

Table of Contents

CHAPTER 18	<u>1</u>
Use of Force	<u>1</u>
A. GENERAL	<u>1</u>
1. Use of Force Issues Related to Counterterrorism Efforts	<u>1</u>
a. <i>Testimony on the Authorization for Use of Military Force</i>	<u>1</u>
b. <i>Notification to UN of Action Taken in Libya</i>	<u>5</u>
c. <i>Notification to UN of Actions Against ISIL</i>	<u>6</u>
d. <i>War Powers Resolution Report Regarding Iraq</i>	<u>7</u>
e. <i>War Powers Resolution Report Regarding Syria</i>	<u>8</u>
2. Bilateral Agreements and Arrangements	<u>8</u>
<i>Bilateral Security Agreement and NATO Status of Forces</i> <i>Agreement with Afghanistan</i>	<u>8</u>
3. International Humanitarian Law	<u>10</u>
a. <i>U.S. Remarks at the ICRC Meeting and the UN General Assembly</i>	<u>10</u>
b. <i>Applicability of international law to conflicts in cyberspace</i>	<u>13</u>
c. <i>Private military and security companies</i>	<u>21</u>
B. CONVENTIONAL WEAPONS	<u>21</u>
1. Ottawa Convention (Anti-Personnel Landmines).....	<u>21</u>
2. Convention on Certain Conventional Weapons.....	<u>22</u>
3. Presidential Policy Directive on U.S. Conventional Arms Transfers	<u>27</u>
C. DETAINEES	<u>30</u>
1. Transfers	<u>30</u>
2. U.S. court decisions and proceedings	<u>32</u>
a. <i>Detainees at Guantanamo: Habeas Litigation</i>	<u>32</u>
b. <i>Former Detainees</i>	<u>52</u>
3. Criminal Prosecutions and Other Proceedings	<u>56</u>
a. <i>Al Bahlul v. United States</i>	<u>56</u>
b. <i>Military Commission Charges</i>	<u>66</u>
Cross References.....	<u>68</u>

CHAPTER 18

Use of Force

A. GENERAL

1. Use of Force Issues Related to Counterterrorism Efforts

a. *Testimony on the Authorization for Use of Military Force*

On May 21, 2014, State Department Principal Deputy Legal Adviser Mary E. McLeod testified before the Senate Committee on Foreign Relations on the 2001 Authorization for Use of Military Force (“AUMF”). Ms. McLeod’s testimony appears below and is also available at www.state.gov/s/l/releases/remarks/226395.htm.

* * * *

Thank you very much Chairman Menendez, Ranking Member Corker, and members of the committee, for the invitation to speak at this hearing. The Administration looks forward to engaging with this Committee and the Congress on this important topic.

I will begin with some introductory remarks before discussing briefly a few international law aspects of the Administration’s legal framework for conducting operations pursuant to the 2001 Authorization for Use of Military Force (AUMF). I will conclude by laying out a few relevant considerations for establishing our legal framework beyond 2014. My colleague Stephen Preston, General Counsel of the Department of Defense, will then address the current framework under U.S. law for military counterterrorism operations.

As an initial matter, the President has made clear his desire to engage with Congress about the future of the AUMF. The President expressed his commitment to “move [America] off a permanent war footing” one year ago in his speech at the National Defense University (NDU), and reaffirmed this commitment in this year’s State of the Union address. And the President

made clear in his NDU speech that his goal is to engage with Congress and the American people to “refine, and ultimately repeal” the AUMF.

As we begin our dialogue on this issue, it will be critical to assess our legal authorities not only within the context of our current military operations, but also in light of future needs, which as of today’s hearing may not be fully apparent. At the same time, as the President has said, we must keep in mind going forward that not every collection of thugs that label themselves al Qaeda will pose a threat to the United States that requires the use of military force in response.

International Legal Considerations

Turning now to international legal considerations, as we consider the future of the AUMF, it will be critical to ensure that U.S. actions continue to be grounded firmly in international law. Under international law, the United States has an inherent right of self-defense to use force to respond to an armed attack, or the imminent threat of an armed attack. And, when in an armed conflict, the United States may use force, in accordance with the law of war, to prosecute that conflict. Our use of military force must comply with international law’s requirements of necessity, proportionality, distinction, and humanity.

United States use of force abroad is carried out in furtherance of these international law rights and requirements, and the law of war specifically has and will continue to provide the legal framework for U.S. military actions taken in the armed conflict against al Qaeda, Taliban, and associated forces. Going forward, the Office of the Legal Adviser at the State Department will continue to work to ensure that we exercise our rights consistent with these and other applicable international law principles.

I also want to note that there is a firm basis in international law to support our friends and partners facing the threat of terrorism within their own borders. Even where violent extremists pose a greater threat to these countries than they do to the United States, we can draw from all elements of national power—including military force, in appropriate cases—to help them counter these threats. In Mali, for example, we have been providing military aid to French forces to push back terrorists and other extremists. As the President stated in his speech one year ago, “we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” Indeed, targeted efforts undertaken in partnership with other countries can be highly effective in countering terrorist threats, without keeping the United States on a permanent wartime footing.

Post-2014 Legal Framework

With these principles in mind, let me now outline a few considerations regarding a future legal framework. We are currently working to identify an appropriate U.S. military presence in Afghanistan after 2014. We are also working toward the closure of the detention facility at Guantanamo Bay, which the President has reaffirmed will further our national security, our international standing, and our ability to cooperate with allies in counterterrorism efforts. We also continue to work with our allies and partners to provide assistance and training to increase their capacity to take effective measures against terrorist organizations.

The State Department is joined by many other U.S. agencies in implementing this comprehensive strategy, which includes a broad range of military and other foreign assistance, law enforcement cooperation, intelligence sharing, and diplomatic engagement. All of these efforts are vital to countering threats. This is true even at times—such as the present—when we are using military force as part of our response to the terrorist threat. In the long term, the success

of our efforts will depend not exclusively on the use of military force, but also on sustained attention to achieving effective governance and the rule of law in countries where terrorist threats proliferate.

We also bear in mind what Department of Homeland Security Secretary Jeh Johnson, then in his capacity as General Counsel of the Department of Defense, stated in his November 2012 speech at the Oxford Union. He noted that there will come a “tipping point” when our efforts to disrupt, dismantle, and defeat al Qaeda have succeeded to such an extent that we will no longer describe ourselves as being in an “armed conflict” with al Qaeda to which the law of war applies. At that point, we will rely primarily on law enforcement, intelligence, foreign assistance, and diplomatic means—in cooperation with the international community—to counter any remaining threat posed by al Qaeda and its affiliates. And as we do so, we will retain the authority, under both international and domestic law, to act in national or collective self-defense against armed attacks or imminent threats thereof posed by terrorist groups.

Based on all of these considerations, we would suggest that our efforts to identify a future legal framework be guided by the following principles:

- First, any domestic authority that we rely on to use military force should reflect the President’s clear direction that we must move America off a permanent wartime footing. As the President stated, this means that we will engage with Congress and the American people to “refine, and ultimately repeal” the AUMF, and that the President will not sign a law designed to expand the AUMF’s mandate further.
- Second, any authorization to use military force, including any detention operations, must be consistent with international law.
- Third, we must continue to enhance our cooperation with partner nations to take action within their own borders, including law enforcement action and other forms of engagement, where those methods provide the most effective and sustainable means of countering terrorist threats.
- Fourth, the President has made clear that now is the time to close the detention facility at Guantanamo Bay, and any future legislation should lift all remaining restrictions on the Commander in Chief’s authority to transfer detainees held under the law of war.
- Finally, we must keep in mind that the President’s authority to defend the United States would remain part of any framework that emerges.

* * * *

As mentioned in Ms. McLeod’s testimony, the Senate Foreign Relations Committee also heard from Stephen Preston, general counsel for the Department of Defense. Mr. Preston’s testimony follows.

* * * *

I'd like to open with a brief discussion of the current legal framework for U.S. military operations, focusing on how the 2001 Authorization for the Use of Military Force is being applied by the Department of Defense.

Although the AUMF makes no express mention of specific nations or groups, it was clearly intended to authorize the president to use force against al-Qaida, the organization that perpetrated the 9/11 attacks, and the Taliban, which harbored al-Qaida. In addition, based on the well-established concept of co-belligerency in the laws of war, the AUMF has been interpreted to authorize the use of force against associated forces of al-Qaida and the Taliban.

As the administration has stated publicly on numerous occasions, to be an associated force a group must be both an organized, armed group that has entered the fight alongside al-Qaida or the Taliban, and a co-belligerent with al-Qaida or the Taliban in hostilities against the United States or its coalition partners.

The Department of Defense relies on the AUMF in three contexts: ongoing U.S. military operations in Afghanistan, our ongoing military operations against al-Qaida and associated forces outside the United States in the theater of Afghanistan and detention operations in Afghanistan and at the Guantanamo Bay, Cuba, facility.

In Afghanistan, the U.S. military currently conducts operations pursuant to the AUMF against al-Qaida, the Taliban and other terrorist or insurgent groups that are engaged alongside al-Qaida and the Taliban in hostilities against the United States and its coalition ... partners. In addition, the ISAF and U.S. rules of engagement permit the targeting of hostile personnel in Afghanistan based on the threat they pose to U.S., coalition and Afghan forces or to civilians.

Outside the United States in areas of active hostilities, the U.S. military currently takes direct action under the AUMF—that is, capture and lethal operations—in the following circumstances: First, in Yemen, the U.S. military has conducted direct action targeting members of al-Qaida in the Arabian Peninsula. AQAP is an organized, armed group that is part of al-Qaida, or at least an associated force of al-Qaida for purposes of the AUMF.

Second, the U.S. military has also conducted capture or lethal operations under the AUMF outside Afghanistan against individuals who are part of al-Qaida and targeted as such. For example, in Somalia, the U.S. military has conducted direct action against a limited number of targets who have been determined to be part of al-Qaida. And in Libya, in October 2013, in reliance on the AUMF, U.S. forces captured long-time al-Qaida member Abu Anas al-Libi.

Now, the fact that an al-Qaida-affiliated group has not to date been identified as an associated force for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an associated force. We are prepared to review this question whenever a situation arises in which it may be necessary to take direct action against a terrorist group in order to protect our country.

Lastly, in our ongoing armed conflict against al-Qaida, the Taliban and associated forces, the U.S. military relies on the authority of the AUMF to hold enemy belligerents in military detention in Afghanistan and at the detention facility at Guantanamo Bay.

The AUMF is not the only authority the president has to use force to keep us safe. For example, the president has authority under the United States Constitution to use military force as needed to defend the nation against armed attacks or imminent threats of armed attack. This inherent right of self-defense is also recognized in international law.

Looking forward, a central question is what future legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet the threat.

As was made clear in the president's NDU speech last year, the answer is not legislation granting the executive unbound powers more suited for traditional armed conflicts between nation-states. Rather, the objective is a framework that will support a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. The challenge is to ensure that the authorities for U.S. military operations are both adequate and appropriately tailored to the threat.

* * * *

b. Notification to UN of Action Taken in Libya

On June 17, 2014, U.S. Permanent Representative to the United Nations Samantha Power reported to the UN Security Council, in accordance with Article 51 of the UN Charter, that the United States had taken action in Libya to capture Ahmed Abu Khattalah, who was involved in the attacks on the U.S. mission in Benghazi, Libya in 2012. U.N. Doc. S/2014/417. Ambassador Power's letter to Vitaly Churkin, then-president of the Security Council, appears below.

* * * *

On behalf of my Government, I wish to report that the United States has taken action in Libya to capture Ahmed Abu Khattalah, a senior leader of the Libyan militant group Ansar al-Sharia-Benghazi in Libya. Abu Khattalah will be presented to a United States Federal Court for criminal prosecution.

As is well known, the U.S. Temporary Mission Facility and Annex in Benghazi, Libya were attacked in September 2012, and the U.S. Ambassador to Libya and three other Americans were killed. Following a painstaking investigation, the U.S. Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks. The investigation also determined that he continued to plan further armed attacks against U.S. persons.

The measures we have taken to capture Abu Khattalah in Libya were therefore necessary to prevent such armed attacks, and were taken in accordance with the United States' inherent right of self-defense. We are reporting these measures to the Security Council in accordance with Article 51 of the Charter of the United Nations.

* * * *

c. Notification to UN of Actions Against ISIL

On September 23, 2014, Ambassador Power provided another notification to the UN in accordance with Article 51 regarding U.S. actions to counter threats presented by the armed group known as the Islamic State in Iraq and the Levant (“ISIL”). U.N. Doc. S/2014/695. Ambassador Power’s September 23 letter follows.

* * * *

In the letter dated 20 September 2014 from the Minister for Foreign Affairs of Iraq addressed to the President of the Security Council (S/2014/691, annex) and other statements made by Iraq, including the letter dated 25 June 2014 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General (S/2014/440, annex), Iraq has made clear that it is facing a serious threat of continuing attacks from the Islamic State in Iraq and the Levant (ISIL) coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq’s people. For these reasons, the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq’s borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.

* * * *

d. War Powers Resolution Report Regarding Iraq

Also on September 23, 2013, President Obama reported to the Speaker of the House of Representatives and the President Pro Tempore of the Senate regarding actions taken in Iraq to counter ISIL. The text of the letter follows, and is available on the White House website at www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq.

* * * *

In my reports of August 8 and 17 and September 1 and 8, 2014, I described a series of discrete military operations in Iraq to stop the advance on Erbil by the Islamic State of Iraq and the Levant (ISIL), support civilians trapped on Mount Sinjar, support operations by Iraqi forces to recapture the Mosul Dam, support an operation to deliver humanitarian assistance to civilians in the town of Amirli, Iraq, and conduct airstrikes in the vicinity of Haditha Dam.

As I noted in my address to the Nation on September 10, with a new Iraqi government in place, and following consultations with allies abroad and the Congress at home, I have ordered implementation of a new comprehensive and sustained counterterrorism strategy to degrade, and ultimately defeat, ISIL. As part of this strategy, I have directed the deployment of 475 additional U.S. Armed Forces personnel to Iraq, and I have determined that it is necessary and appropriate to use the U.S. Armed Forces to conduct coordination with Iraqi forces and to provide training, communications support, intelligence support, and other support, to select elements of the Iraqi security forces, including Kurdish Peshmerga forces. I have also ordered the U.S. Armed Forces to conduct a systematic campaign of airstrikes and other necessary actions against these terrorists in Iraq and Syria. These actions are being undertaken in coordination with and at the request of the Government of Iraq and in conjunction with coalition partners.

It is not possible to know the duration of these deployments and operations. I will continue to direct such additional measures as necessary to protect and secure U.S. citizens and our interests against the threat posed by ISIL.

I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and Public Law 107-243) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.

* * * *

e. *War Powers Resolution Report Regarding Syria*

On September 23, 2013, President Obama sent a letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate reporting on actions taken in Syria, consistent with the War Powers Resolution (Pub. L. No. 93-148). The text of the letter follows, and is available on the White House website at www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria.

As I have repeatedly reported to the Congress, U.S. Armed Forces continue to conduct operations in a variety of locations against al-Qa'ida and associated forces. In furtherance of these U.S. counterterrorism efforts, on September 22, 2014, at my direction, U.S. military forces began a series of strikes in Syria against elements of al-Qa'ida known as the Khorasan Group. These strikes are necessary to defend the United States and our partners and allies against the threat posed by these elements.

I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States. I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.

2. *Bilateral Agreements and Arrangements*

Bilateral Security Agreement and NATO Status of Forces Agreement with Afghanistan

On September 30, 2014, the Government of Afghanistan and the Government of the United States signed a bilateral security agreement ("BSA"). The BSA provides the legal framework for members of the U.S. armed services to continue to work in Afghanistan post-2014 to target remnants of al-Qaida and to train, advise, and assist the Afghan National Security Forces. Signing the BSA implements the Strategic Partnership Agreement signed in May 2012. See *Digest 2012* at 592-93. On the same day as the BSA was signed, NATO and Afghanistan signed a status of forces agreement ("SOFA"). Both the BSA and the NATO SOFA are available at www.state.gov/s/l/c8183.htm. President Obama's statement on the signing appears below. Daily Comp. Pres. Docs., 2014 DCPD No. 00722 (Sept. 30, 2014).

* * * *

Today we mark an historic day in the U.S.-Afghan partnership that will help advance our shared interests and the long-term security of Afghanistan. After nearly 2 years of hard work by negotiating teams on both sides, earlier today in Kabul the United States and the new Afghan Government of national unity signed a bilateral security agreement (BSA). This agreement represents an invitation from the Afghan Government to strengthen the relationship we have built over the past 13 years and provides our military servicemembers the necessary legal framework to carry out two critical missions after 2014: targeting the remnants of Al Qaida and training, advising, and assisting Afghan national security forces. The signing of the BSA also reflects the implementation of the strategic partnership agreement our two governments signed in May 2012.

Today Afghan and NATO officials also signed the NATO status of forces agreement, giving forces from allied and partner countries the legal protections necessary to carry out the NATO Resolute Support mission when ISAF comes to an end later this year.

These agreements follow an historic Afghan election in which the Afghan people exercised their right to vote and ushered in the first peaceful democratic transfer of power in their nation's history. The BSA reflects our continued commitment to support the new Afghan unity Government, and we look forward to working with this new Government to cement an enduring partnership that strengthens Afghan sovereignty, stability, unity, and prosperity and that contributes to our shared goal of defeating Al Qaida and its extremist affiliates.

This day was only possible because of the extraordinary service of our men and woman in uniform who continue to sacrifice so much in Afghanistan on behalf of our security and the Afghan people. The American people are eternally grateful for their efforts.

* * * *

Secretary of State John Kerry issued a statement on the signing of the BSA and NATO SOFA on September 30, 2014. Secretary Kerry's statement appears below and is available at www.state.gov/secretary/remarks/2014/09/232329.htm.

* * * *

The signing of the Bilateral Security Agreement sends a long-awaited and unequivocal message that the United States and Afghanistan are determined not just to sustain, but to build on more than a decade of progress.

This is a milestone moment for so many who, for over a decade, put their lives on the line every single day for reason and peace and fairness.

The signing of the Bilateral Security Agreement and the NATO Status of Forces Agreement earlier today puts an exclamation point on our enduring commitment to the security

and stability of Afghanistan, the region, and the world. This is a bond that will continue for the United States, our NATO allies, and Afghanistan.

Our job now is to support Afghanistan for the Afghans. As envisioned in the Enduring Strategic Partnership Agreement, the Bilateral Security Agreement will allow the United States to continue to train, advise, and assist Afghan National Security Forces (ANSF), so that terrorists can never again threaten the world from Afghan soil. The NATO SOFA agreement will ensure that international efforts to train, advise, and assist the ANSF continue full speed ahead after the International Security Assistance Force mission concludes at the end of this year.

The gains of the past decade have been won with blood and treasure. They must not be lost, and we all have a stake in ensuring they're a foundation upon which to build.

* * * *

3. International Humanitarian Law

a. U.S. Remarks at the ICRC Meeting and the UN General Assembly

Mary McLeod addressed the third meeting of States on enhancing compliance with international humanitarian law, held in Geneva June 30-July 1, 2014. Her opening remarks are excerpted below and available at

<https://geneva.usmission.gov/2014/07/01/u-s-opening-remarks-at-international-humanitarian-law-meeting/>.

* * * *

The number of delegations represented in this room is a testament to the importance of the work before us. Although the United States recognizes the progress States have made in improving the implementation of IHL over the past decades, more can and should be done. Establishing a dedicated forum in which States can engage with each other in substantive, non-politicized discussions on IHL issues would mark an important step forward. Indeed, we continue to believe that the most effective way to achieve our shared humanitarian objectives is by creating a forum that is conducive to serious, non-politicized engagement on important issues of IHL implementation. That is critical to ensuring compliance in the long-term.

In the meetings that have been held since the 2011 International Conference, we have begun to craft a mechanism that would advance this cause. For that, we recognize in particular the role that the Swiss and the ICRC have played in facilitating this discussion among States, as well as the sense of purpose that States have brought to bear.

However, more work lies ahead. As the Background Document helpfully prepared by the Swiss and the ICRC reflects, there are core areas of agreement as well as areas—both large and small—on which States have yet to achieve consensus. In addition, there are issues that have yet

to be explored fully, most notably how to address non-State actors, which we know are responsible for some of the most horrific IHL violations.

As the form of a potential new IHL compliance mechanism takes shape, we must continue to be guided by the core principles that are reflected in the Background Document. We must remember that the purpose of any new mechanism should be actually to enhance implementation and compliance by both States and non-State actors. Politicization must be avoided, as it would undermine the very atmosphere of constructive engagement we have sought to foster.

* * * *

On October 21, 2014, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, addressed the 79th UN General Assembly Sixth Committee (Legal) session on the status of the Protocols Additional to the Geneva Conventions of 1949. Mr. Townley discussed U.S. efforts to ratify Additional Protocol II as well as other actions taken by the United States to uphold and strengthen principles of international humanitarian law. His remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/234022.htm>.

* * * *

Thank you Mr. Chairman. The United States has long been a strong proponent of the development and implementation of international humanitarian law, which we often also refer to as the law of war or the law of armed conflict, and we recognize the vital importance of compliance with its requirements during armed conflict. President Obama has consistently reaffirmed the need for nations to work together within a rule of law framework in addressing the numerous security challenges currently confronting States; as he stated in his address to the U.N. General Assembly in September, “all of us—big nations and small—must meet our responsibility to observe and enforce international norms.” Accordingly, the United States continues to ensure that all of our military operations that are conducted in connection with armed conflict comply with international humanitarian law, and all other applicable international and domestic law.

