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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MUKHTAR YAHIA NAJI AL WARAFI,
(ISN 117)

Petitioner,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

Civil Action No. 09-CV-2368 (RCL)

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO GRANT PETITION FOR WRIT OF HABEAS CORPUS

As a matter of international and domestic law, the United States currently remains in an armed conflict with al-Qaeda, Taliban, and associated forces. Petitioner Mukhtar Yahia Al Warafi (ISN 117), a Guantanamo Bay detainee previously determined by this Court to be part of Taliban forces, incorrectly contends that his detention at Guantanamo Bay has become unlawful because, he alleges, the United States' armed conflict against the Taliban in Afghanistan ended at the close of 2014. In accordance with the law of armed conflict and the precedents of both the Supreme Court and Court of Appeals, law of war detention remains lawful until the end of active hostilities. Contrary to Petitioner's claims, the record here, as supported by a declaration from a senior military official describing the current state of hostilities in Afghanistan, establishes that active hostilities against al-Qaeda, Taliban, and associated forces have not ceased. Consequently, Petitioner's detention remains lawful under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, as informed by the laws of war.

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Petitioner's motion also fails for a separate reason: the determination of whether hostilities have ended is a matter "of political judgment for which judges have neither technical competence nor official responsibility." *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948). With respect to the current armed conflict against al-Qaeda, Taliban, and associated forces, both political branches are in agreement, through Congress's continued statutory authority and the Executive's posture and military actions undertaken pursuant to that authority, that active hostilities against those forces have not ceased. Indeed, high-ranking Executive Branch officials have recently testified before Congress in 2015 that active hostilities in Afghanistan remain ongoing. There is thus no legal basis for the Court to second-guess the shared judgment of Congress and the Executive Branch on this critical question of national security.

Petitioner acknowledges and does not challenge the well-established precedent that determinations regarding the end of hostilities are reserved for the political branches. Instead, he argues – incorrectly – that recent public statements by the President constitute the requisite determination by the Government that active hostilities in Afghanistan have ceased. Petitioner, however, misunderstands the meaning of the President's public statements in December 2014 announcing that "[t]his month, our combat mission" and "America's war in Afghanistan will come to a responsible end." The President has not declared that active hostilities against al-Qaeda, Taliban, and associated forces have ceased or that the fighting in Afghanistan has stopped. Rather, the President's public statements made clear that, in light of the continuing threats faced by the United States in Afghanistan, counterterrorism and other military operations would continue even after the end of the combat mission. Simply put, the President's statements signify a transition in United State military operations, not a cessation. The Government's position, as represented in recent testimony to Congress and reiterated again here following high-

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level Executive Branch coordination, is that active hostilities against al-Qaeda, Taliban, and associated forces in Afghanistan remain ongoing.

For these reasons, as explained further below, Petitioner's detention remains lawful and his motion to grant the petition for writ of habeas corpus should be denied.

PROCEDURAL BACKGROUND

Petitioner Al Warafi is a Yemeni national who was captured in Afghanistan in November 2001 and subsequently detained by the United States at Naval Station Guantanamo Bay, Cuba. He filed a petition for writ of habeas corpus in 2004 challenging the legality of his detention under the AUMF. This Court held a multi-day hearing on the merits of the petition in January 2010. On March 24, 2010, the Court denied the petition, finding that Petitioner (1) traveled to Afghanistan to fight with Taliban forces; (2) received weapons training at the Khoja Khar line, where the Taliban was fighting the Northern Alliance; (3) was stationed on the front line and remained on the northern front until the Taliban fell to coalition forces; and (4) traveled to Mazar-e-Sharif with other Taliban fighters to surrender to the Northern Alliance on orders from his Taliban commander. *See Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010). Based on these findings, the Court concluded that Petitioner's detention was lawful under the AUMF because Petitioner "more likely than not was part of Taliban forces." *Id.* at 35.

The Court also rejected Petitioner's alternative argument that because he was exclusively engaged in providing medical services to the Taliban, he qualified as medical personnel under Article 24 of the First Geneva Convention, and thus was entitled to be repatriated under the provisions of that Convention. *Id.* at 44. Petitioner argued that he was entitled to that status because, after he left the front lines, he served as a Taliban medic in two clinics and a hospital in Afghanistan. *Id.* at 36. The Court concluded that Petitioner could not validly invoke the Geneva

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Conventions as a source of rights, relying on Section 5 of the Military Commissions Act, Pub. L. No. 109–366, § 5, 120 Stat. 2600, 2631 (Oct. 17, 2006) (codified at 28 U.S.C. § 2241 note).

On appeal, the Court of Appeals affirmed the Court's finding that Petitioner was more likely than not a part of the Taliban at the time of his capture. *See Warafi v. Obama*, 409 Fed. Appx. 360, 361 (D.C. Cir. 2011). With respect to Petitioner's Geneva Convention argument, the Court of Appeals concluded that, in its view, this Court "did not explicitly address whether [Petitioner] was permanently and exclusively medical personnel within the meaning of Article 24 of the First Geneva Convention and Army Regulation 190-8, § 3-15(b)(1)-(2), assuming arguendo their applicability." *Id.* The Court of Appeals therefore remanded the case to this Court "to consider Al Warafi's argument he was permanently and exclusively engaged as a medic and to make a finding on this issue." *Id.*

Following consideration of additional evidence submitted by the parties on remand, this Court again rejected Petitioner's Geneva Convention claim. The Court concluded that Petitioner failed to meet his burden of proving his status as permanent and exclusive medical personnel. *See Al Warafi v. Obama*, 821 F. Supp. 2d 47, 55 (D.D.C. 2011) ("At the time of his surrender, petitioner carried no form of identification indicating his status as permanent medical personnel. Nor has he presented any other documentation that might put him in a position to prove that he is a member of the medical personnel, in order that he may enjoy the status accorded to him under the Convention.") (internal quotations omitted).

The Court of Appeals affirmed, explaining that it was "undisputed" that Petitioner did not wear an armlet or carry an identification card denoting his status as medical personnel. *See Al Warafi v. Obama*, 716 F.3d 627, 630 (D.C. Cir. 2013). The Court of Appeals also noted that this Court "found facts—*e.g.*, the prior combat deployment—inconsistent with"

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Petitioner's claim of permanent medical personnel. *Id.* ("The evidence in the record gives credence to the view that Al Warafi is unable to provide the proof required under the Convention because he was not a medic."). The Court of Appeals therefore concluded that "without the mandatory indicia of status, [Petitioner] has not carried his burden of proving that he qualified 'as permanent medical personnel.'" *Id.* at 631. The Court of Appeals subsequently denied Al Warafi's petition for rehearing *en banc* on August 26, 2013. *See Al Warafi v. Obama*, No. 11-5276 (D.C. Cir. 2013). The Supreme Court denied Al Warafi's petition for certiorari on May 5, 2014. *See Al Warafi v. Obama*, 134 S. Ct. 2134 (2014).

