

## Table of Contents

<b>CHAPTER 18</b> .....	<a href="#">744</a>
<b>Use of Force</b> .....	<a href="#">744</a>
<b>A. GENERAL</b> .....	<a href="#">744</a>
1. Use of Force Issues Related to Counterterrorism Efforts .....	<a href="#">744</a>
a. <i>Request for an Authorization for Use of Military Force against ISIL</i> .....	<a href="#">744</a>
b. <i>Legal Framework for Counterterrorism Efforts</i> .....	<a href="#">750</a>
2. Actions in Syria.....	<a href="#">757</a>
3. War Powers Resolution.....	<a href="#">758</a>
4. Department of Defense 2015 Law of War Manual.....	<a href="#">758</a>
5. Bilateral Agreements and Arrangements .....	<a href="#">759</a>
6. International Humanitarian Law .....	<a href="#">759</a>
a. <i>Oslo Conference on Safe Schools</i> .....	<a href="#">759</a>
b. <i>Applicability of international law to conflicts in cyberspace</i> .....	<a href="#">760</a>
c. <i>Private military and security companies</i> .....	<a href="#">760</a>
d. <i>International Conference of the Red Cross and Red Crescent</i> .....	<a href="#">761</a>
<b>B. CONVENTIONAL WEAPONS</b> .....	<a href="#">762</a>
1. Anti-Personnel Landmines.....	<a href="#">762</a>
2. Convention on Cluster Munitions.....	<a href="#">763</a>
<b>C. DETAINEES</b> .....	<a href="#">764</a>
1. President’s Statement on National Defense Authorization Act for 2016 .....	<a href="#">764</a>
2. U.S. Response to Inter-American Commission Report on Guantanamo.....	<a href="#">765</a>
3. Transfers .....	<a href="#">774</a>
4. U.S. court decisions and proceedings .....	<a href="#">775</a>
a. <i>Detainees at Guantanamo: Habeas Litigation</i> .....	<a href="#">775</a>
b. <i>Former Detainees</i> .....	<a href="#">782</a>
3. Criminal Prosecutions and Other Proceedings .....	<a href="#">785</a>
a. <i>United States v. Hamidullin</i> .....	<a href="#">785</a>
b. <i>Military Commission</i> .....	<a href="#">795</a>

**Cross References** ..... [796](#)

## CHAPTER 18

### Use of Force

#### A. GENERAL

##### 1. Use of Force Issues Related to Counterterrorism Efforts

###### a. *Request for an Authorization for Use of Military Force against ISIL*

On February 11, 2015, President Obama conveyed proposed legislation to Congress authorizing the use of force against the terrorist organization known as the Islamic State of Iraq and the Levant (“ISIL”). President Obama’s message to Congress accompanying the proposed legislation is excerpted below. Daily Comp. Pres. Docs. 2015 DCPD No. 00093.

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\* \* \* \*

The so-called Islamic State of Iraq and the Levant (ISIL) poses a threat to the people and stability of Iraq, Syria, and the broader Middle East, and to U.S. national security. It threatens American personnel and facilities located in the region and is responsible for the deaths of U.S. citizens James Foley, Steven Sotloff, Abdul-Rahman Peter Kassig, and Kayla Mueller. If left unchecked, ISIL will pose a threat beyond the Middle East, including to the United States homeland.

I have directed a comprehensive and sustained strategy to degrade and defeat ISIL. As part of this strategy, U.S. military forces are conducting a systematic campaign of airstrikes against ISIL in Iraq and Syria. Although existing statutes provide me with the authority I need to take these actions, I have repeatedly expressed my commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against ISIL. Consistent with this commitment, I am submitting a draft AUMF that would authorize the continued use of military force to degrade and defeat ISIL.

My Administration's draft AUMF would not authorize long-term, large-scale ground combat operations like those our Nation conducted in Iraq and Afghanistan. Local forces, rather than U.S. military forces, should be deployed to conduct such operations. The authorization I propose would provide the flexibility to conduct ground combat operations in other, more limited circumstances, such as rescue operations involving U.S. or coalition personnel or the use of special operations forces to take military action against ISIL leadership. It would also authorize the use of U.S. forces in situations where ground combat operations are not expected or intended, such as intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces.

Although my proposed AUMF does not address the 2001 AUMF, I remain committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF. Enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF.

I can think of no better way for the Congress to join me in supporting our Nation's security than by enacting this legislation, which would show the world we are united in our resolve to counter the threat posed by ISIL.

\* \* \* \*

The draft of a proposed authorization for the use of military force against ISIL as provided to Congress appears below and is available at [https://www.whitehouse.gov/sites/default/files/docs/aumf\\_02112015.pdf](https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf).

\* \* \* \*

## **JOINT RESOLUTION**

To authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant.

\*\*\*

Whereas the terrorist organization that has referred to itself as the Islamic State of Iraq and the Levant and various other names (in this resolution referred to as "ISIL") poses a grave threat to the people and territorial integrity of Iraq and Syria, regional stability, and the national security interests of the United States and its allies and partners;

Whereas ISIL holds significant territory in Iraq and Syria and has stated its intention to seize more territory and demonstrated the capability to do so;

Whereas ISIL leaders have stated that they intend to conduct terrorist attacks internationally, including against the United States, its citizens, and interests;

Whereas ISIL has committed despicable acts of violence and mass executions against Muslims, regardless of sect, who do not subscribe to ISIL's depraved, violent, and oppressive ideology;

Whereas ISIL has threatened genocide and committed vicious acts of violence against religious and ethnic minority groups, including Iraqi Christian, Yezidi, and Turkmen populations;

Whereas ISIL has targeted innocent women and girls with horrific acts of violence, including abduction, enslavement, torture, rape, and forced marriage;

Whereas ISIL is responsible for the deaths of innocent United States citizens, including James Foley, Steven Sotloff, Abdul-Rahman Peter Kassig, and Kayla Mueller;

Whereas the United States is working with regional and global allies and partners to degrade and defeat ISIL, to cut off its funding, to stop the flow of foreign fighters to its ranks, and to support local communities as they reject ISIL;

Whereas the announcement of the anti-ISIL Coalition on September 5, 2014, during the NATO Summit in Wales, stated that ISIL poses a serious threat and should be countered by a broad international coalition;

Whereas the United States calls on its allies and partners, particularly in the Middle East and North Africa, that have not already done so to join and participate in the anti-ISIL Coalition;

Whereas the United States has taken military action against ISIL in accordance with its inherent right of individual and collective self-defense;

Whereas President Obama has repeatedly expressed his commitment to working with Congress to pass a bipartisan authorization for the use of military force for the anti-ISIL military campaign; and

Whereas President Obama has made clear that in this campaign it is more effective to use our unique capabilities in support of partners on the ground instead of large-scale deployments of U.S. ground forces: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

#### SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force against the Islamic State of Iraq and the Levant.”

#### SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.

#### (b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.).

#### (c) LIMITATIONS.—

The authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.

#### SEC. 3. DURATION OF THIS AUTHORIZATION.

This authorization for the use of military force shall terminate three years after the date of the enactment of this joint resolution, unless reauthorized.

#### SEC. 4. REPORTS.

The President shall report to Congress at least once every six months on specific actions taken pursuant to this authorization.

#### SEC. 5. ASSOCIATED PERSONS OR FORCES DEFINED.

In this joint resolution, the term “associated persons or forces” means individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners.

SEC. 6. REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ.

The Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107– 243; 116 Stat. 1498; 50 U.S.C. 1541 note) is hereby repealed.

\* \* \* \*

President Obama also delivered remarks on February 11, 2015 on the request for an authorization to use force against ISIL. Daily Comp. Pres. Docs. 2015 DCPD No. 00092 (Feb. 11, 2015). His remarks are excerpted below.

\* \* \* \*

Good afternoon. Today, as part of an international coalition of some 60 nations, including Arab countries, our men and women in uniform continue the fight against ISIL in Iraq and in Syria. More than 2,000 coalition airstrikes have pounded these terrorists. We’re disrupting their command and control and supply lines, making it harder for them to move. We’re destroying their fighting positions, their tanks, their vehicles, their barracks, their training camps, and the oil and gas facilities and infrastructure that fund their operations. We’re taking out their commanders, their fighters, and their leaders.

...[W]hen I announced our strategy against ISIL in September, I said that we are strongest as a nation when the President and Congress work together. Today my administration submitted a draft resolution to Congress to authorize the use of force against ISIL. I want to be very clear about what it does and what it does not do.

This resolution reflects our core objective to destroy ISIL. It supports the comprehensive strategy that we’ve been pursuing with our allies and our partners: a systemic and sustained campaign of airstrikes against ISIL in Iraq and Syria; support and training for local forces on the ground, including the moderate Syrian opposition; preventing ISIL attacks in the region and beyond, including by foreign terrorist fighters who try to threaten our countries; regional and international support for an inclusive Iraqi Government that unites the Iraqi people and strengthens Iraqi forces against ISIL; humanitarian assistance for the innocent civilians of Iraq and Syria, who are suffering so terribly under ISIL’s reign of horror.

\* \* \* \*

The resolution we’ve submitted today does not call for the deployment of U.S. ground combat forces to Iraq or Syria. It is not the authorization of another ground war, like Afghanistan or Iraq. The 2,600 American troops in Iraq today largely serve on bases, and yes, they face the risks that come with service in any dangerous environment. But they do not have a combat mission. They are focused on training Iraqi forces, including Kurdish forces.

As I’ve said before, I’m convinced that the United States should not get dragged back into another prolonged ground war in the Middle East. That’s not in our national security

interest, and it's not necessary for us to defeat ISIL. Local forces on the ground who know their countries best are best positioned to take the ground fight to ISIL, and that's what they're doing.

At the same time, this resolution strikes the necessary balance by giving us the flexibility we need for unforeseen circumstances. For example, if we had actionable intelligence about a gathering of ISIL leaders, and our partners didn't have the capacity to get them, I would be prepared to order our Special Forces to take action, because I will not allow these terrorists to have a safe haven. So we need flexibility, but we also have to be careful and deliberate. And there is no heavier decision than asking our men and women in uniform to risk their lives on our behalf. As Commander in Chief, I will only send our troops into harm's way when it is absolutely necessary for our national security.

Finally, this resolution repeals the 2002 authorization of force for the invasion of Iraq and limits this new authorization to 3 years. I do not believe America's interests are served by endless war or by remaining on a perpetual war footing. As a nation, we need to ask the difficult and necessary questions about when, why, and how we use military force. After all, it is our troops who bear the costs of our decisions, and we owe them a clear strategy and the support they need to get the job done. So this resolution will give our Armed Forces and our coalition the continuity we need for the next 3 years.

It is not a timetable. It is not announcing that the mission is completed at any given period. What it is saying is that Congress should revisit the issue at the beginning of the next President's term. It's conceivable that the mission is completed earlier. It's conceivable that after deliberation, debate, and evaluation, that there are additional tasks to be carried out in this area. And the people's representatives, with a new President, should be able to have that discussion.

In closing, I want to say that in crafting this resolution we have consulted with, and listened to, both Republicans and Democrats in Congress. We have made a sincere effort to address difficult issues that we've discussed together. In the days and weeks ahead, we'll continue to work closely with leaders and Members of Congress on both sides of the aisle. I believe this resolution can grow even stronger with the thoughtful and dignified debate that this moment demands. I'm optimistic that it can win strong bipartisan support and that we can show our troops and the world that Americans are united in this mission.

\* \* \* \*

On March 11, 2015, Secretary of State John Kerry testified before the Senate Committee on Foreign Relations on President Obama's request for an authorization to use force against ISIL (or Daesh). Secretary Kerry's testimony is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/03/238769.htm>.

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\* \* \* \*

...I'm pleased to return here, and particularly so with—in the distinguished company of Defense Secretary Ash Carter and our Chairman of the Joint Chiefs of Staff, Marty Dempsey.

... We are very simply looking for ...the appropriate present-day authorization ... statement by the United States Congress about the authority with which we should be able to go after, degrade, and destroy, as the President has said, a group known as ISIL or Daesh.

Now, Mr. Chairman, in our democracy, there are many views about the challenges and the opportunities that we face, and that's appropriate. That's who we are. But I hope we believe that there is an overwhelming consensus that Daesh has to be stopped. Our nation is strongest, always has been, when we act together. There's a great tradition in this country of foreign policy having a special place, that politics ends at the water's edge, and that we will act on behalf of our nation without regard to party and ideology. We simply cannot allow this collection of murderers and thugs to achieve in their group their ambition, which includes, by the way, most likely the death or submission of all those who oppose it, the seizure of land, the theft of resources, the incitement of terrorism across the globe, the killing and attacking of people simply for what they believe or for who they are.

And the joint resolution that is proposed by the President provides the means for America and its representatives to speak with a single powerful voice at this pivotal hour. When I came here last time, I mentioned that ... ISIL's momentum has been diminished, Mr. Chairman. It's still picking up supporters in places. Obviously, we've all observed that. But in the places where we have focused and where we are asking you to focus at this moment in time, it is clear that even while savage attacks continue, there is the beginning of a process to cut off their supply lines, to take out their leaders, to cut off their finances, to reduce the foreign fighters, to counter the messaging that has brought some of those fighters to this effort. But to ensure its defeat, we have to persist until we prevail in the broad-based campaign along multiple lines of effort that have been laid out over the course of the last months.

The President already has statutory authority to act against ISIL, but a clear and formal expression of this Congress's backing at this moment in time would dispel doubt that might exist anywhere that Americans are united in this effort. Approval of this resolution would encourage our friends and our partners in the Middle East, it would further energize the members and prospective members of the global coalition that we have assembled to oppose Daesh, and it would constitute a richly deserved vote of confidence in the men and women of our armed forces who are on the front lines prosecuting this effort on our behalf.

Your unity would also send an unmistakable message to the leaders of Daesh. They have to understand they can't divide us. Don't let them. They cannot intimidate us. And they have no hope of defeating us. The resolution that we have proposed would give the President a clear mandate to prosecute the armed component of this conflict against Daesh and associated persons or forces, which we believe is carefully delineated and defined. And while the proposal contains certain limitations that are appropriate in light of the nature of this mission, it provides the flexibility that the President needs to direct a successful military campaign. And that's why the Administration did propose a limitation on the use of "enduring offensive ground combat operations." I might add that was after the committee – then-committee chair Senator Menendez and the committee moved forward with its language and we came up here and testified and responded, basically, to the dynamics that were presented to us within the committee and the Congress itself.

So the proposal also includes no geographic limitation, not because there are plans to take it anywhere, but because... The point of the no geographic limitation is not that there are any plans or any contemplation. I think the President has been so clear on this. But what a mistake it would be to send a message to Daesh that there are safe havens, that there is somehow just a two-country limitation, so they go off and put their base, and then we go through months and months of deliberation again. We can't afford that. So that's why there's no limitation.

And Mr. Chairman, we know that there are groups in the world, affiliated terrorist groups, who aspire to harm the United States, our allies, our partners. Daesh is, however, very distinctive in that, because it holds territory and it will continue—if not stopped—to seize more, because it has financial resources, because of the debilitating impact of its activities in the broader Middle East, because of its pretensions to worldwide leadership, and because it has already been culpable in the violent deaths of Americans and others.

\* \* \* \*

**b. *Legal Framework for Counterterrorism Efforts***

Stephen W. Preston, General Counsel at the Department of Defense, addressed the annual meeting of the American Society of International Law in Washington, DC, on April 10, 2015 on “The Legal Framework for the United States’ Use of Military Force Since 9/11.” Mr. Preston’s remarks are excerpted below and available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931>.

\* \* \* \*

... Today, I will discuss how the U.S. Government has responded to this rapidly changing world and, specifically, how the legal framework for our military operations has developed since the attacks of 9/11.