As we reported in the last discussion of this agenda item in this Committee two years ago, the United States announced its intent to seek the U.S. Senate’s advice and consent to ratification of Additional Protocol II, and this treaty is pending on the calendar of the Senate. An extensive interagency review found that U.S. military practice was consistent with the Protocol’s provisions, and we believe it remains so today. Although the United States continues to have significant concerns with many aspects of Additional Protocol I, Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well. Indeed, in

the recently updated Department of Defense Directive on its Detainee Program, specific reference is made to the principles in Article 75 of Additional Protocol I.

We have also been pleased to see further discussion of weapons review in the context of the informal expert meeting on Lethal Autonomous Weapons Systems, held last spring under the auspices of the Convention on Certain Conventional Weapons. The United States believes that the importance of conducting the legal reviews of weapons to determine their consistency with the State's international obligations, which for Parties to Additional Protocol I is reflected in parts of Article 36, warrants the international community's renewed attention, and not just as it relates to Lethal Autonomous Weapons Systems. The U.S. Department of Defense has long-standing policies and processes for conducting the legal review of weapons when acquiring new weapons. Moreover, under a Department of Defense policy with respect to the use of autonomy in weapon systems, two reviews, including both legal and policy considerations, are conducted of certain types of autonomous weapon systems—once prior to making the decision to enter into formal development of a weapon, and again before a weapon is fielded. The United States supports continued informal discussions on Lethal Autonomous Weapon Systems within meetings of States Parties to CCW and we hope that such discussions will continue to address the importance of conducting such reviews when developing or acquiring new weapons. We also hope the CCW will serve as a useful vehicle for a broader exchange of good practices in this area, while recognizing States' needs to protect certain national security and proprietary information.

I'd like to take this opportunity to discuss two recent, broader initiatives. The first is the Swiss-ICRC initiative on strengthening compliance with IHL, to which the Swiss and ICRC Presidents referred in a recent published statement on the 150th anniversary of the 1864 Geneva Convention. Although the United States recognizes the progress States have made in improving the implementation of IHL over the past decades, more can and should be done. We therefore support efforts to establish a dedicated forum in which States can engage with each other in substantive, non-politicized discussions about the ways they have implemented IHL. Such a forum would foster serious engagement on how States address their most pressing issues. The United States supports the concept of States reporting on their own practice, as well as discussions of particularly timely topics. We fully support the idea, also recently suggested by Presidents Burkhalter and Maurer, that such a forum could be a vehicle to facilitate capacity-building. We look forward to the further development of this initiative in advance of the 32nd International Conference of the Red Cross and Red Crescent.

The second initiative I'd like to discuss is the multi-year ICRC project related to the legal protections for persons deprived of their liberty in relation to non-international armed conflicts. The United States supports this continuing effort to ensure that IHL remains practical and relevant in providing legal protection to detainees and internees, and to inform the ICRC's presentation of a range of options and recommendations to the 32nd International Conference. We were pleased to participate in the first of two consultations with government experts, which addressed the conditions of detention and the protection of particularly vulnerable groups. We look forward to participating in the next round of discussions this month, which will consider the grounds and procedures for deprivation of liberty in non-international armed conflict, as well as transfers from one authority to another. We would emphasize that the situations in non-international armed conflict that may warrant detention can be quite varied, operationally complex, and logistically challenging. As we continue these discussions hosted by the ICRC, we

must remain mindful that, apart from legally required baseline protections, detention procedure and processes must remain flexible, practical, and appropriate for the particular situation. We look forward to extensive discussion among State participants on their practical experiences and views on these issues.

With respect to both of these initiatives, we highlight that nations will need to find the right way to address the conduct of, and frequent violations of IHL by, non-state actors. It is important that international mechanisms not in any way lend legitimacy to non-state actors. On the other hand, in discussing non-international armed conflict, it will be critical to address the conduct of non-state actors. We look forward to exchanging views with others on how this can best be achieved, as the actions of non-state actors undoubtedly will remain an important topic as we work toward a world where IHL is better implemented across the full range of ongoing conflicts.

We would also briefly like to signal our strong support for ongoing work to establish a Montreux Document Forum where issues relating to private security companies can be considered.

In conclusion, let me once again reaffirm our commitment to IHL and to its effective implementation. Thank you, Mr. Chairman.

* * * *

b. *Applicability of international law to conflicts in cyberspace*

As discussed in *Digest 2013* at 560, consensus was achieved in 2013 by the UN Group of Governmental Experts (“UNGGE”) on Developments in the Field of Information and Telecommunications in the Context of International Security. On January 9, 2014, the UN General Assembly adopted a resolution (U.N. Doc. A/RES/68/243) requesting the establishment of a further Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security with a mandate to continue to study, among other things, how international law applies to the use of information and communications technologies by States. In October 2014, the United States submitted the following paper to the 2014–15 Group of Governmental Experts.

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Introduction and Background

... This submission addresses the application of international law to the use of information and communications technologies (ICTs) by States and proposes measures that would promote responsible behavior of States with regard to ICTs. This submission builds upon the 2010 and 2013 consensus reports of prior UNGGEs and the U.S. views articulated in its submissions to these prior UNGGEs.

It is clear from the 2013 UNGGE consensus report reached by Experts that States recognize that existing international law applies to State use of ICTs. Specifically, the 2013

UNGGE report noted that international law “is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment.”¹ The report further affirmed, *inter alia*, the application of the UN Charter and international law principles of sovereignty, human rights and fundamental freedoms, and State responsibility to State use of ICTs.² The Experts also noted the need to further study *how* international law applies, and recommended that States should further consider how best to cooperate in implementing norms and principles of responsible behavior in the ICT environment.³

To build on the successes of the prior UNGGEs, the UN General Assembly (UNGA) established the present UNGGE to continue to study, *inter alia*, how international law applies to the use of ICTs by States, and the norms, rules, or principles of responsible behavior of States in cyberspace.⁴ The United States’ submission for the 2014–15 UNGGE focuses on these elements of the mandate and expands on the views presented in its prior submissions (Appendix A and Appendix B), offering a series of considerations that provide an analytical framework for applying existing international law to States’ use of ICTs and providing additional ideas on measures that would promote responsible State behavior—and, therefore, security and stability—in cyberspace.

The cornerstone of the U.S. view has been that existing international law applies to State conduct in cyberspace, in particular to armed conflict, the use of proxy actors, human rights, and State responsibility. When assessing cyber activities within the framework of existing international law, States should take into account the distinctive characteristics of such activities. As noted in the 2012–13 U.S. submission to the UNGGE, applying international law to the context of cyberspace can present certain challenges. This is not unusual: similar challenges have been confronted when applying existing international law to other new technologies and situations. But the challenge is not whether existing international law applies to State behavior in cyberspace. As the 2012–13 GGE affirmed, international law does apply, and such law is essential to regulating State conduct in this domain. The challenge is providing decision-makers with considerations that may be taken into account when determining how existing international law applies to cyber activities. Despite this challenge, history has shown that States, through consultation and cooperation, have repeatedly and successfully applied existing bodies of law to new technologies. It continues to be the U.S. view that all States will benefit from a stable international ICT environment in which existing international law is the foundation for responsible State behavior in cyberspace.

I. The Application of International Law to Cyber Activities in the Context of Hostilities

As noted in the U.S. submissions for the prior UNGGEs, there are two related bodies of international law that are relevant to the question of how existing international law applies to ICTs and the use of force in and through cyberspace: the *jus ad bellum* (the body of law that addresses, *inter alia*, uses of force triggering a State’s right to use force in self-defense) and the *jus in bello* (the body of law governing the conduct of hostilities in the context of armed conflict). In this section and those that follow, we set out in bold-face type some basic principles of international law that apply to State behavior in cyberspace and provide, where applicable,

¹ Report of the 2012–13 UNGGE (June 24, 2013), UN Doc. A/68/98, paragraph 19.

² *Id.* at paragraphs 19–21, 23.

³ *Id.* at paragraphs 16 and 25.

⁴ UNGA Resolution 68/243 (January 9, 2014), paragraph 4.

some considerations that States may take into account when determining how such principles apply to State use of ICTs in specific situations they confront.

It is important to note here that this UNGGE need not reach consensus on exactly how existing principles of international law apply to all conceivable cyber situations. It would suffice to identify the basic legal principles that apply and then reach a consensus on some of the relevant considerations States should take into account when they confront real-world situations. Such considerations about how international law applies to actions in cyberspace will necessarily be taken into account on a case-by-case basis and will depend on the particular circumstances of the situation at hand. We need not spell out how international law applies to all hypothetical scenarios—we have not done so with respect to other types of operations, and in any case there will undoubtedly be situations that arise that we are unable to predict given the speed of change in ICTs. But reaching a consensus on some of the relevant considerations for States in determining how existing international law applies to the use of ICTs will assist all States in meeting the challenge of applying, and abiding by, existing international law when real-world situations involving the use of ICTs present themselves.

A. Cyber activities and the *jus ad bellum*

Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.

A State's inherent right of self-defense, recognized in Article 51 of the UN Charter, may in certain circumstances be triggered by cyber activities that amount to an actual or imminent armed attack.⁵ This inherent right of self-defense⁶ against an actual or imminent armed attack in or through cyberspace applies whether the attacker is a State actor or a non-State actor.

In determining whether a cyber activity constitutes a use of force prohibited by Article 2(4) of the UN Charter and customary international law or an armed attack sufficient to trigger a State's inherent right of self-defense, States should consider the nature and extent of injury or death to persons and the destruction of, or damage to, property. Although this is necessarily a case-by-case, fact-specific inquiry, cyber activities that proximately result in death, injury, or significant destruction, or represent an imminent threat thereof, would likely be viewed as a use of force / armed attack. If the physical consequences of a cyber activity work the kind of damage that dropping a bomb or firing a missile would, that cyber activity should equally be considered a use of force / armed attack.

Some of the factors States should evaluate in assessing whether an event constitutes an actual or imminent use of force / armed attack in or through cyberspace include the context of the event, the actor perpetrating the action (recognizing the challenge of attribution in cyberspace, including the ability of an attacker to masquerade as another person/entity or manipulate transmission data to make it appear as if the cyber activity was launched from a different location or by a different person), the target and its location, the effects of the cyber activity, and the intent of the actor (recognizing that intent, like the identity of the attacker, may

⁵ In this document, the term "attack" refers to activity that qualifies as an attack under the relevant provisions of the *jus ad bellum* or the *jus in bello*, and not to cyber activities that are colloquially called "attacks" that do not meet the relevant threshold.

⁶ In this document, the term "self-defense" is used in the *jus ad bellum* sense of activity undertaken in response to an armed attack; the term is not to be conflated with cyber activities that constitute "network defense."

be difficult to discern, but that hostile intent may be inferred from the particular circumstances of a cyber activity), among other factors.

Determining whether the right to use force in self-defense against an imminent armed attack in or through cyberspace has been triggered is difficult given the ability of actors to cloak their behavior—including preparations for an armed attack—in cyberspace, and the speed with which a cyber activity may be launched and its effects felt. Additionally, it may be difficult to determine whether a particular cyber activity, such as the placement of malware on a system, was undertaken because the actor has actually decided to conduct an armed attack using that malware, is merely acquiring the capability to undertake an armed attack in the future, or is using or intends to use the malware in a manner that would not constitute an armed attack. Just as in the kinetic context, States should consider all available information before using force in self-defense against an imminent armed attack in or through cyberspace. Such consideration may be especially necessary when the threat of an imminent armed attack in or through cyberspace is not associated with a corresponding threat of imminent armed attack through kinetic means.

States may employ cyber capabilities that rise to the level of a use of force as a means of self-defense against a kinetic armed attack (*i.e.*, one that was not launched in or through cyberspace). Additionally, States may in certain circumstances use kinetic military force in self-defense against an armed attack in or through cyberspace.

The use of force in self-defense must be limited to what is necessary and proportionate to address the imminent or actual armed attack in or through cyberspace.

Before resorting to forcible measures in self-defense against an actual or imminent armed attack in or through cyberspace, States should consider whether passive cyber defenses or active defenses below the threshold of the use of force would be sufficient to neutralize the armed attack or imminent threat thereof.

The widespread availability of both the means and knowledge to undertake cyber activities and the relatively low costs of such activities make cyber activities an attractive option for non-State actors. When determining whether the use of force in self-defense is necessary to address an imminent or actual armed attack in or through cyberspace by a non-State actor, States should consider whether it is feasible to secure the cooperation of the territorial State in preventing or ending the cyber activity. A State facing an imminent or actual armed attack by a non-State actor in or through cyberspace generally must make a reasonable, good faith effort to seek the territorial State's consent before using force on its territory against the non-State actor to prevent or end the armed attack. When seeking consent, the requesting State should give the territorial State a reasonable opportunity to respond, recognizing that the reasonableness of a timeframe in a particular context may be determined in relation to the nature of the actual or imminent armed attack.

A State may act without consent, however, if the territorial State is unwilling or unable to stop or prevent the actual or imminent armed attack launched in or through cyberspace. In evaluating whether a State is unwilling or unable to stop or prevent an actual or imminent armed attack, relevant considerations may include whether the territorial State is actively supporting the non-State actor, whether the State is tacitly accepting the activities of the non-State actor on its territory, and whether the State previously acted on its own or with others to suppress the non-State actor's activities in its territory. Additionally, the question whether to proceed with the use of force in self-defense without the consent of the territorial State should be evaluated based on the articulated reasons, if any, for withholding consent. If the territorial State does not consent to

the use of force on its territory because it proposes to take a reasonable alternative course of action to respond to the actual or imminent armed attack or to allow others to do so, it generally should not be treated as “unwilling.”

In circumstances in which a victim State must use force in self-defense against an actual or imminent armed attack by non-State actors in or through cyberspace, the victim State must take reasonable measures to ensure that its defensive actions are directed exclusively at the non-State actors when the territorial State is not also responsible for the armed attack.

B. Cyber activities and the *jus in bello*

Cyber activities in the context of an armed conflict may in certain circumstances constitute an “attack” for purposes of the application of the *jus in bello* rules that govern the conduct of hostilities.

In the context of an armed conflict, a cyber activity directed against a civilian computer network, for example, would not violate the *jus in bello* prohibition on attacking civilian objects unless the activity qualifies as an “attack”; however, a civilian computer network is not immune from attack if it is being used by a belligerent for military purposes. When determining whether a cyber activity constitutes an “attack” for *jus in bello* purposes, States should consider, *inter alia*, whether a cyber activity results in kinetic and irreversible effects on civilians, civilian objects, or civilian cyber infrastructure, or non-kinetic and reversible effects on the same, as well as the nature of the connection, if any, between the cyber activity and the particular armed conflict in question.

The *jus in bello* principle of distinction applies to cyber attacks undertaken in the context of an armed conflict. In the context of cyber capabilities used in armed conflict, the principle of distinction requires that only legitimate military objectives be made the object of attack.

A legitimate military objective is an object that, by its nature, location, purpose, or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Military computers and military cyber infrastructure may be understood to qualify as military objectives by their nature. Additionally, civilian computers and civilian cyber infrastructure may qualify as military objectives if used for military purposes by a party to the armed conflict. The often dual-use nature of ICT infrastructure—the fact that it is often shared by State militaries and civilian communities, as well as by non-State actors who may seek to launch an armed attack in or through cyberspace—is a relevant consideration in applying the principle of distinction. Although an attack on civilian cyber objects being used for military ends may be permissible in certain circumstances, such objects may be part of a larger network of civilian cyber objects that are not being used in that way. As a result, States must consider the principle of proportionality when targeting legitimate military objectives that are networked to purely civilian objects or otherwise part of dual-use cyber infrastructure.

The *jus in bello* principle of distinction also affects what weapons may be used in the context of an armed conflict. Weapons that are incapable of being used in accordance with the principles of distinction and proportionality would be inherently indiscriminate and *per se* unlawful under the law of armed conflict. Certain cyber tools could, in light of the interconnected nature of computer networks, be inherently indiscriminate in the sense that their effects cannot be predicted or controlled. For example, use of a worm that could spread

uncontrollably within civilian networks might be prohibited by the law of war if such use would constitute an “attack” for *jus in bello* purposes. States should consider the principle of proportionality before undertaking any cyber attacks in armed conflict that reasonably might be expected to cause unpredictable or unintended effects beyond the intended target.

The *jus in bello* principle of proportionality applies to cyber activities undertaken in the context of an armed conflict. The principle of proportionality prohibits attacks that may be expected to cause incidental loss to civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.

In the cyber context, this rule would require parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users, including shared physical infrastructure (such as a dam or a power grid) that would affect civilians. In addition to the potential physical damage that a cyber activity may cause, such as death or injury that may result from effects on critical infrastructure, parties must assess the potential effects of a cyber attack on civilian objects that are not military objectives, such as private, civilian computers that hold no military significance but may be networked to military objectives.

Given the interconnectivity of ICTs, there is a serious risk that any given cyber activity might cause unintended or cascading effects on civilians and civilian objects. When undertaking a proportionality evaluation, parties to an armed conflict should consider the risk of unintended or cascading effects on civilians and civilian objects in launching a particular cyber attack, as well as the harm to civilian uses of dual-use infrastructure that may be the target of an attack.

Additionally, in the context of conducting cyber activities that amount to attacks during armed conflict, parties to a conflict should take feasible precautions to reduce the risk of incidental harm of such cyber activities on civilian infrastructure and users.

States should undertake a legal review of weapons, including those that employ a cyber capability.

Such a review should entail an analysis, for example, of whether a particular capability would be inherently indiscriminate, *i.e.*, that it could not be used consistent with the principles of distinction and proportionality.

II. The Application of International Law to Cyber Activities that Occur Outside the Context of Armed Conflict

Most cyber activities undertaken by States and other actors fall below the threshold of the use of force and outside of the context of armed conflict. Such activities, however, do not take place in a legal vacuum. Instead, they are governed by, *inter alia*, international legal principles that pertain to State sovereignty, human rights, and State responsibility. The following sections discuss certain of these legal principles and considerations that may be taken into account when applying them to State behavior in cyberspace.

A. Sovereignty principles and cyberspace

State sovereignty, among other long-standing international legal principles, must be taken into account in the conduct of activities in cyberspace, including outside of the context of armed conflict. Because of the interconnected, interoperable nature of cyberspace, operations targeting networked information infrastructures in one country can have effects in many countries around the world. Whenever a State contemplates conducting activities in cyberspace, the sovereignty of other States needs to be considered.

The implications of sovereignty for cyber activities are complex, but we can start by acknowledging the relevance of territorial jurisdiction. The physical infrastructure that supports the Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State. The exercise of jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations.

As we have noted before, the 1948 Universal Declaration of Human Rights (UDHR) was remarkably forward-looking in anticipating these trends. It says: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers*.” All human beings hold certain rights, whether they choose to exercise them in a city square or an Internet chat room. The right to freedom of expression is well-established internationally in both the UDHR and the International Covenant on Civil and Political Rights. Both of these instruments clearly state that this right can be exercised through any media and regardless of frontiers. Both of these instruments set forth the right of individuals to publish, to create art, to practice their religions, and to gather together and discuss issues of the day. Regardless of whether these activities occur online or offline, they are governed by the same principles.

B. State responsibility, including the responsibility for the conduct of proxy actors

A State is responsible for an internationally wrongful act when there is an act or omission that is attributable to it under international law that constitutes a breach of an international obligation of the State. Cyber activities may constitute internationally wrongful acts if they are inconsistent with a primary rule of international law and are attributed to a State under the secondary rules on State responsibility.

A State is legally responsible for cyber activities undertaken through “proxy actors” who act on the State’s instructions or under its direction or control. If a State exercises a sufficient degree of control over a person or group of persons committing an internationally wrongful act, the State assumes responsibility for the act just as if the State had committed the act itself. These rules apply to conduct online just as they do offline, and they ensure that States cannot hide behind putatively private actors in engaging in internationally wrongful conduct.

The ability to cloak one’s identity and geography in cyberspace, as well as the ease with which computers can be remotely controlled and identities spoofed, may create attribution challenges. The mere fact that a cyber activity was launched from, or otherwise originates from, another State’s territory or from the cyber infrastructure of another State is insufficient, without more, to attribute the activity to that State. Additionally, the mere fact that a cyber activity has been routed through the cyber infrastructure of another State is insufficient, without more, to attribute a cyber activity to a State.

C. Non-forcible countermeasures

In certain circumstances, a State injured by cyber activities that are attributable to another State and that constitute an internationally wrongful act, but do not amount to an armed attack, may respond with acts of retorsion⁷ or non-forcible countermeasures.⁸

⁷ Acts of retorsion are unfriendly acts not inconsistent with any international obligations.

Countermeasures undertaken in response to an internationally wrongful act in or through cyberspace that is attributable to a State must be directed only at the State responsible for the wrongful act, must meet the requirements of necessity and proportionality, must be designed to induce the State to return to compliance with its international obligations, and must cease no later than when the State begins complying with its international obligations.