On February 26, 2015, Petitioner filed the motion presently before the Court seeking a writ of habeas corpus based on the assertion that the United States' war and combat mission against the Taliban in Afghanistan ended at the close of 2014. *See* ECF No. 80.

FACTUAL BACKGROUND

In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224.

On March 13, 2009, the Government submitted its definition of detainable individuals under the AUMF to this Court. *See* Memorandum Regarding Government Detention Authority (Mar. 13, 2009), *In re Guantanamo Bay Detainee Litigation*, No. 08-MC-442 (ECF No. 1690). That definition, which the government explained was "informed by the principles of the laws of war," includes:

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> 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.

Id. The Government has relied on that interpretation of the AUMF in the Guantanamo Bay habeas litigation, and the Courts have accepted and approved that interpretation. *See e.g., Al-Bihani v. Obama*, 590 F.3d 866, 872-874 (D.C. Cir. 2010); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013)

In 2011, section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA) was enacted, Pub. L. No. 112-81, 125 Stat. 1562, which "affirm[ed]" that the authority the AUMF granted the President in 2001 includes detention of persons who were "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." NDAA § 1021(a), (b)(2), 125 Stat. 1562. Congress also reaffirmed in the NDAA that the authority under the AUMF includes, *inter alia*, "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." *Id.* § 1021(c)(1).

Since 2001, two Presidents have exercised the authority granted by the AUMF to deploy U.S. armed forces in the fight against al-Qaeda and the Taliban regime that harbored al-Qaeda in Afghanistan, as well as forces associated with them. Beginning in October 2001, U.S. and coalition forces began a military campaign in Afghanistan composed of air, land, and sea forces to overthrow the Taliban from power and to destroy al-Qaeda. *See* National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report at 337-38 (2004). The

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U.S.-led military campaign removed the Taliban from control of much of Afghanistan in December 2001, but Taliban, al-Qaeda, and associated forces continued to operate and conduct attacks in Afghanistan. *See id.* From 2001 until the end of 2014, the United States led a large-scale military combat operation known as Operation Enduring Freedom designed to bring safety, security, and stability to Afghanistan. *See* Statement by Secretary of Defense Chuck Hagel on Operation Enduring Freedom and Operation Freedom's Sentinel (Dec. 28, 2014) (Exhibit 1) ("Hagel Statement"). More than a half million U.S. service members participated in this major combat mission over the course of its thirteen years in furtherance of the armed conflict against al-Qaeda, Taliban, and associated forces. *See* Statement by the President on Ten Years of American Service in Afghanistan (Oct. 7, 2011) (Exhibit 2).

In addition, the International Security Assistance Force (ISAF), a United Nations-authorized international coalition operating under the command of the North Atlantic Treaty Organization (NATO), conducted combat and other military operations in Afghanistan with the goal of maintaining security and creating conditions for stabilization and reconstruction. *See* Letter From The President To The Speaker of the House, Six Month Consolidated War Powers Resolution Report (Dec. 11, 2014) (Exhibit 3). The ISAF consisted of tens of thousands of military personnel from more than 50 contributing nations, including the United States. *See* NATO Nations, Impacts, and Contributions (Exhibit 4). In connection with these military operations, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay. A small subset of those persons, including Petitioner, remains detained there.

On June 22, 2011, the President addressed the Nation from the White House and announced that the United States would begin removing military personnel from Afghanistan

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later that year. *See* Remarks by the President on the Way Forward in Afghanistan (June 22, 2011) (Exhibit 5). Specifically, the President announced a multi-year plan to reduce the number of U.S. forces in Afghanistan, with the goal of transitioning from a combat mission to a support mission by 2014. *See id.*

Over the course of the next three years, the United States and its coalition partners steadily reduced the number of armed forces in Afghanistan as the Afghan government took on greater responsibility for its own security and reconstruction. On May 27, 2014, the President announced that U.S. forces had been reduced from a peak of approximately 100,000 to approximately 32,000. *See* Statement by the President on Afghanistan (May 27, 2014) (Exhibit 6). The President also outlined the United States' military missions in Afghanistan for 2015 and beyond. *Id.* Specifically, the President announced that U.S. military personnel would maintain a presence in Afghanistan for "two narrow missions after 2014: training Afghan forces and supporting counterterrorism operations against the remnants of al Qaeda." *Id.* ("I've determined the nature of the commitment that America is prepared to make beyond 2014. Our objectives are clear: Disrupting threats posed by al Qaeda; supporting Afghan security forces; and giving the Afghan people the opportunity to succeed as they stand on their own."). In furtherance of these objectives, the President announced that the United States would deploy approximately 10,000 service members in different parts of Afghanistan at the beginning of 2015. *Id.*

On September 30, 2014, the United States and Afghanistan signed a Bilateral Security Agreement setting forth the terms of the United States' military presence in Afghanistan beyond 2014.[1] *See* Statement by the President on the Signing of the Bilateral Security Agreement and

[1] NATO and Afghanistan also entered into a separate Status of Forces agreement governing the multi-national coalition NATO mission in Afghanistan beyond 2014.

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NATO Status of Forces Agreement in Afghanistan (Sept. 30, 2014) (Exhibit 7). This agreement, which entered into force on January 1, 2015, memorialized the framework under which the United States would carry out its post-2014 missions in Afghanistan to conduct counterterrorism operations against al-Qaeda and its affiliates, and to train, advise, and assist the Afghan National Defense Forces and Security Institutions. *See* Bilateral Security Agreement (Exhibit 8). The agreement by turns authorized or reflected an expectation of continued authorization for certain U.S. military activities, including "force protection," "counter-terrorism," and "military operations to defeat al-Qaeda and its affiliates." *See id.*, art. 2-3, 7. It stipulated that U.S. forces "shall not conduct combat operations in Afghanistan" unless the parties mutually agree to allow such operations (which was understood to include existing arrangements). *See id.*, art. 2. The agreement also expressly recognized the continued right of U.S. forces to act in "self-defense, consistent with international law." *Id.*, art. 3.

