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# CHAPTER 18

# Use of Force

## A. GENERAL

### 1. Frameworks Guiding U.S. Use of Force

On March 12, 2018 the President provided a report to Congress on the "legal and policy frameworks guiding the United States' use of military force and related national security operations." See the President's transmittal letter, available at https://www.whitehouse.gov/briefings-statements/text-letter-president-united-states-officials/. The report was provided consistent with Section 1264 of the National Defense Authorization Act for Fiscal Year 2018. The report also provides an update to the legal, factual, and policy bases for the "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," originally published on December 5, 2016 (the "original report"), which is discussed in *Digest 2016* at 795-801. Excerpts follow from the report, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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***The Domestic Law Bases for the Ongoing Use of U.S. Military Force***

- *Statutory Authorization: The 2001 AUMF*
  - The Scope of the 2001 AUMF: The classified annex contains more information on the application of the Authorization for Use of Military Force (2001 AUMF) …
- *Statutory Authorization: The 2002 AUMF:* Although the … 2002 AUMF was mentioned in the original report with respect to its authorization to use force against ISIS in Iraq and in certain circumstances in Syria, the original report did not provide a full explanation of the scope of the 2002 AUMF.

Under the relevant portions of the 2002 AUMF, "[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to …defend the national security of the United States against the continuing threat posed by Iraq." Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq. After Saddam Hussein's regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against al-Qaida in Iraq (now known as ISIS). Then, as now, that organization posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Congress ratified this understanding of the 2002 AUMF by appropriating funds over several years. Furthermore, although the Iraq AUMF limits the use of force to address threats to, or stemming from, Iraq, it (like the 2001 AUMF) contains no geographic limitation on where authorized force may be employed. Accordingly, the 2002 AUMF reinforces the authority for military operations against ISIS in Iraq and, to the extent necessary to achieve the purposes described above, in Syria or elsewhere.

- *The President's Constitutional Authority to Take Military Action in Certain Circumstances Without Specific Prior Authorization of Congress:* In addition to these statutes, Article II of the Constitution provides authority for the use of military force in certain circumstances even without specific prior authorization of Congress. For example, on April 6, 2017, the President directed a military strike against the Shayrat military airfield in Syria pursuant to his authority under Article II of the Constitution to conduct foreign relations and as Commander in Chief and Chief Executive. United States intelligence indicated that Syrian military forces operating from that airfield were responsible for the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria. The President directed this strike in order to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian government from using or proliferating chemical weapons, thereby promoting regional stability and averting a worsening of the region's current humanitarian catastrophe. In directing this strike, the President acted in the vital national security and foreign policy interests of the United States. Congress was notified of this particular strike on April 8, 2017, in a Presidential report, consistent with the War Powers Resolution.

### *Working With Others in an Armed Conflict*

The 2017 National Security Strategy and the 2018 National Defense Strategy continue to prioritize working by, with, and through allies and partners to achieve our national security objectives. This calls for partnerships with states, multinational forces, and in some cases, non-state actors that share U.S. interests. For example, 70 state partners (and 4 international organizations) are part of the Defeat-ISIS Coalition. United States-supported non-state actors in Syria were also critical in dismantling ISIS's self-proclaimed physical "caliphate."

- *Domestic Authorities and Limitations:*

Section 1232 of the NDAA for FY 2017, as amended by Section 1231 of the NDAA for FY 2018, purports to limit "bilateral military-to-military cooperation" between the United States and Russia. The United States does not support Russia's military strategy in Syria, and U.S. military forces do not cooperate with Russian military forces. However, Section 1232

does not purport to limit military-to-military discussions with Russia to de-conflict military operations in Syria to reduce the risk of interference, miscalculation, or unintended escalation of military operations.

As described in the original report, the United States often supports its partners and allies by providing intelligence in furtherance of shared objectives. As appropriate, the United States takes a variety of measures, including diplomatic assurances, vetting, training, and monitoring, to promote respect for human rights and compliance with the law of armed conflict by the recipient of U.S. intelligence and to mitigate the risk that the intelligence will be used in violation of the law. Sharing must always be consistent with U.S. domestic law.

***Application of Key Domestic and International Legal Principles to Key Theaters***

- *Afghanistan:* Since October 7, 2001, the United States has conducted counterterrorism combat operations in Afghanistan. Pursuant to the strategy that the President announced publicly on August 21, 2017, U.S. forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and for the purpose of creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. or coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against al-Qa'ida, ISIS, the Taliban, and the Taliban Haqqani Network, and active hostilities are ongoing. The domestic and international legal bases for U.S. military operations and activities in Afghanistan remain unchanged from the original report.
- *Iraq:* Due to accelerated progress in the fight to defeat ISIS, the United States and the Defeat-ISIS Coalition are shifting focus in Iraq from combat operations to sustaining military gains. United States forces, however, continue to conduct airstrikes, and Iraqi security forces are still engaged in combat operations against remaining cells of ISIS. ISIS retains the ability to carry out lethal attacks, and it still poses a significant threat to civilians and the stability of the region. At the continued request and with the consent of the Government of Iraq, and with the continued authority provided by statute and the Constitution, U.S. forces are advising and coordinating with Iraqi forces and are training, equipping, and building the capacity of select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces, to prevent the re-emergence of ISIS. The domestic and international legal bases for U.S. military operations and activities in Iraq remain unchanged from the original report.
- *Syria:* The United States and the Defeat-ISIS Coalition liberated 4.5 million people from ISIS oppression in 2017, and ISIS has lost 98 percent of the territory it once claimed in Iraq and Syria. The United States and U.S.-supported Syrian Democratic Forces (SDF) are engaged in liberating the middle Euphrates River valley in Syria. U.S. operations include continued airstrikes; advice and coordination to indigenous ground forces; and training, equipment, and other assistance in support of those indigenous forces. Despite this, ISIS continues to be able to carry out lethal attacks. Therefore, the United States continues to use force against ISIS and al-Qa'ida in other parts of Syria as well. After the

middle Euphrates River valley is liberated, the United States will continue to conduct airstrikes against these terrorist groups in Syria and will continue to train, equip, and build the capacity of appropriately vetted Syrian groups pursuant to the authority provided by statute and the Constitution.

The fight against ISIS continues, and it remains a regional and global threat through its ability to organize and inspire acts of violence throughout the world. Similarly, al-Qa'ida continues to pose a threat to the United States and to the security of our partners and allies. The domestic and international legal bases for U.S. military operations and activities against ISIS and al-Qa'ida in Syria remain unchanged from the original report.

In May and June 2017, as well as February 2018, the United States took strikes against the Syrian Government and pro-Syrian Government forces. These strikes were limited and lawful measures taken to counter immediate threats to U.S. or partner forces while engaged in the campaign against ISIS. As a matter of domestic law, the 2001 AUMF provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. As a matter of international law, necessary and proportionate use of force in national and collective self-defense against ISIS in Syria includes measures to defend U.S., Coalition, and U.S.-supported partner forces while engaged in the campaign to defeat ISIS.

- *Yemen:* In addition to conducting direct action against AQAP in Yemen as described in the original report, the United States has also conducted a limited number of airstrikes against ISIS in Yemen. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Yemen in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

  As described in the original report, since 2015, the United States has provided limited support to the Kingdom of Saudi Arabia (KSA)-led coalition military operations against Houthi and Saleh-aligned forces in Yemen. Authorized types of support continue to include intelligence sharing, best practices, and other advisory support when requested and appropriate. Additionally, the Arms Export Control Act (AECA) and associated delegations of authority provide the Secretary of State, primarily through the Foreign Military Sales program and through the Department of State's licensing of Direct Commercial Sales, the authority to provide or license defense articles and defense services to KSA, the United Arab Emirates (UAE), and other members of the KSA-led coalition. Many of these defense articles and defense services have been used in the conflict in Yemen. The domestic and international legal bases for limited U.S. military support to KSA-led coalition operations in Yemen remain unchanged from the original report.
- *Somalia:* In addition to conducting direct action against al-Qa'ida and al-Shabaab in Somalia as described in the original report, the United States has also conducted airstrikes against a limited number of ISIS terrorist targets in Somalia. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Somalia in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

- *Libya:* The United States has continued to conduct airstrikes against ISIS terrorist targets in Libya, including its desert camps and networks, to promote regional stability and contribute to the defeat of ISIS in Libya. The domestic and international legal bases for military direct action in Libya remain unchanged from the original report,
- *Niger:* At the request of the Government of Niger, the previous Administration approved, and the current Administration continued, the deployment of U.S. forces to Niger under the President's constitutional authority as Commander-in-Chief and Chief Executive and under certain statutory authorities of the Secretary of Defense to train, advise, and assist Nigerien partner forces. On October 4, 2017 and December 6, 2017, those U.S. forces and their Nigerien partner forces were attacked by forces assessed to be elements of ISIS, a group within the scope of the 2001 AUMF, and responded with force in self-defense. The Administration has concluded that this use of force was also conducted pursuant to the 2001 AUMF.

***Targeting***

*United States Policies Regarding Targeting and Incidental Civilian Casualties:* The United States remains committed to complying with its obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality. In addition to American values and legal imperatives that guide U.S. forces in the protection of civilians, protecting civilians is fundamentally consistent with mission accomplishment and the legitimacy of operations. The United States continues, as a matter of policy, to apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict. These heightened policy standards are reflected in Presidential and other Executive Branch policies, military orders and rules of engagement, and the training of U.S. personnel. …

***Capture and Detention of Individuals in Armed Conflict***

The capture of terrorist suspects remains an essential part of U.S. counterterrorism strategy. The United States uses all available tools at its disposal, including law of armed conflict detention, the criminal justice system, and transfers to third countries. Maximizing intelligence collection and seeking the most appropriate long-term disposition are key factors in choosing the right tool or combination of tools, while always adhering to U.S. legal obligations, policies, and values. The classified annex contains additional information on this topic.

The President issued Executive Order (E.O.) 13823 on January 30, 2018, directing the Secretary of Defense, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies, to recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict. The Executive Branch will inform Congress of any new policies approved by the President.

- *Scope of Military Detention Under Article II of the US Constitution:* As discussed in the original report, the President as Chief Executive and Commander-in-Chief has constitutional authority to direct the use of military force in certain circumstances, without prior statutory authorization. Over two centuries of Executive Branch practice support this authority… This authority has been the basis for using force in a number of instances discussed throughout the original report and in this update. If the President were to order operations in reliance on his constitutional authority to use military force abroad, that authority would include the power to detain individuals with whom the United States

is engaged in hostilities so that they could not return to the battlefield for the duration of those hostilities.

- *Review of Continued Detention of Detainees at Guantanamo Bay:* The President issued E.O. 13823 on January 30, 2018, revoking Section 3 of E.O. 13492 of January 22, 2009, which was never acted upon fully but which ordered the closure of detention facilities at U.S. Naval Station Guantanamo Bay. Detention operations at Guantanamo Bay are necessary because a number of the remaining detainees are being prosecuted by military commission, and the detention of others is necessary to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews. Further, detention operations at Guantanamo Bay are legal, safe, humane, and conducted consistent with U.S. and international law. The E.O. provides that all detention operations at U.S. Naval Station Guantanamo Bay will continue to be conducted consistent with all applicable United States and international law. The E.O. also permits the transport and detention of new detainees to Guantanamo Bay when lawful and necessary to protect the United States and directs the Secretary of Defense, in consultation with the Secretary of State and the Attorney General, to recommend policies to the President governing the transfer of individuals to Guantanamo Bay.

  For those detainees at Guantanamo Bay not charged in or subject to a judgment of conviction by a military commission, E.O. 13823 retains the procedures for periodic review established in E.O. 13567 of March 7, 2011, which are described in the original report. The purpose of the periodic review is to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

***Prosecution of Individuals Through the Criminal Justice System and Military Commissions***

Since the publication of the original report, the Department of Justice has successfully prosecuted a number of individuals for terrorism and terrorism-related offenses. Among others, Ibrahim Adam Huran, also known as Spin Ghul, was sentenced to life imprisonment for his role in attempting to murder American military personnel in Afghanistan and conspiring to bomb the U.S. Embassy in Nigeria, and Ahmed Abu Khattala was convicted of federal terrorism charges stemming from his role in the 2012 attacks on U.S. facilities in Benghazi.

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

### *Congressional communications regarding legal basis for counterterrorism operations*

On February 12, 2018, Assistant Secretary of State for Legislative Affairs Mary K. Waters wrote to Senator Tim Kaine in response to his letter of December 19, 2017 about the U.S. military counter ISIS campaign in Iraq and Syria. The State Department response was coordinated with the Department of Defense ("DoD"), which also responded to Senator Kaine on January 29, 2018. Excerpts follow from the State Department letter to Senator Kaine.

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Our purpose and reasons for being in Iraq and Syria are unchanged: defeating ISIS and degrading al-Qa'ida. The Iraqi Security Forces, including the Kurdish Peshmerga, and local partner forces in Syria, with the support of the 74-member Global Coalition to Defeat ISIS, have made great progress in destroying ISIS's so-called "caliphate." With Coalition support, our partners on the ground have liberated nearly all of the territory and millions of civilians once under ISIS's despotic control. However, the threat posed by ISIS and al-Qa'ida is not solely dependent upon the physical control of territory by these groups. Ensuring that ISIS cannot regenerate its forces or reclaim lost ground is essential to the protection of our homeland. Realizing that military operations are necessary, but insufficient by themselves, to achieve ISIS's enduring defeat, the U.S.-led Global Coalition to Defeat ISIS is committed to helping stabilize liberated communities through activities including restoring basic essential services, de-mining, and facilitating our partners' transition to sustainable, self-sufficient security forces and credible, inclusive governance. Through this approach, we are laying the groundwork to prevent ISIS's reemergence and setting the conditions that are ultimately conducive to allowing displaced Syrians and refugees to safely and voluntarily return to their homes.

The United States also continues to believe that the Syrian civil conflict must be resolved through a political solution, and a political solution can only be reached through the full implementation of United Nations Security Council Resolution 2254.

The domestic and international legal bases for use of military force by the United States in Iraq and Syria are unchanged, and outlined below.

As a matter of domestic law, legal authority for the use of military force against ISIS and al-Qa'ida includes the … AUMF of 2001 and 2002. The 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. The strikes taken by the United States in May and June 2017 against the Syrian Government and pro-Syrian-Government forces were limited and lawful measures taken under that authority to counter immediate threats to U.S. or partner forces engaged in that campaign. The United States does not seek to fight the Government of Syria or Iran or Iranian-supported groups in Iraq or Syria. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in operations to defeat ISIS and degrade al-Qa'ida. There has been no assessment that either the Syrian Government or pro-Syrian-Government forces are "associated forces" of ISIS under the 2001 AUMF.

The 2002 AUMF provides authority "to defend the national security of the United States against the continuing threat posed by Iraq." The 2002 AUMF is an important source of authority for the use of military force to assist the Government of Iraq in military operations against ISIS and in continuing counterterrorism operations to address threats to U.S. national security emanating from Iraq following the destruction of ISIS's so-called physical "caliphate."

As a matter of international law, the United States is using force in Iraq with the consent of the Iraqi government. In Syria, the United States is using force against ISIS and al-Qa'ida, and is providing support to Syrian partner forces fighting ISIS such as the Syrian Democratic Forces, in the collective self-defense of lraq (and other States) and in U.S. national self-defense. Consistent with the inherent right of self-defense, the United States initiated necessary and proportionate actions in Syria against ISIS and al-Qa'ida in 2014, and those actions continue to the present day. Such necessary and proportionate measures include the use of force to defend U.S., Coalition, and U.S.-supported partner forces from any threats from the Syrian Government and pro-Syrian Government forces.

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The January 29, 2018 Defense Department response to Senator Kaine is excerpted below.

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The 2001 … AUMF authorizes the United States to use force against al-Qa'ida, the Taliban, and associated forces and against ISIS. DoD remains particularly focused on targeting ISIS and al-Qa'ida in Iraq and Syria. U.S. and partner forces in both countries continue to fight ISIS and al-Qa'ida and disrupt terrorist attack plotting. The Department of Defense is not targeting other militias or organizations, including Shia militia groups or Iranian proxies.

In support of the President's Iran Strategy, DoD is reviewing the breadth of our security cooperation activities, force posture, and plans. The Department of Defense is identifying new areas where we will work with allies and partners to pressure the Iranian regime, neutralize its destabilizing influences, and constrain its aggressive power projection, particularly its support for terrorist groups and militants. DoD supports State Department-led efforts to collaborate with allies and partners and, through sanctions and multilateral organizations like the United Nations, to pressure Iran to halt its destabilizing activities.

Although U.S. and Coalition-backed forces have liberated the vast majority of the territory ISIS once held in Iraq and Syria, more tough fighting remains ahead to defeat ISIS's physical "caliphate" and achieve the group's permanent defeat. ISIS is transitioning to an insurgency in Iraq and Syria, while continuing to support the global terrorist operations of its branches, networks, and individual supporters worldwide. Just as when we previously removed U.S. forces prematurely, the group will look to exploit any abatement in pressure to regenerate capabilities and reestablish local control of territory. As ISIS evolves, so too, is the campaign to defeat ISIS transitioning to a new phase in Iraq and Syria. DoD is optimizing and adapting our military presence to maintain counterterrorism pressure on the enemy, while facilitating stabilization and political reconciliation efforts needed to ensure the enduring defeat of ISIS. We, along with the Coalition and our partners, remain committed to ISIS's permanent defeat. ISIS will be defeated when local security forces are capable of effectively responding to and containing the group, and when ISIS is unable to function as a global organization.

With the approval of the Government of Iraq, DoD and other foreign partners are working with the Iraqi Security Forces to improve their capabilities and secure areas liberated from ISIS. In Syria, operating under current authorities, the U.S. military will continue to support local partner forces in Syria to complete the military defeat of ISIS and prevent its resurgence. The United States continues to support the Geneva-based political process pursuant to United Nations Security Council Resolution 2254.…

As part of our effort to accelerate the campaign against ISIS, DoD revised how it publicly reports force levels in Iraq and Syria. As a result, DoD now publicly reports that it has approximately 2,000 forces in Syria. These numbers do not reflect an increase in the number of personnel on the ground; rather, they represent a change in how these numbers are publicly reported. Under previous reporting practices, certain forces in Syria on a temporary duty status were not publicly reported, but they are now included in the 2,000 force total. For operational

security reasons, U.S. forces conducting sensitive missions are not included in the publicly reported numbers. As you know, DoD provides these classified details to its congressional oversight committees in closed sessions. We anticipate these numbers will decrease as the nature of our operations change in Iraq and Syria, but we do not have a timeline-based approach to our presence in either Iraq or Syria.

In addition to providing authority to conduct offensive counterterrorism operations against al-Qa'ida and ISIS in Iraq and Syria, the 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such force is a necessary and appropriate measure in support of the D-ISIS campaign. The small number of strikes taken by U.S. forces since May 2017 against the Syrian Government and pro-Syrian Government forces, referenced in the June and December 2017 periodic reports to Congress consistent with the War Powers Resolution, were limited and lawful measures taken under this authority to counter immediate threats to U.S. or partner forces engaged in the D-ISIS campaign. There has been no assessment that either the Syrian Government or pro-Syrian Government forces are "associated forces" of ISIS under the 2001 AUMF.

The April 6, 2017, U.S. missile strike on Shayrat airfield in Syria was not based on the authority of either the 2001 or 2002 AUMFs. Rather, as was notified to the Congress on April 8, the President authorized that strike pursuant to his power under Article II of the Constitution as Commander in Chief and Chief Executive to use this sort of military force overseas to defend important U.S. national interests. The U.S. military action was directed against Syrian military targets directly connected to the April 4 chemical weapons attack in Idlib and was justified, legitimate, and proportionate as a measure to deter and prevent Syria's illegal and provocative use of chemical weapons.

Finally, the 2002 Authorization for Use of Military Force Against Iraq Resolution (2002 AUMF) continues to provide authority for military operations against ISIS in Iraq. It also provides authority to respond to threats to U.S. national security emanating from Iraq that may re-emerge and that may not be covered by the 2001 AUMF. The 2002 AUMF thus remains necessary to support the use of military force to assist the Government of Iraq both in the fight against ISIS, and in stabilizing Iraq following the destruction of ISIS's so-called caliphate.

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## 3. Bilateral and Multilateral Agreements and Arrangements

### *a. Defense Cooperation with Cote D'Ivoire*

The United States and Cote D'Ivoire effected an agreement on defense cooperation by exchange of notes at Abidjan on June 7, 2017 and February 23, 2018. The agreement entered into force February 23, 2018. The text of the agreement is available at https://www.state.gov/18-223-2/.

### *b. Defense Cooperation with Ghana*

The United States and Ghana signed a defense cooperation agreement at Accra on May 9, 2018. The agreement entered into force on May 31, 2018. The text of the agreement, with annex and appendix, is available at https://www.state.gov/18-531/.

### *c. Defense Cooperation with Honduras*

The United States and Honduras effected an agreement amending the annex of the agreement of May 6 and May 7, 1982 regarding defense cooperation. The agreement making the amendment was done by exchange of notes at Tegucigalpa on September 13, 2017 and May 16, 2018 and entered into force May 16, 2018. The text, with attachment, is available at https://www.state.gov/18-516/.

### *d. Defense Cooperation with Japan*

The United States and Japan effected an agreement regarding defense cooperation by exchange of notes at Tokyo on November 20, 2018. The agreement entered into force November 20, 2018 and is available at https://www.state.gov/18-1120.

### *e. Defense Cooperation with Poland*

In 2018, the United States and Poland effected an agreement amending their defense cooperation agreement of July 15, 2015. The agreement making the amendment was effected by exchange of notes at Warsaw on November 28 and December 21, 2018 and entered into force December 21, 2018. The agreement is available at https://www.state.gov/18-1221.

## 4. International Humanitarian Law

### *a. Civilians in Armed Conflict*

On May 22, 2018, U.S. Representative to the UN for Economic and Social Affairs Kelley Currie delivered remarks at a UN Security Council open debate on the protection of civilians in armed conflict. Ambassador Currie's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-the-protection-of-civilians-in-armed-conflict/.

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The 2018 Secretary-General's report paints a dismal picture of the protection of civilians in the field and describes a "state of unrelenting horror and suffering affecting millions of women children and men across all conflicts."

The state of affairs for the protection of civilians is desolate. Millions of people are bearing the consequences. Tens of thousands innocently dying from unlawful attacks involving explosive weapons and chemical weapons, deliberate attacks on schools and medical facilities, extra judicial killings, starvation, sexual violence, and blatant disregard for international

humanitarian law. Many more civilians are either missing or have been forced from their homes; and medical and humanitarian personnel are being targeted at an alarming number. Sexual violence increasingly is being used as a tactic of war, and victims continue to be targeted based on their ethnic and religious backgrounds. Member States seemingly feel no qualms about routinely denying humanitarian access to civilians in dire need, from Burma to Yemen.

We all have an obligation and moral duty to demand and uphold the international community's resounding rejection of the use of chemical weapons in war 100 years ago after the world first witnessed the horrors of chemical warfare during World War I. We all have an obligation to uphold UN Security Council resolutions that call for the protection of schools, medical facilities, and even journalists from being targets in war. We have an obligation to insist on unhindered humanitarian access for all those in need and safe, voluntary evacuations of civilians compelled destruction to flee their homes, consistent with our obligations under international humanitarian and human rights law.

It is critical that all UN Member States do their part to protect civilians. The United States welcomes the Secretary-General's steps to improve peacekeeping and revive a sense of collective responsibility for the success of UN peacekeeping operations. But we need to be honest and clear when Member States are not living up to their commitments, and we—especially we in this Council—should be willing to apply meaningful pressure when parties to a conflict do not change course.