Countermeasures taken in response to cyber activities attributable to States that constitute internationally wrongful acts may take the form of cyber-based countermeasures or non-cyber-based countermeasures, depending on the circumstances. Just as in non-cyber contexts, before an injured State can undertake countermeasures in response to a cyber-based internationally wrongful act attributable to a State, it generally must call upon the responsible State to cease its wrongful conduct, unless urgent countermeasures are necessary to preserve the injured State's rights. Countermeasures must, moreover, be directed only against the State responsible for the initial wrongful act, and they must be proportional to the initial wrongful act.

D. Measures To Promote Responsible State Behavior with regard to ICTs Outside the Context of Armed Conflict

As the international community moves toward a better understanding of how existing international law applies to cyber activities, many States agree that steps must be taken to address certain State-sponsored cyber activities that occur outside the context of an armed conflict that are potentially destabilizing. Of particular concern are cyber activities intended to damage or impair the use of infrastructure that provides essential services to the public and cyber activities intended to prevent national computer security incident response teams (CSIRTs) from responding to cyber incidents. Preventing such malicious activities should be of universal interest and of benefit to all States. Calling on States to refrain from such malicious cyber activities would promote the responsible behavior of States. Additionally, implementing these measures would enhance the stability of the ICT environment and lay the groundwork for further understanding of what constitutes responsible State conduct applicable to peaceful use of cyberspace.

A State should not conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide services to the public. As noted in UNGA Resolution 58/199, although each country will determine its own "critical infrastructure," the phrase generally refers to the networks and infrastructure that support the operations of systems used for, *inter alia*, the generation, transmission, and distribution of energy; air and maritime transport; banking and financial services; e-commerce; water supply; food distribution; and public health.

A State should not conduct or knowingly support activity intended to prevent national CSIRTs from responding to cyber incidents. A State should also not use CSIRTs to enable online activity that is intended to do harm. A CSIRT is an organization that protects ICT networks by identifying and responding to cybersecurity incidents. A national CSIRT receives, reviews, and responds to cybersecurity incident reports for a State. These organizations play a vital role in the safe and secure functioning of networks, not only for the networks for which they are responsible, but for the entire ICT environment.

⁸ Countermeasures are acts that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State if they were not taken in response to an internationally wrongful act by the latter in order to procure cessation.

A State should cooperate, in a manner consistent with its domestic law and international obligations, with requests for assistance from other States in investigating cyber crimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory. States must take robust and cooperative action to investigate criminal activity by non-State actors. This measure recognizes that States, in line with the parameters set forth above, should seek to cooperate in criminal matters when criminal conduct originates in one State and has an effect in another State. Enhancing cooperation in criminal matters will increase confidence and build trust among States, and reduce the likelihood of destabilizing misperceptions.

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c. *Private military and security companies*

See Chapter 5 for a discussion of litigation involving private military and security companies.

B. CONVENTIONAL WEAPONS

1. Ottawa Convention (Anti-Personnel Landmines)

On June 27, 2014, the United States announced a new policy on anti-personnel landmines at the Third Review Conference of States Parties to the Ottawa Convention, hosted by Mozambique. The U.S. policy provides that:

The United States will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including to replace such munitions as they expire in the coming years. Meanwhile, we are diligently pursuing other solutions that would be compliant with the Convention and that would ultimately allow us to accede to the Convention. We are also conducting a high fidelity modeling and simulation effort to ascertain how to mitigate the risks associated with the loss of anti-personnel landmines. Other aspects of our landmine policy remain under consideration, and we will share outcomes from that process as we are in a position to do so.

Statement by National Security Council Spokesperson Caitlyn Hayden, available at www.whitehouse.gov/the-press-office/2014/06/27/statement-nsc-spokesperson-caitlin-hayden-us-anti-personnel-landmine-pol. At the Review Conference in Maputo, Mozambique, the U.S. Ambassador to Mozambique delivered a statement likewise announcing the U.S. policy not to produce or acquire any anti-personnel munitions and to replace such munitions as they expire.

On September 23, 2014, the United States announced further commitments to the aims of the Ottawa Convention, prohibiting the use, stockpiling, and transfer of anti-personnel landmines (“APLs”). The United States is moving toward accession to the Ottawa Convention, which includes over 160 states, international organizations, and non-governmental organizations. Specifically, on September 23, 2014:

the United States announced that we will not use these mines outside of the Korean Peninsula, where our actions are governed by the unique situation there. This policy change announced today builds on our prior commitments, including our announcement in June, in which we stated we will no longer produce or acquire anti-personnel landmines.

Today’s announcement also means that we will not assist, encourage, or induce others to use, stockpile, produce or transfer anti-personnel landmines outside of the Korean Peninsula. And we will diligently undertake to destroy stockpiles of these landmines that are not required for the defense of the Republic of Korea.

Department of State press statement on landmine policy, available at www.state.gov/r/pa/prs/ps/2014/09/231995.htm. See also, White House Fact Sheet on Changes to U.S. Anti-Personnel Landmine Policy, available at www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy; Statement by NSC Spokesperson Caitlin Hayden on Anti-Personnel Landmine Policy, available at www.whitehouse.gov/the-press-office/2014/09/23/statement-nsc-spokesperson-caitlin-hayden-anti-personnel-landmine-policy.

2. Convention on Certain Conventional Weapons

On May 13, 2014, Stephen Townley delivered the opening statement for the U.S. delegation at a CCW informal experts meeting on lethal autonomous weapons systems. Mr. Townley’s statement is excerpted below and available at <https://geneva.usmission.gov/2014/05/13/u-s-delegation-opening-statement-at-ccw-informal-experts-meeting-on-lethal-autonomous-weapons-systems/>.

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We will provide specific comments during the sessions to come, but at the outset, we would like to make three framing points and then highlight one issue that is, to us, critical in thinking about autonomous features of weapons systems.

First, this important discussion is just beginning and we believe considerable work still needs to be done to establish a common baseline of understanding among states. Too often, the phrase “lethal autonomous weapons system” appears still to evoke the idea of a humanoid

machine independently selecting targets for engagement and operating in a dynamic and complex urban environment. But that is a far cry from what we should be focusing on, which is the likely trajectory of technological development, not images from popular culture.

To move toward a common understanding does not mean that we need to define “lethal autonomous weapons systems” at the outset. Recent discussions in which we have participated, along with other states, and scientists, roboticists, lawyers, and ethicists, have shown that some ideas about lethal autonomous weapons systems are so widely divergent that it would be imprudent, if not impossible, to precisely define the term now. Much examination and discussion [are] necessary before we try to undertake that task. As we begin our discussions here, though, we must be clear on one point—we are here to discuss future weapons or, in the words of the mandate for this meeting, “emerging technologies.” Therefore we need to be clear, in these discussions we are not referring to remotely piloted aircraft, which as their name indicates are not autonomous and therefore, conceptually distinct from LAWS.

Second, it follows from the fact that we are indeed at such an early stage of our discussions that the United States believes it is premature to determine where these discussions might or should lead. In our view, it is enough for now for us collectively to acknowledge the value in discussing lethal autonomous weapons systems in the CCW, a forum focused on international humanitarian law, which is the relevant framework for this discussion.

Third, we must bear in mind the complex and multifaceted nature of this issue. This complexity means we need to carefully think through the full range of possible consequences of different approaches. For instance, our discussion here will necessarily touch on the development of civilian technology, which we expect to continue unrestricted by those discussions.

With that said, the United States would like to highlight one of the key issues we think states should focus on in considering autonomy in weapons systems—and that is risk. We will elaborate on this further in the coming days, but, to give just one example, how does the battlefield—whether cluttered or uncluttered—affect the risk of using a particular weapons system?

In order to assess risk associated with the use of any weapons system, States need a robust domestic legal and policy process and methodology. We think states may also need to tailor those legal and policy processes when considering weapons with autonomous features. For that reason, as you know, after a comprehensive policy review, the United States Department of Defense issued DoD Directive 3000.09, “Autonomy in Weapon Systems,” in 2012. The Department developed the directive in order to better understand and identify the risks posed by autonomy, as well as to consider possible ways to mitigate risks that are identified. It established a high-level, detailed process for considering weapons with autonomous features and issued specific guidelines designed to “minimize the probability and consequences of failures that could lead to unintended engagements.”

The United States intends to discuss the risks of autonomy, as well as possible benefits, and means of analyzing those risks, over the coming days, using the Directive as an example. We would likewise encourage other states to consider presenting their own ways and means of thinking about the risks of autonomy and whether they have their own domestic processes for evaluating those risks.

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The 16th Conference of the High Contracting Parties to Amended Protocol II (Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and other Devices) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (“CCW”) convened on November 12, 2014 in Geneva. The U.S. opening statement at the conference was delivered by Michael W. Meier, attorney-adviser for the U.S. Department of State. The opening statement is excerpted below and available at <https://geneva.usmission.gov/2014/11/12/u-s-opening-statement-at-the-conference-of-the-high-contracting-parties-to-amended-protocol-ii-to-the-convention-on-prohibitions-or-restrictions-on-the-use-of-certain-conventional-weapons-which-may-b/>.

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The United States continues to demonstrate its commitment to address the humanitarian consequences that can be caused by landmines and other conventional weapons. For more than two decades the United States has committed to a multi-agency effort to mitigate the harmful effects of conventional weapons, including landmines, explosive remnants of war, Man-Portable Air-Defense Systems (MANPADS) and excess small arms and light weapons and ammunition. The Department of State is joined in this multi-agency effort by the Department of Defense, and the U.S. Agency for International Development’s Leahy War Victims Fund. In addition, numerous private sector partners contribute to the success of the U.S. Conventional Weapons Destruction program.

Since 1993, the United States has provided more than \$2.3 billion in aid to over 90 countries for conventional weapons destruction programs, including clearance of landmines and unexploded munitions and destruction of excess small arms and light weapons and munitions. In addition to supporting the above-mentioned programs, the United States provides a wide variety of assistance to combat the illicit trafficking of conventional weapons, helping states improve their export control practices and providing technical assistance for physical security and stockpile management of at-risk conventional arms and munitions. The United States has been and remains the world’s single largest financial supporter of humanitarian mine action, which includes not only clearance of landmines, but also medical rehabilitation and vocational training for those injured by landmines and other explosive remnants of war.

The United States is very proud of the assistance we have provided over the years. Our Conventional Weapons Destruction program is an important investment that is saving lives and fostering stability in every region of the world. The program helps countries recover from conflict and create safe, secure environments to rebuild infrastructure, return displaced citizens to their homes and livelihoods, help those injured by these weapons to recover and provide for their families, and promote peace and security by helping establish conditions conducive to stability, democracy and economic development.

As many of you are aware, in the past year the United States has announced several important changes to our policy with respect to anti-personnel landmines (APL). At the Third Review Conference of States Parties to the Ottawa Convention in Maputo, Mozambique in June, the United States announced that it will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including to replace such munitions as they expire in the coming years. In September, we further announced that we are aligning our APL policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. This means that United States will:

- not use APL outside the Korean Peninsula;
- not assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention; and
- undertake to destroy APL stockpiles not required for the defense of the Republic of Korea.

Although we are not currently changing our landmine policy with respect to the Korean Peninsula, where our actions are governed by the unique circumstances there, we will continue to work to find ways that would allow us to ultimately comply fully and accede to the Ottawa Convention while ensuring our ability to respond to contingencies on the Korean Peninsula.

As we continue our diligent efforts to pursue solutions that would be compliant with the Ottawa Convention, the U.S. remains committed to implementing APII. To that end:

- The United States maintains no minefields anywhere in the world;
- As of January 1, 2011, the United States ended the use of all persistent mines, which can remain active for years after the end of a conflict, and has since removed all such mines, both APL and MOTAPM [mines other than anti-personnel mines], from its active inventory. Those mines remaining in the active inventory have a highly reliable self-destruct mechanism with a self-deactivation back-up with field-selectable self-destruct settings of 4 hours, 48 hours and 15 days;
- As of 2009, the United States has removed and destroyed all non-detectable mines from our active inventory, except for a small quantity reserved for testing and training purposes. All of our mines are detectable with commonly available mine detection equipment.
- To date, the United States has destroyed over 2M of 2.6M persistent anti-vehicle and anti-personnel mines. The remaining mines, other than a small quantity for countermine/demining testing and training purposes, will be destroyed through our conventional ammunition demilitarization process.

Overall, the United States is comprehensively addressing the humanitarian issues posed by landmines both through our own policies and through our humanitarian assistance efforts in concert with international partners, which have helped 15 countries around the world to become free of the impact of landmines and have helped to dramatically reduce the number of people killed or injured by landmines each year.

* * * *

The United States attended the Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons

Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (“CCW”) in November 13, 2014 in Geneva. The opening statement for the U.S. delegation at the meeting was delivered by Michael Meier. Mr. Meier’s statement, excerpted below, is available in full at <https://geneva.usmission.gov/2014/11/13/u-s-statement-at-the-meeting-of-high-contracting-parties-to-the-convention-on-certain-conventional-weapons-ccw/>.

* * * *

The United States places great value in the CCW as an IHL [International Humanitarian Law] framework that brings together States with diverse security interests to discuss issues related to weapons which may be deemed to be excessively injurious or that have indiscriminate effects. We believe that discussing important issues related to the use of weapons systems and learning from each other’s national implementation provides significant, real humanitarian benefit. We appreciate the work done in the experts’ meetings over the past year and commend the excellent work done by the various coordinators. We are pleased with the decisions of the High Contracting Parties to Amended Protocol II and Protocol V that will allow us to continue our important work related to IEDs and explosive remnants of war.

The United States places a special emphasis on the need for universalization of the CCW and its protocols. The most obvious way to increase the humanitarian benefits of the convention and its protocols is for the universalization of this important convention. We welcome Iraq’s accession to the CCW and its protocols.

The importance of universalization has been brought home by recent events around the world. We have seen the concerning reports that incendiary weapons continue to be used against the civilian population in Syria and reports of use in Ukraine. The United States shares in the international community’s concern about the humanitarian impact of the indiscriminate use of all munitions, including incendiary weapons and cluster munitions. These disturbing reports underscore that the universalization and implementation of CCW and its protocols, which represent a fundamental contribution to International Humanitarian Law, is critical if we want to help preclude such activities from taking place in the future. We therefore call on all States not yet party to the CCW to join the 118 States that are High Contracting Parties, and to accede to the CCW and its protocols at the earliest opportunity.

As we look ahead at decisions we will take with respect to next year’s work, the United States believes there is value in continuing our discussions on lethal fully autonomous weapons systems in the CCW. We were pleased with the level of participation in the informal meeting of experts in May of this year, which provided an opportunity for us to further identify and discuss the legal, technical, military, and ethical issues raised by this complex subject. It is clear that this discussion is just beginning and further work is required to help shape our understanding of this future technology. The United States believes that that it is important to continue our informal discussions in 2015 that should include no less than 5 days of discussion.

While it is premature to decide where these discussions might or should ultimately lead, it is important that our work move forward and build upon what was accomplished last May. We need to have an in depth discussion of the variety of issues surrounding LAWS. The United States believes that one important area that deserves increased attention next year is how states

evaluate new weapons systems such as LAWS. We believe that focusing, in part, on the weapons review process could provide the basis to identify fundamental issues and provide guidance for states that are considering any new weapons system. We believe such a discussion could result in a set of best practices applicable to the future development of lethal autonomous weapons systems. With the possibility that this could be a consensual outcome document in time for the 2016 Review Conference, the United States could support additional time for discussion on this specific topic in 2015. We believe this would be a positive first step for CCW High Contracting Parties to take while continuing to refine the legal, technical, military, and ethical issues surrounding these complex future weapons systems.

* * * *

3. Presidential Policy Directive on U.S. Conventional Arms Transfers

On January 15, 2014, President Barack Obama issued Presidential Policy Directive 27 on United States Conventional Arms Transfer Policy. Daily Comp. Pres. Docs., 2014 DCPD No. 00027 (Jan. 15, 2014). The Directive is excerpted below.

* * * *

Conventional weapons have continued to play a decisive role in armed conflict in the early 21st century and will remain legitimate instruments for the defense and security policy of responsible nations for the foreseeable future. In the hands of hostile or irresponsible state and non-state actors, however, these weapons can exacerbate international tensions, foster instability, inflict substantial damage, enable transnational organized crime, and be used to violate universal human rights. Therefore, global conventional arms transfer patterns have significant implications for U.S. national security and foreign policy interests, and the U.S. policy for conventional arms transfer has an important role in shaping the international security environment.

United States conventional arms transfer policy supports transfers that meet legitimate security requirements of our allies and partners in support of our national security and foreign policy interests. At the same time, the policy promotes restraint, both by the United States and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace and security.

Goals of U.S. Conventional Arms Transfer Policy

United States conventional arms transfer policy serves the following U.S. national security and foreign policy goals:

1. Ensuring U.S. military forces, and those of allies and partners, continue to enjoy technological superiority over potential adversaries.
2. Promoting the acquisition of U.S. systems to increase interoperability with allies and partners, lower the unit costs for all, and strengthen the industrial base.
3. Enhancing the ability of allies and partners to deter or defend themselves against aggression.
4. Encouraging the maintenance and expansion of U.S. security partnerships with those who share our interests, and regional access in areas critical to U.S. interests.

5. Promoting regional stability, peaceful conflict resolution, and arms control.
6. Preventing the proliferation of conventional weapons that could be used as delivery systems for weapons of mass destruction.
7. Promoting cooperative counterterrorism, critical infrastructure protection, and other homeland security priorities.
8. Combating transnational organized crime and related threats to national security.
9. Supporting democratic governance and other related U.S. foreign policy objectives.
10. Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.

Process and Criteria Guiding U.S. Arms Transfer Decisions

Arms transfer decisions will continue to meet the requirements of applicable statutes such as the Arms Export Control Act, the Foreign Assistance Act, the International Emergency Economic Powers Act, and the annual National Defense Authorization Act, as well as the requirements of all applicable export control regulations and of U.S. international commitments.

All arms transfer decisions will be guided by a set of criteria that maintains the appropriate balance between legitimate arms transfers to support U.S. national security and that of our allies and partners, and the need for restraint against the transfer of arms that would enhance the military capabilities of hostile states, serve to facilitate human rights abuses or violations of international humanitarian law, or otherwise undermine international security. This includes decisions involving the transfer of defense articles, related technical data, and defense services through direct commercial sales, government-to-government transfers, transfers of arms pursuant to U.S. assistance programs, approvals for the retransfer of arms, changes of end-use, and upgrades. More specifically, all arms transfer decisions will be consistent with relevant domestic law and international commitments and obligations, and will take into account the following criteria:

- Appropriateness of the transfer in responding to legitimate U.S. and recipient security needs.
- Consistency with U.S. regional stability interests, especially when considering transfers involving power projection capability, anti-access and area denial capability, or introduction of a system that may foster increased tension or contribute to an arms race.
- The impact of the proposed transfer on U.S. capabilities and technological advantage, particularly in protecting sensitive software and hardware design, development, manufacturing, and integration knowledge.
- The degree of protection afforded by the recipient country to sensitive technology and potential for unauthorized third-party transfer, as well as in-country diversion to unauthorized uses.
- The risk of revealing system vulnerabilities and adversely affecting U.S. operational capabilities in the event of compromise.
- The risk that significant change in the political or security situation of the recipient country could lead to inappropriate end-use or transfer of defense articles.

- The degree to which the transfer supports U.S. strategic, foreign policy, and defense interests through increased access and influence, allied burden sharing, and interoperability.
- The human rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question.
- The likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit human rights abuses or serious violations of international humanitarian law, or identify the United States with human rights abuses or serious violations of international humanitarian law.
- The impact on U.S. industry and the defense industrial base, whether or not the transfer is approved.
- The availability of comparable systems from foreign suppliers.
- The ability of the recipient to field effectively, support, and appropriately employ the requested system in accordance with its intended end-use.
- The risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs can be addressed by other means.

Supporting Arms Control and Arms Transfer Restraint

A critical element of U.S. conventional arms transfer policy is to promote control, restraint, and transparency of arms transfers. The United States will continue its participation in the U.N. Register of Conventional Arms and the U.N. Standardized Instrument for Reporting Military Spending, in the absence of an international legally binding treaty that requires such transparency measures. The United States will continue to urge universal participation in the U.N. Register and encourage states reporting to the Register to include military holdings, procurement through national production, and model or type information for transfers, thereby providing a more complete picture of change in a nation's military capabilities each year. The United States will also continue to examine the scope of items covered under the Register to ensure it meets current U.S. national security concerns. Additionally, the United States will support regional initiatives to enhance transparency in conventional arms.

The United States will continue its participation in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which began operations in 1996 and is designed to prevent destabilizing accumulations of conventional arms and related dual-use goods and technologies. By encouraging transparency, consultation, and, where appropriate, national policies of restraint, the Arrangement fosters greater responsibility and accountability in transfers of arms and dual-use goods and technologies. We will continue to use the Wassenaar Arrangement to promote shared national policies of restraint against the acquisition of armaments and sensitive dual-use goods and technologies for military end-uses by states whose behavior is a cause for serious concern.

The United States will also continue vigorous support for current arms control and confidence-building efforts to constrain the demand for destabilizing weapons and related technology. The United States recognizes that such efforts bolster stability in a variety of ways, ultimately decreasing the demand for arms.

The United States will not authorize any transfer if it has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against

humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. 2441.

