

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FAYEZ MOHAMED AHMED AL  
KANDARI (ISN 552),

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Civil Action No. 1:15-cv-329 (CKK)

**RESPONDENTS' REPLY IN SUPPORT OF MOTION  
TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW**

Petitioner Fayez Mohammed Ahmed Al Kandari (ISN 552) is lawfully detained 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, because active hostilities against al-Qa’ida, Taliban, and associated forces are currently ongoing. The parties agree that the “key to resolving this petition on the merits” is “a question that may only be answered by the Executive.” *See* Pet’r’s Opp’n at 8 (ECF No. 16). As explained below, that question is whether active hostilities are ongoing. And the Executive has answered that question in the affirmative, repeatedly and consistently in 2015, through public statements of high-ranking Executive Branch officials, including the President of the United States himself, as well as the filings in this case. Most recently, in June 2015, the President sent a letter to Congress addressing the deployment of U.S. Armed Forces in Afghanistan and 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) (attached as Exhibit 42) (“WPR Letter”), *available at* <https://www.whitehouse.gov/the-press-office/2015/06/11/letter-president-six-month-consolidated-war-powers-resolution-report>. Thus, pursuant to principles reflected in Article 118 of the Third Geneva Convention, and consistent with the relevant decisions by the Supreme Court and Court of Appeals, Petitioner’s continued detention is lawful.

Petitioner, however, mistakenly contends there is no longer a legal basis for his detention or that “of any other detainee.” *See* Pet’r’s Opp’n at 17. He incorrectly asks the Court to disregard the President’s determination that active hostilities remain ongoing because, he insists, certain prior statements of the President constitute the “declared reality” that the United States’ “war” in Afghanistan is now over. *See* Pet’r’s Opp’n at 8. In so insisting, Petitioner ignores the governing legal standard applicable with regard to the claim he is asserting in this case – whether the “cessation of active hostilities” has been reached – and incorrectly asks this Court to disregard the Executive’s determination, based on undisputed facts set forth in Respondents’ motion, that active hostilities are continuing against al-Qa’ida, Taliban, and associated forces in Afghanistan. Petitioner simply asks for too much based on too little.

The resolution of this habeas petition turns on the Executive’s determination that active hostilities remain ongoing, as clearly expressed by the President and other high-ranking members of the Executive Branch. There is no basis or precedent for the Court to second-guess or substitute its judgment for that of the President on this critical question of national security. Accordingly, the Court should grant Respondents’ motion to dismiss or for judgment as a matter of law, and deny the petition for writ of habeas corpus.<sup>1</sup>

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<sup>1</sup> Petitioner questions the procedural basis for Respondents’ response to the Petition and motion to dismiss or for judgment as a matter of law in this unique habeas corpus case. *See* Pet’r’s Opp’n at 4 n.2. To the extent Petitioner is asserting that the Court must “take[] as true”

## ARGUMENT

### **I. The Legal Standard That Governs Petitioner’s Claim Is The End of Active Hostilities.**

Throughout the opposition brief, Petitioner argues that the Court must order his release because the President has said in speeches that the “*combat mission* in Afghanistan is over,” Pet’r’s Opp’n at 7 (emphasis added), or that “the *war* in Afghanistan is over,” *id.* at 4 (emphasis added); *see also, e.g., id.* at 9 (Executive’s detention authority is “limited to the duration of the *war* in Afghanistan” and the former *combat mission* in Afghanistan ... has now ended”). The appropriate legal standard, however, is whether *active hostilities* are ongoing.

Article 118 of the Third Geneva Convention, which is entitled “Release and Repatriation[,]” states that “[p]risoners of war shall be released and repatriated without delay after the cessation of *active hostilities*.” *See Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, Aug. 12, 1949, 6 U.S.T. 3316, 3406, Article 118 (emphasis added). Relying on this provision in construing the detention authority provided