President Obama has made clear from the beginning of his presidency that he is deeply committed to transparency in government because it strengthens our democracy and promotes accountability. Although a certain degree of secrecy is of course required to protect our country, the Administration has demonstrated its commitment to greater transparency in matters of national security and, specifically, in explaining the bases, under domestic and international law, for the United States’ use of military force abroad. We have seen this in the President’s own speeches, for example, at the National Archives in May 2009, at National Defense University in May 2013, and at West Point in May 2014.\*

Among senior Administration lawyers, we saw this early on, in a speech by the State Department’s Legal Adviser at ASIL in March 2010—this same meeting, five years ago—and in later speeches by the Attorney General at Northwestern in March 2012, and by my predecessor as DoD General Counsel at Yale and at Oxford, both in 2012.\*\* There was even a very modest contribution by the CIA General Counsel in remarks at Harvard Law School in April 2012. My remarks here today are the latest in the series—an update of sorts—addressing the legal authority for U.S. military operations as the mission has evolved over the past year or so.

This talk will proceed in four parts. First, I want to review the legal framework for the use of military force developed in the aftermath of the 9/11 attacks. Second, I will explain the legal basis for current military operations against the so-called Islamic State of Iraq and the Levant, or ISIL. Third, I will discuss the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF. Fourth,

\* Editor’s note: See *Digest 2009* at 709-13; *Digest 2013* at 540-46; *Digest 2014* at 88.

\*\* Editor’s note: See *Digest 2010* at 715-19; *Digest 2012* at 575-84, 590-92.

and finally, I will look ahead to the legal framework for counterterrorism operations in the future.

Let us begin with a bit of history. It is only by seeing where we have been over the past decade and a half that we can understand where we are today.

Return to the first days after the attacks on September 11, 2001, for it is in that time that our government began to articulate the legal framework that we still rely on today. As many of you know, it was only days after the 9/11 attacks that Congress passed, and the President signed, an authorization for the use of military force, or AUMF, authorizing the President to take action to protect the United States against those who had attacked us. Even though it was only days later, we already knew that the attacks were the work of al-Qa'ida, a terrorist organization operating out of Afghanistan, led by a man named Usama bin Laden.

The authorization that was enacted into law—which came to be known as the 2001 AUMF—was not a traditional declaration of war against a state. We had been attacked, instead, by a terrorist organization. Yes, the Taliban had allowed bin Laden and his organization to operate with impunity within Afghanistan. But it was not Afghanistan that had launched the attack. It was bin Laden and his terrorist organization.

The authorization for the use of military force that Congress passed aimed to give the President all the statutory authority he needed to fight back against bin Laden, his organization, and those who supported him, including the Taliban. At the same time, the 2001 AUMF was not without limits. It authorized 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, 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.”

With this statutory authorization, the United States commenced military operations against al-Qa'ida and the Taliban in Afghanistan on October 7, 2001, notifying the UN Security Council consistent with Article 51 of the UN Charter that the United States was taking action in the exercise of its right of self-defense in response to the 9/11 attacks.

Although the 2001 AUMF was not unlimited, enacted as it was just a short time after the attacks, it was necessarily drafted in broad terms. Shortly after President Obama came into office, his Administration filed a memorandum in Guantanamo habeas litigation offering the new President's interpretation of his statutory authority to detain enemy forces as an aspect of his authority to use force under the 2001 AUMF. That memorandum explained that the statute authorized the detention of “persons who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.” Moreover, it stated that “[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized” under the AUMF.

This interpretation of the 2001 AUMF was adopted by the D.C. Circuit and, in 2011, it was expressly endorsed by Congress in the context of detention. The National Defense Authorization Act for Fiscal Year 2012 reaffirmed the authority to detain “[a] 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, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” It also reaffirmed that dispositions of such individuals are made “under the law of war.”

Thus, a decade after the conflict began, all three branches of the government weighed in to affirm the ongoing relevance of the 2001 AUMF and its application not only to those groups that perpetrated the 9/11 attacks or provided them safe haven, but also to certain others who were associated with them.

My predecessor, Jeh Johnson, later elaborated on the concept of associated forces. In a speech at Yale Law School in February 2012, he explained that the concept of associated forces is not open-ended. He pointed out that, consistent with international law principles, an associated force must be both (1) an organized, armed group that has entered the fight alongside al-Qa'ida, and (2) a co-belligerent with al-Qa'ida in hostilities against the United States or its coalition partners. This means that not every group that commits terrorist acts is an associated force. Nor is a group an associated force simply because it aligns with al-Qa'ida. Rather, a group must have also entered al-Qa'ida's fight against the United States or its coalition partners.

More recently, during a public hearing before the Senate Foreign Relations Committee in May 2014, I discussed at some length the Executive branch's interpretation of the 2001 AUMF and its application by the Department of Defense in armed conflict. \*\*\* In my testimony, I described in detail the groups and individuals against which the U.S. military was taking direct action (that is, capture or lethal operations) under the authority of the 2001 AUMF, including associated forces. Those groups and individuals are: al-Qa'ida, the Taliban and certain other terrorist or insurgent groups in Afghanistan; al-Qa'ida in the Arabian Peninsula (AQAP) in Yemen; and individuals who are part of al-Qa'ida in Somalia and Libya. In addition, over the past year, we have conducted military operations under the 2001 AUMF against the Nusrah Front and, specifically, those members of al-Qa'ida referred to as the Khorasan Group in Syria. We have also resumed such operations against the group we fought in Iraq when it was known as al-Qa'ida in Iraq, which is now known as ISIL.

The concept of associated forces under the 2001 AUMF does not provide the President with unlimited flexibility to define the scope of his statutory authority. Our government monitors the threats posed to the United States and maintains the capacity to target (or stop targeting) groups covered by the statute as necessary and appropriate. But identifying a new group as an associated force is not done lightly. The determination that a particular group is an associated force is made at the most senior levels of the U.S. Government, following reviews by senior government lawyers and informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. intelligence community. In addition, military operations against these groups are regularly briefed to Congress. There are no other groups—other than those publicly identified, as I have just described—against which the U.S. military is currently taking direct action under the authority of the 2001 AUMF.

That brings me to my second topic: the legal authority applicable to today's fight against ISIL. The military operations conducted by the United States against ISIL in Iraq and Syria are consistent with both domestic and international law.

First, a word about this group we call ISIL, referred to variously as ISIS, the Islamic State or Daesh (its acronym in Arabic). In 2003, a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before 9/11—conducted a series of sensational terrorist attacks in Iraq. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-

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\*\*\* Editor's note: See *Digest 2014* at 722-24.

Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, often referred to as al-Qa'ida in Iraq, or AQI for short, conducted numerous deadly terrorist attacks against U.S. and coalition forces, as well as Iraqi civilians, using suicide bombers, car bombs and executions. In response to these attacks, U.S. forces engaged in combat—at times, near daily combat—with the group from 2004 until U.S. and coalition forces left Iraq in 2011. Even since the departure of U.S. forces from Iraq, the group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel in Iraq.

The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. The recent split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden's al-Qa'ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it, not al-Qa'ida's current leadership, is the true executor of bin Laden's legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa'ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests.

In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue protecting the country from ISIL—a group that has been subject to that AUMF for close to a decade—simply because of disagreements between the group and al-Qa'ida's current leadership. A contrary interpretation of the statute would allow the enemy—rather than the President and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

Some initially greeted with skepticism the President's reliance on the 2001 AUMF for authority to renew military operations against ISIL last year. To be sure, we would be having a different conversation if ISIL had emerged out of nowhere a year ago, having no history with bin Laden and no more connection to current al-Qa'ida leadership than it has today, or if the group once known as AQI had, for example, renounced terrorist violence against the United States at some point along the way. But ISIL did not spring fully formed from the head of Zeus a year ago, and the group certainly has never laid down its arms in its conflict against the United States.

The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden's jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority. After all, how many new terrorist groups have, by virtue of this reading of the statute, been determined to be among the groups against which military force may be used? The answer is zero.

The President's authority to fight ISIL is further reinforced by the 2002 authorization for the use of military force against Iraq (referred to as the 2002 AUMF). That AUMF authorized the use of force to, among other things, “defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals,

has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. After Saddam Hussein's regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI, which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria.

Beyond the domestic legal authorities, our military operations against ISIL have a firm foundation in international law, as well. The U.S. Government remains deeply committed to abiding by our obligations under the applicable international law governing the resort to force and the conduct of hostilities. In Iraq, of course, the United States is operating against ISIL at the request and with the consent of the Government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL. In Syria, the United States is using force against ISIL in the collective self-defense of Iraq and U.S. national self-defense, and it has notified the UN Security Council that it is taking these actions in Syria consistent with Article 51 of the UN Charter. Under international law, states may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face armed attacks or the imminent threat of armed attacks and the use of force is necessary because 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 inherent right of self-defense is not restricted to threats posed by states, and over the past two centuries states have repeatedly invoked the right of self-defense in response to attacks by non-state actors. Iraq has been clear, including in letters it has submitted to the UN Security Council, that it is facing a serious threat of continuing armed attacks from ISIL coming out of safe havens in Syria, and it has asked the United States to lead international efforts to strike ISIL sites and strongholds in Syria in order to end the continuing armed attacks on Iraq, to protect Iraqi citizens and ultimately enable Iraqi forces to regain control of Iraqi borders. ISIL is a threat not only to Iraq and our partners in the region, but also to the United States. Finally, the Syrian government has shown that it cannot and will not confront these terrorist groups effectively itself.

Let's turn now to my third topic: the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF.

At the outset, I pause to observe, as Clemenceau put it, "It is far easier to make war than to make peace." That remains as true today as it was a hundred years ago. Indeed, in an armed conflict between a state and a terrorist organization like al Qaeda or ISIL, it is highly unlikely that there will ever be an agreement to end the conflict. Unlike at the close of the World Wars, there will not be any instruments of surrender or peace treaties.

The situation is further complicated by the fact that the U.S. Constitution says nothing directly about how wars are to be ended. The closest it comes is the Treaty Clause, which gives the President and the Senate the power, together, to join treaties—which were, at the time the Constitution was written, the main way that wars were brought to an end. But, again, for a variety of reasons, the current conflict is unlikely to end in that way.

How, then, are we to know when the armed conflict has come to an end? The Supreme Court has not directly addressed this question, but it has offered important guidance. In *Hamdi v. Rumsfeld*, the plurality interpreted the 2001 AUMF as informed by the international law of war. Citing Article 118 of the Third Geneva Convention, it explained, "[i]t is a clearly established

principle of the law of war that detention may last no longer than active hostilities.” It concluded, “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States.” Consistent with the Court’s approach, the Obama Administration has interpreted the AUMF as informed by these international law principles, and this interpretation has been embraced by the federal courts. Hence, where the armed conflict remains ongoing and active hostilities have not ceased, it is clear that congressional authorization to detain and use military force under the 2001 AUMF continues.

Now what does this mean for U.S. military operations in Afghanistan after 2014? Although our presence in that country has been reduced and our mission there is more limited, the fact is that active hostilities continue. As a matter of international law, the United States remains in a state of armed conflict against the Taliban, al-Qa’ida and associated forces, and the 2001 AUMF continues to stand as statutory authority to use military force.

At the end of last year, the President made clear that “our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion.” As a part of this transition, we have drawn down our forces to roughly 10,000—the fewest U.S. forces in Afghanistan in more than a decade. The U.S. military now has two missions in Afghanistan. First, the United States is participating in the NATO non-combat mission of training, advising and assisting the Afghan National Security Forces. Second, the United States continues to engage in counterterrorism activity in Afghanistan to target the remnants of al-Qa’ida and prevent an al-Qa’ida resurgence or external plotting against the homeland or U.S. targets abroad. With respect to the Taliban, U.S. forces will take appropriate measures against Taliban members who directly threaten U.S. and coalition forces in Afghanistan, or provide direct support to al-Qa’ida. The use of force by the U.S. military in Afghanistan is now limited to circumstances in which using force is necessary to execute those two missions or to protect our personnel.

At the same time, our military operations in Afghanistan remain substantial. Indeed, the President recently announced that U.S. force levels in Afghanistan will draw down more slowly than originally planned because Afghanistan remains a dangerous place. It is sometimes said that the enemy gets a vote. Taliban members continue to actively and directly threaten U.S. and coalition forces in Afghanistan, provide direct support to al-Qa’ida, and pose a strategic threat to the Afghan National Security Forces. In response to these threats, U.S. forces are taking necessary and appropriate measures to keep the United States and U.S. forces safe and assist the Afghans. In short, the enemy has not relented, and significant armed violence continues.

The United States’ armed conflict against al-Qa’ida and associated forces in Afghanistan and elsewhere also continues. As my predecessor explained at the Oxford Union in 2012, there will come a time when “so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.” Unfortunately, that day has not yet come. To be sure, progress has been made in disrupting and degrading al-Qa’ida, particularly its core, senior leadership in the tribal areas along the Afghanistan-Pakistan border. But al-Qa’ida and its militant adherents—including AQAP, that most virulent strain of al-Qa’ida in Yemen—still pose a real and profound threat to U.S. national security—one that we cannot and will not ignore.

Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because al-Qa’ida and associated forces continue to target U.S. persons and interests actively, the

United States will use military force against them as necessary. Active hostilities will continue in Afghanistan (and elsewhere) at least through 2015 and perhaps beyond. There is no doubt that we remain in a state of armed conflict against the Taliban, al-Qa'ida and associated forces as a matter of international law. And the 2001 AUMF continues to provide the President with domestic legal authority to defend against these ongoing threats.

Finally, we have come to my fourth topic: the future of the legal framework governing the United States' use of military force. I have described for you how we arrived where we are over the course of nearly fourteen years. The 2001 AUMF continues to provide authority for our ongoing military operations against al-Qa'ida, ISIL and others, even though the conditions of the fight have changed since that authorization was first enacted.

In his 2013 NDU speech, the President anticipated "engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate." While, today, the Administration's immediate focus is to work with Congress on a bipartisan, ISIL-specific AUMF, the President's position on the 2001 statute has not changed. ... Our democracy is at its best when we openly debate matters of national security, and our nation is strongest when the President and Congress are in agreement on the employment of military force in its defense. The President has made clear that he stands ready to work with Congress to refine the 2001 AUMF after enactment of an ISIL-specific AUMF.

In February of this year, President Obama submitted to Congress draft legislation authorizing use of "the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces." This raises the question: if the President already has the authority needed to take action against ISIL, why is he seeking a new authorization?

Most obviously and importantly, as the President has said, the world needs to know we are united behind the effort against ISIL, and the men and women of our military deserve our clear and unified support. Enacting the President's proposed AUMF will show our fighting forces, the American people, our foreign partners and the enemy that the President and Congress are united in their resolve to degrade and defeat ISIL.

But the value of having a new authorization expressly directed against ISIL and associated forces of ISIL extends beyond its expression of the political branches' unified support for our counter-ISIL efforts. The 2001 and 2002 AUMFs authorize the current military operations against ISIL, but they were enacted more than a decade ago. The last 14 years have taught us that the threats we face tomorrow will not be the same as the threats we faced yesterday or face today. This confrontation with ISIL will not be over quickly, and now is an appropriate time for the President, Congress, and the American people to define the scope of the conflict and make sure we have the appropriate authorities in place for the counter-ISIL fight.

To that end, the President has made clear that as part of the counter-ISIL mission he will not deploy U.S. forces to engage in long-term, large-scale ground combat operations like those our nation conducted in Iraq and Afghanistan. With its proposed AUMF, the Administration has sought to strike a balance, putting in place reasonable limitations that would, as the President said at NDU, "discipline our thinking, our definition, [and] our actions," while continuing to provide the authority and flexibility needed to accomplish the mission and preserve the Commander in Chief's authority to respond to unforeseen circumstances. And by working with Congress and the American people to come up with appropriate authorizing legislation for the fight against ISIL, we might also create a model to guide future efforts to refine the 2001 AUMF or otherwise authorize the use of force against some new threat we may not yet foresee.

