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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOATH HAMZA AHMED AL-ALWI (ISN 28), *Petitioner*, v. UNITED STATES OF AMERICA, *et al.*, *Respondents*.	Civil Action No. 15-CV-681 (RJL)

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGMENT

Respondents hereby respond to Petitioner Moath Hamza Ahmed Al-Alwi's Petition for Writ of Habeas Corpus (ECF No. 1) and move to dismiss or for judgment.

As a matter of international and domestic law, the United States currently remains in an armed conflict with al-Qa'ida, Taliban, and associated forces. Petitioner Al-Alwi (ISN 28), a Guantanamo Bay detainee previously determined by the Court of Appeals to be part of al-Qa'ida or Taliban forces, incorrectly contends that his detention at Guantanamo Bay has become unlawful because, he alleges, the United States' combat mission 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-Qa'ida, Taliban, and associated forces have not ceased. Indeed, two judges of this Court have issued recent decisions denying similar claims for release brought by other Guantanamo Bay detainees, concluding that "Respondents have offered convincing

evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped." *Al Warafi v. Obama*, No. 09-CV-2368 (RCL), 2015 WL 4600420 at *7 (D.D.C. July 30, 2015); *Al-Kandari v. United States*, No. 15-CV-329 (CKK), Classified Memorandum Opinion at 21 (D.D.C. Aug. 31, 2015) ("A review of the documents submitted by Respondents supports the President's assertion that fighting has not stopped in Afghanistan and that active hostilities remain ongoing at this time.") (Exhibit 1). 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.

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-Qa'ida, Taliban, and associated forces, both political branches are in agreement, as exhibited 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. The President of the United States recently reaffirmed this position in a letter to Congress addressing the deployment of U.S. Armed Forces in Afghanistan and unequivocally stated: "The United States currently remains in an armed conflict against al-Qa'ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing." *See* Letter from the President, Six Month Consolidated War Powers Resolution Report (June 11, 2015) ("WPR Report") (Exhibit 2). Thus, there is 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 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 earlier 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 late 2014 and early 2015 announcing that "our combat mission in Afghanistan is over, and America's longest war has come to a responsible and honorable end." *See, e.g.*, Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015) (Exhibit 3). The President has not declared that active hostilities against al-Qa'ida, 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 States military operations, not a cessation. The Government's position, as reflected by the President's own words, the public statements of other high-ranking Executive Branch officials, and reiterated again here following appropriate Executive Branch coordination, is that active hostilities against al-Qa'ida, Taliban, and associated forces in Afghanistan remain ongoing.

There is also no merit to Petitioner's alternative contention that active hostilities have ceased because the United States has decimated al-Qa'ida beyond its capacity to engage in further hostilities. Petitioner's ignores the factual bases for his detention articulated by this Court, from which the Court of Appeals concluded that Petitioner was part of al-Qa'ida or Taliban forces, and improperly asks the Court to evaluate the threat and capability of a transnational terrorist organization such as al-Qa'ida. Moreover, the record here establishes that

al-Qa'ida continues to pose a threat to the United States and maintains the operational capacity to engage in continuing hostilities.

Similarly, the Court should reject Petitioner's argument that his ongoing detention violates the Convention Against Torture and Additional Protocol I to the Geneva Conventions. In this and every conflict, the United States has taken seriously its obligations under international law to ensure humane treatment of detainees. Neither of those provisions, however, addresses the issue presented in this case, nor alters the well-established rule that law of war detention may last for the duration of active hostilities.

For these reasons, as explained further below, Petitioner's detention remains lawful. Consequently, Respondents respectfully request that the motion to dismiss or for judgment be granted, and that the petition for writ of habeas corpus be denied.

PROCEDURAL BACKGROUND

Petitioner Al-Alwi is a Yemeni national who was captured near the Afghanistan-Pakistan border in December 2001 and subsequently detained by the United States at Naval Station Guantanamo Bay, Cuba. He filed his first petition for a writ of habeas corpus in 2005, challenging the legality of his detention under the AUMF. *See Al-Alwi v. Obama*, No. 05-CV-2223 (RJL). This Court held a two-day hearing on the merits of the petition on December 16-17, 2008. On December 30, 2008, the Court denied the petition, finding that Petitioner (1) stayed at several guesthouses in Pakistan and Afghanistan that were closely associated with the Taliban and al-Qa'ida; (2) voluntarily surrendered his passport at a guesthouse closely associated with al-Qa'ida; (3) received military training at a Taliban camp and then traveled to two different fronts in Afghanistan to support Taliban forces; and (4) remained with Taliban forces after the attacks on September 11, 2011, and did not leave until U.S. forces began bombing the area. *See Al-Alwi*

v. Bush, 593 F. Supp. 2d 24, 28 (D.D.C. 2008).[1] Based on these findings, the Court concluded that "petitioner is being lawfully detained" under the AUMF "because it is more probable than not that he was 'part of or supporting Taliban or al Qaeda forces' both prior to and after the initiation of U.S. hostilities in October 2001."[2] *Id.* at 29.