In missions across the globe, peacekeepers today serve at great personal risk and act heroically in many cases to protect civilians. However, we also still have far too many examples of peacekeepers failing to take necessary action to protect civilians. We continue to see units retreat from towns they are supposed to protect, rather than standing their ground as armed attackers approach. We continue to see those who are responsible for protecting civilians abuse their positions of trust.

Improving the protections of civilians in peacekeeping requires increased accountability and the United States welcomes the Secretary-General's steps to institutionalize a culture of accountability for performance in UN peacekeeping, starting with the development and implementation of a comprehensive performance policy that identifies transparent standards for performance and details measures to hold underperformers accountable.

The United States stands firmly behind the commitment to enhance performance for the protection of civilians and encourages all Member States to do the same by supporting the Kigali Principles, which were designed to help peacekeepers effectively implement their protection of civilians mandates. For example, the Principles call for troop-contributing countries to empower military commanders of peacekeeping contingents to use force to protect civilians—knowing that if a commander has to wait hours and hours for guidance from capital, it may be too late to prevent a fast-approaching attack on a nearby village. If properly implemented, there is little doubt that the Kigali Principles would make peacekeeping missions more effective, improve civilian security, and save lives.

We also join our UK colleagues in support of the human rights elements of peacekeeping missions. Their work fulfills crucial protection and prevention aspects to Council mandates, to which all Council members—but especially the P5—have agreed.

But what else can we as the Security Council or as Member States do to promote respect for international humanitarian law?

For one, we as the Security Council should stand in solidarity against genocide, crimes against humanity, war crimes, and ethnic cleansing, and work together to adopt urgently needed resolutions in all such cases.

Secondly, we as the Council should use the entire range of tools at our disposal that can and should be employed to compel parties to comply with applicable IHL and international human rights law and to promote accountability for breaches or violations. This includes sanctions, arms embargoes, fact-finding missions, independent mechanisms to gather, collect, and store evidence, and justice mechanisms to bring those responsible for these violations to justice.

Thirdly, each state should ensure that they have appropriate legislative and institutional arrangements to address current—and prevent future—violations of international humanitarian law and violations and abuses of fundamental human rights. Accountability is essential to provide both justice for victims of such violations and to end the culture of impunity that leads to them in the first place. Individual states should also investigate and, where appropriate, prosecute crimes committed within their jurisdiction. Credible national accountability efforts should be encouraged and supported along with other mechanisms, including fact-finding missions, commissions of inquiry, and international and hybrid tribunals. These mechanisms are critical when national options are unavailable or futile.

Fourth, we should use all the prevention tools we have at our disposal to stop cycles of conflict, build social cohesion, and promote and protect human rights. We note the Secretary-General's important leadership on the prevention and peacebuilding agendas.

And finally, the international community must give this issue the attention it deserves. Today is an important step in this regard.

We all know it's not enough just to be outraged by the accounts we've heard here today—and pretty much every other week that we sit in this Council. It's not enough to say the right things in this room, and then walk out of here and do nothing. We must remain committed to promoting the protection of civilians by doing our own part, as well. We have to use the tools that we have to ensure that we are doing our part to protect civilian lives and fulfill our own conventional and customary obligations under international humanitarian law and international human rights law. This not something any of us can do alone, but that should not stop all of us from taking the robust national and regional steps we can. We will need solid commitments and urgent action by all of us to truly and effectively protect innocent human lives.

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Attorney-Adviser Thomas Weatherall provided the U.S. explanation of vote on a Third Committee resolution on missing persons on November 16, 2018. Mr. Weatherall's statement follows and is also available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-missing-persons/.

The United States agrees that avoiding harm to civilians, including through minimizing military use of civilian infrastructure, is important for preventing missing persons in armed conflict. The United States notes, however, that there is no obligation under international law for states to minimize the military use of civilian infrastructure. Accordingly, we read the language in operative paragraph

4 as referring only to states' general obligation to act in accordance with applicable international law and not as stating that international law requires states to minimize military use of civilian infrastructure.

### *b. Report on Civilian Casualties*

On June 1, 2018, the Department of Defense submitted the annual report on civilian casualties in connection with U.S. military operations required by Section 1057 of the National Defense Authorization Act ("NDAA") for Fiscal Year 2018. Excerpts follow from the report.

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As noted in Executive Order 13732, *United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force*, of July 1, 2016, the protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to U.S. national security. As a matter of policy, U.S. forces therefore routinely conduct operations under policy standards that are more protective than the requirements of the law of war that relate to the protection of civilians.

U.S. forces also protect civilians because it is the moral and ethical thing to do. Although civilian casualties are a tragic and unavoidable part of war, no force in history has been more committed to limiting harm to civilians than the U.S. military. This commitment is reflected in DoD's consistent efforts to maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from DoD operations to further enhance the protection of civilians. Executive Order 13732 catalogues the best practices DoD has implemented to protect civilians during armed conflict, and it directs that those measures be sustained in present and future operations.

**I. MILITARY OPERATIONS DURING 2017 THAT WERE CONFIRMED, OR REASONABLY SUSPECTED, TO HAVE RESULTED IN CIVILIAN CASUALTIES**

During 2017, U.S. forces engaged in a number of military operations, some of which were assessed to have resulted in civilian casualties. This section provides information regarding: a) Operation INHERENT RESOLVE and other military actions related to Iraq and Syria; b) Operation FREEDOM'S SENTINEL, including support to the North Atlantic Treaty Organization (NATO)-led RESOLUTE SUPPORT Mission; c) U.S. military actions in Yemen against al-Qa'ida in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and Syria (ISIS); d) U.S. military actions in Somalia against ISIS and al-Shabaab; and e) U.S. military actions in Libya against ISIS.

DoD's practice for many years has been not to tally systematically the number of enemy combatants killed or wounded during operations. Although the number of enemy combatants killed in action is often assessed after combat, a running "body count" would not necessarily provide a meaningful measure of the military success of an operation and could even be

misleading. For example, the use of such metrics in the Vietnam War has been heavily criticized. We have therefore provided other information that is intended to help give context, such as information regarding the objectives, scale, and effects of these operation.

It is longstanding DoD policy to comply with the law of war in all military operations, however characterized. All DoD operations in 2017 were conducted in accordance with law of war requirements, including law of war protections for civilians, such as the fundamental principles of distinction and proportionality and the requirement to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.

DoD assesses that there are credible reports of approximately 499 civilians killed and approximately 169 civilians injured during 2017 as a result of Operation INHERENT RESOLVE in Iraq and Syria**,** Operation FREEDOM'S SENTINEL in Afghanistan, and U.S. military actions in Yemen against AQAP and ISIS. For the purposes of this report, these are incidents in which U.S. aircraft conducted the strike or strikes or where U.S. personnel engaged in ground combat. DoD has no credible reports of civilian casualties from U.S. military operations in Somalia or Libya in 2017. Sub-sections A through E below … provide additional information about these operations.

The assessments of civilian casualties are based on reports that DoD has been able to assess as "credible"; *i.e.*, based on the available information, it is assessed that it is more likely than not that the report regarding civilian casualties is correct. Section II of this report describes in more detail the processes for conducting these assessments.

**A. Operation INHERENT RESOLVE and other military actions related to Iraq and Syria**

*Operation INHERENT RESOLVE.* During 2017, as part of the United States' comprehensive strategy to defeat ISIS, U.S. forces conducted a systematic campaign of airstrikes and other vital actions against ISIS forces in Iraq and Syria and carried out airstrikes and other necessary actions against al-Qa'ida in Syria in the context of the ongoing armed conflict against those groups.

U.S. forces were also deployed to Syria to conduct actions against ISIS with indigenous ground forces. In Iraq, U.S. forces advised and coordinated with Iraqi forces and provided training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces.

During 2017, the U.S.-led Coalition to defeat ISIS conducted more than 10,000 strikes, which killed hundreds of ISIS leadership figures and facilitators in Iraq and Syria; disrupted ISIS's command control network; degraded its use of unmanned aerial systems; reduced its ability to conduct research and development, procurement, and administration; and denied sources of funding for terrorist activities. These losses have undermined ISIS's ability to conduct attacks throughout the region and the world. With the loss of terrain and the liberation of the local population, ISIS can no longer generate funding through extortion and taxation. Additionally, airstrikes and ground operations crippled ISIS's use of hydrocarbon generating facilities and facilitation routes that moved and supplied ISIS fighters and supported illicit oil sales. U.S. forces have also degraded ISIS media operations.

These actions helped support partners, in particular the Iraqi Security Forces (ISF) and Syrian Democratic Forces (SDF), to make extraordinary progress over the past year, liberating Mosul and Raqqah – the former capitals of ISIS's self-proclaimed "caliphate" – during 2017. The liberation of Mosul provided the ISF with the momentum that led to the quick liberation of

Tal Afar and Hawijah. During 2017, more than 61,500 square kilometers were liberated from ISIS control across Iraq and Syria, equating to the liberation of more than 98 percent of the land once claimed by ISIS and of more than 4.5 million people from ISIS oppression. Actions in Iraq were undertaken in coordination with the Government of Iraq, and in conjunction with Coalition partners.

In 2017, U.S. forces participating in the Defeat-ISIS campaign in Syria also took a limited number of strikes against Syrian government and pro-Syrian government forces in order to counter immediate threats to U.S. and partner forces while engaged in that campaign.

DoD assesses that there were credible reports of civilian casualties caused by Operation INHERENT RESOLVE in Iraq and Syria during 2017, as indicated earlier in the report.

For Operation INHERENT RESOLVE, U.S. Central Command (USCENTCOM) publishes a monthly report that: (1) catalogues reports of civilian casualties that have been received, including the date and location in which the civilian casualties reportedly occurred and the source of the report (*e.g.*, a military unit's own after-action reporting, media report, non-governmental organization report, posting on social media); and (2) whether reports of civilian casualties have been assessed to be credible or not, and if not, the general reasons why such reports were assessed not to be credible. The monthly report also identifies the reports of civilian casualties that still remain to be assessed.

It should be noted that the U.S.-led Coalition to defeat ISIS, as a matter of strategy and policy, considers all civilian casualties to be the combined result of "Coalition" action and jointly attributed to Coalition members. It is rarely the case that a single civilian casualty occurs solely from the actions of one nation's military activities. Coalition personnel from multiple countries take part in every strike in some manner, from the initial collection and analysis of intelligence, to the Coalition's deliberate targeting process, and finally, in conducting the strikes themselves. In our view, this is the most appropriate way to view civilian casualty incidents related to Coalition action in Iraq and Syria. Public reports released by USCENTCOM about civilian casualties reflect this approach.

Due to the number of reports of civilian casualties in Iraq and Syria received during 2017 and the resources required to review each report, as of February 26, 2018, more than 450 reports of civilian casualties from 2017 remained to be assessed. As described below, DoD continues to assess reports and updates assessments if DoD receives additional information on any report of civilian casualties.

*Additional Military Action in Syria.* Additionally, on April 6, 2017, U.S. forces in the Mediterranean Sea operating beyond the territorial sea of any State struck the Shayrat military airfield in Syria in response to the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria, on April 4, 2017. The strike, which involved 59 Tomahawk Land Attack missiles, was assessed to have resulted in the damage or destruction of fuel and ammunition sites, air defense capabilities, and 20 percent of Syria's operational aircraft. DoD has no credible reports of civilian casualties resulting from this strike.

**B. Operation FREEDOM'S SENTINEL, including support to the North Atlantic Treaty Organization (NATO)-led RESOLUTE SUPPORT Mission**

During 2017, U.S. forces operated in Afghanistan to eliminate the reemergence of safe-havens that enable terrorists to threaten the United States or its interests, support the Afghan government and the Afghan military as they confront terrorist organizations in the field, and help create conditions to support a political process to achieve a lasting peace. In the context of the ongoing armed conflict in Afghanistan, U.S. forces in Afghanistan trained, advised, and assisted

Afghan forces; conducted and supported counterterrorism actions against al-Qa'ida and against ISIS; and took appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. and Coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success.

These actions included strikes, such as (1) the strike on February 26, 2017, that killed Taliban commander Mullah Abdul Salam, along with four other enemy combatants in Kunduz; (2) the strike on an ISIS tunnel complex in Achin district, Nangarhar Province, on April 13, 2017, that was designed to minimize the risk to Afghan and U.S. forces conducting clearing operations in the area while maximizing the destruction of ISIS fighters and facilities; (3) the strike on April 19, 2017, that killed Quari Tayib, once known as the Taliban shadow governor of Takhar Province, along with eight additional Taliban fighters in Kunduz Province; (4) the strike on an ISIS headquarters in Kunar Province on July 11, 2017, that killed an emir of ISIS, Abu Sayed; and (5) the strike on December 1, 2017, that killed the Taliban's "Red Unit" commander Mullah Shah Wali, along with one of Wali's deputy commanders and three other insurgents in Helmand Province. These actions also included strikes on seven Taliban drug labs and one Taliban command-and-control node in northern Helmand Province during November 2017.

DoD assesses that there were credible reports of civilian casualties caused by U.S. military actions in Afghanistan during 2017, as indicated earlier in the report.

**C. U.S. military actions in Yemen against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS**

During 2017, a small number of U.S. military personnel were deployed to Yemen to conduct actions in the context of the armed conflict against AQAP and ISIS. U.S. forces continued to work closely with the Government of Yemen and regional partner forces to dismantle and ultimately eliminate the terrorist threat posed by these groups. U.S. forces conducted a number of airstrikes against AQAP operatives and facilities in Yemen, and supported United Arab Emirates- and Yemen-led efforts to clear AQAP from Shabwah Governorate.

For example, on January 20, 21, and 22, 2017, the U.S. military conducted strikes in al-Baydah Governorate, which killed five AQAP operatives. On January 28, 2017, U.S. forces conducted a raid on an AQAP compound in al-Bayda, Yemen, to gather information to help prevent future terrorist attacks, killing 14 AQAP operatives. U.S. forces also conducted a counter-terrorism operation against a compound associated with AQAP in Ma'rib Governate, Yemen, on May 23, 2017, which killed seven AQAP militants through a combination of small arms fires and airstrikes. On November 20, 2017, U.S. airstrikes in al-Bayda Governorate, Yemen, killed five AQAP militants, including an AQAP leader responsible for planning and conducting terrorist attacks against Yemeni and Coalition forces and an al-Bayda-based facilitator. U.S. forces also conducted eight airstrikes in Yemen in December 2017 that targeted both AQAP and ISIS, resulting in the death of an AQAP external operations facilitator and the AQAP deputy arms facilitator with ties to senior AQAP leadership and who was responsible for facilitating the movement of weapons, explosives, and finances in Yemen.

DoD assesses that there were credible reports of civilian casualties caused by U.S. military actions in Yemen against AQAP and ISIS during 2017, as indicated earlier in the report.

**D. U.S. military actions in Somalia against ISIS and al-Shabaab**

During 2017, U.S. forces in Somalia were countering the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. In the context of the armed conflict against those groups, U.S. forces conducted a number of airstrikes against ISIS and al-Shabaab. For

example, on January 7, 2017, Somali partner forces, African Union Mission in Somalia (AMISOM) forces, and U.S. advisors conducted a self-defense strike against al-Shabaab in Gaduud, Somalia. On June 11, 2017, U.S. forces also conducted an airstrike in southern Somalia on an al-Shabaab command and logistics node, killing a number of militants. Periodic strikes continued throughout the summer and fall of 2017, killing numerous al-Shabaab militants. On November 21, 2017, U.S. forces conducted an airstrike against an al-Shabaab camp 125 miles northwest of Mogadishu, killing more than 100 militants. Strikes continued into December 2017, with U.S. forces conducting more airstrikes against al-Shabaab vehicle-borne improvised explosive devices and al-Shabaab militants. U.S. forces also advised, assisted, and accompanied regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism actions in Somalia in 2017.

As indicated earlier in the report, DoD has no credible reports of civilian casualties resulting from U.S. strikes in Somalia in 2017. One 2017 report of civilian casualties in Somalia remains under investigation.

**E. U.S. military actions in Libya against ISIS**

During 2017, U.S. forces conducted a number of airstrikes in Libya as part of the ongoing armed conflict against ISIS. For example, on January 19, 2017, U.S. forces conducted airstrikes destroying two ISIS camps 45 kilometers southwest of Sirte. On September 26, 2017, U.S. forces also conducted two airstrikes in Libya, killing several ISIS militants. These airstrikes were conducted in coordination with Libya's Government of National Accord.

As indicated earlier in the report, DoD has no credible reports of civilian casualties resulting from U.S. strikes in Libya in 2017.

## II. DOD PROCESSES FOR ASSESSING REPORTS OF CIVILIAN CASUALTIES FROM U.S. MILITARY OPERATIONS

As reflected in Executive Order 13732, *United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force*, of July 1, 2016, the U.S. military, as appropriate and consistent with mission objectives and applicable law, including the law of war, has a practice of reviewing or investigating incidents involving civilian casualties, including by considering relevant information from all available sources, such as other agencies, partner governments, and nongovernmental organizations and taking measures to mitigate the likelihood of future incidents of civilian casualties.

Specific processes for reviewing or investigating incidents have varied over the years and have varied by geographic combatant command and by operation. Department of Defense has different processes due to host nation requests, different mission objectives, different operational designs, different available resources, and different organizational designs and command relationships within the Area of Responsibilities. As but one example, some commands do not have access on the ground to areas where civilian casualties are suspected to have occurred. Commands also work to improve their processes over time and adapt to the ever-changing fog and friction of war. The following is a general description of processes U.S. military units used during 2017.

After a report of civilian casualties resulting from a command's operations becomes known, the command or another entity (such as a specialized board or team) will seek to assess the credibility of the report. The command or entity would consider reports from any source, including its own after-action reporting or reports from external sources, such as a nongovernmental organization, the news media, or social media. In assessing the report, the command or entity would seek to review all readily available information from a variety of

sources. This may include, but is not limited to, operational planning data, video surveillance and other data from Intelligence, Surveillance, and Reconnaissance (ISR) assets, witness observations (including those of partnered forces) where available, news reports, and information provided by nongovernmental organizations and other sources such as local officials or social media.

After reviewing the available information, a competent official determines whether it is more likely than not that civilians were injured or killed. If warranted, a more extensive administrative investigation would be conducted to find facts about the incident, and to make relevant recommendations, such as identifying process improvements to reduce the risk of further civilian casualty incidents.

DoD acknowledges that there are differences between DoD assessments and reports from other organizations. These differences result from a variety of factors. For example, nongovernmental organizations and media outlets often use different types of information and different methodologies to assess whether civilian casualties have occurred. Some organizations conduct on-the-ground assessments and interviews, while others rely heavily on media reporting. DoD assessments seek to incorporate all available information, including tools and information that are not available to other organizations—such as operational planning data and intelligence sources. As the RESOLUTE SUPPORT (RS) Mission explained in an April 2018 report that sought to explain discrepancies between its assessments and those of the United Nations Assistance Mission in Afghanistan (UNAMA):

The RS investigation team assess that in several of the cases where casualties were alleged to be from air strikes, no aerial platforms were nearby at the time, and reported explosions may have resulted from concealed IEDs or insurgents firing rockets and mortars. In other cases, RS investigators have access to surveillance information that gives them confidence that civilians were not present at the scene of a strike.

For example, on November 19, 2017, in the air campaign under new US authorities striking Taliban revenue streams, a suspected drug lab was struck in northern Helmand. UNAMA relayed information to RS alleging that nine civilians from the same family were killed in the strike. They shared detailed information about three women, two boys and four girls—including a one-year-old. This claim of nine dead was included in the UNAMA report, but not counted by RS. RS investigations disproved the allegation as surveillance of the house over a significant period of time showed no sign of the presence of a family. Local government officials said that no civilians were killed.

It also bears noting that DoD's assessments reflect DoD's efforts to review reports of civilian casualties. In some cases, DoD has not been able to assess a report as credible because insufficient information has been provided or because investigators have not yet been able to review the report due to a large volume of reports. However, DoD assessments continue to be conducted, and existing assessments are updated if new information becomes available.

**III. STEPS DOD TAKES TO MITIGATE HARM TO CIVILIANS**

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During 2017, all operations previously listed were conducted consistent with the best practices identified in Executive Order 13732. For example, pre-deployment training for U.S. military units during 2017 included instruction on the law of war, rules of engagement, and other policies related to protecting civilian populations. Also, during U.S. military operations in 2017,

practices related to protecting civilians during operations included: (1) characterizing the operating environment in an effort to identify the locations of civilians in advance of operations; (2) carefully crafting the operational design to avoid civilians during planned ground maneuver; (3) conducting shaping actions to reduce the need later to conduct fires in self-defense; (4) optimizing targeting processes; and (5) taking active measures to mitigate weapons' effects in order to protect civilians and structures.

*Characterizing the operating environment*—Available sensors (*e.g.*, visual sensors, human intelligence, signals intelligence) were used to characterize the battlespace to determine where the enemy was located, where civilians were located, and where the enemy kept equipment, arms, and other objects required to fight. For large operations, this process can start a year or more in advance. For smaller operations, the process can start weeks ahead of ground force maneuver. Characterizing the battlespace is a continual process used during target selection, target engagement, and post-strike assessments.

*Crafting the operational design*—U.S. military planners also worked with partner forces during 2017 to design battle plans so ground forces were able to maneuver around areas of the enemy and civilians in such a way as to reduce harm to civilians.

*Conducting shaping actions*—U.S. forces also relied heavily on precision-guided munitions (PGMs) during 2017 to conduct shaping actions designed to degrade enemy capabilities and defenses well ahead of the arrival of ground forces. Although the law of war does not require the use of PGMs when non-precision-guided weapons may be used in compliance with the law of war, commanders understood that shaping actions could use a relatively few, well-placed PGMs to concentrate force for greater effects in degrading enemy defensive capabilities. This helped speed up the successful liberation of enemy-held areas and maximized the protection of civilians and structures. When supporting partner forces, most munitions were employed dynamically as the partner force maneuvered and was in contact with the enemy. By using shaping actions to shorten the period when ground forces would be in contact with enemy forces, the number of munitions employed by liberating forces in the conflict can often be decreased, resulting in more protection of civilians from the dangers of combat.

*Optimizing targeting processes*—During U.S. military operations in 2017, measures were also taken during targeting processes to protect civilians more fully. For example, strike processes worked with commanders to define the required effects of different strikes, intelligence sources and analysis were used to identify enemy forces as accurately as possible, and determinations were made whether the required effects could be achieved through non-kinetic options. For example, in some instances, simply bringing aircraft overhead was enough to get the enemy to react and to slow or stop a counterattack and thus enable friendly forces to regain the initiative. Additionally, some lawful targets were not attacked due to concerns about collateral effects on objects and/or certain persons, even though such collateral harm would not have been excessive. Before strikes, U.S. forces often leveraged multiple ISR assets to do collateral scans to help protect transient civilians. This included employment of multiple strike aircraft and ISR platforms to clear for and to protect transient civilians during attacks. In situations where commanders determined a strike was required, they were often able to choose weapons that would achieve the desired effects but that would also cause the least amount of collateral damage.

*Mitigating weapons' effects*—During U.S. military operations in 2017, techniques were used to mitigate weapons' effects on civilians and structures. One example was to delay the fuse on air-to-ground munitions. Delaying the fuse buries the munition, allowing the ground to absorb

fragmentation from the munition and to channel the blast, which can more effectively protect nearby civilians and structures. Low-yield and direct fire munitions were also used to reduce the likelihood of causing collateral damage. Another technique used during U.S. military operations in 2017 was to use specific angles of entry for munitions sent into target areas, which allowed for the munitions to strike more precisely (*e.g.*, a particular floor of a building or other specific location of hostile forces), thereby further minimizing civilian casualties and effects on structures.

As mentioned earlier, we believe that the U.S. military operations listed above were conducted consistent with the best practices identified in Executive Order 13732. Unfortunately, despite the best efforts of U.S. forces, civilian casualties are a tragic but at times unavoidable consequence of combat operations. This is especially true when fighting in urban areas and against adversaries like ISIS and al-Qa'ida who use civilians as shields and whose tactics include intentionally endangering the lives of innocents.