A central question as we look ahead is what follow-on 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 that threat. Drawing again from the President's NDU speech, the answer is not legislation granting the Executive "unbound powers more suited for traditional armed conflicts between nations." 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. counterterrorism operations are both adequate and appropriately tailored to the present and foreseeable threat.

Of course, in conducting military operations under the authority of existing AUMFs, a new, ISIL-specific AUMF, or a follow-on framework designed to replace the 2001 AUMF, we will remain committed to acting in accordance with our international obligations. As I have already described, our actions against ISIL in Iraq and Syria are justified as a matter of international law, and our military operations are being carried out in accordance with the law of armed conflict. This will continue to be the case under any new domestic authorizations.

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Transparency to the extent possible in matters of law and national security is sound policy and just plain good government. As noted earlier, it strengthens our democracy and promotes accountability. Moreover, from the perspective of a government lawyer, transparency, including clarity in articulating the legal bases for U.S. military operations, is essential to ensure the lawfulness of our government's actions and to explain the legal framework on which we rely to the American public and our partners abroad. Finally, I firmly believe transparency is important to help inoculate, against legal exposure or misguided recriminations, the fine men and women the government puts at risk in order to defend our country. We agency counsel all serve the same client, the United States of America, and each of us answers to the head of our respective agencies. But our highest calling, in my personal view, is to serve those who serve us.

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## 2. Actions in Syria

On September 30, 2015, Secretary of State John Kerry addressed the United Nations Security Council during a meeting on international peace and security and countering terrorism. Secretary Kerry's statement is excerpted below and available at <http://www.state.gov/secretary/remarks/2015/09/247639.htm>.

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Let me remind this council that coalition air operations are grounded in well-established military procedures, firmly based in international law, and the requests of neighboring states for

collective self-defense under Article 51 of the UN Charter. That foundation has not changed, and we will continue our mission with the full sanction of international law.

Pursuant to these procedures in Syria over the past year, the coalition has now conducted nearly 3,000 airstrikes against ISIL targets, and we are now in position with France, Australia, Canada, Turkey, and other coalition partners joining the campaign, to dramatically accelerate our efforts. This is what we will do. Over the coming weeks we will be continuing our flights out of Incirlik base in Turkey to apply constant pressure on strategic areas held by ISIL in northwest Syria.

We will also be sustaining our support to anti-ISIL fighters in northeast Syria. These efforts will put greater pressure on ISIL's operational areas, and we will ensure through precision airstrikes that ISIL leaders do not have any sanctuary anywhere on the ground in Syria.

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### **3. War Powers Resolution**

On October 14, 2015, President Obama sent a letter to leaders in the U.S. Congress to report, consistent with the War Powers Resolution (Public Law 93–148), on the deployment of U.S. Armed Forces personnel to Cameroon. Daily Comp. Pres. Docs. 2015 DCPD No. 00724 (Oct. 14, 2015). The letter specified that approximately 90 U.S. Armed Forces personnel were being deployed to Cameroon initially, with the consent of the Government of Cameroon, in advance of the deployment of additional personnel to Cameroon “to conduct airborne intelligence, surveillance, and reconnaissance operations in the region.” The ultimate deployment was estimated to be about 300, to “remain in Cameroon until their support is no longer needed.” President Obama’s letter stated that he “directed the deployment of U.S. forces in furtherance of U.S. national security and foreign policy interests, and pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”

### **4. Department of Defense 2015 Law of War Manual**

On June 12, 2015, the U.S. Department of Defense Office of the General Counsel issued the 2015 Law of War Manual, pursuant to Department directives. The 2015 Law of War Manual is available at <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>. The 2015 Law of War Manual is the first Defense Department-wide version, in contrast to previous service-specific manuals. As stated in the section on the purpose of the manual:

The purpose of this manual is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.

This manual represents the legal views of the Department of Defense. This manual does not, however, preclude the Department from subsequently changing its interpretation of the law. Although the preparation of this manual has benefited from the participation of lawyers from the Department of State

and the Department of Justice, this manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.

This manual is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

## 5. **Bilateral Agreements and Arrangements**

On May 21, 2015, President Obama announced his intent to designate Tunisia as a Major Non-NATO ally. On July 10, 2015, the designation process was complete and Tunisia became the 16<sup>th</sup> Major Non-NATO Ally (“MNNA”) of the United States. See State Department media note, available at <http://www.state.gov/r/pa/prs/ps/2015/07/244811.htm>. As explained in the media note, MNNA status signals U.S. support for democracy in Tunisia and emphasizes U.S. friendship with the Tunisian Government and people. “MNNA status is a symbol of our close relationship and comes with tangible privileges including eligibility for training, loans of equipment for cooperative research and development, and Foreign Military Financing for commercial leasing of certain defense articles.”

Singapore and the United States signed an enhanced Defense Cooperation Agreement (“DCA”) in December 2015, an update to the 2005 U.S.-Singapore DCA and part of the bilateral Strategic Framework Agreement (“SFA”) between both sides.

## 6. **International Humanitarian Law**

### *a. Oslo Conference on Safe Schools*

In response to an invitation from Norway to participate in the conference on Safe Schools in Oslo, May 28-29, 2015, representatives of the United States, Australia, Japan, the United Kingdom, the Republic of Korea, Canada, and France signed a joint statement to express their views on the work of the Oslo conference and the draft Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict (the “Lucens Guidelines”). The May 28, 2015 joint statement delivered to the Permanent Representative of Norway to the UN in Geneva is excerpted below.

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We share the strong desire to minimize the adverse effects of armed conflict on children, schools, and universities, and we strongly agree with the importance of maximizing the protections for civilians and civilian objects, such as schools and the students who attend them. We deplore the fact that armed conflict can expose students and teaching personnel to harm and

that attacks during armed conflict have resulted in the bombing, shelling, and burning of schools and universities and have entailed the killing, abduction, and arbitrary arrest of students, teachers, and academics.

We are aware that attacks on educational facilities, students, and teaching personnel can cause severe and long-lasting harm to individuals and societies and may, in many circumstances, constitute violations of international humanitarian law, including the unlawful targeting of civilians who are entitled to protection during armed conflict.

We reiterate that education is fundamental to development and contributes to the full enjoyment of human rights and fundamental freedoms.

We highlight the importance of United Nations Security Council resolutions 1998 (2011) and 2143 (2014), which urge parties to armed conflict to refrain from actions that impede children's access to education, and we continue to support the work of the United Nations Security Council on the promotion of the welfare of children in armed conflict.

We note that the Guidelines for protecting schools and universities from military use during armed conflict are not legally binding and do not affect existing rights, obligations, or protections under international law, but rather ... provide recommendations and ... contribute to good practice with a view to minimizing the harmful effects of armed conflict on civilians and civilian objects. However, we have concerns that the guidelines do not mirror the exact language and content of international humanitarian law, and that the full implications of this divergence are yet to be fully explored. We consider that the full implementation of international humanitarian law provides the best protection for civilians in situations of armed conflict.

We therefore take this opportunity to reaffirm our commitment, and invite all States to reaffirm their commitment, to international humanitarian law and to emphasize the importance, in all circumstances, of the full implementation of and compliance with international humanitarian law, and to the need to pursue accountability for violations thereof.

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

See Chapter 16 for a discussion of a new Executive Order issued by President Obama relating to persons engaging in malicious cyber-enabled activities.

***c. Private military and security companies***

On March 26, 2015, the U.S. delegation to the 28<sup>th</sup> session of the Human Rights Council provided its explanation of vote on the resolution entitled "Open-ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring, and oversight of the activities of private military and security companies." The U.S. explanation of vote is excerpted below and available at <https://geneva.usmission.gov/2015/03/26/eov-on-item-3-resolution-entitled-open-ended-intergovernmental-working-group-to-consider-the-possibility-of-elaborating-an-international-regulatory-framework-on-the-regulation-monitoring-a/>.

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The United States will abstain from this resolution, due to our concern about the length of the mandate extension and its related costs. While we appreciate that changes were made regarding the mandate during the negotiations, we are also concerned about the lack of a clear reference to paragraph 77 of the report of the second OEIGWG session, which this Council's previous resolution on this mandate, Resolution 22/33, referenced specifically. To reiterate, we see paragraph 77, including the issues defined in subparagraph (B), as providing the basis for our continued cooperation. We will continue to evaluate the OEIGWG against that metric.

The United States has consistently advocated bringing together home states, territorial states, contracting states, experts, and other stakeholders to make step-by-step progress on promoting and protecting human rights in the context of activities of PSCs and PMCs. But the United States continues to believe that what is needed now is not new international law but better implementation of the existing international law, as well as improvements in law, regulation, and policy at the national level. We hope that continued discussion in the OEIGWG can be a vehicle for facilitating that kind of enhancement of domestic standards.

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The International Code of Conduct Association ("ICOCA"), a multi-stakeholder association comprised of governments, including the United States, civil society organizations, and private security companies, was established to ensure effective implementation of the International Code of Conduct for Private Security Service Providers (2010). See *Digest 2010* at 740-42. ICOCA continued to make progress in 2015 on developing a mechanism for certifying and monitoring private security companies. See ICOCA website, <http://icoca.ch/en>. At the annual General Assembly meeting on October 8, 2015, the Government Members of ICOCA voted unanimously to elect a representative from the United States of America to serve a three-year term on the ICOCA Board of Directors, replacing another U.S. representative. See Minutes of the Board Meetings, October 2015, available at <http://icoca.ch/en/resources#category-tid-534>.

**d. *International Conference of the Red Cross and Red Crescent***

The 32nd quadrennial International Conference of the Red Cross and Red Crescent convened in Geneva in December 2015. The United States joined in the consensus adoption of a number of relevant resolutions on international humanitarian law ("IHL") during the International Conference. Resolutions and reports from the International Conference are available at <http://rcrcconference.org/international-conference/documents/>. Resolution 2 would have created a new "meeting of States" on IHL. Due to opposition from some countries at the International Conference, it was not created. Instead, the resolution recommends "continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32<sup>nd</sup>

International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States.” Doc. 32IC/15/19.2 (2015). Resolution 1 confirms the pursuit of further in-depth work... with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular, in relation to [non-international armed conflict or] NIAC.” Doc. 32IC/15/R1 (2015). The International Conference also adopted its first resolution pertaining to preventing and responding to sexual and gender-based violence. Doc. 32IC/15/R3.

## **B. CONVENTIONAL WEAPONS**

### **1. Anti-Personnel Landmines**

On November 4, 2015, U.S. Permanent Representative to the Conference on Disarmament Robert Wood delivered the U.S. explanation of vote on a draft resolution under consideration by the UN General Assembly’s First Committee on implementation of the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Landmines. Ambassador Wood’s statement is excerpted below and available at <http://usun.state.gov/remarks/6956>.

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... As many of you are aware, last year the United States announced a number of important changes to U.S. anti-personnel landmine, APL, policy.

On June 27, 2014 the United States delegation at the Third Review Conference of the Ottawa Convention in Maputo, Mozambique, announced that the United States will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention, including replacing such munitions as they expire in the coming years.

On September 23, 2014 the United States further announced that we are aligning our APL policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. This means that the 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

These measures represent important further steps to advance the humanitarian aims of the Ottawa Convention and to bring U.S. practice in closer alignment with the international humanitarian movement embodied in the Ottawa Convention.

Even as we take the steps announced last year, the unique circumstances on the Korean Peninsula preclude us from changing our landmine policy there at this time. As such, we are not presently in a position to comply fully with and seek accession to the Ottawa Convention, and must continue to abstain on this resolution. However, we will continue our diligent efforts to

pursue material and operational solutions that would be compliant with and ultimately allow us to accede to the Ottawa Convention while ensuring our ability to respond to contingencies on the Korean Peninsula and meet our alliance commitments to the Republic of Korea.

More broadly, the United States is the world's single largest financial supporter of humanitarian mine action, providing more than \$2.5 billion in aid in over 90 countries for conventional weapons destruction programs since 1993. The United States will continue to support this important work and remains committed to a continuing partnership with Ottawa States Parties and non-governmental organizations in addressing the humanitarian impact of anti-personnel landmines.

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## 2. Convention on Cluster Munitions

On November 4, 2015, Ambassador Wood delivered the explanation of vote on behalf of the United States at the UN General Assembly First Committee discussion of Draft Resolution L.49/Rev.1, "Implementation of the Convention on Cluster Munitions." Ambassador Wood's statement is excerpted below and available at <http://usun.state.gov/remarks/6955>.

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Mr. Chairman, my delegation has abstained on draft resolution L.49/Rev.1, "Implementation of the Convention on Cluster Munitions." The United States is not a party to this convention and as such is not bound by its provisions. We consider this resolution applicable only to those States Parties to this Convention, in particular those paragraphs calling for the Convention's full and effective implementation.

It strongly remains the U.S. view that when used properly in accordance with international humanitarian law, cluster munitions with a low unexploded ordnance, UXO, rate provide key advantages against certain types of legitimate military targets and can produce less collateral damage than high explosive, unitary weapons.

Although cluster munitions remain an integral part of U.S. force capabilities, the United States is committed to reducing the potential for unintended harm to civilians and civilian infrastructure caused by either the misuse of cluster munitions or the use of cluster munitions that generate a large amount of UXO. Under the Department of Defense's 2008 Cluster Munitions Policy, by the end of 2018 DOD will no longer employ cluster munitions with a UXO rate greater than one percent. In addition, by U.S. law, the United States does not transfer cluster munitions to other countries except those that meet the 1% UXO rate.

We note the references to "the principles of humanity and the dictates of public conscience," which flow from the Martens Clause. While the United States believes that "the principles of humanity and the dictates of public conscience" can provide a relevant and important paradigm for discussing the moral or ethical issues related to warfare, the Martens Clause is not a rule of international law that prohibits any particular weapon, including cluster munitions.

In general, the lawfulness of the use of a type of weapon under international law does not depend on an absence of authorization, but instead depends upon whether the weapon is prohibited. The United States does not accept by this or any other standard that the Convention on Cluster Munitions represents an emerging norm or reflects customary international law that would prohibit the use of cluster munitions in armed conflict.

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## **C. DETAINEES**

### **1. President's Statement on National Defense Authorization Act for 2016**

On October 22, 2015, President Obama sent a message to the House of Representatives, returning without approval the National Defense Authorization Act for Fiscal Year 2016. Daily Comp. Pres. Docs. 2015 DCPD No. 00750 (Oct. 22, 2015). Among the reasons identified in his message for vetoing the bill is that it would impede the closure of the detention facility at Guantanamo Bay. As his message explains:

I have repeatedly called upon the Congress to work with my Administration to close the detention facility at Guantanamo Bay, Cuba, and explained why it is imperative that we do so. As I have noted, the continued operation of this facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists. Yet in addition to failing to remove unwarranted restrictions on the transfer of detainees, this bill seeks to impose more onerous ones. The executive branch must have the flexibility, with regard to those detainees who remain at Guantanamo, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy. Rather than taking steps to bring this chapter of our history to a close, as I have repeatedly called upon the Congress to do, this bill aims to extend it.

On November 25, 2015, President Obama signed the amended version of the National Defense Authorization Act for Fiscal Year 2016. Daily Comp. Pres. Docs. 2015 DCPD No. 00843 pp. 1-2 (Nov. 25, 2015). President Obama's signing statement explains that he signed the legislation because it provided acceptable levels of funding for national defense, but goes on to say that the executive branch deems some of its provisions relating to Guantanamo to be contrary to the national interest and potentially unconstitutional:

I am, however, deeply disappointed that the Congress has again failed to take productive action toward closing the detention facility at Guantanamo. Maintaining this site, year after year, is not consistent with our interests as a Nation and undermines our standing in the world. As I have said before, the

continued operation of this facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists. It is imperative that we take responsible steps to reduce the population at this facility to the greatest extent possible and close the facility. The population once held at Guantanamo has now been reduced by over 85 percent. Over the past 24 months alone, we have transferred 57 detainees, and our efforts to transfer additional detainees continue. It is long past time for the Congress to lift the restrictions it has imposed and to work with my Administration to responsibly and safely close the facility, bringing this chapter of our history to a close.

