánamo.[2] But in any event the alleged policy is not entitled to deference as a matter of law.[3]

The government also contends that even if domestic and international law provide for the return of a detainee's money and other personal property upon transfer, those authorities do not

[1] *See* Email from government counsel refusing to provide discovery (attached as Reply Ex. A).

[2] *See* Decl. of Jay Alan Liotta ¶ 11 (attached to Gvt. Br.) (dkt. no. 357-1) ("Liotta Decl.").

[3] To the extent that the Court determines the "policy" is relevant to its resolution of Mr. Ameziane's motion or the government's cross-motion, Mr. Ameziane requests that the Court order the government to provide discovery or schedule an evidentiary hearing so that Mr. Ameziane may question Mr. Liotta about the policy. *See* 28 U.S.C. §§ 2243, 2246.

contemplate a judicial remedy in U.S. courts. The government is wrong as a matter of law, and in any event does not address many of the arguments cited by Mr. Ameziane in his motion.

In addition, the government contends that the Court lacks jurisdiction to compel the return of Mr. Ameziane's money. The government argues that his claim is not cognizable in habeas, but ignores that its sole basis for withholding his money (Al Qaeda uses money to launch attacks) is inextricably intertwined with a central question tested by this habeas case (whether Mr. Ameziane was part of Al Qaeda). The government alleges that "al-Qaeda rel[ies] on financing and support networks to sustain operations and launch attacks"; it is "possible that former detainees will use their returned money to help finance terrorist activities"; money is as "dangerous[ ] as a weapon"; and retention "mitigates the threat that a detainee released from Guantánamo Bay may pose by removing from his possession any . . . currency that might be used to adversely impact the safety and security of the United States."[4]

Mr. Ameziane filed this habeas case to challenge the legality of his detention and erase any notion that he is a terrorist or terrorist sympathizer, and the government cites no authority barring this Court from granting his request for relief.

The government finally argues that Mr. Ameziane's motion should be denied and his habeas case should be dismissed as moot because he has been released from Guantánamo, he cannot establish any collateral consequence of his prior detention that is redressible by a favorable ruling on his habeas petition, and the Court lacks jurisdiction over non-habeas claims pursuant to 28 U.S.C. § 2241(e)(2). The government's arguments should be rejected for several reasons, including because § 2241(e)(2) is unconstitutional and therefore void. Construing the

[4] Liotta Decl. ¶ 11.

Court's habeas authority to afford the limited relief requested would avoid any such difficult constitutional questions.

In sum, if the government believes that Mr. Ameziane presents a possible risk to the United States, it may employ well-established, congressionally-authorized procedures to block the assets of specially designated terrorists, which, unlike the government's unilateral action here, would trigger legal remedies that would allow him to contest the seizure and recover his money. The government has not done so, of course, because Mr. Ameziane poses no threat.

Argument

I. The Government Does Not Seriously Dispute that U.S. and International Law Contemplate the Return of Mr. Ameziane's Personal Property, and No Authority Prohibits this Court from Granting Habeas Relief to Enforce that Right

The government contends that the Court lacks habeas jurisdiction to order the return of Mr. Ameziane's money. It claims that neither Army Regulation 190-8 nor international law requires or authorizes the Court to order return of the money. The government also argues that Mr. Ameziane's claim is not cognizable in habeas. The government is wrong in each respect.

A. The Government Has Waived Opposition to Several Arguments Raised by Mr. Ameziane in Support of His Entitlement to the Return of His Money

As an initial matter, Mr. Ameziane argues in his opening brief that he is entitled to the return of his money under the 1907 Hague Convention, the Fourth Geneva Convention, and international human rights law. *See* Mot. at 8-10. Because the government does not address these arguments in its brief, the Court should deem them conceded and any opposition waived. The government likewise does not dispute that the Court has broad, equitable authority to order habeas relief that is not limited to an order of release from custody; that the Court may dispose of this habeas case as law and justice require; and that the Court may utilize ordinary civil rules in

order to fashion appropriate relief, including an award of interest on the money withheld. *Id.* at 10-12 (citing 28 U.S.C. § 2243 and *Harris v. Nelson*, 394 U.S. 286, 291 (1969)).

B. *Al-Warafi* Does Not Bar Mr. Ameziane's Reliance on Army Regulation 190-8

The government argues that Army Regulation 190-8 cannot be invoked in this habeas case under *Al-Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013). The government points to language from that decision stating that "a detainee may invoke Army Regulation 190-8 to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody." *Id.* at 629. Citing no other authority, the government asserts that this language means Mr. Ameziane may not invoke the regulation because he is not arguing for release. Gvt. Br. at 12. But *Al-Warafi* did not involve the same issues as Mr. Ameziane's motion, and as such the Circuit had no opportunity to prescribe any limit to the applicability of Army Regulation 190-8. There is also no basis for a court to conclude that the regulation may be invoked only in part by a habeas petitioner who seeks an order of release, or may be enforced by a U.S. court only to the extent that it compels an order of release. The regulation is domestic U.S. law that applies in its entirety. *See Al-Bihani v. Obama*, 619 F.3d 1, 12 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing *en banc*) ("[A]cting pursuant to congressional authorization, the Executive Branch has promulgated numerous legally binding rules that regulate wartime conduct of the military [including Army Regulation 190-8]. . . . Those laws, along with many other statutes and regulations, together constitute a comprehensive body of domestic U.S. laws of war."); *id*. at 13 ("[D]omestic U.S. law [is] enforceable in U.S. courts."); *id.* at 14 n.3 (190-8 has "force of law"); *see also Service v. Dulles*, 354 U.S. 363, 388 (1957) (agency is obligated to follow its regulations and may not selectively apply their provisions). Habeas relief is also not limited to orders of release. *See Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014)

("[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.'").