On December 28, 2014, the President announced an end to the United States' combat mission in Afghanistan, stating "our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion." *See* Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014) (Exhibit 9). The President's announcement praised the men and women of the United States who served in Afghanistan since 2001, including the more than 2,200 service members who died while in Afghanistan, for their exemplary service to the Nation. *Id.* The President also explained that, although significant progress had been made in Afghanistan and the combat mission would end at the close of 2014, the United States' military commitment to Afghanistan would continue beyond 2014:

> Afghanistan remains a dangerous place, and the Afghan people and their security forces continue to make tremendous sacrifices in defense of their country. At the invitation of the Afghan government, and to preserve the gains we have made together, the

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> United States–along with our allies and partners–will maintain a limited military presence in Afghanistan to train, advise and assist Afghan forces and to conduct counterterrorism operations against the remnants of al Qaeda. Our personnel will continue to face risks, but this reflects the enduring commitment of the United States to the Afghan people and to a united, secure and sovereign Afghanistan that is never again used as a source of attacks against our nation.

Id.

On January 1, 2015, the United States and NATO transitioned their military missions in Afghanistan. The United States concluded Operation Enduring Freedom and immediately transitioned to the support and counterterrorism mission entitled Operation Freedom's Sentinel. *See* Declaration of Rear Admiral Sinclair M. Harris, Vice Director of Operations for the Joint Chiefs of Staff, ¶ 6 ("Harris Decl.") (Exhibit 10); *see also* Hagel Statement (Ex. 1). Operation Freedom's Sentinel has two primary components. *See* Harris Decl. ¶ 7. The first component involves training, advising, and assisting the Afghan National Defense Security Forces to assist the Afghan government in its effort to establish a secure and stable country. *See id.* [redacted]

[redacted] *Id.* [redacted]

[redacted] *Id.* [redacted]

[redacted] *Id.*

The United States conducts its support mission in conjunction with the NATO coalition mission called Resolute Support.[2] *Id.* ¶ 7; *see* NATO, About Resolute Support (Exhibit 12). On December 31, 2014, NATO announced the conclusion of the ISAF's combat mission and its transition to a mission focused on training, advising, and assisting Afghan forces and security institutions in a variety of security, planning, and governance operations. *See* NATO Resolute Support Mission in Afghanistan (Exhibit 13). Military personnel from 41 nations, including from the United States, are deployed in support of the Resolute Support mission. *See* Statement of General John F. Campbell, Commander United States Forces-Afghanistan, Before The House Armed Services Committee On The Situation in Afghanistan at 2 (Mar. 4, 2015) (Exhibit 14). ("Campbell Statement").

The second component of Operation Freedom's Sentinel is a counterterrorism mission directed against al-Qaeda, persons providing support to al-Qaeda, and persons engaged in hostilities against the United States and coalition forces in Afghanistan. *See* Harris Decl. ¶ 8. [redacted] *See id.* The purpose of the counterterrorism mission is "to ensure that Afghanistan is never again used to stage attacks against our homeland" and "to target al Qaeda and its affiliates in Afghanistan to degrade their capability to target the United States and its allies." *See* Hagel Statement (Ex. 1); DoD Report on Progress Toward Security and Stability in Afghanistan at 9 (Oct. 2014) (Exhibit 15) (DoD report submitted to Congress in accordance with sections 1230 and 1231 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, as amended) ("DoD Report").

[2] This mission was welcomed and supported by the United Nations Security Council. *See* U.N.S.C. Res. 2189, U.N. Doc. S/RES/2189 (Dec. 12, 2014) (Exhibit 11).

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The President has authorized approximately 9,800 U.S. uniformed military personnel to be present in Afghanistan today [redacted] in support of Operation Freedom's Sentinel. *See* Harris Decl. ¶ 6. The President has also recently announced that this troop level will remain consistent through the end of 2015. *See* Remarks by President Obama and President Ghani of Afghanistan in Joint Press Conference (Mar. 24, 2015) (Exhibit 16). These military personnel are deployed across Afghanistan at 21 military bases, from which a variety of training, support, and counterterrorism operations are conducted.[3] *See* Campbell Statement at 4.

Although the United States and NATO have ended their combat missions and transitioned to a new phase of military operations in Afghanistan, the threat posed by al-Qaeda, Taliban, and associated forces remains significant and attacks against U.S. and coalition forces continue. [redacted] Harris Decl. ¶ 10. [redacted] *Id.* [redacted] *Id.* Al-Qaeda's leader, Ayman al-Zawahiri, is still at large, as is Mullah Omar, the Taliban's leader. *Id.*; *see also* Mirwais Harooni, Afghan's Taliban Say Mullah Omar Is Alive And Well, Reuters, Apr. 6, 2015 (Exhibit 18). [redacted]

[3] The NATO mission operates with one central hub in Kabul and four additional bases in Mazar-e-Sharif, Herat, Kandahar, and Laghman. *See* Fact Sheet: Wales Summit – NATO's Changing Role in Afghanistan (Sept. 4, 2014) (Exhibit 17). Four Allied nations serve as leading "framework nations" at each of these locations: Turkey in the capital of Kabul; Germany in the north (Mazar-e-Sharif); Italy in the west (Herat); and the United States in the south and east (Kandahar and Laghman). *See id.*

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[redacted] *Id.* Further, al-Qaeda leaders and operatives continue to maintain a significant presence in Afghanistan. *Id.* ¶¶ 10, 16. It is, therefore, a primary goal of the United States to disrupt al-Qaeda, and deny the organization the ability to project power against the United States, or our allies and partners, from Afghanistan. *Id.*; *see also* United States National Security Strategy at 9-10 (Feb. 2015) (Exhibit 19) (explaining that combating the threat posed by al-Qaeda is a continuing national security priority).

The Taliban also remains a resilient, lethal force [redacted] *Id.* ¶ 11. [redacted] *Id.* [redacted] *Id.* Elements of the Taliban are actively supporting the operations of al-Qaeda, and there is no indication that the Taliban's support is diminishing. *Id.* ¶ 16. The Taliban has not laid down arms and joined in the Afghan political process. *Id.* According to the United Nations, "2014 saw a significantly elevated number of Taliban attacks across Afghanistan, marking an increase in their activity." *See* United Nations Report Concerning The Taliban And Other Associated Individuals And Entities Constituting A Threat To Peace, Stability And Security In Afghanistan at 3 (Dec. 11, 2014) (Exhibit 20). There were 20,051 security incidents in Afghanistan in 2014, an increase of 10% over the same period in 2013. *See* United Nations Report: The Situation In Afghanistan at 5 (Feb. 17, 2015) (Exhibit 21) ("U.N. Report"). Throughout 2014, the Taliban "continued to conduct high-profile and complex attacks against individuals, population centers, and remote outposts." *See* DoD Report (Ex. 15) at 2. "The insurgency remained resilient and continued to pose a threat to U.S. and coalition forces and Afghan civilians." *Id.*; *see also id.* at 13-20 (describing attacks and security

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incidents in Afghanistan during 2014). [redacted] Harris Decl. ¶ 11; *see also id.* ¶ 16 (explaining that the Taliban remains active across Afghanistan; it is not confined solely to the border provinces with Pakistan).

