~~PROTECTED INFORMATION – FILED UNDER SEAL~~

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE, Petitioner, v. BARACK OBAMA, *et al.*, Respondents.	:	Civil Action No. 05-392 (ESH)

MOTION FOR ORDER OF RELEASE AND OTHER RELIEF IN RESPONSE TO THE GOVERNMENT'S STATUS REPORT REGARDING EFFORTS TO TRANSFER MR. AMEZIANE

CENTER FOR CONSTITUTIONAL RIGHTS
J. Wells Dixon
Shayana D. Kadidal
Susan Hu
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499

Counsel for Djamel Ameziane

Petitioner Djamel Ameziane, by and through his undersigned counsel, respectfully submits this motion in response to the government's sealed status report, dated August 8, 2013, regarding its efforts to transfer him [dkt. nos. 303, 306]. Mr. Ameziane requests that the Court: (1) grant his habeas corpus petition and order his release from Guantánamo; (2) enter an order declaring that he falls within the court-order exception to the transfer restrictions set forth in Section 1028 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013) ("NDAA"), which would eliminate a significant obstacle to his transfer; or (3) order the government to show cause why it should not be held in contempt for failing to make any meaningful effort to transfer him over the last four years, and why the sanction should not include an order of release to vindicate the Court's own authority. The government opposes the motion.[1]

Preliminary Statement

This is an exceptional case. Four years ago, the Court stayed Mr. Ameziane's habeas case indefinitely, over his objections, in reliance on the government's representations to the Court that he would be transferred quickly. But he continues to be held indefinitely and without foreseeable end. As the government's [redacted] makes plain, Mr. Ameziane continues to be held not because his detention continues to serve any ostensible purpose (*e.g.*, to prevent return to the battlefield), but rather because the government has made absolutely no meaningful effort to transfer him to any country since his case was stayed in 2009; worse, as explained below, and as counsel can explain further at the August 14th status conference, the government has blocked

[1] The parties request that the Court close a portion of the August 14th status conference to address the transfer issues under seal, subject to later disclosure of versions of the hearing transcripts suitable for public filing. The Court should also direct the government to produce public versions of its status report and this motion in response without delay.

[redacted] foreign governments from resettling him. The government also fails to offer any indication that it will attempt to transfer Mr. Ameziane in the near future. To be clear, [redacted] provides not a single shred of evidence – not one phone call, email, meeting or other discussion is cited – that it has attempted to [redacted] try to transfer Mr. Ameziane, or that it will do so in the near future. Mr. Ameziane's detention, now in its twelfth year without charge, is arbitrary and perpetual by any measure. It is a miscarriage of justice.

The Court is now confronted with a situation unique to the particular facts and circumstances of this case. More than four years ago the government exercised its discretion to release Mr. Ameziane and affirmatively disclaimed any need or desire to continue to detain him. And on that basis it convinced the Court to stay Mr. Ameziane's habeas case indefinitely because there was nothing further to be done. The government represented that Mr. Ameziane would receive the same relief as a result of its decision to approve him for transfer as he would from an order granting his habeas petition. But Mr. Ameziane remains in Guantánamo several years later – currently, to our knowledge, locked in isolation, on a hunger strike, deprived of his legal materials and other possessions, and subject to genital searches that inhibit his access to counsel, the Court and his family – because the government has not executed its discretion to release him without a court order. Despite representations to the Court that Mr. Ameziane would be released quickly, the government's [redacted] shows that it has not even tried to release him in the last four years. Thus, because after four years of bureaucratic inaction and intransigence there is no basis to conclude that the government will actually do what it promised to do on its own – release Mr. Ameziane – the Court should exercise its statutory and equitable habeas

authorities to correct this miscarriage of justice, grant his habeas petition, and order his release without further delay.

Alternatively, the Court should enter an order "affecting the disposition" of Mr. Ameziane's case within the meaning of NDAA § 1028(a)(2). Pursuant to the plain language of that provision, as well as the Court's indisputable common-law habeas authority to cut through all forms and impose flexible, pragmatic remedies to dispose of a case as justice and law require, the Court should enter an order declaring that based on the unique facts and circumstances of this case Mr. Ameziane falls within the NDAA's court-order exception to the certification requirements for transfer under NDAA § 1028(b), which the government claims have restricted its ability to transfer him. This form of order would have the practical effect of eliminating a significant obstacle to his transfer, and perhaps allow the government to negotiate his transfer with a broader range of potential transferee countries than might otherwise be suitable for certification, *e.g.*, because of their small size or open-border policies.

At a minimum, if Mr. Ameziane is not released within thirty days of the August 14th status conference the Court should order the government to show cause why it should not be held in contempt for failing to transfer him over the last four years, and why the appropriate sanction should not include an order releasing him. The government told the Court that it would transfer Mr. Ameziane, and the Court relied on that representation in staying his case. But after several years the government has not transferred him for reasons that are inexplicable but ultimately irrelevant. The fact of the matter is that by failing to abide by its commitment to transfer Mr. Ameziane without a court order mandating his release, the government has undermined this Court's authority and ultimately the effectiveness of the Great Writ. Further, by its inaction the government has caused Mr. Ameziane grievous, irreparable harm – the very harm that he filed

this habeas case in order to remedy more than eight years ago, which the Court fairly warned the government must not be compounded by an order staying the case. An order to show cause, and, if necessary, an order of release, is therefore necessary to vindicate the Court's own authority.

Background

After the U.S. Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), Mr. Ameziane aggressively pursued his habeas case before this Court. In October 2008, the government approved him for transfer and attempted to stay his case on the ground that a habeas hearing would serve no purpose because if the case were litigated to a final decision on the merits and Mr. Ameziane prevailed he would be in the same position. *See* Mot. to Stay (filed Dec. 17, 2008). Judge Hogan, acting in a coordinating role, rejected the government's request to stay Mr. Ameziane's habeas case, and litigation then proceeded rapidly before this Court.

In May 2009, after this Court denied Mr. Ameziane's motion for expedited judgment and ordered discovery to begin, the Guantánamo Review Task Force approved Mr. Ameziane for transfer once again. The government renewed its stay request, and asked the Court to seal Mr. Ameziane's Task Force determination. Mr. Ameziane objected. The Court entered an administrative stay by minute order dated May 27, 2009.

The Court thereafter held a series of hearings to address the stay and related issues, including whether Mr. Ameziane could say publicly that he had been approved for transfer. *See, e.g.* Motion to Unseal, or in the Alternative, for a Hearing to Address Whether to Lift the Stay at 4 (dated June 10, 2009) (opposing stay based on the government's claim that it would transfer Mr. Ameziane at some point in the future, and urging the Court to reject the government's position that "these prisoners [should] sit and do nothing except remain in prison while they wait for the government to sort out the human rights disaster that is Guantánamo"). The Court

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

repeatedly expressed discomfort with potentially placing Mr. Ameziane in a worse position than if he were allowed to proceed with his habeas case:

- "What bothers me is having someone land up worse off than if they got to exercise their habeas rights, which you [the government] don't want them to do." July 7, 2009 Hearing Tr. at 16;
- "[Y]ou have a situation where people are giving up their right to a habeas hearing . . . [and] [t]hey're relying solely on . . . the U.S. government's efforts [ ] to put them someplace else." *Id.* at 11;
- "The problem I have is that you're working under a premise that because the president of the United States says he's going to close Guantánamo in January [2010], these people will all be placed somewhere [else]." *Id.* at 22;
- "[I]t would be unfair if he were in a worse position . . . than if his habeas case had proceeded and he was ordered released by this Court." Mem. Op. & Order at 6-7 (filed July 8, 2009).

The government acknowledged the Court's concerns: "We understand the concern of the Court of moving Mr. Ameziane quickly . . . we are moving as quickly as we can . . . so that we can move him." July 7, 2009 Hearing Tr. at 23; *see also* Declaration of Daniel Fried (executed June 9, 2009) (stating it is necessary to seal Task Force clearance decisions in order to ensure detainees are transferred and the prison is closed by January 2010); Mot. to Stay at 6 (filed Dec. 17, 2008) ("[S]teps are [being] taken to arrange for the end of [Mr. Ameziane's] custody."). The Court accepted the government's representations, and concluded that a habeas hearing was "useless" and a "waste of everyone's time." June 30, 2009 Hearing Tr. at 31; July 7, 2009 Hearing Tr. at 11, 26. The stay continued accordingly. *See* Mem. Op. & Order at 5, 6 (filed July 8, 2009). But four years later Mr. Ameziane continues to be held at Guantánamo indefinitely and without foreseeable end.

On July 29, 2013, in response to Mr. Ameziane's motion for a status conference to address the seizure and comingling of his legal materials [dkt. no. 302], the Court entered a

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

minute order directing the government to file a status report addressing, in part, (1) its efforts to transfer Mr. Ameziane over the past four years, and (2) what it expects will happen in the near future regarding his release from Guantánamo, [redacted] the government has done absolutely nothing meaningful to try to transfer Mr. Ameziane in the last four years, and is not making any discernible effort to transfer him now.