C. The Government Misreads U.S. and International Law, Which Are Intended to Facilitate Rather than Limit the Return of a Detainee's Personal Property

The government also argues that Army Regulation 190-8 and the Third Geneva Convention provisions that it implements as domestic law many not be judicially enforced because disputes regarding impounded money must be referred to a detainee's home country for resolution. Gvt. Br. at 2, 13-14. The government further implies that resolution by the detainee's home country is the only method of resolution, which is plainly wrong. Nothing in the regulation or under international law more generally purports to bar a judicial remedy in U.S. courts. Indeed, *Al-Warafi* illustrates the contrary – a court must apply Army Regulation 190-8 because it has the force of law. The purpose of the regulation and international law that it implements, both treaty-based and customary, is unambiguously to ensure that detainees held during armed conflict are able to get their money and other personal property back upon repatriation. *See* Mot. at 7-10 (citing provisions for return of money).[5]

The government also misreads the specific provisions on which it relies. It cites § 6-3(b)(2) of Army Regulation 190-8, which states in part that disputes about compensation for lost or impounded money will be referred to the detainee's home country. The government also cites the Commentary to Article 18 of the Third Geneva Convention, which likewise states in part that

[5] Citing Section 5 of the Military Commissions Act of 2006, the government argues that a detainee may not invoke the Geneva Conventions as a source of rights. Gvt. Br. at 11-12. Putting aside the fact that Mr. Ameziane relies on domestic law as a source of rights, this provision is unconstitutional because it prescribes "rules of decision to the Judicial Department" and is tantamount to "allowing one party to a controversy to decide it in its own favor." *United States v. Klein*, 80 U.S. 128, 146 (1872). The provision also notably contravenes *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-32 (2006), which finally resolved the question of whether Common Article 3 of the Geneva Conventions applies in these cases.

if money is not returned at the end of captivity, a detainee "cannot make a claim against the former Detaining Power." Gvt. Br. at 13. But contrary to the government's contention, these provisions do not purport to establish a *legal barrier* to seeking recovery from the Detaining Power. Rather, as the Commentary plainly shows these provisions recognize that at the end of hostilities between nation-states a detainee may not as a *practical matter* have an opportunity to seek relief from the Detaining Power (because he may not have time before transfer, or may already have been returned home, or may otherwise lack the ability to bring a claim directly against the Detaining Power in the war's aftermath). *See* Int'l Comm. of the Red Cross, *Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War* 170-71 (Jean S. Pictet ed. 1960) ["Commentary"]. Thus, the Commentary "suggest[s]" that the detainee's own country should take responsibility for compensating him, and "a general solution" to such claims should be worked out between state parties to the conflict "within the context of [a] peace treaty" because "[t]his solution would certainly be *more advantageous* for the prisoner of war." *Id.* at 171 (emphasis added). In other words, these provisions are intended to help detainees get their property back rather than to limit or prohibit them from doing so.[6]

Any suggestion that Mr. Ameziane must get his money back in the context of a peace treaty also makes no sense in the context of a war without apparent end in which the United

[6] The government also cites the Commentary to Article 68 of the Third Geneva Convention. Gvt. Br. at 14. That provision recognizes that if money is not returned at the end of captivity the prisoner of war retains the right to make a claim for it based on a receipt provided to him at the time of his transfer; but "*[i]n fact*, however, at the end of captivity a prisoner of war *will have no opportunity* to make a claim against the Detaining Power" and thus must have a mechanism for obtaining relief in the context of a peace treaty negotiated between the state parties to the conflict. Commentary at 337 (emphasis added). Again, the obvious reading of this provision is to ensure that personal property including money is returned to detainees at the time of their repatriation in the most advantageous way possible rather than to restrict their ability to get it back based on their status as former prisoners (which, of course, would make no sense at the end of hostilities).

States claims to be engaged in a world-wide armed conflict with a non-state actor such as Al Qaeda. *See* Gvt. Br. at 14 n.10 (citing cases in which war reparations claims were extinguished by peace treaties at the end of hostilities and thereby became claims of the state).

Customary international law further confirms that detainees like Mr. Ameziane are entitled to the return of their money upon repatriation. *See* Mot. at 9 (citing ICRC Customary International Humanitarian Law Rule 122). The government attempts to distinguish Rule 122 on the ground that it prohibits pillage, which involves unlawful appropriation of property. Gvt. Br. at 12 n.7.[7] But again, the government reads this provision too narrowly to restrict a detainee's ability to get his money back rather than to ensure its safekeeping during detention and facilitate its return upon transfer. As state practice relating to Rule 122 illustrates, the prohibition against pillage in the context of detained persons is not so limited. Indeed, in non-international armed conflict many states (notably including close U.S. allies Canada, France, Israel and the United Kingdom) appear simply to refer back to the Third Geneva Convention and principles of armed conflict applicable to prisoners of war. *See* Mot. at 9 n.10 (examples of state practice available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule122). For example, the United Kingdom appears to apply the procedures for processing prisoners of war and safeguarding their personal property, and regulations like those incorporated in Army Regulation 190-8 that guarantee the return of the property upon repatriation:

> Money that is the private property of the prisoner of war is either credited to his account or returned to him at the end of captivity. . . . Articles of value may be taken for safe custody only. A record must be made and a receipt given. The articles must be returned intact at the end of captivity.

[7] Rule 122 addresses pillage only in the context of property belonging to civilians and persons "hors de combat," who are deprived of their liberty; pillage as a prohibited method of warfare is addressed separately in Customary International Humanitarian Law Rule 52 (available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule52).

Id.; *see also* United Kingdom Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict §§ 8.25(g), (h) (2004).[8]

D. There Is No Serious Dispute that this Court Has Statutory and Common Law Habeas Jurisdiction to Grant Relief

The government argues that Mr. Ameziane's motion for the return of his money is not cognizable in habeas. Gvt. Br. at 5-8. The government is wrong for several reasons.