Also, the United States will exercise unilateral restraint in the export of arms in cases where such restraint will be effective or is necessitated by overriding national interests. Such restraint will be considered on a case-by-case basis in transfers involving states whose behavior is a cause for serious concern, where the United States has a substantial lead in weapon technology, where the United States restricts exports to preserve its military edge or regional stability, where the United States has no fielded countermeasures, or where the transfer of weapons raises concerns about undermining international peace and security, serious violations of human rights law, including serious acts of gender-based violence and serious acts of violence against women and children, serious violations of international humanitarian law, terrorism, transnational organized crime, or indiscriminate use.

Finally, the United States will work bilaterally and multilaterally to assist other suppliers in developing effective export control mechanisms to support responsible export control policies.

Supporting Responsible U.S. Transfers

The United States Government will provide support for proposed U.S. exports that are consistent with this policy. This support will include, as appropriate, such steps as: tasking our overseas mission personnel to support overseas marketing efforts of U.S. companies bidding on defense contracts; actively involving senior government officials in promoting transfers that are of particular importance to the United States; and supporting official Department of Defense participation in international air and trade exhibitions when the Secretary of Defense, in accordance with existing law, determines such participation to be in the national interest and notifies the Congress. The United States will also continue to pursue efforts to streamline security cooperation with our allies and partners, and in the conduct of conventional arms transfer policy and security cooperation policy, the United States Government will take all available steps to hasten the ultimate provision of conventional arms and security assistance.

This Directive supersedes Presidential Decision Directive/ NSC–34, dated February 10, 1995.

* * * *

C. DETAINEES

1. Transfers

The number of detainees remaining at Guantanamo Bay declined significantly in 2014 as part of ongoing U.S. efforts to close the facility. A total of 27 detainees were transferred from the detention facility at Guantanamo Bay in 2014 to governments around the world that support ongoing U.S. efforts to close Guantanamo and that coordinated with the United States to ensure these transfers took place consistent with appropriate security and humane treatment measures.

On March 13, 2014, the Department of Defense announced the transfer of Ahmed Belbacha to the Government of Algeria. In a news release available at

www.defense.gov/releases/release.aspx?releaseid=16578, the Department of Defense explained that this individual was approved for transfer by consensus of the six departments and agencies comprising the interagency Guantanamo Review Task Force after a comprehensive review that considered security issues, among other factors. At that point, 154 detainees remained at Guantanamo.

On May 31, 2014, the Department of Defense informed Congress of the decision to transfer five detainees from Guantánamo Bay to Qatar. The announcement of the transfer of these detainees was made when the Department announced that U.S. Sargent Bowe Bergdahl had been placed under the care of the U.S. military after being handed over by his captors in Afghanistan. See Defense Department news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=16737. The United States coordinated with Qatar to ensure that security measures were in place and the national security of the United States would not be compromised.

On November 5, 2014, the Department of Defense announced the transfer of Fouzi Khalid Abdullah Al Awda from the detention facility at Guantanamo Bay to the Government of Kuwait. As explained in the news release available at www.defense.gov/releases/release.aspx?releaseid=17019, Al Awda's transfer was approved by a Periodic Review Board, consisting of representatives from the Departments of Defense, Homeland Security, Justice, State; the Joint Staff, and the Office of the Director of National Intelligence.

On November 20, 2014, the Department of Defense announced the transfer of Salah Mohammed Salih Al-Dhabi, Abdel Ghaib Ahmad Hakim, and Abdul Khaled Al-Baydani from the detention facility at Guantanamo Bay to the Government of Georgia. These three men were approved for transfer after a review by the interagency Guantanamo Review Task Force. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17042. On the same day, the Department also announced the transfer of Hashim Bin Ali Bin Amor Sliti and Husayn Salim Muhammad Al-Mutari Yafai from the detention facility at Guantanamo Bay to the Government of Slovakia. Their transfer was also approved after review by the Guantanamo Review Task Force. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17043.

On November 22, 2014, in a news release available at www.defense.gov/releases/release.aspx?releaseid=17048, the Department of Defense announced the transfer of Muhammed Murdi Issa Al-Zahrani from the detention facility at Guantanamo Bay to the government of the Kingdom of Saudi Arabia. Al-Zahrani's transfer was recommended by a Periodic Review Board in October. The news release on Al-Zahrani's transfer also quoted Mr. Paul Lewis, Special Envoy for Guantanamo Detention Closure, who summarized transfer activity over the course of 2014 as follows:

In the past three weeks, the Department of Defense has transferred seven detainees. These transfers include both the first Yemenis since 2010 and two transfers involving detainees made eligible by the Periodic Review Board

process. A total of 13 detainees have been transferred this year. This strikes a responsible balance and reflects the careful deliberation the Secretary of Defense brings to the transfer process, and follows a rigorous process in the interagency to review several items including security review prior to any transfer.

On December 7, 2014, the Department of Defense announced the transfer of Ahmed Adnan Ahjam, Ali Hussain Shaabaan, Omar Mahmoud Faraj, Abdul Bin Mohammed Abis Ourgy, Mohammed Tahanmatan, and Jihad Diyab from the detention facility at Guantanamo Bay, Cuba, to the government of Uruguay. These six detainees were approved for transfer as a result of a comprehensive review of their cases by the interagency Guantanamo Review Task Force. See news release, available at www.defense.gov/news/newsarticle.aspx?id=123782.

On December 20, 2014, the Department of Defense announced the repatriation of Shawali Khan, Khi Ali Gul, Abdul Ghani, and Mohammed Zahir from the detention facility at Guantanamo Bay to the Government of the Islamic Republic of Afghanistan. These four detainees were approved for transfer as a result of a comprehensive review of their cases by the interagency Guantanamo Review Task Force. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17083.

On December 30, 2014, the Department of Defense announced the transfer of Asim Thabit Abdullah Al-Khalaqi, Muhammad Ali Husayn Khanayna, Sabri Muhammad Ibrahim Al Qurashi, Adel Al-Hakeemy, and Abdullah Bin Ali Al-Lufti from the detention facility at Guantanamo Bay to Kazakhstan. These five were also transferred in accordance with the recommendation of the Guantanamo Review Task Force. With these transfers, the number of detainees remaining at Guantanamo as of the end of the year was 127. See news release, available at www.defense.gov/Releases/Release.aspx?ReleaseID=17093.

2. U.S. court decisions and proceedings

a. *Detainees at Guantanamo: Habeas Litigation*

(1) Hussain v. Obama

In January 2014, the United States filed its brief in the Supreme Court of the United States in opposition to a petition for certiorari in *Hussain v. Obama*, No. 13-638. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at <http://www.justice.gov/sites/default/files/osq/briefs/2013/01/01/2013-0638.resp.pdf>.

* * * *

The court of appeals correctly concluded that the government had carried its burden of establishing by a preponderance of the evidence that petitioner was part of al Qaeda or Taliban forces at the time of his capture. Most clearly, petitioner admitted to carrying an AK-47 assault rifle during an extended stay with Taliban forces near the front lines of a battlefield in Afghanistan. The court of appeals' case-specific determination does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda or Taliban forces at the time of his capture—a point that petitioner does not now dispute. ...

The D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces should be made “on a case-by-case basis * * * using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.” *Uthman*, 637 F.3d at 403 (citation omitted). Proof that an individual engaged in fighting, see Pet. App. 5a (citing *Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012)), or that an individual was part of either organization's formal “command structure,” *ibid.* (citing *Awad*, 608 F.3d at 11), is sufficient, but not necessary, to demonstrate an individual is part of enemy forces. As the court of appeals explained, “permitting detention only for those detainees who engaged in active hostilities would be inconsistent with the realities of ‘modern warfare,’” in which “commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; [and] supply-line forces, critical to military operations, may never encounter their opposition.” *Id.* at 6a (quoting *Khairkhwa*, 703 F.3d at 550).

Under the D.C. Circuit's functional test, proof that a detainee travelled with or maintained a close association with al Qaeda or Taliban fighters, carried a weapon issued by al Qaeda or the Taliban, or received training by al Qaeda or the Taliban is highly probative of whether the detainee is properly deemed to have been part of one of those groups. See, e.g., *Suleiman v. Obama*, 670 F.3d 1311, 1314, cert. denied, 133 S. Ct. 353 (2012); *Alsabri v. Obama*, 684 F.3d 1298, 1306 (2012); *Al Alwi v. Obama*, 653 F.3d 11, 17 (2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (2011), cert. denied, 132 S. Ct. 2739 (2012). But the D.C. Circuit has also recognized that not everyone having some association with al Qaeda or Taliban forces is “part of” either organization. “[T]he purely independent conduct of a freelancer,” it has explained, “is not enough’ to establish that an individual is ‘part of’ al-Qaida.” *Salahi v. Obama*, 625 F.3d 745, 752 (2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)). Similarly, the D.C. Circuit has held that “intention to fight is inadequate by itself to make someone ‘part of’ al Qaeda.” *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether “a particular individual is sufficiently involved with the organization to be deemed part of it,” an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (quoting *Bensayah*, 610 F.3d at 725).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. Of particular significance, petitioner admitted that he chose to accompany Taliban guards to an area near the front lines of fighting between the Taliban and the Northern Alliance. See Pet. App. 7a. There, a Taliban fighter provided petitioner with an AK-47 assault rifle and taught him how

to use it. *Ibid.* Petitioner stayed in this war-torn area for ten months with Taliban fighters, and he did not leave Afghanistan until after the September 11, 2001 attacks. *Id.* at 7a, 9a. That evidence powerfully demonstrated that petitioner is subject to detention under the AUMF. As the court of appeals observed, “[e]vidence that [petitioner] bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites—and may very well compel—the conclusion that he was loyal to those forces.” *Id.* at 7a-8a.2 Especially considered in conjunction with petitioner’s non-credible account of the reasons for his travels and his repeated, extended stays in Jama’at al-Tablighi mosques, the court of appeals correctly held that the government had established “by a preponderance of the evidence[] that [petitioner] was part of al Qaeda, the Taliban, or associated forces at the time of his capture.” *Id.* at 4a.

2. Petitioner does not argue that the court of appeals articulated the wrong legal standard for determining whether he was properly detained. To the contrary, he apparently agrees with the court of appeals that the government must “show[], by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture.” Pet. App. 4a; see Pet. 7 & n.1. But he contends that the court of appeals “effectively” applied a different standard than it articulated. Pet. 6, 8, 13. His argument lacks merit.

a. Petitioner asserts (Pet. 7-11), that the court of appeals, “[d]espite recognizing preponderance of the evidence as the governing standard * * * effectively applied the less rigorous substantial evidence standard” to the question whether petitioner is detainable. Pet. 8. His principal basis for that assertion is that the court of appeals did not require any “findings that [petitioner] used the gun, engaged in battle, or otherwise supported the activities of al Qaeda or the Taliban.” Pet. 10. But as the court of appeals correctly recognized, such findings are not required to demonstrate that an individual is “part of” enemy forces; any other view would be inconsistent with the realities of modern warfare. ...

Petitioner also faults (Pet. 10-11) the court of appeals for relying on his repeated visits to mosques associated with Jama’at al-Tablighi, arguing that “nothing in the District Court’s findings distinguishes [petitioner] from the thousands of other Muslim travelers who regularly stayed at [Jama’at al-Tablighi] mosques in the relevant time frame.” Pet. 11. But the court of appeals was careful to note that his stays were probative, not necessarily dispositive, and to emphasize that it was his “extended affiliation with the group over time” that weighed in favor of his affiliation with al Qaeda or the Taliban. Pet. App. 10a. That holding did not establish a “‘categorical rule’ that ‘any contact with the [Jama’at al-Tablighi] organization suggests an affiliation with al Qaeda.’” Pet. 11 (quoting Pet. App. 11a); see Pet. App. 11a (“[Petitioner] misstates the district court’s analysis. As we have just shown, the district court did not rely on such a categorical rule, but engaged in the type of fact-specific inquiry we require.”). On the record here—particularly petitioner’s admission that he bore a weapon while present with the Taliban near the frontline of a battlefield—his stays at Jama’at al-Tablighi mosques merely fortified the court of appeals’ conclusion that he was detainable under the AUMF.

b. Petitioner also contends (Pet. 12-14) that the district court and the court of appeals—again, despite express statements to the contrary—placed the burden on him to prove that he was not detainable. He rests that argument on the lack of specific findings by the district court about petitioner’s activities in the period between his departure from near the Taliban front lines in August 2001 and his eventual capture in March 2002.

As an initial matter, petitioner failed to raise that argument before the district court or in his appellate briefs. A question about that period of time was raised for the first time by the panel

during oral argument, and the only written argument that petitioner submitted on the question (apart from his petition for rehearing) was a two-page post-argument letter. . . . Even then, petitioner did not expressly contend that by failing to make a specific finding about his affiliation with al Qaeda or the Taliban after he left the area near the Taliban front lines, the district court had shifted the burden of proof to him. Nor did the court of appeals pass on that argument. Accordingly, this is not a suitable case to consider petitioner’s second question presented. . . .

In any event, neither the district court nor the court of appeals shifted the burden of proof to petitioner. Rather, they found that the evidence demonstrated that petitioner continued to be a part of al Qaeda or Taliban forces at the time of his capture. The court of appeals noted that petitioner was “part of” enemy forces “while living in Northern Afghanistan at least through August 2001.” Pet. App. 11a. It then pointed to the district court’s finding that petitioner had provided conflicting explanations for his reasons for returning to Pakistan in the period between his departure from near the Taliban front lines and his capture, a period of time when numerous Taliban fighters were fleeing into Pakistan. One was that he wanted to return to Yemen to get married and reunite with his family; another was that he wanted to enroll in a religious university; and still another was that he wanted to learn about computers—even though he could not speak the native language. . . . Petitioner also stated that he wished to travel to the Yemeni embassy in Islamabad in order to renew his Pakistani visa, which had expired. . . .

Given that petitioner did none of the things he purportedly intended to do despite having ample opportunity, nor made any credible attempt to do them, the district court, which observed petitioner’s demeanor during his testimony, did not clearly err in concluding that his story was an elaborate fabrication. And, as the court of appeals correctly observed, such “false cover stories * * * are evidence—often strong evidence—of guilt.” Pet. App. 10a . . . That evidence substantiated the view that petitioner remained a part of al Qaeda or the Taliban after leaving the area near the front lines. And in opposition to that strong inference, petitioner “ma[de] no argument that he affirmatively cut * * * ties” with enemy forces “before his capture only six months later.” *Id.* at 11a. The court of appeals therefore correctly determined that “the evidence points” to the conclusion that he continued to be a part of al Qaeda or Taliban forces after leaving the area near the front lines. . . .

* * * *

On April 21, 2014, the Supreme Court of the United States denied the petition for certiorari in *Hussain v. Obama*, No. 13-638. Justice Breyer wrote a statement respecting the denial, which appears below.

* * * *

The Authorization for Use of Military Force (AUMF), passed in September 2001, empowers the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” §2(a), 115 Stat. 224. In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), five Members of the

Court agreed that the AUMF authorizes the President to detain enemy combatants. *Id.*, at 517–518 (plurality opinion); *id.*, at 587 (THOMAS, J., dissenting). In her opinion for a plurality of the Court, Justice O’Connor understood enemy combatants to include “an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.*, at 516 (internal quotation marks omitted). She concluded that the “detention of individuals falling into the *limited category we are considering, for the duration of the particular conflict in which they were captured*,” is “an exercise of the ‘necessary and appropriate force’” that Congress authorized under the AUMF. *Id.*, at 518 (emphasis added). She explained, however, that the President’s power to detain under the AUMF may be different when the “practical circumstances” of the relevant conflict are “entirely unlike those of the conflicts that informed the development of the law of war.” *Id.*, at 521.

In this case, the District Court concluded, and the Court of Appeals agreed, that petitioner Abdul Al Qader Ahmed Hussain could be detained under the AUMF because he was “part of al-Qaeda or the Taliban at the time of his apprehension.” 821 F. Supp. 2d 67, 76–79 (DDC 2011) (internal quotation marks omitted; emphasis added); accord, 718 F. 3d 964, 966–967 (CA DC 2013). But even assuming this is correct, in either case—that is, irrespective of whether Hussain was part of al Qaeda or the Taliban—it is possible that Hussain was not an “individual who . . . was part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*.” 542 U. S., at 516 (emphasis added).

The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not “engaged in an armed conflict against the United States” in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.

The circumstances of Hussain’s detention may involve these unanswered questions, but his petition does not ask us to answer them. See Pet. for Cert. i. Therefore, I agree with the Court’s decision to deny certiorari.

* * * *

(2) Al Warafi v. Obama

As discussed in *Digest 2013* at 609-11, the U.S. Court of Appeals for the D.C. Circuit affirmed a district court’s denial of a petition for habeas brought by Yemeni citizen Mukhtar Al Warafi. 716 F.3d 627 (D.C. Cir. 2013). Al Warafi claimed that he should have been afforded protection as “medical personnel” pursuant to the First Geneva Convention, and thus should have been entitled to be repatriated under the provisions of that Convention. He filed a petition for certiorari after the Court of Appeals affirmed the district court. On March 28, 2014, the United States filed its brief in opposition to the petition, addressing the criteria and standards for determining whether Al Warafi qualified as a “permanent and exclusive medical personnel” pursuant to Article 24 of the First Geneva Convention. Excerpts follow (with footnotes and record citations

omitted) from the U.S. brief, which is available in full at www.justice.gov/sites/default/files/osq/briefs/2013/01/01/2013-0768.resp.pdf. The U.S. Supreme Court denied the petition on May 5, 2014.

* * * *

Petitioner challenges the authority of the President to detain him under the AUMF. The court of appeals, however, correctly held that petitioner was detainable because he was part of Taliban forces when he was captured in Afghanistan. That conclusion rested on petitioner's admissions that he traveled to Afghanistan to fight with Taliban forces, received weapons training and was assigned to a fighting unit at the front line of the battle with the Northern Alliance, and was captured, while armed, along with other Taliban fighters while surrendering at his Taliban commander's direction. Petitioner contends that he was a permanent and exclusive medic within the meaning of Article 24 of the First Geneva Convention. But he has not claimed that he was issued the armband or special identity card that the Convention requires parties to provide their Article 24 medical personnel. In any event, petitioner does not challenge in his certiorari petition the district court's factual findings demonstrating that he was not exclusively employed as a medic. The decision below does not conflict with a decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's finding that petitioner "more likely than not was part of the Taliban" at the time of his capture.

a. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. ...

The D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces should be made "on a case-by-case basis * * * using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." *Uthman*, 637 F.3d at 403 (citation omitted). ...

... But the D.C. Circuit has also recognized that not everyone having some interaction with al Qaeda or Taliban forces is "part of" either organization. "[T]he purely independent conduct of a freelancer," it has explained, "is not enough to establish that an individual is 'part of' al-Qaida." *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Similarly, the D.C. Circuit has held that "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether "a particular individual is sufficiently involved with the organization to be deemed part of it," an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (citation omitted).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. The court concluded that petitioner was part of Taliban forces when captured based on the district court's detailed findings, none of which petitioner contends were clearly erroneous. Specifically, the district court found that "the reliable evidence in the record shows that petitioner more likely than not * * * went to Afghanistan to fight with the Taliban; received weapons training while stationed at the Khoja Khar line; volunteered to serve as a medic when

the need arose; and surrendered on his commander's orders," at which time petitioner was carrying a weapon. Although petitioner states that he served as a "full-time medical worker" in clinics not "owned or operated by the Taliban" after October 7, 2001, the district court expressly found that "like a soldier volunteering for a special duty, petitioner remained in the command structure of the Taliban and served as a medic only on an as needed basis." Given those findings, the court of appeals correctly concluded that petitioner "was more likely than not a part of the Taliban."

b. Petitioner argues that because he did not actually engage in combat against the United States, his detention exceeds the authorization provided by the AUMF as construed by the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). According to petitioner, the *Hamdi* plurality interpreted the AUMF as permitting detention only of "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" ... Petitioner misunderstands both the AUMF and the *Hamdi* plurality opinion.

Neither the AUMF nor the NDAA requires proof that a detainee personally took part in combat against the United States. To the contrary, the NDAA specifically affirms that the President's detention authority encompasses any person "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners" and is not limited merely to those committing "a belligerent act." § 1021(b)(2), 125 Stat. 1562.

Nor does the law of war, which informs the AUMF, limit the President's detention authority to individuals who personally engaged in combat against the United States. See Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4, Aug. 12, 1949, 6 U.S.T. 3320, 3322, 75 U.N.T.S. 138, 140 (defining different categories of prisoners of war, without regard to whether the individual had personally engaged in combat). As the D.C. Circuit has explained, a rule requiring proof that a detainee "actively engaged in combat" is "untenable" because in "modern warfare, * * * supporting troops behind the front lines do not confront enemy combatants face to face." *Khairkhwa*, 703 F.3d at 550.

Petitioner misreads the plurality opinion in *Hamdi*. That opinion made clear that the plurality sought to answer "only the narrow question before us," which was whether a United States citizen who "was part of or supporting forces hostile to the United States or coalition partners * * * and who engaged in an armed conflict against the United States" in Afghanistan qualifies as an enemy combatant who may be detained under the AUMF. 542 U.S. at 516 (opinion of O'Connor, J.) (internal quotation marks omitted). The plurality concluded that the AUMF authorizes the detention of such persons, see *id.* at 518, 521, but did not suggest that the President's detention authority encompasses only individuals who personally engaged in combat against the United States. To the contrary, the plurality did not find or require that the detainee personally had engaged in combat. Moreover, the plurality stated that "[t]he legal category of enemy combatant has not been elaborated on in great detail," and instructed that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Id.* at 522 n.1. Petitioner thus errs in contending that the plurality opinion in *Hamdi* supports his view that, despite carrying a weapon while serving under the command structure of the Taliban in Afghanistan in 2001, he may not be detained because he did not personally participate in combat against United States forces.