As to the first issue concerning efforts to transfer Mr. Ameziane over the past four years, the government's status report states (at p.4) that [redacted] [2] The government also states (at p.4) that [redacted] [3] But nowhere does the government indicate that [redacted]. Similarly, the government cites (at p.5) [redacted] But nowhere does the government state that [redacted]

[2] [redacted]

[3] [redacted]

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

The government says even less about future efforts to transfer Mr. Ameziane. It notes (at p.6) that [redacted] Finally, the government states (at p.7) that [redacted] Indeed, [redacted] the government told the Court more than four years ago when it ordered the government to detail "the specific steps that have been and are being taken to effectuate the transfer of petitioner, including specific information regarding what countries are under consideration." Respondents' Status Report (filed June 23, 2009) (quoting Court's sealed order filed June 17, 2009). The government responded that "[t]he current focus of the Respondents' efforts in this case is likewise to transfer the Petitioner back to his home country of Algeria." *Id.* ¶ 5; July 7, 2009 Hearing Tr. at 6 (government counsel: "It's not that the government is only willing to consider Algeria . . . . The government is primarily considering Algeria because that is where the petitioner is from."); *see also* Declaration of Daniel Fried ¶ 3 (executed July 9, 2009) (stating "present conclusion" that detainees should be repatriated to Algeria).[4] [redacted]

The only notable aspects of the status report are statements (at p.5) that [redacted]

[4] [redacted]

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

[redacted] But as described below, those statements do not help the government avoid the relief sought by this motion. For what the government fails to inform the Court is that [redacted] Indeed, undersigned counsel has personal knowledge, or is otherwise informed, about what transpired based on communications with [redacted]

In 2009, the Court asked undersigned counsel "how realistic is it that you can get [Mr. Ameziane] some place other than where he doesn't want to go?" June 30, 2009 Hearing Tr. at 2. Undersigned counsel responded that Mr. Ameziane's lawyers and advocates in the U.S., Canada and Europe had made substantial efforts in various countries to try to resettle him. *Id.* at 2-3. Those efforts continued over the next several years (and continue today), and have been successful in generating interest among foreign governments [redacted] to inquire about resettling Mr. Ameziane. [redacted]

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

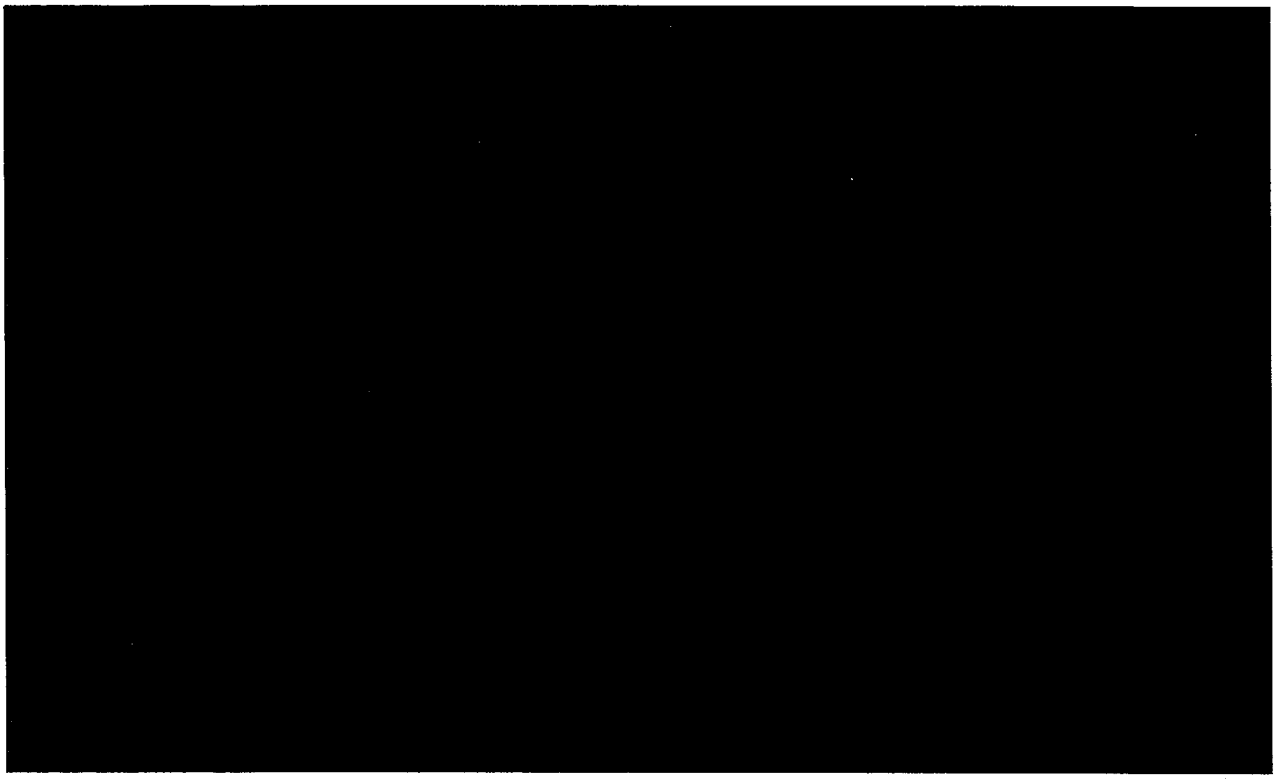
[redacted]

[redacted]

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

[redacted]

~~PROTECTED INFORMATION – FILED UNDER SEAL~~



However, although we have been successful in generating opportunities for Mr. Ameziane's resettlement over the last four years, the fact remains that Mr. Ameziane and his counsel have no ability to negotiate or arrange for his transfer to a specific foreign country. As the government is quick to point out, that is largely the prerogative of the Executive Branch. The point is still the same – although the Court may not necessarily order Mr. Ameziane released to [redacted]any other specific foreign country, he has current, viable opportunities for transfer that the government could take advantage of if they were inclined to try to transfer him, or if they were otherwise ordered by the Court to release him. This is not a case in which there is nowhere for Mr. Ameziane to go; it is one where the government has failed to take any meaningful action to release him, and has further blocked opportunities generated by him.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Argument

I. The Court Should Grant Mr. Ameziane's Habeas Petition and Order His Release in Order to End His Indefinite, Arbitrary Detention and Correct a Miscarriage of Justice

More than half of the 166 detainees who remain at Guantánamo have been approved for transfer by the government, which means that all of the relevant military, law enforcement and intelligence agencies with a stake in Guantánamo have determined unanimously that these men may be released "consistent with the national security and foreign policy interests of the United States." Exec. Order 13,492, § 4(c)(2), 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009). What this means is that the government has concluded that cleared detainees like Mr. Ameziane no longer pose a risk of future harm that would require their continued detention. *See* Final Report, Guantánamo Review Task Force 7 (Jan. 22, 2010) (the first factor in transfer determinations is whether detainee poses threat that can be sufficiently mitigated to permit transfer). Indeed, in this case the government has not made any assertion that Mr. Ameziane poses any risk at all.

Mr. Ameziane is nonetheless exceptional and distinct from other detainees approved for transfer in several respects. First, as set forth in his motion for a status conference (at p.2), the government long ago determined that there are no "military rationales" for his continued detention; his detention is "no longer at issue"; "the only issue truly remaining is the country to which [he] should be sent"; and "steps are [being] taken to arrange for the end of such custody." Mot. to Stay (filed Dec. 17, 2008). Second, unlike other cleared detainees Mr. Ameziane did not give up his habeas rights voluntarily and agree to an indefinite stay of his case once he was approved for transfer by the Task Force; as discussed above, the Court imposed a stay over his objections based on the government's representations that a habeas hearing was unnecessary because Mr. Ameziane would be released. *See also* July 7, 2009 Hearing Tr. at 25-26 ("He gave

~~UNCLASSIFIED//FOR PUBLIC RELEASE~~

up his habeas, not voluntarily, but because [the government] wanted a stay, and [the Court] agreed that it ought to be stayed because it's a waste of everyone's time."). Third, [redacted] although it has made some effort to transfer other cleared detainees, for reasons that remain unknown it has not made any meaningful effort to transfer Mr. Ameziane over the last four years; and it has blocked opportunities that have arisen as a result of his own efforts to find a suitable transferee country. Fourth, Mr. Ameziane is unique because he continues to have viable resettlement opportunities that may slip away if not addressed by the government. He may well be the only detainee as to whom [redacted] inquire about resettling him.

The Court is therefore confronted with a situation that is unique to the facts and circumstances of this particular case. The government has exercised its discretion to release Mr. Ameziane and has disclaimed any need or desire to continue to detain him, and on that basis convinced the Court that a habeas hearing was unnecessary because he would be released. But for more than four years the government has failed or refused to execute its discretion to release him. And the government's ongoing failure to take any action to execute its discretion threatens to further compound the harm to Mr. Ameziane because his current, viable opportunities for transfer may disappear if not addressed now. In other words, Mr. Ameziane is detained not because his detention continues to serve any military necessity or other ostensible purpose, but rather merely because of bureaucratic inaction or inertia that is self-perpetuating. Mr. Ameziane's detention is indefinite, arbitrary and perpetual by any measure, and the Court should grant his habeas petition accordingly.

The government has claimed authority to detain Mr. Ameziane pursuant to the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224

(2001), which permits the use of "necessary and appropriate force [against a narrow set of groups or individuals] in order to prevent any future acts of international terrorism against the United States." But the AUMF "does not authorize unlimited, unreviewable detention." *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009); *cf. Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009) (Leon, J.) (granting the writ where the purpose of AUMF detention is not served). In *Hamdi v. Rumsfeld*, the Supreme Court stated unequivocally that the AUMF does not authorize indefinite or perpetual detention, and "indefinite detention for the purpose of interrogation is not authorized." 542 U.S. 507, 521 (2004). Even in circumstances where detention may be "necessary and appropriate" to prevent a combatant's return to the battlefield, that justification may "unravel" if the practical circumstances of the conflict are entirely unlike those that informed the development of the laws of war. *Id.* at 521; *see also Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (noting that post-September 11 conflict is among the longest wars in American history); *id.* at 785 (hostilities may last a generation or more); *id.* at 797-98 (courts may be required to define the outer boundaries of war powers if terrorism continues to pose a threat for years to come). "[A] state of war is not a blank check for the President." *Hamdi*, 542 U.S. at 536.