First, to the extent that the government continues to suggest that habeas relief is limited to an order of release, *see id.* at 5, 9, that argument has been squarely rejected by the D.C. Circuit. *See Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) ("[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.'"). Mr. Ameziane's claim is also plainly cognizable in habeas because the harm flows directly (and exclusively) from the fact of his prior detention. *See id.* at 1036 ("The illegality of a petitioner's custody may flow from the fact of detention, the duration of detention, the place of detention, or the conditions of detention . . . . In all such cases . . . he may employ the writ to remedy such illegality.") (citations omitted). Indeed, taken to its logical extreme there can be no serious question that the government's decision to withhold a detainee's property would operate as a seizure of his "corpus" and fall within the core of the Court's habeas jurisdiction – for example, if the government decided unilaterally to withhold upon transfer a detainee's clothing or essential medication, or perhaps a prosthetic limb, such that the ultimate consequence of the government's conduct could foreseeably include death or bodily harm. Like the concrete harm outlined in Mr. Ameziane's opening brief, such "significant restraints" exceed

[8] As in this country, the United Kingdom also recognizes that the law of armed conflict may be enforced through civil litigation. *Id.* § 16.1(h). *See also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating Guantánamo military commissions for failure to comply with the Uniform Code of Military Justice or Common Article 3 of the Geneva Conventions).

those ordinarily imposed on the public (including other former prisoners or parolees), and "are enough to invoke the help of the Great Writ." *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963) (holding that habeas includes non-physical governmental restraints on an individual's liberty, such as conditions of parole); *id.* at 243 ("Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner[ ] [has been released] from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom.").

As noted above, the government also does not dispute that the Court has broad, equitable habeas authority to fashion appropriate relief based on the facts and circumstances of the case, and in doing so may utilize or analogize to ordinary civil rules to award relief such as interest on the money withheld. *See supra* pp.4-5; Mot. for Release at 10-12 (redacted) (dkt. no. 343-1) (citing 28 U.S.C. § 2243 and *Harris v. Nelson*, 394 U.S. 286, 291 (1969)). The government likewise does not address Mr. Ameziane's claim that a court's general equitable powers may be invoked in order to seek the return of property. *See* Mot. for Release at 10 (redacted) (dkt. no. 343-1) (citing *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987)).

The government instead argues that because no habeas court has granted the specific relief that Mr. Ameziane seeks here, he has not asserted a proper habeas claim. Gvt. Br. at 2, 5, 10 n.4. In this particular context, however, the fact that no court has granted a Guantánamo detainee's request for the return of his property is meaningless because to our knowledge no

detainee has made such a request to the courts previously.[9] In addition, at common law habeas corpus afforded broad relief appropriate to the circumstances of the particular case. *See* Paul D. Halliday, *Habeas Corpus: From England to Empire* 176 (2010) ("[The] King's Bench issued the writ by reasoning not from precedents, but from the writ's central premise: that it exists to empower the justices to examine detention in all forms. . . . There were no real precedents, but there was nothing any more surprising about using the writ [in evolving ways]."). Indeed, habeas ensures that "errors [are] corrected and 'justice should be done' . . . even where law ha[s] not previously provided the means to do so. . . . There was and is another word for this vast authority to do justice, even in the absence of previously existing rules or remedies: equity." *Id.* at 87; *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (habeas courts not constrained by black-letter rules from providing greater protection in cases of non-criminal detention); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). *See generally* Br. of Legal Historians and Habeas Corpus Experts as *Amici Curiae* Supporting Pet'r's Petition for Writ of Certiorari, *Trinidad y Garcia v. Thomas*, 133 S. Ct. 845 (Nov. 8, 2012) (No. 12-6615) (available at http://www.lawfareblog.com/wp-content/uploads/2012/11/Trinidad-y-Garcia-Cert-Amicus.pdf).

[9] Counsel are informed that at least two former detainees requested the return of their property, which the government denied that it possessed, and no further relief was pursued in court. This is not to say that the government has not left other detainees utterly destitute. *See The Report of the Constitution Project's Task Force on Detainee Treatment* ch. 8, at 284 (2013) (quoting former detainee from the UK Bisher al-Rawi: "When I was [first] released from Guantánamo, I did not have a penny and I did not have any clothes. That's a fact, I only had the clothes that were on me. Nothing else and not a penny in my pocket. And I was [47] years old . . . and not a penny in my pocket. . . . [Most of the people] leaving GTMO . . . they haven't got anything. There must be a system to assist them to become normal.") (alterations in original) (available at http://detaineetaskforce.org/pdf/Full-Report.pdf).

The government's contention that habeas courts have barred claims such as Mr. Ameziane's is also incorrect. In support of its argument, the government cites several mostly-*pro se* prisoner cases, none of which is binding on this Court and none of which supports the sweeping proposition for which the government cites it. Gvt. Br. at 5-8. Not a single case cited by the government is remotely illustrative or relevant to the instant case, where the government has wrongfully withheld a detainee's property based on the mere fact of his prior detention, which he claims was unlawful. Rather, for example, the cases variously involve petitioners who do not appear to have been imprisoned; who alleged incomprehensible claims; who alleged "mere negligence" and other "tort claims" again prison officials for lost property; who made claims for property that either did not belong to them, was seized as law enforcement evidence, or was properly retained on the merits; and whose habeas claims were dismissed for unrelated reasons including mistaken filing, failure to exhaust state remedies, and res judicata or collateral estoppel. Other decisions reject habeas jurisdiction over conditions of confinement claims, which, as noted, is squarely addressed in *Aamer*. And none provides meaningful analysis of whether claims to recover property are cognizable in habeas; the issues are summarily resolved.