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the legal effect Petitioner wishes his characterization of the facts to have, that is decidedly not appropriate, even outside the habeas corpus context. *See, e.g., Lee v. District of Columbia*, 733 F. Supp. 2d 156, 159 (D.D.C. 2010) (on motion to dismiss in normal civil case, court “need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations”). In any event, given the *sui generis* nature of these law of war detention habeas proceedings, the Judges of this Court have consistently resolved issues in the Guantanamo habeas cases through motions for judgment in which each party submits evidence for the Court’s consideration, as is appropriate. Here, Respondents have responded to the Petition and explained why, based on the evidence submitted by the parties, judgment in favor of Respondents is warranted. *See also* Fed. R. Civ. P. 81(a)(4); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality) (the “full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate” in habeas proceedings contesting lawfulness of military detention); *Al-Bihani v. Obama*, 590 F.3d 866, 876-77 (D.C. Cir. 2010) (noting appropriateness of accommodations made “to reduce the burden habeas corpus proceedings will place on the military”) (citing *Boumediene v. Bush*, 553 U.S. 723, 795 (2008)). Furthermore, for purposes of the petition in this case, the Court needs to decide only the straightforward question whether the Executive has determined that the cessation of active hostilities in the relevant conflict has been reached. The Court can decide that issue based on the submissions of the parties.

by the AUMF, the Supreme Court in *Hamdi v. Rumsfeld* explained 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. at 521 (plurality opinion) (citing Third Geneva Convention, Art. 118).

More recently, the Court of Appeals directly addressed arguments by a Guantanamo detainee that his law of war detention was no longer justified because the conflict in which he was captured had purportedly ended. In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the petitioner argued that he “must now be released according to longstanding law of war principles because the *conflict* with the Taliban has allegedly ended,” *id.* at 874 (emphasis added), but the Court of Appeals rejected that argument and held that “[t]he Geneva Conventions require release and repatriation only at the ‘cessation of *active hostilities*.’” *Id.* (quoting Third Geneva Convention, Art. 118) (emphasis added). The Court of Appeals explained that “the Conventions use the term ‘active hostilities’ instead of the terms ‘conflict’ or ‘state of war’ found elsewhere in the document” and found that usage “significant,” concluding that “[t]he Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.” *Id.* As this Court recently stated in another Guantanamo detainee case: “The Supreme Court and the D.C. Circuit have repeatedly held that detention under the AUMF is lawful for the duration of active hostilities.” *See Al Odah v. United States*, 62 F. Supp. 3d 101, 114 (D.D.C. 2014).

This conclusion is consistent with the commentary to the Third Geneva Convention, which explains that the substitution of the term “armed conflict” for “war” in Article 2 of the Convention was “deliberate,” because “[i]t is possible to argue almost endlessly about the legal definition of ‘war.’” *See* 3 Int’l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, art. 2 at 23 (J. Pictet ed., 1960) (“Geneva

Convention Commentary”). Similarly, in an effort to avoid disputes over terminology when the factual situation was clear, such as the dispute Petitioner attempts to create here, the Convention uses the term “active hostilities” to emphasize that release of enemy belligerents is required when “the fighting is over.” *Id.*, art.118 at 547.

Petitioner ignores this well-established precedent and asks the Court to adopt a new legal standard that is contrary to both law and common sense. Neither “combat mission” nor “war” has the same meaning as “active hostilities,” no matter how many times Petitioner repeats his claim. *See* 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”). Further, Petitioner’s proposed standard, in which release of enemy belligerents would be legally required before the end of active hostilities, would undermine the “fundamental” purpose of law of war detention, which is “to prevent a combatant’s return to the battlefield.” *Hamdi*, 542 U.S. at 519; *see Ludecke v. Watkins*, 335 U.S. 160, 167 (1948) (the law does not “lag behind common sense”).