The restrictions contained in this bill concerning the detention facility at Guantanamo are, as I have said in the past, unwarranted and counterproductive. Rather than taking steps to close the facility, this bill aims to extend its operation. Section 1032 renews the bar against using appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or under the control of the Department of Defense unless authorized by the Congress. Section 1031 also renews the bar against using appropriated funds to transfer Guantanamo detainees into the United States for any purpose. Sections 1033 and 1034 impose additional restrictions on foreign transfers of detainees—in some cases purporting to bar such transfers entirely. As I have said repeatedly, the executive branch must have the flexibility, with regard to the detainees who remain at Guantanamo, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy.

Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles. Additionally, section 1033 could in some circumstances interfere with the ability to transfer a detainee who has been granted a writ of habeas corpus. In the event that the restrictions on the transfer of detainees in sections 1031, 1033, and 1034 operate in a manner that violates these constitutional principles, my Administration will implement them in a manner that avoids the constitutional conflict.

## **2. U.S. Response to Inter-American Commission Report on Guantanamo**

On March 30, 2015, the United States submitted its response to the Inter-American Commission on Human Rights (“IACHR”) regarding the IACHR’s Draft Report on the Closure of Guantanamo (OEA/Ser.L/V/II. Doc. 30 January 2015). Excerpts follow (with footnotes omitted) from the U.S. submission, which is available in full at <http://www.state.gov/s/l/c8183.htm>. The IACHR final report, “Towards the Closure of Guantanamo” was released June 3, 2015. AS/Ser.L/V/II. Doc. 20/153 June 2015.

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## II. Relevant International Legal Framework

All U.S. military detention operations conducted at Guantanamo Bay are carried out in accordance with the law of armed conflict, also known as the “law of war” or international humanitarian law (IHL), including Common Article 3 of the Geneva Conventions of 1949, and all other applicable international and domestic laws.

The detainees who remain at the Guantanamo Bay detention facility continue to be detained lawfully, both as a matter of international law and under U.S. domestic law. As a matter of international law, the United States is engaged not in a “war on terrorism,” as characterized in the draft report, but in an ongoing armed conflict with al-Qaida, the Taliban, and associated forces. As part of this conflict, the United States has captured and detained enemy belligerents, and is permitted under the law of war to hold them until the end of hostilities. Further, as a matter of domestic law, this detention is authorized by the 2001 Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war. We object to the finding that U.S. detention operations at Guantanamo constitute arbitrary detention in violation of applicable international law. In both international and non-international armed conflicts, a State may detain enemy belligerents consistent with the law of armed conflict until the end of hostilities, and such detention is not arbitrary.

During situations of armed conflict, the law of war is the *lex specialis* and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Further, despite the general presumption that specific law of war rules govern the entire process of planning and executing military operations in armed conflict, certain provisions of human rights treaties may apply in armed conflicts. For example, the obligations to prevent torture and cruel, inhuman, or degrading treatment or punishment in the Convention Against Torture (CAT) remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of war. As our response in Section IV further demonstrates, the United States is fully committed to ensuring that individuals it detains in any armed conflict are treated humanely in all circumstances, consistent with applicable U.S. treaty obligations, U.S. domestic law, and U.S. policy.

The United States notes that many of the sources referred to by the Inter-American Commission do not give rise to binding legal obligations on the United States or are not within the Commission’s mandate to apply with respect to the United States. The United States has undertaken a political commitment to uphold the American Declaration of the Rights and Duties of Man (“American Declaration”), a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory states.<sup>15</sup> Article 20 of the Statute of the Inter-

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<sup>15</sup> Because the American Declaration is non-binding, the United States interprets any assertions regarding alleged violations of the American Declaration as allegations that the United States has not lived up to its political commitment to uphold the Declaration. Furthermore, as the IACHR Statute makes clear, the powers of the Commission to issue recommendations as set forth in Article 20 to States not party to the American Convention are strictly advisory. Article 18 of the IACHR Statute sets forth enumerated powers of the Commission with respect to Member States of the OAS including preparing “such studies or reports as it considers advisable for the performance

American Commission on Human Rights (“IACHR Statute”) sets forth the powers of the Commission that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Further, the United States reiterates its understanding that the Commission lacks the authority to issue precautionary measures to a non-State Party to the American Convention. Accordingly, we continue to have concerns about the jurisdictional competence of the Commission with respect to the United States and the law of war.

Moreover, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor, as previously noted, is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention does not govern U.S. commitments under the American Declaration. Likewise, advisory opinions of the Inter-American Court interpreting other international agreements, such as the International Covenant on Civil and Political Rights (ICCPR), are not relevant.

### **III. Overview of United States’ Efforts and Accomplishments Regarding Guantanamo Closure**

The United States continues to work toward the goal of closing the detention facility at Guantanamo Bay, a process that started under the Bush Administration, and is working assiduously to reduce the detainee population at Guantanamo and to close the facility in a responsible manner that protects national security. President Obama has repeatedly reaffirmed this commitment, including in his State of the Union Address in January 2015; he has stated that closing the detention facility at Guantanamo is a national security imperative and that its continued operation weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists.

On January 22, 2009, President Obama signed Executive Order (E.O.) 13492, which ordered the closure of the detention facility at Guantanamo Bay. Pursuant to that order, the Department of Justice coordinated a special Guantanamo Review Task Force, which was established to review comprehensively information in the possession of the U.S. Government about the detainees in order to determine the appropriate disposition—transfer, prosecution, or other lawful disposition—for each of the 240 detainees subject to the review.

It is important to note that a decision to designate a detainee for transfer does not reflect a decision that the detainee poses no threat, nor does it equate to a judgment that the U.S. Government lacks legal authority to hold the detainee. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. The United States continues to have legal authority to hold Guantanamo detainees in law of war detention until the end of hostilities, consistent with

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of its duties,” making “recommendations to the governments of the states on the adoption of progressive measures in favor of human rights,” and conducting “on-site observations in a state, with the consent or at the invitation of the government in question.”

U.S. law and applicable international law, but has elected, as a policy matter, to ensure that it holds them no longer than necessary to mitigate the threat posed.

Subsequently, after working through numerous, complex issues associated with building a comprehensive process, the Periodic Review Board (PRB) process commenced in October 2013. The PRB consists of senior national security officials from the Departments of Defense, Homeland Security, Justice, and State, as well as from the Office of the Chairman of the Joint Chiefs of Staff and the Office of the Director of National Intelligence. The PRB process is a discretionary, administrative, interagency process that is reviewing the status of detainees at Guantanamo Bay to determine whether continued detention remains necessary to protect against a continuing significant threat to the security of the United States. In this way, the United States will ensure that any continued detention is carefully evaluated and justified. The PRB process thus makes an important contribution toward the Administration's goal of closing the Guantanamo Bay detention facility by ensuring a principled and sustainable process for reviewing the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

The PRB has conducted fourteen full hearings and three six-month file reviews. Eight of the full hearings have resulted in a final determination that law of war detention is no longer necessary, and one hearing is still pending a final determination.

Since 2002, more than 640 detainees have departed Guantanamo Bay to more than 40 countries, including OAS Member States. The United States is grateful to these governments for their support for U.S. efforts to close the Guantanamo Bay detention facility. All told, more than 80 percent of those at one time held at the Guantanamo Bay facility have been repatriated or resettled, including all detainees subject to final court orders directing their release. Of the 242 detainees at Guantanamo at the beginning of the Obama Administration, 116 have been transferred out of the facility. In 2014, 28 detainees were transferred from the facility, more than in any year since 2009. As of March 27, 2015, 122 detainees remain at the Guantanamo Bay detention facility, the lowest number since the initial weeks after the facility was opened. Of these, 56 are eligible for transfer, 10 are being prosecuted or have been convicted, with 2 currently awaiting sentencing, and the remaining 56 will be reviewed by the PRB.

#### **IV. Responses to Particular Issues Raised**

##### **A. Conditions of Detention**

###### **1. Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment or Punishment**

It is the clear position of the United States that torture and cruel treatment are categorically prohibited under domestic and international law, including human rights law and the law of armed conflict. The United States has taken important steps to ensure adherence to its legal obligations, establishing laws and procedures to strengthen the safeguards against torture and cruel treatment. For example, E.O. 13491, issued by President Obama during his first days in office, directs that, consistent with the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions, as well as U.S. law, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. The Executive Order also directs that no individual in U.S. custody in any armed conflict "shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3." The manual explicitly prohibits threats, coercion, and physical abuse. Interrogations undertaken in compliance with the Army Field Manual are

consistent with U.S. domestic and international legal obligations. E.O. 13491 also revoked all previous executive directives that were inconsistent with the Order, provided that no officer, employee, or agent of the U.S. Government could rely on any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009, and created a Special Task Force on Interrogations and Transfer Policies, which helped strengthen U.S. policies so that individuals transferred to other countries would not be subjected to torture.

The United States does not permit its personnel to engage in acts of torture or cruel, inhuman, or degrading treatment or punishment of any person in its custody either within or outside U.S. territory. As the United States recently reaffirmed in its presentation before the U.N. Committee Against Torture in November 2014, torture and cruel, inhuman, or degrading treatment or punishment are prohibited at all times in all places.

The Commission's draft report references the release of the declassified Executive Summary, Findings, and Conclusions of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program ("SSCI Report"). The SSCI Report contains a review of a program that included interrogation methods used on terrorism suspects in secret facilities at locations outside of both the United States and Guantanamo Bay. Harsh interrogation techniques highlighted in that Report are not representative of how the United States deals with the threat of terrorism today, and are not consistent with our values. In E.O. 13491, President Obama prohibited the use of those techniques and ended the detention and interrogation program described in the SSCI Report. President Obama also determined that the Executive Summary, Findings, and Conclusions of the SSCI Report should be declassified, with appropriate redactions necessary to protect national security, because public scrutiny, debate, and transparency will help to inform the public's understanding of the program to ensure that the United States never resorts to these kinds of interrogation techniques again.

## 2. Accountability

The Department of Defense, the Central Intelligence Agency (CIA), the Department of Justice, and others have conducted numerous independent, rigorous investigations into detainee treatment, detention policy, and conditions of confinement since the September 11 attacks. Reports have been issued by, among others, the Inspectors General of the Army, Navy, and CIA; Major General Ryder, the General Officer appointed by the Commander, U.S. Southern Command, for the purpose of investigating conditions of detention; an independent panel led by former Secretary of Defense James Schlesinger; the Senate Armed Services Committee; and the Senate Select Committee on Intelligence. For the sake of transparency and accountability, many of these reports were released to the public, to the extent consistent with national security and other applicable U.S. law and policy. These investigations led to hundreds of recommendations on ways to improve detention and interrogation operations, and the Department of Defense and the CIA have instituted processes to address these recommendations.

The U.S. military is, and has always been, required to investigate every credible allegation of abuse by U.S. forces in order to determine the facts, including identifying those responsible for any violation of law, policy, or procedures. The Department of Defense has multiple accountability mechanisms in place to ensure that personnel adhere to law and policy associated with military operations and detention.

The Department of Justice conducted preliminary reviews and criminal investigations into the treatment of individuals alleged to have been mistreated while in U.S. Government

custody subsequent to the September 2001 terrorist attacks, brought criminal prosecutions in several cases, and obtained the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody. Further, in August 2009, the Department of Justice commenced a preliminary review of the treatment of 101 persons alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks. That review, led by Assistant United States Attorney John Durham, who is a career federal prosecutor, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution consistent with the Principles of Federal Prosecution, which require that each case be evaluated for a clear violation of a federal criminal statute with provable facts that reflect evidence of guilt beyond a reasonable doubt and a reasonable probability of conviction.

With respect to accountability for legal advice, the conduct of two senior Department of Justice officials in giving legal advice that justified the use of certain “enhanced interrogation techniques” following the September 11 attacks was reviewed by an Associate Deputy Attorney General, a longtime career Department of Justice official. In a 69-page January 5, 2010 memorandum subsequently released publicly with limited redactions, he found that they had narrowly construed the torture statute, often failed to expose countervailing arguments, and overstated the certainty of their conclusions. He concluded that although they had exercised poor judgment, the evidence did not establish that they had engaged in professional misconduct.

### 3. Camp 7 Conditions

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo Bay, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. Camp 7 is a climate-controlled, single-cell facility currently used to house a small group of special detainees at Guantanamo captured during operations in the war against al-Qaida, the Taliban, and associated forces. The transfer of these detainees to Guantanamo Bay was announced in 2006. Individuals in this group are accused of plotting the September 11 attacks on the United States, the attack on the USS COLE, and various other attacks that have taken the lives of innocent civilians around the world. Facilities at Camp 7 or at any of the other camps are routinely maintained for habitability, which would include repairing or replacing equipment, plumbing, or structures in the interest of humane treatment consistent with applicable treatment standards.

The Department of Defense has been working closely with the International Committee of the Red Cross to facilitate increased opportunities for high-value Guantanamo detainees to communicate with their families. The addition of near-real-time communication is another step in the Department of Defense’s efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of confinement for detainees in its custody. The Department of Defense has concluded that increasing family contact for the high-value detainees can be done in a manner that is consistent with both humanitarian and security interests.

### 4. Role of Health Professionals

The Joint Medical Group at Guantanamo is committed to providing appropriate and comprehensive medical care to all detainees. The healthcare provided to the detainees being held at the Guantanamo Bay detention facility is comparable to that which our own service personnel receive while serving at Joint Task Force-Guantanamo. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialty physicians.

U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Department of Defense physicians and health care personnel charged with providing care to detainees take their responsibility for the health of detainees very seriously. DoD Instruction 2310.08E, “Medical Program Support for Detainee Operations,” June 6, 2006, states: “Health care personnel charged with the medical care of detainees have a duty to protect detainees’ physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces.”

Military physicians, psychologists, and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Department of Defense policy authorizes healthcare personnel qualified in behavioral sciences to provide consultative services to support authorized law enforcement or intelligence activities, including observation and advice on the interrogation of detainees when the interrogations are fully in accordance with applicable law and interrogation policy. These behavioral science consultants are not involved in the medical treatment of detainees and do not access medical records.

It is the policy of the United States to support the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws. To that end, the Department of Defense has established clinically appropriate procedures to address the medical care and treatment of individual detainees experiencing the adverse health effects of clinically significant weight loss, including those individuals who are engaged in hunger strikes. Involuntary feeding is used only as a last resort, if necessary to address significant health issues caused by malnutrition and/or dehydration. These procedures are administered in accordance with all applicable domestic and international laws pertaining to humane treatment.

#### 5. Religious and Cultural Accommodations

Detainees at Guantanamo have the opportunity to pray five times each day. Prayer times are posted for the detainees, and arrows are painted in the living areas—in each cell and in communal areas—so that the detainees know the direction of Mecca. Once prayer call sounds, detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if detainees are not involved in religious activity. The majority of detainees are in communal living accommodations, where they are able to pray communally. Even detainees who are in single cell living accommodations conduct prayer together.

Joint Task Force Guantanamo schedules detainee medical appointments, interviews, classes, legal visits, and other activities mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meal schedules in observance of religious requirements. Special accommodations are made to adhere to Islamic dietary needs. Department of Defense personnel deployed to Guantanamo receive cultural training to ensure they understand Islamic practices.

#### 6. Requests by the Commission to Visit the Guantanamo Bay Detention Facility

The United States is committed to being as open and transparent to the international community as possible. We have invited the Commission to visit the Guantanamo Bay detention

facility and view the detention operations there. However, because of relevant security procedures in effect at the detention facility, we are unable to accommodate the Commission's request to meet with detainees held there. The United States continues to recognize the special role of the International Committee of the Red Cross (ICRC) under the Geneva Conventions of 1949 and grants it access to all detainees held at Guantanamo Bay. We value our relationship with the ICRC and address any concerns it may raise at all levels of the chain of command.