In the case *In re Hill*, No. 04-5436, 2005 U.S. App. LEXIS 4280 (D.C. Cir. Mar. 14, 2005), for example, a *per curiam* opinion that was four sentences long, the D.C. Circuit dismissed a prisoner's *pro se* case because it was not filed in the proper district where his immediate custodian was located. The court also dismissed his claim for "non-habeas relief," without prejudice, "because the court has no authority to order the return of petitioner's property." But the court offered no explanation of what property was at issue or what specific form of relief was requested with respect to the property. Moreover, it seems that the case below was docketed not as a habeas case but as an action pursuant to 42 U.S.C. § 1983, which was

promptly dismissed by Judge Collyer (apparently on the same day that it was docketed). *See Hill v. United States*, No. 04-cv-01349 (D.D.C.).[10] Accordingly, the D.C. Circuit did not publish its opinion because the panel concluded it lacked precedential value. *See* D.C. Cir. R. 36(e)(2).

In sum, the government cites no authority that would prohibit this Court from exercising habeas jurisdiction over Mr. Ameziane's motion for the return of his money. To the contrary, the Court has equitable habeas authority to grant relief as justice requires in this case given the truly appalling nature of what has happened to Mr. Ameziane. The Court should further interpret its habeas authority, including its authority under 28 U.S.C. §§ 2241 and 2243, broadly to avoid the serious constitutional problems would otherwise arise concerning § 2241(e)(2). *See infra* Part III; *Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001) (construing statute to avoid serious constitutional concerns); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (construing statute concerning aliens not formally admitted to the United States to avoid constitutional issues).

II. This Habeas Case Is Not Moot Because the Court May Grant Effective Relief

As the D.C. Circuit held in this case, "a case is not moot unless it is impossible for the court to grant any effectual relief whatever." *Ameziane v. Obama*, 699 F.3d 488, 492 (D.C. Cir. 2010) (quotation marks omitted). Citing *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), the government argues that Mr. Ameziane's habeas case should be dismissed because he is no longer detained at Guantánamo and he has not suffered any collateral consequences of his prior detention that can be redressed by the Court. Gvt. Br. at 3, 15-19. The government claims that the loss of Mr. Ameziane's life savings cannot be remedied by the Court because even if he prevailed in habeas the government would not return his money pursuant to its "policy" to retain the money of any detainee held at Guantánamo regardless of the facts and circumstances of the

[10] It appears from the District Court docket that the petitioner filed numerous *pro se* actions.

particular case. *Id.* at 16-17. To be clear, the government claims the right to retain the property of anyone ever held at Guantánamo, whether mistakenly brought there or not, including the proverbial little old lady in Switzerland who unwittingly donates money to what she thinks is a charity that helps orphans in Afghanistan, whom the government once claimed authority to detain for the duration of hostilities. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The government's contention is as overbroad as it is baseless.[11]

[11] The government continues to argue that the collateral consequences doctrine should not apply to Guantánamo detainee cases. Gvt. Br. at 15 n.13. Mr. Ameziane contends it does apply, that collateral consequences should be presumed, and that the burden of proof to establish mootness should be on the government. The D.C. Circuit held in *Gul* that collateral consequences would not be presumed and that a detainee must make an actual showing that his prior detention or continued enemy-combatant designation burdens him with concrete injuries, but it did so because "Guantanamo and designation as an enemy combatant are recent phenomena; we have no basis for inferring they routinely have collateral consequences." 652 F.3d at 17. Whatever the case may have been at the time *Gul* was decided, there is now a clear factual record of the burdens and disabilities that former detainees continue to suffer upon their release. *See*, *e.g.*, *The Report of the Constitution Project's Task Force on Detainee Treatment* ch. 8 (2013) (available at http://detaineetaskforce.org/pdf/Full-Report.pdf). As the government's brief makes clear, the Guantánamo cases are unique and simply unprecedented with regard to the damaging stigma that is associated with prior detention – stigma that would be mitigated if not eliminated by a court ruling that a detainee's detention was unlawful. *See* Gvt. Br. at 17-18 (suggesting all detainees held were by definition part of Al Qaeda and therefore present a risk of "reengag[ing]"). For example, the harm includes irresponsible recidivism claims and bare allegations of involvement in controversial incidents despite an admitted lack of any supporting evidence. *See*, *e.g.*, Liotta Decl. ¶ 11 (reciting wildly overblown recidivism statistics); *Leaving Guantánamo: Policies, Pressures and Detainees Returning to the Fight*, House Armed Servs. Comm., 112th Congr. (Comm. Print 2012) (same). *Compare also*, *e.g.*, Adam Goldman, *Former Guantanamo Detainee Implicated in Benghazi Attack*, Wash. Post, Jan. 7, 2014 ("U.S. officials suspect that a former Guantanamo Bay detainee played a role in the attack on the American diplomatic compound in Benghazi, Libya."), *with* David D. Kirkpatrick, *U.S. to List Libyan Groups and Militant Tied to Benghazi Attack as Terrorists*, N.Y. Times, Jan. 8, 2014 ("The designation was also expected to apply to . . . a former inmate at the United States military prison in Guantánamo Bay . . . . but officials briefed on the designations and the intelligence reports said that there was *no evidence* linking him to the attack.") (emphasis added).

Mr. Ameziane has demonstrated actual harm that may be remedied by an order of this Court granting him habeas relief. As explained in his opening brief, Mr. Ameziane has been forced to rely on the uncertain, temporary charity of others to support himself since his forced transfer because the government will not give back his money. The government concedes in its opposition brief that it has withheld the money not based on Mr. Ameziane's conduct at any time but rather based on the fact that he was detained at Guantánamo for about twelve years. *See* Liotta Decl. ¶ 12. Asserting in substance that everyone held at Guantánamo was part of Al Qaeda, the government contends that retention of detainees' money is necessary to mitigate the threat that the detainee will use that money to harm the United States upon release, "[b]ecause money can be [ ] useful to a terrorist organization" like Al Qaeda. Gvt. Br. at 17. The logic that Guantánamo detainees are terrorists because they were held at Guantánamo is circular, of course, and the purported concern that they would use their money to harm the United States rather than buy clothes and food is entirely speculative without reference to the facts of their particular cases. But the harm to former detainees like Mr. Ameziane is actual and undisputed here.