On appeal, the Court of Appeals affirmed this Court's decision. *See Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011). The Court of Appeals rejected Petitioner's substantive arguments that the Court applied the wrong detention standard, concluding that the facts found by this Court were sufficient to demonstrate that Petitioner was "part of" al-Qa'ida or Taliban forces. *See Al-Alwi*, 653 F.3d at 16-18. In doing so, the Court of Appeals also rejected Petitioner's argument that the Court erred by relying on Petitioner's own statements that, in Petitioner's view, were not sufficiently corroborated. *See id.* at 18-20. The Court of Appeals also rejected Petitioner's procedural argument that the Court deprived Petitioner of an opportunity to develop an appropriate record to challenge his detention. *See id.* at 21-27. The Supreme Court denied Petitioner's petition for *certiorari* on June 11, 2012. *See Al-Alwi v. Obama*, __ U.S. __, 132 S. Ct. 2739 (2012).

On May 5, 2015, Petitioner filed a second petition for writ of habeas corpus, which is presently before the Court. The petition raises two claims for relief. The first claim contends that the Government's authority to detain Petitioner under the AUMF has ended because of the President's announcement that the combat mission in Afghanistan is over.

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[1] In light of these findings, the Court concluded it was unnecessary to address Respondents' additional evidence that Petitioner "served as a bodyguard to Usama bin Laden" and "received military training at the al-Farouq training camp." *See Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 29 (D.D.C. 2008).

[2] Petitioner "does not seek to re-litigate those findings" in this case. *See* Petition for Writ of Habeas Corpus ¶ 21 (ECF No. 1) ("Petition").

See Petition ¶¶ 35-37. The second claim contends that Petitioner's continuing detention violates Article 75 of Additional Protocol I to the Geneva Conventions and the Convention Against Torture. *See id.* ¶¶ 38-47.

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. *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:

> 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 in this Circuit 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. *See* Pub. L. No. 112-81, 125 Stat. 1562. The 2012 NDAA

"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 2012 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-Qa'ida and the Taliban regime that harbored al-Qa'ida 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-Qa'ida. *See* National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report at 337-38 (2004). The U.S.-led military campaign removed the Taliban from control of much of Afghanistan in December 2001, but Taliban, al-Qa'ida, 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 4) ("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-Qa'ida, Taliban, and associated forces. *See* Statement by the President on Ten Years of American Service in Afghanistan (Oct. 7, 2011) (Exhibit 5).

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 6). 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 7). 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 certain military personnel from Afghanistan later that year. *See* Remarks by the President on the Way Forward in Afghanistan (June 22, 2011) (Exhibit 8). 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 9). 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.[3] *See* Statement by the President on the Signing of the Bilateral Security Agreement and NATO Status of Forces Agreement in Afghanistan (Sept. 30, 2014) (Exhibit 10). 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-Qa'ida and its affiliates, and to train, advise, and assist the Afghan National Defense Forces and Security Institutions. *See* Bilateral Security Agreement (Exhibit 11). 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.*, arts. 2-3, 7. It

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

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 12). 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 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 13); *see also* Hagel Statement. 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]

The United States conducts its support mission in conjunction with the NATO coalition mission called Resolute Support.[4] *Id.* ¶ 7; *see* NATO, About Resolute Support (Exhibit 15). 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 16). 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 17). ("Campbell Statement").

[4] 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 14).

The second component of Operation Freedom's Sentinel is a counterterrorism mission directed against al-Qa'ida, persons providing support to al-Qa'ida, and persons engaged in hostilities against the United States and coalition forces in Afghanistan. *See* Harris Decl. ¶ 8.

[redacted] *See id.*; *see also* Department of Defense Report on Enhancing Security and Stability in Afghanistan at 4, 12-13 (June 2015) (Exhibit 18) (describing details of the U.S. counterterrorism mission and policies for targeting enemy forces) ("DoD Report").[5] The purpose of the counterterrorism mission is to target "the remnants of al Qaeda in Afghanistan to prevent its resurgence and to defeat external plotting against U.S. targets or the homeland." *See* DoD Report at 11.

The President has authorized approximately 9,800 U.S. uniformed military personnel to be present in Afghanistan today, [redacted] *See* Harris Decl. ¶ 6; WPR Report (stating that there are approximately 9,100 U.S. forces in Afghanistan as of June 2015). The President has also 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 19). These military personnel are deployed across Afghanistan at 21 military bases, from which a variety of training, support, and counterterrorism operations are conducted.[6] *See* Campbell Statement at 4.

[5] The Department of Defense submitted this report to Congress in accordance with the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291.

[6] 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

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-Qa'ida, Taliban, and associated forces remains significant and attacks against U.S. and coalition forces continue. [redacted] Harris Decl. ¶ 10; *see also* Rob Nordland, Message Believed to be From Qaeda Leader Pledges Support for Taliban, New York Times, Aug. 13, 2015 (Exhibit 21) (audio message from Al-Zawahiri pledging allegiance to the new leader of the Taliban). Al-Qa'ida's leader, Ayman al-Zawahiri, is still at large. *Id.* [redacted] Harris Decl. ¶ 10. Further, al-Qa'ida leaders and operatives continue to maintain a significant presence in Afghanistan. Harris Decl. ¶¶ 10, 16. Indeed, the United Nations recently reported that "[o]ver the past six months, the threat posed by Al-Qaida and associates inside Afghanistan has become more visible." *See* United Nations Security Council, Seventeenth Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2161 (2014) Concerning Al-Qaida and Associated Individuals and Entities at 6 (June 16, 2014) (Exhibit 22).