Here, again, Mr. Ameziane continues to be detained for no reason other than the government has failed over the course of four years to make any meaningful effort to try to send him somewhere, as it represented to the Court it would do in order to obtain a stay of his habeas case. If indefinite detention for the purpose of interrogation is not authorized, Mr. Ameziane's indefinite detention without foreseeable end is surely impermissible where the government has not only ceased interrogations but concluded there are no "military rationales" for his continued detention, his detention is "no longer at issue," "the only issue truly remaining is the country to

which [he] should be sent," and "steps are [being] taken to arrange for the end of such custody," Mot. to Stay (filed Dec. 17, 2008), and yet no substantial efforts have been made over several years to try to send him anywhere. In the simplest of terms, absent an order of the Court, Mr. Ameziane is likely to continue to languish at Guantánamo until at some unknown point in the future someone in the government accidentally trips over his file, remembers that he is still detained, and finally decides to try to do something to free him. Whether or when that might happen is unknown, but under no circumstances could such arbitrary detention be authorized by the AUMF.

Moreover, the Court should construe the AUMF not to authorize detention in circumstances such as Mr. Ameziane's in order to avoid the obvious, serious constitutional problems that a statute permitting indefinite, arbitrary detention would raise. *See Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001) (construing statute authorizing detention of admitted aliens to contain reasonable time limitation in order to avoid serious constitutional concerns raised by indefinite detention); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (construing statute to limit detention of aliens not formally admitted to the United States to avoid constitutional issues).

Nor does the D.C. Circuit's substantial body of precedent holding that the AUMF authorizes the detention of individuals who are "part of" the Taliban, Al Qaeda or associated forces foreclose this Court from concluding that Mr. Ameziane's ongoing detention falls outside the AUMF. Although D.C. Circuit case law unquestionably affords the government broad authority to hold Guantánamo detainees, no decision of that court has addressed the narrow question presented here – whether indefinite detention without foreseeable end is lawful in circumstances where the government has exercised its discretion and has disclaimed any need or desire to hold a detainee, convinced a court to deny the detainee a habeas hearing on the basis

that it would release the detainee, and then failed over the course of several years to take any serious action to execute its discretion and release him, thereby causing him substantial harm.

Even if the AUMF generally were to authorize indefinite detention without foreseeable end, this Court would retain its equitable, common-law habeas authority to dispose of this case as justice and law require based on its unique facts and circumstances. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."). Since the 17th Century, courts in England and America with authority to dispose of habeas corpus petitions have been governed by equitable principles. *See Sanders v. United States*, 373 U.S. 1, 17 (1963); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (citing *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). "Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). In exercising habeas jurisdiction, courts have equitable discretion to correct a miscarriage of justice. *See McClesky v. Zant*, 499 U.S. 467, 502 (1991). Habeas courts also have not hesitated to fill perceived gaps in a statutory scheme, place a central focus on justice rather than law, and impose flexible, pragmatic remedies. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993); *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.") (internal quotation marks omitted); Brief of Eleven Legal Historians as *Amici Curiae* Supporting Petitioner, *Holland v. Florida*, 130 S. Ct. 2549 (No. 09-5327) (citing cases); *see also Boumediene*, 553 U.S. at 780 (common-law habeas courts often did not follow black-letter rules in order to afford greater protection in cases of non-criminal detention). "The very nature of the

writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Accordingly, because the government has had more than four years to try to transfer Mr. Ameziane without a court order and has failed, if only for lack of meaningful effort, the Court should apply the AUMF in conjunction with 28 U.S.C. § 2243, its equitable habeas authority as recognized in *Boumediene*, and principles of constitutional avoidance, and thereby grant Mr. Ameziane's habeas petition and order his release without further delay. A flexible, pragmatic remedy is acutely and unquestionably necessary in this exceptional case in order to cut right to the heart of this matter, end Mr. Ameziane's indefinite detention, and correct a miscarriage of justice.

II. The Court Should Enter an Order Declaring that Mr. Ameziane Falls Within the Court-Order Exception to the NDAA Transfer Restrictions in Order to Remove a Significant, Practical Obstacle to His Release

As an alternative to granting his habeas petition, the Court should enter an order declaring that Mr. Ameziane falls within the court-order exception of NDAA § 1028(a)(2). Although the government objects to this request, an order granting this relief would as a practical matter remove a significant obstacle to Mr. Ameziane's release that the government itself has identified [redacted].

As set forth in Mr. Ameziane's motion for a status conference and the government's status report, NDAA § 1028 includes transfer restrictions limiting the government ability to use funds allocated by Congress to transfer a detainee to a foreign country unless the Secretary of Defense issues a multi-part certification attesting to the transferee country's capacity to accept the detainee. *Id.* § 1028(b). If certain certification requirements are impossible to satisfy, the

Secretary of Defense may issue a national security waiver of those requirements. *Id.* § 1028(d)(1). The only exception to the certification and waiver requirements is in instances where the detainee obtains an order "affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction." *Id.* § 1028(a)(2). [redacted] this Court should construe the exception in NDAA § 1028(a)(2) to apply to the unique facts and circumstances of this case.[6] Although by enacting the NDAA transfer restrictions Congress has arguably chosen for the first time in our nation's history to legislate onerous obstacles to the Executive's ability to implement its discretionary decisions to transfer detainees held in military custody, Congress has created a specific statutory exception to the certification requirements for instances in which courts or tribunals with jurisdiction enter orders "affecting the disposition" of detainees. That statutory exception should be construed broadly for two reasons.

First, the statutory exception should be read broadly based on its plain language. Tracking closely a court's authority under 28 U.S.C. § 2243 to "dispose of [a] matter as law and justice require," the language of the NDAA court-order exception plainly contemplates court

[6] [redacted] One might therefore expect the government to join in Mr. Ameziane's request for an order triggering the exception to the certification requirements. But the government instead appears to believe that the exception may be triggered only by a habeas grant, which Mr. Ameziane has not yet obtained. As explained above, however, he has not yet obtained a habeas grant because the government convinced the Court that such an order was unnecessary to effectuate his transfer. In any case, for the reasons discussed herein the Court should enter an order now.

orders that fall short of granting habeas petitions.[7] If Congress had intended to limit such orders to habeas grants, it undoubtedly would have done so in clear terms. *Cf. Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (invalidating Congress's specific attempt to strip courts of jurisdiction to hear detainee habeas cases). There is also nothing in the legislative history of the NDAA to indicate that Congress intended to limit the court-order release exception to habeas grants. Rather, the court-order release exception was added to the 2011 NDAA during conference, apparently without debate, and the legislative history of the 2012 NDAA, which extended the transfer restrictions and the court-order release exception but added the waiver provision codified in Section 1028(d)(1) of the current statute, further clarifies that notwithstanding the imposition of the certification requirements, detainee transfers from Guantánamo were expected to continue under the NDAA. *See H. Comm. on Armed Serv., 111th Cong., Legis. Text & J. Explanatory Statement to Accompany H.R. 6523*, at 472 (Comm. Print 2010); 157 *Cong. Rec.* S7641 (daily ed. Nov. 17, 2011) (statement of Sen. Carl Levin) ("Contrary to what some have said, [the 2012 NDAA transfer restrictions] do[ ] not prohibit transfers from Gitmo. In fact, [the 2012 NDAA] is less restrictive of such transfers than legislation passed in the last Congress and signed by the President.").

Second, the statutory exception should be read broadly to avoid serious constitutional problems that would otherwise arise. If there were any doubt about the sufficiency of the plain language of NDAA § 1028(a)(2) as a basis for the Court to enter an order triggering the exception and thereby avoid the transfer restrictions without granting Mr. Ameziane's habeas petition, the Court should construe the court-order provision in light of its equitable habeas authority in order to provide the practical relief that Mr. Ameziane requests. *See Brecht v.*

[7] This is most obvious from the fact that the exception mentions "tribunals" as well as courts.

Abrahamson, 507 U.S. 619, 633 (1993) (equitable habeas power used to fill statutory gaps); *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.") (internal quotation marks omitted). Indeed, the Court has an obligation to construe the statute in that way to avoid the serious constitutional problems that would arise if the NDAA were actually to block Mr. Ameziane's transfer under the unique facts and circumstances of his present situation. *See Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001) (implying reasonable limitation on statute to avoid serious constitutional concerns); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (same); *cf.* Statement by the President on H.R. 4310 (Jan. 2, 2013) (NDAA transfer restrictions "hinder[ ] the Executive's ability to carry out its military, national security, and foreign relations activities"), [redacted].

Accordingly, the Court should enter an order declaring that based on the unique facts and circumstances of this case Mr. Ameziane falls within the statutory exception set forth in NDAA § 1028(a)(2), and is not subject to the certification requirements of NDAA § 1028(b). This order is minimally necessary to sweep aside a substantial, practical obstacle to his transfer.