There is also no serious question that the Court may remedy the harm to Mr. Ameziane by granting habeas relief and ordering the government to return his property. Alternatively, the Court could grant his habeas petition on the ground that he is not part of Al Qaeda, the Taliban or associated forces, which would vitiate the government's purported basis for withholding his money. Any suggestion that seizure of Mr. Ameziane's money was a necessary pre-condition of his transfer is baseless – as reflected by the government's prior, unqualified representations that there was no longer any military need to detain him and his detention was no longer at issue, seizure of his money was plainly irrelevant to his transfer. Indeed, having relied on those representations as a basis to avoid a ruling on the merits of his habeas petition, the government

should be judicially estopped from asserting now that Mr. Ameziane presented a threat that required retention of his money. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.") (internal citation and quotation omitted); *Zedner v. United States*, 547 U.S. 489, 504 (2006) (generally, judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase") (internal citation and quotation omitted).[12]

The government's self-serving conduct is also neither binding on the Court nor entitled to judicial deference as a matter of law. Given the paucity of information about the policy provided by the government, combined with its refusal to provide any measure of discovery about where the policy resides, what it actually states, whether it has ever been applied before to block the return of a detainee's property, and ultimately whether it has the force of law, there is no basis to conclude that the policy constrains this Court's habeas authority or otherwise precludes relief in the form of an order requiring the government to return the money. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (agency's informal interpretation of statute not entitled to deference). For the same reason the Court should not give the self-styled "policy" any weight when conducting its own review on the merits of Mr. Ameziane's motion. *Id.* (where agency interpretation is not entitled to deference, it is reviewed *de novo* and entitled only to "weight"

[12] Mr. Ameziane does not ask the Court to determine whether he poses a threat to the United States. The government long ago conceded that he does not and should be released. Thus, the government's claim that threat mitigation is a matter properly vested in the Executive to the exclusion of the Judiciary is irrelevant. Gvt. Br. at 18 n.14.

that "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control") (citation and quotation marks omitted).

The government next claims that its retention of detainee funds regardless of whether they prevail in habeas moots this case because it is similar to the placement of a detainee on the "No Fly List," which was rejected in *Gul* as insufficient to show collateral consequences of prior detention. Gvt. Br. at 18-19. The government's analogy is inapt. *Gul* rejected the claim that detainees suffer cognizable harm by being placed on the No Fly List because that designation is mandated by a congressional statute and is an entirely separate "barrier imposed by that law." *Gul v. Obama*, 652 F.3d 12, 19 (D.C. Cir. 2011). *Gul* also noted the unique interest served by No Fly List designations, which is to control entry into the United States. *Id.* (citing *Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010)). The court further explained 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 Guantánamo and designated as an enemy combatant. *Id.* at 19-20.

Here, of course, the alleged policy at issue does not have the force of law, is not entitled to deference or weight, and does not involve unique interests such as controlling entry into the United States. The only factor in determining whether a detainee's funds should be withheld is whether he was properly held at Guantánamo and thus (at least according to one government

official) by definition was part of Al Qaeda – a central question tested through habeas.[13] An individual who is placed on the No Fly List is also notably entitled to challenge his designation. *See* 49 U.S.C. §§ 44903(j)(2)(G)(i); 44926(a); 46110; *Latif v. Holder*, 686 F.3d 1122, 1125-26 (9th Cir. 2012). Yet the government apparently contends that no similar remedies should be available to detainees like Mr. Ameziane whose money it seizes unilaterally regardless of the allegations against them.

Moreover, if the government were truly concerned that Mr. Ameziane might use his money to harm the interests of the United States, it already has an available, congressionally-prescribed remedy. It could seek to add him to the List of Specially Designated Nationals and Blocked Persons ("SDN List"), which includes "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries," as well as "individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific." Office of Foreign Assets Control, SDN List (available at http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx). Individuals who are added to the SDN List may have their assets frozen pursuant to various provisions of law, including 50 U.S.C. § 1702(a)(1)(C). But again, an individual added to the SDN List has available remedies to challenge his designation and recover his blocked property. *See*, *e.g.*, 31 C.F.R. § 501.807. By

[13] The government's isolated statement that its policy of withholding detainees' money is "analogous" to the transfer requirements of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (Dec. 26, 2013) ("NDAA"), also has no bearing on this case. *See* Liotta Decl. ¶ 11. Whatever that vague statement was intended to mean, the NDAA was enacted after Mr. Ameziane's transfer. The transfer restrictions also do not apply to detainees who prevail in habeas. NDAA § 1035(a)(2) (court order exception); *see also* Mot. for Release at 17-20 (redacted) (dkt. no. 343-1) (addressing 2013 NDAA restrictions). Thus to the extent the government might claim that it would continue to withhold Mr. Ameziane's money regardless of whether he prevailed in habeas because retention would be required by the NDAA threat-mitigation requirement, *see* Gvt. Br. at 18 & n.14, that argument is meritless.

contrast, Mr. Ameziane, who no one seriously contends is a terrorist, is not afforded the same protections as a specially designated terrorist.