Petitioner’s attempts to distinguish the straightforward holding in *Hamdi* are unavailing. Petitioner first argues that the plurality opinion in *Hamdi* “limited th[e] [Executive’s detention] authority to the ‘*particular conflict*’ in which the prisoners were captured,” Pet’r’s Opp’n at 10 (quoting *Hamdi*, 542 U.S. at 518) (emphasis added), or to “the duration of the *relevant conflict*,” *id.* at 12 (quoting *Hamdi*, 542 U.S. at 521) (emphasis added). Petitioner attributes greater meaning to these phrases than they can bear. As discussed previously, the *Hamdi* plurality, in addressing the question of when release is required, cited the language from Article 118 to answer, “no longer than active hostilities.” 542 U.S. at 521. The plurality’s later use of the phrases “particular conflict” and “relevant conflict” does not undermine that holding; rather,

those phrases simply refer to the parties involved in the hostilities. *Id.* at 518 (explaining that “individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network,” are detainable “for the duration of the particular conflict in which they were captured”); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 628-631 (2006) (discussing the “relevant conflict” by reference to the parties to the conflict, such as the United States, the Taliban, and al-Qa’ida). The “relevant conflict” here is the conflict against al-Qa’ida, Taliban, and associated forces, and active hostilities against those groups continue.

Petitioner further misconstrues the meaning of those terms by arguing that they apply to a particular military operation rather than the armed conflict itself. *See* Pet’r’s Opp’n at 11-12 (arguing that “Enduring Freedom was the relevant conflict”). But there is no merit to the contention that Petitioner should be released simply because the United States announced a transition of its mission in Afghanistan at the beginning of 2015, and correspondingly renamed the current military mission “Freedom’s Sentinel.” *Id.* To be sure, the transition of the United States’ military mission in Afghanistan at the beginning of 2015 is a significant milestone, but it reflects just that, a transition, and not a cessation of active hostilities. Armed conflict is unpredictable, and the nature of hostilities can and do change dramatically in the course of any conflict. Accordingly, it should be unsurprising that military missions undergo transition as they are adjusted to respond to current facts and circumstances, which is precisely what occurred at the beginning of 2015 when the United States transitioned to a support and counterterrorism mission in Afghanistan, in which active hostilities remain ongoing. To require the release of enemy belligerents at each transition point within an ongoing armed conflict would defy common sense and conflict with the purpose of law of war detention, which is “to prevent

captured individuals from returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518.

Petitioner also misconstrues *Hamdi*'s use of the phrase “active combat” in an attempt to argue that his detention is unlawful because the President has declared an end to the “combat mission” in Afghanistan. *See* Pet'r's Opp'n at 12. In summarizing its decision, the plurality in *Hamdi* stated: “If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force,’ and therefore are authorized by the AUMF.” *See Hamdi*, 542 U.S. at 521. When read in its full context, the Court was using the phrase “active combat” synonymously with “active hostilities.” Specifically, the Court used the term “active combat” immediately following its discussion of the “active hostilities” standard and, in so doing, cited various news articles and government press releases to support the position that the standard had been met, noting that several thousand United States troops remained in Afghanistan in 2004 and military operations continued there. *See id.* Consequently, there is no basis to draw any substantive distinction between these terms as the plurality employed them.

In reaching its conclusion that law of war detention may last until the end of active hostilities, the *Hamdi* plurality cautioned that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.” *Hamdi*, 542 U.S. at 521. Petitioner points to this language at various points in his opposition brief and contends that a decision by this Court to detain Petitioner contrary to “the rules governing conventional warfare” would mean that “we have plainly reached the point where the traditional principles of law of war detention have unraveled.” *See* Pet'r's Opp'n at 4, 15. But just as *Hamdi* noted, “that is not the situation we

face as of this date.” *Hamdi*, 542 U.S. at 521. In accordance with the President’s determination as Commander-in-Chief that active hostilities remain ongoing, approximately 9,100 U.S. service members are currently stationed in Afghanistan, and they engage, when and where appropriate, in uses of force against Al-Qa’ida, Taliban, and associated forces, consistent with the laws of war in a context similar to that presented to the Supreme Court in *Hamdi* and that presented in other traditional military operations. *See* Resp’ts’ Mot. at 17-18; Resp’ts’ Ex. 16, 43; *Hamdi*, 542 U.S. at 521. This case, thus, does not present a situation in which Petitioner’s detention would be inconsistent with “the clearly established principle of the law of war that detention may last no longer than active hostilities.” *Hamdi*, 542 U.S. at 520.<sup>2</sup>