III. The Court Should Order the Government to Show Cause Why It Should Not Be Held in Contempt for Failing to Transfer Mr. Ameziane, and Why the Sanction Should Not Include an Order Releasing Him to Vindicate the Court's Own Authority

It has been obvious for the last four years that the government has not fulfilled its commitment to transfer Mr. Ameziane because he remains in detention. What was not known until the government filed its status report was that it had not made any meaningful effort to comply with its obligation to transfer him since this case was stayed more than four years ago.

The consequences for Mr. Ameziane (and his family) have been severe.[8] Why the government has not undertaken substantial efforts to transfer Mr. Ameziane for a period of several years is inexplicable but ultimately irrelevant. The fact of the matter is that the government told the Court it would transfer him; the Court relied on that representation to stay his habeas case; and the government has failed to do what it said it would do without a court order. Consequently, the Court should enter an order compelling the government to act. If Mr. Ameziane is still detained thirty days after the status conference, the Court should require the government to show cause why it should not be held in contempt for failing to transfer him, and why the appropriate sanction should not include an order of release.

The Court has broad, inherent power to enter such an order for the purpose of vindicating its own judicial authority, preserving the integrity of these proceedings, and ensuring that habeas corpus is exercised in a meaningful and effective fashion as required by the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 780, 795 (2008) (holding that "the costs of delay can no longer be borne by those who are held in custody," "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing," and "the writ must be effective"). Courts are vested with inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). That inherent power includes the discretion to "fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 44-45; *see also* 18 U.S.C. § 401 (court has power to punish "contempt of its authority"); *Ex parte Robinson*, 19 Wall. 505, 510 (1874) (contempt power is "essential to the preservation of order in

[8] Attached as Exhibit A is a DVD of a short documentary film about Mr. Ameziane, which shows the toll that his detention has had on his family.

judicial proceedings"). The Court should exercise those powers here to remedy a miscarriage of justice.

* * *

Finally, the Court should reject any suggestion that the only remedy available to Mr. Ameziane is to move to lift the stay and conduct a full habeas hearing as if the last four years never happened and this case could somehow be magically transported back to May 2009. The government took the unambiguous position in 2009 that a habeas hearing was unnecessary because there was no practical distinction between a transfer based on his Task Force clearance and the relief that he would have obtained with a habeas grant, and convinced the Court to stay Mr. Ameziane's habeas case indefinitely on that basis. The government should be judicially estopped from changing its litigation position now to argue that if Mr. Ameziane is not content to remain at Guantánamo until some undetermined point in the future he must litigate a full habeas hearing to obtain an order of release because that would better suit the exigencies of the present situation caused by the government's failure to do what it said it would do years ago. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.") (internal citation and quotation omitted); *Zedner v. United States*, 547 U.S. 489, 504 (2006) (generally, judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase") (internal citation and quotation omitted). Any other result would undermine the integrity of the judicial process. *Maine*, 532 U.S. at 749-50 (because judicial estoppel "protect[s] the integrity of the judicial process" and

"prevents parties from 'playing fast and loose with the courts'" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," a court may invoke the doctrine at its discretion) (citations omitted).[9]

In sum, the government's successful attempt to avoid Mr. Ameziane's habeas case, over his objections, based on representations to the Court that he would be transferred, has had inescapable consequences both for the government and Mr. Ameziane. If the Court was "appalled at the situation" four years ago, June 30, 2009 Hearing Tr. at 29, and could determine no "good reason why . . . this gentleman . . . is going to sit down there [in Guantánamo Bay] for as long as humanly possible," July 7, 2009 Hearing Tr. at 17, surely the government cannot provide a satisfactory explanation now. The government has had more than four years to try and release Mr. Ameziane, and it has failed, if only for lack of meaningful effort. The Court should exercise its equitable habeas powers to cut to the heart of this matter, grant this motion and dispose of this case as justice requires, and end Mr. Ameziane's Guantánamo nightmare.

Conclusion

This motion should be granted.

Date: New York, New York
August 12, 2013

Respectfully submitted,

J. Wells Dixon (Pursuant to LCvR 83.2(g))
Shayana D. Kadidal
Susan Hu (Pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS

[9] The Court should likewise reject any suggestion that Mr. Ameziane somehow bears responsibility for the fact that he has not been transferred because he failed to move to lift the stay that the government sought and the Court imposed despite his objections. Mr. Ameziane did not create the current situation confronting the Court, and should not be faulted for believing that the government was making substantial efforts to transfer him over the last four years.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499
wdixon@ccrjustice.org
skadidal@ccrjustice.org
shu@ccrjustice.org

Counsel for Djamel Ameziane

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013, I caused the foregoing Motion for Order of Release and Other Relief, with attachments, to be filed with the Court under seal and served on counsel listed below via overnight mail. I also emailed the motion, without attachments, to counsel listed below on this date.

Andrew I. Warden, Esq.
Daniel M. Barish, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
Andrew.Warden@usdoj.gov
Daniel.Barish@usdoj.gov

Counsel for Respondents

J. Wells Dixon

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE, Petitioner,	:	
v.	:	Civil Action No. 05-392 (ESH)
BARACK OBAMA, *et al.*, Respondents.	:	

REPLY IN FURTHER SUPPORT OF MOTION FOR ORDER OF RELEASE AND OTHER RELIEF

CENTER FOR CONSTITUTIONAL RIGHTS
J. Wells Dixon
Shayana D. Kadidal
Susan Hu
666 Broadway, 7th Floor
New York, New York 10012
Tel. (212) 614-6423
Fax (212) 614-6499

Counsel for Djamel Ameziane

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Petitioner Djamel Ameziane, by and through his undersigned counsel, respectfully submits this reply in further support of his motion for an order of release and other relief.

Preliminary Statement

At the August 14th hearing, the Court ordered the government to file a factual and legal response to Mr. Ameziane's motion. The Court said it was not satisfied with the government's platitudes and vague representations about efforts to transfer Mr. Ameziane, and instructed the government to provide [redacted] more facts about efforts to repatriate or resettle him. The Court specifically directed the government to address efforts since [redacted] the injunction barring Mr. Ameziane's forcible transfer to Algeria expired, and provide more than generalities about [redacted] The Court wanted to know what the government means when it says that [redacted] whether it will actually attempt to transfer him [redacted] whether [redacted] whether there are other obstacles to his transfer; and when he will be transferred. In addition, the Court cautioned that the government's factual response would have some bearing on whether it had acted in good faith or misled the Court about efforts to transfer Mr. Ameziane, particularly given that it blocked his resettlement [redacted] – a fact the government does not dispute.

The government has failed to comply with the Court's order. Apparently ignoring the Court's instructions to move forward rather than look backward, the government's brief largely rehashes the procedural history of this case and recycles complaints about the injunction that barred Mr. Ameziane's transfer to Algeria several years ago. The government also repeats the same non-specific assertions about its focus, desire and intention to transfer Mr. Ameziane that it

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

has made since at least 2009, and laments the NDAA transfer restrictions but provides no evidence that it has attempted to use the certification and waiver mechanism to transfer him.

The opposition is supported by [redacted] useful only to confirm that the government has no idea when or where Mr. Ameziane will be transferred. *Id.*; Gvt. Br. at 12.

The Court should therefore proceed on the factual record as it exists now concerning the government's transfer efforts, and draw from that record the only reasonable conclusion – that the government has not made any meaningful efforts to transfer Mr. Ameziane since this case was stayed in 2009, and that he will not be released in the near future absent a court order. There is simply no basis to conclude that the government will do what it promised to do on its own more than four years ago – release him. Accordingly, the Court should exercise its statutory and equitable habeas authority to grant his habeas petition and order his release without further delay. Alternatively, the Court should enter an order declaring that he falls within the court-order exception to the transfer restrictions set forth in NDAA § 1028(a)(2), which would have the

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

practical effect of eliminating a significant obstacle to his transfer, and/or should order the government to show cause why it should not be held in contempt for failing to transfer him if he is not released within thirty of the Court's ruling on this motion.

Argument

As set forth in Mr. Ameziane's motion for release, the Court is confronted with a situation unique to the particular facts and circumstances of this case. The question to be decided by the Court is not *whether* Mr. Ameziane should be released from Guantánamo, or *where* he should be sent, but whether the Court should enter an order to effectuate the result desired by all parties. The government has exercised its discretion to release Mr. Ameziane and affirmatively disclaimed any need or desire to continue to detain him. Indeed, the government's opposition does not dispute its longstanding determination that there are no "military rationales" for his continued detention; his detention is "no longer at issue"; "the only issue truly remaining is the country to which [he] should be sent"; and "steps are [being] taken to arrange for the end of such custody." Mot. to Stay (filed Dec. 17, 2008). Those matters are conclusively resolved; whatever the case may have been when Mr. Ameziane was sent to Guantánamo more than a decade ago, no one contends that his detention continues to serve any ostensible purpose (*e.g.*, to prevent return to the battlefield). The problem is that for more than four years the government has failed to execute its discretion to release him. The government told the Court that it would transfer him; the Court relied on that representation to stay his habeas case; and the government has failed to do what it said it would do without a court order. Mr. Ameziane's detention is indefinite, arbitrary and perpetual by any measure, and will remain so absent a court order. The government's contention that the Court lacks jurisdiction to remedy this miscarriage of justice is meritless and should be rejected for the following reasons.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

I. The Government Does Not Respond to Mr. Ameziane's Request for an Order Declaring that He Falls Within the Court-Order Exception of NDAA § 1028(a)(2)

In his motion for release, Mr. Ameziane argues that the Court should issue an order declaring that he falls within the court-order exception of NDAA § 1028(a)(2), and thus shall not be subject to the transfer restrictions of NDAA § 1028(b), which form of order would have the practical effect of removing a significant obstacle to his transfer. The government admits that its failure to transfer Mr. Ameziane has been due in part to the transfer restrictions, *see* Gvt. Br. at 23; [redacted] and does not dispute that placing him within the court-order exception would hasten his transfer. But the government claims that the NDAA does not create any new authority for the Court to "enter an order of release." Gvt. Br. at 31-33. It contends that reading the NDAA to confer authority for the Court to "issue orders of release" would conflict with its AUMF detention authority. *Id.* at 32. The government misses the point entirely, and on that basis the Court should grant Mr. Ameziane's actual request for relief absent objection.