III. The Jurisdiction-Stripping Provision of 28 U.S.C. § 2241(e)(2) Is Unconstitutional

The government argues that Mr. Ameziane's motion should be denied and his habeas petition should be dismissed on the ground that the Court lacks jurisdiction pursuant to 28 U.S.C. § 2241(e)(2). Gvt. Br. at 2, 8 nn.2-3, 9-10. Section 2241(e)(2) is void to the extent that it purports to strip federal courts of federal question jurisdiction. It therefore does not foreclose this Court from hearing such claims.[14]

A. Section 2241(e)(2) Violates Article III

1. The Constitution Forbids Removal of All Federal Court Jurisdiction over Federal Questions

Section 2241(e)(2) purports to eliminate all jurisdiction (both original and appellate) in all courts (both federal and state) over various types of claims relating to the detention and transfer of "enemy combatants." The Constitution forbids such a broad elimination of all federal jurisdiction over federal question claims like those at issue here.

The text of Article III states:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> **Section 2.** The judicial Power shall extend to all Cases, [arising under federal law];—to all Cases affecting [foreign officials];—to all Cases of admiralty and maritime Jurisdiction;—to Controversies [between six sets of governmental and/or diverse parties].
>
> In all Cases affecting [foreign officials and states], the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court

[14] Mr. Ameziane also contends that § 2241(e)(2) does not apply because he was not "properly detained as an enemy combatant." *But see Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014).

> shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, §§ 1-2. Section 2 uses imperative language ("shall extend") to make clear that the "judicial Power" must include "all Cases" involving federal questions (those "arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority").[15] And the first sentence of Section 1 ensures that some federal court – whether the Supreme Court or some lower federal courts created by Congress – will exercise this judicial power, again using imperative language ("shall be vested").

The clause in Section 1 giving Congress discretion over the structure of the lower federal courts and the clause in Paragraph 2 of Section 2 allowing Congress to make exceptions to the Supreme Court's appellate jurisdiction cannot be read in isolation from the sections mandating that "[t]he judicial Power . . . shall be vested" in federal courts and "shall extend to all cases . . . arising under" federal law. Congress does not have the option to eliminate all lower federal courts and simultaneously to restrict the Supreme Court's appellate jurisdiction without limitation. Instead, read together, the first three paragraphs of Article III mandate that some

[15] The "judicial Power" must also extend to "all Cases" in the other two mandatory categories of Section 2 – Ambassadors and Admiralty. But out of the nine categories of "Cases" and "Controversies" set forth in Section 2, only in the three sets of "Cases" *must* some form of federal jurisdiction lie. *See* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. Rev. 205, 261-62 (1985). In other words, these three sets of "Cases" (involving federal questions, ambassadors, and admiralty) comprise a "mandatory tier" of cases in which (unlike the other six sets of "Controversies" involving governmental and/or diverse parties) "state courts were not permitted to be the final word"; at some point, a federal court must be able to rule on the issue, even if only on appellate review from a state court system. *Id*. Of course, as to Ambassador cases, original federal jurisdiction in the Supreme Court is guaranteed by Section 2 ¶ 2. That leaves only "Cases, in *Law and Equity*, arising under" federal law, and admiralty cases (which were considered to arise in neither law nor equity, *see* Akhil R. Amar, *Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1513 (1990)). Thus, putting aside the Ambassador cases reserved for the original jurisdiction of the Supreme Court, and the state-vs.-state controversies that remain in the Supreme Court's original jurisdiction after the 11th Amendment, Article III reserves for mandatory federal court review only claims involving uniquely federal subject matter – cases "arising under" federal law and admiralty. Just such uniquely federal questions are at issue in the present case.

federal court must have some form of jurisdiction (whether appellate or original) over "all Cases . . . arising under" federal law. This requirement can be satisfied by vesting original federal-question jurisdiction in the district courts (as has existed consistently since 1875); or, if original jurisdiction is left to state courts, by allowing an avenue for appeal to some federal court at some point in the life of the case (as has existed consistently since the Founding, *see*, *e.g.*, § 25 of the first Judiciary Act, which expressly authorized appellate review of federal questions in the Supreme Court).[16]

The history of the drafting of Article III and the confirmation debates confirm this view. *See generally* 1 Max Farrand, The Records of the Federal Convention of 1787 (1911) (Randolph; Yates' notes). The ratification debates in the several states "produced almost no suggestions by [the Constitution's advocates] that Congress could delimit the sphere of federal court jurisdiction," Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 810 (1984), and Alexander Hamilton's famous defenses of the federal judiciary in The Federalist Nos. 78-82 are consistent with the notion of mandatory federal jurisdiction over the three sets of "Cases" in Section 2. *See* The Federalist No. 81 (power of Congress to create inferior federal courts "is evidently calculated to obviate the *necessity* of having recourse to the Supreme Court in every case of federal cognizance") (emphasis added); The Federalist No. 82 ("The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public

[16] The 1789 Judiciary Act, § 25, 1 Stat. 73, 85-87, granted the Supreme Court appellate jurisdiction over federal questions (more precisely, denials of federal claims or "exemptions") arising on appeal from state court systems, *see generally* Amar, *Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. at 1515-17, and the current original general federal question jurisdiction in district courts has been continuously available since 1875. *See* Jurisdiction and Removal Act of 1875, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331(a)); *see also* Judiciary Act of 1801, § 11, 2 Stat. 89, 92 (first creating plenary federal question jurisdiction in district courts).

reasons receive their *original or final* determination in the courts of the Union.") (emphasis added); *see also* 1 Annals of Congress 831-32 (J. Gales ed. 1789) (Rep. Smith, in debates over Judiciary Act, stating Article III allows "no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States."). *See generally* Clinton, 132 U. Pa. L. Rev. 741.