Moreover, the Taliban has publicly declared that it will continue to fight U.S. forces in Afghanistan into 2015 and beyond. *Id.* For example, the Taliban declared at the end of 2014 that it "will fight until there is not one foreign soldier on Afghan soil and we have established an Islamic state." *See* Tom Howell, Jr., Obama Marks End of Afghan Mission As Milestone, Washington Times, Dec. 28, 2014 (Exhibit 22). And, in response to the President's March 2015 announcement that the United States will maintain the current number of military personnel in Afghanistan throughout 2015, the Taliban said: "This means the war will go on until they are defeated." *See* Emal Haidary, Suicide Bomber Hits Kabul as Taliban Warn on U.S. Troop Pullout, Yahoo News, Mar. 25, 2015 (Exhibit 23).

The Taliban's continued efforts to fight U.S. and coalition forces are evident in its actions. Harris Decl. ¶ 11. For example, in recent months Taliban forces have conducted several high-profile attacks against U.S. and coalition forces:

- The Taliban has continued its tactic of infiltrating Afghan security forces in order to carry out insider attacks on U.S. and coalition forces. For example, on January 29, 2015, Taliban forces infiltrated a military base in Kabul and killed three U.S. civilian contractors. *See* Sudarsan Raghavan & Missy Ryan, Taliban Claims Responsibility For Attack on Americans at Kabul Airport Base, Washington Post, Jan. 30, 2015 (Exhibit 24); *see also* Campbell Statement at 5-6 ("Although insider

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attacks against U.S. and Coalition forces declined again in 2014, they remain a focus area of force protection.").

- On December 12, 2014, Taliban forces detonated a roadside bomb near a bus carrying NATO forces that resulted in the deaths of two U.S. servicemen. *See* Hamid Shalizi & Mirwais Harooni, Dozens Killed in Afghanistan Fighting As Foreign Troops Head Home, Reuters, Dec. 13, 2014 (Exhibit 25).
- On February 26, 2015, the Taliban claimed responsibility for a car bomb attack on NATO's top envoy in Afghanistan, claiming that the intended target of the attack was a convoy of U.S. forces. *See* Jessica Donati, Suicide Bomb Strikes Top NATO Envoy Team in Afghanistan, Reuters, Feb. 26, 2015 (Exhibit 26).
- [redacted] *See* Harris Decl. ¶ 11.
- On April 10, 2014, the Taliban claimed responsibility for an attack on U.S. forces by a suicide car bomber near the United States military base in Jalalabad. *See* Sudarsan Raghavan, Suicide Bomber in Afghanistan Attacks U.S. Convoy, Washington Post, April 10, 2015 (Exhibit 27).

The United Nations has also reported that there were 5,075 security incidents in Afghanistan between November 16, 2014 and February 15, 2015, a 10% increase as compared to the same period in 2014. *See* U.N. Report (Ex. 22) at 4-5.

The attacks on U.S. forces by Taliban, al-Qaeda, and associated forces will continue in the future. *See* Harris Decl. ¶ 16. In recent testimony before the House Armed Services Committee in March 2015, General John F. Campbell, Commander United States Forces-Afghanistan, stated that "Afghanistan remains a dangerous place" and U.S. and coalition forces

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in Afghanistan "will be targeted and we will suffer casualties." *See* Campbell Statement (Ex. 14) at 4-5 ("we manage considerable risks to our mission and force and contend with myriad of lethal threats"); *see also* Testimony of General John F. Campbell, Commander United States Forces-Afghanistan, Before The Senate Armed Services Committee On Afghanistan Issues at 26 (Feb. 12, 2015) (Exhibit 28) ("IEDs have become the weapon of choice not only in Afghanistan" and "will continue to be a threat to both the coalition forces and the Afghan security forces."). Additionally, General Campbell stated that "Taliban threats from indirect fire, insider attacks, and complex attacks are projected to increase in the next fighting season."[4] *See* Campbell Statement (Ex. 14) at 16 ("our personnel will be exposed to risks in 2015 and beyond"); Harris Decl. ¶ 16 (explaining that instances of hostilities between the U.S. and enemy forces in Afghanistan are expected to increase throughout the coming months and assessing that Taliban and al-Qaeda fighters will gather in greater numbers than they have in previous fighting seasons). The United Nations also anticipates that the "coming summer season will likely see an intensification of the armed conflict." *See* U.N. Report (Ex. 22) at 16.; *see also* Sudarsan Raghavan, Foreign Fighters Are Spilling Into Afghanistan, Helping The Taliban, Washington Post, Apr. 14, 2015 (Exhibit 29) (discussing increase in foreign fighters coming to Afghanistan for upcoming 2015 fighting season).

In light of the continuing threat posed by al-Qaeda, Taliban, and associated forces, [redacted] Harris ¶ 12. From January 2015 to the present, there have been numerous, specific instances of hostile

[4] In past years in Afghanistan, relatively few instances of fighting have occurred in winter months, like January, compared with the warmer months. Harris Dec. ¶ 16. The height of "fighting season" in Afghanistan generally lasts from April until October. *Id.*

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forces, including the Taliban and al-Qaeda, engaging U.S. personnel and facilities in Afghanistan. *Id.* ¶¶ 9, 12. For example, [redacted] *Id.* ¶ 13. [redacted] *Id.* [redacted] *See* Harris Decl. ¶ 14. [redacted] *Id.* [redacted] *Id.* Additionally, as explained above, [redacted] *Id.* ¶ 15. [redacted] *Id.* [redacted] *Id.*

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ARGUMENT

1. Petitioner's Detention Is Lawful Under The AUMF Because Active Hostilities Against al-Qaeda, Taliban, and Associated Forces Remain Ongoing.