For much the same reason, petitioner is incorrect that the denial of his habeas petition demonstrates that the courts below deprived him of the meaningful review required by this

Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). The decision below did not authorize the detention of an individual who engaged only in "care for the sick and injured." Rather, the district court, after carefully reviewing the evidence in the record, found that petitioner served as a medic only on an as-needed basis, and the court of appeals affirmed that finding in holding that petitioner was detainable under the AUMF. No decision of this Court establishes that such members of enemy forces are immune from capture and detention.

2. Assuming that Article 24 of the First Geneva Convention applies here, the court of appeals correctly held that it does not preclude petitioner's continued detention, both because petitioner concededly was not issued and did not possess the requisite indicia of status and because, in any event, the record evidence was entirely inconsistent with his claim that he was exclusively employed as a medic.

a. i. Article 24 concerns personnel who are "exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff exclusively engaged in the administration of medical units and establishments." 6 U.S.T. 3132, 75 U.N.T.S. 48. ... [T]he First Geneva Convention provides that Article 24 personnel "shall be respected and protected" at all times, *ibid.*, which means, among other things, that they must not be made the object of attack, see [Int'l Comm. of the Red Cross, *Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Jean S. Pictet, ed. 1952)] *GCI Commentary* 134-135, 220-221. In addition, if captured, Article 24 personnel have "retained personnel" status under Article 28, which means that they "shall continue to carry out * * * their medical * * * duties" and "shall be retained only in so far as the state of health * * * and the number of prisoners of war require." First Geneva Convention, art. 28, 6 U.S.T. 3134, 75 U.N.T.S. 50. If their retention is not indispensable for the care of prisoners of war, they "shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit." *Id.* art. 30, 6 U.S.T. 3134, 75 U.N.T.S. 50.

By contrast, "auxiliary personnel" who provide medical services only "should the need arise" are not encompassed by Article 24 and are not entitled to "retained personnel" status. First Geneva Convention, art. 25, 6 U.S.T. 3132, 75 U.N.T.S. 48. Such persons must be "respected and protected" only if they are carrying out medical duties when they come into contact with the enemy, and they are not entitled to be returned as soon as a road is open and military requirements permit. *Ibid.*

The parties to the First Geneva Convention recognized that the special protections afforded to Article 24 personnel create a powerful incentive for abuse. For example, as the *GCI Commentary* notes, if anyone who provided medical assistance were entitled to "retained status" under the Geneva Convention, "[o]ne can well imagine a belligerent giving training as stretcher-bearers to large numbers of the fighting troops of his armed forces, in order to furnish them with a claim to repatriation, should they be captured." *GCI Commentary* 258-259. To guard against such abuse, the Convention provides that Article 24 personnel must be designated as such by military authorities. See First Geneva Convention, art. 40, 6 U.S.T. 3140, 75 U.N.T.S. 56 (referring to exclusive medical personnel "designated in Article 24"). As the *GCI Commentary* explains, Article 24 refers to the "official medical personnel * * * of the armed forces." *GCI Commentary* 218. Thus, "[i]t is for each Power to decide the composition of its Medical Service and to say who shall be employed in it." *Ibid.*

The First Geneva Convention also specifies the means by which military authorities must designate their official medical personnel. In the case of a medic trained and designated by military authorities, Article 40 provides that individuals designated as Article 24 personnel “shall wear, affixed to the left arm, a water-resistant armband bearing the distinctive emblem, issued and stamped by the military authority,” and that they must be issued a “special identity card bearing the distinctive emblem * * * [and] embossed with the stamp of the military authority.” First Geneva Convention, art. 40, 6 U.S.T. 3140, 3142, 75 U.N.T.S. 56, 58 (emphasis added). The armband itself is not sufficient; the individual must also “be in a position to prove that he is entitled to wear it,” so “[a] special identity card is * * * necessary.” *GCI Commentary* 312. It is the stamp of the military authority, which indicates that the items have “been issued by, and on the responsibility of, the military authority,” that renders both the armband and the identity card authentic. *Id.* at 311, 315.

Because petitioner concededly was never issued and did not possess either an armband or an identity card, the court of appeals correctly held that he cannot establish his entitlement to Article 24 status. Even assuming, moreover, that a form of documentation other than those specified in the Convention could satisfy the identification requirement, petitioner does not contend that he possessed any other form of documentation supporting his Article 24 status. Indeed, petitioner does not even claim that Taliban forces designated him as Article 24 medical personnel, and the government’s unrebutted evidence demonstrated that Taliban forces did not have any established medical corps in 2001, much less a practice of designating or identifying members of its forces as permanent and exclusive medical personnel.

ii. Petitioner argues that, even if he did not possess any documentation identifying him as Article 24 personnel, he qualified for that status because he worked full-time in medical clinics at some point prior to his capture, assertedly satisfying Article 24’s substantive standard. That contention lacks merit. The First Geneva Convention’s “mandatory language,” requires that Article 24 personnel be formally designated by the relevant party to the conflict, which then must issue the armband and special identity card enabling Article 24 personnel to prove their status. Petitioner’s functional approach is inconsistent with that requirement.

Any other conclusion would be impracticable in a battlefield situation. To hold that Article 24 status turns on an individual’s activities would leave the capturing party without a means for determining whether the individual should be treated as an Article 24 permanent medic, who qualifies for “retained personnel” status, or instead as a person who is not entitled to that status, such as an Article 25 as-needed medic or other combatant who is simply performing medical duties. . . . As the district court explained, “[r]eliance on a functional evaluation would leave the soldier without the means of determining whether the uniformed individual is a permanent medic entitled to full immunity or an enemy combatant who is simply attending to the wounded at that time.” *Id.* at 36a. And as discussed above, . . . a functional analysis could lead to rampant abuse of the First Geneva Convention because combatants could readily feign Article 24 status upon capture.

Petitioner cites a statement from the International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Claud Pilloud, et al., eds., 1987) (*Additional Protocols Commentary*), that “the means of identification do not constitute the right to protection, and that from the moment that medical personnel . . . have been identified, shortcomings in the means of identification cannot be used as a pretext for failing to respect them.” . . . That statement does not indicate that an

individual can prove Article 24 status through a means other than those specified in the Geneva Convention—*i.e.*, an armband or a special identity card. Rather, it means only that “shortcomings” in those methods of proof (*e.g.*, a failure to include certain required information on the special identity card) do not automatically deprive an individual of Article 24 status. Moreover, the very same section of the *Additional Protocols Commentary* on which petitioner relies reiterates that “the medical personnel who [are] * * * to be protected” are “only personnel duly recognized and authorized by the Parties to the conflict concerned.” *Additional Protocols Commentary* 224. As discussed above, petitioner does not allege that he was ever recognized and authorized by the Taliban to be a permanent and exclusive medic, nor could he plausibly so argue on this record, given the unrebutted evidence that the Taliban did not engage in those practices when petitioner was captured.

* * * *

iii. Petitioner argues that further review is warranted because of the “sweeping” scope of the court of appeals’ decision. That contention rests on a misunderstanding of the decision below. Petitioner asserts, for example, that the decision below forecloses medical personnel of the Taliban or any other “irregular forces” from successfully invoking Article 24 status. That is not so. The court of appeals relied on the district court’s finding that the Taliban failed to issue the identification materials mandated by Article 40, but that finding was based exclusively on the evidence presented in this case. Consequently, the court of appeals’ ruling would not foreclose another detainee from submitting evidence that the Taliban did in fact issue identifying documentation that complied with the Convention’s requirements. And it certainly would not foreclose such a claim by members of other irregular forces, for whom the district court made no findings. Although the decision below held that individuals without proper identification cannot invoke the protections of Article 24 status, at least where their lack of identification is not attributable to “captors or inadvertence,” Pet. App. 10a n.1, that is a consequence of the balance struck in the Convention between protecting medical personnel and ensuring that captured combatants cannot abuse Article 24 by falsely claiming to be medical personnel.

iv. Accordingly, the decision below correctly held that petitioner lacked Article 24 status and thus was properly detainable even assuming Article 24 applies in this proceeding. Because petitioner does not claim that the court’s legal conclusion conflicts with any decision of this Court or another court of appeals, further review of the court’s holding is not warranted.

* * * *

(3) *Enteral feeding cases*

As discussed in *Digest 2013* at 611-15, the United States filed its brief on appeal in the consolidated claims brought by several detainees challenging the practice of enteral feeding used with detainees on hunger strikes. The Court of Appeals for the D.C. Circuit decided the appeal on February 11, 2014, concluding that certain challenges to the conditions of confinement, including petitioners’ claims in this case, could properly be

raised in a statutory *habeas corpus* petition consistent with Circuit precedent, but that these detainees failed to meet the standard for granting preliminary injunctive relief. Excerpts follow from the opinion of the D.C. Circuit. The Court disagreed with the U.S. argument in its brief that the Military Commissions Act (“MCA”) removes the courts’ jurisdiction over such claims. *Aamer et al. v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

* * * *

We begin, as we must, with the question of subject-matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101–02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The government contends, as both district courts held, that the MCA’s jurisdiction-stripping provision bars federal courts from considering petitioners’ force-feeding challenges. Our review is de novo. *Ass’n of Civilian Technicians v. FLRA*, 283 F.3d 339, 341 (D.C.Cir.2002).

* * * *

[T]he jurisdictional question we consider here is relatively narrow: are petitioners’ claims the sort that may be raised in a federal habeas petition under section 2241? As the government emphasizes, petitioners challenge neither the fact nor the duration of their detention, claims that would lie at the heart of habeas corpus. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody.”). Instead, they attack the conditions of their confinement, asserting that their treatment while in custody renders that custody illegal—claims that state and federal prisoners might typically raise in federal court pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). But although petitioners’ claims undoubtedly fall outside the historical core of the writ, that hardly means they are not a “proper subject of statutory habeas.” *Kiyemba*, 561 F.3d at 513. “Habeas is not ‘a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.’” *Boumediene*, 553 U.S. at 780, 128 S.Ct. 2229 (quoting *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963)).

If, as petitioners assert, their claims fall within the scope of habeas, then the district courts possessed jurisdiction to consider them because the federal habeas corpus statute extends, in its entirety, to Guantanamo. *See Kiyemba*, 561 F.3d at 512 & n. 2. But if petitioners’ claims do not sound in habeas, their challenges “constitute[] an action other than habeas corpus” barred by section 2241(e)(2). *Al-Zahrani*, 669 F.3d at 319.

Contrary to the contentions of the government and the dissent, in order to resolve this jurisdictional question we have no need to inquire into Congress’s intent regarding federal court power to hear Guantanamo detainees’ claims. Although Congress undoubtedly intended to preclude federal courts from exercising jurisdiction over *any* claims brought by Guantanamo detainees, it chose to do so through a statute that separately proscribes two different sorts of challenges: “habeas” actions, *see* 28 U.S.C. § 2241(e)(1), and all “other” actions, *see id.* § 2241(e)(2). *Boumediene* struck down the first of these—the provision that would, but for *Boumediene*, preclude Guantanamo detainees from bringing habeas actions. *See Kiyemba*, 561 F.3d at 512. The remaining, lawful subsection of MCA section 7 has, by its terms, “no effect on

habeas jurisdiction.” *Al-Zahrani*, 669 F.3d at 319. In the wake of *Boumediene* and this court’s interpretation of that decision in *Kiyemba*, Congress might very well want to preclude Guantanamo detainees from bringing particular types of habeas actions. But even assuming that Congress intends to again strip federal courts of habeas jurisdiction, it has yet to do so. Because we are unable to give effect to a non-existent statute, any such unmanifested congressional intent has no bearing on whether petitioners may bring their claims. Instead, given that statutory habeas extends to Guantanamo, the issue now before us is not Guantanamo-specific. We ask simply whether a challenge such as that advanced by petitioners constitutes “a proper claim for habeas relief” if brought by an individual in custody in Guantanamo or elsewhere. *Kiyemba*, 561 F.3d at 513.

For the same reasons, we have no need to explore the reach or breadth of the Suspension Clause. Simply put, there is no longer any statute in place that might unconstitutionally suspend the writ. We express no view on whether Congress could constitutionally enact legislation designed to preclude federal courts from exercising jurisdiction over the particular species of habeas claim petitioners advance. For our purposes, it suffices to say that Congress has not done so. Moreover, because of our focus on statutory habeas corpus, we have less need in this case to examine the writ’s scope at the time the Constitution was ratified than we might in a case in which the constitutional question was presented. It is to the question of the current scope of statutory habeas corpus that we now turn.

C.

The Supreme Court once suggested—indeed, held—that the scope of the writ encompasses conditions of confinement claims such as those petitioners assert. In *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), the Court permitted a federal prisoner to challenge by writ of habeas corpus a prison regulation that prohibited him from providing legal assistance to other prisoners. *See id.* at 484, 490, 89 S.Ct. 747. Likewise, in *Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971), the Court expressly held that a petition brought by state prisoners challenging “their living conditions and disciplinary measures,” *id.* at 249, 92 S.Ct. 407, was “cognizable in federal habeas corpus,” *id.* at 251, 92 S.Ct. 407.

Subsequently, however, in *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court reversed course, opting instead to treat as an open question the writ’s extension to conditions of confinement claims. ...

Since *Preiser*, the Court has continued—quite expressly—to leave this question open. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Court left “to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.” *Id.* at 527 n. 6, 99 S.Ct. 1861. More recently, in *Boumediene* itself, the Court declined to “discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.” 553 U.S. at 792, 128 S.Ct. 2229.

Although the Supreme Court has avoided resolving the issue, this circuit has not. Our precedent establishes that one in custody may challenge the conditions of his confinement in a petition for habeas corpus, and we must “adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court.” *Rasul v. Myers*, 563 F.3d 527, 529 (D.C.Cir.2009).

Most important is our decision in *Hudson v. Hardy*, 424 F.2d 854 (D.C.Cir.1970) (“*Hudson II*”). In *Hudson II*, an inmate in the District of Columbia jail sought relief from certain

jail officials who he claimed subjected him to beatings and threats and deprived him of his right to practice his religion, among other things. *Id.* at 855; *see also Hudson v. Hardy*, 412 F.2d 1091, 1091 (D.C.Cir.1968) (“*Hudson I*”) (describing petitioner’s claims). Responding to the government’s argument that the case had become moot because the petitioner had since been transferred outside the jurisdiction, we held that even if the complaint could not be construed as a section 1983 claim for damages, the “core of [the inmate’s] complaint when filed was an unlawful deprivation of liberty,” and thus the petition was “in effect ... for a writ of habeas corpus.” *Hudson II*, 424 F.2d at 855. In language directly applicable to this case, we held: “Habeas corpus tests not only the fact but also the form of detention.” *Id.* at 855 n. 3. If, we continued, the inmate’s pleadings were treated as a petition for habeas corpus, then the case might not be moot for a number of reasons, among them that the inmate’s “disciplinary record may follow him throughout the prison system” in a manner that could both lead to harsher treatment while he was incarcerated and “affect his eligibility for parole.” *Id.* at 856. We therefore remanded for the district court to ascertain whether, if the petition was for habeas corpus, as opposed to a claim for damages, the inmate was “still subject to disabilities because of the unlawful acts alleged.” *Id.* at 856.

Hudson II’s description of the writ’s availability to test “not only the fact but also the form of detention” was integral to our ultimate disposition of the case, and thus constitutes binding precedent. If habeas jurisdiction would not lie over the inmate’s claims, we would have had no need to direct the district court to conduct further proceedings regarding the mootness of any such habeas petition. We based the necessary antecedent conclusion regarding habeas jurisdiction on two premises: that the petitioner attacked the conditions of his confinement while in custody; and that such claims may be raised in habeas corpus. Doing so quite explicitly, we held that the inmate’s petition—which, again, alleged that jail officials “had subjected him to cruel and unusual punishment, to punishment without cause, and to unconstitutional discrimination,” *Hardy II*, 424 F.2d at 855—was “for a writ of habeas corpus” because “[h]abeas corpus tests not only the fact but also the form of detention.” *Id.* at 855 & n. 3. Indeed, unless we were holding that habeas jurisdiction would lie for this purpose, we could not have offered as a potential justification for the continued existence of a live controversy the possibility that the disciplinary record would subject petitioner to harsher treatment while in prison, *see id.* at 856—an independent, and therefore precedential, basis for our remand. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”).

* * * *

During oral argument, the government asserted that our decisions recognize only that a habeas petitioner may challenge the *place* of confinement, not the conditions therein. It is true that the petitioner in *Miller* alleged that his confinement in a particular place was illegal. *See Miller*, 206 F.2d at 419. But neither *Hudson II* nor *Wilson* was so limited. Not only did petitioners in both cases directly attack their treatment while in custody, but we made no mention of the possibility that they might instead be detained in a different place in which such conditions were absent.

In any event, we see little reason to distinguish a place of confinement challenge, which unquestionably sounds in habeas, *see, e.g., Kiyemba*, 561 F.3d at 513; *In re Bonner*, 151 U.S.

242, 255–56, 14 S.Ct. 323, 38 L.Ed. 149 (1894), from the one presented here. The substantive inquiry in which courts engage in the two types of cases will often be identical. A place of confinement claim such as that asserted in *Miller* rests on the contention that the conditions of confinement in a particular place violate the law. ... A conditions of confinement claim involves the very same inquiry: do the conditions in which the petitioner is currently being held violate the law? See *Wilson*, 471 F.2d at 1080; *Hudson II*, 424 F.2d at 855.

The principal functional difference between the two sorts of challenges lies in the relief that a court might grant. In a place of confinement claim, the petitioner's rights may be vindicated by an order of transfer, while in a conditions of confinement claim, they may be vindicated by an order enjoining the government from continuing to treat the petitioner in the challenged manner. But even this distinction is largely illusory, as either of these two forms of relief may be reframed to comport with the writ's more traditional remedy of outright release. ...

Indeed, as *Miller* illustrates, the near-complete overlap between these two sorts of challenges ultimately reflects the fact that in this circuit the underlying rationale for exercising habeas jurisdiction in either case is precisely the same. *Miller* relied on *Coffin v. Reichard*, 143 F.2d 443 (6th Cir.1944), which involved a habeas petition alleging "assaults, cruelties and indignities from guards and ... co-inmates." *Id.* at 444. *Coffin* unequivocally held that a habeas court has jurisdiction over such conditions of confinement claims and "may remand with directions that the prisoner's retained civil rights be respected." *Id.* at 445. ...

This circuit is by no means alone in adopting this reasoning. Several of our sister circuits have concluded that an individual in custody may utilize habeas corpus to challenge the conditions under which he is held. ...

Of course, as the government emphasizes, other circuits have reached a contrary conclusion. But even if we had authority to depart from our own precedent, none of these decisions would provide a compelling reason to do so.

The Fifth Circuit appears to have relied on its own, longstanding precedent in holding that a habeas petitioner may not challenge his treatment while in custody. See *Cook v. Hanberry*, 592 F.2d 248, 249 (5th Cir.1979) ("Habeas corpus is not available to prisoners complaining only of mistreatment during their legal incarceration.") (citing *Granville v. Hunt*, 411 F.2d 9, 12–13 (5th Cir.1969)). This precedent originally rested, however, on the now-questionable rationale that the conditions of confinement are within the discretion of prison administrators and thus beyond the cognizance of the courts. See *Granville*, 411 F.2d at 12; but see, e.g., *Procurier v. Martinez*, 416 U.S. 396, 405–06, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

The other circuits that have reached a similar conclusion appear to have done so on the basis of an even more questionable rationale, one reflecting a fundamental misunderstanding of the Supreme Court's decision in *Preiser*. As recounted above, see *supra* at 1050, *Preiser* imposed a habeas-channeling rule, not a habeas-limiting rule: the Court held only that claims lying at the "core" of the writ must be brought in habeas, and expressly disclaimed any intention of restricting habeas itself. ...

In sum, although the Supreme Court has left the question open, the law of this circuit—which is consistent with the weight of the reasoned precedent in the federal Courts of Appeal—compels us to conclude that a prisoner may, in a federal habeas corpus petition, "challenge the conditions of his confinement." *Wilson*, 471 F.2d at 1081. Petitioners here advance just such a

challenge. They raise claims that their force-feeding at the hands of their jailers constitutes an “additional and unconstitutional restraint[] during [their] lawful custody,” *Preiser*, 411 U.S. at 499, 93 S.Ct. 1827, and violates their fundamental right to religious freedom, *see* 42 U.S.C. § 2000bb–1, thus rendering their “imprisonment more burdensome than the law allows or curtail[ing] [their] liberty to a greater extent than the law permits.” *Miller*, 206 F.2d at 420 (quoting *Coffin*, 143 F.2d at 445); *see also Reed v. Farley*, 512 U.S. 339, 347–48, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (describing availability of federal habeas corpus for fundamental nonconstitutional claims). They have therefore brought “a proper claim for habeas relief” over which the district courts possess subject-matter jurisdiction. *Kiyemba*, 561 F.3d at 513. We thus turn to the question of whether petitioners have established their entitlement to injunctive relief.

III.