## **B. Access to Justice**

### **1. Habeas Corpus**

All Guantanamo Bay detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge. Except in rare instances required by compelling security interests, all of the evidence relied upon by the government in habeas proceedings to justify detention is disclosed to the detainees' counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose cases have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during pendency of proceedings.

With regard to the effectiveness of the habeas remedy afforded to Guantanamo detainees, the United States notes that the evidentiary issues and other procedural concerns raised in the draft report are matters within the expertise and purview of our independent federal judiciary, as the U.S. Supreme Court ruled in *Boumediene v. Bush*, 553 U.S. 723, 796 (2008). Many of the detainees at Guantanamo today have challenged their detention in U.S. federal courts. All of the detainees at Guantanamo who have prevailed in habeas proceedings under orders that are no longer subject to appeal have been either repatriated or resettled. To date, 32 detainees have been ordered released, and they were transferred from Guantanamo pursuant to U.S. federal court orders.

### **2. Military Commissions**

The U.S. Government remains of the view that in our efforts to protect our national security, military commissions and federal courts can—depending on the circumstances of the specific prosecution—each provide tools that are both effective and legitimate. A statutory ban currently prohibits the use of funds to transfer Guantanamo detainees to the United States, however, even for prosecution in federal court.

All current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are consistent with those in Additional Protocol II to the 1949 Geneva Conventions, as well.

These include: (1) innocence is presumed and the prosecution must prove guilt beyond a reasonable doubt; (2) there is a prohibition on the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except against a person accused of torture or such treatment as evidence that the statement was made; (3) the accused has latitude in selecting defense counsel; (4) in capital cases, the accused is provided counsel “learned in applicable law relating to capital cases”; and (5) the accused has the right to pre-trial discovery.

The 2009 Military Commissions Act also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review, and

subsequently to the U.S. Court of Appeals for the District of Columbia Circuit and then to the U.S. Supreme Court, both of which are federal civilian courts comprised of life-tenured judges. Further, the United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are now transmitted via video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the Office of Military Commissions website, [www.mc.mil](http://www.mc.mil).

### **C. Transfer Issues**

#### **1. Yemeni Detainees**

Seventy-five of the remaining 122 detainees at Guantanamo are Yemeni nationals, 18 of whom are designated for transfer subject to appropriate security measures. An additional 30 Yemeni nationals are designated for “conditional detention,” which means they are not approved for repatriation to Yemen at this time, but may be transferred to third countries if an appropriate resettlement option becomes available, or repatriated to Yemen in the future if security conditions improve.

The current situation in Yemen precludes us from repatriating Yemeni detainees at this time. Accordingly, we are vigorously engaging with partners and allies around the world for assistance in resettling these detainees. The U.S. Government, through intensive diplomatic efforts across the world, has found and continues to identify countries willing to resettle Yemeni detainees, including recent transfers of four individuals to Oman, three to Kazakhstan, three to Georgia, and one each to Slovakia and Estonia.

#### **2. Non-refoulement**

As a matter of fundamental policy and practice, the United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured. The United States’ firm and long-standing commitment to this policy is demonstrated in many ways, such as in section 1242 of the Foreign Affairs Reform and Restructuring Act where it is explicitly stated, and in E.O. 13491, which required the formation of a special U.S. Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and U.S. policies pertaining to treatment. The United States considers the totality of relevant factors relating to the individual to be transferred and the proposed recipient government in question. Such factors include, but are not limited to:

- the individual’s allegations of prior or potential mistreatment by the receiving government;
- the receiving country’s human rights record;
- whether post-transfer detention is contemplated;
- the specific factors suggesting that the individual in question is at risk of being tortured by officials in that country;
- whether similarly situated individuals have been tortured by the country under consideration;
- and, where applicable, any diplomatic assurances of humane treatment from the receiving country (including an assessment of their credibility).
- Humane treatment assurances are necessarily tailored to the specific context of a particular transfer. With respect to law of war detainee transfers, it is U.S. practice to obtain

access for post-transfer monitoring where post-transfer detention by the receiving state is anticipated. Specifically, the United States seeks consistent, private access to the individual who has been transferred and thereafter detained, with minimal advance notice to the detaining government. If the United States determines, after taking into account all relevant information, including any assurances received and the reliability of such assurances, that it is more likely than not that a person would be tortured if transferred to a foreign country, the United States would not approve the transfer of the person to that country.

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### 3. Transfers

The number of detainees remaining at Guantanamo Bay declined further in 2015 as part of ongoing U.S. government efforts to close the facility. On January 14, 2015, the Defense Department announced the transfer of Guantanamo detainee Akhmed Abdul Qadir to Estonia. See January 14, 2015 Release No: NR-016-15, available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17109>. In accordance with President Obama's January 22, 2009 executive order, Qadir was unanimously approved for transfer by the six departments and agencies making up the Guantanamo Review Task Force. Also on January 14, the Defense Department announced the transfers of Al Khadr Abdallah Muhammad Al Yafi, Fadel Hussein Saleh Hentif, Abd Al-Rahman Abdullah Au Shabati, and Mohammed Ahmed Salam from the detention facility at Guantanamo Bay to Oman. See Release No: NR-015-15, available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17110>. These four detainees were approved for transfer by the Guantanamo Review Task Force. After the transfers announced on January 14, 2015, 122 detainees remained at Guantanamo Bay.

On June 13, 2015, the Department of Defense announced the transfer to Oman of six Guantanamo detainees, approved for transfer by the Guantanamo Review Task Force. See June 13, 2015 Release No: 235-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/605565/detainee-transfer-announced>.

On September 17, 2015, the Department of Defense announced the repatriation of Younis Abdurrahman Chekkouri from the detention facility at Guantanamo Bay to the Government of Morocco. See September 17, 2015 Release No: NR-361-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/617549/detainee-transfer-announced>. Chekkouri was approved for transfer by the Guantanamo Review Task Force. The Department of Defense announced the transfer of Abdul Shalabi from the detention facility at Guantanamo Bay to the government of the Kingdom of Saudi Arabia on September 22. See September 22, 2015 Release No: NR-370-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/618219/detainee-transfer-announced>. Shalabi was recommended for transfer by the Periodic Review Board established by E.O. 13567.

The Department announced the transfer of Ahmed Ould Abdel Aziz from the detention facility at Guantanamo Bay to the Government of Mauritania on October 29.

See October 29, 2015 Release No: NR-412-15. On October 30, 2015, the Department of Defense announced the repatriation of Shaker Aamer to the Government of the United Kingdom. See October 30, 2015 Release No: NR-415-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/626666/detainee-transfer-announced>. Both transfers announced in October were pursuant to approval by the Guantanamo Review Task Force. For discussion of litigation involving Aamer, see section 3.a(2), *infra*.

On November 15, 2015, the Department of Defense announced the transfer of five detainees at Guantanamo to the Government of the United Arab Emirates. See November 15, 2015 Release No: NR-438-15, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/628980/detainee-transfers-announced>. Four of the five detainees were approved for transfer after a comprehensive review by the Guantanamo Review Task Force. The other was recommended for transfer by the Periodic Review Board, established by E.O. 13567. As of November 15, 2015, 107 detainees remained at Guantanamo Bay.

#### **4. U.S. court decisions and proceedings**

##### ***a. Detainees at Guantanamo: Habeas Litigation***

###### ***(1) Al-Warafi v. Obama and other petitions asserting cessation of active hostilities***

On April 17, 2015, the United States filed its opposition to Al-Warafi's motion to grant his petition for habeas corpus. As discussed in *Digest 2013* at 609-11, the U.S. Court of Appeals for the D.C. Circuit had previously affirmed the district court's denial of Al-Warafi's earlier petition for habeas relief, which was premised on his assertion that he was entitled to recognition as "medical personnel" under the First Geneva Convention. Al-Warafi's latest motion claims that his detention has become unlawful because the armed conflict against the Taliban in Afghanistan allegedly concluded at the end of 2014. The U.S. brief in opposition asserts that active hostilities remain ongoing and clarifies that public statements by President Obama that the U.S. combat mission in Afghanistan was coming to an end do not constitute the requisite determination by the U.S. government that active hostilities had ceased pursuant to the law of armed conflict, including the Third Geneva Convention and U.S. court precedent. The brief identifies numerous examples of attacks by the Taliban in 2015 precipitating hostile actions by U.S. and coalition forces remaining in Afghanistan in support of its assertion that hostilities are ongoing. The brief emphasizes that this determination is a matter for the political branches, and the judiciary must give the political branches "wide deference" on questions concerning the cessation of hostilities. The brief cites congressional and executive branch determinations and statements confirming that active hostilities are ongoing in Afghanistan post-2014, including Mr. Preston's ASIL remarks, excerpted *supra*. The public version of the U.S. brief filed in the district court in opposition to Al-

Warafi's 2015 petition is available at <http://www.state.gov/s/l/c8183.htm>. The court denied the petition on July 30, 2015. *Al Warafi v. Obama*, No. 09-CV-2368 (D.D.C.).

On May 8, 2015, the United States filed a similar brief in support of its motion to dismiss the petition for habeas by Fayez Mohammed Ahmed Al Kandari, who also claimed he was being unlawfully detained because the war in Afghanistan allegedly had ended. The U.S. brief in *Al Kandari* is also available at <http://www.state.gov/s/l/c8183.htm>. On July 24, 2015, the United States filed its reply brief in support of its motion to dismiss. The reply brief is also available at <http://www.state.gov/s/l/c8183.htm>. On August 31, 2015, the district court issued its opinion denying the petition. *Al Kandari v. United States*, No. 15-CV-329 (D.D.C.). On September 8, 2015, the Periodic Review Board concluded its review of Al-Kandari's case, recommending his transfer. \*\*\*\*

On September 4, 2015, the United States filed its brief in response to the petition of Moath Hamza Ahmed Al-Alwi and in support of its motion to dismiss that petition. Al-Alwi, who had previously been determined to be part of al-Qa'ida or Taliban forces by the U.S. Court of Appeals for the District of Columbia, also claimed his detention became unlawful after the U.S. combat mission in Afghanistan allegedly ended at the close of 2014. The U.S. brief makes the same arguments as the briefs in *Al-Warafi* and *Al Kandari*: (1) that law of war detention remains lawful until the end of active hostilities and active hostilities against al-Qa'ida and Taliban forces have not ceased; and (2) the determination of when active hostilities have ceased is reserved for the political, not judicial, branches of government. The brief also responds to Al-Alwi's additional assertions that his detention violates the Convention Against Torture and Additional Protocol I to the Geneva Conventions. The public version of the U.S. brief in *Al-Alwi* is available at <http://www.state.gov/s/l/c8183.htm>. The U.S. reply brief, filed on November 24, 2015, is also available at <http://www.state.gov/s/l/c8183.htm>.

(2) Aamer v. Obama

On July 2, 2015, the United States filed its opposition to the motion brought by petitioner Shaker Aamer to compel examination by a mixed medical commission. The introduction to the U.S. brief, below, summarizes the background of the case and the U.S. arguments against the extraordinary remedy sought by the petitioner. The full text of the brief is available at <http://www.state.gov/s/l/c8183.htm>. On October 30, 2015, the Department of Defense announced Aamer's repatriation to the United Kingdom. Aamer was approved for transfer by the Guantanamo Review Task Force. See Defense Department news release, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/626666/detainee-transfer-announced>.

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\*\*\*\* Editor's note: The Department of Defense announced Al Kadari's repatriation to Kuwait on January 8, 2016. See Defense Department news release, available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/641982/detainee-transfer-announced>.

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Petitioner Shaker Aamer moves the Court for the extraordinary remedy of a permanent injunction compelling the Executive to establish a Mixed Medical Commission pursuant to one of the military regulations that implements provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (“Third Geneva Convention” or “GC III”), and also to appoint his hired medical expert, Dr. Emily Keram, to that Commission. . . . Such an order would necessarily require the Executive to establish such a commission, craft procedures for it, and develop criteria applicable to this non-international armed conflict against al-Qaida, Taliban, and associated forces from principles laid down in the Model Agreement annexed to the Third Geneva Convention for determining the types of disabilities and sicknesses that warrant repatriation. Each of these steps implicates the United States’ interpretation and application of the Third Geneva Convention and the implementing military regulations. Petitioner seeks this relief even though neither the relevant provisions of that military regulation nor of the Third Geneva Convention apply to him.

The Court should deny Petitioner’s motion for two reasons. First, the Court does not have or should not exercise jurisdiction to consider his claim for relief. Pursuant to 28 U.S.C. § 2241(e)(2), the Court lacks jurisdiction to hear any claim that does not sound in habeas. Here, Petitioner’s claim for relief does not sound in habeas, and therefore is barred, because he seeks affirmative injunctive relief that will not lead directly to his release or otherwise affect the duration or form of his detention. Petitioner claims that the Court has authority to order this extraordinary relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), but the All Writs Act does not confer or enlarge the Court’s jurisdiction. Moreover, even if Petitioner’s claim could be said to sound in habeas, the Court should refrain from exercising its jurisdiction over this claim as a matter of equity—which it may do pursuant to statutory and common law—because an order requiring the Executive to take an action pursuant to certain provisions of a military regulation implementing its treaty obligations would be contrary to the Executive’s considered interpretation about the scope and applicability of those provisions, which in turn would be inconsistent with the great deference the Court should give the Executive on these matters. It would also place an extraordinary burden on the Executive by, among other things, requiring the Executive to launch a difficult and unprecedented policy process to establish the procedures for a Mixed Medical Commission and the contours of the standards it would apply in this non-international armed conflict.

Second, although framed as a request for a preliminary injunction, Petitioner actually seeks permanent injunctive relief requiring the establishment of a Mixed Medical Commission to decide his case (because he does not seek to preserve the status quo pending further litigation or relief that is “preliminary”), but he has not made the showing required to warrant such an extraordinary remedy. As an initial matter, Petitioner fails to demonstrate that he is entitled to the establishment of, and examination by, a Mixed Medical Commission. Petitioner claims that he should be accorded the privileges of an enemy prisoner of war—which can include access to a Mixed Medical Commission—because, pursuant to Army Regulation 190-8, he qualifies as an “other detainee,” a placeholder status for individuals “who have not been classified as an [enemy prisoner of war, or EPW], [retained personnel, or RP], or [civilian internee, or CI], [and who] shall be treated as EPWs until a legal status is ascertained by a competent authority.” Army Reg.

190-8, Appendix B, Section II-Terms. But Petitioner's legal status has been determined. In 2002, the Executive determined that al-Qaida, Taliban, and associated forces did not qualify for prisoner of war status under the Third Geneva Convention. In 2004, a Combatant Status Review Tribunal ("CSRT") determined that Petitioner is an "enemy combatant," which means that the Executive determined that he was in fact an individual who was part of or supporting al-Qaida, Taliban, or associated forces, forces that the President previously determined did not qualify for prisoner of war status. Accordingly, because Petitioner was detained as part of those forces, his status has already been determined, and he does not qualify for protections afforded an EPW, either permanently or as a placeholder under the regulation, and he therefore has no basis to seek permanent injunctive relief on those grounds.

Petitioner is also not entitled to such wide-ranging, permanent injunctive relief because he cannot show that the equities tip in his favor. The injunctive relief sought by Petitioner would be improper because it would impose substantial hardships on the Executive and, on the facts presented here, would be wholly unprecedented. For similar reasons, the public interest also tips in favor of Respondents. In contrast, Petitioner's claim that an injunction would remedy his purported irreparable injury is speculative because at best, as he concedes, an order establishing a Mixed Medical Commission would only provide him an opportunity to seek release, not actual release. Moreover, in prior briefing, Respondents submitted a declaration of the senior medical officer at Guantanamo responsible for Petitioner's care demonstrating that his medical condition is far different than Dr. Keram claims. Thus, on balance, Petitioner is not entitled to the relief he seeks.