Petitioner's motion should be denied because active hostilities against al-Qaeda, Taliban, and associated forces remain ongoing and have not ceased.[5] In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court held that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. 507, 520 (2004) (plurality opinion).[6] The plurality based this conclusion on Article 118 of the Third Geneva Convention of 1949, which provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.* (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 3406, art. 118). Based on its understanding of "longstanding law-of-war principles," the *Hamdi*

[5] As a preliminary matter, Respondents object to the form of Petitioner's filing because he has not stated an appropriate legal basis for his request that the Court reconsider his habeas petition on a new legal theory. As explained above, Petitioner's habeas petition was fully and finally adjudicated. Therefore, because the petition was denied, he must either move for relief from that judgment pursuant to Fed. R. Civ. P. 60 or file a new petition. Here, Petitioner does not cite any basis for the Court to reconsider its final judgment, *see generally Hazel v. Ives*, No. 11-CV-1100 (BAH), 2013 WL 1749867, at *1 (D.D.C. Apr. 23, 2013) (discussing the application of Rule 60 to a habeas judgment), but rather asserts a new claim never raised in his habeas petition as his basis for requesting an order of release; such a claim should be considered a new petition for a writ of habeas corpus. *See* Order, *Al-Adahi v. Obama*, No. 05-CV-280 (GK) (D.D.C. Aug. 7, 2014) (ECF No. 563) at 1 n.1 (stating that "there are serious objections" to a detainee filing a motion for release in a finally-adjudicated habeas case based on a new legal theory but declining to address that procedural issue because the merits of the detainee's motion clearly warranted denial of the motion); *see also Al-Odah v. United States*, No.13-CV-1420 (CKK), 2014 WL 3809772, at *1-2 (D.D.C. Aug. 7, 2014) (addressing merits of a second habeas petition filed by Guantanamo detainee after Court had denied the original petition). The Court should require Petitioner to file a new habeas petition asserting the basis of his request for relief. *Cf.* 28 U.S.C. § 2242.

[6] Justice Thomas wrote separately and provided a fifth vote for upholding law of war detention authority under the AUMF, but he would have gone further than the plurality, stating that "the power to detain does not end with cessation of formal hostilities." *See Hamdi*, 542 U.S. at 587-88 (Thomas, J., dissenting).

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plurality held that "Congress' grant of authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain for the duration of the relevant conflict." *Hamdi*, 542 U.S. at 521. Congress subsequently affirmed this understanding of the Government's detention authority in the 2012 NDAA by authorizing "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for the Use of Military Force." NDAA § 1021(c)(1). *Cf. Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

In reaching its conclusion that law of war detention may last until the cessation of active hostilities, the plurality in *Hamdi* referenced the fact that "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan." 542 U.S. at 521 (citing various news articles and government press releases to support position that between 13,500 and 20,000 U.S. military personnel remained in Afghanistan at the time and operations continued there). "If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions [of Taliban forces] are part of the 'necessary and appropriate force' and therefore authorized by the AUMF." *Id.* Because active hostilities remained ongoing, the Court concluded that Hamdi's detention was lawful "for the duration of these hostilities." *Id.*; *see, e.g.*, *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) ("[T]his court has repeatedly held that under the Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001), individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."); *Ali v.*

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Obama, 736 F.3d 542, 544 (D.C. Cir. 2013) ("Detention under the AUMF may last for the duration of hostilities.").

Here, Petitioner's detention is lawful because active hostilities against al-Qaeda, Taliban, and associated forces in Afghanistan have not ceased. As explained above, substantial numbers of U.S. military personnel remain in Afghanistan, engaged in a range of military operations to counter the continuing threat posed by al-Qaeda, Taliban, and associated forces. At present, approximately 9,800 United States troops are deployed at 21 military bases across Afghanistan. These forces engage, where appropriate, [redacted] These military operations remain active and ongoing in 2015, as reflected by the repeated occasions in which hostile action by U.S. forces has been required in recent months. In accordance with *Hamdi*, the record here more than sufficiently establishes that active hostilities remain ongoing and Petitioner's detention remains lawful. *See supra* at 10-17.

Petitioner's motion contends that he should be released because "the United States' war in Afghanistan and its combat mission in Afghanistan ended at the close of 2014." *See* Pet'r's Mot. at 3. Petitioner, however, fails to understand that the relevant inquiry is whether active hostilities have ceased, not whether a particular combat mission has ended. Article 118 of the Third Geneva Convention, upon which the *Hamdi* plurality relied in construing the duration of detention authority under the AUMF, requires release and repatriation of prisoners of war only upon the "cessation of active hostilities." The official commentary to Article 118 provides additional explanation that release is required only when "the fighting is over."[7] *See* 3 Int'l

[7] Consistent with Article 118, Department of the Army regulations and guidance provide for release of prisoners of war at the cessation of active hostilities. *See* Army Regulation 190-8, § 3-13 ("Prisoners who are not sick or wounded will be repatriated or released at the cessation of

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Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, art. 118 at 547 (J. Pictet ed., 1960).

The Court of Appeals in *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), agreed with this understanding of the point at which active hostilities end, holding that detention under the AUMF may continue until the "fighting stops." In *Al-Bihani*, the Court of Appeals considered a challenge similar to the one presented in this case by a Guantanamo Bay detainee who argued that he was entitled to release because "the conflict with the Taliban has allegedly ended." *Id.* The Court of Appeals rejected that argument on both "factual and practical grounds." *Id.* Citing a NATO press release, the Court stated that hostilities were ongoing because "there are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan." *Id.* The Court also rejected the detainee's argument that release was required at the conclusion of "each successful campaign of a long war." *Id.* That principle, if accepted, would be "a Pyrrhic prelude to defeat" because it "would trigger an obligation to release Taliban fighters captured in earlier clashes" and result in "constantly refresh[ing] the ranks" of enemy forces. *Id.* In making this "commonsense observation," the Court referred to Article 118 and explained that "the Conventions use the term 'active hostilities' instead of the terms 'conflict' or 'state of war' found elsewhere in the document is significant. It serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does

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hostilities as directed by OSD."); Army Field Manual, Law of Land Warfare, FM 27-10 (July 18, 1956), § 198 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

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not necessarily track formal timelines. The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops."[8] *Id.*

Although the United States has ended its combat mission in Afghanistan, the fighting there certainly has not stopped. As explained above, [redacted] *See supra* at 10-17. Petitioner, however, misunderstands the legal standard for detention under the law of war and incorrectly equates the United States' decision to reduce the scope of its military operations in Afghanistan with a cessation of hostilities. But the end to the U.S. combat mission does not mean the cessation of active hostilities. That distinction is consistent with *Al-Bihani*'s "commonsense" observation that the release of enemy belligerents prior to the end of hostilities could result in refreshing the enemy ranks, thereby undermining the

[8] Other influential commentators agree with this interpretation of Article 118, explaining that "cessation of active hostilities" is "a situation of complete end of the war, if not in a legal sense, at least in a material one with *clearly no probability of resumption of hostilities in a near future*." *See* Christiane Shields Delessert, Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War 52 (1977) (emphasis in original) ("The end of war for the purpose of the application of Article 118, meant the end of military operations."); *id.* at 75 ("Article 118 clearly envisaged the factual end of the fighting as the event establishing the obligation of each Party to repatriate its prisoners."); *id.* at 103 ("Parties to a conflict, according to traditional international law, cannot be expected release prisoners if there is some real danger that the enemy will resume hostilities."); *see also* 2 L. Oppenheim, International Law § 275 (H. Lauterpacht 7th ed. 1952) ("Probably the phrase 'cessation of active hostilities" in the sense of Article 118 refers not to suspension of hostilities in pursuance of an ordinary armistice which leaves open the possibility of a resumption of the struggle, but to a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as render it out of the question for the defeated party to resume hostilities."); 1 G. Schwarzenberger, International Law 216 (5th ed. 1967) (stating that Article 118 "prescribes repatriation already on cessation of active hostilities, that is, when, in good faith, neither side expects a resumption of hostilities."); The Handbook of Humanitarian Law in Armed Conflicts § 732 (Dieter Fleck ed., 1995) (explaining that "cessation of active hostilities" involves a situation where "the fighting has stopped" as reflected by "lasting peace" and "demobilization of the parties to the conflict" as opposed to "merely an interruption in the hostilities").