Role in Afghanistan (Sept. 4, 2014) (Exhibit 20). 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.*

"Al-Qaida and associates remain a serious threat to the security and stability of Afghanistan and the wider region." *Id.*; *see* DoD Report at 8, 32 (discussing continuing threat posed by al-Qa'ida in Afghanistan). It is, therefore, a primary goal of the United States to disrupt al-Qa'ida, and deny the organization the ability to project power against the United States, or our allies and partners, from Afghanistan. *Id.* ¶ 10; *see also* United States National Security Strategy at 9-10 (Feb. 2015) (Exhibit 23) (explaining that combating the threat posed by al-Qa'ida is a continuing national security priority).

The Taliban also remains a resilient, lethal force [redacted] Harris Decl. ¶ 11. [redacted] *Id.* [redacted] *Id.*; *see also* Bruce Riedel, The Taliban Affirm their Alliance with al-Qaida: Afghan Peace Talks in Doubt, Brookings Institution (Aug. 20, 2015) (Exhibit 24) (public message by new Taliban leader Mullah Mansour accepting loyalty pledge from al-Qa'ida leader Al-Zawahiri). Elements of the Taliban are actively supporting the operations of al-Qa'ida, and there is no indication that the Taliban's support is diminishing. Harris Decl. ¶ 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 25). 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 and its Implications for International Peace and Security at 5 (Feb. 27, 2015) (Exhibit 26) ("U.N. Report"). [redacted]

[redacted]

[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 or to other specific locales). 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 at 4-5.

Moreover, the Taliban has publicly declared that it will continue to fight U.S. forces in Afghanistan into 2015 and beyond. Harris Decl. ¶ 11. 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 27); DoD Report at 8, 26. 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 28).

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 29); *see also* DoD Report at 29 (explaining continuing threat posed by insider attacks).

- On February 26, 2015, the Taliban claimed responsibility for a car bomb attack on NATO's top envoy in Afghanistan, asserting 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 30).
- [redacted] *See* Harris Decl. ¶ 11.
- On April 10, 2015, 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, Apr. 10, 2015 (Exhibit 31);
- On June 30, 2015, a Taliban suicide attacker drove an explosive-packed vehicle into a NATO military convoy, killing at least one person and wounding two U.S. service members. *See* Lynne O'Donnell & Rahim Faiez, Taliban Suicide Attack on NATO Convoy in Afghanistan Kills 2, Wounds 26, Associated Press, June 30, 2015 (Exhibit 32).
- On August 7, 2015, the Taliban launched coordinated attacks across Afghanistan, killing more than 50 people, including a United States Special Forces soldier. *See* Masoud Popalzai, Barbara Starr, Joshua Berlinger, U.S. Service Member Among More Than 50 People Killed in Afghanistan Attacks, CNN, Aug. 8, 2015 (Exhibit

33); Army Green Beret from Rhode Island Killed in Afghanistan, Associated Press, Aug. 10, 2015 (Exhibit 34).[7]

The attacks on U.S. forces by al-Qa'ida, Taliban, and associated forces will continue in the future. *See* Harris Decl. ¶ 16. In 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 in Afghanistan "will be targeted and we will suffer casualties." *See* Campbell Statement at 4-5 ("we manage considerable risks to our mission and force and contend with myriad of lethal threats"). General Campbell also testified that, in 2015, al-Qa'ida "will likely attempt to rebuild its supply networks and planning capabilities with the intention of reconstituting its strike capabilities against western interests." *See id.* at 13. Additionally, General Campbell stated that "Taliban threats from indirect fire, insider attacks, and complex attacks are projected to increase in the next fighting season."[8] *See id.* 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-Qa'ida fighters will gather in greater numbers than they have in previous fighting seasons). The United Nations also anticipates that the "summer season will likely see an intensification of the armed conflict." *See* U.N. Report at 16.; *see also* Sudarsan Raghavan, Foreign Fighters Are Spilling Into Afghanistan, Helping The Taliban, Washington Post, Apr. 14,

[7] In addition to attacks against U.S. forces, the Taliban also hold several U.S. citizens hostage. *See* Shane Harris, An American Mom and Her Baby Are Being Held Hostage by The Taliban, The Daily Beast, Apr. 23, 2015 (explaining that the Taliban kidnapped a pregnant American woman in 2012 and she gave birth while in captivity) (Exhibit 35).

[8] 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.*

2015 (Exhibit 36) (discussing increase in foreign fighters coming to Afghanistan for 2015 fighting season). Indeed, in announcing the start of the 2015 fighting season in late April, the Taliban stated that the "main targets" of their "spring offensive" were to be "the foreign occupiers, especially their permanent military bases." *See* Usman Sharifi, Afghan Taliban Announce 'Spring Offensive' to Start Friday, Yahoo News, Apr. 22, 2015 (Exhibit 37). The Taliban followed through with their threat and began the 2015 fighting season by launching a rocket attack against the U.S. military base at Bagram Airfield, near Kabul. *See* Mirwais Harooni, Taliban Launch Spring Offensive With Rocket Attack on U.S. Base, Reuters, Apr. 24, 2015 (Exhibit 38). From December 2014 through May 2015, 38 U.S. military personnel were wounded in action and 4 were killed in action. *See* DoD Report at 29.