The U.S. Supreme Court thus has never upheld a complete preclusion of all federal judicial fora for federal claims, and has applied the strongest of presumptions against preclusion of such claims.[17] Article III demands some federal court review – whether original or appellate – over all federal question claims. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329, 331 (1816) (the "whole judicial power" set forth in Section 2 "must . . . be vested in some [federal] court, by congress," "at all times, . . . either in an original or appellate form"); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1589 (1833) ("One of two courses only could be open for adoption; – either to create inferior courts under the national authority, to reach all cases fit for the national jurisdiction, which either constitutionally or conveniently, could not be of original cognizance in the Supreme Court; or to confide jurisdiction of the same cases to the state courts, with a right of appeal to the Supreme Court."). Because 28 U.S.C. § 2241(e)(2) purports to eliminate all such review over Mr. Ameziane's claims arising under U.S. and international law, it is unconstitutional and void.

An unconstitutional jurisdictional statute must be disregarded as "void." *Marbury v. Madison*, 5 U.S. 137, 177, 180 (1803); *see also United States v. Klein*, 80 U.S. 128, 147-48

[17] *See*, *e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding provisions depriving district courts of jurisdiction over "second or successive" habeas petition because the Supreme Court retained original jurisdiction); *Reno v. AADC*, 525 U.S. 471 (1999) (upholding severe but not complete restriction of federal judicial review); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

(1871) (disregarding unconstitutional statute that divested court of jurisdiction and reinstating judgment obtained under prior statutory scheme); *Kiyemba v. Obama*, 561 F.3d 509, 512 n.** (D.C. Cir. 2009) (invalidation of jurisdiction-stripping provision of 28 U.S.C. § 2241(e)(1) "necessarily restored the status quo ante, in which detainees at Guantánamo had the right to petition for habeas under § 2241").

2. *Al-Zahrani* Does Not Require a Contrary Result

The government cites *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012), in support of its claim that § 2241(e)(2) strips this Court of jurisdiction to consider non-habeas claims filed by Guantánamo detainees. Gvt. Br. at 9. But nothing in the *Al-Zahrani* opinion indicates that the D.C. Circuit actually decided that case on properly jurisdictional grounds, or otherwise foreclosed Mr. Ameziane's argument that the Constitution forbids the removal of all federal court jurisdiction over claims arising under federal law. Indeed, the *entire* treatment of the *Al-Zahrani* plaintiffs' constitutional objections to the jurisdictional issue takes up one paragraph in the panel's opinion, with the discussion at best ambiguous as to whether it addresses jurisdiction proper – the power of the court to rule on damages claims – or merely whether Congress intended a *remedy* to exist. *See Al-Zahrani*, 669 F.3d at 319-20 ("But the only remedy [plaintiffs] seek is money damages, and, as the government rightly argues, such remedies are not constitutionally required. . . . As we have recently said, '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)); *see also Janko v. Gates*, 741 F.3d 136, 145-47 (D.C. Cir. 2014) (citing *Al-Zahrani* without addressing Article III issues); *Hamad v. Gates*, 732 F.3d 990, 1003-06 (9th

Cir. 2013) (same).[18] The *Al-Zahrani* opinion, on this reading, falls into a long line of decisions using the term "jurisdictional" loosely[19] to refer to the absence of a valid cause of action. *Cf. Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (emphasis in original).

B. The Due Process Clause Also Limits Congress's Power to Strip Jurisdiction

The Fifth Amendment to the Constitution post-dates Article III and contains further limitations on Congress's ability to modify federal jurisdiction. The D.C. Circuit has repeatedly confirmed that, "to the extent that the provisions of Article III are inconsistent with the due process clause of the fifth amendment, those provisions of Article III must be considered modified by the amendment." *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987) (quotation marks omitted).[20] As an initial matter, the Due Process Clause suggests that there must be some federal judicial forum for the enforcement of federal rights. *Id.*; *see also Am. Coal. for*

[18] The availability of the particular remedy that Mr. Ameziane seeks in this case is not at issue because the Court unquestionably has equitable authority, in habeas or otherwise, to fashion an appropriate remedy based on the facts and circumstances of the case. *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances."); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (return of money governed by a court's general equitable powers).

[19] See, for example, on this point, a number of recent corrective decisions of the Supreme Court: *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (Title VII 15-emplyee minimum rule not jurisdictional, and thus subject to waiver); *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*) (seven-day filing period under Fed. R. Crim. P. 33 not jurisdictional, and thus subject to waiver); *Scarborough v. Principi*, 541 U.S. 401 (2004) (EAJA element that government action be "not substantially justified" was not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (Fed. R. Bankr. P. 4004 deadline not jurisdictional, and thus subject to waiver).

[20] Reconsideration en banc was granted and then withdrawn, reinstating the panel opinion. *See Bartlett v. Bowen*, 824 F.2d 1240, 1241-42 (D.C. Cir. 1987).

Competitive Trade v. Clinton, 128 F.3d 761, 765 (D.C. Cir. 1997) ("[A] statute that totally precluded judicial review for constitutional claims would clearly raise serious due process concerns."); *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 681 n.12 (1986); *Webster v. Doe*, 486 U.S. 592, 603 (1988). Section 2241(e)(2) must then at a minimum be interpreted to preserve jurisdiction to address the issues raised by Mr. Ameziane's case. *See Bataglia v. Gen. Motors*, 169 F.2d 254, 257 (2d Cir. 1948) ("[T]he exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. . . . [I]t must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

The Due Process Clause also incorporates equal protection principles identical to those contained in the Fourteenth Amendment against the federal government;[21] it both protect the

[21] The Supreme Court has recognized that the Fifth Amendment's Due Process Clause embraces the "concept of equal justice under law." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Accordingly, the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause "require the same type of analysis." *Id.*; *see Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995) ("[T]he equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable").

rights of aliens "within the territorial jurisdiction" of the United States as well as citizens.[22] Section 2241(e)(2) violates those principles because by its terms it applies only to aliens. By drawing categorical distinctions between citizens and aliens even when each is properly