\* \* \* \*

(3) *Al-Hawsawi v. Obama*

On November 16, 2015, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in *Al-Hawsawi v. Obama*, No. 15-5267. Al-Hawsawi filed a habeas petition in the district court, seeking an order for production of unredacted copies of all of his medical records, the appointment of an independent physician to report on his health, and a preliminary injunction halting military commission proceedings pending the district court's resolution of his petition. The district court dismissed the petition, ruling that Al-Hawsawi's claims are discovery requests over which the court lacks subject-matter jurisdiction. The U.S. brief in support of affirming the dismissal is excerpted below (with footnote omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

\* \* \* \*

The district court properly dismissed Al-Hawsawi's action for lack of subject-matter jurisdiction. The Military Commissions Act and this Court's precedents expressly restrict the jurisdiction of the federal courts to claims that properly sound in habeas. Al-Hawsawi's claims are not cognizable in habeas, for resolving his claims would not require a court to address the lawfulness of his detention or any aspect of his confinement, and granting the relief he seeks would not necessarily affect his detention. Because Al-Hawsawi's claims fall beyond the outer limits of the

writ, they are barred by 28 U.S.C. § 2241(e)(2).

**A. Al-Hawsawi's Claims Are Not Cognizable in Habeas and Are Therefore Barred by 28 U.S.C. § 2241(e)(2)**

Through Section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e), Congress exercised its constitutional prerogative to withdraw from federal courts jurisdiction over all conditions-of-confinement claims brought against the United States by detainees at Guantanamo Bay. One subsection barred federal courts from hearing any “application for a writ of habeas corpus filed by or on behalf of” a detainee. 28 U.S.C. § 2241(e)(1). The other barred federal courts from hearing all actions “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of” a detainee. *Id.* § 2241(e)(2).

The Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), invalidated § 2241(e)(1) with respect to Guantanamo detainees such as Al-Hawsawi, holding that withdrawing jurisdiction over detainee habeas petitions violated the Suspension Clause. But *Boumediene*'s limited holding does not extend to § 2241(e)(2), which this Court has upheld as a valid exercise of congressional power. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012); *Kiyemba v. Obama*, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009). Because § 2241(e)(2) remains in full force, a detainee who does not allege a “proper claim for habeas relief” may not invoke the jurisdiction of the federal courts. *Kiyemba*, 561 F.3d at 513. If a claim does not sound in habeas, it constitutes “an action other than habeas corpus barred by section 2241(e)(2).” *Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014). Section 2241(e)(2) bars Al-Hawsawi's claims.

1. The habeas petitioner's “essential claim is that his custody in some way violates the law.” *Aamer*, 742 F.3d at 1036. The writ of habeas corpus is an “instrument to obtain release from such confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). At its core, the writ allows a petitioner to challenge the fact, place, or duration of his confinement. *Ibid.* This Court has held that the writ also allows a petitioner to challenge certain conditions of his confinement. *Aamer*, 742 F.3d at 1038.

The writ does not encompass any claim that a petitioner might raise, however. As this Court has explained, “petitioners invoking habeas jurisdiction must assert claims that sound in habeas.” *Aamer*, 742 F.3d at 1033. The purpose of the writ is “to remedy,” *id.* at 1036, confinement that is “more burdensome than the law allows,” *id.* at 1038 (quoting *Miller v. Overholser*, 206 F.2d 415, 420 (D.C. Cir. 1953)). To qualify as a conditions-of-confinement claim sounding in habeas, a claim must present the “substantive inquiry” of whether “the conditions in which the petitioner is currently being held violate the law.” *Id.* at 1035; see also *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (per curiam) (evaluating whether a complaint sought “a judgment at odds with his conviction” or some other aspect of the prisoner's confinement cognizable in habeas). Only then does that claim test “the form of detention” in a manner cognizable under the writ. *Aamer*, 742 F.3d at 1033 (quoting *Hudson v. Hardy*, 424 F.2d 854, 855 n.3 (D.C. Cir. 1970)).

In *Aamer*, for instance, this Court considered three identical requests for a preliminary injunction banning the government from implementing its policy of administering enteral feeding when medically necessary to preserve a detainee's life and health. *Id.* at 1026-27. This Court reasoned that such claims ought to be cognizable in habeas because, like challenges to the place of confinement, the claims rested on the contention that “some aspect” of the petitioners' detention “deprived” the petitioners “of a right to which” they were “entitled while in custody.” *Id.* at 1036. Those claims directly presented the issue of whether the conditions of the *Aamer*

petitioners' confinement were lawful. And resolving those claims in the *Aamer* petitioners' favor would have necessarily eliminated the allegedly unlawful conditions.

*Aamer* does not suggest that habeas jurisdiction extends to claims that do not require a court to pass upon whether "the conditions in which the petitioner is currently being held violate the law." 742 F.3d at 1035. As this Court has recognized, claims where "success on the merits" would not necessarily "impact \* \* \* the duration of custody" or some other aspect of a petitioner's detention "may not even lie within the bounds of habeas, much less at its core." *Davis v. United States Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013). To the contrary, a claim that does not "as such raise any implication about the validity" of a petitioner's detention or "necessarily" "affect" some cognizable aspect of the petitioner's confinement does not present a claim "on which habeas relief could [be] granted on any recognized theory" of the writ's scope. *Muhammad*, 540 U.S. at 754-55; see *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (explaining that a claim which does not "necessarily demonstrate the invalidity of confinement or its duration" need not be brought in habeas form); *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (emphasizing that the Court has not recognized that habeas is even "available \* \* \* where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody'" (quoting *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring))).

2. Neither of Al-Hawsawi's claims "raise[s] any implication about the validity" of the fact, place, duration, or conditions of his confinement. *Muhammad*, 540 U.S. at 754-55; see *Davis*, 716 F.3d at 665. Al-Hawsawi contends that he has not received complete records of his medical history, although the government is providing his medical records on a rolling basis. D... He also contends that he must receive a report on his health from an independent physician (and identifies his preferred doctor), although the government has provided and is continuing to provide him with medical care. ...

Such claims do not sound in habeas. The "substantive inquiry" that governs whether Al-Hawsawi should prevail on these claims does not require a court to decide whether the government's medical care is constitutionally adequate. See *Aamer*, 742 F.3d at 1035. Indeed, a court that reaches the merits of Al-Hawsawi's arguments would decide his claims without reference to his confinement at all. At most, a court would have to determine whether Al-Hawsawi had some free-standing right to obtain his medical records in some different way, or to obtain the appointment of a doctor to produce a report about Al-Hawsawi's health. But such claims are not habeas claims, and at no point in the inquiry would the legality of any aspect of his confinement enter play.

The relief that Al-Hawsawi seeks further underscores that his claims do not sound in habeas, as the relief does not seek changes to his conditions of confinement. Far from directly challenging a condition of his confinement, he seeks access to records and appointment of an expert. As the district court correctly recognized, Al-Hawsawi's claims are demands for discovery in the guise of a habeas action. Because discovery requests do not sound in habeas, they are barred by 28 U.S.C. § 2241(e)(2). The district court properly dismissed Al-Hawsawi's action for lack of subject-matter jurisdiction.

\* \* \* \*

**C. Even If Al-Hawsawi's Claims Are Not Barred by 28 U.S.C. § 2241(e)(2), the District Court's Ruling Should Be Affirmed**

Even if the district court decided the jurisdictional question incorrectly, its judgment of dismissal without prejudice should be affirmed on prudential grounds. Al-Hawsawi has not exhausted his remedies before the military commission. And comity counsels against interfering with ongoing commission proceedings. These prudential considerations suggest that the district court's judgment should be affirmed whether Al-Hawsawi's claims sound in habeas or not.

1. "[F]or prudential reasons," the Supreme Court requires defendants to "exhaust[] \* \* \* alternative remedies" before invoking the writ. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); see *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999) (applying that rule in the context of military tribunals); *Noyd v. Bond*, 395 U.S. 683, 693-99 (1969) (same). The "reach of the law's writs" is informed by "[p]ractical considerations and exigent circumstances." *Boumediene*, 553 U.S. at 793. When neither pragmatism nor exigency demands judicial intervention, using habeas to superintend pending military proceedings would generate "wholly needless" friction between military tribunals and Article III courts. See *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Al-Hawsawi himself acknowledges that "courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." ...

Prudential considerations are especially important here. Congress and the President, acting together, established the military commission system to "disciplin[e] \* \* \* enemies" charged with "violat[ing] the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (per curiam); see 10 U.S.C. § 948a et seq. Al-Hawsawi's prosecution by military commission reflects the considered judgment of the political branches about how the grave crimes with which he is charged should be tried. The deference that the courts generally owe such a judgment, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), underscores the peril of hasty intervention in the commission process.

Exercising jurisdiction now over Al-Hawsawi's claims risks transforming the federal courts into a venue for interlocutory review of any decision that a military commission might issue. Al-Hawsawi's own claims prove the point: To the extent he has invoked the right to counsel at all, the right he asserts relates not to pending habeas proceedings but to his military commission. ... This would create uncertainty about the orderly progression of military commission proceedings that could not be confined to this case. Such proceedings could be impaired any time a detainee can convert an objection to any military commission order into a complaint about some aspect of his confinement, no matter the strength on the merits of that imaginative claim. This Court should decline Al-Hawsawi's invitation to interfere with the military commission process.

2. The breadth of alternative remedies available to Al-Hawsawi also counsels against preempting ongoing military commission proceedings by way of habeas corpus. *Cf. In re Al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) (observing that this Court remains "mindful" of Congress's choices in crafting the Military Commissions Act when deciding whether to grant relief). As we have explained, the military commission has jurisdiction to hear and to remedy any concerns that the governmental policies at issue affect the integrity of Al-Hawsawi's trial. And Al-Hawsawi may challenge the military commission's rulings in appellate courts.

That conclusion does not change even if this Court credits Al-Hawsawi's belated attempt to convert his district court filing into a conditions-of-confinement challenge. Again, Congress has given Al-Hawsawi ample opportunities to raise such arguments after his military trial concludes. And the military commission offers him multiple avenues of relief if, as he now suggests, his medical condition prevents him from contributing to his defense. For example, Al-Hawsawi retains the right to request a continuance in his military case at any time, which the

military judge may grant upon a showing of “reasonable cause.” 10 U.S.C. § 949e. And the judge in Al-Hawsawi’s military commission prosecution has entertained a continuance on the ground that a panel of independent medical experts should assess the fitness for trial of one of Al-Hawsawi’s co-defendants. In sum, the military commission process is more than capable of addressing Al-Hawsawi’s recharacterized claims.

\* \* \* \*

**b. Former Detainees**

*Al Janko v. Gates*

As discussed in *Digest 2014* at 771-74, the U.S. Court of Appeals for the D.C. Circuit upheld the district court’s dismissal of a complaint for civil damages brought by a former detainee due to its lack of jurisdiction under the Military Commissions Act (“MCA”), 28 U.S.C. § 2241(e)(2). *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014). On February 4, 2015, the United States filed its brief in the U.S. Supreme Court in opposition to the petition for certiorari. Excerpts follow from the U.S. brief, with footnotes omitted.

\* \* \* \*

The court of appeals correctly held that [Section 2241\(e\)\(2\)](#) forecloses petitioner’s money-damages action. Petitioner’s arguments to the contrary (Pet. 9-22) lack merit, and he does not contend that any other circuit has reached a different conclusion on either his statutory or his constitutional arguments. The only other circuits that have addressed the constitutionality of [Section 2241\(e\)\(2\)](#) have reached the same conclusion as the decision below, and this Court recently denied review of those decisions. See [Ameur v. Gates, No. 14-6711, 2015 WL 232012 \(Jan. 20, 2015\)](#); [Hamad v. Gates, 134 S. Ct. 2866 \(2014\)](#) (No. 13-9200). Further review is therefore unwarranted.

1. Petitioner contends (Pet. 17-22) that because he was granted habeas relief, [Section 2241\(e\)\(2\)](#) does not bar his money-damages action against federal officials. That argument rests on a misinterpretation of [Section 2241\(e\)\(2\)](#).

a. With exceptions not relevant here, [Section 2241\(e\)\(2\)](#) prohibits a court from exercising jurisdiction over a non-habeas action “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 or is awaiting such determination.” [28 U.S.C. 2241\(e\)\(2\)](#). The court of appeals correctly held that the phrase “determined by the United States to have been properly detained as an enemy combatant” refers exclusively to an Executive Branch determination, not to a judicial ruling in a habeas proceeding.

Taken in isolation, the phrase “United States” is “susceptible of multiple meanings.” Pet. App. 10a. For that reason, in construing “United States” in various federal statutes, courts have examined the relevant statutory context to determine whether the term refers to the United States as a sovereign, the components of the Executive Branch alone, or some other concept. ...For a number of reasons, the statutory context of [Section 2241\(e\)\(2\)](#) indicates that the phrase

“determined by the United States to have been properly detained as an enemy combatant” refers exclusively to the Executive Branch. ...

First, the text of [Section 2241\(e\)\(2\)](#) makes clear that “United States,” which appears three times in that provision, means the Executive Branch. The phrase immediately preceding “determined by the United States to have been properly detained as an enemy combatant” limits Section 2241(e)(2)’s application to an alien who “is or was detained by the United States.” As the court of appeals concluded, the use of “United States” in that phrase clearly refers exclusively to the Executive Branch; Congress and the Judiciary do not detain enemy combatants. See Pet. App. 11a-12a. And because it would be discordant to interpret the term “United States” in two different ways within the same sentence, it follows that the phrase “determined by the United States” also refers exclusively to the Executive Branch. ...

In addition, [Section 2241\(e\)\(2\)](#) applies either to an alien “determined by the United States to have been properly detained as an enemy combatant” *or* to an alien who “is awaiting such determination.” That disjunctive structure strongly indicates that a single entity makes the relevant “determination.” If petitioner were correct that both the Executive Branch and the Judicial Branch can make the relevant “determination” (see Pet. 22), an alien could both have been determined to be an enemy combatant (by the Executive Branch) *and* simultaneously be awaiting “such determination” (by the Judicial Branch). That would not be consistent with a statute that treats those two circumstances as alternatives.

Second, neighboring [Subsection \(e\)\(1\) of Section 2241](#), which was enacted at the same time as the current version of Subsection (e)(2), unequivocally uses the term “United States” to mean the Executive Branch. See Military Commissions Act of 2006 (MCA), [Pub. L. No. 109-366, § 7\(a\), 120 Stat. 2635](#). In language that parallels Subsection (e)(2), Subsection (e)(1) withdraws jurisdiction over habeas actions filed by any alien “detained by the United States” who has been “determined by the United States to have been properly detained as an enemy combatant” or “is awaiting such determination.” The phrase “determined by the United States” in that provision must refer exclusively to the Executive Branch’s determination. As the court of appeals explained, “[i]n 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.” Pet. App. 14a; see *id.* at 18a n.7 (“The statute cannot be fairly read to include within the meaning of ‘determined by the United States’ a judicial decision which, in the same statutory section, the Congress attempted to preclude.”). The identical phrase “determined by the United States” in Subsection (e)(2) should be construed the same way. ...

Third, the statutory history of [Section 2241\(e\)\(2\)](#) indicates that Congress intended an Executive Branch determination of an alien’s status alone to trigger the jurisdictional bar. The version of [Section 2241\(e\)\(2\)](#) that preceded the current version barred a non-habeas “action 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 in accordance with [statutory-review] procedures \*\*\* to have been properly detained as an enemy combatant.” DTA § 1005(e)(1), 119 Stat. 2742 ([28 U.S.C. 2241\(e\)\(2\)\(B\)](#) (Supp. V 2005)). As the court of appeals explained, that provision recognized that the detaining entity (the Department of Defense) was different from the entity determining the propriety of the detention (the D.C. Circuit). See Pet. App. 15a-16a. But when Congress amended the statute in 2006, it “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).” *Id.* at 16a. See MCA § 7(a), 120 Stat.