In light of the continuing threat posed by al-Qa'ida, Taliban, and associated forces [redacted] Harris ¶ 12. Since January 2015, there have been numerous, specific instances of hostile forces, including the Taliban and al-Qa'ida, engaging U.S. personnel and facilities in Afghanistan. *Id.* ¶¶ 9, 12; *see* Testimony of General John F. Campbell, Commander United States Forces-Afghanistan, Before The Senate Armed Services Committee On Afghanistan Issues at 19 (Feb. 12, 2015) (Exhibit 39) ("the last four or five months, in particular, the pressure we've had on A.Q. has been quite good"). For example, [redacted] *Id.*; *see also* U.S. Airstrikes Hit Southern Afghan District Seized by Taliban,

Possible Casualties, Associated Press, August 27, 2015 (Exhibit 40) (describing multiple airstrikes by U.S. forces in Musa Qala, Afghanistan in late August 2015)

[redacted] *Id.*; *see also* DoD Report at 4 (explaining United States role of providing combat enabler support to Afghan forces).

Consistent with the President's decision to continue military operations in Afghanistan in 2015, both the President and senior members of the Executive Branch have publicly explained what the transition from a "combat mission" to a support and counterterrorism mission means, and in doing so, reaffirmed that active hostilities remain ongoing. In February 2015, the Principal Deputy Under Secretary of Defense for Policy testified before the Senate Armed Services Committee, and in response to a question asking whether hostilities in Afghanistan had

ceased, such that the United States was required by law to release Guantanamo Bay detainees, stated: "We're not at the end of hostilities in Afghanistan." *See* Guantanamo Detention Facility and Future of U.S. Detention Policy: Hearing Before The Senate Armed Services Committee, 114th Cong. (Feb. 5, 2015) at 24 (statement of Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy) ("I agree with you, sir, that hostilities are not over.") (Exhibit 41).

In April 2015, the Department of Defense General Counsel gave a speech to the American Society of International Law in which he explained that the transition from the combat mission, which involved the draw down of U.S. Armed Forces to approximately 10,000 personnel and a narrowing of the scope of the United States' mission in Afghanistan, did not constitute an end of active hostilities. *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 at 7-9 (April 10, 2015) (Exhibit 42). "Although our presence in [Afghanistan] has been reduced and our mission there is more limited, the fact is that active hostilities continue." *Id.* at 8; *see also* DoD Report at 4 (explaining differences between the former combat mission and the current support and counterterrorism mission with respect to targeting enemy forces).

Most recently, on June 12, 2015, the President sent a letter to Congress addressing "deployments of U.S. Armed Forces equipped for combat" and unequivocally stated that active hostilities in Afghanistan remain ongoing:

> **Afghanistan.** United States Armed Forces have transitioned the lead for security to Afghan security forces while striking significant blows against al-Qa'ida's leadership and preventing Afghanistan from being used to launch attacks against our homeland. As I previously announced, the U.S. combat mission in Afghanistan ended on December 31, 2014; however, a limited number of U.S. forces remain in Afghanistan for the purposes of training, advising, and assisting Afghan forces, conducting and supporting counterterrorism operations against the remnants of al-Qa'ida, and taking

> appropriate measures against Taliban members who directly threaten U.S. and coalition forces in Afghanistan or provide direct support to al-Qa'ida. The United States currently remains in an armed conflict against al-Qa'ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing.

WPR Letter at 2-3 (emphasis in original).

ARGUMENT

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

The petition for writ of habeas corpus should be denied because active hostilities against al-Qa'ida, Taliban, and associated forces remain ongoing and have not ceased. 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).[9] 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* 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

[9] 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).

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.").

Here, Petitioner's detention is lawful because active hostilities against al-Qa'ida, 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-Qa'ida, Taliban, and associated forces. At present, approximately 9,100 United States troops are deployed at 21 military bases across Afghanistan. These forces engage, where appropriate, in traditional uses of force consistent with prior armed

conflicts, such as air strikes, ground raids, and support to coalition partners in active combat zones. 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 10-21.

Judges Lamberth and Kollar-Kotelly recently agreed with this conclusion in denying relief to other Guantanamo Bay detainees seeking release based on the purported end of hostilities. *See Al Warafi*, 2015 WL 4600420; *Al-Kandari*, Classified Memorandum Opinion (Resp'ts' Ex. 1). Applying the "active hostilities" standard set forth in *Hamdi*, Judge Lamberth concluded that "active hostilities continue" and explained that "Respondents have offered convincing evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped." *See Al Warafi*, 2015 WL 4600420 at *2, 7. Similarly, Judge Kollar-Kotelly held that "[a] review of the documents submitted by Respondents supports the President's assertion that fighting has not stopped in Afghanistan and that active hostilities remain ongoing at this time." *Al-Kandari*, Classified Memorandum Opinion at 19-21 (Resp'ts' Ex. 1).