Additionally, Petitioner contends that the phrase “active hostilities” “is a *limiting* principle on a war that has not been declared over, *not* a basis for expanding detention authority after that war has been declared over.” Pet’r’s Opp’n at 11. Respondents are not advocating for an expansion of the Executive’s detention authority beyond what the law of war permits, but instead are continuing to assert that authority within what the law of war permits. The United States currently remains in an armed conflict against al-Qa’ida, Taliban, and associated forces, and active hostilities against those groups remain ongoing. In other words, the active hostilities

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<sup>2</sup> Petitioner also asserts that Respondents are “asking this Court to endorse detention without end.” Pet’r’s Opp’n at 3. Not so. Respondents have consistently advocated for law of war detention authority that conforms with longstanding law of war principles. Because active hostilities continue against al-Qa’ida, Taliban, and associated forces, Petitioner’s detention remains lawful and in accordance with well-established precedent. In any event, the Executive continues to transfer Guantanamo detainees to foreign countries where appropriate. *See* Detainee Transfer Announced (June 15, 2015), *available at* <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17339> (announcing transfer of 6 Guantanamo detainees to Oman). Additionally, the Executive conducts Periodic Review Board hearings in order to determine whether continued custody of 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 scheduled for July 27, 2015.

that are ongoing are taking place within the context of an ongoing armed conflict. This case does not present a situation of seeking to extend detention of enemy belligerents beyond the end of the armed conflict or active hostilities.

Petitioner also misreads the history of Article 118 and errs by equating Respondents' position here with the type of unwarranted detention that Article 118 sought to address. *See* Pet'r's Opp'n at 18-19. The "cessation of active hostilities" standard was first adopted in the 1949 Geneva Conventions following problems associated with delayed repatriation of prisoners of war in earlier armed conflicts. *See* Geneva Convention Commentary, art. 118 at 540-47; 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 50-72 (1977)* ("Delessert"). Two multilateral law of war treaties that were predecessors to the 1949 Geneva Conventions – the Hague IV Convention Respecting the Laws and Customs of War on Land and its Annexed Regulations of 1907 and the Geneva Convention Relative to the Treatment of Prisoners of War of 1929 – required repatriation of prisoners of war "after the conclusion of peace." *See* Article 20 of the Regulations Annexed to the Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907 ("After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."); Article 75 of the Convention Between the United States of America and other Powers Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021, 2055 (1932) ("repatriation of prisoners shall be effected with the least possible delay after the conclusion of peace"). Problems arose with application of these provisions during World Wars I and II because there was often a substantial gap of time between the cessation of active hostilities and the date when formal peace treaties were entered into force, if at all. *See* Geneva Convention Commentary, art.

118 at 541-43; Delessert at 52-64. Consequently, prisoners of war, whose detention under the laws of war is to prevent them from returning to the field of battle and taking up arms once again, remained in detention “for no good reason,” well beyond the end of “the fighting” when “there was no danger of any resumption of hostilities.” *See Geneva Convention Commentary*, art. 118 at 541, 546-47. The 1949 Geneva Conventions sought to correct this problem by requiring release of prisoners of war upon “cessation of active hostilities” without being contingent on a formal peace accord or political agreement between the belligerent parties. *See Geneva Convention Commentary*, art. 118 at 541, 543, 546-47; Delessert at 64-72; *see also* Yoram Dinstein, *The Release of Prisoners of War*, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* 37-45 (1984).

Respondents’ position here is entirely consistent with the history and purpose of Article 118, because active hostilities against al-Qa’ida, Taliban, and associated forces remain ongoing. On the other hand, Petitioner’s position is inconsistent with the Article 118, as it would require Respondents to release enemy belligerents well before “the fighting is over,” thereby undermining the central purpose of law of war detention. *See Geneva Convention Commentary*, art. 118 at 546-47.