Although Mr. Ameziane surely seeks an order granting his habeas petition, *see infra* Part III, he does not seek that relief pursuant to the NDAA. He requests an order declaring that he falls within the NDAA court-order exception *in the alternative* to his request for an order of release.[1] To be clear, his NDAA argument has no bearing on the government's detention authority because it merely asks the Court to remove an obstacle that prevents the government from doing what it claims in its opposition that it has already decided to do in the exercise of its discretion – release him. It is difficult to understand why the government would not join this request, except perhaps because politically it may be afraid of upsetting members of Congress who oppose the closure of Guantánamo, or perhaps because the transfer restrictions are too

[1] *See also* Mot. for Release, [Proposed] Order #2.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

convenient an excuse for President Obama to blame Congress for his own failure to resettle Mr. Ameziane and close the prison.[2] But whatever the government's motivation may be is ultimately irrelevant because the Court plainly has lawful authority to grant the limited relief requested.

As set forth in Mr. Ameziane's motion, the plain language of the NDAA court-order exception authorizes a court to enter an order declaring that the transfer restrictions do not apply to an individual detainee based on the particular facts and circumstances of his case. There is no serious dispute that the exception encompasses more than orders granting habeas petitions. *See* Mot. for Release at 18-19 & n.7. The statute does not reference habeas petitions. It applies broadly to orders "affecting the disposition" of a detainee, which surely include but are not limited to habeas grants. Indeed, nothing about that language indicates that it is limited to orders resolving cases on their merits, or that that was Congress's intention in drafting the exception. Arguments about Congress's intentions are irrelevant as a matter of law given the plain language of the statute, *see United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989), but it would be entirely reasonable to conclude that Congress drafted the exception to allow for flexibility in circumstances where a court (rather than the Executive) concludes it is necessary to declare the transfer restrictions inapplicable to a particular detainee. *See* 28 U.S.C. § 2243.

As further indication that the statute applies to more than habeas grants, the exception references not only orders issued by a "court" but also orders issued by a "competent tribunal." What is meant by "competent tribunal" is unclear; the government contends that this refers to military commissions, although that is merely speculation because nothing in the relevant text or

[2] *See, e.g.*, *Text of President Obama's May 23 Speech on National Security*, Wash. Post, May 23, 2013 ("As president, I have tried to close GTMO. . . . before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them in the United States."), available at http://goo.gl/9fGA9X.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

legislative history refers to commissions. *See* Aug. 14, 2013 Hearing Tr. (Sealed Portion) at 26. In any event, it is a concession that the exception applies to more than habeas grants. If Congress had intended to limit the statute to habeas grants, it would have done so in clear terms. *Cf.* Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1005(e), 119 Stat. 2680, 2741-42 (attempting to strip habeas jurisdiction); Military Commission Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (same). The government's opposition does not address these points, however.

Nor does the government seriously dispute that separate and apart from the legal authority supplied by the NDAA itself, the Court may exercise its independent, equitable habeas authority to enter an order declaring that Mr. Ameziane falls within the court-order exception without actually ordering him released. The government's only response in this regard is to argue that there is no gap to be filled in the NDAA such that the Court could use its equitable habeas authority "to provide the ultimate habeas relief of an order of release." Gvt. Br. at 33 n.10. Again, an order of release is not what Mr. Amezaine seeks pursuant to the NDAA. The government also misapprehends the broad scope of the Court's equitable habeas authority, including its authority to fashion a practical remedy that may not have been applied previously but is necessary and appropriate based on the particular facts and circumstances of the case.

As set forth in Mr. Ameziane's motion, since the 17th Century courts with authority to dispose of habeas petitions have been governed by equitable principles, including the power to impose remedies that are flexible, pragmatic and designed to cut through to the heart of the matter. *See* Mot. for Release at 16-17 (citing cases). Above all, habeas ensures that "errors [are] corrected and 'justice should be done' . . . even where law ha[s] not previously provided the means to do so. . . . There was and is another word for this vast authority to do justice, even in

the absence of previously existing rules or remedies: equity." Paul D. Halliday, *Habeas Corpus: From England to Empire* 87 (2010); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (habeas courts not constrained by black-letter rules from providing greater protection in cases of non-criminal detention). Equity is a concept "associated with the provision of mercy [and] attention to the specifics of every case." Halliday, *supra*, at 89-90. "The key to making judgments about infinitely variable circumstances [is] the consideration of details about why, when, how and by whom people [are] imprisoned." *Id.* at 102. The point is that habeas is an adaptable remedy, the application and scope of which change depending on the totality of facts and circumstances of a case. *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). This makes sense in the separation of powers context, too, of course, because judicial power must include authority to impose a remedy disposing of a matter as law and justice require.

The law is equally clear that courts have habeas authority to enter any form of order, including declaratory relief, where, as here, the requested relief directly compels or indirectly "affects" or hastens the petitioner's release from custody. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release."); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (emphasizing that habeas statute "does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *see also, e.g., Edwards v. Balisok*, 520 U.S. 641 (1997) (after determining that true nature of relief sought is speedier release from imprisonment, Court assumes that habeas court had authority to adjudicate claim); *Brownwell v. Tom We Shung*, 352 U.S. 180, 181 (1956) (non-citizen may test legality of inadmissibility determination in declaratory judgment action or through habeas

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

corpus); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 809 (D.C. Cir. 1988) (holding that habeas is available for petitioner challenging parole eligibility even though he is "not laying claim to immediate release or release in the near future"); *Bourke v. Hawk-Sawyer*, 269 F.3d 1072, 1074 (D.C. Cir. 2001) (holding that habeas is appropriate remedy for petitioner seeking to challenge his eligibility for a sentence reduction); *cf. Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013) (suggesting that habeas may not be available for claims that have only a "probabilistic" impact on custody). *See generally* Halliday, *supra*, at 101 (common law habeas judgments "did not just happen; they were made. Judges, not rules, made them. . . . By negotiating settlements, by constraining – sometimes undermining – the statutes or customs on which other magistrates acted, and by chastising those who wrongfully detained others, the justices defined what counted as jurisdiction and what counted as liberties."). Here, again, the government does not dispute that an order declaring that Mr. Ameziane falls within the NDAA exception would hasten his release.

In addition, the Supreme Court has held repeatedly that statutes will not be construed to displace courts' traditional, equitable habeas authority absent the clearest command. *See* Mot. for Release at 16 (citing *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (citing cases)). Here, of course, the NDAA does not purport to displace the Court's traditional habeas authority, and no court including the D.C. Circuit has held otherwise.[3] To the contrary, the language of the court-order exception ("affecting the disposition" of a detainee) closely tracks the language of 28 U.S.C. § 2243, which recognizes a court's equitable authority to "dispose of [a] matter as law and justice require."

[3] The D.C. Circuit would not likely have occasion to address this Court's authority to declare that Mr. Ameziane or any other detainee falls within the exception to the transfer restrictions because such an order would not constitute a final judgment or otherwise present an appealable issue.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Finally, the government offers no serious response to Mr. Ameziane's argument that the Court must read the NDAA court-order exception broadly to avoid serious constitutional issues that would otherwise arise. *See* Mot. for Release at 19-20. The government does not dispute this well-established canon of statutory construction, but merely points out that Mr. Ameziane has not identified in his motion the constitutional violations that might arise from a narrower reading of the NDAA. Indeed, Mr. Ameziane did not enumerate the violations because they are plainly obvious. For example, as in *Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001), and *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (involving non-citizens outside the United States), a statute causing indefinite detention without any reasonable limitation would raise serious due process concerns. In addition, if the Court were to conclude that it lacked jurisdiction to declare the NDAA transfer restrictions inapplicable to Mr. Ameziane, those restrictions would be facially unconstitutional because they would interfere with the Executive's commander-in-chief power to transfer detainees in military custody. *See* Mem. of Law in Supp. of Pet'r's Mot. for Partial Summ. J. on the First Claim of Pet'r's Am. Pet. for Writ of Habeas Corpus at 10-21, *Ajam v. Obama*, No. 09-cv-745 (RCL) (D.D.C. filed Aug. 16, 2013) (attached hereto as Ex. A); *see also* Statement by the President on H.R. 4310 (Jan. 2, 2013) (NDAA transfer restrictions "hinder[ ] the Executive's ability to carry out its military, national security, and foreign relations activities"), available at http://goo.gl/TR6tjt.