“ ‘A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.’ ” *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C.Cir.2011) (alteration in original) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). We review the district court’s balancing of these four factors for abuse of discretion, while reviewing *de novo* the questions of law involved in that inquiry. *Id.* at 393.

A.

We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits. Petitioners advance two separate substantive claims regarding the legality of force-feeding.

Their first and central claim is that the government’s force-feeding of hunger-striking detainees violates their constitutionally protected liberty interest—specifically, the right to be free from unwanted medical treatment, *see Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278–79, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990)—and that the government is unable to justify the practice of force-feeding under the standard established in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). In *Turner*, the Supreme Court set forth the general test for assessing the legality of a prison regulation that “impinges on” an inmate’s constitutional rights, holding that such a regulation is “valid if it is reasonably related to legitimate penological interests.” *Id.* at 89, 107 S.Ct. 2254. As the government does not press the issue, we shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo and that we should use the *Turner* framework to evaluate petitioners’ claim. *But cf. Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C.Cir.2009), *vacated by Kiyemba v. Obama*, 559 U.S. 131, 130 S.Ct. 1235, 175 L.Ed.2d 1070 (2010), *modified and reinstated*, 605 F.3d 1046, 1048 (D.C.Cir.2010).

In their briefs, petitioners detail the significant number of international organizations, medical associations, and public figures who have criticized the practice of force-feeding prisoners unwilling to eat. . . . Since oral argument in this case, a task force organized by the Institute on Medicine as a Profession and the Open Society Foundation has issued a scathing report detailing the abuses of medical ethics in the government’s treatment of detainees in Guantanamo, Afghanistan, and Iraq, concluding specifically that doctors who assist in the treatment of hunger-striking Guantanamo detainees “have become agents of a coercive and

counter-therapeutic procedure that for some detainees continued for months and years, resulting in untold pain, suffering, and tragedy for the detainees for whom they were medically responsible.” Task Force Report, *Ethics Abandoned: Medical Professionalism and Detainee Abuse in the War on Terror* 84 (2013) (submitted by petitioners pursuant to Fed. R.App. P. 28(j)); see also Denise Grady & Benedict Carey, Medical Ethics Have Been Violated at Detention Sites, a New Report Says, N.Y. TIMES, Nov. 5, 2013, at A16 (describing the task force’s report). Given these authorities—and, we might add, given the government’s own description of its force-feeding protocol—we have no doubt that force-feeding is a painful and invasive process that raises serious ethical concerns.

For petitioners to be entitled to injunctive relief, however, it is not enough for us to say that force-feeding may cause physical pain, invade bodily integrity, or even implicate petitioners’ fundamental individual rights. This is a court of law, not an arbiter of medical ethics, and as such we must view this case through *Turner*’s restrictive lens. The very premise of *Turner* is that a “prison regulation [that] impinges on inmates’ constitutional rights” may nonetheless be “valid.” *Turner*, 482 U.S. at 89, 107 S.Ct. 2254. That is, although “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,” they do substantially change the nature and scope of those constitutional protections, as well as the degree of scrutiny that courts will employ in assessing alleged violations. *Id.* at 84, 107 S.Ct. 2254; see *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”). Thus, even if force-feeding “burdens fundamental rights,” *Turner*, 482 U.S. at 87, 107 S.Ct. 2254, *Turner* makes clear that a federal court may step in only if the practice is not “reasonably related to legitimate penological interests,” *id.* at 89, 107 S.Ct. 2254.

The government has identified two penological interests at stake here: preserving the lives of those in its custody and maintaining security and discipline in the detention facility. As the government emphasizes, many courts have concluded that such interests are legitimate and justify prison officials’ force-feeding of hunger-striking inmates. *E.g.*, *In re Grand Jury Subpoena John Doe v. United States*, 150 F.3d 170, 172 (2d Cir.1998); *Garza v. Carlson*, 877 F.2d 14, 17 (8th Cir.1989); *Matter of Bezio v. Dorsey*, 21 N.Y.3d 93, 967 N.Y.S.2d 660, 989 N.E.2d 942, 950–51 (2013); *Laurie v. Senecal*, 666 A.2d 806, 809 (R.I.1995). The New York Court of Appeals recently explained that prison officials faced with a hunger-striking inmate whose behavior is life-threatening would, absent force-feeding, face two choices: (1) give in to the inmate’s demands, which would lead other inmates to “copy the same tactic, manipulating the system to get a change in conditions”; or (2) let the inmate die, which is a harm in its own right, and would often “evoke[] a strong reaction from the other inmates and create[] serious safety and security concern[s].” *Matter of Bezio*, 967 N.Y.S.2d 660, 989 N.E.2d at 951 (internal quotation marks omitted); *accord Freeman v. Berge*, 441 F.3d 543, 547 (7th Cir.2006) (“If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the other prisoners.”). . . .

Thus, the overwhelming majority of courts have concluded, as did Judge Collyer and as we do now, that absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death. See *Freeman*, 441 F.3d at 546; *Commissioner of Correction v. Coleman*, 303 Conn. 800, 38 A.3d 84, 95–97 (2012) (collecting cases). Petitioners point to nothing specific to their situation that would give us a basis for concluding that the

government's legitimate penological interests cannot justify the force-feeding of hunger-striking detainees in Guantanamo.

* * * *

IV.

For the forgoing reasons, we affirm the district courts' denials of petitioners' applications for a preliminary injunction.

* * * *

(4) Abdullah v. Obama

On April 4, 2014, the U.S. Court of Appeals for the D.C. Circuit affirmed the decision of the district court denying a detainee's motion for a preliminary injunction regarding his allegedly illegal indefinite detention, and regarding his allegedly unlawful conditions of confinement. *Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014). Abdullah contended that his detention violated an executive agreement between the United States and Yemen as well as the Third Geneva Convention. As discussed in *Digest 2013* at 616-19, the United States filed its brief on appeal in 2013, arguing that Abdullah's detention was lawful. Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals.

* * * *

Abdullah has not made a "clear showing" that he is entitled to the requested declaration. *Sherley*, 644 F.3d at 392. Even accepting *arguendo*, first, his claim that indefinite detention violates the Yemen Agreement and, second, that he may enforce the protections of the Agreement in court, he has not demonstrated he is likely to succeed on his habeas petition because he has not shown that *his* detention is indefinite or otherwise illegal. Contrary to Abdullah's assertions, the Government does not claim the right to detain him indefinitely but instead only "for the duration of hostilities." Appellees' Br. 17, *Abdullah v. Obama*, No. 13-5203 (D.C.Cir. Oct. 31, 2013). And, as noted, the AUMF permits the President to detain enemy combatants "for the duration of the particular conflict in which they were captured." *Hamdi*, 542 U.S. at 518, 124 S.Ct. 2633 (plurality opinion); *id.* at 588-89, 124 S.Ct. 2633 (Thomas, J., dissenting); *see also Boumediene*, 553 U.S. at 733, 128 S.Ct. 2229; *Janko*, 741 F.3d at 138; *Maqaleh*, 738 F.3d at 317. Further, a plurality of the Supreme Court has recognized, as have we, that such detention is sanctioned by international law. *See Hamdi*, 542 U.S. at 518, 124 S.Ct. 2633 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal

agreement and practice,’ are ‘important incident[s] of war.’ ”) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30, 63 S.Ct. 2, 87 L.Ed. 3 (1942)); *id.* at 520, 124 S.Ct. 2633 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities.” (citing Third Geneva Convention, art. 118, 6 U.S.T. 3316 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”))); *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C.Cir.2010) (Third Geneva Convention “codif[ies] what common sense tells us must be true: release is only required when the fighting stops”). Abdullah was captured during the conflict in Afghanistan, and it is undeniable that the conflict persists. *See Maqaleh*, 738 F.3d at 330 (political branches have exclusive authority to mark end of conflicts and neither has indicated Afghanistan conflict has ended). Absent a challenge to the *fact* of his detention on appeal, we can only conclude, then, that the *duration* of Abdullah’s detention is consistent with the AUMF and with international law and, consequently, that he is unlikely to succeed on his underlying habeas petition.

Nor has Abdullah demonstrated that the remaining preliminary injunction factors weigh in his favor. To begin with, Abdullah has forfeited any argument related to irreparable injury, the balance of equities and the public interest because he did not address these factors until his reply brief. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C.Cir.2008) (argument raised for first time in reply brief is forfeited). But even if Abdullah had not forfeited his arguments, it is plain that none of the remaining factors supports the requested relief. Most notably, Abdullah has not shown that he will suffer an irreparable injury if the Court withholds a declaration proscribing indefinite detention. A declaration prohibiting Abdullah’s indefinite detention would have no practical effect because the Government plans to detain him not indefinitely but, under the AUMF, until hostilities in Afghanistan conclude. *See supra* at p. 198. Abdullah concedes as much in his opening brief. *See Appellant’s Br.* 3–4.

Abdullah’s request for relief enjoining his allegedly unlawful conditions of confinement has also been forfeited. Abdullah’s opening brief presses this request for injunctive relief with only the bare and conclusory assertion that “Respondents are now, and have been for a decade, violating sections 3, 25, 70–72, and 78–79” of the Third Geneva Convention. Appellant’s Br. 16. He does not fully explain the nature of the alleged violations until his reply brief. His efforts fail to preserve the claim. *See Bryant v. Gates*, 532 F.3d 888, 898 (D.C.Cir.2008) (if party’s argument consists of “single, conclusory statement argument is forfeited); *accord N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C.Cir.2007) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.” (quotation marks omitted)). Moreover, Abdullah does not argue in his opening brief that the irreparable injury, balance-of-equities and public interest prongs warrant granting the injunction, with the result that Abdullah has forfeited his request for injunctive relief on these bases as well. *See Kempthorne*, 530 F.3d at 1001; *see also Davis*, 571 F.3d at 1292 (“[T]he movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.”).

For the foregoing reasons, the judgment of the district court is affirmed.

* * * *

(5) Hatim v. Obama

On August 1, 2014, the Court of Appeals for the D.C. Circuit reversed the decision of a lower court sustaining a challenge to changes in security procedures at Guantanamo as improperly interfering with detainees' access to counsel. *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014). The Court of Appeals held that the new procedures—changing the location where detainees could meet with their attorneys and additional frisk-searches which cover the groin area—were rationally related to a legitimate government interest in prison security. Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals.

* * * *

We need not determine whether the district court's view of the scope of habeas is correct, for this challenge falls squarely within the jurisdiction we recognized recently in *Aamer v. Obama*, 742 F.3d 1023 (D.C.Cir.2014). In *Aamer*, we held that challenges to conditions of confinement can properly "be raised in a federal habeas petition under section 2241," and when so raised are not barred by (e)(2)'s prohibition on *non-habeas* actions. *Id.* at 1030, 1038. The government has expressly conceded that the procedures challenged by these habeas petitions are "conditions of confinement." Br. of Appellant at 17–19. The district court thus had jurisdiction under *Aamer*, and we need not address other jurisdictional theories.

III

We review constitutional challenges to prison policies under the test announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). This deferential standard applies to military detainees as well as prisoners....

* * * *

IV

We assume, without deciding, that the district court was correct in concluding that the detainees' right to habeas includes the right to representation by counsel and that that right has been burdened by the policies that the detainees challenge. *See Overton v. Bazzetta*, 539 U.S. 126, 131–32, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (declining to define the asserted right where, even if such a right existed and was violated, the regulations survived *Turner*). *Turner* requires that we look to four factors to determine if these new policies are reasonable: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it," *Turner*, 482 U.S. at 89, 107 S.Ct. 2254 (internal quotation marks omitted); (2) "whether there are alternative means of exercising the right that remain open to prison inmates," *id.* at 90, 107 S.Ct. 2254; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *id.*; and (4) "the absence of ready alternatives" to the regulation, *id.* Although we examine each factor, the first is the most important. *Amatel*, 156 F.3d at 196 ("[T]he first factor looms especially large. Its rationality inquiry tends to encompass the remaining factors...."); *see also Beard v. Banks*, 548 U.S. 521, 532, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (plurality opinion).

Prison security, the government's asserted purpose for the challenged policies, is beyond

cavil a legitimate governmental interest. *See Bell v. Wolfish*, 441 U.S. 520, 546–47, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). *Turner* teaches that, and common sense shouts it out. The only question for us is whether the new policies are rationally related to security. We have no trouble concluding that they are, in no small part because that is the government’s view of the matter. “The task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials.” *Florence*, 132 S.Ct. at 1517 (internal quotation marks omitted). We must accord “[p]rison administrators ... wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and discipline and to maintain institutional security.” *Bell*, 441 U.S. at 547, 99 S.Ct. 1861 (emphasis added); *see Florence*, 132 S.Ct. at 1517; *cf. Phillips*, 591 F.2d at 972.

The touchstone of our deference, of course, is whether the government’s assertion of a connection between prison security and the challenged policy is reasonable. Here, Guantanamo officials explained that they adopted the new search policies to address the risk to security posed by hoarded medication and smuggled weapons. It stands to reason that enhancing the thoroughness of searches at Guantanamo in the way called for by standard Army prison protocol would enhance the effectiveness of the searches. *See Florence*, 132 S.Ct. at 1516–17. The detainees make no claim to the contrary. Instead, they argue that more thorough searches are not needed during their visits with counsel because the government failed to provide evidence that the contraband was smuggled into the housing camps during these visits. But the authorities at Guantanamo do not know how or when detainees obtain contraband. ... In light of such uncertainty and the fact that smuggling takes place, we think administering a more thorough search in connection with attorney visits as well as with any other detainee movements or meetings is a reasonable response to a serious threat to security at Guantanamo.

Likewise, it is reasonable to require that all meetings between detainees and their visitors, including counsel, take place in Camp Echo, which requires fewer guards than the housing camps. Each meeting room in Camp Echo, unlike those in the detainees’ housing camps, has a restroom and a space for prayer, which means that guards are not needed to transfer detainees mid-meeting. And the video monitoring in Camp Echo eliminates the need to post guards outside each meeting room, as is necessary in Camps 5 and 6. Guards who would have to stand sentry if the visits took place in a housing camp are instead available for postings elsewhere at Guantanamo, enhancing the facility’s overall security.

* * * *

Turner next requires that we consider whether the new policies leave the detainees with some other means to exercise their right to counsel. Detainees who forgo visits with their lawyers to avoid the searches can still communicate with counsel via letter. Supreme Court precedent teaches that alternative means of exercising the claimed right “need not be ideal, however; they need only be available.” *See Overton*, 539 U.S. at 135, 123 S.Ct. 2162. But we need not decide whether letters are an adequate replacement for meetings in person, because even if we were to agree with the detainees that they are not, the lack of an alternative “is not conclusive of the reasonableness of the [regulation]” because the other factors must still be considered, *Beard*, 548 U.S. at 532, 126 S.Ct. 2572 (plurality opinion) (internal quotation marks omitted).

Both of the remaining factors cover much of the same ground as the first and reinforce our conclusion that these policies are reasonable. *See Amatel*, 156 F.3d at 196. As to the third factor, the impact of an accommodation, we have already concluded that the new search procedures promote the safety of the guards and inmates by more effectively preventing the hoarding of medication and the smuggling of dangerous contraband, and thus the accommodation the detainees seek would necessarily have a negative impact “on guards and other inmates.” *See Turner*, 482 U.S. at 90, 107 S.Ct. 2254; *Beard*, 548 U.S. at 532, 126 S.Ct. 2572 (plurality opinion). Allowing counsel meetings with detainees to take place in the housing camps instead of Camp Echo would burden “the allocation of prison resources.” *See Turner*, 482 U.S. at 90, 107 S.Ct. 2254.

Finally, the detainees have pointed to no “ready alternative[]” to the new policies. *Id.* To be “ready,” a policy must be an “obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal.” *Overton*, 539 U.S. at 136, 123 S.Ct. 2162. The detainees’ suggested alternative of reverting to the old policies does not meet this “high standard.” *Id.* Having already determined that we defer to the military’s judgment that the old policies hinder the government’s interest in security, we can hardly say that they are nonetheless “ready alternatives.” In the considered and experienced judgment of Guantanamo administrators, the old policies contributed to the troubling lapses in security. We will not second-guess that determination. *See id.*; *see also Thornburgh v. Abbott*, 490 U.S. 401, 419, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (“[W]hen prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an ‘exaggerated response’ under *Turner*.”).

* * * *

b. Former Detainees

Al Janko v. Gates

On January 17, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014). The U.S. brief filed in the D.C. Circuit in the case in 2013 is discussed and excerpted in *Digest 2013* at 623-25. The Court of Appeals agreed with the primary argument in the United States brief, namely, that the district court correctly held it lacked jurisdiction over Al Janko’s complaint about his detention filed after he had been released due to the jurisdiction-stripping provision of the Military Commissions Act (“MCA”), 28 U.S.C. § 2241(e)(2). Excerpts follow (with footnotes omitted) from the decision of the Court of Appeals.**

* * * *

** Editor’s note: On March 9, 2015, the U.S. Supreme Court denied the petition for writ of certiorari in the case. *Al Janko v. Gates*, No. 14-650.

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and *has been determined by the United States to have been properly detained* as an enemy combatant....

28 U.S.C. § 2241(e)(2) (emphasis added). This action is undoubtedly an action (1) other than habeas corpus or direct review of a [Combatant Status Review Tribunal or] CSRT determination (2) against the United States or its agents (3) brought by an alien (4) previously detained by the United States, which action (5) relates to an aspect of his detention. The crux of the parties' dispute is whether the Appellant was "determined by *the United States* to have been properly detained as an enemy combatant." *Id.* (emphasis added).

1. Meaning of "the United States"

The Government argues that the statute bars the Appellant's claims because "the United States" means only "the Executive Branch." Because the CSRT is an executive-branch tribunal, the Government contends that the first CSRT's determination that the Appellant was properly detained triggered the jurisdictional bar. The Appellant, citing to a dictionary and to cases interpreting unrelated statutes, argues that "the United States" ordinarily encompasses all three branches of the federal government and not solely the Executive Branch. He argues that the bar does not apply to him because the district court's grant of the writ is a determination by the United States "that he was *never* properly detained as an enemy combatant." Pl.-Appellant's Opening Br. 2 (Janko Br.), *Janko v. Gates*, No. 12-5017 (D.C.Cir. Jan. 9, 2013) (emphasis in original).

* * * *

If "the United States" seems "ambiguous in isolation," it is "clarified by the remainder of the statutory scheme[] because the same terminology is used elsewhere in a context that makes its meaning clear...." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). The statute applies to any alien "detained by *the United States*" and "determined by *the United States* to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2) (emphases added). In light of the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning," the Congress's use of the same words to describe the detaining authority and the authority responsible for making the propriety-of-detention determination leads us to conclude that they are one and the same. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998); *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007). As the Congress well understood when it enacted the MCA, the detention of aliens as enemy combatants is an exclusively executive function. *See Boumediene*, 553 U.S. at 782-83, 128 S.Ct. 2229 (distinguishing between those "detained by executive order" at Guantanamo and those held pursuant to criminal sentence); *Hamdi*, 542 U.S. at 516-17, 124 S.Ct. 2633 (holding AUMF gives "the Executive ... the authority to detain citizens who qualify as 'enemy combatants'"); *Rasul v. Bush*, 542 U.S. 466, 475, 483 n. 15, 485, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004) (recognizing that detainees at Guantanamo are in exclusively executive detention); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. 57,833, 57,834 (Nov. 13, 2001) (executive order authorizing detention of enemy combatants); *see also*

Oral Argument 13:17, *Janko v. Gates*, No. 12–5017 (D.C.Cir. Oct. 22, 2013) (The Appellant’s counsel conceding that “courts ordinarily don’t detain people so the reference to ‘the United States’ in terms of an ‘alien detained by the United States’ ordinarily” refers to the Executive Branch); *cf. Uthman v. Obama*, 637 F.3d 400, 402 (D.C.Cir.2011). Because the detaining authority referred to as “the United States” in section 2241(e)(2) is exclusively the Executive Branch, and the determination triggering the jurisdictional bar is made by the detaining authority, a “determin[ation] by the United States” is one made by the Executive Branch.

Section 2241(e)(1), enacted as part of the same statutory subsection, confirms our interpretation. The provision ousts all federal courts of jurisdiction over a habeas petition filed by any alien “detained by the United States” and “determined by the United States to have been properly detained as an enemy combatant.” 28 U.S.C. § 2241(e)(1). This provision is plainly *in pari materia* with section 2241(e)(2) and so we must give a consistent interpretation to the two provisions’ identical language. *See Nijhawan v. Holder*, 557 U.S. 29, 39, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (“Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.”); *cf. Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972). This we can easily do. In a statute depriving federal courts of jurisdiction to decide the lawfulness of *executive* detention, the phrase “determined by the United States” must refer to an executive-branch determination. We will not “attribute a schizophrenic intent to the” Congress by reading “the United States” to refer to executive-branch determinations in section 2241(e)(1) but not in section 2241(e)(2). *Yousuf v. Samantar*, 451 F.3d 248, 256 (D.C.Cir.2006) (quoting *Marek v. Chesny*, 473 U.S. 1, 21, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)).