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### *c. Protocols to the Geneva Conventions*

On October 15, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at a meeting of the Sixth Committee on "Agenda Item 83: Status of the Protocols Additional to the Geneva Conventions of 1949." Mr. Simcock's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-83-status-of-the-protocols-additional-to-the-geneva-conventions-of-1949/.

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The United States has long been a strong proponent of the development and implementation of international humanitarian law, IHL, which we often also refer to as the law of war or the law of armed conflict. We recognize the vital importance of compliance with its requirements during armed conflict. Accordingly, the United States continues to ensure that all of our military operations comply with IHL, as well as all other applicable international and domestic law. We similarly call on all states and parties to armed conflicts to ensure that they comply fully with applicable IHL.

The United States is a party to the Third Additional Protocol to the 1949 Geneva Conventions relating to the adoption of an additional distinctive emblem, but it is not a party to the 1977 Additional Protocols to the 1949 Geneva Conventions.

The United States has, under successive Administrations, urged the Senate to give its advice and consent to ratification of Additional Protocol II to the Geneva Conventions, and this treaty is pending before the Senate for its advice and consent. Extensive interagency reviews, including one completed in 2011, have found U.S. military practice to be consistent with the Protocol's provisions. It also found that any issues could be addressed with reservations, understandings, and declarations. We believe these conclusions remain valid today. Although the United States continues to have significant concerns with many aspects of Additional Protocol I,

Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well.

Proper implementation of IHL obligations is critical to reducing the risk to civilians and civilian objects during armed conflict. As we have seen in recent conflicts, it is a tragic reality of war that egregious harm to civilians can occur even when parties comply with their obligations under IHL. Thus, it is all the more critical for parties to comply with IHL, including the principles of distinction and proportionality, as well as the obligations of both attacking and defending parties to take precautionary measures for the protection of the civilian population and other protected persons and objects. In taking precautions for the protection of civilians, the United States routinely imposes, as a matter of policy, certain heightened standards that are more protective of civilians than would otherwise be required under IHL. Moreover, the United States always seeks to adhere to applicable IHL requirements during armed conflicts and encourages all states and parties to armed conflicts to do the same. There are many practical measures that states can take to help effectively implement IHL. I would like to mention three examples.

The first is Weapons Reviews. The U.S. Department of Defense policy has for many years required the legal review of the intended acquisition or procurement of weapons or weapon systems. This review includes ensuring that such acquisition or procurement is consistent with the law of war. Although the United States is not bound by Article 36 of Additional Protocol I, and customary law does not require "weapons reviews," as such, we view the review of the legality of weapons as a best practice for implementing customary law and treaty law relating to weapons. Such reviews may be especially important with respect to weapons that incorporate in novel ways emerging technologies, such as new developments in artificial intelligence. It is important to consider any risks that such novel applications entail as well as the potential to use emerging technologies in upholding compliance with IHL, such as by reducing the risk of civilian casualties. Under a U.S. Department of Defense policy that addresses the use of autonomy in weapons systems, the Department of Defense conducts two reviews that include both legal and policy considerations pertinent to certain types of autonomous and semi-autonomous weapon systems—once prior to making the decision to enter into formal development of the weapon, and another before the weapon is fielded. However, even weapons that are not subject to this special policy review process receive a legal review in accordance with DoD policy. Conducting legal reviews of weapons is a practical measure that all states can take to support their compliance with IHL.

The second example is Sharing State Practice. States can further improve their implementation of IHL through the voluntary and non-politicized sharing of state practice, including official publications, policies, and procedures. Through such exchanges, states can learn how other states have implemented their IHL obligations and can identify good practices that they may wish to incorporate into their own procedures. The state-driven intergovernmental process on strengthening respect for IHL, under Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent, provides a valuable opportunity to create a non-politicized space for this type of regular exchange and dialogue. The United States recently submitted an official proposal to create an online repository of official state documents regarding their practice and policies related to their implementation of IHL. This outcome could also be complemented by, and is without prejudice to, whatever other outcomes states may agree upon.

We look forward to further progress under this initiative in advance of and during the 33rd International Conference in December 2019.

The third example is ICRC Notification and Access. Providing the ICRC notification of and access to detainees in non-international armed conflicts, NIACs, can also improve the implementation of IHL. For many years, the U.S. military has adhered to the policy and practice of notifying the ICRC about detainees in U.S. custody and allowing the ICRC timely access to them, consistent with Department of Defense regulations and policies. This policy and practice is now codified as a requirement under U.S. domestic law. The U.S. military has found this practice beneficial, in part because of the ICRC's practical experience in understanding the challenges of detention and the "confidential" modalities under which access is granted. The "confidential" modalities help ensure a frank, constructive, and non-politicized dialogue with the ICRC that has proven very valuable. The United States believes that providing ICRC notification and access to detainees in military detention facilities is a good practice for parties to armed conflict, as it can help them identify better ways to implement IHL and further ensure the humane treatment of detainees.

In sum, conducting weapons reviews, sharing state practice under appropriate modalities, and providing the ICRC with notice of and access to detainees are three practical and non-politicized ways that states can enhance their implementation of IHL and help further ensure compliance. These three examples reflect broader categories of mechanisms that states can use to implement their commitment to the fundamental principles of IHL into their military operations so as to provide concrete humanitarian benefits. Although the fundamental principles of IHL are clear and universally recognized, how these principles apply in particular circumstances or how these principles might be most effectively implemented is not always as clear and universally recognized.

We therefore encourage all states to implement these measures and similar measures for the sound and efficacious implementation of IHL. We also look forward to continuing to work with other states including our allies and partners, as well as the ICRC, on further strengthening the implementation of and respect for IHL.

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### *d. Applicability of international law to conflicts in cyberspace*

On September 20, 2018, the White House released its 2018 National Cyber Strategy. The document outlines the steps the federal government is taking to "promote an open, secure, interoperable, and reliable cyberspace." The Strategy includes four pillars: I. Protect the American People, the Homeland, and the American Way of Life; II. Promote American Prosperity; III. Preserve Peace Through Strength; and IV. Advance American Influence. The State Department media note on the release of the 2018 National Cyber Strategy is available at https://www.state.gov/release-of-the-2018-national-cyber-strategy/. The Strategy is available at https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf and excerpts follow from the section on "Pillar III: Preserve Peace Through Strength."

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**Enhance Cyber Stability through Norms of Responsible State Behavior**
The United States will promote a framework of responsible state behavior in cyberspace built upon international law, adherence to voluntary non-binding norms of responsible state behavior that apply during peacetime, and the consideration of practical confidence building measures to reduce the risk of conflict stemming from malicious cyber activity. These principles should form a basis for cooperative responses to counter irresponsible state actions inconsistent with this framework.

***Priority Action***

**ENCOURAGE UNIVERSAL ADHERENCE TO CYBER NORMS:** International law and voluntary non-binding norms of responsible state behavior in cyberspace provide stabilizing, security-enhancing standards that define acceptable behavior to all states and promote greater predictability and stability in cyberspace. The United States will encourage other nations to publicly affirm these principles and views through enhanced outreach and engagement in multilateral fora. Increased public affirmation by the United States and other governments will lead to accepted expectations of state behavior and thus contribute to greater predictability and stability in cyberspace.

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The Department of Defense ("DoD") released its own Cyber Strategy on September 18, 2018, outlining its execution of the National Strategy. The DoD Summary of the DoD Strategy is available at https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.PDF.

On September 28, 2018, Deputy Secretary of State John J. Sullivan spoke about a ministerial meeting he hosted that day on advancing responsible state behavior in cyberspace. Deputy Spokesperson Robert Palladino and Deputy Assistant Secretary for Cyber and International Communications and Information Policy Robert L. Strayer joined Deputy Secretary Sullivan in providing a briefing on U.S. efforts to advance responsible behavior in cyberspace. The briefing is available at https://www.state.gov/on-the-ministerial-meeting-on-advancing-responsible-state-behavior-in-cyberspace/ and excerpted below.

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…This morning I hosted a meeting with like-minded countries on advancing responsible state behavior in cyberspace. Our goal is to deter malicious activity in cyberspace. The U.S.-led international effort seeks to promote and maintain an open, interoperable, reliable, and secure cyberspace.

During the meeting this morning we discussed strategies to confront cyber threats while maintaining the many benefits that free people and free nations have come to enjoy from the internet. The U.S.-promoted framework launched by President Trump last week for international

cyber stability has three components. First, responsible states must comply with their obligations under international law. Second, nonbinding norms of responsible behavior during peacetime provide important guidance to states, and we're looking to develop those. And third, implementation of political confidence-building measures can help bring stability to cyberspace.

Having said that, there must be consequences for states that act contrary to this framework. Today I called on like-minded partners to join the United States to work together to hold states accountable for their malicious cyber activity.

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**DEPUTY SECRETARY SULLIVAN:** …What we're talking about is action by nation-states that are contrary to the norms that have developed over time on appropriate use of cyberspace, which we saw in interference in the U.S. election in 2016, in cyber attacks that have been attributed over the last year and a half or so—WannaCry and Petya.

One of the things we talked about today at the ministerial was the work we need to …further define those norms and define those boundaries that states can't cross, and if they do cross, that there would be consequences and costly consequences for crossing those boundaries.

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**DEPUTY SECRETARY SULLIVAN:** … what we focused on today was, for the most part, cyber activities short of what we would characterize as a use of force, as an act of war. There are potential cyber activities that would be catastrophic and cause enormous loss of life and property damage, which would be the equivalent of … an act of war.

… And that's where we're focused on defining norms of behavior, and through the UN with the GGE, the Group of Government Experts, which we hope to reconvene, to define norms of behavior that states will abide by and, if they don't, to impose consequences.

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**DEPUTY SECRETARY SULLIVAN:** So we discussed today the concept of deterrence, which is embedded in our National Security Strategy and in particular our National Cyber Strategy, to impose costs and consequences on those state actors and non-state actors who seek to attack the United States, our allies and partners, our cyber infrastructure.

**QUESTION:** Now would that be sanctions?

**DEPUTY SECRETARY SULLIVAN:** It could be any number of tools that are available to the President, whether it's sanctions, diplomatic activity, offensive cyber activities by the United States. There's … really a wide variety of tools that the President could employ depending on the nature of the attack that was made on the United States.

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**DEPUTY SECRETARY SULLIVAN:** … [I]t's certainly mentioned in our National Security Strategy and National Cyber Strategy that there are state actors that have targeted the United States. And that's … discussed in the strategy documents, and we are … working hard to make our cyber domain more secure, more resilient, but also to deter that type of behavior by the

range of responses that I mentioned, which would also include offensive cyber operations by the United States.

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## B. CONVENTIONAL WEAPONS

### 1. U.S. Policy on Conventional Arms Transfer

On April 19, 2018, the President issued a National Security Presidential Memorandum (NSPM-10), laying out U.S. policy on conventional arms transfers. In July, the Secretary of State submitted to the President the Implementation Plan requested as part of NSPM-10. The criteria used to review proposed transfers appear in a State Department fact sheet available at https://www.state.gov/conventional-arms-transfer-cat-policy/. A special briefing by Tina S. Kaidanow, Principal Deputy Assistant Secretary of State for Political-Military Affairs on April 19, 2018 explained the updated conventional arms transfer policy and unmanned aerial systems (UAS) export policy, and is available at https://www.state.gov/briefing-on-updated-conventional-arms-transfer-policy-and-unmanned-aerial-systems-uas-export-policy/. On August 8, 2018, Principal Deputy Assistant Secretary Kaidanow provided further remarks on the CAT policy, available at https://www.state.gov/u-s-arms-transfer-policy/.

### 2. Convention on Certain Conventional Weapons ("CCW")

The 2017 Meeting of High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects ("CCW"), decided that the "group of governmental experts" ("GGE") on emerging technologies in the area of lethal autonomous weapons systems ("LAWS") would meet for ten days in 2018. The United States government submitted two working papers to the LAWS GGE in 2018. The final report of the GGE for 2018 adopted ten "guiding principles," for which the United States expressed strong support. U.N. Doc. No. CCW/GGE.1/2018/3. Excerpts follow (with footnotes omitted), first, from the March 28, 2018 U.S. paper regarding humanitarian benefits of emerging technologies in the area of lethal autonomous weapon systems. U.N. Doc. No. CCW/GGE.1/2018/WP.4.

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2. Civilian casualties are a tragic part of war. Although civilian casualties do not necessarily reflect a violation of international humanitarian law (IHL), protecting civilians from unnecessary suffering is one of the main purposes of IHL. Reducing civilian casualties promotes the objectives and purposes of the CCW, whose preamble recalls the "general principle of the protection of the civilian population against the effects of hostilities."

3. Emerging autonomy-related technologies, such as artificial intelligence (AI) and machine learning, have remarkable potential to improve the quality of human life with applications such as driverless cars and artificial assistants. The use of autonomy-related technologies can even save lives, for example, by improving the accuracy of medical diagnoses and surgical procedures or by reducing the risk of car accidents. Similarly, the potential for these technologies to save lives in armed conflict warrants close consideration.

4. In particular, the United States believes that discussion of the possible options for addressing the humanitarian and international security challenges posed by emerging technologies in the area of lethal autonomous weapons systems in the context of the objectives and purpose of the Convention must involve consideration of how these technologies can be used to enhance the protection of the civilian population against the effects of hostilities.

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6. The fundamental IHL principles of distinction and proportionality are consistent with military doctrines that are the basis for effective combat operations. …

7. Existing State practice provides many examples of ways in which emerging technologies in the area of lethal autonomous weapons systems could be used to reduce risks to civilians: (1) incorporating autonomous self-destruct, self-deactivation, or self-neutralization mechanisms; (2) increasing awareness of civilians and civilian objects on the battlefield; (3) improving assessments of the likely effects of military operations; (4) automating target identification, tracking, selection, and engagement; and (5) reducing the need for immediate fires in self-defense.

**Autonomous self-destruct, self-deactivation, or self- neutralization mechanisms**

8. Autonomous self-destruct, self-deactivation, or self-neutralization mechanisms can be used to reduce the risk of weapons causing unintended harm to civilians or civilian objects. These mechanisms are not necessarily new, but they have become more effective with advances in technology.

9. For example, the Amended Protocol II to the Convention recognizes that self-destruction or self-neutralization mechanisms can help ensure that a mine will no longer function as a mine when the mine no longer serves the military purpose for which it was emplaced.

10. Similarly, the Hague VIII Convention Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, also recognizes that naval mines and torpedoes should be constructed so as to become harmless after they have fulfilled their military purpose.

11. Although the United States is not a party to Convention on Cluster Munitions and does not regard its prohibitions as reflecting customary international law, that instrument recognizes that electronic self-destruction mechanisms and electronic self-deactivating features in explosive submunitions that are designed to be dispersed or released from a conventional munition can help avoid indiscriminate area effects and the risks posed by unexploded submunitions.

12. Apart from mines and bombs employing submunitions, a number of weapons systems can use self-destructing ammunition, which automatically destroys the projectile after a period of time so that it poses less risk of inadvertently striking civilians and civilian objects. …

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**Increasing military awareness of civilians and civilian objects**

14. Civilian casualties can result from a lack of awareness of the presence of civilians on the battlefield due to the "fog of war." …

15. AI could help commanders increase their awareness of the presence of civilians and civilian objects on the battlefield by automating the processing and analysis of data.

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**Improving assessments of the likely effects of military operations**

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23. U.S. planners regularly use software tools in planning military operations to assist in assessing the likely effects of weapons, such as estimating potential collateral damage. The use of software tools allows estimates that once took hours or days to be generated in minutes.

24. More sophisticated computer modelling software could help military planners more accurately assess the presence of civilians or predict the likely effects that the weapon would create when striking the military objective. Assessments could be generated more quickly and more often, further reducing the risk of civilian casualties.

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**Automating target identification, tracking, selection, and engagement**

26. Automated target identification, tracking, selection, and engagement functions can allow weapons to strike military objectives more accurately and with less risk of collateral damage.

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28. The use of munitions with guidance systems allows commanders to strike military objectives more accurately and with less risk of harm to civilians and civilian objects. Moreover, when the weapon is more accurate, fewer weapons need to be fired to create the same military advantage.

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**Reducing civilian casualties from the immediate use of force in self-defense**

32. Emerging technologies could reduce risk of civilian casualties from the immediate use of force in self-defense.

33. Civilians are at increased risk in situations in which military forces are in contact with the enemy and respond to enemy fires in self-defense. In those operational situations, the imperative to take immediate action to counter a threat from the enemy reduces the time available to take precautions to reduce the risk of civilian casualties.

34. Existing practice, however, suggests that emerging technologies may offer a number of ways to reduce civilian casualties as a result of such engagements.

35. First, the use of robotic and autonomous systems can reduce the need for immediate self-defense fires by reducing the exposure of human beings to hostile fire. For example, remotely piloted aircraft or ground robots have been used to scout ahead of forces conducting

patrols in environments where they might be surprised by enemy ambushes or roadside bombs. Robotic and autonomous systems can provide a greater standoff distance from enemy formations, allowing forces to exercise tactical patience to reduce the risk of civilian casualties.

36. Second, technologies to identify automatically the direction and location of incoming fire can reduce the risk of misidentifying the location or source of enemy fire. …

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Excerpts below (with most footnotes omitted) are from the second U.S. working paper, submitted to the LAWS GGE on August 28, 2018 regarding "Human-Machine Interaction in the Development, Deployment, and Use of Emerging Technologies in the Area of [LAWS]." U.N. Doc. No. CCW/GGE.2/2018/WP.4.

* * * *

1. In our view, the key issue for human-machine interaction in emerging technologies in the area of LAWS is ensuring that machines help effectuate the intention of commanders and the operators of weapons systems. This is done by, *inter alia*, taking practical steps to reduce the risk of unintended engagements and to enable personnel to exercise appropriate levels of human judgment over the use of force.

2. This approach supports compliance with the law of war. Weapons that do what commanders and operators intend can effectuate their intentions to conduct operations in compliance with the law of war and to minimize harm to civilians and civilian objects.

3. This paper discusses a number of measures the United States is taking to ensure that new weapons help effectuate the commander's intent. These measures and policies are set forth in U.S. Department of Defense Directive 3000.09, Autonomy in Weapon Systems (DoD Directive 3000.09). DoD Directive 3000.09 was initially issued in 2012 after a DoD working group considered DoD's past practice in using autonomy in weapon systems, including lessons learned, and potential future applications of autonomy in weapon systems.

**Minimizing unintended engagements**

4. DoD Directive 3000.09 states that one of its purposes is to establish "guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements."

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**Ensuring appropriate levels of human judgment over the use of force**

8. DoD Directive 3000.09 requires that autonomous and semi-autonomous weapon systems "be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."

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**Practical measures to ensure the use of autonomy in weapon system effectuates human intentions**

16. DoD Directive 3000.09 establishes a number of requirements—at different stages of the weapon design, development, and deployment process—intended to ensure the use of autonomy in weapon systems effectuates human intentions.

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**Holistic, Proactive, Review Processes Guided by the Fundamental Principles of the Law of War**

27. Emerging technologies are difficult to regulate because technologies continue to change as scientists and engineers develop advancements. A best practice today might not be a best practice in the near future. Similarly, a weapon system that, if built today, would risk creating indiscriminate effects, might, if built with future technologies, prove more discriminating than existing alternatives by reducing the risk of civilian casualties.

28. Thus, rather than seeking to codify best practices or set new international standards, States should seek to exchange practice and implement holistic, proactive review processes that, are guided by the fundamental principles of the law of war.

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**Proactive reviews during development and before fielding**

32. We also recommend a proactive approach in addressing issues in human-machine interaction. States seeking to develop new uses for autonomy in their weapons should be affirmatively seeking to identify and address these issues in their respective processes for managing the life cycle of such weapons. …

33. This practice in conducting a special policy review is consistent with broader DoD practice in conducting legal reviews of the intended acquisition or procurement of any weapon by the Department of Defense, as reflected in U.S. Department of Defense Directive 5000.01, The Defense Acquisition System. Such reviews, among other things, help ensure consistency with the law of war.

**Guidance from the fundamental principles of the law of war**

34. In applying holistic approaches and proactive review processes, States should be guided by the fundamental principles of the law of war.

35. The U.S. military has long used the fundamental principles of law of war as a general guide for conduct during war, when no more specific rule applies. These principles are: military necessity, humanity, distinction, proportionality, and honor.

36. These principles have also been the basis for many codifications of the law of war, including the Geneva Conventions of 1949, which, as the International Court of Justice (ICJ) has observed, "are in some respects a development, and in other respects no more than the expression, of" fundamental general principles of international humanitarian law.[20]

37. The practice of resorting to the fundamental principles of the law of war even though specific rules might not apply, has itself been codified in the so-called "Martens Clause." First included in the Preamble to the 1899 Hague Convention II with Respect to the Laws and

[20] Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14, 113 (June 27, 1986, ¶218).

Customs of War on Land, the clause also is included in a common article to the 1949 Geneva Conventions, which states that denunciation of the Convention "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[21]

38. The ICJ has observed that, in relation to "the cardinal principles constituting the fabric of humanitarian law," the Martens Clause "has proved to be an effective means of addressing the rapid evolution of military technology."[22] The ICJ's observation has been reflected in the practice of the United States. For example, careful consideration of the principles of military necessity and humanity has been critical to the U.S. Department of Defense's review of the legality of new weapons.

39. In addition to helping to assess whether a new weapon falls under a legal prohibition, the fundamental principles of the law of war may also serve as a guide in answering novel ethical or policy questions in human-machine interaction presented by emerging technologies in the area of LAWS.

40. For example, if the use of a new technology advances the universal values inherent in the law of war, such as the protection of civilians, then the development or use of this technology is likely to be more ethical than refraining from such use.

41. The following questions might be useful to consider in assessing whether to develop or deploy an emerging technology in the area of lethal autonomous weapons systems:

(a) Does military necessity justify developing or using this new technology?
(b) Under the principle of humanity, does the use of this new technology reduce unnecessary suffering?
(c) Are there ways this new technology can enhance the ability to distinguish between civilians and combatants?
(d) Under the principle of proportionality, has sufficient care been taken to avoid creating unreasonable or excessive incidental effects?
(e) Under the principle of the honor, does the use of this technology respect and avoid undermining the existing law of war rules?

**"Human Control"**

42. The key issue for human-machine interaction in the development, deployment, and use of emerging technologies in the area of lethal autonomous weapons systems is ensuring that when it is necessary to use force, such force is used to effectuate the intentions of commanders and operators. In particular, practical measures should be taken to reduce the risk of unintended engagements (e.g., those resulting from accidents or sabotage) and to ensure that personnel exercise appropriate levels of human judgment over any use of force.

43. We view this as distinct from the concept of "human control," a term that risks obscuring the genuine challenges in human-machine interaction.

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[21] Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 63, 1950 UNTS 32, 68; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949, art. 62, 1950 UNTS 86, 120; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 142, 1950 UNTS 136, 242; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 158, 1950 UNTS 288, 392.

[22] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, 257 (July 8, 1996, 78).

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**Terminologies and Conceptualizations: The Misplaced Focus of "Human Control"**

46. During the April 2018 session of the GGE, delegations presented a range of different terminologies and conceptualizations regarding human-machine interaction, including human control, supervision, oversight, and judgment. Some have advocated that CCW GGE discussions focus in particular on the issue of "human control" of weapons systems and have advocated for the promulgation of new standards to ensure minimum levels of control or "meaningful human control." The concept of "human control" is subject to divergent interpretations that can hinder meaningful discussion.