To be clear, although the Court does not need to reach the constitutionality of the NDAA transfer restrictions, Mr. Ameziane adopts the *Ajam* arguments in the alternative, and contends that the Court should decide the constitutionality of the transfer restrictions if it concludes that it lacks authority to declare those restrictions inapplicable to him.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

II. The Government Should Be Judicially Estopped from Changing Its Litigation Position to Argue that Mr. Ameziane's Only Remedy Is to Litigate a Full Habeas Hearing to Obtain an Order of Release

The government opposes Mr. Ameziane's request for an order to show cause why it should not be held in contempt on the grounds that it has not violated any clear order or misled the Court about its efforts to transfer Mr. Ameziane, and has otherwise undertaken meaningful efforts to transfer him. Little more needs to be said here about the government's transfer efforts. It was not Mr. Ameziane's contention that the government lied to or intentionally misled the Court – although as the Court itself has noted the government's factual response bears on those issues.[4] Rather, the point is simply that the government has not done what it said it would do four years ago, causing substantial harm to Mr. Ameziane, and the Court must issue an order to show cause to preserve the integrity of the judicial process and ensure effectiveness of the Great Writ if he is not released within thirty days of the Court's ruling on this motion.

Although the government affirms its commitment to transferring Mr. Ameziane, it concedes that it still has no idea when or where he will actually be transferred. It also contends that an order to show cause is not necessary to vindicate the Court's authority for two reasons. First, the government attempts to exculpate itself from its failure to transfer Mr. Ameziane by blaming the Court, Mr. Ameziane, and Congress -- everyone but itself – for the horrible situation that now exists. Second, the government argues that if Mr. Ameziane is not content to remain at Guantánamo until some undetermined point in the future his only remedy is to move to lift the stay and conduct a full habeas hearing to determine whether he is "part of" the Taliban, Al Qaeda

[4] A finding of bad faith is not required for contempt. *See, e.g., Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.D.C. 1999) ("In this circuit, a finding of bad faith by the contemnor is not required.").

~~PROTECTED INFORMATION FILED UNDER SEAL~~

or associated forces based on alleged events that occurred 15 or 20 years ago. *See* Gvt. Br. at 18-24. But the government is wrong on the facts and the law.

The government contends throughout its opposition brief that it bears no responsibility for the indefinite stay of Mr. Ameziane's habeas case because the Court entered the stay order *sua sponte*. But the fact of the matter is that the government took an unambiguous position in 2008 and 2009 that a habeas hearing was unnecessary because there was no practical distinction between a transfer based on a detainee's Task Force clearance and the relief that he would have obtained with a habeas grant, and convinced the Court to stay Mr. Ameziane's habeas case on that basis. The record in this case is clear.[5] The government advocated for the stay in this case on the ground that "[c]onducting merits proceedings where the United States is seeking to end its custody of Petitioner is not appropriate, where, at the end of the day, even if Petitioner prevails, the parties will be in a similar situation as they are in now, with Respondents seeking to transfer Petitioner out of U.S. custody."[6] The government took the same position in 2009 with respect to

[5] *See, e.g.*, Mot. to Stay (filed Dec. 17, 2008); Mot. for Release at 5, 12-13 (citing record); July 7, 2009 Hearing Tr. at 25-26 ("He gave up his habeas, not voluntarily but because [the government] wanted a stay, and [the Court] agreed that it ought to be stayed because it's a waste of everyone's time. But for him to give that [right] up and be in a worse position than somebody who exercises their habeas rights, [the government] can't have it both ways. It's just not fair."); *see also* Opening Br. for Appellants at 39, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Aug. 6, 2009) (notice of Task Force clearance provided to allow court to stay habeas case pending transfer).

[6] Resp'ts' Reply in Supp. of Mot. to Confirm Designation and Opp'n to Pet'r's Mot. to Unseal or, in the Alternative, for Hr'g to Address Whether to Lift the Stay at 8 (filed June 24, 2009); *see also* Gvt. Br. at 6.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

other cleared Algerian detainees.[7] Indeed, throughout much of 2009 the government went so far as to argue to the Judges of this Court that they lacked jurisdiction to proceed with habeas cases involving detainees who had been approved for transfer by the Task Force because D.C. Circuit and Supreme Court precedent barred them from granting relief beyond that which the government had already determined in the exercise of its discretion to provide – its best efforts to transfer a detainee from Guantánamo.[8]

The record is equally clear that Mr. Ameziane opposed the indefinite stay of this case. As the government notes he filed a motion to unseal his Task Force clearance or lift the stay, arguing among other things that he should not be required to "sit and do nothing" while waiting for the government to transfer him at some undetermined point in the future.[9] As addressed above, the Court also recognized the inherent risk of requiring Mr. Ameziane to give up his habeas rights and end up in a worse position than if he had litigated his habeas case. In addition, the government was well-aware of Mr. Ameziane's objections. The parties litigated this case

[7] *See, e.g.*, Resp'ts' Mot. for Stay of Proceedings and Continuance of Briefing Schedule as Pet'r Has Been Cleared for Transfer by the Gvt., *Naji v. Obama*, No. 05-cv-2386 (RBW) (D.D.C. filed May 20, 2009) ("Respondents should not be forced to litigate the merits of this case when they are presently seeking to relinquish Petitioner from custody.") (attached hereto as Ex. B); J. Status Report, *Mohammed v. Obama*, No. 05-cv-1347 (GK) (D.D.C. filed July 13, 2009) (attached hereto as Ex. C); Resp'ts' Mot. to Reconsider Stay of Proceedings, *Mohammed v. Obama*, No. 05-cv-1347 (GK) (D.D.C. filed July 20, 2009) (attached hereto as Ex. D) (arguing courts can order no more relief than government's best efforts to transfer detainee).

[8] *See, e.g., id.*; Resp'ts' Mem. in Supp. of Stay of Proceedings Involving Pt'rs Who Were Previously Approved for Transfer at 1, *Sanani v. Obama*, No. 05-cv-2386 (RBW) (D.D.C. filed in multiple cases Mar. 9, 2009) (arguing that "cases involving certain petitioners who were previously approved for transfer by the Government are non-justiciable after *Kiyemba*") (attached hereto as Ex. E).

[9] The government points out that Mr. Ameziane had no desire to litigate unnecessarily and was generally amenable to a stay. *See* Gvt. Br. at 20. That is true, and he still has no desire to litigate any issue unnecessarily, but it does not change the fact that he objected to the stay because in 2009, as now, the government could provide no actual evidence that he would be transferred.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

through the D.C. Circuit on the question of whether Mr. Ameziane could publicly disclose his approval for transfer specifically in circumstances where his habeas case had been stayed over his objections.[10] The government never questioned whether Mr. Ameziane had objected sufficiently to the stay – until now, when its longstanding position regarding stays of habeas cases involving cleared detainees no longer serves the exigencies of its current litigation position.

The government should therefore be judicially estopped from taking a fundamentally inconsistent legal position from the one it prevailed on more than four years ago to stop this case. The government represented to Your Honor and the other Judges of this Court that Task Force-cleared detainees including Mr. Ameziane would receive the same relief as a result of the government's discretionary decision to approve them for transfer as they would from orders granting their habeas petitions. The government said that an order of release was not needed, and, further, would be outside the Court's jurisdiction, and it prevailed on that claim and obtained stays of many detainee cases. Some of those detainees have since been released, but Mr. Ameziane remains in Guantánamo without foreseeable end because the government has not executed its discretion to release him without a court order.

The simple fact of the matter is that regardless of its motive, the government has failed for years to abide by its commitment to transfer Mr. Ameziane without a court order mandating

[10] *See* Opening Br. for Appellee at 27, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Aug. 27, 2009) ("There is no serious dispute that Ameziane's approval for transfer is inextricably intertwined with the merits of his habeas petition. This habeas case has been stayed and administratively closed at the request of the government, over Ameziane's objections, based on his approval for transfer by the Task Force."); Corrected Reply Br. of Appellants at 4, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Sept. 11, 2009) ("Petitioner has argued that he is harmed because he is unable to litigate his habeas case.").

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

his release.[11] This has had inescapable consequences for Mr. Ameziane, causing him substantial unfair prejudice, and should likewise bind the government to its prior position.[12] It would undermine the integrity of these proceedings and ultimately the effectiveness of the Great Writ to allow the government to escape legal positions that it prevailed on more than four years earlier to avoid a habeas hearing because they are no longer convenient. Indeed, it would sanction what the Supreme Court clearly held in *Boumediene* was impermissible – further inordinate delay. Moreover, by arguing that Mr. Ameziane could have moved to lift the stay again at any point in time if he was unsatisfied with the government's failure to transfer him, the government rather disingenuously attempts to place the burden of delay squarely his shoulders, contrary to the Supreme Court's mandate that detainees shall not bear such costs. *See Boumediene v. Bush*, 553 U.S. 723, 783, 795 (2008) (holding that "the costs of delay can no longer be borne by those who are held in custody," "[t]he detainees in these cases are entitled to a prompt habeas corpus

[11] The government argues in part that its failure to transfer Mr. Ameziane should be excused because it could not have anticipated enactment of the NDAA transfer restrictions. Gvt. Br. at 18-19, 22-23. While it may be true that the restrictions were unexpected, that does not explain the government's efforts to block his resettlement [redacted] prior to enactment of the transfer restrictions, or the government's failure to attempt to certify or waive him for transfer to any country pursuant to the NDAA since its enactment.