Indeed, Petitioner’s argument is the same one as the Court of Appeals rejected in *Al-Bihani*. *See* 590 F.3d at 874 (rejecting detainee’s argument that “each successful campaign of a long war” required release because, if accepted, such a rule would be “a Pyrrhic prelude to defeat” and “would trigger an obligation to release Taliban fighters captured in earlier clashes” and result in “constantly refresh[ing] the ranks” of enemy forces”). Petitioner attempts to distinguish *Al-Bihani*, but his argument lacks merit. Petitioner argues that a “critical” distinction is that the petitioner in that case “argued that he should be released because a portion of the war

in Afghanistan—the conflict between the U.S. and the Taliban as government of Afghanistan—was then over” and he “did not argue that the war in Afghanistan was over” nor “could [he] even give the Court a specific date for the conclusion of the war that he was describing.” Pet’r’s Opp’n at 16.<sup>3</sup> But that is a distinction without a difference. Like Petitioner here, the petitioner in *Al-Bihani* argued that the conflict had reached a point that necessitated his release because the conflict “has allegedly ended.” *See Al-Bihani*, 590 F.3d at 874 (arguing that release was required when the Taliban was removed as the governing power in Afghanistan). Petitioner here identifies a different alleged end point – the transition of the United States’ mission in 2015 – but his argument suffers the same flaw the Court of Appeals identified in *Al-Bihani*: active hostilities have not ceased. The Court of Appeals rejected a similar attempt to “draw such fine distinctions” regarding the point at which release is required under the laws of war and, instead, reaffirmed the longstanding rule that “release is only required when the fighting stops.” *Id.* As in *Al-Bihani*, Petitioner has merely identified a transition point in the armed conflict, not the end of active hostilities.

## **II. The President Has Determined That Active Hostilities Remain Ongoing And Petitioner’s Contrary Arguments Lack Merit.**

Because the end of “active hostilities” is the correct legal standard that governs the claim Petitioner has asserted in this case, the only remaining issue for the Court to decide is whether the President has made the requisite determination that active hostilities have ceased. He has not. To the contrary, the President has expressly 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* WPR Letter. As explained in detail in Respondents’

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<sup>3</sup> Petitioner’s summary of the facts of *Al-Bihani* is incorrect, as the petitioner in *Al-Bihani* “offer[ed] the court a choice of numerous event dates . . . to mark the end of the conflict.” 590 F.3d at 874.

opening brief, that position is supported by undisputed facts that U.S. military forces are continuing to engage in fighting against al-Qa'ida, Taliban, and associated forces in Afghanistan. *See* Resp'ts' Mot. at 12-18; *see also* Department of Defense Report on Enhancing Security and Stability in Afghanistan at 1, 3-4, 8, 11-15, 23-32. (June 2015) (attached as Exhibit 43).<sup>4</sup>

As an initial matter, Respondents agree with Petitioner that courts lack the "authority to determine when and whether active hostilities have ended" and courts must "defer to the President's determination as to the end of hostilities." Petr's' Opp'n at 4, 5 n.3; *see, e.g., Al-Bihani*, 590 F.3d at 874 ("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."); Resp'ts' Mot. at 23-26 (citing cases dating back to the Civil War).

Petitioner, however, contends that Respondents are trying to "have it both ways" by arguing "that the Court is obliged to defer to the President's decision about whether the war is over, but to ask the Court to weigh evidence and in fact reach a conclusion at odds with the President's unambiguous statements." Pet'r's Opp'n at 9; *see also id.* at 4-6. Petitioner misunderstands Respondents' argument; Respondents are not asking the Court to weigh anything. Rather, as a matter of prudence and in response to the allegations raised in the habeas petition, Respondents have provided the Court with evidence confirming the Executive's determination that active hostilities remain ongoing, the same type of evidence that other courts

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<sup>4</sup> A prior version of this Report from October 2014 was attached as Exhibit 15 to Respondents' Motion to Dismiss or For Judgment as a Matter of Law. The June 2015 Report, which was submitted to Congress in accordance with the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. No. 113-291), provides more recent information about the current deployment of U.S. Armed Forces in Afghanistan and the continuing threat posed by al-Qa'ida, Taliban, and associated forces.

have cited when faced with similar questions regarding whether active hostilities remain ongoing. *See, e.g., Hamdi*, 541 U.S. at 521 (citing several public sources to note that active hostilities remained ongoing); *Al-Bihani*, 590 F.3d at 874 (same). Based on Petitioner's Opposition brief, it is also now clear that he is not asserting a fact-based claim that active hostilities have ended.<sup>5</sup> Instead, Petitioner's claim is far narrower, focused solely on whether the Executive has made the requisite determination that active hostilities have ceased. As explained further below, not only has the Executive yet to announce a cessation of active hostilities, but the President and other high-ranking Executive officials have repeatedly declared that active hostilities remain ongoing.