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49. …[P]ast regulation of weapons systems under international humanitarian law has not included broadly applicable standards for weapon control systems. Moreover, existing international humanitarian law instruments, such as the CCW and its Protocols, do not seek to enhance "human control" as such. Rather, these instruments seek, *inter alia*, to ensure the use of weapons consistent with the fundamental principles of distinction and proportionality, and the obligation to take feasible precaution for the protection of the civilian population. Although control over weapon systems can be a useful means in implementing these principles, "control" is not, and should not be, an end in itself.

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**Manual control of a weapons system is not a prerequisite for holding humans accountable**

54. Some may argue that it is important to emphasize control because of concerns that the use of autonomous weapons systems somehow removes individuals from responsibility. However, personnel are responsible for their decisions to use force regardless of the nature of the weapon system they utilize. The lack of a manual control over a weapon system does not remove this responsibility or result in an accountability gap.

* * * *

56. When using weapons systems with autonomous functions, the commander must make the legal judgments required by IHL, including by the principles of distinction and proportionality. The human operators of the system and their superior commanders are responsible and accountable for their use of the system, even if that system has sophisticated autonomous functions.

* * * *

On October 26, 2018, U.S. Permanent Representative to the Conference on Disarmament and U.S. Special Representative for Biological and Toxin Weapons Convention (BWC) Issues Robert Wood delivered remarks at UN General Assembly First Committee discussion on conventional weapons. Ambassador Wood's remarks are

excerpted below and available at https://www.state.gov/remarks-at-un-general-assembly-first-committee-discussion-on-conventional-weapons/.

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…[T]he United States supported the outcome of the CCW Group of Governmental Experts (GGE) on Lethal Autonomous Weapons Systems in 2018. This GGE was successful and productive…. States … adopted a substantive report that included ten possible guiding principles for future work on emerging technologies in the area of LAWS. We think it is important to continue to engage in these reality-based discussions.

…[T]he United States continues to urge all Member States to implement fully the UN Programme of Action ["PoA"] to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons and the International Tracing Instrument. The third Review Conference of the PoA provided an opportunity to renew our shared commitments to ending the human suffering caused by the illicit trade in small arms and light weapons. … The United States remains committed to seeing the full implementation of the PoA, and will continue providing both financial and technical conventional weapons destruction assistance …

[A]lthough it has been some time since the world has seen Man-Portable Air Defense Systems (MANPADS) used to bring down a civilian airliner, this significant threat remains. In furtherance of our efforts in seeing the full implementation of the PoA, the United States continues to work with partners to deter their illicit trafficking and use, including through training programs for border security forces, destruction of excess state-held stocks, and assisting with the mitigation of MANPADS threats near critical aviation sites such as international airports. Since 2003, the United States has cooperated with countries around the globe to destroy more than 38,000 excess, loosely secured, illicitly held, or otherwise at-risk MANPADS missiles, and thousands more launchers, in more than 40 countries.

…[T]he United States strongly supports the UN Register of Conventional Arms. The Register pioneered international discussion of international transfers of conventional arms, and it remains the cornerstone of international efforts to address the problems arising from irresponsible transfers of such arms. The United States urges all States to report data on their international transfers of conventional arms, and to include data on transfers of small arms and light weapons alongside the traditional categories of heavy weapons.

[T]he United States is committed to ensuring that conventional arms are transferred in a responsible manner. To this end, the United States attended the meetings of the Working Groups and the fourth Conference of State Parties of the Arms Trade Treaty in Tokyo. Further, we have continued to satisfy our financial and reporting obligations and we encourage States Parties to do the same.

[T]he United States remains the world's single largest financial supporter of conventional weapons destruction programs. We remain committed to providing assistance that reduces excess arms and ammunition from State-held stockpiles, improves stockpile security, and remediates landmines and explosive remnants of war in order to facilitate stability, security, and prosperity in countries recovering from conflict, and to prevent illicit small arms and light weapons proliferation. Since 1993 we have provided more than $3.2 billion in assistance to more than 100 countries through our conventional weapons destruction program, which covers both weapons

and ammunition destruction and stockpile security, as well as humanitarian mine action. We remain committed to these programs, particularly as humanitarian mine action plays an increasing role in our effort to deliver rapid stabilization assistance in both post conflict and conflict zones.

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## C. DETAINEES

### 1. Law and Policy regarding Detainees: E.O. 13823

On January 30, 2018, the President issued Executive Order 13823 "Protecting America Through Lawful Detention of Terrorists." 83 Fed. Reg. 4831 (Feb. 2, 2018). Excerpts follow from the order.

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Section 1. Findings.

(a) Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict.

(b) Following the terrorist attacks of September 11, 2001, the 2001 Authorization for Use of Military Force (AUMF) and other authorities authorized the United States to detain certain persons who were a part of or substantially supported al-Qa'ida, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners. Today, the United States remains engaged in an armed conflict with al-Qa'ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.

(c) The detention operations at the U.S. Naval Station Guantanamo Bay are legal, safe, humane, and conducted consistent with United States and international law.

(d) Those operations are continuing given that a number of the remaining individuals at the detention facility are being prosecuted in military commissions, while others must be detained to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews.

(e) Given that some of the current detainee population represent the most difficult and dangerous cases from among those historically detained at the facility, there is significant reason for concern regarding their reengagement in hostilities should they have the opportunity.

Sec. 2. Status of Detention Facilities at U.S. Naval Station Guantanamo Bay.

(a) Section 3 of Executive Order 13492 of January 22, 2009 (Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities), ordering the closure of detention facilities at U.S. Naval Station Guantanamo Bay, is hereby revoked.

(b) Detention operations at U.S. Naval Station Guantanamo Bay shall continue to be conducted consistent with all applicable United States and international law, including the Detainee Treatment Act of 2005.

(c) In addition, the United States may transport additional detainees to U.S. Naval Station Guantanamo Bay when lawful and necessary to protect the Nation.

(d) Within 90 days of the date of this order, the Secretary of Defense shall, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies as determined by the Secretary of Defense, recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict, including policies governing transfer of individuals to U.S. Naval Station Guantanamo Bay.

(e) Unless charged in or subject to a judgment of conviction by a military commission, any detainees transferred to U.S. Naval Station Guantanamo Bay after the date of this order shall be subject to the procedures for periodic review established in Executive Order 13567 of March 7, 2011 (Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force), to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

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## 2. Criminal Prosecutions: *Hamidullin*

As discussed in *Digest 2016* at 856-65, and *Digest 2017* at 750-63, the U.S. Court of Appeals in *Hamidullin*, No. 15-4788, considered the question of whether Hamidullin qualified as a prisoner of war under the Third Geneva Convention and was entitled to combatant immunity. On April 18, 2018, the Fourth Circuit issued its opinion, affirming the district court's denial of Hamidullin's claim of combatant immunity. Excerpts follow from the majority opinion, with footnotes omitted.

* * * *

Appellant Irek Hamidullin appeals his conviction for, among other things, providing and conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A, and conspiring and attempting to destroy an aircraft of the United States Armed Forces, in violation of 18 U.S.C. § 32. Hamidullin contends that the district court erred in concluding that he was not entitled to combatant immunity under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention" or "Convention"), and that he did not qualify for the common law combatant immunity defense of public authority. Hamidullin also challenges his conviction for violating 18 U.S.C. § 32, arguing that § 32 does not apply to otherwise lawful military actions committed during armed conflicts.

We affirm, concluding that Hamidullin is not entitled to combatant immunity. We also conclude that § 32 clearly applies.

I. Irek Hamidullin is a former Russian Army officer affiliated with the Taliban and Haqqani Network. He was captured by the Afghan Border Police and American soldiers in the Khost province of Afghanistan in 2009 after he planned and participated in an attack on an Afghan Border Police post at Camp Leyza. He was taken into U.S. custody and held in U.S.

facilities in Afghanistan. He was later indicted in the Eastern District of Virginia for acts associated with the attack….

Prior to trial, Hamidullin moved for dismissal of the second superseding indictment on the grounds that he qualified for combatant immunity pursuant to the Third Geneva Convention and common law. Hamidullin also moved to dismiss his 18 U.S.C. § 32 charge, arguing that the statute was not intended to apply to lawful military actions.

The district court held an evidentiary hearing on Hamidullin's motions at which experts testified as to the applicability of the Third Geneva Convention and laws of war in Hamidullin's circumstance and as to the structure and practices of the Taliban and the Haqqani Network. Thereafter, the court denied Hamidullin's motion to dismiss. The district court assumed without deciding that in 2009, when the alleged acts took place, the conflict in Afghanistan was an international armed conflict and determined that Hamidullin was not a lawful combatant because neither the Taliban nor the Haqqani Network fell within any of the categories of lawful combatants listed in Article 4 of the Third Geneva Convention. Thus, the district court concluded that, as a matter of law, Hamidullin was not entitled to combatant immunity under the Third Geneva Convention or common law and precluded him from presenting this defense at trial. The district court also determined that the plain language of 18 U.S.C. § 32 embraced unlawful acts in a combat zone.

In August 2015, Hamidullin was convicted by a jury on all charges and sentenced to multiple life sentences. On appeal, Hamidullin argues that the district court erred in (1) holding that his prosecution was not barred by the doctrine of combatant immunity, as articulated by the Third Geneva Convention and common law, and (2) determining that 18 U.S.C. § 32 applied to his actions. On June 23, 2017, this Court ordered supplemental briefing to address whether the district court possessed jurisdiction to decide, in the first instance, whether Hamidullin qualifies for combatant immunity under the Third Geneva Convention. In particular, we requested briefing on whether the district court's jurisdiction was affected by Army Regulation 190-8—which implements international law relating to detention during armed conflicts. In response, Hamidullin argues that Army Regulation 190-8 requires that this Court vacate his conviction and remand with instructions that he be transferred to the U.S. military for treatment in accordance with Army Regulation 190-8.

II. Hamidullin argues he is entitled to combatant immunity under various theories. Accordingly, we begin with a brief discussion of the doctrine of combatant immunity. Combatant immunity is rooted in the customary international law of war and "forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002). … In order to invoke combatant immunity, a combatant must also be lawful, as described below. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

The current doctrine of combatant immunity is codified in the Third Geneva Convention. The Third Geneva Convention is one of four international agreements drafted in the wake of World War II to govern the status and treatment of wounded and captured military personnel and civilians in wartime. *See* Adriana Sinclair, *Geneva Conventions*, in 1 *The Oxford Encyclopedia of American Military and Diplomatic History* 414 (Timothy J. Lynch ed., 2013). The Geneva Conventions have been signed and ratified by every country in the world, including the United

States. *Id.* The Conventions therefore have the force of law in the United States. U.S. Const. art. VI, cl. 2.

Article 2 of each of the Geneva Conventions renders the full protections of the Conventions, including combatant immunity, applicable only in international armed conflicts between signatories of the Conventions. Third Geneva Convention, art. 2. ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties"). If Article 2 is applicable, then the Third Geneva Convention provides that lawful combatants who are captured in such a conflict are considered prisoners of war (POWs). The categories of combatants qualifying as lawful are listed in Article 4 of the Convention. Two of these categories are relevant in this case:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) . . . .
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b)that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

*Id.* art. 4(A)(2)–(3). Under the Convention, POWs are granted combatant immunity. *See id.* art. 87 (stating that POWs "may not be sentenced …to any penalties except those provided for in respect of members of the armed forces of the [detaining] Power who have committed the same acts"); *id.* art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."). If there is doubt as to whether a captured combatant is a lawful combatant and thus entitled to POW status, Article 5 of the Convention requires that the captured person be treated as a POW until their status is determined by a "competent tribunal." *Id.* art. 5 ("Should any doubt arise …such persons shall enjoy the protection of the [Third Geneva] Convention until such time as their status has been determined by a competent tribunal."). The text of the Convention is silent as to what qualifies as a competent tribunal.

When a conflict is not an international conflict between Geneva Convention signatories, at least one article of the Geneva Conventions still applies. Article 3 of each Convention provides that in an "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," certain provisions, including protecting "[p]ersons taking no active part in the hostilities," and refraining from "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* art 3; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006). Thus, Article 3 allows for combatants

captured during non- international conflicts to face trial and judgment for their actions as long as they are tried in the opposing force's country's "regularly constituted court." *Id.*; *see also* 1 Int'l Comm. of Red Cross (ICRC), *Customary International Humanitarian Law* 354–55 (2005) (stating that pursuant to Article 3 of the Third Geneva Convention, captured combatants can be sentenced in a "regularly constituted court" that is "established and organised in accordance with the laws and procedures already in force in a country.").

The Supreme Court has determined that Article 2 of the Third Geneva Convention applies when a conflict "involve[s] a clash between nations," whereas Article 3 "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict." *See Hamdan*, 548 U.S. at 628–29 (discussing the conflict in Afghanistan between the U.S. and al-Qaeda and applying Article 3). *See also* ICRC, *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* 1350–51 (1987) (discussing the Conventions' distinction between international and non- international conflicts and explaining that "in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power").

Here, Hamidullin claims that he cannot be tried in a United States criminal court because he is a POW entitled to combatant immunity under the Third Geneva Convention. We now turn to that inquiry.

III. As a threshold matter, we must consider whether the district court had jurisdiction to decide in the first instance whether Hamidullin qualified as a POW under the Third Geneva Convention, or whether Army Regulation 190-8 requires that his status first be determined by a military tribunal.

Army Regulation 190-8 controls the Army, Navy, Air Force, and Marine Corps approach to the treatment and care of enemy prisoners of war and other detainees. Army Reg. 190-8, i. The regulation articulates a general policy that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the [Third Geneva Convention]," *id.* 1–5(a)(2), and that "[i]n accordance with Article 5 [of the Convention], if any doubt arises as to whether a person …belongs to any of the categories enumerated in Article 4, …such persons shall enjoy the protection of the [Third Geneva] Convention until such time as their status has been determined by a competent tribunal," *id.* 1–6(a). Army Regulation 190-8 further states:

> A competent tribunal shall determine the status of *any* person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

*Id.* 1–6(b) (emphasis added). Army Regulation 190-8 defines a competent tribunal as a tribunal "composed of three commissioned officers." *Id.* 1–6(c).

Hamidullin argues that Army Regulation 190-8 limits the ability of Article III courts to hear criminal claims against him. He contends that, like in the context of the federal prosecution of juveniles and hate crimes, when the Attorney General must make a certification to the district court demonstrating the unavailability or inappropriateness of state court prosecution prior to federal prosecution, the government must comply with Army Regulation 190-8 prior to proceeding with the criminal prosecution of captured combatants. *See* 18 U.S.C. § 5032; 18

U.S.C. § 249(b). He asserts that Army Regulation 190-8 requires that any doubt about the applicability of combatant immunity to captured combatants be resolved in the first instance by a competent tribunal composed of three military officers. Because no such tribunal determined his status, Hamidullin contends that he is immune from criminal prosecution in civilian court and should be remanded to the custody of the U.S. military. This argument is unpersuasive.

A. Army Regulation 190-8's general implementation of the Third Geneva Convention does not impact the district court's jurisdiction in this case. Army Regulation 190-8 confirms that persons taken into custody by U.S. forces will be provided Geneva Convention protections. The regulation implements Article 5 of the Convention and provides that if there is doubt as to whether a detained person is a POW, as defined by the Third Geneva Convention, the detainee "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Army Reg. 190-8, 1–6(a). Critically, however, Army Regulation 190-8, in implementing Article 5, is also restricted by Article 5's applicability. Article 2 of the Convention provides that the Article 5 determination of POW status by a competent tribunal is only applicable in cases of international armed conflict between Convention signatories. Consequently, Army Regulation 190-8, by its own terms, only provides that POW status is determined by a competent tribunal in cases of international armed conflict. We conclude, however, that at the time of Hamidullin's offense, the conflict in Afghanistan was not an international armed conflict, and therefore that the Army Regulation 190-8 and the Article 5 requirement that POW status be determined by a competent tribunal does not apply.

The conflict in Afghanistan began in 2001 as an international armed conflict arising between two or more Third Geneva Convention signatories—it was a conflict between the United States and its coalition partners on one side, and the Taliban- controlled Afghan government on the other. *See* J.A. 265–66. Shortly thereafter, in 2002, the Taliban lost control of the government and was replaced by a government led by Hamid Karzai. *See* J.A. 270. The United States and its coalition partners remained in Afghanistan at the request of this new government, assisting it in combating the continued Taliban insurgency. J.A. 311–12. Thus, by 2009, the conflict in Afghanistan had shifted from an international armed conflict between the United States and the Taliban-run Afghan government to a non-international armed conflict against unlawful Taliban insurgents.

The Pictet Commentary, which the Supreme Court has found instructive in interpreting the Third Geneva Convention in *Hamdan*, 548 U.S. at 619–20, supports the conclusion that in 2009, the conflict in Afghanistan was non-international. The Pictet Commentary explains that Article 4(A)(3) of the Convention, which defines POWs to include "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power," Third Geneva Convention, art. 4(A)(3), was a response to the refusal of certain states to recognize the combatant immunity of French followers of General Charles de Gaulle fighting during World War II, ICRC, *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* 62 (J. Pictet ed., 1960) ("[Article 4] must be interpreted, in the first place, in the light of the actual case which motivated its drafting—that of the forces of General de Gaulle which were under the authority of the French National Liberation Committee."). Article 4(A)(3) was drafted to afford POW protections to combatants who, like the Free French led by General de Gaulle, continued to engage in armed conflict even after a new government had been installed in their country and reached an armistice with a once-adversary. *Id.* at 61–63. However, Article 4(A)(3) is not without limit; indeed, the drafters of the Third Geneva Convention feared that an overly broad interpretation of Article 4(A)(3) would be "open to abusive interpretation" and lead

"to the formation of armed bands." *Id.* at 62, 63. The Pictet Commentary, therefore, makes clear that the installation of a new government by an invading power is not enough to convert a conflict from international to non-international. Rather, some level of international recognition is required for the conflict to remain an "international armed conflict." *Id.* at 63 ("It is not expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but *this condition is consistent with the spirit of the provision,* which was founded on the specific case of the forces of General de Gaulle." (emphasis added)). In the case of the Free French, the ousted government led by General de Gaulle was recognized by the Allied forces. Conversely, by the time Hamidullin was captured, the Taliban had been removed from power for eight years and *no* country recognized the Taliban as the legitimate government of Afghanistan. J.A. 275–76 (explaining that the last country recognizing the Taliban government withdrew its recognition within months of 9/11). Thus, the Pictet Commentary suggests that in 2009, the conflict in Afghanistan was a non-international armed conflict for the purposes of the Convention.

The International Committee of the Red Cross and the executive branch of the United States government have reached this same conclusion. *See* ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 10 (2011) ("As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature)."); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 7 (2007) ("This conflict [against the Taliban and Al-Qaeda] is non-international …because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States."); *see also* The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 19, 32 (2016) (stating that the United States is currently engaged only in non-international armed conflicts). Common sense agrees. If the conflict in Afghanistan was originally an international armed conflict occurring between two "High Contracting Parties"—the United States and the Afghan government—the conflict cannot remain international when the conflict between the recognized Afghan government and the United States has ceased. Accordingly, the provision in Army Regulation 190-8 directing that POW status be determined in accordance with Article 5 is inapplicable, and Hamidullin's argument that these provisions require a competent tribunal to determine his POW status must fail.

Instead, because we conclude that the conflict in Afghanistan was non-international at the time of Hamidullin's offense, the protections of Article 3 of the Convention apply. Under Article 3, however, there is no provision entitling combatants captured during non-international conflicts to POW status or the resulting combatant immunity. Therefore, there is no process by which Hamidullin is entitled to a determination of whether he is a POW, as no POW status exists under Article 3, and, consequently, combatant immunity cannot be granted. Pursuant to Article 3, Hamidullin can be sentenced in a "regularly constituted court" that is "established and organised in accordance with the laws and procedures already in force in a country." 1 ICRC, *Customary Int'l Humanitarian Law* 355 (2005) (interpreting Third Geneva Convention, art. 3). A U.S. federal district court is one such court. *See* 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); *Hamdan*, 548 U.S. at 632, 635 (clarifying that "Article 3 [of the

Conventions] … tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems"). Thus, the district court had jurisdiction to adjudicate Hamidullin's case irrespective of Army Regulation 190-8's invocation of Article 5 of the Convention.

B. Hamidullin also argues that Army Regulation 190-8's statement that "[a] competent tribunal shall determine the status of *any* person not appearing to be entitled to prisoner of war status …who asserts that he or she is entitled to treatment as a prisoner of war" entitles him to a competent tribunal regardless of whether the 2009 conflict was international. *Id.* 1–6(b) (emphasis added). We disagree.

To be sure, military regulations have the force of law. *Standard Oil Co. of Cal. v. Johnson*, 316 U.S. 481, 484 (1942) ("War Department regulations have the force of law."); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302(1842) ("[R]ules and orders publicly promulged [sic] through [the secretary of war] must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."). However, both the Supreme Court and this Court have made clear that military law does not govern our Article III jurisprudence. *See United States v. Rendon,* 607 F.3d 982, 990 (4th Cir. 2010) ("[M]ilitary law 'is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.' " (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953))). Consequently, a regulation such as Army Regulation 190-8, 1–6(b), cannot preclude district court jurisdiction when doing so contravenes Congress's grant of jurisdiction to the judiciary.

Hamidullin's interpretation of Army Regulation 190-8, 1–6(b), would allow an internal executive branch regulation to strip Article III courts of their statutorily granted jurisdiction. At the time of his trial, Hamidullin was in civilian custody and under indictment for civilian crimes over which Congress has granted exclusive jurisdiction to Article III district courts. *See* 18 U.S.C. § 3231. During his civilian criminal proceeding Hamidullin raised a defense—combatant immunity—that is inextricably tied up in questions of treaty interpretation. This defense does not deprive the district court of its authority to hear Hamidullin's case, as there can be no question that it is the role of the judiciary, not the executive, to interpret treaties. To quote the Supreme Court in *Sanchez- Llamas v. Oregon*:

Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power …extend[s] to …Treaties." *Id.* § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. *Id.*; see also *Williams v. Taylor*, 529 U.S. 362, 378–379 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility— independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"). 548 U.S. 331, 353–54 (2006). Determining the meaning of the Third Geneva Convention as a matter of federal law "is emphatically the province and duty of the judicial department," *Marbury*, 5 U.S. (1 Cranch) at 177, and remanding this case to the executive branch to determine the Convention's meaning and applicability to Hamidullin in the first instance would be an abdication of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction

given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Of course, the executive may engage in the interpretation of treaties in order to implement them into its own internal procedures and regulations. Such interpretations are "entitled to great weight" and can inform the judiciary's own interpretations. *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (discussing the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T.I.A.S. No. 11670); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982). Here, the Executive Branch has used Army Regulation 190-8 to implement the protections of the Third Geneva Convention. Additionally, the executive has explicitly expressed its interpretation of the Third Geneva Convention with regards to the Taliban. In 2002, when the conflict in Afghanistan was still considered an international armed conflict and, thus, Article 4 of the Convention applied to determine whether a combatant qualified as a POW, President George W. Bush determined that Taliban detainees did not qualify as POWs because they were unlawful combatants. Memorandum of President George W. Bush to the Vice President, et. al. (Feb. 7, 2002); *see also Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) ("The President found that Hamdan was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a 'competent authority' for these purposes.").