[22] U.S. Const. amend. XIV, § 1; *Plyler v. Doe*, 457 U.S. 202, 210 (1982). Due process and habeas are also inextricably intertwined, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 525-26 (2004) (plurality opinion) (discussing interaction of habeas and due process); *id.* at 555-57 (Scalia, J., dissenting) (same), and to the extent habeas jurisdiction has been recognized at Guantánamo at least some measure of the Due Process Clause also reaches there. *See id.* at 538 (plurality opinion) ("[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."); *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (applying the "impracticable and anomalous" test for application of constitutional rights outside the United States and concluding that "there are few practical barriers to the running of the writ" at Guantánamo); *id.* at 784-85 (addressing due process). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction."); *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory" where our "unchallenged and indefinite control . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."); *cf. Hussain v. Obama*, No. 13-638, 2014 U.S. LEXIS 2548, at *2 (S. Ct. Apr. 21, 2014) (Breyer, J., statement respecting the denial of certiorari) (Supreme Court has not determined whether the Constitution may limit the duration of detention at Guantánamo). Nor can the D.C. Circuit's decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (*Kiyemba I*), be fairly read to preclude the application of due process entirely at Guantánamo; that decision addressed only the narrow question of whether due process authorizes entry into the United States of non-citizens without property or presence in the country. *Id.* at 1026-27. Indeed, there is no other way to read *Kiyemba I* consistently with subsequent panel decisions of the Circuit. *See Kiyemba v. Obama*, 561 F.3d 509, 514 n.* (D.C. Cir. 2009) (*Kiyemba II*) ("[W]e assume arguendo these alien detainees have the same constitutional rights . . . as . . . U.S. citizens" detained by the U.S. military in Iraq); *id.* at 518 n.4 (Kavanaugh, J., concurring) ("[A]s explained in the opinion of the Court and in this concurring opinion, the detainees do not prevail in this case even if they are right about the governing legal framework: Even assuming that the Guantanamo detainees . . . possess constitutionally based due process rights" they would not prevail); *Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) (*Kiyemba III*) ("[P]etitioners never had a constitutional right to be brought to this country and released."); *id.* at 1051 (Rogers, J., concurring) ("Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States."); *cf. Kiyemba v. Obama*, 131 S. Ct. 1631, 1631-32 (2011) (Breyer, Kennedy, Ginsburg, Sotomayor, JJ., statement respecting the denial of certiorari) (third country's offer to resettle detainees transformed their due process claim seeking entry into the United States, which, should circumstances change in the future, may be raised again before the Court).

determined to have acted in the very same way, it violates the equal protection component of the Due Process Clause of the Fifth Amendment. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."). Citizenship is no bar to belligerency, *see Ex Parte Quirin*, 317 U.S. 1, 37 (1942), and the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), draws no such distinction. But § 2241(e)(2) deprives only "an alien" enemy combatant of the right of access to the courts.

In addition, were this Court to read the statute to eliminate jurisdiction over Mr. Ameziane's motion, the statute would violate the equal protection component of the Fifth Amendment because it discriminates in the allocation of fundamental rights, and, in particular, the fundamental right of access to the courts. *See*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *see also* 152 Cong. Rec. H7940 (daily ed. Sept. 29, 2006) (statement of Rep. Nadler: "If you pick up two people in New York, one of them is a citizen, they go to the Federal court, and you accuse them of being unlawful enemy combatants, they go to the regular American system of justice. One is awaiting citizenship but is a permanent resident, he goes through this other [system of justice]. He has no rights . . . . That is clearly unconstitutional. It is a denial of equal protection."). The Supreme Court has applied heightened review to government efforts to discriminate in access to courts, even based on non-suspect classifications. *See*, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004) (stating that "the right of access to the courts" is subject to "more searching judicial review" under equal protection).

Moreover, a jurisdiction-stripping provision that was intended to apply only to Muslims violates equal protection principles. No non-Muslim has been detained by the United States government as an "enemy combatant" anywhere to our knowledge – by the time of or since the

enactment of 28 U.S.C. § 2241(e)(2). Even a facially neutral law applied in so uniformly discriminatory a manner triggers strict scrutiny. *See*, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Congress was clearly aware of this fact. *See* 152 Cong. Rec. S.10,395 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn: "Let me just say a word about who that enemy is. . . . [I]t is an enemy that has hijacked one of the world's great religions, Islam"); *id*. at S.10,402 (statement of Sen. McConnell: "We are a Nation at war, and we are at war with Islamic extremists."). In such circumstances, courts have applied strict scrutiny to overturn legislation motivated in part by desire to disfavor members of a suspect class. *Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265-66 (1977).[23] The Court should apply the same standard here and invalidate 28 U.S.C. § 2241(e)(2).

Conclusion

For all of the foregoing reasons, Mr. Ameziane's motion should be granted and the Court should order the government to return his money, with interest, or schedule a full habeas hearing that will ultimately achieve the same result. The Court should also deny the government's cross-motion to dismiss. In addition, the Court should order any other relief that it deems necessary and appropriate pursuant to its equitable habeas authority.

[23] The Supreme Court "does not require a plaintiff to prove that [legislative] action rested *solely* on . . . discriminatory purposes . . . [If] a discriminatory purpose has been *a* motivating factor in the decision, [ ] judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 264-65 (emphasis added). The "historical background of the decision is [another] evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. Finally, "legislative or administrative history," including especially "contemporary statements," *id.* at 268, are a third factor. All are present here.

Date: New York, New York
May 9, 2014

Respectfully submitted,

/s/ J. Wells Dixon

J. Wells Dixon (Pursuant to LCvR 83.2(g))
Shayana D. Kadidal
Susan Hu (Pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499
wdixon@ccrjustice.org
skadidal@ccrjustice.org
shu@ccrjustice.org

Counsel for Djamel Ameziane