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hard-earned military gains previously obtained at a time when thousands of U.S. service members are deployed in Afghanistan and continue to face threats there on a daily basis. *See Al-Bihani*, 590 F.3d at 874. Moreover, in considering whether active hostilities have ceased, the actions and statements of Taliban, al-Qaeda, and associated forces, as well as those of the United States, must be considered. As explained above, these groups continue to conduct lethal attacks against U.S. and coalition troops in Afghanistan, including recent car bombings and rocket attacks, and they have publicly vowed that additional attacks will continue until "there is not one foreign soldier on Afghan soil." *See supra* at 12-16. Indeed, the United Nations Security Council recently issued a resolution in March 2015 "[r]eiterating its concern about the security situation in Afghanistan, in particular the ongoing violent and terrorist activities by the Taliban, al-Qaeda and other violent and extremist groups." *See* U.N.S.C. Res. 2210, U.N. Doc. S/RES/2210 (March 16, 2015) (Exhibit 30) (discussing the "the continuously alarming threats posed by the Taliban, al-Qaeda and other violent and extremist groups"). Based on the current activities of U.S. forces in Afghanistan as well as the hostile actions and statements of Taliban, al-Qaeda, and associated forces, there is no legal or factual basis on which to conclude that active hostilities between the United States and these groups have ceased.

2. Whether Active Hostilities Have Ended Is A Question For The Political Branches And There Has Been No Such Determination That Hostilities Have Ceased.

Petitioner's claim for release also fails because the political branches are in agreement that active hostilities against Taliban, al-Qaeda, and associated forces continue. In *Al-Bihani*, the Court of Appeals held: "The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al-Bihani*, 590 F.3d at 874. The Court of Appeals also emphasized that, under separation of powers principles, the

judiciary is obligated to give the political branches "wide deference" on questions concerning the cessation of hostilities. *Id.* at 875. "In the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified." *Id.*

The Court of Appeals reaffirmed this holding several years later in *Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013). In that case involving detentions in Afghanistan, the Court of Appeals held that "whether an armed conflict has ended is a question left exclusively to the political branches." *Id.* at 341. ("The Government represents that the United States remains at war in Afghanistan."). The Court of Appeals concluded that hostilities in Afghanistan remained ongoing because "the political branches [have] yet to announce an end to the war in Afghanistan" and "the President has repeatedly declared that it is ongoing." *Id.*

The Court of Appeals in *Al-Bihani* and *Maqaleh* based its holdings on Supreme Court cases dating back to the Civil War recognizing, in a variety of contexts, that the determination whether war, belligerency, or hostilities have ended is reserved for the political branches. *See Al-Bihani*, 590 F.3d at 874; *Maqaleh*, 738 F.3d at 341. Both cases relied principally on *Ludecke v. Watkins*, 335 U.S. 160 (1948), a case in which the Supreme Court held that the President retained the war power to deport enemy aliens notwithstanding the surrender of Germany in World War II, because the President had determined that a state of war still existed. *Id.* at 168-170 (stating that the United States still has "armies abroad exercising our war powers"). Noting that the law does not "lag behind common sense," the Supreme Court recognized that war does not necessarily end with a cease-fire order; rather, war "may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act." *Id.* at 168-169. In reaching this conclusion, the Supreme Court emphasized that questions

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concerning the time at which wars end are "matters of political judgment for which judges have neither technical competence nor official responsibility." *Id.* at 170.

Ludecke, in turn, followed a long line of prior Supreme Court cases from other armed conflicts. *See, e.g., United States v. Anderson*, 76 U.S. 56, 70-71 (1869) (relying on a public proclamation from President Andrew Johnson to establish the end date for the Civil War, explaining the "inherent difficulty of determining" when the Civil War ended, and rejecting an argument that a court could determine the end point of the Civil War by identifying "when the last Confederate general surrendered to the National authority"); *The Protector*, 79 U.S. 700, 701-702 (1871) ("Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise date it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates"); *The Three Friends*, 166 U.S. 1, 63 (1897) ("But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted to the terms of the intention expressed."); *Commercial Trust Co. of New Jersey v. Miller*, 262 U.S. 51, 57 (1923) (stating that a "court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time"); *see also Citizens Protective League v. Clark*, 155 F.2d 290, 295 (D.C. Cir. 1946) ("It is not for the courts to determine the end of a war declared by the Congress."). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court summarized this line of cases and concluded that they support the proposition that questions concerning the "dates of duration of hostilities" are committed to the political branches. *Id.* at 213. The Court explained that questions concerning

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"when and whether a war has ended" require "finality in the political determination" and lack "clearly definable criteria for decision" by courts. *Id.*

With respect to the current armed conflict, Congress and the Executive are in agreement that active hostilities against al-Qaeda, Taliban, and associated forces have not ceased. The AUMF, which authorizes the use of force against al-Qaeda, Taliban, and associated forces, remains in effect, and it has not been repealed or amended by Congress. *See Ali*, 736 F.3d at 552 ("the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities"). Further, in the 2012 NDAA, Congress reaffirmed "the authority of the President to use all necessary and appropriate force pursuant to the [AUMF,]" including "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." *See* NDAA § 1021(a) and (b)(2), 125 Stat. 1562. Acting pursuant to this statutory authority, the United States continues to conduct certain military operations in Afghanistan, including support of Afghan forces in their combat activities and counterterrorism operations against al-Qaeda, Taliban, and associated forces, where appropriate, in order to prevent these groups from threating U.S. targets or the homeland. *See supra* at 10-17

The Government has kept Congress and the public informed of its military activities in Afghanistan though sworn testimony of high-ranking military officials, regular written reports, and public statements. *See, e.g.*, Campbell Statement (Ex. 14); DoD Report (Ex. 15).[9] Indeed, a senior Department of Defense official recently stated unequivocally to Congress in February 2015 that active hostilities in Afghanistan remain ongoing, notwithstanding the end of the combat mission. *See* Guantanamo Detention Facility and Future of U.S. Detention Policy:

[9] The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat 2, § 1230, requires detailed reports every 180 days regarding the security situation in Afghanistan.