Petitioner, however, contends that he should be released because the "combat mission" and "combat operations are over." *See* Petition ¶¶ 4, 37. But Petitioner fails to understand that the relevant inquiry is whether active hostilities have ceased, not whether a particular combat mission or operation has ended. *See Al Warafi*, 2015 WL 4600420 at *7; *Al-Kandari*, Classified Memorandum Opinion at 16-18 (Resp'ts' Ex. 1). 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." Further, the commentary to Article 118 provides additional explanation that release is required only when "the fighting is over."[10] *See* 3 Int'l 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), rejected an argument similar to the one Petitioner raises here, holding that detention under the AUMF may continue until the "fighting stops." In *Al-Bihani*, the Court of Appeals considered a challenge 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 the fact 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

[10] 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 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.").

end of a conflict, because fighting does 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."[11] *Id.*

Although the United States has ended its combat mission in Afghanistan, the fighting there certainly has not stopped. As explained above, the United States is currently engaged in active and ongoing hostilities against al-Qa'ida, Taliban, and associated forces in Afghanistan. *See supra* at 10-21; *Al Warafi*, 2015 WL 4600420 at *7; *Al-Kandari*, Classified Memorandum Opinion at 19-21 (Resp'ts' Ex. 1). Petitioner, however, 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 – and has not meant – the cessation of active hostilities. That distinction is consistent with *Al-Bihani*'s "commonsense"

[11] 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 71-72 (1977) (emphasis in original); *id.* ("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 renew 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 . . . 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").

observation that the release of enemy belligerents prior to the end of hostilities could result in refreshing the enemy ranks, thereby undermining the 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-Qa'ida, 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 13-19. Indeed, the United Nations Security Council 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 43) (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-Qa'ida, 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-Qa'ida, 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 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

"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-Qa'ida, Taliban, and associated forces have not ceased. The AUMF, which authorizes the use of force against al-Qa'ida, 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-Qa'ida, Taliban, and associated forces, where appropriate, in order to prevent these groups from threating U.S. targets or the homeland.[12] *See supra* at 10-21.

The words and actions of the Executive – from the public statements of the President, to the decision to continue deployment of U.S. Armed Forces in Afghanistan, to the execution of the Bilateral Security Agreement – also clearly reflect the determination that active hostilities remain ongoing. Indeed, the President expressly stated in June 2015: "The United States currently remains in an armed conflict against al-Qa'ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing." *See* WPR Letter. The President's

[12] The Executive 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; DoD Report.

statement reiterated earlier statements to the same effect from other high-ranking Executive Branch officials. *See* Guantanamo Detention Facility and Future of U.S. Detention Policy: Hearing Before The Senate Armed Services Committee, 114th Cong. (Feb. 5, 2015) at 24 (Resp'ts' Ex. 41); 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 at 7-9 (April 10, 2015) (Resp'ts' Ex. 42); *cf. National Treasury Employees Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974) ("the President speaks and acts through lower governmental officials"). Respondents reaffirm this position again here: active hostilities against al-Qa'ida, Taliban, and associated forces in Afghanistan have not ceased. Under *Al-Bihani*, there is no basis for the Court to second-guess this judgment.[13]

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[13] In concluding that active hostilities remain ongoing, Judge Lamberth stated that it was not necessary to resolve whether the Court should conduct its own independent examination of that question or defer to the Executive's determination because, under either standard of review, the Government would prevail. *See Al Warafi*, 2015 WL 4600420 at *2; *see also Al-Kandari*, Classified Memorandum Opinion at 9 ("the court need not address the contours of the appropriate judicial inquiry because the Court finds that the evidence supports Respondents' position and the Court declines to accept the Petitioner's interpretation of the President's statements"). Nevertheless, Judge Lamberth stated in dicta that he "would, if necessary, reject both parties' arguments that the President's statements control regardless of the facts on the ground." *Id.* Although Judge Lamberth was "inclined" to conclude otherwise, Respondents respectfully submit that, under the law of this Circuit, courts must defer to the determination of the political branches regarding whether active hostilities have ceased. *See Al-Bihani*, 590 F.3d at 874. In any event, Judge Lamberth appeared to misperceive Respondents' argument on this point. Respondents are not suggesting that "the courts can hear habeas petitions only insofar as they rule for the government." *Id.* Even though the question whether active hostilities have ceased is one for the political branches, the Court has a role to play in assessing the meaning and legal consequences of any such political determination if disputes regarding those issues are raised in the habeas litigation. As this case illustrates, the Court has a role in resolving whether the President has made the requisite determination that active hostilities have ceased, under a deferential standard of review. That type of narrow judicial review does not displace the role of the Court. Rather, it is consistent with the balanced approach taken by courts in other cases in which judicial review is sought in areas where certain determinations are committed by law to the political branches, yet judicial review continues in a tailored manner that does not infringe on the exclusive authority of the political branches. *See U.S. ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952) (per curiam) (deferring to congressional resolution terminating the state of war

Petitioner, notably, does not dispute the well-established precedent that determinations concerning the end of hostilities are reserved for the political branches. Petitioner, however, incorrectly contends that earlier 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* Petition ¶¶ 24-30. To support his claim, Petitioner focuses on several earlier statements by the President from late 2014 and early 2015 announcing that, "our combat mission in Afghanistan is over, and America's longest war has come to a responsible and honorable end." *See id.* ¶ 27; *see generally id.* ¶¶ 24-30.[14] 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-Qa'ida, Taliban, and associated forces have ceased. *See Al-Kandari*, Classified Memorandum Opinion at 13, 16 (Resp'ts' Ex. 1). 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 continue in Afghanistan. *See* Resp'ts' Ex. 12. Further, on March 25, 2015, in a joint public

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between the United States and Germany, but evaluating legal consequences of that decision and holding that that power to remove German national detained under the Alien Enemy Act had lapsed); *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc) (holding that a court cannot review the merits of an Executive extradition decision, but a court can review in habeas whether the Executive has complied with non-discretionary legal obligations).