[12] The government's claim that judicial estoppel is inappropriate because the stay does not involve a substantive issue, Gvt. Br. at 22, is baseless. The harm to Mr. Ameziane is substantive, not procedural. Delay means more indefinite detention, and that *itself* is the harm that Ameziane filed his habeas petition in order to remedy more than eight years ago. *See Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) ("This is a habeas corpus proceeding, and thus particularly inappropriate for any delay."). Nor is it necessary to assume that Mr. Ameziane would have prevailed at a full habeas hearing in 2009 in order to grant relief; the point is that he was denied the opportunity to try to obtain a court order, and that has caused him substantive harm that cannot be undone.

hearing," and "the writ must be effective"); *see also Harris v. Nelson*, 394 U.S. 286, 291-92 (1969) ("habeas corpus proceeding must not be allowed to founder in a 'procedural morass.'").[13]

It is no longer 2009, and Mr. Ameziane simply cannot relive the intervening years that he has suffered and lost in custody through no fault of his own. To quote this Court, it is time to move forward and unhelpful to look backward. *See* Aug. 14, 2013 Hearing Tr. (Sealed Portion) at 44. The Court should therefore exercise its discretion and order the government judicially estopped from proceeding on the basis that a full habeas hearing is necessary for Mr. Ameziane to obtain relief because it is now called by the Court to account for its failure over several years to transfer him – and worse, after blocking his resettlement [redacted].[14] And if Mr. Ameziane is still detained at Guantánamo thirty days after the Court rules on his motion for release, it should be ordered to appear and show cause why it should not be held in contempt.

III. Mr. Ameziane's Arbitrary, Indefinite Detention Violates the AUMF, *Hamdi* and the Laws of War, and D.C. Circuit Precedent Does Not Hold Otherwise

In asking the Court to grant his habeas petition, Mr. Ameziane argues that his detention is unlawful because it is arbitrary, indefinite, and perpetual. The government long ago renounced any need or desire to detain him, and his detention no longer serves any ostensible purpose (*e.g.*, to prevent return to the battlefield). Instead, he continues to be detained simply because the government has not made any meaningful efforts to execute its discretion to release him. His

[13] As explained at the August 14th hearing, throughout the stay the government continued to represent that it was working "diligently" to transfer Mr. Ameziane, and he relied on those representations, at least until receiving the government's status report that prompted his motion for release. *See, e.g.*, Letter from U.S. Dep't of State to Inter-American Comm'n on Human Rts., July 24, 2012 (attached as Exhibit A to Mot. for Status Conference (dkt. no. 302)); Jan. 19, 2012 Email from Gvt. Counsel (attached hereto as Ex. F).

[14] The government's claim that it should not be judicially estopped because its failure to transfer Mr. Ameziane touches on public policy, Gvt. Br. at 22, is also baseless. The government is no more entitled to play "fast and loose" with the Court than a private party in a situation like this that arises merely as a litigation tactic. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

detention thus violates the AUMF's qualified force authorization and *Hamdi*'s clear holding that indefinite or perpetual detention for no purpose is unlawful; and, even if indefinite detention were authorized, the traditional law-of-war rationale has since unraveled. Mr. Ameziane further argues that the Court must construe the AUMF not to authorize his detention under these circumstances in order to avoid serious constitutional issues that would arise; and in any case the Court has broad, equitable habeas authority to order his release.

The government does not dispute most of these points in its opposition. It does not dispute that Mr. Ameziane's continued detention no longer serves any ostensible purpose such as to prevent return to the battlefield. It does not dispute its longstanding determination that there are no "military rationales" for his continued detention; his detention is "no longer at issue"; "the only issue truly remaining is the country to which [he] should be sent"; and "steps are [being] taken to arrange for the end of such custody." Mot. to Stay (filed Dec. 17, 2008). And, as addressed above, it does not seriously dispute Mr. Ameziane's constitutional avoidance argument or the scope of the Court's statutory and equitable habeas authority. The government's only response is to contend that Mr. Ameziane's threat level is irrelevant to whether he continues to be lawfully detained, and to claim that he may be held until the end of hostilities regardless of the particular facts and circumstances of his case, including, specifically, whether his ongoing detention continues to serve any ostensible purpose. The government is wrong in each respect.

The government first argues that "[t]he threat posed by Petitioner is not a matter for the Court to address as part of the Petitioner's habeas case." Gvt. Br. at 26. But Mr. Ameziane does not ask the Court to evaluate his threat level. As explained at the outset of this reply, the issues to be decided by the Court are not whether he should be released or where he should be sent, but rather whether a court order is necessary to effectuate the result that all parties seek – his release.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Whether Mr. Ameziane poses a threat and whether he can and should be safely released have already been conclusively resolved by the government itself in the exercise of its discretion; but again, those determinations have had serious, substantive consequences in terms of the conduct of this habeas case that bind the government. Relatedly, as explained in his motion for release, Mr. Ameziane does not rely solely on his approval for transfer as a basis for habeas relief, but rather on the totality of facts and circumstances unique to his particular case, including the government's conclusion that there are no continuing "military rationales" for his detention and the stay of this case for a period of several years without meaningful efforts to transfer him.

The government's second claim that Mr. Ameziane may be detained until the end of hostilities regardless of whether his detention continues to serve any ostensible purpose should also be rejected for several reasons.

As set forth in Mr. Ameziane's motion, the AUMF authorizes the use of "necessary and appropriate force [against a narrow set of groups or individuals] in order to prevent any future acts of international terrorism against the United States." Mot. for Release at 13-14. It does not authorize unlimited force, or force not tied to the express purpose of preventing future acts of terrorism. Nor does it directly authorize detention. As the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004), the power to detain may be inferred from the right to use force under "longstanding law-of-war principles." The Court further explained that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518; *id.* at 519 (although the AUMF "does not use specific language of detention," detention "to prevent a combatant's return to the battlefield is a

fundamental incident of waging war" and thus permitted).[15] The Court concluded that detention is authorized in the "narrow circumstances" where necessary to prevent return to the battlefield, but may last "no longer than active hostilities." *Id.* at 520 (citing Third Geneva Convention art. 118). It also concluded that indefinite or perpetual detention is not authorized. *Id.* at 521; *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009); *cf. Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).[16]

Yet indefinite and perpetual detention is precisely what the government advocates for here, where, again, it has disclaimed any need or desire to detain. In support of this contention, the government cites the D.C. Circuit's decision in *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), which held that "release is only required when the fighting stops." The government also cites *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), which merely quotes the same excerpt from *Al-Bihani*. But its reliance on those cases is misplaced for several reasons.

First, the portion of *Al-Bihani* cited is no longer binding law; it is dicta, as later explained by a majority of Judges of the D.C. Circuit in *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) ("[A]s the various opinions issued in the case indicate, the panel's discussion of [the role

[15] *See also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.") (quoted in *Hamdi*, 542 U.S. at 518).

[16] As Justice Souter explained in his opinion concurring in the *Hamdi* judgment, when a court is asked to infer detention authority from a wartime resolution such as the AUMF, it must assume that Congress intended to place no greater restraint on liberty than was unmistakably indicated by the language it used, which, given the qualified "necessary and appropriate" force language of the AUMF, necessarily suggests that AUMF detention authority is equally limited. 542 U.S. at 544 (quoting *Ex Parte Endo*, 323 U.S. 283, 300 (1944)). Constitutional avoidance also requires such a reading of the AUMF, as discussed in Mr. Ameziane's motion and essentially ignored in the government's opposition. Mot. for Release at 15 (citing *Zadvydas* and *Clark*); Gvt. Br. at 29 n.9 (arguing *Zadvydas* and *Clark* are irrelevant because this is not an immigration case).

of international law-of-war principles in interpreting the AUMF] is not necessary to the disposition of the merits." (citing *Al-Bihani*, 590 F.3d at 871, 873-74)).

Second, neither *Al-Bihani* nor *Awad* involve facts or circumstances like those present here. Those cases involved detainees who the government had not affirmatively disclaimed any need or desire to continue to detain; they were not approved for transfer and the government wanted to hold them. Those detainees argued instead that they should be released because the government had failed to prove that they were too dangerous to release, which the Circuit held was not required because they were determined to be "part of" the Taliban, Al Qaeda or associated forces and thus presumed to present a continuing threat. In *Al-Bihani* specifically, the D.C. Circuit rejected the petitioner's contention that he was no longer detainable under the laws of war by remarking that this would constitute a "prelude to defeat" because the initial success of the U.S. war effort would be lost and "the victors would be commanded to constantly refresh the ranks of the fledgling [Afghanistan] democracy's most likely saboteurs." *Id.* Again, far from being a "likely saboteur," the government has said that there are no "military rationales" for Mr. Ameziane's continued detention and he should be released. As addressed in his motion for release, *see* Mot. for Release at 15-16, no decision of the D.C. Circuit has addressed the narrow question presented here – whether indefinite detention without foreseeable end is lawful in circumstances where the government has exercised its discretion and has disclaimed any need or desire to hold a detainee, convinced a court to deny the detainee a habeas hearing on the basis that it would release the detainee, and then failed over the course of several years to take any

serious action to execute its discretion and release him, thereby causing him substantial harm. This case is unique.[17]

Third, the portion of *Al-Bihani* that the government relies on merely recites the same law-of-war principle cited by the Supreme Court in *Hamdi*, *i.e.*, that detention may last "no longer than" the end of hostilities. *Compare Hamdi*, 542 U.S. at 520 (citing Third Geneva Convention art. 118), *with Al-Bihani*, 590 F.3d at 874 (citing Third Geneva Convention art. 118). In other words, the cases cite the same law-of-war authority for the uncontroversial proposition that the end of hostilities provides a presumptive end-point for wartime detentions. But nothing about that end-point suggests that the presumption may not be overcome based on the government's own discretionary actions, or that release of some detainees may not otherwise be required before the end of hostilities. Indeed, the D.C. Circuit's recent decision in *Al-Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013), expressly recognizes that there may be circumstances where a detainee who is determined by a court to be "part of" the Taliban may nonetheless be entitled to a grant of his habeas petition because his release is required by the laws of war, including the Geneva Conventions and U.S. laws or regulations incorporating the Conventions. It is simply incorrect to contend that the D.C. Circuit has authorized the continuing, indefinite detention of detainees until the last shot is fired in the so-called Global War on Terror without regard to military necessity or other intervening facts and circumstances in a particular case.