Hamidullin asks us to provide a three-member military tribunal with the authority to displace the president's interpretation of the Convention. In arguing that Army Regulation 190-8, 1–6(b) applies even if at the time of his offense the conflict in Afghanistan was non-international, Hamidullin requests that we remand him to military custody to allow a tribunal to determine whether the Third Geneva Convention provides him with combatant immunity. This will necessarily involve a reconsideration of President Bush's interpretation of the Convention, as the Convention only extends combatant immunity to combatants involved in international armed conflicts. Accordingly, Hamidullin not only asks this Court to abdicate our duty to decide cases properly within our jurisdiction, but also asks us to ignore the legal determination already made by the President of the United States, and to instead authorize a panel of three mid-level, non-lawyer military officers to usurp our authority and responsibility. *See* Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, 26 Op. O.L.C. 1, 9 (2002). (stating that Article 5 "[t]ribunals are …designed to determine whether a particular set of facts falls within one of the Article 4 categories; they are not intended to be used to resolve the proper interpretation of those categories."). Moreover, remanding this case to a military tribunal to make a legal determination that the Commander-in- Chief has already made could lead to an inconsistent application of the laws of war, would undermine the United States and its partners' current application of the legal framework for non-international armed conflicts in Afghanistan, and, perhaps most troubling, would violate separation of powers principles by conferring our responsibility to hear cases properly within our jurisdiction upon a three-member military tribunal. We cannot allow Hamidullin's interpretation of Army Regulation 190-8 to upend our system of governance. It is the responsibility of this Court—not of a three-member panel of military officers—to decide the lawfulness of the executive's interpretation. *See Sanchez-Llamas*, 548 U.S. at 353–54.

Consequently, we conclude that the district court had jurisdiction to determine whether Hamidullin qualifies as a POW and was entitled to combatant immunity under the Convention, irrespective of Army Regulation 190-8. We therefore decline to remand Hamidullin to military custody, and turn to the merits of his combatant immunity defenses.

IV. Hamidullin argues he is entitled to combatant immunity pursuant to the Third Geneva Convention and common law. We review the district court's factual findings for clear error, and its legal determinations de novo. *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005).

A. To be entitled to combatant immunity, the Third Geneva Convention requires that a combatant (1) be captured during an international armed conflict, Third Geneva Convention, art. 2, and (2) be a lawful combatant—in other words, the combatant must belong to one of the Article 4 categories defining POW's, *id.* art. 4. Article 4 lists six categories of lawful combatants, but only two categories, Article 4(A)(2) and (A)(3), are relevant here. Article 4(A)(2) provides that members of militias belonging to a party to the conflict are lawful combatants entitled to POW status so long as they are commanded by a person responsible for subordinates, carry a "fixed distinctive sign," carry arms openly, and operate in accordance with the laws of war. *Id.* art. 4(A)(2). Article 4(A)(3) provides that "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" are likewise POWs. *Id.* art. 4(A)(3).

Below, the district court assumed, without deciding, that the conflict in Afghanistan in 2009 was international and determined that neither the Taliban nor the Haqqani Network fit into an Article 4 category. It held that the Taliban and Haqqani Network most closely resembled a "militia" or "organized resistance movement" as described in Article 4(A)(2), but that neither organization fulfilled the criteria of Article (4)(2). Specifically, the district court found that neither organization has a fixed, distinctive sign recognizable at a distance, carries arms openly, or conducts operations in accordance with the laws and customs of war. *See id.* art. 4(A)(2).

Hamidullin does not identify a clear error in the district court's factual findings, and makes no claim that the Taliban satisfy the criteria set forth in Article 4(A)(2). Instead, he contends he is entitled to POW status under Article 4(A)(3), which covers "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Id.* art. 4(A)(3). Unlike the criteria for militia in Article 4(A)(2), Article 4(A)(3) contains no conditions that groups must fulfill in order to be entitled to POW status; membership in a regular armed force expressing allegiance to a government not recognized by the detaining power is the only enumerated requirement. Hamidullin contends that because the Third Geneva Convention does not expressly incorporate the Article 4(A)(2) criteria into Article 4(A)(3), he is entitled to POW status regardless of whether the Taliban satisfies the Article 4(A)(2) criteria.

The difficulty with Hamidullin's argument is that, as discussed above, we hold that the conflict in Afghanistan was not an international armed conflict. As a result, irrespective of whether Taliban fighters are entitled to POW status pursuant to Article 4(A)(3), Hamidullin is not entitled to combatant immunity because the protections of Article 3 (governing non-international conflicts), rather than Article 2 (governing international conflicts), apply. Article 3 only requires that Hamidullin be tried "by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, art. 3. The U.S. federal district courts are "established and organised in accordance with the laws and procedures already in force" in the United States. *See* 1 ICRC, *Customary International Humanitarian Law* 355 (2005); 18 U.S.C. § 3231. Accordingly, the district court did not err in determining that Hamidullin was properly tried in a regularly constituted American court.

B. In the alternative, Hamidullin argues that even if he does not qualify for combatant immunity under the Third Geneva Convention, he is eligible for common law combatant immunity as an enemy soldier fighting for a rival sovereign. He frames this defense as a public authority defense, citing *Dow v. Johnson* and other post-Civil War jurisprudence. 100 U.S. 158, 165 (1879) ("[F]rom the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army."); *see also Coleman v. Tennessee*, 97 U.S. 509, 515 (1879) ("Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them."). Hamidullin argues that just as defendants who act in objectively reasonable reliance on the authority of a government official are immune from criminal liability, *see United States v. Fulcher*, 250 F.3d 244, 252–53 (4th Cir. 2001), soldiers in armed conflict are immune from criminal liability when they act by virtue of the direction of a belligerent party. Typically, however, the public authority defense looks to whether the defendant's actions were sanctioned by a U.S. official, as foreign officials do not have authority to authorize violations of U.S. criminal law. *See* 1 Charles E. Torcia, *Wharton's Criminal Law* § 41 (15th ed. 2015) ("The fact that a crime committed in time of peace was committed under the directions of the authority of a foreign government is no defense."). Nonetheless, Hamidullin asserts that "immunity from ordinary criminal liability applies without distinction between soldiers who fight on behalf of a State and opposing forces who assert a rival claim to sovereign authority." Appellant Br. 35. We disagree.

The Third Geneva Convention is the governing articulation of lawful combatant status. The principles reflected in the common law decisions cited by Hamidullin were refined and collected in 20th century efforts to codify the international law of war that resulted in the Third Geneva Convention. Just as a statute preempts common law when Congress speaks directly to the question, *see e.g.*, *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981), a self-executing treaty like the Third Geneva Convention would similarly preempt common law if the treaty speaks directly to the question. The Third Geneva Convention explicitly defines the category of individuals entitled to POW status, and concomitantly, combatant immunity. Third Geneva Convention, art. 4. As such, the Third Geneva Convention's definition of lawful and unlawful combatants is conclusive.

Moreover, Hamidullin's broad framing of common law combatant immunity would extend immunity far beyond the Third Geneva Convention, to every person acting on behalf of an organization that claims sovereignty. For example, it could supply a claim of immunity to terrorists operating on behalf of the Islamic State, which itself claims sovereignty. We decline to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention. The Convention represents an international consensus on the norms of treatment of prisoners, a consensus that would be eviscerated if common law principles were interpreted as superseding. Because Hamidullin does not qualify for combatant immunity pursuant to the Third Geneva Convention, he likewise does not qualify for the common law defense of public authority.

V. Last, Hamidullin challenges his conviction for conspiring and attempting to destroy a U.S. military aircraft in violation of 18 U.S.C. § 32(a). Section 32(a) states that "[w]hoever willfully—(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States" shall be imprisoned not more than twenty years. 18 U.S.C. § 32(a). The special jurisdiction of the United States includes "an aircraft of the armed forces of the United States" in flight. 49 U.S.C. § 46501(2)(B). Section 32(b) criminalizes the

damage or destruction of "civil aircraft registered in a country other than the United States." The district court held that the plain language of § 32(a) applies to unlawful acts even when committed in a combat zone.

Hamidullin argues that Congress did not intend to apply § 32 to military personnel whose attacks on aircraft are accepted under the laws of armed conflict. To support this contention, he relies on a memorandum from the Office of Legal Counsel which analyzed § 32(b) and reasoned that § 32(b) should not be construed to "have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law." United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 164 (1994).

We conclude that Hamidullin's argument fails because even Hamidullin's preferred construction of congressional intent does not preclude application of the statute in this case. He claims that Congress did not intend § 32 to apply to the actions of "military force" that are lawful under international law. However, as described above, Hamidullin was not a lawful combatant and his conduct was not lawful under the Third Geneva Convention. Hence, the district court did not err in determining that the plain language of § 32(a) applied to Hamidullin's conduct. Here, Hamidullin was convicted of attempting to fire anti-aircraft weapons at U.S. military helicopters. Given Hamidullin's status as an unlawful combatant, that attack falls under the plain language of 18 U.S.C. § 32(a).

We do not take our duty to respect and comply with the tenets of international law lightly. This is especially true when, as here, our interpretation of that responsibility has the potential to seriously impact the treatment of persons captured during armed conflicts. Nonetheless, for the foregoing reasons, it is clear to us that neither the Third Geneva Convention nor U.S. Army regulations grant Hamidullin immunity from criminal prosecution in an Article III court. Moreover, the text of § 32(a) clearly applies to these facts. Accordingly, the judgment of the district court is *AFFIRMED.*

* * * *

Hamidullin filed a motion in the Fourth Circuit seeking rehearing en banc. On June 12, 2018, the United States filed a brief opposing the motion, which is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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En banc review is warranted only when the panel decision conflicts with a decision of the Supreme Court or this Court or where "the proceeding involves a question of exceptional importance," such as "an issue on which the panel decision conflicts with the authoritative decisions of other" courts of appeals. Fed. R. App. P. 35(a) and (b). Neither circumstance exists here.

Hamidullin contends that this Court should grant rehearing en banc to consider three claims. First, Hamidullin argues that Army Regulation 190-8 requires a remand for a military tribunal to determine in the first instance whether Hamidullin was entitled to POW status.

Second, Hamidullin claims he was entitled to combatant immunity under a broader, "common law" theory that, unlike the GPW, allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. Third, Hamidullin argues that 18 U.S.C. § 32(a) does not prohibit attacking aircraft during an armed conflict. The panel correctly rejected those claims, and its decision does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. Moreover, Hamidullin has not shown that his claims present issues of exceptional importance that are likely to recur. Finally, Hamidullin would not be entitled to relief in any event. As the district court found, even if the Taliban were treated as an armed group belonging to a State engaged in an international armed conflict, Hamidullin's bid for combatant immunity would fail because the Taliban's systematic violations of the law of war disqualify their members from combatant immunity.

1. Hamidullin contends (Pet. 6-13) that, under AR 190-8, a military tribunal must determine his entitlement to POW status before an Article III court may exercise criminal jurisdiction. The panel correctly rejected that novel claim.

a. Army Regulation 190-8 implements Article 5 of the GPW by providing that, where there is doubt as to whether a person detained by the U.S. armed forces qualifies as a POW, such persons should be provided POW protections until their status has been determined by a competent tribunal. *Hamidullin*, 888 F.3d at 69. "Critically, however, [AR 190-8], in implementing Article 5, is also restricted by Article 5's applicability," and Article 5 is "only applicable in cases of international armed conflict." *Id.* That limitation makes sense. There is no need for a military tribunal to determine whether a prisoner detained by a State in a non-international armed conflict is entitled to POW protections under Article 4 because those protections, including combatant immunity, do not apply. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (explaining that Article 3 of the Convention is the only article that applies in non-international armed conflicts). Under Article 3, States may prosecute captured fighters in a "regularly constituted court," and Article III courts meet that standard. *Hamidullin*, 888 F.3d at 71, 75. Because the conflict in Afghanistan was non-international at the time of Hamidullin's conduct, the panel correctly held that AR 190-8 has no application here.

b. The President's determination that Taliban detainees are unlawful combatants who do not qualify as POWs under the GPW also forecloses Hamidullin's entitlement to a tribunal under AR 190-8. Nothing in that regulation requires convening a panel of military officers to make a legal determination that their Commander-in-Chief has already made. *Hamidullin*, 888 F.3d at 72-73. Hamidullin's construction of AR 190-8 would authorize a military tribunal "to displace the [P]resident's interpretation of the Convention," thereby undermining the Executive Branch's ability to apply a consistent legal framework to the ongoing armed conflict in Afghanistan. *Id.*; *see also id.* at 78 (Wilkinson, J., concurring) ("Empowering different panels of military officers" to "override the determination of the President" would "fly in the face" of the President's "control over the military," result in "disparate treatment of similarly situated detainees," "hamstring our country in its ability to approach armed conflicts in a unified fashion," and "undermine the consistent practice of both the United States and its allies to uniformly treat Taliban fighters as insurgents who lack any claim to the Third Geneva Convention's combatant immunity defense").

c. Hamidullin argues (Pet. 7) that AR 190-8 goes beyond the GPW by affording a presumption of POW status even to members of non-State armed groups in non-international armed conflicts. That claim is inconsistent with the regulation's stated purpose, which is to implement Geneva Convention protections, not to extend them to circumstances where they do

not apply. And even if AR 190-8 could plausibly be read to apply to the non-international armed conflict against the Taliban, that reading would be superseded by more recent Defense Department directives issued by higher-level authorities (*e.g.*, the Deputy Secretary of Defense) that govern the current armed conflict. *See, e.g.*, DoD Directive 2310.01E, *DoD Detainee Program*, August 19, 2014, Incorporating Change 1, May 24, 2017. That Directive makes clear that the requirement to provide POW protections in certain cases until a competent tribunal has determined a detainee's status applies only "[d]uring international armed conflict." *See id.* ¶ 3(h).

d. Hamidullin argues (Pet. 7-8) that applying AR 190-8 only to international armed conflicts cannot be squared with a Congressional statement of U.S. policy to provide Article 5 tribunals in any case where there is "doubt" regarding a detainee's POW status. But that statement merely repeats the language of Article 5 and AR 190-8 itself, which require a military tribunal only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges, and not as to each and every captured combatant. *See id.* ¶ 1- 5(a)(2) (requiring POW protections "*until some other legal status is determined by competent authority*.") (emphasis added). In Hamidullin's case, there is no such doubt. "Competent authorit[ies]" at the highest levels of the Executive Branch have conclusively determined that Taliban detainees do not "belong to any of the categories enumerated in Article 4" because (1) the conflict against the Taliban in 2009 was not an international armed conflict; and (2) the Taliban flagrantly and systematically violate the Article 4 criteria. *See Hamidullin*, 888 F.3d at 71-72; *Hamidullin*, 114 F. Supp. 3d at 386-87. Those determinations are sufficient to resolve any "doubt" as to Hamidullin's status, and nothing in AR 190-8 requires convening a tribunal to revisit those determinations in each individual case. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) (holding that the President's determination barred a military commission defendant's claim of entitlement to an AR 190-8 tribunal because "[n]othing in [AR 190-8]…suggests that the President is not a 'competent authority' for these purposes").

e. Hamidullin contends (Pet. 8-9) that denying POW status to Taliban fighters is inconsistent with U.S. practice in earlier conflicts. But the authorities he cites do not establish that the United States has historically afforded POW status in non-international armed conflicts to non-State insurgent groups like the Taliban that defy the laws of war. The prosecution of Taliban fighters as unlawful combatants in civilian courts is entirely consistent with the Geneva Convention framework and the uniform practice of the United States and its partners. *See Hamidullin*, 888 F.3d at 77-78 (Wilkinson, J., concurring).

f. Hamidullin's AR 190-8 argument does not warrant en banc review. There is no conflict with any decision of the Supreme Court, this Court, or any other court of appeals. And the argument arises only in the limited context of persons captured by the U.S. armed forces and later prosecuted in Article III court. Hamidullin does not claim that this is a frequently recurring pattern, nor has he cited any other case where a defendant in an Article III prosecution has invoked AR 190-8 to seek a remand to a military tribunal.

The remand Hamidullin seeks would serve no purpose except delay. Hamidullin provides no reason to believe that his claim for POW status before a military tribunal would fare any better than it did in district court. Even if the military panel accepted Hamidullin's unsupported contention that combatant immunity is available to fighters for non-State groups in non-international armed conflicts, he would still have to persuade the panel that the Taliban's flagrant violations of the law of war do not foreclose its members from claiming POW status. The district court rejected that contention, and federal courts in other cases have uniformly rejected bids for

combatant immunity on behalf of the Taliban and other groups that defy the laws of war. *See, e.g.*, *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense because Taliban do not comply with the laws of war); *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (same as to al Qaeda); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (same). There is no reason to doubt that a military tribunal would reach the same conclusion.

2. Hamidullin, relying on post-Civil War cases addressing in various contexts the legal consequences of belligerent acts by Confederate forces, contends (Pet. 13-16) he was entitled to combatant immunity under a broader, "common law" theory that, according to Hamidullin, allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. That contention has no merit and does not warrant en banc review.

The panel correctly held that the GPW, not the nineteenth-century common law jurisprudence Hamidullin relies on, provides the modern standard for combatant immunity in U.S. courts. *See Hamidullin*, 888 F.3d at 75-76. As the panel explained, "[t]he principles reflected in the [pre-Geneva Convention] common law decisions" were "refined" and codified in the GPW, which "represents an international consensus" on the scope of combatant immunity. *Id.* For that reason, the panel correctly held that the GPW's "explicit[] definition "of lawful and unlawful combatants is conclusive." *Id.*

Extending combatant immunity to non-State insurgent groups would undermine the international consensus that the Geneva Conventions reflect. *See Hamidullin*, 888 F.3d at 76. Moreover, affording combatant immunity to armed groups beyond the Geneva Convention framework would inhibit the government's ability to bring terrorists to justice. *See id.* ("Hamidullin's broad framing of common law combatant immunity would extend immunity far beyond the [GPW] to every person acting on behalf of an organization that claims sovereignty," including "terrorists operating on behalf of the Islamic State"); *see also id.* at 12 (Wilkinson, J., concurring) (Hamidullin's theory "would threaten to elevate every band of terrorists…to near nation-state status and, in so doing, to extend the protections of the Geneva Convention to those who both regularly and flagrantly violate its dictates"). Hamidullin's sweeping expansion of combatant immunity would require the United States to treat lawless insurgents, many of whom are responsible to no one but themselves, as if they were members of a State's regular forces. The panel therefore correctly "decline[d] to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention." *Id.* at 76.

Hamidullin does not contend that any federal court has applied any other standard for combatant immunity since the adoption of the GPW. As far as the government is aware, every federal court to have considered a combatant immunity defense since U.S. ratification of the 1949 Geneva Conventions has applied the GPW standards.

Hamidullin contends (Pet. 13-14) that the panel's decision is in tension with decisions of this Court and other courts of appeals recognizing the existence of a "common law of war" based on domestic precedents. However, the fact that domestic precedents may shed light on law-of-war issues in some contexts not explicitly addressed in the Geneva Conventions, such as military commission jurisdiction, *see Bahlul v. United States*, 767 F.3d 1, 23 (D.C. Cir. 2014) (en banc), or civil liability for defense contractors, *see Al Shimari v. CACI International, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (en banc), has no bearing on the issue here, where the GPW explicitly provides the governing standard for assessing Hamidullin's combatant immunity claim.

In any event, the post-Civil War cases addressing the lawfulness of Confederate belligerency provide no support for Hamidullin's claims. As those cases recognize, the United States in the Civil War determined as a matter of policy to treat Confederate forces as lawful belligerents, and the courts deferred to that determination. *See The Prize Cases*, 67 U.S. 635, 670 (1862). Here, the United States and its partners have made the opposite determination with respect to the Taliban. Nothing in the common law or the GPW requires extending the protections of combatant immunity to members of non-State insurgent groups such as the Taliban that regularly and flagrantly violate the laws of war.

3. Hamidullin argues (Pet. 16-17) that 18 U.S.C. § 32(a), which prohibits conspiring or attempting to destroy a U.S. military aircraft, does not apply to his conduct. The panel correctly rejected that argument. As the panel explained, even assuming the statute contains an implied exception for lawful combatants who shoot at U.S. military aircraft during an armed conflict, Hamidullin's "status as an unlawful combatant" takes him outside any such exception. *Hamidullin*, 888 F.3d at 76. Accordingly, Hamidullin's attempt to fire anti-aircraft weapons at U.S. military helicopters "falls under the plain language of 18 U.S.C. § 32(a)." *Id.*

Hamidullin does not contend that the panel's construction of Section 32(a) conflicts with any other federal court decision. Instead, he relies on an Office of Legal Counsel memorandum that, in addressing a different subsection of Section 32, stated that Congress did not intend for that provision to criminalize "actions by military personnel that are lawful under international law." However, as the panel held, Hamidullin's conduct does not satisfy that criterion. Hamidullin and his insurgent group were not "military personnel" who belong to a State, and who, with State authorization, conduct operations in compliance with the laws of war. Hamidullin, as an unlawful combatant fighting on behalf of a non-State insurgent group that systematically violates the laws of war, is not immune from Section 32(a)'s prohibition on attacking U.S. military aircraft.

* * * *

## 3. U.S. Court Decisions and Proceedings

### *a. Joint Habeas Petition:* Al-Bihani et al.

The United States responded on February 16, 2018 to a joint habeas petition filed in U.S. District Court for the District of Columbia on behalf of a group of Guantanamo detainees challenging their continued detention. Excerpts follow from the U.S. brief in *Al-Bihani* et al. *v. Trump*, et al., No. 01994-UNA, (D.D.C. 2018), available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Petitioners erroneously contend that their detention violates the AUMF because they are subject to "perpetual" and "indefinite" detention. … But Petitioners' continued detention is not indefinite, as it is bounded by the cessation of active hostilities, …. In *Hamdi*, the detainee argued that the AUMF did not authorize "indefinite or perpetual detention," and the plurality replied that the AUMF grants the authority to detain for the duration of active hostilities. See 542

U.S. at 520-21. That rationale is appropriate here: Petitioners are detained because of their affiliation with al-Qaeda, Taliban, or associated forces, and they remain detained today because active hostilities against those groups remain ongoing. See *al-Wirghi v. Obama*, 54 F. Supp. 3d 44, 47 (D.D.C. 2014) (Lamberth, J.) (rejecting same argument raised by Petitioners and concluding that "detention is not unconstitutionally indefinite").

Petitioners' argument that they are subject to indefinite detention under the AUMF essentially boils down to the assertion that they should be released because hostilities have been ongoing for too long. But the notion that Petitioners must be released even though hostilities continue ignores binding precedent and turns the law respecting wartime detention on its head; Petitioners effectively ask this Court to reward enemy forces for extending the length of the conflict by persistently continuing their attacks. There is no support for that position, and the Court of Appeals has expressly rejected the argument that courts should alter the standard for law-of-war detention due to the length of detention. See *Ali*, 736 F.3d at 552. The AUMF "does not have a time limit" and "absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more stringent over time, it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Id*. (and noting further that "Congress and the President may choose to make long-term military detention subject to different, higher standards," while acknowledging the Executive's conduct of periodic reviews regarding the need for ongoing detention).

…

Petitioners also erroneously contend that they should be released because the purpose underlying their law of war detention—*i.e.*, to prevent their return to the battlefield—"has evaporated" and no longer exists. … [T]here is no merit to this claim because active hostilities against Al-Qaeda, Taliban, and associated forces remain ongoing. The law of war expressly ties the authority to detain enemy belligerents to the duration of active hostilities because the very purpose of law of war detention is "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. Accordingly, longstanding law-of-war principles and "common sense" dictate that "release is only required when the fighting stops." *Al-Bihani*, 590 F.3d at 874. Here, active hostilities against al-Qaeda, Taliban, and associated forces continue, and therefore, the AUMF, as informed by the laws of war, continues to authorize Petitioners' detention to prevent Petitioners from returning to the fight.

Petitioners also argue that even if they were "once part of a targetable group, their past membership alone is no longer enough, if it ever was, to presume a threat of return to the battlefield." … Petitioners attempt to support this view by selectively and misleadingly quoting from an international law treatise to contend that detention is not authorized "where a detainee is no longer likely to take part in hostilities against the Detaining Power (in the case of combatants)." … What the treatise actually says is that "the Third Geneva Convention requires the repatriation of seriously wounded and sick prisoners of war because they are no longer likely to take part in hostilities against the Detaining Power." 1 Jean-Marie Henckaerts & Louise Doswald–Beck, Customary International Humanitarian Law 345 (2005) (emphasis added). None of the Petitioners here raise claims based on Articles 109 and 110 of the Third Geneva Convention, which addresses the repatriation of sick and wounded prisoners of war—privileged belligerents detained in international armed conflict. Further, Petitioners notably omit that their cited treatise recognizes "the long-standing custom that prisoners of war may be interned for the duration of active hostilities," at least in international armed conflicts. Id. at 344, 451-56 (citing Article 118 of the Third Geneva Convention).