Finally, we find support for our interpretation in the version of section 2241(e)(2) which the MCA amended. *See Johnson v. United States*, 529 U.S. 694, 710, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) (“[W]hen a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law.”); *see also Hamilton v. Rathbone*, 175 U.S. 414, 421, 20 S.Ct. 155, 44 L.Ed. 219 (1899). The Congress originally added 28 U.S.C. § 2241(e) to the U.S.Code in section 1005(e) of the Detainee Treatment Act (DTA) of 2005, Pub.L. 109–148, § 1005, 119 Stat. 2739, 2742–43. Section 1005(e)(2) granted this Court exclusive jurisdiction to review CSRT determinations, *see Bismullah v. Gates*, 501 F.3d 178, 183 (D.C.Cir.2007), *vacated and remanded on other grounds* by 554 U.S. 913, 128 S.Ct. 2960, 171 L.Ed.2d 881 (2008), and section 1005(e)(1) (the portion codified at 28 U.S.C. § 2241(e)(2)) ousted the federal courts of jurisdiction to consider any non-habeas claim “against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who ... has been determined by the United States Court of Appeals for the District of Columbia Circuit [D.C. Circuit] ... to have been properly detained as an enemy combatant,” DTA § 1005(e)(1), 119 Stat. at 2742 (codified at 28 U.S.C. § 2241(e)(2) (Supp. V 2005)) (emphasis added).

Responding to the Supreme Court’s interpretation of section 1005(e) of the DTA, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006), the Congress amended 28 U.S.C. § 2241(e) in the MCA. Despite retaining our review of CSRT determinations, *see MCA* § 7(a), 120 Stat. at 2636 (excepting from jurisdictional bar actions brought under “paragraph [](2) ... of section 1005(e) of the” DTA), section 7(a) replaced both “the Department of Defense” (the detaining authority) and the “D.C. Circuit” (the relevant status determiner) with “the United States,” *compare* DTA § 1005(e)(1), 119 Stat. at 2742, *with* MCA

§ 7(a), 120 Stat. at 2635–36. The change is significant. Under the DTA, the relevant propriety-of-detention determination was made by a tribunal (the D.C. Circuit) independent of the detaining authority (the Department of Defense). Under the MCA, however, the Congress abandoned the independent, judicial propriety-of-detention determination in favor of a non-judicial determination made by the same entity that detains the alien (the United States). Adopting the Appellant’s interpretation would deprive the changes made by section 7(a) of any “real and substantial effect” and flout the Congress’s manifest intent to have section 2241(e)(2)’s applicability turn on a non-judicial status determination. *Stone v. INS*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995).

2. The Appellant’s Counterarguments

The Appellant counters our interpretation by arguing that we effectively read “properly” out of the statute. His contention rests on the belief that the statute bars claims only from detainees who received “proper” CSRT determinations, to wit, those detainees who *in fact* are enemy combatants. A CSRT determination is “proper,” apparently, if a habeas court subsequently reaches the same conclusion. Because the district court in *Al Gincio* disagreed with the Appellant’s two CSRTs, he argues that he is not in fact an enemy combatant and section 2241(e)(2) does not apply.

The Appellant’s argument results in a very subtle rewriting of the statute. The statute applies to an alien “determined by the United States to have been *properly* detained as an enemy combatant.” 28 U.S.C. § 2241(e)(2) (emphasis added). He reads “properly” to modify “determined,” thereby requiring that a CSRT *correctly* determine a detainee’s status in order that section 2241(e)(2) apply. But “properly” does not modify “determined”; it modifies “detained.” The phrase “properly detained as an enemy combatant” identifies the type of determination the Executive Branch must make, *viz.*, a determination that the detainee meets the AUMF’s criteria for enemy-combatant status. *See, e.g., Barhoumi v. Obama*, 609 F.3d 416, 423, 432 (D.C.Cir.2010) (detainee is “properly detained pursuant to the AUMF” if he meets the requirements for enemy combatant status). But the statute does not say that the bar applies to an alien whom “the United States has *properly* determined to have been properly detained as an enemy combatant.” It requires only that the Executive Branch determine that the AUMF authorizes the alien’s detention without regard to the determination’s correctness. Conditioning the statute’s applicability on the accuracy of the Executive Branch’s determination would do violence to the statute’s clear textual directive.

* * * *

C. Constitutional Challenge

Having determined that the statute applies to the Appellant, we must now decide whether its application is constitutional. We conclude that it is. He first argues that section 2241(e)(2) is unconstitutional because it deprives him of a damages remedy for violations of his constitutional rights. Apparently recognizing that we rejected this argument in *Al-Zahrani*, 669 F.3d at 319–20, the Appellant once again relies on his successful habeas petition to distinguish his case. While 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. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010) (“[T]he term ‘jurisdictional’ properly applies only to ‘prescriptions delineating the classes of

cases (subject-matter jurisdiction) and the persons (personal jurisdiction)’ implicating [the court’s] authority.” (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004))). The class of claims to which section 2241(e)(2) constitutionally applies plainly encompasses the Appellant’s claims—that is, *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-Zahrani*, 669 F.3d at 318–19. The writ, although perhaps relevant to the merits of his constitutional claims, does not move them out of the class to which section 2241(e)(2) constitutionally applies.

* * * *

3. Criminal Prosecutions and Other Proceedings

a. *Al Bahlul v. United States*

The U.S. Court of Appeals for the District of Columbia Circuit issued its en banc decision in the case of Ali Hamza Ahmad Suliman Al Bahlul on July 14, 2014. 767 F.3d. 1 (D.C. Cir. 2014). The U.S. brief on appeal is discussed and excerpted in *Digest 2013* at 633-38. Mr. Bahlul was convicted by a U.S. military commission of conspiracy, solicitation, and material support for terrorism based on his activities in support of al-Qaida and Osama bin-Laden and in assisting with preparations for the September 11, 2001 attacks. A panel of the Court of Appeals for the D.C. Circuit vacated his conviction based on *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (“*Hamdan II*”), which concluded that conspiracy and other crimes not recognized under the international law of war could not be the basis for prosecution under the 2006 Military Commissions Act (“MCA”). The en banc Court of Appeals rejected Mr. Bahlul’s Ex Post Facto challenge to his conspiracy conviction but vacated his material support and solicitation convictions, and remanded his other constitutional challenges back to a panel of the D.C. Circuit for resolution. Excerpts follow (with footnotes omitted) from the majority opinion of the en banc court.

* * * *

As noted, *Hamdan II* held that the 2006 MCA “does not authorize *retroactive* prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission.” 696 F.3d at 1248. Because we conclude, for the reasons that follow, that the 2006 MCA is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status—we now overrule *Hamdan II*’s statutory holding. ...

A. The 2006 MCA is Unambiguous

The 2006 MCA confers jurisdiction on military commissions to try “any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001.*” 10 U.S.C. § 948d(a) (2006) (emphases added). “Any,” in this context, means “all.” ... The “offense[s] made punishable by this chapter” include the charges of which Bahlul was convicted: conspiracy to commit war crimes, providing material support for terrorism and solicitation of others to commit war crimes. 10 U.S.C. §§ 950u, 950v(b)(25), 950v(b)(28) (2006). There could hardly be a clearer statement of the Congress’s intent to confer jurisdiction on military commissions to try the enumerated crimes regardless whether they occurred “before, on, or after September 11, 2001.” And the provisions of the statute enumerating the crimes triable thereunder expressly “do not preclude trial for crimes that occurred before the date of the enactment of this chapter.” 10 U.S.C. § 950p(b) (2006). For good reason: If it were otherwise, section 948d’s conferral of jurisdiction to prosecute the enumerated crimes occurring on or before September 11, 2001 would be inoperative. ... Although we presume that statutes apply only prospectively “absent clear congressional intent” to the contrary, that presumption is overcome by the clear language of the 2006 MCA. ...

Review of the inter-branch dialogue which brought about the 2006 MCA confirms the Congress’s intent to apply all of the statute’s enumerated crimes retroactively. ...

The Congress answered the Court’s invitation with the 2006 MCA, which provides the President the very power he sought to exercise in *Hamdan*—the power to try the 9/11 perpetrators for conspiracy—by including conspiracy as an offense triable by military commission, 10 U.S.C. § 950v(b)(28) (2006), and by conferring jurisdiction on military commissions to try alien unlawful enemy combatants for conspiracy based on conduct that occurred “before, on, or after September 11, 2001,” *id.* § 948d(a). We must heed this inter-branch dialogue, as *Boumediene* instructs. 553 U.S. at 738, 128 S.Ct. 2229.

* * * *

... In enacting the military commission provisions of the 2006 MCA, the Congress plainly intended to give the President the power which *Hamdan* held it had not previously supplied—just as the 2006 MCA clarified that in fact the Congress *did* intend section 7(b)’s ouster of habeas jurisdiction to apply to pending cases. The legislative history confirms this view. *See Boumediene*, 553 U.S. at 739, 128 S.Ct. 2229 (“The Court of Appeals was correct to take note of the legislative history when construing the statute...”). Supporters and opponents of the legislation alike agreed that the 2006 MCA’s purpose was to authorize the trial by military commission of the 9/11 conspirators. And because the 9/11 conspiracy took place long before 2006, the statute could accomplish its explicit purpose only if it applied to pre-enactment conduct. As the Court itself made clear, “we cannot ignore that the [2006] MCA was a direct response to *Hamdan*’s holding.” *Boumediene*, 553 U.S. at 739, 128 S.Ct. 2229.

Reading the MCA in this context and given the unequivocal nature of its jurisdictional grant, we conclude the 2006 MCA unambiguously authorizes Bahlul’s prosecution for the charged offenses based on pre-2006 conduct.

B. The Avoidance Canon is Inapplicable

Hamdan II 's contrary conclusion turned on the following provision of the 2006 MCA:

(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

10 U.S.C. § 950p (2006). In *Hamdan II*, the Court read this provision to reflect the Congress's "belie[f] that the Act codified no new crimes and thus posed no ex post facto problem." 696 F.3d at 1247. Because the Congress was wrong in its textually stated premise—*i.e.*, the Act *did* codify new war crimes—the Court found "at least something of an ambiguity" in the statute. *Id.* at 1248. It then turned to the avoidance canon to resolve the ambiguity, concluding that the Congress intended to authorize retroactive prosecution only if "the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." *Id.*

The "avoidance canon" reflects a fundamental principle of judicial restraint. *See Ashwander v. TVA*, 297 U.S. 288, 341–48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). But "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them.*" *Clark v. Martinez*, 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (emphasis in original); ... Because the 2006 MCA unqualifiedly confers jurisdiction on military commissions to try "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001,*" 10 U.S.C. § 948d(a) (2006) (emphases added), it is not "fairly possible" to read the statute to apply only prospectively. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916) (Holmes, J.).

* * * *

The "ambiguity" *Hamdan II* identified was the Congress's failure to address what it "would ... have wanted" if it "had known that the Act was codifying some new crimes." 696 F.3d at 1247. In other words, *Hamdan II* found the statute ambiguous because the Congress did not include in the text of the statute alternative language in case it was wrong in its reading of the law on which it premised its legislation. But the Congress always legislates on the basis of some set of facts or premises it believes to be true. It holds hearings and investigates precisely for the purpose of acquiring facts and then legislates on the basis of those facts. Because it believes to be true the facts on which it bases its legislation, the Congress seldom (if ever) includes instructions on what to do if those facts are proven incorrect. Here, the Congress authorized prosecution for "any offense made punishable by" the 2006 MCA, including offenses based on pre-enactment conduct, precisely because it believed that all of the offenses were already triable by military commission. The Congress's plainly expressed belief about pre-enactment law should govern our

understanding of the Congress’s intent expressed in the text of the statute. If judicial inquiry reveals that the Congress was mistaken, it is not our task to rewrite the statute to conform with the actual state of the law but rather to strike it down insofar as the Congress’s mistake renders the statute unconstitutional. *See Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 673 n. 7 (D.C.Cir.2013) (“The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures.”), *cert. granted* (June 23, 2014).

* * * *

IV. Bahlul’s *Ex Post Facto* Challenge

Because the Congress’s intent to authorize retroactive prosecution of the charged offenses is clear, we must address Bahlul’s *ex post facto* argument. . . .As noted, we may overturn Bahlul’s convictions only if they constitute plain constitutional error.

The Constitution prohibits the Congress from enacting any “*ex post facto* Law.” U.S. Const. art. I, § 9, cl. 3. “The phrase *ex post facto* law was a term of art with an established meaning at the time of the framing.” *Peugh v. United States*, — U.S. —, 133 S.Ct. 2072, 2081, 186 L.Ed.2d 84 (2013) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)) (quotation marks omitted). In *Calder v. Bull*, Justice Chase set forth his understanding of that meaning:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798) (opinion of Chase, J.); *see Peugh*, 133 S.Ct. at 2081 (reciting Justice Chase’s formulation); *Carmell v. Texas*, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (Supreme Court has “repeatedly endorsed” Justice Chase’s formulation); *see also id.* at 537–39, 120 S.Ct. 1620 (noting that *Collins* did not eliminate Justice Chase’s fourth category).

In our order granting *en banc* review, we asked the parties to brief whether the *Ex Post Facto* Clause applies in cases involving aliens detained at Guantanamo. The Government has taken the position that it does. Although we are not obligated to accept the Government’s concession, *see Young v. United States*, 315 U.S. 257, 258–59, 62 S.Ct. 510, 86 L.Ed. 832 (1942); *United States v. Baldwin*, 563 F.3d 490, 491 (D.C.Cir.2009), we will assume without deciding that the *Ex Post Facto* Clause applies at Guantanamo. In so doing, we are “not to be understood as remotely intimating in any degree an opinion on the question.” *Petite v. United States*, 361 U.S. 529, 531, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) (per curiam); *see also Casey v. United States*, 343 U.S. 808, 808, 72 S.Ct. 999, 96 L.Ed. 1317 (1952) (per curiam) (“To accept in this case [the Solicitor General’s] confession of error would not involve the establishment of any precedent.”); *United States v. Bell*, 991 F.2d 1445, 1447–48 (8th Cir.1993).

A. Conspiracy

We reject Bahlul’s *ex post facto* challenge to his conspiracy conviction for two independent and alternative reasons. First, the conduct for which he was convicted was already criminalized under 18 U.S.C. § 2332(b) (section 2332(b)) when Bahlul engaged in it. It is not “plain” that it violates the *Ex Post Facto* Clause to try a pre-existing federal criminal offense in a military commission and any difference between the elements of that offense and the conspiracy charge in the 2006 MCA does not seriously affect the fairness, integrity or public reputation of judicial proceedings. Second, it is not “plain” that conspiracy was not already triable by law-of-war military commission under 10 U.S.C. § 821 when Bahlul’s conduct occurred.

1. Section 2332(b)

Bahlul was convicted of conspiracy to commit seven war crimes enumerated in the 2006 MCA, including the murder of protected persons. Although the 2006 MCA post-dates Bahlul’s conduct, section 2332(b) has long been on the books, making it a crime to, “outside the United States,” “engage [] in a conspiracy to kill[] a national of the United States.” 18 U.S.C. § 2332(b); *see* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub.L. No. 99–399, § 1202(a), 100 Stat. 853, 896. Section 2332(b) is not an offense triable by military commission but, the Government argues, “[t]he fact that the MCA provides a different forum for adjudicating such conduct does not implicate *ex post facto* concerns.” E.B. Br. of United States 67. We agree. *See infra* p. 31 (remanding to panel to determine Bahlul’s other constitutional challenges).

The right to be tried in a particular forum is not the sort of right the *Ex Post Facto* Clause protects. *See Collins*, 497 U.S. at 51, 110 S.Ct. 2715. In *Collins*, the Supreme Court sifted through its *Ex Post Facto* Clause precedent, noting that some cases had said that a “procedural” change—*i.e.*, a “change[] in the procedures by which a criminal case is adjudicated”—may violate the *Ex Post Facto* Clause if the change “affects matters of substance” by “depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime or arbitrarily infringing upon substantial personal rights.” *Id.* at 45, 110 S.Ct. 2715 (citations, brackets and quotation marks omitted). The Court observed that such language had “imported confusion” into its doctrine and it attempted to reconcile that language so as to not enlarge the *Ex Post Facto* Clause’s application beyond laws that “make innocent acts criminal, alter the nature of the offense, or increase the punishment.” *Id.* at 46, 110 S.Ct. 2715...

Similarly, in *Cook v. United States*, the Court held that an act vesting jurisdiction over a crime in a newly formed judicial district does not violate the *Ex Post Facto* Clause because “[i]t only ... subjects the accused to trial in th[e new] district rather than in the court of some other judicial district established by the government against whose laws the offense was committed. This does not alter the situation of the defendants in respect to their offense or its consequences.” 138 U.S. 157, 183, 11 S.Ct. 268, 34 L.Ed. 906 (1891); ...

It is therefore not a plain *ex post facto* violation to transfer jurisdiction over a crime from an Article III court to a military commission because such a transfer does not have anything to do with the definition of the crime, the defenses or the punishment. That is so regardless of the different evidentiary rules that apply under the 2006 MCA. *See Carmell*, 529 U.S. at 533 n. 23, 120 S.Ct. 1620 (change in “[o]rdinary rules of evidence ... do[es] not violate the [*Ex Post Facto*] Clause”); *id.* at 542–47, 120 S.Ct. 1620; *Collins*, 497 U.S. at 43 n. 3, 110 S.Ct. 2715; *Beazell v. Ohio*, 269 U.S. 167, 171, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Thompson v. Missouri*, 171 U.S. 380, 386–88, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah*, 110 U.S. 574, 589–90, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Nor is this a case like *Carmell*, where a law retroactively reduced the

“quantum of evidence necessary to sustain a conviction,” 529 U.S. at 530, 120 S.Ct. 1620; the 2006 MCA requires the Government to prove guilt beyond a reasonable doubt, *see* 10 U.S.C. § 949l (c); *see also* Trial Tr. 233, 878 (military judge’s instructions to commission).

Our inquiry is not ended, however, because the 2006 MCA conspiracy-to-murder-protected-persons charge and section 2332(b) do not have identical elements. The difference is a potential problem because the *Ex Post Facto* Clause prohibits “retrospectively eliminating an element of the offense” and thus “subvert[ing] the presumption of innocence by reducing the number of elements [the government] must prove to overcome that presumption.” *Carmell*, 529 U.S. at 532, 120 S.Ct. 1620. Both statutes require the existence of a conspiracy and an overt act in furtherance thereof. *See* 18 U.S.C. § 2332(b)(2); 10 U.S.C. § 950v(b)(28) (2006); *see also* Trial Tr. 846, 849–50 (military judge’s instructions to commission). The 2006 MCA conspiracy charge is in one sense more difficult to prove than section 2332(b) because it applies only to alien unlawful enemy combatants engaged in hostilities against the United States. *See* 10 U.S.C. §§ 948b(a), 948c, 948d; *see also* Trial Tr. 843–45 (instructions). But the 2006 MCA charge is in two ways easier to prove than a section 2332(b) charge. It does not require that the conspiracy occur “outside the United States” or that the conspiracy be to kill a “national of the United States,” as section 2332(b) does. It simply requires a conspiracy to murder “one or more protected persons.” Trial Tr. 850–51 (instructions); *see supra* n. 10 (providing MCA’s definition of “protected person”). Although the two statutes are quite similar, then, the 2006 MCA conspiracy charge eliminates two elements required to convict a defendant under section 2332(b).

Nevertheless, Bahlul cannot bear his burden of establishing that the elimination of the two elements “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 732, 113 S.Ct. 1770 (quotation marks omitted); *see United States v. Vonn*, 535 U.S. 55, 62–63, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002) (defendant bears burden of proving *Olano*’s fourth prong); *see also United States v. Johnson*, 331 F.3d 962, 967 (D.C.Cir.2003) (proceeding directly to fourth prong if it can resolve appeal). He cannot satisfy the fourth prong because the charges against him and the commission’s findings necessarily included those elements and the evidence supporting them was undisputed. ...

* * * *

Here, the evidence of the two missing elements was not simply “overwhelming” and “essentially uncontroverted”—it was *entirely* uncontroverted. Bahlul was charged with committing numerous overt acts “in Afghanistan, Pakistan and elsewhere” that furthered the conspiracy’s unlawful objects; those objects included the murder of protected persons. App. 122–25. He did not dispute that his conduct occurred outside the United States nor did he dispute that the purpose of the conspiracy was to murder United States nationals. *See* Trial Tr. 167 (Bahlul: “And what I did ... is to kill Americans....”); *id.* at 511–12 (“[Bahlul] does not consider anybody protected person[s] or civilians.... [A]s long as you’re a[n] American, you are a target.”). Indeed, several witnesses testified that Bahlul considered *all* Americans to be targets. *Id.* at 503, 512, 596, 653. The commission was instructed on the overt acts allegedly undertaken by Bahlul in furtherance of the conspiracy, *see id.* at 846–47, and was instructed that one of the conspiracy’s object offenses was the murder of protected persons, *id.* at 850. The commission specifically found that Bahlul committed ten overt acts, all of which took place outside the

United States and several of which directly relate to the 9/11 attacks that killed thousands of United States nationals. App. 132–33. And it found that all seven of the alleged object offenses, including murder of protected persons, were objects of the conspiracy. App. 131. There is no scenario in which the commission could have found that Bahlul committed these overt acts yet rationally found that the conspiracy did not take place outside the United States and did not have as an object the murder of United States nationals. *Accord Webb*, 255 F.3d at 901. Although the commission was not specifically instructed that it had to find these two elements, the overt acts it *did* find Bahlul had committed necessarily included the two elements and Bahlul did not, and does not, dispute either. Therefore, although the 2006 MCA conspiracy offense, as charged here, does “eliminat[e] an element of the offense,” *Carmell*, 529 U.S. at 532, 120 S.Ct. 1620, the omission did not seriously affect the fairness, integrity, or public reputation of the proceedings.