[14] The relevant texts of the President's statements cited by Petitioner are: "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." *See* Resp'ts' Ex. 12 (Dec. 28, 2015); "Tonight, for the first time since 9/11, our combat mission in Afghanistan is over." *See* Remarks by the President in State of the Union Address (Jan. 20, 2015) (Exhibit 44); "After more than 13 years, our combat mission in Afghanistan is over, and America's longest war has come to a responsible and honorable end." *See* Resp'ts' Ex. 2 (Jan. 28, 2015); "Their government signed the Bilateral Security Agreement between our two countries, and on December 31st, after more than 13 years, America's combat mission in Afghanistan came to a responsible end." *See* Resp'ts' Ex. 19 (Mar. 24, 2015). The President's statements, when read in full context, equate the "war" with the "combat mission." *See Al-Kandari,* Classified Memorandum Opinion at 13.

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* Resp'ts' Ex. 19. 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.* These statements, when read in their full context, make clear that the United States transitioned in 2015 to a support and counterterrorism mission in Afghanistan, and that active hostilities remain ongoing. As Judge Kollar-Kotelly recently concluded, the statements do not constitute the requisite determination that hostilities in Afghanistan have ceased, particularly when those same statements emphasize that military operations in Afghanistan will continue. *See Al-Kandari*, Classified Memorandum Opinion at 8 (Resp'ts' Ex. 1) ("the Court finds that the President has not declared the end to active hostilities."); *id.* at 9 ("the Court declines to accept the Petitioner's interpretation of the President's statements").

The statements of the President cited by Petitioner also must 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* Respt's' Ex. 10. 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* Respt's' Ex. 11. The Bilateral Security Agreement, thus, 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 negotiation, that anticipated 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, and hostilities have not 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. *See Al-Kandari*, Classified Memorandum Opinion at 16 (Resp'ts' Ex. 1). Instead, the President and other high-level Executive Branch officials have issued clear and unequivocal statements to Congress and the public in 2015 that active hostilities remain ongoing. *See, e.g.*, Respt's' Ex. 2, 18, 42, 43.[15]

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[15] 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

Even assuming there were some ambiguity in the President's public statements about the continued existence of active hostilities (and there is not), the law requires that the Court give the political branches "wide deference" on questions concerning the cessation of hostilities.[16] *Al-Bihani*, 590 F.3d at 875. And here, where the President has been consistent in its statements to Congress and the public that active hostilities remain ongoing, there is no basis for the Court to ascribe a meaning to the President's other 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.[17] *See Center for Nat. Sec.*

Executive continued. *Id.* at 167-68; *see Al-Warafi*, 2015 WL 4600420 at *6 (discussing *Hamilton*).

[16] 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.

[17] 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

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.").

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 approximately 9,100 service members remain deployed overseas and engaged in operations to suppress the threat posed by Taliban, al-Qa'ida, and associated forces – risks "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 216.[18] Further, such a decision could lead to significant foreign relations complications with Afghanistan, such as uncertainty about whether

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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.

[18] The risk of conflicting decisions on this important national security issue is further compounded by the fact that this same question is being litigated before multiple Judges of this Court in different cases. As noted above, Judge Lamberth and Judge Kollar-Kotelly recently issued separate decisions denying similar claims for relief. *See Al Warafi*, 2015 WL 4600420; *Al-Kandari*, Classified Memorandum Opinion (Resp'ts' Ex. 1).

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 these decisions are properly left to the political branches. *See Anderson*, 76 U.S. at 70-71. There is no basis for this Court to depart from that precedent.

3. Al-Qa'ida Remains A Threat To The United States And Is Capable Of Engaging In Hostilities.

Petitioner also suggests that active hostilities against al-Qa'ida have ceased because of "the decimation of al-Qaida." *See* Petition ¶ 22-23. More specifically, Petitioner cites various public statements of President and suggests that the United States' military efforts since the attacks of September 11, 2001, have destroyed al-Qaeda to such an extent that it is no longer possible for active hostilities to continue. *See id.* This position lacks merit for several reasons. As a threshold matter, Petitioner's argument is directed only to al-Qa'ida, not the Taliban or associated forces. That distinction is important because the Court of Appeals concluded that Petitioner was "'part of al Qaeda or Taliban forces," a fact he does not challenge in this proceeding. *See id.* ¶ 21; *Al-Alwi*, 653 F.3d at 17; *see also Al-Alwi*, 593 F. Supp. 2d at 29. Therefore, the current nature of hostilities with al-Qa'ida alone does not determine the legality of Petitioner's detention under the AUMF.

Additionally, as discussed previously, the appropriate legal standard for determining when release is required under the law of war is the cessation of active hostilities. Petitioner's argument about al-Qa'ida's ability to engage in hostilities focuses exclusively on the *capacity* of the enemy forces to engage in hostilities rather than the fact of whether active hostilities are ongoing. Although the capacity of enemy forces might be one factor among many in any determination by the political branches as to whether active hostilities remain ongoing, the Court should decline Petitioner's invitation to focus only on this factor because it is inconsistent with well-established precedent, and because the Court has neither the authority nor the expertise to evaluate the operational capacity and future threat posed by an enemy of the United States, especially when that enemy is a transnational terrorist organization such as al-Qa'ida. *See Center for Nat. Sec. Studies*, 331 F.3d at 928 ("America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore."); *El Shifa Pharmaceutical Industries v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) ("[W]hether the terrorist activities of foreign organizations constitute threats to the United States are political judgments, decision of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.") (internal quotations omitted). If "wide deference" to the political branches is appropriate for a determination of when hostilities have ceased, then *a fortiori*, such deference is even more appropriate when the question would require an assessment of capacity of enemy forces to engage in future hostilities. *See Al Bihani*, 590 F.3d at 875.