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Hearing Before The Senate Armed Services Committee, 114th Cong. (Feb. 5, 2015) at 24 (Exhibit 31) (statement of Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy) ("We're not at the end of hostilities in Afghanistan."); *id.* ("I agree with you, sir, that hostilities are not over.") Respondents reaffirm those representations again here: active hostilities against al-Qaeda, Taliban, and associated forces in Afghanistan have not ceased. Under *Al-Bihani*, there is no basis for the Court to second-guess that judgment.

Petitioner, notably, does not dispute the well-established precedent that determinations concerning the end of hostilities are reserved for the political branches. Indeed, Petitioner concedes: "Under these precedents, a conflict is over when the President says it is over." Pet'r's Mot. at 6. Petitioner, however, incorrectly contends that recent public statements by the President constitute the requisite determination that active hostilities in Afghanistan have ceased, such that this Court can order an end to Petitioner's law of war detention. *See id.* at 3-6. To support his claim, Petitioner's motion focuses on the President's public statements in December 2014 and January 2015 announcing that, "our combat mission" and "America's war in Afghanistan will come to a responsible end." *See id.* at 3.[10] But Petitioner misunderstands the meaning of these statements as they relate to his law of war detention. The President never declared that active hostilities against al-Qaeda, Taliban, and associated forces have ceased. Rather, in his public statement on December 28, 2014, announcing the end of the "combat mission in Afghanistan," the President expressly stated that "counterterrorism operations" will

[10] The relevant texts of the President's statements are: "This month, after more than 13 years, our combat mission in Afghanistan will be over. This month, America's war in Afghanistan will come to a responsible end." (Dec. 15, 2014) (Exhibit 32); "Now, thanks to the extraordinary sacrifices of our men and women in uniform, our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion." (Dec. 28, 2015) (Ex. 9); "Tonight, for the first time since 9/11, our combat mission in Afghanistan is over." (Jan. 20, 2015) (Exhibit 33). *See* Pet'r's Mot. at 3-4.

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continue in Afghanistan. *See* Ex. 9. Further, on March 25, 2015, in a joint public statement with President Ghani of Afghanistan, the President made clear that only the United States' combat mission, not hostilities, has ended: "[O]n December 31st, after more than 13 years, America's combat mission in Afghanistan came to a responsible end." *See* Remarks by President Obama and President Ghani of Afghanistan in Joint Press Conference (Mar. 24, 2015) (Ex. 16). In that same statement the President went on to explain, "Afghanistan still remains a very dangerous place, and insurgents still launch attacks, including cowardly suicide bombings against civilians." *Id.* In light of these security threats, the President reaffirmed that "the United States will continue to train, advise, and assist Afghan security forces," as well as "conduct targeted counterterrorism operations," in order to prohibit "terrorist activities [from] being launched out of Afghanistan." *Id.* To that end, the Secretary of Defense has stated publicly in 2015 that U.S. forces will conduct "counterterrorism [operations] against Al-Qaeda and its remnants" as well as "take appropriate measures against Taliban members who directly threaten U.S. and coalition forces in Afghanistan, or provide direct support to Al-Qaeda." *See* Joint Press Conference By Secretary Hagel and President Ghani in Kabul, Afghanistan (Dec. 6, 2014) (Exhibit 34). General Campbell, in testimony before the Senate in February 2015, also explained the necessity of these continuing operations: "[with] our presence inside of Afghanistan with a great counterterrorism capability, we've been able to continue to keep pressure on insurgents that would want to do harm to both Afghanistan and to other nations to include Europe and the United States." *See* Ex. 29. And, on March 23, 2015, Secretary of State Kerry reaffirmed that counterterrorism operations will continue against both al-Qaeda and Taliban forces. *See* Joint Press Availability With Secretary of Defense Ashton Carter, Secretary of State John Kerry, Afghan President Ashraf Ghani, and Afghan Chief Executive Abdullah Abdullah (Mar. 23, 2015) (Exhibit 35).

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Most recently, on April 10, 2015, the General Counsel for the Department of Defense gave a public speech to the American Society of International Law stating unequivocally that active hostilities in Afghanistan are currently ongoing. *See* Remarks By The General Counsel of the Department of Defense on the Legal Framework For the United States' Use of Military Force Since 9/11 (April 10, 2015) (Exhibit 36) ("Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because Al-Qaida and associated forces continue to target U.S. person 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."). Taken together, these public statements make clear that the Executive has determined that active hostilities remain ongoing and have not ceased.

The President's public statements must also be considered in context with the Bilateral Security Agreement between the United States and Afghanistan, which the President described as a "historic" achievement following nearly two years of negotiations. *See* Ex. 7. The Bilateral Security Agreement provides authorization for the United States to conduct certain "force protection" and "counter-terrorism" activities; memorializes the Parties' expectation that Afghanistan's authorization for the United States to conduct "military operations to defeat al-Qaeda and its affiliates" will continue for the foreseeable future, even after the conclusion of the U.S. combat mission; and expressly recognizes the continued right of the United States to act in self-defense. *See* Ex. 8. Therefore, the Bilateral Security Agreement stands as further evidence that the Government has determined that active hostilities in Afghanistan remain ongoing. To accept Petitioner's contrary argument, the Court would have to accept the nonsensical position that the President entered into an agreement with Afghanistan, following years of diplomatic

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negotiation, anticipating United States military operations in Afghanistan beyond 2014 and then declared those operations to be at an end before they even began. That argument lacks merit.

Accordingly, there is no basis on which to conclude that the President has announced a cessation of hostilities, either through diplomatic agreement or in his public statements, nor have hostilities ceased as a matter of fact. If the President concluded that active hostilities were over, he would doubtless have issued a clear statement to that effect. He has not. Instead, the President and other high-level Executive Branch officials have made clear to Congress and the public in 2015 that hostilities remain ongoing. *See, e.g.*, Ex. 9, 32, 34, 38.