2. Section 821

When Bahlul committed the crimes of which he was convicted, section 821 granted—and still grants—military commissions jurisdiction “with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821. Section 821 and its predecessor statute have been on the books for nearly a century. *See* Pub.L. No. 64–242, 39 Stat. 619, 653 (1916); Pub.L. No. 66–242, 41 Stat. 759, 790 (1920); Pub.L. No. 81–506, 64 Stat. 107, 115 (1950); *Madsen v. Kinsella*, 343 U.S. 341, 350–51 & n. 17, 72 S.Ct. 699, 96 L.Ed. 988 (1952). We must therefore ascertain whether conspiracy to commit war crimes was a “law of war” offense triable by military commission under section 821 when Bahlul’s conduct occurred because, if so, Bahlul’s *ex post facto* argument fails.

In answering this question, we do not write on a clean slate. In *Hamdan*, seven justices of the Supreme Court debated the question at length. Four justices concluded that conspiracy is not triable by military commission under section 821. 548 U.S. at 603–13, 126 S.Ct. 2749 (plurality opinion of Stevens, J.). Three justices opined that it is. *Id.* at 697–704, 126 S.Ct. 2749 (Thomas, J., dissenting). Both opinions scoured relevant international and domestic authorities but neither position garnered a majority. The case was resolved on other grounds and the eighth vote—one justice was recused—left the conspiracy question for another day, noting that the Congress may “provide further guidance in this area.” *See id.* at 655, 126 S.Ct. 2749 (Kennedy, J., concurring). In light of the uncertainty left by the split, it was not “plain” error to try Bahlul for conspiracy by military commission pursuant to section 821. *See United States v. Terrell*, 696 F.3d 1257, 1260 (D.C.Cir.2012) (plain error met only if “its erroneous character” is established by “a clear precedent in the Supreme Court or this circuit”).

The reason for the uncertainty is not only the divided result in *Hamdan* but also the High Court’s failure to clearly resolve a subsidiary question: What body of law is encompassed by section 821’s reference to the “law of war”? That dispute takes center stage here. Bahlul contends that “law of war” means the *international* law of war, full stop. The Government contends that we must look not only to international precedent but also “the common law of war developed in U.S. military tribunals.” E.B. Br. of United States 28; *see also* Oral Arg. Tr. 15 (“[W]e believe the law of war is the international law of war as supplemented by the experience and practice of our wars and our wartime tribunals.”). The answer is critical because the Government asserts that conspiracy is *not* an international law-of-war offense. *See* E.B. Br. of United States 34; Oral Arg. Tr. 15.

* * * *

Ultimately, we need not resolve *de novo* whether section 821 is limited to the international law of war. It is sufficient for our purpose to say that, at the time of this appeal, the answer to that question is not “obvious.” *Olano*, 507 U.S. at 734, 113 S.Ct. 1770; see *Henderson v. United States*, — U.S. —, 133 S.Ct. 1121, 1130–31, 185 L.Ed.2d 85 (2013) (plainness of error determined at time of appeal). As seven justices did in *Hamdan*, we look to domestic wartime precedent to determine whether conspiracy has been traditionally triable by military commission. That precedent provides sufficient historical pedigree to sustain Bahlul’s conviction on plain-error review.

Most notably, the individuals responsible for the assassination of President Abraham Lincoln were charged with a single offense—“combining, confederating, and conspiring ... to kill and murder ... Abraham Lincoln”—and were convicted of that offense by military commission. General Court–Martial Order No. 356, War Dep’t (July 5, 1865), reprinted in H.R. DOC. NO. 55–314, at 696 (1899). The specification of the offense includes several paragraphs, each of which sets forth a separate overt act done “in further prosecution of the unlawful and traitorous conspiracy.” *Id.* at 697–98; see also THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 18–21 (New York, Moore, Wiltach & Baldwin 1865). A federal district court later denied three of the conspirators’ habeas petitions raising jurisdictional objections to the commission. *Ex Parte Mudd*, 17 F.Cas. 954 (S.D.Fla.1868).

President Andrew Johnson personally approved the convictions. In doing so, he considered the jurisdictional limits of military commissions: He asked Attorney General James Speed whether the accused could be tried for conspiracy in a military commission. In a lengthy opinion, Attorney General Speed said they could. See *Military Commissions*, 11 Op. Att’y Gen. 297 (1865). We think this highest-level Executive Branch deliberation is worthy of respect in construing the law of war. *Cf. Sosa v. Alvarez–Machain*, 542 U.S. 692, 733–34, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (looking “albeit cautiously” to sources like “controlling executive ... act[s]” to ascertain current state of international law (quoting *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900))); *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 n. 6 (D.C.Cir.1984) (Edwards, J., concurring) (Attorney General opinions not binding but “entitled to some deference, especially where judicial decisions construing a statute are lacking”). Granted, the Attorney General’s framing of the question presented—“whether the persons charged with the offence of having assassinated the President can be tried before a military tribunal”—casts some doubt on whether he was addressing inchoate conspiracy or the offense of assassination. 11 Op. Att’y Gen. at 297; see *Hamdan*, 548 U.S. at 604 n. 35, 126 S.Ct. 2749 (plurality). But the Attorney General’s opinion was written *after* the commission had been convened and the convictions had been approved; he would therefore have been aware that the sole offense alleged was conspiracy. On the other hand, that the Attorney General’s opinion was written after the convictions were approved may undermine its persuasive value, as it could be viewed as a *post hoc* rationalization for a decision already made.

Either way, the Lincoln conspirators’ trial was a matter of paramount national importance and attracted intense public scrutiny. Thus, when the Congress enacted section 821’s predecessor—and “preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions,” *Hamdan*, 548 U.S. at 593, 126 S.Ct. 2749 (majority)—it was no doubt familiar with at least one high-profile example of a conspiracy charge tried by a military commission. Because of the national prominence of the

case and the highest-level Executive Branch involvement, we view the Lincoln conspirators' trial as a particularly significant precedent.

Also noteworthy is the World War II-era military commission trial of several Nazi saboteurs who entered the United States intending to destroy industrial facilities; they were convicted of, *inter alia*, conspiracy to commit violations of the law of war. See *Quirin*, 317 U.S. at 21–23, 63 S.Ct. 2. Although the Supreme Court resolved the case on other grounds and therefore did not review the validity of the conspiracy conviction, the case remains another prominent example of a conspiracy charge tried in a law-of-war military commission. President Franklin D. Roosevelt, like President Johnson before him, approved the charges. See 7 Fed.Reg. 5103–02 (July 7, 1942). Moreover, *Quirin* is not the sole example from that era. See *Colepaugh v. Looney*, 235 F.2d 429, 431–32 (10th Cir.1956) (upholding conviction by military commission of Nazi saboteur of conspiracy to commit offense against law of war); General Order (G.O.) No. 52, War Dep't (July 7, 1945) (President Truman approves convictions of *Colepaugh* conspirators), reprinted in Supp. Auth. 149–50; Memo. of Law from Tom C. Clark, Assistant Att'y Gen., to Major General Myron C. Kramer, Judge Advocate Gen., at 6 (Mar. 12, 1945), reprinted in Supp. Auth. 139 (opining, with regard to *Colepaugh* case, that “it may be said to be well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military justice”). Finally, during the Korean War, General Douglas MacArthur ordered that persons accused of “conspiracies and agreements to commit ... violations of the laws and customs of war of general application” be tried by military commission. See Letter Order, Gen. HQ, United Nations Command, Tokyo, Japan, *Trial of Accused War Criminals* (Oct. 28, 1950) (Rules of Criminal Procedure for Military Commissions, Rule 4).

We do not hold that these precedents conclusively establish conspiracy as an offense triable by military commission under section 821. After all, four justices examined the same precedents and found them insufficiently clear. *Hamdan*, 548 U.S. at 603–09, 126 S.Ct. 2749 (plurality); cf. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). But there are two differences between *Hamdan* and this case. First, the elements of the conspiracy charge were not defined by statute in *Hamdan* and therefore the plurality sought precedent that was “plain and unambiguous.” 548 U.S. at 602, 126 S.Ct. 2749. Here, the Congress has positively identified conspiracy as a war crime. We need not decide the effect of the Congress's action, however, because we rely on the second difference: The *Hamdan* plurality's review was *de novo*; our review is for plain error. We think the historical practice of our wartime tribunals is sufficient to make it not “obvious” that conspiracy was not traditionally triable by law-of-war military commission under section 821. *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. We therefore conclude that any *Ex Post Facto* Clause error in trying Bahlul on conspiracy to commit war crimes is not plain. See *United States v. Vizcaino*, 202 F.3d 345, 348 (D.C.Cir.2000) (assuming error to decide it was not plain).

B. Material Support

A different result obtains, however, regarding Bahlul's conviction of providing material support for terrorism. The Government concedes that material support is not an international law-of-war offense, see Oral Arg. Tr. 15; Panel Br. of United States 50, 57, and we so held in *Hamdan II*, 696 F.3d at 1249–53. But, in contrast to conspiracy, the Government offers little domestic precedent to support the notion that material support or a sufficiently analogous offense has historically been triable by military commission. Although Bahlul carries the burden to

establish plain error, *see United States v. Brown*, 508 F.3d 1066, 1071 (D.C.Cir.2007), we presume that in the unique context of the “domestic common law of war”—wherein the Executive Branch shapes the relevant precedent and individuals in its employ serve as prosecutor, judge and jury—the Government can be expected to direct us to the strongest historical precedents. What the Government puts forth is inadequate.

The Government relies solely on a number of Civil War-era field orders approving military commission convictions of various offenses that, the Government contends, are analogous to material support. Before delving into the specifics of the orders, we note our skepticism that such informal field precedent can serve as the sole basis for concluding that a particular offense is triable by a law-of-war military commission. Unlike the Lincoln conspirators’ and Nazi saboteurs’ cases, which attracted national attention and reflected the deliberations of highest-level Executive Branch officials, the field precedents are terse recordings of drumhead justice executed on or near the battlefield. . . . In addition, the military commissions these orders memorialize were not always models of due process. And, as the *Hamdan* plurality explained, the Civil War commissions “operated as both martial law or military government tribunals and law-of-war commissions,” obliging us to treat the precedents “with caution” because of their unclear jurisdictional basis. 548 U.S. at 596 n. 27, 126 S.Ct. 2749 (plurality); *see also id.* at 608, 126 S.Ct. 2749.

In any event, even if the law of war can be derived from field precedents alone, none of the cited orders charges the precise offense alleged here—providing material support for terrorism. The Government nonetheless contends that the material support charge “prohibits the same conduct, under a modern label, as the traditional offense of joining with or providing aid to guerrillas and other unlawful belligerents.” E.B. Br. of United States 48. But we do not think the cited field orders establish that such conduct was tried by law-of-war military commissions during the Civil War.

* * * *

The upshot is that the Civil War field precedent is too distinguishable and imprecise to provide the sole basis for concluding that providing material support for terrorism was triable by law-of-war military commission at the time of Bahlul’s conduct. We therefore think it was a plain *ex post facto* violation—again, assuming without deciding that the protection of the Ex Post Facto Clause extends to Bahlul, *see supra* pp. 17–18—to try Bahlul by military commission for that new offense. *See Collins*, 497 U.S. at 42–43, 110 S.Ct. 2715. The error is prejudicial and we exercise our discretion to correct it by vacating Bahlul’s material support conviction. *Olano*, 507 U.S. at 734–36, 113 S.Ct. 1770; *see also Casey*, 343 U.S. at 808, 72 S.Ct. 999 (vacating conviction based on Government’s confession of error); *United States v. Law*, 528 F.3d 888, 909 (D.C.Cir.2008) (same); *cf. Petite*, 361 U.S. at 531, 80 S.Ct. 450 (vacating conviction based on Government’s motion).

C. Solicitation

We also conclude that solicitation of others to commit war crimes is plainly not an offense traditionally triable by military commission. The Government concedes it is not an international law-of-war offense. *See Oral Arg. Tr.* 15; Panel Br. of United States 50, 57. The Government contends that solicitation “possesses a venerable lineage as an offense triable by military commission,” E.B. Br. of United States 50, but it cites only two Civil War-era field orders involving three defendants in support thereof. . . .

As noted, we are skeptical that field orders can be the sole basis for military commission jurisdiction over a particular offense. *See supra* p. 27. Moreover, the two field orders discussed fall far short of meeting any showing we would require. Because solicitation to commit war crimes was not an offense triable by law-of-war military commission when Bahlul’s conduct occurred, it is a plain *ex post facto* violation—again, assuming without deciding that the protection of the *Ex Post Facto* Clause extends to Bahlul, *see supra* pp. 17–18—to try him by military commission for that new offense. *See Collins*, 497 U.S. at 42–43, 110 S.Ct. 2715. The error is prejudicial and we exercise our discretion to correct it by vacating Bahlul’s solicitation conviction. *Olano*, 507 U.S. at 734–736, 113 S.Ct. 1770; *see also Casey*, 343 U.S. at 808, 72 S.Ct. 999; *Law*, 528 F.3d at 909; *cf. Petite*, 361 U.S. at 531, 80 S.Ct. 450.

V. Remaining Issues

In his brief to the panel, Bahlul raised four challenges to his convictions that we have not addressed here. He argued that (1) the Congress exceeded its Article I, § 8 authority by defining crimes triable by military commission that are not offenses under the international law of war, *see Br. for Bahlul 38, Bahlul v. United States*, No. 11–1324 (D.C.Cir. Mar. 9, 2012); (2) the Congress violated Article III by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war, *see id.* at 39–40; (3) his convictions violate the First Amendment, *see id.* at 43; and (4) the 2006 MCA discriminates against aliens in violation of the equal protection component of the Due Process Clause, *see id.* at 54. We intended neither the *en banc* briefing nor argument to address these four issues. *See Order, Bahlul v. United States*, No. 11–1324 (D.C.Cir. May 2, 2013) (notifying parties that Equal Protection and First Amendment issues are not “within the scope of the rehearing *en banc*”). And with the exception of a few passages regarding the first two, we received none from the parties. We therefore remand the case to the original panel of this Court to dispose of Bahlul’s remaining challenges to his conspiracy conviction. *See United States v. McCoy*, 313 F.3d 561, 562 (D.C.Cir.2002) (*en banc*) (remanding outstanding issue to panel).

For the foregoing reasons, we reject Bahlul’s *ex post facto* challenge to his conspiracy conviction and remand that conviction to the panel to consider his alternative challenges thereto. In addition, we vacate Bahlul’s convictions of providing material support for terrorism and solicitation of others to commit war crimes, and, after panel consideration, remand to the CMCR to determine the effect, if any, of the two vacatur on sentencing.

* * * *

b. Military Commission Charges

As discussed in *Digest 2013* at 638, charges were sworn against Guantanamo detainee Abd al Hadi al-Iraqi, an Iraqi national, in 2013. On June 18, 2014, Chief Prosecutor Mark Martins delivered remarks at Guantanamo Bay announcing Al-Iraqi’s arraignment. Mr. Martins’s speech is excerpted below.

* * * *

Good afternoon. Today Abd al Hadi al-Iraqi—an Iraqi national whose records indicate was born as Nashwan Abd al Razzaq in 1961 in the city of Mosul—was arraigned before a United States military commission on charges that, as a senior member of Al Qaeda, he conspired with and led others in a series of unlawful attacks and related offenses in Afghanistan, Pakistan, and elsewhere from 2001 to 2006. These attacks and other offenses allegedly resulted in the death and injury of U.S. and coalition service members and civilians. I emphasize that the charges against Abd al Hadi are only allegations. In this military commission, he is presumed innocent unless and until proven guilty beyond a reasonable doubt.

He also is afforded “all of the judicial guarantees recognized as indispensable by civilized peoples,” the requirement when conducting trials under the law of armed conflict. His trial will take place in accordance with the Military Commissions Act passed by Congress in 2009 and signed into law by the President of the United States that same year. His alleged crimes, which include violations long outlawed by the community of nations, have been codified as offenses triable by military commission within U.S. federal law. To the present date, he has been lawfully, humanely, and securely detained as an unprivileged belligerent, and since 2008, he and his attorney have had recourse to the writ of habeas corpus in federal court.

As alleged in the charge sheet, which is available on the military commissions’ website, Abd al Hadi joined Al Qaeda by 1996 and, in furtherance of the group’s hostile and terrorist aims, participated as a high-ranking leader on various senior councils that set Al Qaeda’s goals and policies. He served as liaison between Al Qaeda and the Taliban. He commanded Al Qaeda’s insurgency efforts in Afghanistan and Pakistan, during which he supported, supplied, funded, and directed attacks against U.S. and coalition forces. These operations violated the law of armed conflict in a variety of ways, in that they involved detonation of vehicle-borne improvised explosive devices and suicide vests in civilian areas, firing upon a medical helicopter as it attempted to recover casualties, rewarding an intentional attack that killed a United Nations aid worker, and other means and methods of war that have long been condemned. Abd al Hadi directed his fighters to kill all coalition soldiers encountered during their attacks, thereby denying quarter to potential captive or wounded coalition troops. In addition to commanding Al Qaeda’s insurgency in Afghanistan and Pakistan, Abd al Hadi was eventually tasked by Usama bin Laden to travel to Iraq to advise and assist Al Qaeda in Iraq’s insurgency there.

For these and other alleged acts, Abd al Hadi is now formally charged with the following offenses under the Military Commissions Act of 2009: denying quarter; attacking protected property; using and attempting treachery or perfidy; and conspiring with Usama bin Laden and other Al Qaeda leaders to commit terrorism. The convening authority referred these charges to a non-capital military commission on June 2, 2014. The maximum penalty for these charges is life imprisonment, except for attacking protected property and attempting to use treachery or perfidy to kill or injure, which carry a maximum penalty of 20 years’ imprisonment each. No trial date has yet been set in this case.

The serious charge of using treachery calls for further brief definition, as members of the public may be unfamiliar with this offense against the law of war—a set of rules concerning hostilities that is also referred to as international humanitarian law. One who uses treachery invites others to believe that he is entitled to protection under the law of war and then betrays that belief in order to kill or injure. Treachery is not merely deception, as war has long included lawful actions of deception. Such lawful deceptions are sometimes termed “ruses of war.”

Rather, treachery is a particular type of deception that secures its advantage through an adversary's compliance with law. It is forbidden because it can destroy the basis for a restoration of peace, thus prolonging or escalating the conflict and multiplying the number of innocents exposed to armed violence. Far from quaint or old-fashioned, the traditional prohibition on treachery is grounded in wisdom acquired from the harsh realities of conflict. It polices the principle of distinction between combatants and noncombatants that is at the heart of international humanitarian law.

The charges against Abd al Hadi are the result of extensive military-to-military and law enforcement cooperation and of determined work by the Federal Bureau of Investigation; the Defense Department's Criminal Investigation Task Force, Office of General Counsel, and Office of Military Commissions; the State Department; the Justice Department; the intelligence community; and many other components of government. The prosecution of this case combines dedicated trial counsel from the Defense and Justice Departments.

To the family and friends of the fallen, we understand that nothing can fill the empty spaces in your homes. No words can ease the pain of your loss. But know that the United States is committed to justice and accountability for those who violate with impunity those longstanding laws by which humankind has sought to limit the depravity and suffering of war. This arraignment—a session that includes public notification of the nature of the charges, advisement by the judge regarding counsel rights, and commencement of commission proceedings—marks an important milestone in that process.

To counter transnational terror networks, we must use all the lawful instruments of our national power and authority. I have previously stated that there is a narrow but important category of cases in which the pragmatic choice among those instruments is a military commission. This is such a case. The nature of the alleged offenses, the identities of the victims (who were from eight countries), the location in which the offenses allegedly occurred, the context of genuine hostilities with Al Qaeda, and the manner in which the case was investigated and evidence gathered all make a military commission the most appropriate forum to try this case. I am confident that these proceedings—which incorporate every fundamental guarantee of a fair trial that is demanded by our shared values—will help protect peaceful peoples everywhere and serve the interests of justice. ...

* * * *

Cross References

Terrorism, **Chapter 3.B.1.**

ILC Draft Articles on Effects of Armed Conflict on Treaties, **Chapter 4.A.4.**

Al-Shimari v. CACI, **Chapter 5.A.2.b. & 5.B.1.**

KBR v. Harris, **Chapter 5.B.3.**

KBR v. Metzgar, **Chapter 5.B.4.**

U.S. observations at ICCPR on law of armed conflict, **Chapter 6.A.2.**

Children and armed conflict, **Chapter 6.C.2.**

UN Committee Against Torture, **Chapter 6.H.**

Arbitrary detentions, **Chapter 6.I.2.**

Remotely piloted aircraft, **Chapter 6.N.2.**

ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.D.3.**

Internet governance, **Chapter 11.F.2.**

ITU plenipotentiary conference, **Chapter 11.F.3.**

Sanctions relating to armed conflict, **Chapter 16.A.7.**

Arms Export Control Act and International Trafficking In Arms regulations, **Chapter 16.B.**

Protecting civilians during peacekeeping operations, **Chapter 17.B.9.**

Mutual Defense Agreement with the United Kingdom, **Chapter 19.B.10.g.**

Arms Trade Treaty, **Chapter 19.J.**