Petitioner mistakenly contends that "the President's statements as to the end of the fighting in Afghanistan have been clear and unequivocal." Pet'r's Opp'n at 6. As support for this contention, Petitioner cites to a variety of the President's statements, beginning at the end of 2014 and continuing into 2015, in which the President stated that "our combat mission in Afghanistan is over, and American's longest war has come to a reasonable and honorable end." *See id.* at 6-7 (quoting Pet'r's Ex. 2, Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015)). But in none of these statements has the President declared that active hostilities against al-Qa'ida, Taliban, and associated forces have ceased or that fighting in Afghanistan has stopped. Further, the President's statements, as well as the Bilateral Security Agreement with the Government of Afghanistan, made clear that, in light of the continuing threat faced by the United States in Afghanistan, military operations would

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<sup>5</sup> Although initially raised in his Petition, Petitioner also does not challenge Respondents' contention that al-Qa'ida continues to maintain the capacity to engage in active hostilities. *See Resp'ts' Mot.* at 34-37.

continue after the conclusion of the combat mission in order to support Afghan forces and to conduct counterterrorism operations.<sup>6</sup> *See, e.g.*, Resp'ts' Ex. 8, 9, 16.

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 reaffirmed that active hostilities remain ongoing. In February 2015, the 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 (Resp'ts' Ex. 35). 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

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<sup>6</sup> Petitioner argues that U.S. Armed Forces "are precluded from combat under the terms of the Bilateral Security Agreement." *See* Pet'r's Opp'n at 3, 11. But the Bilateral Security Agreement provides: "*Unless otherwise mutually agreed*, United States forces shall not conduct combat operations in Afghanistan." *See* Resp'ts' Ex. 8, art. 2 (emphasis added). Such operations are currently ongoing in Afghanistan, where appropriate and with Afghan consent. For example, U.S. Armed Forces provide combat enabler support (*e.g.*, close air support) to certain joint missions involving U.S. and Afghan forces as well as to certain unilateral Afghan missions. *See* Resp'ts' Ex. 43 at 4, Department of Defense Report on Enhancing Security and Stability in Afghanistan (June 2015). Further, the Bilateral Security Agreement by turns authorizes or reflects an expectation of continued authorization for a variety of U.S. military activities, including "force protection," "counter-terrorism," and "military operations to defeat al-Qaeda and its affiliates." *See* Resp'ts' Ex. 8, art. 2-3, 7. Moreover, the agreement also expressly recognizes the continued right of U.S. Armed Forces to act in "self-defense, consistent with international law." *See id.*, art. 3. The Bilateral Security Agreement, therefore, reflects the expectation that active hostilities will continue. *See* Resp'ts' Mot. at 8-9, 29-30.

constitute an end of active hostilities.<sup>7</sup> *See* Remarks by the General Counsel of the Department of Defense on the Legal Framework for the United States' Use of Military Force Since 9/11 (April 10, 2015) at 8-9 (Resp'ts' Ex. 18). "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.

Petitioner tries to characterize these statements, as well as Respondents' arguments in this case in which the President is a named Respondent, as the actions of subordinate (and apparently rogue) Government officials who "dispute" the meaning of the President's words. *See* Pet'r's Opp'n at 8-9. This argument is without merit. As the Court of Appeals has recognized, "the President speaks and acts through lower governmental officials." *See National Treasury Employees Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974). And to be clear, the position that the United States remains in active hostilities against al-Qa'ida, Taliban, and associated forces is the official position of the United States Government.