In any event, there is no basis in fact on which to conclude that the United States' military and counterterrorism operations have destroyed al-Qa'ida to such an extent that active hostilities have ceased. To be sure, the President has acknowledged the many achievements of

U.S. military and counterterrorism operations against al-Qa'ida, including the killing of Osama bin Laden and other senior al-Qa'ida leadership. *See, e.g.*, Remarks by the President at the National Defense University (May 23, 2013) (Exhibit 45) ("Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat."); Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (Exhibit 46) ("Al Qaeda's leadership on the border region between Pakistan and Afghanistan has been decimated, and Osama bin laden is no more."). But, as the documents cited by Petitioner make clear, the President has never stated that al-Qa'ida has unconditionally surrendered, or no longer poses a continuing threat to the United States warranting hostilities against it, or has been destroyed to such an extent that it cannot engage in hostilities against the United States. *See* Petition ¶¶ 22-23. To the contrary, the President has consistently stated that Afghanistan remains a dangerous place due in part to the continuing threat posed by al al-Qa'ida. *See, e.g.*, Respt's' Exs. 12, 19. And, in order to suppress that threat and preserve the hard-earned success of U.S. and coalition armed forces over the course of the past 13 years, the President has clearly stated that active hostilities remain ongoing and that counterterrorism operations against al-Qa'ida in Afghanistan will continue. *See, e.g.*, Respt's' Exs. 2, 12, 19; *see also* DoD Report.

As explained above, the threat posed by al-Qa'ida in Afghanistan remains significant, [redacted] *See supra* at 13-14. Al-Qa'ida leaders and operatives maintain a significant presence in Afghanistan, [redacted]

[redacted] *See id.* ¶¶ 12-15. Under these circumstances a court order directing Petitioner's release at this time would run contrary to the purpose of detention under the law of war, and such a ruling would inappropriately require a detaining party to re-supply enemy forces with reinforcements while active hostilities remain ongoing. *See Al-Bihani*, 590 F.3d at 874. Here, active hostilities against al-Qa'ida continue, both in fact and as declared by the President, and there is no merit to Petitioner's contention that U.S. forces have annihilated al-Qa'ida beyond its capacity to engage in active hostilities.

4. There is No Merit to Petitioner's Claim for Release Based on Additional Protocol I to the Geneva Conventions and the Convention Against Torture

The Court should also reject Petitioner's alternative claim that his ongoing detention violates Article 75 of Additional Protocol I to the Geneva Conventions and the Convention Against Torture.

Adopted in 1977, Additional Protocol I to the Geneva Conventions supplemented the 1949 Geneva Conventions with respect to the protection of victims in international armed conflicts. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

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[19] Petitioner focuses his argument for release on the state of hostilities against al-Qa'ida only in Afghanistan. Because of Petitioner's focus on the status of "the war in Afghanistan," *see* Petition ¶ 24, the fact that al-Qa'ida continues to threaten the United States in Afghanistan, and the continuing existence of active hostilities there, the Court need not address whether U.S. counterterrorism efforts against al-Qa'ida in countries other than Afghanistan would be sufficient to justify Petitioner's continued law of war detention under the AUMF, which does not limit the geographic scope of its authorization. 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 of an asserted cessation of active hostilities against al-Qa'ida, Taliban, or associated forces in Afghanistan.

Although United States declined to ratify Additional Protocol I,[20] the United States has historically supported Article 75 of Additional Protocol I and has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006); White House Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011) (Exhibit 47). Article 75 sets forth fundamental guarantees of humane treatment for persons detained in an international armed conflict and who do not benefit from more favorable treatment (*e.g.*, Prisoner of War status) under the 1949 Geneva Conventions or under the Protocol itself.

Petitioner contends that his release is required under Article 75(3) of Additional Protocol I, but that claim lacks merit. As a threshold matter, the United States is not a party to Additional Protocol I. *See* Message from the President Transmitting Protocol II to the U.S. Senate, reprinted in S. Treaty Doc. 100-2, at iv ("I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts.").

Further, as noted above, the United States has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an *international armed conflict*. This would, as a legal matter, limit application of Article 75 to conflicts between states, not the non-international armed conflict involving non-state actors like the conflict at issue here. *See* White House Fact Sheet. (Resp'ts' Ex. 48); *cf.* Department of

[20] *See* Message from the President Transmitting Protocol II to the U.S. Senate, reprinted in S. Treaty Doc. 100-2, at iii-iv (1987) (explaining President Reagan's decision not to submit Additional Protocol I for ratification because it is "fundamentally unfair and irreconcilably flawed" and contains "provisions that would undermine humanitarian law and endanger civilians in war").