In the absence of any authority to support their position, the Court should reject Petitioners' invitation to re-write the laws of war to impose a new, unspecified detention standard or time limit that would conflict with longstanding authority that detention is authorized for the duration of active hostilities. See *Ali*, 736 F.3d at 552. Nor is there any basis for Petitioners' contention that their detention under the AUMF entitles them to an individualized judicial determination whether they are likely to return to the battlefield or continue to pose a threat to the national security. The Court of Appeals has expressly rejected that position. See *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities."); *id*. ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF."). Rather, that assessment is to be made by the Executive Branch through its administrative processes, which continue.

…

The Court also should reject Petitioners' argument that the President's detention authority under the AUMF, as informed by the laws of war, should be construed narrowly to avoid raising constitutional issues with Petitioners' ongoing detention. Because Petitioners' continued detention neither implicates the Due Process clause nor violates it, … there is no need to reinterpret the detention authority under the AUMF in a manner that would conflict with longstanding law-of-war principles to avoid alleged constitutional issues with that authority. See *Hamdi*, 542 U.S. at 520 (AUMF authorizes law-of-war detention while active hostilities continue for a U.S. citizen detainee with due process rights); *Ali*, 736 F.3d at 552 ("the Constitution allows detention of enemy combatants for the duration of hostilities").

…

There is also no basis for Petitioners' argument that the Government's detention authority under the AUMF has lapsed because of alleged changes in the nature of the ongoing armed conflict against al-Qaeda, Taliban, and associated forces. Petitioners point to language used by the *Hamdi* plurality in reaching its conclusion that law-of-war detention may last until the end of active hostilities: "If 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. Petitioners contend that the AUMF's detention authority has now "unraveled" because the circumstances of the current conflict can no longer justify their detention. … But just as *Hamdi* concluded, "that is not the situation we face as of this date." *Hamdi*, 542 U.S. at 521 (noting "active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

Consistent with the President's determination as Commander-in-Chief that active hostilities remain ongoing, approximately 14,000 military personnel are currently deployed to Afghanistan, and they engage, when and where appropriate, in uses of force against al-Qaeda, Taliban, and associated forces, consistent with the laws of war in a context similar to that presented to the Supreme Court in *Hamdi* and to that presented in other, traditional military operations. … *Hamdi*, 542 U.S. at 521. Indeed, the United States is still actively fighting al-Qaeda, Taliban, and associated forces, in the same geographic locations, because these groups continue to attack United States forces and plot to inflict harm on the United States and its allies and partners. This case, thus, does not present a situation in which Petitioners' detention would be inconsistent with the "clearly established principle of the law of war that detention may last

no longer than active hostilities" or the rationales underlying that principle. *Hamdi*, 542 U.S. at 520. For these reasons, Judges Kollar-Kotelley and Leon previously rejected the same argument that Petitioners assert here. See *Al-Alwi*, 236 F. Supp. 3d at 423 (rejecting argument that "that the unusual nature and length of the conflict in Afghanistan have caused conventional understandings of the law of war to unravel completely"); *Al-Kandari*, Slip Op. at 18 ("while the plurality in *Hamdi* did caution that the facts of a particular conflict may unravel the Court's understanding of the Government's authority to detain enemy combatants, the Court does not agree with Petitioner that such a situation exists at this point in time").

* * * *

**II. PETITIONERS' CONTINUED DETENTION DOES NOT VIOLATE DUE PROCESS**

In *Boumediene v. Bush*, the Supreme Court granted Guantanamo Bay detainees the privilege of habeas corpus. 553 U.S. at 797. In particular, the Court stated that the detainees were entitled to a "meaningful opportunity" to challenge the basis for their detention. Id. at 779. In doing so, however, the Court also directed that both "the procedural and substantive standards" used to adjudicate these cases must accord appropriate deference to the political branches. *Id*. at 796-797. Over the years, the judges of this District and the Court of Appeals have developed a well-settled body of law that implements that directive.

Petitioners now challenge several aspects of this well-settled precedent, asserting that the passage of time has rendered Petitioners' continued detention in violation of substantive due process and the procedural regime established by the Court of Appeals in violation of procedural due process. For the reasons stated below, those challenges are not well-founded. Most fundamentally, Petitioner may not challenge here what has been foreclosed by the Court of Appeals and the Supreme Court. See *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district courts are obligated to apply controlling Circuit precedent unless that precedent has been overruled by the Court of Appeals en banc or by the Supreme Court). Accordingly, Petitioner's claims that their continued detention violates due process should be rejected.

**A. Petitioners May Not Invoke Due Process Clause Protections**

The law of this Circuit is that the Due Process Clause does not apply to unprivileged alien enemy combatants detained at Guantanamo Bay. *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), vacated and remanded, 559 U.S. 131, reinstated in relevant part, 605 F.3d 1046, 1047, 1048 (D.C. Cir. 2010), cert. denied, 563 U.S. 954 (2011). This holding has been reiterated subsequently by the Court of Appeals, including in *al Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011), and has been applied repeatedly by the judges of this District. Most importantly, that holding has never been overruled. *Salahi*, 2015 WL 9216557 at *5. Consequently, Petitioners' due-process arguments are foreclosed here. See *Torres*, 115 F.3d at 1036.

* * * *

**B. Petitioners' Continued Detention Does Not Violate Substantive Due Process**

Even were the Court to assume that the Due Process Clause extends in some manner to detainees such as Petitioners at Guantanamo Bay, binding Supreme Court and Circuit precedent also establishes that Petitioners' continued detention is fully consistent with due process. As explained supra, five Justices in *Hamdi* determined that the AUMF authorized detention until the cessation of active hostilities. 542 U.S. at 518 (plurality op.) (detention "for the duration of the particular conflict in which… [detainees] were captured[] is so fundamental and accepted an

incident to war as to be an exercise of the 'necessary and appropriate force' Congress [] authorized the President to use"); id. at 587-588 (Thomas, J., dissenting).

There can be no question but that the due-process question was squarely presented in *Hamdi*, for Hamdi himself was a U.S. citizen detained within the United States. *Id*. at 510. And the Court specifically considered the due-process issue, balancing Hamdi's substantial liberty interest and the Government's interest in ensuring that he did not return to the battlefield against the United States. *Id*. at 531.

Acknowledging *Hamdi*, the Court of Appeals has held that Guantanamo Bay detainees may be held under the AUMF until the end of hostilities. *Ali*, 736 F.3d at 544, 552; see also *Aamer*, 742 F.3d at 1041; *al-Bihani*, 590 F.3d at 875. Consequently, even were this Court to find, contrary to Circuit precedent, that Petitioners might have some due-process rights, binding Supreme Court and Circuit precedent establishes that those rights are not violated by Petitioners continuing detention. See *Torres*, 115 F.3d at 1036.

Petitioners' arguments to the contrary—(1) that due process places time-specific limits on their detention and (2) that their continued detention is now unconstitutional based on an arbitrary Executive policy not to release any Guantanamo detainees—do not counsel a different result: the former is inapplicable in the context here, the second is factually wrong.

…First, due process does not place time-specific limits on wartime detention. *Hamdi* and the law of war make clear that enemy combatants such as Petitioners may be detained for the duration of the hostilities. 542 U.S. at 518; accord *Aamer*, 742 F.3d at 1041; *Ali*, 736 F.3d at 544, 552; *al-Bihani*, 590 F.3d at 875. Consequently, as long as the relevant conflict continues— and it does…—no constitutional issue arises as to Petitioners' continued detention. That the duration of that detention may be currently indeterminate—because the end of hostilities cannot be predicted—does not render the detention "perpetual" or unconstitutionally "indefinite." … Rather, Petitioners' detention remains, as it always was, bounded by the ultimate cessation of hostilities. See 542 U.S. at 518. That limit, even though currently not determinable, renders Petitioners' detention sufficiently definite to satisfy due process. See, *e.g.*, *Ali*, 736 at 552 (acknowledging that the conflict with al-Qaeda, the Taliban, and associated forces "has no end in sight" but that, nevertheless, "the Constitution allows detention of enemy combatants for the duration of hostilities").

* * * *

…Petitioners' continued detention still serves the purpose justifying it: to prevent Petitioners' return to the battlefield. Accordingly, Petitioners' detention is not unconstitutionally arbitrary. See *al Wirghi*, 54 F. Supp. 3d at 47.

Petitioners' argument otherwise is grounded on a false premise, specifically that their continued detention is based solely on a policy barring the release of any detainees from Guantanamo Bay. … [T]he policy of the United States was and has remained that detainees will be provided periodic reviews to determine whether their continued, lawful law-of-war detention by the United States may be ended by transfer without endangering security interests of the United States. This policy was reiterated by the Deputy Secretary of Defense just last fall. See Policy Mem., Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Exec. Order 13567 Attach. 3 ¶ 2.a (Nov. 27, 2017) (available at http://www.prs.mil/Portals/60 /Documents/POLICY_MEMORANDUM_IMPLEMENTING_GUIDELINES.pdf ).

Moreover, the President confirmed the vitality of that policy by Executive Order just two weeks ago, when he instructed that the periodic-review process instituted by Executive Order 13,567 would continue and would apply to any detainees transferred to Guantanamo Bay in the future. Exec. Order 13,823 §2(e), 83 Fed. Reg. at 4831-32. At the same time, the President dispelled any doubt that detainees designated as eligible for transfer may be transferred, subject to appropriate security conditions, if deemed appropriate by the Secretary of Defense…Thus, the policy of the United States remains that Guantanamo Bay detainees may be transferred prior to the end of active hostilities when it is determined that their continued law of war detention is no longer necessary to protect against a continuing significant threat to the security of the United States. See id. § 2(e).

In furtherance of this policy, Guantanamo Bay detainees have continued to receive periodic reviews of their detention. …

Furthermore, that two of the Petitioners were previously approved for transfer does not render their continued detention unnecessary or unconstitutionally arbitrary. …

Indeed, more specifically as to these two petitioners, their designations as eligible for transfer explicitly disclaimed any concession that the detainees did not pose any threat to the security of the United States. …

**C. The Judicially Crafted Procedures Governing Petitioners' Habeas Cases Do Not Violate Due Process**

In *Boumediene*, the Supreme Court explicitly left to the "expertise and competence of the District Court[s]" the task of determining appropriate evidentiary and procedural rules for these Guantanamo habeas cases. 553 U.S. at 796. In doing so, the courts were instructed to balance the detainees' need for meaningful access to the writ against the burden on the Executive and, in particular the military, in responding to these wartime petitions. See *id*. at 795-96. Specifically, the Court noted that these habeas proceedings "need not resemble a criminal trial." *Id*. at 783.

In response, the judges of this District and the Court of Appeals have addressed numerous evidentiary and procedural issues in these cases as those issues have arisen. The result is a comprehensive body of case law including:

(1) that when deciding whether to admit government intelligence reports as evidence, a district court is to afford the Government the usual rebuttable presumption of regularity in the recording of the information in government documents, *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011);

(2) that when deciding whether a detainee is legally detained, a district court must consider the evidence as a whole and not piecemeal, *al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010);

(3) that when considering hearsay evidence, a district court must determine the weight to be accorded that evidence, *al-Bihani*, 590 F.3d at 879; and

(4) that when presented with evidence a detainee stayed at an al Qaeda guesthouse, a district court was entitled to draw an inference the detainee was a member of al Qaeda, for one does not generally end up staying at a terrorist guesthouse by mistake—either by the guest or the host, *Ali*, 736 F.3d at 546.

And, of primary concern to Petitioners, the governing case law provides

(5) that the Government must demonstrate by a preponderance of the evidence that a detainee was part of or substantially supported al Qaeda, Taliban, or associated forces. al-Bihani, 590 F.3d at 878.

Petitioners now call into question the constitutionality of these and other unnamed decisions, asserting that they collectively set the bar too low to justify Petitioners' continued detention.

As an initial matter, here again, this is the wrong forum for these arguments. Simply put, Petitioners again ask this Court to reverse or ignore binding Circuit precedent. To do so would be error. *Torres*, 115 F.3d at 1036. For this reason alone, this claim should be denied.

As to Petitioners' more fundamental challenges, the constitutionality of the preponderance-of-the-evidence standard in this wartime detention context has been thoroughly and explicitly discussed in multiple opinions by the Court of Appeals. Petitioners cite none of these opinions, and elide the fact that the Court has not questioned whether that standard required the Government to prove too little, but rather whether it required the Government to prove too much. "Our cases have stated that the preponderance of the evidence standard is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution's requirement for wartime detention." *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); see also *Hussain v. Obama*, 718 F.3d 964, 967 n.3 (D.C. Cir. 2013) ("[i]n *al-Adahi* we wrote that although the standard is 'constitutionally permissible …we have yet to decide whether [it] is required.'") (quoting *al-Adahi*, 613 F.3d at 1103). Petitioners' call for a clear-and-convincing evidence standard to justify their continued detention, therefore, has already been rejected.

Petitioners nevertheless suggest that, whatever the initial constitutionality of the collective decisions they challenge, the passage of time has rendered unconstitutional procedures previously determined to be appropriate. But this argument, too, has been rejected by the Court of Appeals. In *Ali*, the Court rejected the notion that the Government's evidentiary burden is somehow contingent on the duration of detention. Rather, that burden of proof remains temporally fixed, because it is grounded in (1) the purpose of military detention (to keep enemy combatants from returning to the battlefield) and (2) the fact that military detention ends with the end of hostilities. See *Ali*, 736 F.3d at 544; see id. at 552 (noting that the standards it applied in 2013 were the same it would have applied in 2002). This logic applies with full force to the remaining evidentiary decisions, either individually or collectively. Petitioners' complaint that the preponderance burden of proof either separately or in combination with the Court of Appeals' other evidentiary rulings has due to the passage of time become unconstitutional is simply unsupported.

* * * *

### *b.* Paracha v. Trump

In June 2018, the United States filed its brief in the Supreme Court in opposition to a petition for certiorari in *Paracha v. Trump*, No. 17-6853. Paracha is a Pakistani national detained at Guantanamo since 2004. The Supreme Court denied the petition for certiorari. Excerpts follow from the U.S. brief opposing certiorari.

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* * * *

The United States has repeatedly reviewed the propriety of petitioner's detention and determined that his continued detention remains necessary. In 2009, the Guantanamo Review Task Force reviewed petitioner's case, determined that he should not be transferred or released from military detention, and referred petitioner for potential prosecution. Notice 1-2 (July 8, 2013) (Doc. 389); id. Ex. 1, at 4; see Exec. Order No. 13,492, § 4(a), (c)(2) and (3), 3 C.F.R. 205-206 (2009 Comp.). In 2016, the Periodic Review Board reviewed petitioner's case and determined that petitioner should remain in military detention as "a continuing significant threat" in light of, inter alia, his "past involvement in terrorist activities, including contacts and activities with Usama Bin Laden, Kahlid Shaykh Muhammad and other senior al-Qaeda members, facilitating financial transactions and travel, and developing media for al-Qaeda." Periodic Review Board, Unclassified Summary of Final Determination (Apr. 7, 2016), http://go.usa.gov/x9JKg; see Exec. Order No. 13,567, §§ 2-3, 3 C.F.R. 227-229 (2011 Comp.). In 2017, the Board completed its second review of petitioner's case and determined that petitioner's continued detention "remains necessary" in light of, inter alia, his "continued refusal to take responsibility for his involvement with al-Qa'ida" and his "indifference to the impact of his prior actions." Periodic Review Board, Unclassified Summary of Final Determination (Apr. 20, 2017), https://go.usa.gov/xNN2F.

2. a. In April 2015, petitioner filed a motion for summary judgment in his habeas case. Mot. for Summ. J. (Apr. 30, 2015) (Doc. 401). Although petitioner had not filed a pleading raising any bill-of-attainder-based claims, see Am. Habeas Pet. (Doc. 11); Pet. App. 1 n.1, petitioner's summary-judgment motion, as supplemented, asked the district court to "declare[] invalid and void" 32 statutory provisions as unconstitutional bills of attainder. Mot. for Summ. J. 6; see Pet. App. 1 & n.1. Those provisions—many of which have expired, have been repealed, or are no longer effective—fall into four categories. See Gov't C.A. Br. 4-7 & Addendum (Add.) A1-A4.

* * * *

b. The district court denied petitioner's motion for summary judgment and dismissed his purported bill-of-attainder claims. … The court then determined that it lacked jurisdiction over the bill-of-attainder claims on two grounds. …

First, the district court concluded that petitioner lacked Article III standing to challenge the 32 provisions, because petitioner failed to show that any of those provisions had caused him an injury-in-fact that would likely be redressed by the requested relief. ….

Second, the district court concluded that it lacked statutory subject-matter jurisdiction over petitioner's bill-of-attainder claims. … Section 2241(e)(1) of Title 28 provides that no court, justice, or judge shall have jurisdiction to hear "an application for a writ of habeas corpus" filed by an alien detainee who the United States has determined is an enemy combatant or who is awaiting such determination. 28 U.S.C. 2241(e)(1). Section 2241(e)(2)—the provision at issue in this case—further provides that, with an exception not relevant here, no court, justice, or judge shall have jurisdiction to hear or consider

> any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. 2241(e)(2). The district court concluded that Section 2241(e)(2) deprived it of jurisdiction over petitioner's bill-of-attainder claims, which "obviously 'relate[]' to his confinement." Pet. App. 5-6 & n.3. The court added that the bill-of-attainder claims were non-habeas claims within the scope of Section 2241(e)(2), because they do "not actually challenge the legality of [petitioner's] confinement" or "any aspect of the place or conditions of his confinement" and thus do "'not sound in habeas.'"

c. The district court subsequently entered a Rule 54(b) partial final judgment dismissing the bill-of-attainder claims. Pet. App. 10; see id. at 7-9.

3. The court of appeals affirmed in a short, unpublished per curiam judgment. Pet. App. 11-12. The court stated that Section 2241(e)(2) "withdraws jurisdiction over any action other than habeas raised by a detained alien who 'has been determined by the United States to have been properly detained as an enemy combatant.'" … The court also stated that it had "repeatedly upheld the constitutionality of this provision insofar as it withdraws jurisdiction over 'any detention-related claims, whether statutory or constitutional,' that do not sound in habeas." … The court concluded that Section 2241(e)(2) deprived the district court of jurisdiction to hear petitioner's bill-of-attainder claims, because "the Government has determined that [petitioner] is an enemy combatant" and petitioner's bill-of-attainder claims—which "would not alter the fact, duration, or conditions of his confinement" even if they were successful—"do not 'sound in habeas.'" ….

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioner's bill-of-attainder claims on the ground that Section 2241(e)(2) deprived the district court of subject-matter jurisdiction over those claims. … Petitioner asks this Court to review that judgment by presenting two questions: whether certain federal statutory provisions are unconstitutional bills of attainder, …; and whether petitioner has Article III standing to bring his bill-of-attainder claims in this habeas action, …. The court of appeals did not resolve either of those questions, and its jurisdictional judgment would be unaffected by this Court's resolution of them. Certiorari is therefore unwarranted on the two questions that petitioner presents.

In the body of his petition, petitioner also argues that Congress could not have constitutionally prohibited federal courts from exercising jurisdiction over his bill-of-attainder claims, …, and that Section 2241(e)(2)'s jurisdiction-stripping provision should not be construed to apply to such claims, …. Even if petitioner had properly presented those questions, petitioner's contentions would lack merit and would not warrant certiorari.

* * * *

ii. Petitioner asserts … that Section 2241(e)(2) should not apply to his bill-of-attainder claims because those claims are "unrelated to [his] confinement" and do not complain about "any 'aspect of [his] detention, transfer, treatment, trial, or conditions of confinement,'" … But beyond that bare assertion, petitioner does not explain why his bill-of-attainder claims fall outside Section 2241(e)(2)'s text, which extends to any non-habeas claim "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien enemy-combatant detainee, 28 U.S.C. 2241(e)(2) (emphasis added).

* * * *

### 4. Transfer of a U.S. Citizen Detainee: *Doe v. Mattis*

In 2017, a dual citizen of the United States and Saudi Arabia ("Doe") was detained by the United States after being captured on an active battlefield in Syria. Doe admitted to being recruited and trained to fight for ISIL. Doe's counsel filed a petition for habeas corpus in the U.S. District Court for the District of Columbia. The United States simultaneously responded to the habeas petition and sought to transfer Doe to a third country. On January 23, 2018, the district court ordered the United States to provide 72 hours' notice to the court prior to any transfer, providing Doe's counsel the opportunity to contest any transfer to which Doe did not agree. *Doe v. Mattis*, No. 17-2069. The United States appealed that order to the D.C. Circuit, arguing that the United States had authority to transfer Doe to Iraq and Saudi Arabia without notice to the court. The identities of the countries were under seal during the litigation and therefore were redacted from the briefs. The redacted opening and reply briefs are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

While the appeal from the order requiring notice of transfer was pending, the United States notified the district court on April 17, 2018 that Saudi Arabia had agreed to accept Doe's transfer. Doe did not consent to the transfer. The district court granted Doe's motion for a preliminary injunction blocking the transfer on April 19. The United States appealed and that appeal was consolidated with the original appeal of the order requiring notice of any transfer. The redacted version of the U.S. supplemental brief in the D.C. Circuit appealing the preliminary injunction is excerpted below and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

…[W]e have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."); *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) ("Judicial inquiry into a recipient country's basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also the same separation of powers principles that preclude the courts from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign."). …

* * * *

[The] basis for taking custody of Petitioner is closely analogous to Iraq's basis for taking custody of the petitioners in *Munaf*. In *Munaf*, Iraq sought to detain and prosecute two U.S. citizens accused of committing crimes within its borders; … Petitioner's alleged activities with ISIL implicate [redacted] national security, law enforcement, international relations, and foreign policy interests. As with Iraq in *Munaf*, has a direct stake in what happens to Petitioner.

And under international law, [redacted] jurisdiction over Petitioner is clear. Under customary international law, a sovereign has authority to exercise "prescriptive jurisdiction if

there is a genuine connection between the subject of the regulation and the state seeking to regulate." Restatement (Fourth) of Foreign Relations Law of the United States—Jurisdiction § 211 (Am. Law Inst. Draft No. 2, 2016).

* * * *

**B.** Petitioner's primary counter-argument is that the Supreme Court's decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), and the rules governing domestic extraditions apply equally to military transfers in overseas theaters of combat. But the petitioners in *Munaf* made the exact same argument and the Supreme Court unanimously rejected it. That was because, the Court explained, an overseas military transfer does not present "an extradition case." 553 U.S. at 704. There is a fundamental difference between a battlefield detainee captured abroad and "a 'fugitive criminal' ... found within the United States." *Id.* (quotation marks omitted).

* * * *

Petitioner and the district court have cited two other decisions in support of the preliminary injunction against transfer, but both underscore the lack of legal basis for it. *First*, the district court found that *Wilson v. Girard*, 354 U.S. 524 (1957), involved "positive legal authority to transfer the detainee[]," ECF 87 at 3 n.2, but that is mistaken. The petitioner in *Girard* was a serviceman stationed in Japan who was accused of causing the death of a Japanese national. 354 U.S. at 525-26. The U.S. military "notified Japan that Girard would be delivered to the Japanese authorities for trial" and the petitioner filed a habeas petition in the United States seeking to block his transfer into Japanese custody. *Id.* at 526. While it is true that there was a treaty between Japan and the United States governing the presence of servicemen stationed in Japan, that treaty did not confer legal authority on the U.S. military to transfer U.S. citizens. To the contrary, the treaty gave the United States authority under certain circumstances to *refuse* transfers of U.S. citizens despite Japan's territorial jurisdiction; it nowhere conferred additional legal authority to *effectuate* transfers. In other words, Japan agreed in the treaty to surrender some of *its* sovereign authority to the U.S. military by giving the military "the primary right to exercise jurisdiction over members of the United States armed forces," with respect to certain offenses, while providing that the United States could waive that jurisdiction. *Id.* at 527-28. The entire premise of this treaty provision was that no special authority was necessary for U.S. forces to relinquish an individual held in Japan to the Japanese government, given Japan's territorial jurisdiction within its borders.