Indeed, the President's recent letter updating Congress about "deployments of U.S. Armed Forces equipped for combat" unequivocally states 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

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<sup>7</sup> The recent Defense Department Report on Enhancing Security and Stability in Afghanistan includes a section explaining the "Shift From The Combat Mission" that details the operational differences between the former combat mission and the current support and counterterrorism mission with respect to targeting enemy forces. *See* Resp'ts' Ex. 43 at 4. "Although U.S. forces no longer target individuals based on affiliation or association with any group other than al Qaeda, U.S. forces are permitted to take action against those individuals that pose a direct threat to U.S. and coalition forces operating in Afghanistan." *Id.*

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). There is no basis for the Court to second-guess this determination or attribute a meaning to the President's prior statements that would be inconsistent with the President's clearly expressed position. As Petitioner concedes, the "President has spoken for the Executive" and that is the end of the matter. *See* Pet'r's Opp'n at 8.

Petitioner, however, contends that the President's statements would have no meaning if the Court were to accept Respondents' position that active hostilities continue notwithstanding the President's announcement that the "combat mission" or "war" or "major ground war" in Afghanistan is over. *See* Pet'r's Opp'n at 8; Pet'r's Ex. 11.<sup>8</sup> Petitioner repeats four times in his opposition that the President's words have "consequences," *see* Pet'r's Opp'n at 3, 7, 8, 21. Respondents agree. The President's prior statements announcing the end of the combat mission have meaning, indeed significant meaning, just not the inaccurate meaning Petitioner attributes to them. The President's statements announcing the end of the combat mission in Afghanistan reflect an important milestone, not the least of which is the return home for thousands of service men and women. *See* Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014) (Resp'ts' Ex. 9). But Petitioner is wrong to assert that the statements announcing and explaining the transition of the U.S. military operation in Afghanistan

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<sup>8</sup> The President's full statements, when read in context, equate the "combat mission" to the "war" or "major ground war," as these terms are used in tandem together. *See* Resp'ts' Ex. 9, 16, 37; Petr's Ex. 2, 11.

constitute the requisite determination that active hostilities have ceased. Such a determination would have significant consequences not only for the Government's detention authority, but also for the United States' relationship with the Government of Afghanistan as well as the continued status and operation of U.S. military forces in Afghanistan. There is no basis for the Court to attribute such unintended consequences to certain of the President's words selected by Petitioner. If the President had concluded that active hostilities were over, the President would have issued a clear statement to that effect to ensure U.S. military personnel, foreign officials, and the American public understood what action had been taken. *Compare* Presidential Proclamation, 12 Fed. Reg. 1 (Jan. 1, 1947) ("I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946."). The President, however, has not done so. The words and actions of the Executive – from the public statements, to the President's decision to continue deployment of U.S. Armed Forces in Afghanistan, to the execution of the Bilateral Security Agreement – clearly reflect that active hostilities remain ongoing.<sup>9</sup>

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<sup>9</sup> Hostilities are a two-way street, of course, and Petitioner does not dispute Respondents' assertion that al-Qa'ida, Taliban, and associated forces continue to attack U.S. Armed Forces in Afghanistan. *See* Resp'ts' Mot. at 12-17 & Ex. 43; *see also* 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, 2015) (attached as Exhibit 44) ("Over the past six months, the threat posed by Al-Qaida and associates inside Afghanistan has become more visible. Al-Qaida and associates remain a serious threat to the security and stability of Afghanistan and the wider region.").

**CONCLUSION**

For the reasons stated above, as well as those in Respondents' Motion to Dismiss or for Judgment as a Matter of Law, the Court should grant Respondents' motion and deny the petition for writ of habeas corpus.<sup>10</sup>

Dated: July 24, 2015

Respectfully submitted,

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<sup>10</sup> As noted in Respondents' Motion, another Guantanamo Bay detainee, Mukhtar Yahia Al Warafi (ISN 117), filed a motion for release raising a challenge regarding the end of active hostilities similar to the one asserted in this case. See Resp'ts' Mot. at 33 n.16; *Al Warafi v. Obama*, 09-CV-2368 (RCL). Briefing in that case was recently completed and the Court held a hearing on July 14, 2015 to address the motion. The Court has not issued a decision. Additionally, a third Guantanamo Bay detainee has filed a petition for a writ of habeas corpus, in which he asserts a similar claim for release. See *Al-Alwi v. Obama*, No. 15-CV-681 (RCL). Respondents' response to that petition is currently due August 3, 2015.