Defense Directive 2310.01E, DoD Detainee Program, ¶¶ 3a(2)-(3), Aug. 19, 2014 (requiring application of the principles of Article 75 of Additional Protocol I in international armed conflict and occupation and the principles of Articles 4-6 of Additional Protocol II in non-international armed conflict). The 1949 Geneva Conventions distinguish between two types of armed conflict: international armed conflict and non-international armed conflict. Common Article 2 (so-called because it appears in each of the four 1949 Geneva Conventions) states that "the present Convention[s] shall apply to all cases of declared war or 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 . . . [and] to all cases of partial or total occupation of territory of a high contracting party." *See, e.g.*, Third Geneva Convention, art. 2. In contrast, Common Article 3 states that, [i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . [including that detained persons] shall in all circumstances be treated humanely." *See id.*, art. 3. The United States' armed conflict against al-Qa'ida forces is a non-international armed conflict because al-Qa'ida is a terrorist organization and not a State. *See Hamdan*, 548 U.S. at 629-31 (explaining that conflict with al-Qa'ida is not a conflict between States within scope of Common Article 2); *see also* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002) (Exhibit 48) (al-Qa'ida "is an international terrorist group and cannot be considered a state party to the Geneva Convention[s]"). And the United States' armed conflict against the Taliban in Afghanistan currently is also considered a non-international armed conflict. *See also* ICRC, International Humanitarian Law & The Challenges of Contemporary Armed Conflicts, at 725 (Sep. 2007), *available at*

https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf. Thus, while the United States would apply out of a sense of legal obligation the principles of Article 75 to individuals detained in an international armed conflict, it does not apply as a legal matter in the context of individuals detained in the non-international armed conflict at issue in this case.

Additionally, to the extent Petitioner is seeking to rely directly on Additional Protocol I as a source of rights in this habeas proceeding, that claim is barred by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2631 (codified in statutory note following 28 U.S.C. § 2241). Section 5 of the MCA provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

As the Court of Appeals has recognized, "Congress has provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings." *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010); *see Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) ("a detainee may not invoke the Geneva Conventions in a habeas proceeding").

Even assuming Petitioner could invoke Article 75(3) on the merits, this provision does not alter the well-settled rule that law of war detention may last for the duration of active hostilities. Article 75(3) provides, in relevant part, that "[a]ny person arrested, detained, or interned for actions related to the armed conflict . . . shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention, or internment have ceased to exist." Here, the circumstances justifying Petitioner's detention still exist, as active hostilities against al-Qa'ida, Taliban, and associated forces remain ongoing. In addition, to the extent this provision is "concerned with periodic review of internment

decisions," as the commentary to Additional Protocol I states, *see* Int'l Comm. of the Red Cross, Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, at 877 (Sandoz *et al.* eds., 1987), it does not displace the authority of the detaining powers to continue law of war detention of enemy forces until the cessation of active hostilities. *See* Third Geneva Convention, art. 118. Consequently, Article 75(3) has no application to the cessation of hostilities issue with respect to the detention of enemy forces presented in this case.[21]

Petitioner's argument based on the Convention Against Torture fares no better. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 108 Stat. 382, S. Treaty Doc. No. 100-20. The United States has taken seriously its obligations under international law, including the Convention Against Torture, to ensure humane treatment of detainees. The CAT, however, provides no basis for granting relief to Petitioner because it is not a self-executing treaty and, therefore, does not create judicially enforceable private rights. *See Pierre v. Gonzales*, 502 F.3d 109, 119-120 (2d Cir. 2007); S. Exec. Rep. 101-30, at 17-18 ("Because the Convention is not self-executing, the determinations of these [competent administrative] authorities will not be subject to judicial review in domestic courts."); 136 Cong. Rec. 36, 198 (1990) ("the provisions of Articles 1 through 16 of the Convention are not self-executing").

Further, the Court of Appeals has rejected CAT claims by detainees in the Guantanamo Bay habeas litigation because "Congress limited judicial review under the Convention to claims

[21] The Government recognizes the importance of ensuring that detainees are not held any longer than necessary and conducts Periodic Review Board hearings in order to determine whether continued custody of Guantanamo Bay detainees remains necessary to protect against a continuing significant threat to the security of the United States. *See* Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) (establishing Periodic Review Board process). Petitioner's Periodic Review Board hearing is currently scheduled for September 22, 2015.

raised in a challenge to a final order of removal." *See Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009); 8 U.S.C. § 1252(a)(2) ("a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section"). Here, Petitioner is not challenging a final order of removal, thus his CAT claim should be denied.

In any event, Petitioner's CAT claim fails on the merits. Petitioner contends in summary fashion that fact of his ongoing detention "rises to the level of torture." *See* Petition ¶¶ 44-46.[22] As explained in detail above, however, Petitioner's detention is lawful and consistent with longstanding law of war principles that permit the detention of enemy belligerents until the cessation of active hostilities. Because active hostilities continue against al-Qa'ida, Taliban, and associated forces, Petitioner's detention remains lawful, and the fact of his detention does not constitute torture.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the motion to dismiss or for judgment be granted, and that the petition for writ of habeas corpus be denied.

Dated: September 4, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

[22] Petitioner does not allege that any specific aspect of his detention, other than the fact that his detention continues, violates the CAT.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOATH HAMZA AHMED AL-ALWI (ISN 28), *Petitioner*, v. BARACK H. OBAMA, *et al.*, *Respondents*.	Civil Action No. 15-CV-681 (RJL)

[PROPOSED] **ORDER**

The Court, having considered Respondents' Response to the Petition for Writ of Habeas Corpus and Motion to Dismiss or For Judgment, hereby ORDERS the Motion to Dismiss or for Judgment be GRANTED.

The petition for writ of habeas corpus and all other relief requested by Petitioner shall be DENIED.

This action is DISMISSED in its entirety.

Dated: _____

_____
RICHARD J. LEON
United States District Judge

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