2635. That change signaled Congress’s intent that the statutory bar be triggered by the determination of the detaining authority, rather than by the determination of the reviewing court. That inference is confirmed by the legislative record.

b. Petitioner does not meaningfully address the statutory context that the court of appeals found to support the respondents’ interpretation of [Section 2241\(e\)\(2\)](#), and he does not address the statutory history of [Section 2241\(e\)\(2\)](#) at all. ...

Petitioner also contends ... that his interpretation is compelled by the constitutional-avoidance canon. But courts are obligated to “ ‘construe \*\*\* statute[s] to avoid [constitutional] problems’ ” only “if it is ‘fairly possible’ to do so.” [Boumediene v. Bush](#), 553 U.S. 723, 787 (2008) (quoting [Immigration & Naturalization Serv. v. St. Cyr](#), 533 U.S. 289, 299-300 (2001)) (second set of brackets in original). Here, as the court of appeals held, “only one construction of section 2241(e)(2) is ‘fairly possible.’ ” Pet. App. 22a n.9 (quoting [United States v. Jin Fuey Moy](#), 241 U.S. 394, 401 (1916)). And in any event, no serious constitutional question is raised by applying the statute to aliens previously detained as enemy combatants who have been granted habeas relief. ...

2. The court of appeals correctly held that applying [Section 2241\(e\)\(2\)](#) to bar petitioner’s damages action is constitutional, even assuming that petitioner is entitled to the constitutional protections that he invokes. That holding is consistent with the conclusions reached by both of the other courts of appeals to have addressed the constitutionality of [Section 2241\(e\)\(2\)](#). See [Ameur v. Gates](#), 759 F.3d 317, 325-327 (4th Cir. 2014), cert. denied, No. 14-6711, 2015 WL 232012 (Jan. 20, 2015); [Hamad v. Gates](#), 732 F.3d 990, 1003-1004 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

a. Petitioner argues (Pet. 10-14) that application of [Section 2241\(e\)\(2\)](#) to bar his constitutional money-damages claim violates Article III of the Constitution. Petitioner appears to contend that the Constitution requires courts to hear all money-damages claims for alleged constitutional violations or, in the alternative, that only courts—not Congress—may preclude such claims. Those arguments lack merit.

i. As the court of appeals recognized in a prior decision upon which it relied below, Pet. App. 22a-23a, and as the Fourth Circuit and the Ninth Circuit each held in rejecting the same challenge to [Section 2241\(e\)\(2\)](#), money-damages remedies for violations of constitutional rights “are not constitutionally required” and may be barred by Congress. [Al-Zahrani v. Rodriguez](#), 669 F.3d 315, 319 (D.C. Cir. 2012); see [Ameur](#), 759 F.3d at 326; [Hamad](#), 732 F.3d at 1003. That conclusion is consistent with the decisions of other courts of appeals holding, in the context of other statutes, that it is “certain[]” that the Constitution does not “mandate[] a tort damages remedy for every claimed constitutional violation.” [Harris v. Garner](#), 190 F.3d 1279, 1288 (11th Cir.), vacated, 197 F.3d 1059 (11th Cir. 1999) (en banc), reinstated in relevant part, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065 (2001); see, e.g., [Zehner v. Trigg](#), 133 F.3d 459, 461-462 (7th Cir. 1997).

As the D.C. Circuit has explained, this “Court has made this eminently clear in its jurisprudence finding certain of such claims barred by common-law or statutory immunities, and applying its ‘special factors’ analysis” to preclude implied causes of action under the Constitution. [Al-Zahrani](#), 669 F.3d at 319-320. For example, in [Wilkie v. Robbins](#), 551 U.S. 537 (2007), this Court explained that under [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), 403 U.S. 388 (1971), an implied damages remedy for alleged constitutional violations “is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.” [Wilkie](#),

[551 U.S. at 550](#). That principle refutes petitioner’s view that individuals are constitutionally entitled to a money-damages remedy for any constitutional violation.

Moreover, even if a common-law damages remedy might be warranted in this context in the absence of congressional action, petitioner cites no decision in which this Court has held or suggested that an express congressional bar on money-damages claims, such as [Section 2241\(e\)\(2\)](#), is unconstitutional. Indeed, under this Court’s *Bivens* jurisprudence, courts may not recognize a common-law *Bivens* remedy where Congress’s creation of an alternative remedy—even one that does not provide complete relief—demonstrates implicitly that Congress “expected the Judiciary to stay its *Bivens* hand.” [Wilkie, 551 U.S. at 550, 554](#); see [Schweiker v. Chilicky, 487 U.S. 412, 421, 425 \(1988\)](#); [Bush v. Lucas, 462 U.S. 367, 388-389 \(1983\)](#) (emphasizing that “Congress [wa]s in a far better position than a court to evaluate the impact of a new species of [damages] litigation” there). It follows from that principle that Congress may preclude a damages remedy for constitutional violations when it does so expressly. Consistent with that understanding, this Court has emphasized that in the limited circumstances when it has recognized *Bivens* remedies in the past, it has done so only after concluding that, *inter alia*, there was “no explicit statutory prohibition against the relief sought.” [Schweiker, 487 U.S. at 421](#).

In addition, as the D.C. Circuit has explained, petitioner’s argument is inconsistent with this Court’s well-settled jurisprudence recognizing that constitutional damages claims may be barred by common-law and statutory immunities. See [Al-Zahrani, 669 F.3d at 319-320](#). “Even in circumstances in which a *Bivens* remedy is generally available,” this Court has held, “an action under *Bivens* will be defeated if the defendant is immune from suit.” [Hui v. Castaneda, 559 U.S. 799, 807 \(2010\)](#). In [Imbler v. Pachtman, 424 U.S. 409 \(1976\)](#), for example, this Court catalogued a wide array of immunities available in damages suits alleging violations of constitutional rights, including absolute immunity available to judges for “acts committed within their judicial jurisdiction.” [Id. at 418](#) (citation omitted); see [id. at 417-429](#). Similarly, in [Harlow v. Fitzgerald, 457 U.S. 800 \(1982\)](#), as well as numerous subsequent decisions, this Court held that qualified immunity shields a government official from civil liability if his conduct “does not violate clearly established statutory or constitutional rights.” [Id. at 818](#). And in [Hui](#), this Court recognized Congress’s conferral of total immunity on certain individuals from *Bivens* claims. [559 U.S. at 806-808](#). Given those well-established common-law and statutory bars on constitutional damages claims, [Section 2241\(e\)\(2\)](#)—which shields government officials from money-damages claims in connection with sensitive decisions relating to ongoing military operations—was well within Congress’s power to enact.

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### **3. Criminal Prosecutions and Other Proceedings**

#### **a. United States v. Hamidullin**

On May 18, 2015, the United States filed a response to a motion to dismiss the indictment made by defendant Irek Ilgiz Hamidullin, a Russian national who had been detained by the United States since 2009 at the detention facility at Bagram in Afghanistan. In the course of its review of the cases of detainees held at Bagram in preparation for its closure, the U.S. Department of Justice concluded that there was sufficient evidence to prosecute Hamidullin in U.S. court. Hamidullin was transferred to

the United States and indicted for various offenses committed in connection with the November 29, 2009 attack on the Afghan Border Police (“ABP”) compound known as Camp Leyza, to which U.S. forces responded. In Hamidullin’s pre-trial motions, he claimed that, as a Taliban fighter, he was a lawful combatant entitled to immunity from domestic prosecution. The U.S. brief in response is excerpted below (with most footnotes omitted) and available in full at <http://www.state.gov/s/l/c8183.htm>. The brief argues that Hamidullin is not entitled to combatant privilege or immunity pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War (“GPW”)

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In his Motion to Dismiss, Hamidullin claims immunity from federal criminal prosecution through a number of arguments all centering on his claim that he qualified as a “lawful combatant” under the *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 1956 WL 54809 (U.S. Treaty 1956) (“GPW”), and related common law principles. In a similar vein, the defendant’s reliance on requirements of “unlawful” conduct in the charging statutes (*Defendant’s Motion to Dismiss*, at 6-9) boils down to the same exact argument—if this Court determines that he was a lawful enemy combatant, he cannot be prosecuted for violations of federal criminal law. All of these arguments fail. Hamidullin and his cohorts had no legitimate authority for their attack, and neither international nor U.S. law cloaks them with any kind of combatant privilege or immunity.

The United States’ response to the defendant’s arguments is divided into three sections. First, the continued conflict against the Taliban in Afghanistan is not an international armed conflict under Article 2 of the GPW, meaning that the combatant immunity provisions of the GPW do not apply to the Taliban. Moreover, even if that were not the case, Hamidullin’s bid for “lawful combatant” status would fail as members of the Taliban and Taliban-affiliated groups do not qualify for prisoner-of-war protections under Article 4 of the GPW. Second, the defendant’s claim for immunity under a public authority defense fails because Hamidullin’s attack was not authorized by a recognized government or military organization. Finally, the defendant’s argument that the criminal statutes have no application in this case is utterly wrong given the plain terms of the statutes and his failure to qualify for lawful combatant immunity.

#### **A. The Defendant Is Not a Lawful Combatant Entitled to Immunity From Criminal Prosecution Under International Law.**

Lawful combatant immunity is a doctrine reflected in the customary international law of war. It “forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.” *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). Belligerent acts committed by lawful combatants in an armed conflict generally “may be punished as crimes under a belligerent’s municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict.” *Lindh*, 212 F. Supp. 2d at 553.

The concept of lawful combatant immunity has a long history preceding GPW and is grounded in common law principles, early international conventions, statutes, and treatises. *See Instructions for the Government of the Armies of the United States in the Field*, Headquarters,

United States Army, Gen. Order No. 100 (Apr. 24, 1863), *reprinted in The Laws of Armed Conflicts* 3 (3d ed. 1988) (“So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”); Col. William Winthrop, *Military Law and Precedents*, at 791 (2d ed. 1920) (“[T]he status of war justifies no violence against a prisoner of war as such, and subject him to no penal consequence of the mere fact that he is an enemy.”); *Hague Convention Respecting the Laws and Customs of War on Land* (“Hague Convention”), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988); *Manual of Military Law* 240 (British War Office 1914).

As noted by one court, the combatant immunity doctrine is reflected in the provisions of the GPW. *See Lindh*, 212 F. Supp. 2d at 553. The United States is a party to the GPW and it therefore has the force of law in this case under the Supremacy Clause. *See* U.S. Const. art. VI, § 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land. . . .”). The GPW sets forth certain principles with respect to the prosecution of persons entitled to prisoner-of-war status under the GPW:

- Article 87: “Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.”
- Article 99: “No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.”

GPW, arts. 87 and 99. Taken together, these Articles “make clear that a [lawful] belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war.” *Lindh*, 212 F. Supp. 2d at 553.

Although immunity based on lawful combatant status may be available as an affirmative defense to criminal prosecution in appropriate circumstances, this defense is not available to a defendant just because he believes that he has justly taken up arms in a conflict.<sup>4</sup> *Lindh*, 212 F. Supp. 2d at 554. Rather, this defense is available only to a defendant who can establish that he is a “lawful combatant” against the United States under the requisite criteria established in international law that is binding upon the United States—that is, “*members of a regular or irregular armed force who fight on behalf of a state and comply with the requirements for lawful*

<sup>4</sup> To the extent Hamidullin contends that the GPW, of its own force, provides a defense to the charges (as opposed to his reliance on a common law defense that incorporates the Geneva Convention standards for lawful participation in armed conflict), such a contention would lack merit. The GPW does not afford individual defendants judicially enforceable rights or legal defenses. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (concluding that the predecessor to the current GPW—the Third Geneva Convention of 1929—conferred rights on alien enemies that could be vindicated “only through protests and intervention of protecting powers,” not through the courts); *see also Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008) (“background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”); *Hamdi v. Rumsfeld*, 316 F. 3d 450, 468, (4th Cir. 2003) (“The Geneva Conventions evince no [ ] intent [to provide a private right of action]”), *vacated and remanded on unrelated grounds*, 542 U.S. 507 (2004); *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 809 (D.C. Cir. 1984) (same).

*combatants.*” *Id.* at 554 (emphasis added); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); *United States v. Khadr*, 717 F.Supp.2d 1215, 1222 (USCMCR 2007) (“Unlawful combatants . . . are not entitled to ‘combatant immunity’ nor any of the protections generally afforded lawful combatants who become POWs. Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the domestic law of the capturing nation for any and all unlawful combat actions.”). Moreover, the burden of establishing the application of the combatant immunity defense is upon the defendant. *See Lindh*, 212 F. Supp. 2d at 553 (holding “it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity” by showing that “the Taliban satisfied the four criteria required for lawful combatant status outlined by the [Geneva Conventions].”).

Here, Hamidullin argues that he fought as a member of the Taliban and is entitled to combatant immunity. That protection is unavailable for, at least, two reasons. First, under GPW Article 2, the Taliban is not covered by the GPW immunity provisions because this does not involve an international armed conflict between any States or “High Contracting Parties.” Second, even if the defendant’s claimed affiliation with the Taliban permits the application of the GPW’s provisions related to international armed conflict, he could not satisfy the requisite criteria for “lawful combatant” status.

**1. The Taliban is not protected by the GPW immunity provisions.**

The provisions of the GPW that have been interpreted as reflecting the principles of combatant immunity do not apply to the Taliban in this case. Under GPW Article 2, the provisions of the Convention apply to “all cases of declared war or of any other *armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.” GPW, art. 2, ¶ 1 (emphasis added).

By November 2009, however, the Taliban had been removed from power in Afghanistan for eight years and was not the government for Afghanistan (the GPW “High Contracting Party”). At the time of Hamidullin’s attack, there was no international conflict between the United States and Afghanistan. Rather, the two powers, along with other States, were working together in a coalition directed at assisting the legitimate Afghan government to stop the Taliban’s unlawful attacks within the country’s borders. The International Committee of the Red Cross (ICRC), the non-governmental organization that has a special position under the GPW, came to the same conclusion in 2007:

This conflict [against the Taliban] is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. *The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL.* The same body of rules would apply in similar circumstances where the level of violence has reached that of an armed conflict and where a non-State armed actor is party to an armed conflict (e.g. the situation in Somalia).

*Id.* at 725 (emphasis added); *see also ICRC, International Humanitarian Law and the*

*Challenges of Contemporary Armed Conflicts*, at 10 (2011) (“As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.”); Maj. Jerrod Fussnecker, *The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations*, 2014-MAY Army Law. 7, at 12 (May 2014) (“Due to the fall of the Taliban government and the formation of ISAF, coalition members such as the United Kingdom and Canada began considering the ongoing military presence in Afghanistan to have transitioned from an IAC to a NIAC between the government of Afghanistan, with the assistance of the ISAF alliance, against the Taliban and Al Qaeda.”). Thus, as the conflict in Afghanistan no longer falls within GPW Article 2, the relevant provisions of that Convention reflecting the right to combatant immunity do not apply.

Any doubt on the non-applicability of the combatant’s privilege in these circumstances is further dispelled by the ICRC’s independent analysis. The ICRC has emphasized that “*only in international armed conflicts* does [International Humanitarian Law] provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives.” ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 726 (2007) (emphasis in original). “Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes.” *Id.* at 728.

Hamidullin nevertheless relies upon the second paragraph of GPW Article 2 to support his claim to entitlement to its protections. *See Defendant’s Motion to Dismiss*, at 23. It provides that the “Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” GPW, art. 2, ¶ 2. That provision, however, addresses situations where an armed conflict may not exist between the High Contracting Parties because armed resistance was deemed futile by the occupied party. As one commentator explained:

[A]ccording to Jean Pictet, one of the main authors of the Geneva Conventions, the second paragraph of Article 2 “was intended to fill the gap left by paragraph 1.” Pictet continues to explain that “paragraph 2 was designed to protect the interests of protected persons in occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless.”

Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 Ann. Surv. Int’l & Comp. L. 61, 87 (Spring 2008) (citations omitted); *see also* Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 Harv. J.L. & Pub. Pol’y 843, 845 (Summer 2004) (“The *ratio legis* of the provision applying the law of armed conflict to an occupation, even if it meets no armed resistance, is obvious. According to Article 42, para. 1, of the 1907 Hague [Convention], ‘territory is considered occupied when it is actually placed under the authority of the hostile army.’ The civilian population, one of the groups of protected victims, comes under the authority of the enemy’s armed forces and thus is in need of continuing protection by the laws of armed conflict. Moreover, the presence of foreign forces on

a State's territory, which in case of occupation will presumably be against that State's will, is to be considered a continuous use of military force by one State against another State."). Here, the "occupying power" language of Article 2 has no application as the United States was never an Occupying Power in Afghanistan. Moreover, nothing in the "occupying power" language extends the protections of the GPW to non-state actors that are not Parties to the Convention, such as bands of marauders, merely because *they* control territory.

Finally, to support his claim that the conflict involving remnants and adherents of the former Taliban regime is international in character, the defendant relies upon GPW art. 4(A)(3). *Defendant's Motion to Dismiss*, at 27. That provision, which we discuss further, *infra*, provides that members of the military force of a deposed government do not lose entitlement to POW status. It neither transforms an insurgency made up of members of the deposed regime into an international armed conflict governed by GPW, nor does it extend the full ambit of the GPW's protections to the insurgents.

In sum, the provisions of the GPW related to combatant immunity do not cover Hamidullin's unlawful attack on November 29, 2009, which was in the context of a non-international armed conflict. As a result, he is not entitled to prisoner-of-war status and is therefore subject to prosecution under the domestic laws of the United States.

## **2. The defendant cannot satisfy the test for "lawful combatant" status.**

For the foregoing reasons, the defendant is not entitled to POW status under the GPW, putting any claim for "lawful combatant" status out of his reach. *Supra* at 11-14. But even if the conflict was international in character, Hamidullin could not meet the test for claiming "lawful combatant" status under GPW Article 4.

Hamidullin is specifically claiming lawful combatant status as a "prisoner of war" under two provisions of GPW Article 4, which protects: members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces; and members of regular armed forces who profess allegiance a government or an authority not recognized by the Detaining Power. GPW, art. 4(A)(1) and (3). The GPW sets forth criteria that militia or volunteer corps belonging to a State that is a Party to the conflict must meet for its members to qualify for "prisoner of war" status:

- (1) the organization must be commanded by a person responsible for his subordinates;
- (2) the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
- (3) the organization's members must carry arms openly; and
- (4) the organization's members must conduct their operations in accordance with the laws and customs of war.

*Lindh*, 212 F. Supp. 2d at 557 (citing GPW, art. 4(A)(2)).

These criteria have long been understood to be the defining characteristics of any lawful armed force and were well established in customary international law before being codified in the GPW in 1949. *See id.* at 557, n. 34; *Hague Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Convention) ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."); *British Manual of Military Law* 240 (British War Office 1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant

status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces.”).

Hamidullin claims that these requirements, which are specifically enumerated in GPW Article 4(A)(2), do not apply in determining whether a combatant qualifies as a prisoner of war under GPW Article 4(A)(1) and (3) as they are not expressly mentioned under those sections. *Defendant’s Motion to Dismiss*, at 31. The *Lindh* court considered and rejected that very argument and held that these elements must be met for all the categories of combatants covered by the GPW. As it explained, the argument:

ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. *See supra* n. 33. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a “regular armed force.” It would indeed be absurd for members of a so-called “regular armed force” to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label “regular armed force” cannot be used to mask unlawful combatant status.

*Lindh*, 212 F. Supp. 2d at 557, n. 35; *see also United States v. Arnaout*, 236 F. Supp. 2d 916, 918 (N.D.Ill. 2003) (citing to *Lindh* in determining that “all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity.”).

In *Lindh*, the court considered these criteria, as well as the manner in which the President determined “that the Taliban militia [in 2002] were unlawful combatants pursuant to the GPW and general principles of international law, and therefore, they were not entitled to POW status under the Geneva Conventions.” *Lindh*, 212 F. Supp. 2d at 555. Although holding that it was not bound by the President’s determination, the *Lindh* court independently determined that the Executive Branch had acted well within its discretion in determining that the Taliban was not covered by GPW Article 4. *Id.* at 558 (holding that the President’s determination is controlling because (i) the determination is entitled to deference as a reasonable interpretation and application of the GPW; (ii) *Lindh* failed to carry his burden of demonstrating the contrary; and (iii) even absent deference, the Taliban falls far short when measured against the four GPW criteria for lawful combatant status).

The circumstances before this Court are miles beyond the situation addressed in *Lindh*. There, the Taliban could arguably be characterized as the *de facto* government of Afghanistan at the time of *Lindh*’s capture, but that has not been the case since December 2001. Hamidullin has not provided any reason to justify a different conclusion today, several years after the Taliban ceased to have any claim to be the government of Afghanistan. Suffice it to say, the Taliban’s situation in 2009 had certainly not improved since 2002, when the group failed to meet the four criteria for claiming lawful combatant status. *Cf.* A.A.G. Jay S. Bybee, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, Opinions of the Office of Legal Counsel, at 3-5 (2002) (concluding that Taliban forces: did not have an organized command structure whereby members of the militia reported to a military commander who takes

responsibility for the actions of his subordinates, consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures, wore no distinctive uniforms or insignia, did not follow the Geneva conventions and related principles, and made no attempt to distinguish between combatants and non-combatants).

In 2009, the Taliban still lacked a structured system of recruitment, training and command capable of creating a disciplined army that would respect and uphold the laws and customs of war as envisioned by the GPW. They also failed to wear a uniform or distinctive sign that could be recognized by enemy combatants so as to differentiate the enemy forces from the civilian population. Although it appears the Taliban forces sometimes satisfied the third criteria with respect to carrying arms openly, it failed to meet the fourth criteria with respect to observing the laws and customs of war. In the years leading up to and after 2009, the Taliban regularly targeted civilian populations in clear violation of the laws and customs of war. *Id.* at 5. The Taliban's blatant violations have continued into the present.

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For all of these reasons, Hamidullin could not satisfy the requirements for lawful combatant status under any of the provisions of GPW Article 4, even if the current conflict were an international armed conflict. He could not have combatant immunity in this case and his motion to dismiss the indictment should be rejected.

#### **B. The Defendant Cannot Establish Common Law Immunity Under the Public Authority Defense.**

Hamidullin claims that criminal prosecution is also foreclosed under common law combatant immunity law, as applied under the public authority defense. As explained below, the common law provides no greater cover for the defendant than the international law principles embodied in the GPW. His related claim for a public authority defense also fails where the defendant cannot point to any Taliban members with legitimate, actual authority to authorize the November 29, 2009, attack. Finally, the defendant can also find no protection under the related "obedience to military orders defense," where he cannot establish that he received an order to carry out the attack from a superior in a *bona fide* military organization.

#### **1. Common law combatant immunity does not cover the defendant's band of marauders.**

Relying on a patchwork of cases addressing different instances of combatant immunity, Hamidullin first argues that he is eligible for common law immunity as an enemy soldier. *Defendant's Motion to Dismiss*, at 12-16. The authorities he cites, however, are grounded in acts performed under national military authorities, occurring during a state of war and in accordance with the principles of civilized warfare. This authority provides no protection for those acting in concert with unlawful renegade bands operating outside lawful military actions, such as the defendant and his band of marauders.

The "common law" view is articulated by Colonel William Winthrop, who has been referred to as "the Blackstone of Military Law" by the Supreme Court. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006). In his classic treatise, Colonel Winthrop distinguished between the military forces of a sovereign state and "irregular armed bodies" or "guerillas." He observed: "[i]t is the general rule that the operations of war on land can legally be carried on only

through the recognized armies or soldiery of the State as duly enlisted or employed in its service.” Col. William Winthrop, *Military Law and Precedents*, at 782 (2d ed. 1920). In contrast:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished ...

...Where indeed the opposing belligerent is unwilling to accept a certain force of its enemy as entitled to the rights of regular troops, it is open to it to announce that it will not so recognize them.

*Id.* at 783; see also Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100, Art. 82 (1863) (referred to as the “Lieber Code”) (“Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”).

These authorities illustrate the common law’s recognition that insurgents like Hamidullin who are not engaging in hostilities on behalf of a belligerent nation are not entitled to combatant immunity or to be treated as POWs. Moreover, as explained in the previous section, the defendant does not qualify for common law immunity under the laws of war because the Taliban does not fulfill the requirements required for lawful combatants. These very principles were refined and codified in the 20th Century efforts to codify the international law of war that resulted in the Hague Convention and the GPW. For the reasons explained in the previous section, the defendant does not qualify for immunity under those laws.

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### **3. The defendant also cannot establish the obedience to military orders defense.**

In the context of an armed conflict, Hamidullin’s defense also finds voice in the obedience to military orders defense. This defense provides that:

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, known to be unlawful, or if the order in question is actually known to the accused to be unlawful. *United States v. Yunis*, 924 F.2d 1086, 1097 (D.C. Cir. 1991) (citations omitted). But, as with the public authority defense, this defense must be grounded in obedience to orders from a superior vested with actual authority by virtue of his position in a *bona fide* military organization. *Id.* at 1097-98. As adopted by *Yunis*, the criteria for assessing the legality of such an organization tracks the criteria outlined at GPW Art. 4(A)(2). *Id.* at 1097 (approving jury instructions defining a “bona fide military organization” as one meeting the Hague Convention conditions, including that the group had a hierarchical command structure, conducted its operations in accordance with the

laws and customs of war, and its members had a uniform and carried arms openly). For the reasons explained above, Hamidullin is not entitled to this defense because he cannot establish that he received attack orders from a superior in a *bona fide* military organization that satisfies the relevant test. ...

The requirement for actual authorization from a *bona fide* military organization is not only supported by case law, but also by reason. Accepting either the public authority or obedience to military orders defense for rogue organizations, such as the Taliban, would shield marauding bands engaging in unlawful attacks from criminal responsibility. The defendant and his group were operating outside the authorization of any State and thus received no legitimate authorization for the November 29, 2009, attack. Both defenses have no application in this case.

### **C. The Federal Statutes Apply to the Criminal Conduct in this Case.**

Hamidullin also challenges the application of the federal criminal statutes at the heart of the charges in Counts 1, 2 and 5-15. Those counts charge material support for terrorism, attempted murder, violent assault, and various weapons offenses, as well as conspiracy to commit some of those offenses. For those charges, the defendant makes the same general argument at the heart of his lawful combatant immunity claims—if this Court determines that he conducted himself as a lawful enemy combatant under the GPW and common law, he cannot be prosecuted for violations of federal criminal law. *Defendant’s Motion to Dismiss*, at 5-9. For the reasons explained in the previous sections, this argument fails where the defendant is not entitled to lawful combatant protections.

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Although the conspiracy to kill U.S. officers or employees count, *id.* §§ 1114, 1117, contains no explicit extraterritoriality provision, the nature of the offense—protecting U.S. personnel from harm when acting in their official capacity—implies an intent that it apply outside of the United States. The provision protects U.S. employees, and a significant number of those employees perform their duties outside U.S. territory. District courts in our Circuit have applied it so, as have courts in other circuits. *See, e.g., United States v. Benitez*, 741 F.2d 1312, 1317 (11th Cir.1984) (applying §§ 1114, 1117 extraterritorially); *United States v. Bin Laden*, 92 F.Supp.2d 189, 202 (S.D.N.Y.2000) (applying § 1114 extraterritorially). We join them and conclude that §§ 1114 and 1117 apply extraterritorially. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Siddiqui*, 699 F.3d 690, 700-01 (2d Cir. 2012) (rejecting contention that Section 1114, 111, and 924(c) did not apply extraterritorially to attacks on U.S. personnel in an “active theater of war” because “it would be “incongruous to conclude that statutes aimed at protecting United States officers and employees do not apply in areas of conflict where large numbers of officers and employees operate”).

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On July 13, 2015, the district court issued its decision, denying defendant’s motion to dismiss. *United States v. Hamidullin*, 114 F.Supp.3d 365 (E.D.Va. 2015). The conclusion of the district court’s opinion is excerpted below. Hamidullin was subsequently tried, convicted, and sentenced. He has appealed.

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Assuming the existence of a close affiliation, the central issue for the Court is whether the Taliban are lawful combatants entitled to prisoner of war treatment under the 1949 Geneva Convention, or a band of insurgent outlaws to be dealt with as criminals. ... [I]t is apparent from the evidence that the Haqqani Network falls beyond the outer perimeter of the armed entities described in Article 4, particularly when measured against the criteria of Article 4(A)(2).

In order to resolve the core issues, this Court need not determine whether the conflict in Afghanistan is international in nature as contemplated by Article 2 of the GPW. ... Surmounting this hurdle, the Court will turn to Article 4, which specifically addresses prisoners of war.

[Defendant's expert's] interpretation of Article 4 carves a wide swath of entitlement. His expansive interpretation would encompass a broad array of affiliates who would be treated as prisoners of war until hostilities cease. As long as they professed allegiance to an authority or power, they are essentially immune from criminal prosecution for violating the laws of the country in which they are operating. This interpretation could arguably include suicide bombers and other terrorist operatives claiming allegiance or working in association with armed groups.

... This Court, however, is of the opinion that the Haqqani Network and Taliban fit most compatibly within Article 4(A)(2). These groups are not members of militias or volunteer corps forming part of the armed forces of a party to the conflict. Furthermore, they are not members of a regular armed force as contemplated by Article 4(A)(3). Therefore, the Court will turn to the criteria for inclusion of combatants under Article 4(A)(2).

The expert testimony adduced by the government revealed that neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2). They do not have a clearly defined command structure nor a fixed distinctive sign recognizable at a distance. To the contrary, the Taliban's Rules and Regulations for Mujahidin counsel its fighters to adopt local clothing to conceal their identity. Although some Taliban and Haqqani fighters carry arms openly, they frequently utilize suicide bombers with concealed explosives. Lastly, neither entity conducts their operations in accordance with the laws and customs of war. Adams described a number of incidents in which the Taliban have killed large numbers of civilians. Adams testified that prisoners of war and captured police officers are summarily executed. He also testified that Afghans voting in national elections were subject to mutilation. Consequently, this Court finds that neither the Taliban nor Haqqani Network satisfies the criteria for prisoner of war status articulated in Article 4(A)(2), or any other provision of the GPW.

This Court is also unpersuaded that the Defendant was acting under the auspices of a government official with actual authority to attack U.S. troops or members of the International Security Assistance Force. Based upon the foregoing analysis, the Defendant's Motion to Dismiss the Indictment and Motion to Dismiss the Indictment Based on Due Process Concerns, Notice and Jurisdictional Defects will be denied.

\* \* \* \*

#### **b. Military Commission**

Information on cases being tried by military commissions is available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

**Cross References**

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

*Abu Khatallah case*, **Chapter 4.B.1.**

*Meshal case regarding detention in counterterrorism context*, **Chapter 5.A.1.**

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

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

*Protecting human rights while countering terrorism*, **Chapter 6.N.1.**

*Countering violent extremism*, **Chapter 6.N.2.**

*Remotely piloted aircraft*, **Chapter 6.N.3.**

*ILC's work on protection of the environment in relation to armed conflict*, **Chapter 7.D.2.**

*International law in context of outer space activities*, **Chapter 12.B.5.**

*Terrorism sanctions*, **Chapter 16.A.6.**

*Sanctions relating to malicious activities in cyberspace*, **Chapter 16.A.10.**

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

*Protecting civilians during peacekeeping operations*, **Chapter 17.A.12.**

*Responsibility to protect*, **Chapter 17.C.2.**

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