*Munaf* explained as much when the petitioners in that case made the same argument about *Girard* that Petitioner has revived here: "Even though Japan had ceded some of *its* jurisdiction to the United States pursuant to a bilateral Status of Forces Agreement, the United States could *waive* that jurisdiction—as it had done in Girard's case—and the habeas court was without authority to enjoin Girard's transfer to the Japanese authorities." 553 U.S. at 696 (emphases added). In vacating an injunction against transfer similar to the injunction here, *Girard* never suggested that the Government needed special authority to relinquish an individual held abroad to the custody of another country with lawful jurisdiction over that individual. *See Girard*, 354 U.S. at 530 (finding "no constitutional or statutory barrier" to the transfer and holding that absent "such encroachments, the wisdom of the arrangement is exclusively for the

determination of the Executive and Legislative Branches"). The same is true here, where the Government seeks to relinquish custody of a person captured and detained abroad to a country [redacted]

*Second*, the district court found that the Ninth Circuit's decision in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), turned on "positive legal authority" in the "Geneva Convention," ECF 87 at 3 n.2, but that is likewise mistaken. The Ninth Circuit's decision did not pass on the propriety of transferring the petitioner in that case and only referenced the Geneva Convention in reciting the district court's finding that, "under the Geneva Convention, it is the obligation of the United States through the American military authorities to repatriate petitioner to Italy." *Territo*, 156 F.2d at 144.

The Court nowhere suggested that the Geneva Convention supplied positive legal authority without which a transfer of that petitioner would have been unlawful. And on the issue of whether U.S. citizenship imposes special requirements on the Executive in this context, the court explained it had "reviewed the authorities with care and ... found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle." *Id.* at 145. Under that reasoning, Petitioner's status as a U.S. citizen imposes no special constraints on the U.S. military's authority to transfer him.

**C.** At bottom, accepting Petitioner's claim would lead to an extraordinary degree of judicial involvement in military operations overseas. Petitioner does not dispute that the U.S. military is engaged in active hostilities in a volatile region, or that he came into U.S. custody as a result of his choice to travel to an overseas battlefield. U.S. courts have not historically policed—via habeas proceedings or otherwise—day-to-day military operations in that context. That includes transfers of battlefield detainees, which "traditionally have occurred without judicial oversight." *Kiyemba*, 561 F.3d at 515 (Kavanaugh, J. concurring).

The district court's reasoning would, if adopted, essentially require the Executive to prevail in Petitioner's habeas proceeding before it is permitted to relinquish custody of him to another sovereign despite that other sovereign's clear and legitimate basis for taking custody of him. That is contrary not only to *Munaf*, but also the Supreme Court's plurality opinion in *Hamdi v. Rumsfeld*. That opinion held "that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized." 542 U.S. 507, 534 (2004). Here, the Executive has made precisely the opposite determination—seeking to *end* its custody of Petitioner …

In this sort of context—that is, contexts other than long-term U.S. detention—the *Hamdi* plurality was careful to avoid second-guessing "the judgments of military authorities in matters relating to the actual prosecution of a war." 542 U.S. at 535. The importance of deference to "military authorities" in this sensitive sphere is why *Hamdi* expressly exempted short-term battlefield detention from judicial oversight, and is further why *Munaf* unanimously rejected the claim that the extradition apparatus applies to every wartime military transfer of a U.S. citizen captured on an overseas battlefield. This Court should exercise similar caution here and reject Petitioner's effort to use his habeas petition challenging continued U.S. custody as a vehicle for prolonging that custody when the Government seeks to terminate it by relinquishing Petitioner …

* * * *

It is true that transferring Petitioner involves turning him "over to a foreign government where he will be detained," ECF 87 at 5, but Petitioner agrees that releasing him in Iraq would provide him complete relief, even though his detention by another sovereign is entirely possible following such release. Petitioner concedes that the Government has no obligation to transport him back to the United States or to shelter him from apprehension by the Iraqi government (or any other government) if he were released in Iraq, as he has requested. Pet'r. Ans. Br. at 33-34; *see also Munaf*, 553 U.S. at 705 ("Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them."). Petitioner has further conceded that the Government would need to inform Iraq of the time and location of his release should it release him there. Yet providing that notice would enable the Iraqi government (or some other government acting with the Iraqi government's consent) to detain Petitioner immediately and to hold him in custody for as long as Iraqi law (or that other country's law) permits.

There is thus little practical difference from the perspective of Petitioner's habeas petition between the "release" that Petitioner seeks and the "transfer" that the Government proposes to undertake. Both involve termination of U.S. custody and both accordingly extinguish Petitioner's petition by providing him with all the relief habeas can provide. …

* * * *

The public interest weighs in favor of our Government speaking with one voice in matters of military operations and foreign affairs. Absent a significant harm on the other side of the balance—and Petitioner has not shown one for the reasons discussed—this public interest weighs heavily against the district court's injunction. For that reason, too, it should be vacated.

* * * *

On May 9, 2018, a divided panel of the D.C. Circuit ruled in favor of Doe, holding that the United States did not have authority to transfer him to another country without his consent. Excerpts follow from the majority opinion. *Doe v. Mattis*, No. 18-5032 (D.C. Cir. 2018).

* * * *

We first consider the order enjoining the Secretary from transferring Doe to Country B. We address each of the injunction factors in order.

1.

In assessing whether Doe has succeeded on the merits, the relevant question is whether, in the circumstances of this case, involuntarily transferring Doe to Country B would be unlawful. We hold that it would be.

The government makes two species of arguments as to why the Executive has the power to transfer Doe to Country B without his consent. The first rationale has no necessary connection to Doe's designation as an enemy combatant, or even to the wartime context of this case. It instead relies on a general understanding that, when a foreign country wants to prosecute an American citizen already in its territory for a crime committed within its borders, the Executive

can relinquish him to that country's custody for criminal proceedings. The government's second rationale, unlike the first, hinges on Doe's status as an enemy combatant. That second strand of the argument relies on the military's asserted authority under the law of war to transfer an enemy combatant (including an American citizen) to an allied country in the conflict.

Neither of the government's rationales, we conclude, supports the involuntary transfer of Doe to Country B, at least as things currently stand. In reaching that conclusion, we rely on the same undisputed facts as our dissenting colleague: that Doe is an American citizen, that he is in U.S. custody in Iraq, that the government believes he is an ISIL combatant, and that he objects to the government's forcible transfer of him to the custody of Country B. Dissent, at 3-4, 27. While our colleague would conclude that the Executive can forcibly transfer Doe to Country B in those circumstances, we respectfully disagree for the reasons explained in this opinion.

a. A fundamental attribute of United States citizenship is a "right to…remain in this country" and "to return" after leaving. *Mandoli v. Acheson*, 344 U.S. 133, 139 (1952). That right is implicated when the government seeks to forcibly transfer an American citizen from the United States to a foreign country. To effect such a transfer, the government must both (i) demonstrate that a treaty or statute authorizes the transfer, and (ii) give the citizen an opportunity to challenge the factual basis for the transfer. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936); *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922).

The government's first argument in this case, though, is that a citizen loses both of those protections the instant he leaves U.S. territory. When a citizen sets foot outside the United States, the government says, the Executive can forcibly transfer him to the custody of any country having a "legitimate sovereign interest" in him. The transfer, the government emphasizes, would be "total." No. 18-5110, Gov't Second Supp. Br. 8. Following the citizen's transfer, then, he would be fully—and irrevocably—subject to the power of the foreign sovereign now holding him.

i. The government's contention that it possesses that kind of transfer authority over an American citizen is centrally predicated on *Munaf v. Geren*, 553 U.S. 674, which is itself predicated on *Wilson v. Girard*, 354 U.S. 524. We disagree with the government's understanding of those decisions.

In *Wilson*, William Girard, a U.S. soldier stationed in Japan, was accused by Japan of committing a homicide in its territory. 354 U.S. at 525-26. The Army agreed to relinquish Girard to Japanese custody for pretrial detention. *Id.* at 526.

Girard filed a habeas petition, and the district court issued a preliminary injunction prohibiting the transfer. *Id.* The Supreme Court vacated the order and allowed the handover of Girard to Japanese custody.

The Court began by recognizing that, as a general matter, a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." *Id.* at 529. Japan had voluntarily surrendered that prerogative in a security agreement with the United States that governed the treatment of U.S. soldiers stationed in Japan. But the agreement permitted the United States to cede back to Japan the authority to prosecute a service member in a given instance. *Id.* at 527-29. In Girard's case, the United States had done just that. *Id.* at 529. So the question, the Court said, was whether there was any "constitutional or statutory barrier" to the Executive (i) waiving the United States's jurisdiction and (ii) transferring Girard to Japan to face criminal prosecution. *Id.* at 530. Finding no such barrier, the Court sanctioned Girard's transfer to Japanese custody. *Id.*

In *Munaf*, the Court again applied the principle recognized in *Wilson—i.e.*, that, when a foreign country wishes to prosecute an American citizen who is within its borders for a crime he committed while there, the Executive can relinquish him to the country's custody. *Munaf* involved two American citizens who voluntarily traveled to Iraq and allegedly committed crimes while there. 553 U.S. at 679. A multinational military coalition identified the two citizens as security risks, and they were held by U.S. military forces in Iraq "[p]ending their criminal prosecution for those offenses" in Iraqi courts. *Id.* at 705; *see id.* at 681, 683. Both of the citizens filed habeas petitions, asserting (i) that the Executive lacked the power to transfer them to Iraq's custody for criminal proceedings, and (ii) that transferring them thus would violate the Due Process Clause. *Id.* at 692. The Court rejected their arguments and allowed the military to relinquish them to Iraqi custody. *Id.* at 705.

Relying on *Wilson*, the Court emphasized that a country has a "sovereign right to 'punish offenses against its laws committed within its borders.'" *Id.* at 692 (quoting *Wilson*, 354 U.S. at 529). That sovereign entitlement, the Court observed, was one that the Court had long and repeatedly recognized. *Id.* at 694-95 (citing, *e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Neely v. Henkel*, 180 U.S. 109 (1901); *Kinsella v. Krueger*, 351 U.S. 470 (1956)). An order prohibiting the Executive from transferring the two petitioners to Iraqi authorities would infringe that time-honored right. 553 U.S. at 697-98. The Executive thus could transfer the petitioners to Iraqi custody without violating the Due Process Clause. *Id.* at 699-70.

In both *Munaf* and *Wilson*, the authority of the Executive to transfer U.S. citizens had no roots in any military authority over enemy combatants under the law of war. *Wilson*, after all, concerned "the peacetime actions of a [U.S.] serviceman," not the wartime actions of an enemy combatant. *Id.* at 699. In *Munaf*, meanwhile, it is true that the alleged crimes involved insurgent acts committed in a time of war, for which both suspects had been designated "security internees" and one had been deemed an enemy combatant. *See id.* at 681-84, 705. But the Court's recognition of the Executive's power to transfer the two men did not depend on those designations or on the nature of the alleged crimes. That is evident from the Court's heavy reliance on *Wilson*, a case having nothing to do with military authority in wartime.

In accordance with that understanding, the Court in *Munaf* observed that "[t]hose who commit crimes within a sovereign's territory may be transferred to that sovereign's government for prosecution" even if the "crime at issue" is an inherently non-war offense like "embezzlement." *Id.* at 699-700 (discussing *Neely v. Henkel*, 180 U.S. 109 (1901)). To be sure, "there is hardly an exception to that rule when the crime" is "unlawful insurgency directed against an ally during ongoing hostilities." *Id.* at 700. So while the war-related context in which the crimes arose in *Munaf* was not a necessary condition for the Executive to possess the transfer authority recognized in *Wilson*, that context of course did not diminish the Executive's authority.

ii. In holding that the Executive had the power to transfer the *Munaf* petitioners, the Court distinguished its previous decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5. Because Doe chiefly relies on *Valentine* in arguing that the military lacks authority to transfer him to Country B, whereas the government centrally relies on *Munaf* in arguing the opposite, the *Munaf* Court's treatment of *Valentine* warrants our careful examination.

In *Valentine*, three American citizens fled to New York City after being accused by France of committing crimes within its territory. *Id.* at 6. France requested the citizens' extradition, and U.S. officials arrested the three men. *Id.* The men then filed habeas petitions, arguing that, because the extradition treaty between the United States and France contained no obligation for either country to hand over its own citizens, the Executive lacked the power to

extradite them. *Id.* The Court agreed, holding that the power to extradite "is not confided to the Executive in the absence of treaty or legislative provision." *Id.* at 8. *Valentine* thus establishes that the Executive's power to extradite a citizen from the United States to another country must come from a treaty or statute. *Id.* at 9; *see Munaf*, 553 U.S. at 704.

Relying on *Valentine*, Doe contends that the Executive cannot transfer him from U.S. custody to another country's custody unless the transfer is authorized by a treaty or statute. The petitioners in *Munaf* made the same argument in resisting their transfer to Iraqi custody. *Munaf*, 553 U.S. at 704. The Court, though, found *Valentine* "readily distinguishable." *Id.* It explained that *Valentine* "involved the extradition of an individual from the United States." *Id.* The *Munaf* petitioners, by contrast, had "voluntarily traveled to Iraq and [were] being held there." *Id.* They were therefore "subject to the territorial jurisdiction of that sovereign, not of the United States." *Id.*

The Court, for that reason, denied the contention that the Executive invariably "lacks the discretion to transfer a citizen absent a treaty or statute." *Id.* at 705. *Wilson*, the Court said, "forecloses" that contention. *Id.* That is because the only conceivable authority in *Wilson* was the security agreement governing the treatment of U.S. service-members in Japan— which, while authorized by a treaty, was not itself a treaty or statute. *Id.* "Nevertheless," the *Munaf* Court observed, "in light of the background principle that Japan had a sovereign interest in prosecuting crimes committed within its borders," the *Wilson* Court had "found no 'constitutional or statutory' impediment to the United States's waiver of its jurisdiction" over Girard and its ensuing transfer of him to Japanese custody. *Id.*

iii. Because *Munaf* and *Wilson* recognized the Executive's authority to transfer American citizens to foreign custody without having to satisfy *Valentine*'s treaty-or-statute rule, it is apparent that the Executive need not invariably meet the *Valentine* test to effect a forcible transfer. So some transfers of American citizens to foreign custody are governed by *Valentine*; others are not. Into which of those camps does the proposed transfer of Doe to Country B fall?

In arguing that it can forcibly transfer Doe, the government reads *Valentine*, *Munaf*, and *Wilson* to yield the following set of rules. Under *Valentine*, an American citizen in the United States cannot be forcibly transferred to a foreign country absent a statute or treaty (such as an extradition treaty) authorizing the transfer. But under *Munaf* and *Wilson*, the government says, once a citizen voluntarily leaves the United States, the Executive can pick her up and deliver her to any foreign country that has a "legitimate sovereign interest" in her. No. 18-5032, Gov't Opening Br. 27; No. 18-5032, Gov't Reply Br. 15; No. 18-5110, Gov't Supp. Br. 5; No. 18-5110, Gov't Second Supp. Br. 3. And a country's interest in a person qualifies as "legitimate," the government submits, if, under international law, the country would have "prescriptive jurisdiction" over her—that is, the power to prescribe legal rules regulating her pertinent conduct. No. 18-5032, Gov't Opening Br. 23 (citing Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Am. Law Inst. Draft No. 2, 2016)); *see also* No. 18-5032, Gov't Reply Br. 15; No. 18-5110, Gov't Supp. Br. 4-5; No. 18-5110, Gov't Second Supp. Br. 4.

We cannot accept the government's submission. *Munaf* and *Wilson* do not suggest a general prerogative on the part of the Executive to seize any American citizen voluntarily traveling abroad for forcible transfer to any country with some legitimate sovereign interest in her. Consider again the facts of *Valentine*. There was no doubt of the legitimacy of France's interest in the U.S.-citizen petitioners in that case: they had allegedly committed crimes in France. The Executive nonetheless lacked unilateral authority to "dispose of the[ir] liberty" by

extraditing them. 299 U.S. at 9. That is because, the Court said, there is generally "no executive discretion to surrender [a person] to a foreign government, unless… [a] statute or treaty confers the power." *Id*.

Under the government's theory, though, everything would have changed the moment one of the *Valentine* petitioners voluntarily ventured outside the United States—say, on a family vacation to the Canadian side of Niagara Falls. At that moment, the unilateral "executive discretion" found lacking in *Valentine* ostensibly would have sprung to life, such that the person—though an American citizen—could have been seized by the Executive and forcibly transferred to France. *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992) (involving the seizure in Mexico (of a non-U.S. citizen) for transfer to the United States).

That expansive vision of unilateral Executive power over a U.S. citizen who ventures abroad does not follow from *Munaf* and *Wilson*. Those cases did not involve a citizen forcibly transferred from one foreign country they voluntarily visited to the custody of another foreign country. The cases instead involved "the transfer to a sovereign's authority of an individual …already…in that sovereign's territory." *Munaf*, 553 U.S. at 704. The petitioners in *Munaf* had "voluntarily traveled" to Iraq, *id.* at 681, 683, and the petitioner in *Wilson*, an Army specialist, was stationed in Japan, 354 U.S. at 525-26. They were "therefore subject to the territorial jurisdiction of [those] sovereign[s], not of the United States." *Munaf*, 553 U.S. at 704. The petitioners in those cases, already present in the sovereign's territory, could be relinquished by the Executive to that sovereign for prosecution of offenses allegedly committed while there.

That transfer power, the *Munaf* Court explained, is grounded in the receiving country's "territorial jurisdiction" over a person who has "voluntarily traveled" to its territory and is "being held there." *Id.* The government, though, reads *Munaf* and *Wilson* to embrace a transfer power extending to a receiving country's "prescriptive jurisdiction," not just its territorial jurisdiction. *E.g.*, No. 18-5032, Gov't Opening Br. 23. And a country's prescriptive jurisdiction under customary international law, the government emphasizes, extends to any "individual with a 'genuine connection' to the state, *even when the individual is located outside the state's territory*." *Id.* (emphasis added); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Draft No. 2, 2016).

The government is surely correct that a sovereign's prescriptive jurisdiction—its power to regulate conduct— extends to persons located beyond its borders. The practice of extraditing individuals from abroad, and the existence of laws with extraterritorial reach, both illustrate the point. But the fact that a foreign country may have prescriptive jurisdiction over an American citizen who is outside its territory hardly means that, as long as the citizen is somewhere else abroad, the Executive has power to seize her and deliver her to that foreign country.

Indeed, we know of no instance—in the history of the United States—in which the government has forcibly transferred an American citizen from one foreign country to another. (That includes the case of Amir Meshal, in which the government ardently denied a citizen's allegations that foreign officials, who had moved him from Kenya, to Somalia, to Ethiopia, were acting at the United States's behest. *See Meshal v. Higgenbotham*, 47 F. Supp. 3d 115, 119 (D.D.C. 2014), *aff'd*, 804 F.3d 417 (D.C. Cir. 2015)). Especially in habeas cases like this one, "history matters." *Omar*, 646 F.3d at 19.

To that end, the absence of even a single known example of the unilateral power the Executive claims here is illuminating. Indeed, we are unaware of any involuntary transfer of a U.S. citizen from one foreign country to another even pursuant to a treaty or statute. There is all

the more reason, then, to proceed with considerable caution before recognizing such a power as a unilateral (although apparently never-before-exercised) prerogative of the Executive.

* * * *

The government emphasizes that, on the facts of this case, Doe is not just any citizen who traveled someplace abroad and is suspected of conduct like tax evasion. Rather, he went to an active battlefield; and Country B, a "coalition partner[] in an ongoing armed conflict" against ISIL, has, the government says, "an obvious and legitimate interest in taking custody of" him. No. 18-5032, Gov't Reply Br. 6.

Those circumstances, however, do not give the Executive transfer power under *Munaf* and *Wilson* that it would otherwise lack. *Munaf* and *Wilson*, as explained, do not rest on the military's authority under the law of war. And we have declined to read those decisions to manifest a principle of prescriptive jurisdiction under which the Executive can forcibly transfer a U.S. citizen who has traveled abroad to any other country with a legitimate sovereign interest in her. That a country may have an especially important interest in a citizen—including by reason of her allegedly hostile actions against the country's interests in a time of war—does not affect that conclusion.

Does this mean that the military necessarily is without power in a time of war to transfer an enemy combatant who is a U.S. citizen to an allied country's custody? No, it does not. It means that the authority to effect such a transfer does not come from the general transfer power recognized in *Munaf* and *Wilson*. The authority instead would come from the Executive's wartime powers under the law of war, a subject we turn to next.

b. The government, as noted, has said in this case that its "determination that [Doe] is an enemy combatant…is not the basis for the U.S. military's authority to transfer" him to Country B. No. 18-5032, Gov't Reply Br. 8. At the same time, though, the government has also said that "battlefield detainees" like Doe are "lawfully transferrable under the laws of war." *Id.* at 11; *see also id.* at 13 ("[P]etitioner's status as a U.S. citizen imposes no special constraints on the U.S. military's ability to transfer him consistent with the laws of war."); No. 18-5110, Gov't Second Supp. Br. 3 (arguing that transfer is permissible, in part because of "the Department of Defense's good-faith determination…that [Doe] is an enemy combatant").

We now take up the latter facet of the government's claim of authority to transfer Doe: that it can do so pursuant to the Executive's wartime powers under the law of war. We conclude that the Executive does generally possess authority under the law of war to transfer an enemy combatant to the custody of an ally in the conflict. But that authority, we hold, could potentially support a transfer of Doe only if the government (i) demonstrates that it is legally authorized to use military force against ISIL, and (ii) affords Doe an adequate opportunity to challenge the Executive's factual determination that he is an ISIL combatant.

i. The starting point for our analysis is the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). (Because the plurality in *Hamdi* issued the controlling opinion, which our court has treated as binding, *see Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010), we will treat the plurality opinion as that of the Court for purposes of this opinion.) There, the Court spoke directly to the military's authority over an American citizen under the law of war. The case involved Yaser Esam Hamdi, who, like Doe, was captured on a foreign battlefield, where the government alleged he had fought with the Taliban against the United States. *Id.* at

510, 512-13. Hamdi, again like Doe, was a dual citizen of the United States and Saudi Arabia. *See Man Held as Enemy Combatant to Be Freed Soon*, CNN.com (Sept. 22, 2004.)

The military initially detained Hamdi in Afghanistan and at Guantanamo Bay, and then, upon learning he was an American citizen, brought him to the United States for continued detention. 542 U.S. at 510. Hamdi then filed a habeas petition seeking release from his military custody, alleging that his detention without criminal charge violated his rights under the Due Process Clause. *Id.* at 511.

The Court first held that the military had legal authority to detain Hamdi for the duration of the conflict in which he was captured. That power flowed from the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224. 542 U.S. at 517. The 2001 AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons [that] he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. *Id.* at 510 (quoting 115 Stat. 224, § 2(a)). The Court found "no doubt" that Taliban combatants (like Hamdi was alleged to be) fit within that description. *Id.* at 518. And the Court explained that detention of enemy combatants "for the duration of the particular conflict in which they were captured" is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress ha[d] authorized the President to use." *Id.*

The Court next addressed whether Hamdi's U.S. citizenship affected the Executive's power to detain him. On that issue, the Court found "no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id.* at 519. After all, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States." *Id.* (internal citation and quotation marks omitted).