Although Petitioner also attempts to rely on the President's statements that "America's war in Afghanistan will come to a responsible end" by the close of 2014, Petitioner removes that statement from its full context in an attempt to give the misleading impression that the President has declared an end to hostilities in Afghanistan. As explained above, the President has not declared an end to active hostilities in Afghanistan. Moreover, the President's statements, when read in context, equate the "war" with the "combat mission." *See* Remarks By The President To Military And Civilian Personnel At Joint Base McGuire-Dix-Lakehurst (Dec. 15, 2014) (Exhibit 33) ("This month, after more than 13 years, our combat mission in Afghanistan will be over. This month, America's war in Afghanistan will come to a responsible end."); Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014) (Ex. 9) ("Now, thanks to the extraordinary sacrifices of our men and women in uniform, our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion."). These statements do not constitute the requisite determination that hostilities in Afghanistan have ceased, particularly when those same statements also make clear that military operations in Afghanistan will continue. *See id.*, Ex. 33 ("we've got to conduct counterterrorism

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missions because there are still remnants of al Qaeda there."); Ex. 9 ("we will maintain a limited military presence in Afghanistan to train, advise, and assist Afghan forces and to conduct counterterrorism operations against the remnants of al Qaeda").[11] Indeed, the President's actions of deploying approximately 10,000 U.S military personnel to Afghanistan, a location he describes in his statements as "a dangerous place," further reinforces the fact that he has not determined that active hostilities have ended. *See* Ex. 9.

Even assuming there were some ambiguity in the President's public statements, the law requires that the Court give the political branches "wide deference" on questions concerning the cessation of hostilities.[12] *Al-Bihani*, 590 F.3d at 875. And here, where the Executive has been consistent in its statements to Congress and the public that active hostilities remain ongoing,

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[11] The Supreme Court has emphasized that congressionally-authorized war powers cannot be terminated by "passing references in messages to Congress, nor by newspaper interviews with high officers of the army or with officials of the War Department." *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 167 (1919). In *Hamilton*, the Supreme Court rejected an argument similar to the one Petitioner advances here. Relying on "statements of the President to the effect that the war has ended and peace has come," the plaintiff argued that President Woodrow Wilson's public statement announcing the end of World War I terminated certain congressionally-authorized wartime powers. *Id.* at 159. The Supreme Court rejected that position, concluding that the President's announcement that the war was over was "doubtless used in a popular sense" and did not terminate restrictions on the sale of certain types of alcoholic beverages imposed by the War-Time Prohibition Act where the wartime actions of the Executive continued. *Id.* at 167-68.

[12] In *In Re Territo*, 156 F.2d 142 (9th Cir. 1946), an American citizen captured on the battlefield in Italy in 1943 while serving in the Italian army filed a petition for a writ of habeas corpus and argued that his detention had become unlawful by 1946 because of "the cessation of hostilities between the United States and Italy." *Id.* at 147 (explaining that Italy switched sides in World War II and subsequently initiated hostilities against the Axis powers). At the time *Territo* was decided, the 1929 Geneva Convention provided that "repatriation of prisoners shall be effected as soon as possible after the conclusion of peace." *See* Convention Between the United States of America and other Powers Relating to Prisoners of War, art. 75, July 27, 1929, 47 Stat. 2021 (1932). In denying the petition, the Court deferred to the judgment of the political branches and concluded that release was not required because "no treaty of peace has been negotiated with Italy." *Id.* at 145 n.2, 148.

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there is no basis for the Court to ascribe a meaning to the President's public statements that was never intended and would also be at odds with the manner in which he, as Commander-in-Chief, has directed the U.S. armed forces to conduct certain continuing military operations in Afghanistan. *See The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862) (holding that the issue of whether a state of war existed such that President Lincoln could invoke the laws of war and impose a blockade on the southern states during the Civil War "is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department") (emphasis in original). The nature of the current armed conflict does not alter the need for judicial deference to the determination of the political branches with respect to the point at which hostilities end.[13] *See Center for Nat. Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (acknowledging the "long-recognized deference to the executive on national security issues" and applying that deference in the context of the current armed conflict where "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.").

[13] Although there can be no dispute that the AUMF remains in force today, the Supreme Court has recognized that certain statutes "may cease to have validity owing to a change of circumstances." *See Hamilton*, 251 U.S. at 162. That is essentially the claim Petitioner raises here, *i.e.*, the statutory detention authority granted by the AUMF has lapsed, at least with respect to his own detention, due to changed factual circumstances, specifically, the alleged end of active hostilities. But in considering an argument that changed circumstances nullifies a statute that remains on the books, the Supreme Court has emphasized that "every reasonable intendment must be made in favor of its continuing validity" and a "wide latitude of discretion must be accorded" to "Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends." *Id.* Further, "it would require a clear case to justify a court in declaring such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued." *Id.* In light of this deferential standard and the facts explained above, there is no basis on which to conclude that the Government's detention authority under the AUMF has, unbeknownst to Congress or the Executive, somehow silently expired.

Any holding to the contrary by the Court would raise serious separation of powers concerns on a question of national security that "uniquely demand[s] [a] single-voiced statement of the Government's views." *See Baker*, 369 U.S. at 211. Otherwise, a decision by this Court that active hostilities have ceased – issued at a time when the President has not made a determination that hostilities have ceased and nearly 10,000 service members remain deployed overseas and engaged in operations to suppress the threat posed by Taliban, al-Qaeda, and associated forces – risks "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 216.[14] Further, such a decision could lead to significant foreign relations complications with Afghanistan, such as uncertainty about whether the United States' military commitment in Afghanistan will continue. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 341 n.1 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing *en banc*) ("It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat and when the status of combatants, their terms of release, and the mutuality of exchanges may all remain subjects for negotiation and diplomacy."). Precisely because questions surrounding the end point of active hostilities rest on military judgments regarding a multitude of factors that critically affect the national defense, the Supreme Court has consistently held for more than 100 years that this decision is properly left to

[14] The risk of conflicting decisions on this important national security issue is further compounded by the fact that this same question will be litigated before multiple Judges of this Court in different cases. Another Guantanamo Bay detainee, Fayez Al-Kandari (ISN 552), has filed a second petition for a writ of habeas corpus, in which he raises a challenge regarding the end of hostilities similar to the one asserted in this case. *See Al-Kandari v. United States*, No. 15-CV-329 (CKK). Respondents' response to that petition is currently due May 8, 2015.

the political branches.[15] *See Anderson*, 76 U.S. at 70-71. There is no basis for this Court to depart from that precedent.

CONCLUSION

For the reasons stated above, Petitioner's motion to grant the petition for writ of habeas corpus should be denied.

Dated: April 17, 2015

Respectfully submitted,

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[15] It is important to note that Petitioner's motion contends only that hostilities against the Taliban in Afghanistan have ended. Petitioner's motion does not raise a claim with respect to the end of hostilities against al-Qaeda or associated forces. The Court, however, need not address alternative grounds for Petitioner's detention given limited scope of Petitioner's challenge and the current state of hostilities against the Taliban. Nevertheless, Respondents reserve the right to present additional facts and argument regarding alternative grounds for Petitioner's detention should the Court determine that Petitioner's detention is unlawful because hostilities against the Taliban have ceased.