Finally, the Court turned to "the question of what process is constitutionally due to a citizen who disputes his enemy- combatant status." *Id.* at 524. The government argued that its determination to that effect should be subject to highly deferential review, solely to confirm the existence of some evidence supporting it. *Id.* at 527. The government emphasized the "limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict." *Id.* The Court disagreed with the government.

Because "due process demands some system for a citizen- detainee to refute his classification," the Court explained, "the proposed 'some evidence' standard [was] inadequate." *Id.* at 537. Rather, "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. That process, the Court observed, could potentially be afforded in a military proceeding. *Id.* at 538. The Court also clarified, however, that "initial captures on the battlefield need not receive the process" the Court had outlined. *Id.* at 534. Rather, that "process is due only when the determination is made to *continue* to hold" a combatant. *Id.*

After *Hamdi*, we know that if there is legal authority to exercise military force against an enemy, that authority encompasses detention of an enemy combatant for the duration of the conflict. And we further know that the detention authority more generally extends to an enemy combatant who is an American citizen. But a citizen, *Hamdi* instructs, must have a meaningful opportunity to challenge the factual basis for his designation as an enemy combatant in accordance with the procedures set forth by the Court.

ii. Whereas *Hamdi* addressed whether the Executive can detain an alleged enemy combatant who is a citizen, this case (at least at this stage) instead involves whether the Executive can transfer him to the custody of another country. That naturally raises two sets of questions. First, is the Executive's transfer authority (this case) on par with its detention authority (*Hamdi*) as a fundamental incident of waging war? Second, if so, is the Executive's exercise of transfer authority against a U.S. citizen subject to the same conditions attending the exercise of detention authority against a U.S. citizen? In other words, do transfer authority over citizens and detention authority over citizens essentially rise or fall together? We conclude they do.

*First*, the military possesses settled wartime authority under the law of war to transfer enemy combatants to allied countries. That power, in the words of *Hamdi*, is "a fundamental incident of waging war," such that the Executive generally has the authority to transfer when it has legal authorization to engage in hostilities. *Id.* at 519.

Congress confirmed as much in the National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011). There, Congress elaborated on the authority conferred by the 2001 AUMF. It affirmed that the AUMF grants detention authority pending decision of an enemy combatant's "disposition under the law of war"; and it enumerated the available "dispositions" to include "[t]ransfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity." *Id.* § 1021(a), (c). Congress thus expressly considers transfer of an enemy combatant to be one option available to the military under the law of war. The Department of Defense's directives are to the same effect. U.S. Dep't of Def., Directive No. 2310.01E, § 3.m (May 24, 2017).

That understanding is firmly rooted in historical practice. "Throughout the 20th Century, the United States transferred or released hundreds of thousands of wartime alien detainees—some of whom had been held in America—back to their home countries, or in some cases, to other nations." *Kiyemba v. Obama*, 561 F.3d 509, 519-20 (D.C. Cir. 2009) (Kavanaugh, J., concurring). In World War I, for instance, the United States regularly transferred captured combatants to France, an ally. *See* George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213, at 59 (1955), *available at* https://cgsc.cdmhost.com. And in World War II, the United States transferred hundreds of thousands of Axis soldiers to allies like Belgium, France, and Luxembourg, where the soldiers were used as agricultural workers and underwent rehabilitation. *Id.* at 240-41. Transfers to allies were also commonplace during the Vietnam and Gulf Wars. *See* George S. Prugh, *Law at War: Vietnam 1964-1973*, at 62 (1975); U.S. Dep't of Def., Office of Gen. Counsel, *Law of War Manual* at 633 n.742 (Dec. 2016). "Transfers," in short, "are a traditional and lawful aspect of U.S. war efforts." *Kiyemba*, 561 F.3d at 519 (Kavanaugh, J., concurring).

Even if transfers of alien combatants have been a regular feature of warfare, does the traditional authority to transfer enemy combatants extend to a U.S. citizen? On this score, the historical evidence is sparse. As noted, we know of no instance in which the Executive has forcibly transferred a citizen from one foreign country to another; and that includes wartime transfers of enemy combatants.

*Hamdi*, however, instructs that a traditional military power over enemy combatants in wartime should generally be assumed to encompass American citizens. The Court reasoned that a citizen, "no less than an alien," can be a part of an enemy force. 542 U.S. at 519. For that proposition, the Court relied on its decision in *Ex parte Quirin*, 317 U.S. 1 (1942), in which it

had upheld the military trial of a U.S. citizen for his unlawful belligerency in support of the enemy in World War II, *id.* at 30- 31.

To be sure, Justice Scalia, dissenting in *Hamdi*, discounted *Quirin* as "not [the] Court's finest hour." 542 U.S. at 569 (Scalia, J., dissenting). He would have held that the military's wartime authority over enemy combatants—including, presumably, transfer authority—does not extend to a U.S. citizen (at least absent a suspension of the writ by Congress). *See id.* at 554. The Court, though, adhered to *Quirin* notwithstanding Justice Scalia's critique. *Id.* at 522-23. It thus found no reason to exclude U.S. citizens from the Executive's fundamental authority under the law of war to detain enemy combatants for the duration of a conflict. *Id.* at 519. Following the approach set out in *Hamdi*, we similarly see no basis for excluding a citizen—at least as a categorical matter—from the Executive's wartime authority to transfer enemy combatants.

*Hamdi* referenced a Ninth Circuit decision upholding the Executive's power to detain, as a prisoner of war, a dual U.S.- Italian citizen who was a member of the Italian forces in World War II. *Id.* at 524 (discussing *In re Territo*, 156 F.2d 142 (9th Cir. 1946)); *see also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 Syracuse L. Rev. 1, 13 n.73 (discussing Territo's dual citizenship). That decision also contemplated that he would be sent from the United States back to Italy at the war's end. *See* 156 F.2d at 144. True, that contemplated transfer would have been a "repatriation" to the enemy state, which, under the law of war, is distinct from a transfer to an ally (and which, presumably, would result in release rather than continued detention). *Compare* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 12, Aug. 12, 1949, 6 U.S.T. 3316, *with id.* at art. 118. And Territo's repatriation might well have been voluntary, especially given his family and other connections to Italy (he sought release from his detention in the U.S, and the opinion gives no indication that he wanted to stay here if released). *See* 156 F.2d at 143. Still, *Territo* offers modest support for the conclusion that the Executive's power to transfer under the law of war applies to both aliens and citizens. And *Hamdi*, again, teaches that both aliens and citizens may be subject to the Executive's wartime authority.

*Second*, having determined that the Executive has authority to transfer enemy combatants under the law of war, and that there is no blanket exemption from that power for U.S. citizens, we now assess whether *Hamdi*'s conditions on the exercise of detention authority equally govern any exercise of transfer authority. Those conditions, again, are that the Executive have legal authority to use military force against the relevant enemy (here, ISIL), and that the citizen be afforded the process laid out in *Hamdi* for challenging the factual determination that he is an enemy combatant.

In considering whether transfer should be subject to those conditions, an initial point bears noting: the transfer of a citizen to another country's custody, unlike continued detention of that citizen, is irrevocable. Once the Executive relinquishes custody of an American citizen to another country, our government, and our laws—including our law's habeas guarantee, which a detainee can use to seek relief from detention over time—would be unavailable to her, perhaps in perpetuity. Decisions about the duration and conditions of her custody, and about the availability to her of a means of challenging her confinement, would be entirely up to the detaining sovereign.

The government asserts that, when we assess a potential transferee's liberty interests, we cannot factor in her continued detention in the receiving country. That, the government says, follows from our holding in *Kiyemba*. 561 F.3d at 515-16. Here, though, the central issue is not the prospect of continued detention in Country B, but rather the forcible transfer itself, which

would involuntarily send an American citizen from U.S. custody to the custody of another country.

In that regard, *Kiyemba* is starkly different; there, it was undisputed that the detainees had no cognizable interest against being moved from Guantanamo to a foreign country. (Indeed, because transfer was the only relief available to the petitioners—who, as aliens, had no right to be released into the United States—they affirmatively *sought* to be moved to a foreign country. *Id.* at 519 n.5 (Kavanaugh, J., concurring)). Here, by contrast, the transfer centrally implicates Doe's interest in not being forcibly moved into Country B's custody. Indeed, involuntary transfer of a citizen to the custody of another sovereign—including via extradition—undoubtedly involves fundamental liberty interests that can be vindicated in habeas corpus. *E.g.*, *Valentine*, 299 U.S. at 9 ("no executive prerogative to dispose of the liberty of the individual" by way of extradition); *Landon v. Plasencia*, 459 U.S. 21, 36 (1982). *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (deportation from the United States can be viewed a more "severe penalty" for criminal misconduct than imprisonment in the United States).

Given that transfers involve fundamental liberty interests, we see no basis for concluding that, for the transfer of a citizen (as opposed to the detention of a citizen), the Executive need not satisfy the *Hamdi* conditions. The 2012 NDAA is instructive in this regard. There, Congress set out four types of "disposition[s] under the law of war" that the Executive could choose for an enemy combatant, including "[d]etention under the law of war without trial until the end of the hostilities," and "[t]ransfer to the custody or control of the person's country of origin [or] any other foreign country." Pub. L. No. 112-81 §1021(c)(1), (4). The statutory structure indicates that Congress saw transfer and detention as two options falling on largely the same plane—not as one option (transfer) broadly available in circumstances in which the other (detention) would not be.

Significantly, our decisions draw an equivalence between transfer of citizens and detention of citizens. We have rejected the notion "that the Executive Branch may *detain or transfer* Americans or individuals in U.S. territory at will, without any judicial review of the positive legal authority for the *detention or transfer*." *Omar*, 646 F.3d at 24 (emphases added). And we have said that "Congress cannot deny an American citizen or detainee in U.S. territory the ability to contest the positive legal authority (and in some situations, also the factual basis) for his *detention or transfer* unless Congress suspends the writ." *Id.* (emphasis added). For either "detention or transfer," then, an "American citizen" is entitled to challenge both "legal authority" and "factual basis," as *Hamdi* envisions.

The government reads the just-quoted language from our decision in *Omar* to say that an American citizen can bring a "legal authority" or "factual basis" challenge to her "detention or transfer" only if she is in the United States. *See* No. 18-5032, Gov't Reply Br. 14. That is an unsustainable reading. *Hamdi* itself rejects the notion that it could "make a determinative constitutional difference" if an American citizen were detained overseas rather than in the United States. 542 U.S. at 524. The Court understood that any such conclusion would "create[] a perverse incentive" to hold American citizens abroad. *Id.*

The *Omar* court's reference to a challenge brought by "an American citizen or detainee in U.S. territory" thus plainly speaks to a challenge brought by a citizen *anywhere* or by an alien detained in U.S. territory (such as Guantanamo Bay). *Omar*, 646 F.3d at 24 (citing *Boumediene v. Bush*, 553 U.S. 723, 785-86 (2008)); *see also Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("As a general matter, the U.S. Constitution applies to U.S. citizens worldwide and to non-U.S. citizens within the 50 states and the District of Columbia[.]"). There is no basis for thinking that

a citizen relinquishes her right to bring a legal challenge to her detention—or, equivalently, to her transfer—if she is detained in (or transferred from) a foreign country. That is why the court in *Omar* went on to explain that Omar (one of the two *Munaf* petitioners), who was still being held in Iraq, had the requisite opportunity to contest the legal authority for his transfer. *Id.* That discussion would have been entirely unnecessary if he had no right to bring that challenge in the first place since he was held overseas.

Consider the implications if there were, in fact, an asymmetry between transfer and detention, such that the Executive could transfer a U.S. citizen to another country without meeting the *Hamdi* conditions. With regard to legal authority, the military could irrevocably transfer a citizen thought to be an enemy combatant even if judicial review would have revealed that the Executive lacked lawful authority to use military force against the particular enemy. In that event, detainees in U.S. custody—and thus protected by U.S. law— would need to be released or criminally charged. But for those who had already been transferred to another country, an American court could not order their return or grant them comparable relief.

With regard to a factual-basis challenge, the *Hamdi* Court sought to "meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error." 542 U.S. at 534. The procedural guarantees prescribed by the Court were intended to guard against an undue risk of an erroneous military determination. *See id.* But if the transfer of a citizen could be accomplished without affording her those protections, a risk of error thought unacceptable for continued detention would be present for an irrevocable transfer to another country. An "errant tourist" might then be protected against detention but unable to avoid an irrevocable transfer to another country's custody. *Compare* 31A Am. Jur. 2d Extradition § 120 (2d ed. 2018) (describing process granted to persons subject to extradition); 18 U.S.C. § 3191.

The government, in that respect, relies on its having made a "good-faith determination, supported by extensive record evidence, that [Doe] is an enemy combatant." No. 18-5110, Gov't Second Supp. Br. 3. We do not doubt the government's good faith. Nor do we discount the importance of the need to avoid unduly burdening the Executive's prosecution of a war, which concerned the *Hamdi* Court as well. *See* 542 U.S. at 531-35. But in *Hamdi*, one point on which eight Justices agreed was that, in the case of an American citizen, the government's good-faith determination that he is an enemy combatant is not enough to justify his detention for the duration of a conflict. *Id.* at 537; *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 564-65 (Scalia, J., dissenting). We find the same to be true of an irrevocable transfer to another country's custody.

In that regard, it is instructive to consider the implications of the government's argument here for the facts of *Hamdi* itself. Upon holding that the government's continued detention of Hamdi was contingent on his having a meaningful opportunity to challenge the factual basis for his detention, the Court remanded the matter so that the government could conduct the factfinding process the Court had outlined. *See* 542 U.S. at 538-39. That process would result in a determination of whether Hamdi was a person against whom military force could be applied.

Under the government's argument here, though, the Executive, rather than grant Hamdi that process following remand, could have simply avoided it by choosing instead to forcibly and irrevocably transfer him to the custody of another country (pursuant to its authority under the 2001 AUMF). True, the government eventually did in fact transfer Hamdi to Saudi Arabia—but with his consent, not over his objection (and after he renounced his American citizenship). Jerry Markon, *Hamdi Returned to Saudi Arabia*, Washington Post (Oct. 12, 2004). There is, of course,

a vast difference between a voluntary transfer and an involuntary one. As to the latter, we do not believe the *Hamdi* Court would have countenanced Hamdi's forcible transfer to another country unless he were first afforded the process the Court held he was constitutionally due.

The government's final argument on this score is that transfer without process is permissible if effected in conjunction with "initial capture[] on the battlefield." No. 18- 5110, Gov't Supp. Br. 8-9 (quoting *Hamdi*, 542 U.S. at 534). But while *Hamdi* allows for temporary detention without process attending "initial capture," a citizen can be released if there ends up being an insufficient factual basis to continue detention. Transfer may be different because it, by nature, is not temporary.

In addition, there would be no citizenship-based limit on transfer unless there were reason to know that a person is a citizen. *Cf.* Asbury Aff. at 4, *United States v. Lindh*, No. Crim. 02-MJ-51 (E.D. Va. Jan. 15, 2002) ("[Harakat ul-Mujahideen] officials told [John Walker Lindh] not to admit to anyone that he was American but to say, if asked, that he was from Ireland.") Here, at any rate, the Executive decided to transfer Doe—and reached an agreement to do so—several months after his capture. *Doe v. Mattis*, No. 17-cv-2069, Notice at 1 (D.D.C. Apr. 16, 2018), ECF No. 77; Status Hr'g Tr. at 8 (D.D.C. Jan. 22, 2018), ECF No. 55 (stating that no final decision had been made on whether to transfer Doe). This transfer decision, then, was not a battlefield judgment. For those reasons, the Executive cannot transfer Doe at this stage unless he receives the process required by *Hamdi*.

c. In light of the above analysis, can the Executive involuntarily transfer Doe to Country B? We conclude it cannot, at least as things stand now. We take up the two strands of the government's argument in order.

i. We first address whether the Executive can forcibly transfer Doe to Country B based on the general transfer authority recognized in *Munaf* and *Wilson*. That authority, as we have explained, does not encompass the forcible transfer of a citizen from one foreign country to the custody of another foreign country. Insofar as the transfer of Doe to Country B would be an inter-country transfer, it falls outside of *Munaf* and *Wilson*.

* * * *

ii. We now turn to whether the forcible transfer of Doe to Country B can be supported by the Executive's wartime authority over enemy combatants under the law of war. That authority, as we have explained, encompasses transfers of enemy combatants to an allied country. But before the Executive could exercise that transfer power against Doe, the two *Hamdi* conditions would need to be met.

The first condition is a determination that the Executive has legal authority to wage war against ISIL. "For wartime military transfers," we have said, "Article II and the relevant Authorization to Use Military Force generally give the Executive legal authority to transfer." *Omar*, 646 F.3d at 24. Second, Doe would need to be afforded a meaningful chance to rebut the government's factual assertion that he is an ISIL combatant, per the requirements set out in *Hamdi*.

Neither condition has been met at this point. Until those conditions are satisfied, the Executive lacks power under the law of war to transfer Doe to Country B on the basis of his status as an alleged ISIL combatant.

2.

Having addressed Doe's success on the merits of his claim that a forcible transfer to Country B would be unlawful, we now consider whether he has shown he would be irreparably injured absent the injunction. *See Winter*, 555 U.S. at 20. We conclude he has made that showing.

A forcible transfer of Doe to the custody of Country B, the government explains, would be "bona fide and total," in that "[o]nce transfer is effectuated," he "would be entirely in [Country B's] custody," without any continuing oversight by— or recourse to—the United States. No. 18-5032, Gov't Reply Br. 15. Doe, wishing to avoid that irrevocable change in his station, objects to his proposed transfer to the custody of Country B. No more is required to demonstrate that he would face irreparable injury if he were involuntarily (and irreversibly) handed over to Country B in violation of his constitutional rights.

* * * *

3.

When a private party seeks injunctive relief against the government, the final two injunction factors—the balance of equities and the public interest—generally call for weighing the benefits to the private party from obtaining an injunction against the harms to the government and the public from being enjoined. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). We find the balance to tip in Doe's favor.

The equities at stake on both sides are manifestly weighty ones. The government seeks to avoid undue interference with its military judgments in connection with ongoing hostilities and with its conduct of foreign relations with a coalition partner in that campaign. Doe, meanwhile, seeks to vindicate his rights as an American citizen to avoid a forcible and irrevocable transfer to (potentially indefinite) custody at the hands of a foreign sovereign.

As the Supreme Court observed in *Hamdi*, a citizen's "interest in being free from physical detention" is the "most elemental of liberty interests." 542 U.S. at 529. The Court therefore denied the Executive the ability to continue detaining an alleged enemy combatant in wartime unless it afforded him procedural protections the Court thought he was constitutionally owed. And the Court did so despite the government's belief that affording additional process would be unnecessary and unworkable. *See id.* at 525. Here, we conclude an injunction barring Doe's forcible transfer to Country B's custody is warranted for substantially similar reasons and in substantially similar circumstances.

B.

The government also appeals the district court's order requiring it to give 72 hours' notice before transferring Doe to either Country A or Country B. With regard to Country B, the government gave the district court the requisite notice before attempting to effect an agreed-upon transfer. When a defendant complies with an injunction in that fashion, its appeal of the injunction becomes moot. *See People for the Ethical Treatment of Animals, Inc. v. Gittens,* 396 F.3d 416, 421 (D.C. Cir. 2005). At any rate, now that we have sustained the injunction barring Doe's transfer to Country B, any requirement to give advance notice of such a transfer is beside the point.

The notice requirement still presents an ongoing controversy with regard to Country A, however. An order requiring the government to give advance notice before transferring a detainee to another country cannot be sustained if there could be no grounds for enjoining the

transfer. *See Kiyemba*, 561 F.3d at 514. The government relies on that principle here, contending that any transfer of Doe to Country A invariably would be lawful. We are unpersuaded.

As an initial matter, we note that, because of the way this case developed, Doe did not have a meaningful opportunity to address a potential transfer to Country A. In the government's opening brief, it made three alternative requests for relief: (i) vacatur of the injunction in its entirety, (ii) vacatur of the injunction as applied to any "country that the Executive Branch determines has a legitimate interest" in Doe, or (iii) vacatur as applied only to one specified country. *See* No. 18-5032, Gov't Opening Br. 38. Indeed, the government's opening brief noted the possibility of transferring Doe to Country A only in passing in a footnote. *Id.* at 31 n.5. Such a reference is ordinarily inadequate to preserve an argument. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). And while the government specifically included Country A as a possible transferee country in its reply brief, that was too late. *See Abdullah*, 753 F.3d at 199-200.

The lateness of the government's suggestion that it might wish to transfer Doe to Country A is magnified, because, on the existing record, we know very little about what such a transfer would entail. Unlike with Country B, with whom the government has reached an agreement to transfer Doe, we are aware of no concrete plans in the works (or on the horizon) to transfer Doe to Country A. Indeed, the government has not submitted a single affidavit or declaration discussing a transfer of Doe to Country A, the reasons that might give rise to an agreement to transfer Doe there, the terms or expectations surrounding such a transfer, or the anticipated conditions of his custody after that transfer. The government has listed at a high level of generality some possible interests Country A could have in mind if it were to accept custody of Doe. *See* No. 18- 5032, Gov't Reply Br. 8-9. But even with regard to that array of potential interests, we do not know whether a transfer of Doe would occur only for those reasons.

The government thus essentially seeks blanket preapproval to transfer Doe to Country A, regardless of the reasons or circumstances. We decline to recognize that sort of carte-blanche license in the present circumstances. In *Munaf*, the Supreme Court upheld the transfer of the two habeas petitioners to Iraq's custody, but only after examining the reasons for the proposed transfers and the governing law. *See Omar*, 646 F.3d at 24. Here, the government asks for an all-purpose preapproval without any opportunity to assess a particular transfer before it takes place. Particular transfers to Country A may or may not be unlawful depending on the circumstances. The notice requirement secures the ability to make that assessment at a suitable time.

In these circumstances, we cannot set aside the notice requirement as to Country A. In terms of likelihood of success on the merits, with notice of the possibility of a transfer to Country A and at least some factual information about what such a transfer might entail, Doe would have had an opportunity to show that a particular transfer to Country A would be unlawful. With regard to irreparable injury, a particular transfer arrangement, depending on the circumstances, could irrevocably injure his interests, and Doe did not have an opportunity to address in his briefing the potential harm he would suffer if transferred to Country A. And the remaining injunction factors could favor Doe in the context of a concrete transfer proposal.

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After the D.C. Circuit denied the U.S. appeal, the Department of Defense proposed to release Doe back into Syria near the location where he was captured, having determined that release in that area would be safe and consistent with DoD's

policies and obligations under the law of war. On June 6, 2018, the U.S. government provided 72 hours' notice to the district court of the proposed release. The detainee filed a motion for a temporary restraining order to block the release. The court ordered briefing on the motion and the U.S. briefs in opposition were filed on June 22, 2018 and are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The court subsequently stayed the case at the request of the parties. The district court never ruled on the release because, while the case was stayed, the United States government arranged for Doe to return to Bahrain, where he had been living before traveling to Syria. Doe consented to this release, which occurred in October 2018.

**Cross Reference**

*Global Coalition to Defeat ISIS,* **Ch. 3.B.1.e**
*Children in armed conflict,* **Ch. 6.C.2**
*Ordered departure of U.S. personnel from Basrah, Iraq,* **Ch. 9.A.1**
*Sanctions relating to cyber activity,* **Ch. 16.A.9**
*Afghanistan,* **Ch. 17.B.1**
*Syria,* **Ch. 17.B.2**
*Yemen,* **Ch. 17.B.10**
*Responsibility to Protect,* **Ch. 17.C.3**
*Chemical weapons in Syria,* **Ch. 19.D.2**