[17] The government's reliance on the Memorandum Opinion in *Alsawam v. Obama*, No. 05-cv-1244 (CKK) (D.D.C. Nov. 19, 2012), is equally misplaced. The detainee in that case, who is slated for prosecution rather than transfer, *see* Gvt. Br., Ex. 9, at 3, did not seek an order granting his habeas petition. He sought a preliminary injunction granting interim relief to speed his administrative Periodic Review Board hearing (which would determine whether he posed a continuing threat, *see* Exec. Order 13,567, § 2, 76 Fed. Reg. 13277, 13277 (Mar. 7, 2011), or a merits decision in his habeas case. It simply has no bearing on the issues here, except its citations to *Al-Bihani* and *Awad*, addressed above.

It also bears emphasis that under the laws of war a detainee must be released prior to the end of hostilities in circumstances where detention is no longer necessary to prevent return to the battlefield. In international armed conflicts, fought between nation-states and governed by the Third and Fourth Geneva Conventions,[18] "[t]he grounds for initial or continued detention have been limited to valid needs," and detention is not authorized where it no longer serves an imperative security purpose (in the case of civilians) or where a detainee is "no longer likely to take part in hostilities against the Detaining Power" (in the case of combatants). Jean-Marie Henckaerts & Louise Doswald-Beck, 1 *Customary International Humanitarian Law*, Rule 99, at 344-45 (Int'l Comm. of the Red Cross, Cambridge Univ. Press reprtg. 2009) [hereinafter Henckaerts]. Additional Protocol I to the Geneva Conventions, which the United States has signed (but not ratified), and recognizes as binding customary international law, also specifies that "[a]ny person . . . detained or interned for actions related to the armed conflict . . . shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 16 I.L.M. 1391, 1410 ("Additional

[18] Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316 ("Third Geneva Convention"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516 ("Fourth Geneva Convention").

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Protocol I").[19]

This limit on detention is even more pronounced in non-international armed conflicts, which are waged not between nation-states but with armed groups resulting a threshold of violence that exceeds mere "internal disturbances and tensions" such as riots or sporadic violence, and which are not subject to the extensive regulations of the Third and Fourth Geneva Conventions. Non-international armed conflicts, including the conflict with Al Qaeda,[20] are instead governed by Common Article 3 of the Conventions, which sets forth a minimum baseline of human rights protections, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006), and Additional Protocol II of the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 16. I.L.M. 1442 ("Additional Protocol II"). In non-international armed conflicts, "the need for a valid reason for the deprivation of liberty concerns both the initial reason for such deprivation and the continuation of such deprivation." Henckaerts, *supra*, Rule 99, at 348; *id.*, Rule 128(C), at 451 ("Persons deprived of their liberty in

[19] The government concedes that it is legally bound by Article 75 of Additional Protocol I. *See* Fact Sheet: New Actions on Guantánamo and Detainee Policy, The White House, Mar. 7, 2011, available at http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. The government has also taken the position that international law-of-war principles limit its AUMF detention authority: "Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict." Resp'ts' Mem. Regarding the Gvt's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In Re Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (dkt. no. 1689) (citing Geneva Conventions).

[20] The government concedes that the ongoing conflict is governed by Common Article 3. *See* Exec. Order 13,492, § 6, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.'").[21]

In the domestic context, too, of course, non-criminal detention violates due process where the purpose of detention is no longer served. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (upholding statute requiring civil confinement for sex offenders in part because it provided for immediate release once an individual no longer posed a threat to others); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (ordering petitioner's release from commitment to mental institution because there was no longer any evidence of mental illness); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (even if civil commitment was founded upon a constitutionally adequate basis, it "[cannot] constitutionally continue after that basis no longer existed"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (state may no longer hold an incompetent criminal defendant in pretrial civil confinement when probability that defendant might regain capacity to stand trial becomes remote because "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

International human rights law likewise further supports the rule that continued detention that no longer serves its ostensible purpose is arbitrary and unlawful. *See* International Covenant on Civil and Political Rights art. 9.1, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S.

[21] Examples of state practice relating to Customary International Humanitarian Law Rule 128 are available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128. The government has also acknowledged elsewhere that the indefinite detention of cleared detainees negatively impacts its ability to comply with Common Article 3. *See* ADM Patrick Walsh, USN, Vice Chief of Naval Operations, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* 74 (2009) ("[T]he ability of detainees to understand their future . . . will impact the long-term ability to comply with Common Article 3 of the Geneva Conventions."), available at http://goo.gl/dX8LT5.

171 (*entered into force* Mar. 23, 1976). As discussed, there can scarcely be a clearer case of arbitrary detention than one such as this in which Mr. Ameziane remains indefinitely detained for lack of meaningful efforts to try to release him, and because of efforts to block him from transfer opportunities that he has generated himself, but not because anyone thinks he should continue to be detained.

Finally, the Court should conclude that the government's proffered "until-hostilities-end" rationale for continuing detention has eroded in the particular context of this case, and use its equitable habeas authority, construed in conjunction with principles of constitutional avoidance, to grant Mr. Ameziane's petition and order his release. *See* Mot. for Release at 14-15, 16-17. The government's response to this argument is simply to point out that fighting continues in Afghanistan, and that the *Hamdi* plurality endorsed ongoing detention in 2004 because active combat continued there at that time. *See* 542 U.S. 507, 521 (2004). But again, Mr. Ameziane's point is not that "the war is over" and the fighting has ended, but rather that the practical circumstances of the conflict are at this point, and in his case particularly, so entirely unlike those that have informed the development of the traditional laws of war that any authority to detain for the duration of the relevant conflict has unraveled. *See id.* ("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.").

This point is clear in several respects: First, the ongoing fight against terrorism is now the longest military conflict in U.S. history, bar none.[22] "[T]his conflict has come to feel like a

[22] It is even longer than the Vietnam War, as measured from the Gulf of Tonkin Resolution in 1964 to the evacuation of Saigon in 1975.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Forever War: it has changed the nature of our foreign policy and consumed our new Millennium. It has made it hard to remember what the world was like before September 11." Harold H. Koh, Legal Adviser (2009-2013), U.S. Dep't of State, *How to End the Forever War?*, Speech Before the Oxford Union, May 7, 2013.[23] Second, Osama Bin Laden and Al Qaeda's core leadership are dead, imprisoned or detained, and the United States is drawing down troops from Afghanistan.[24] Third, the fighting that does continue globally largely involves Al Qaeda-inspired "franchise" groups that likely did not exist or no one had heard of (including Mr. Ameziane) at

[23] *See also* Jeh Johnson, General Counsel, U.S. Dep't of Def., *The Conflict Against Al Qaeda and Its Affiliates: How It Will End?*, Speech Before the Oxford Union, Nov. 30, 2012 ("In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are . . . near the beginning of the end. . . . [But] there will come a tipping point . . . such that al Qaeda as we know it . . . has been effectively destroyed.").

[24] *See, e.g., Text of President Obama's May 23 Speech on National Security*, Wash. Post, May 23, 2013, *supra* note 2 ("Today, Osama bin Laden is dead, and so are many of his top lieutenants. There have been no large-scale attacks on the United States, and our homeland is more secure. . . . Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. . . . They have not carried out a successful attack on our homeland since 9/11. "); Remarks by the President in the State of the Union Address, Feb. 12, 2013 (announcing withdrawal of 34,000 U.S. troops from Afghanistan over the next twelve months, and stating "the organization that attacked us on 9/11 is a shadow of its former self," and "by the end of next year, our war in Afghanistan will be over"), available at http://www.whitehouse.gov/ the-press-office/2013/02/12/remarks-president-state-union-address; Scott Wilson & David Nakamura, *Obama Announces Reduced U.S. Role in Afghanistan Starting This Spring*, Wash. Post, Jan. 11, 2013 (President Obama: "We achieved our central goal, or have come very close to achieving our central goal, which is to de-capacitate al-Qaeda, to dismantle them, to make sure that they can't attack us again."); Leon E. Panetta, Sec'y of Def., *The Fight Against Al Qaeda: Today and Tomorrow*, Speech at The Center for a New American Security, Nov. 20, 2012 ("Over the last few years, al-Qaeda's leadership, their ranks have been decimated. . . . As a result of prolonged military and intelligence operations, al-Qaeda has been significantly weakened in Afghanistan, and Pakistan. Its most effective leaders are gone. Its command, and control have been degraded, and its safe haven is shrinking. Al-Qaeda's ability to carry out a large scale attack on the United States, has been seriously impacted. And as a result, America is safer from a 9/11 type attack."), available at http://www.defense.gov/speeches/speech.aspx?speechid=1737; *see also* Mark Mazzetti & Matthew Rosenberg, *U.S. Considers Faster Pullout in Afghanistan*, N.Y. Times, July 8, 2013; Inaugural Address by President Barack Obama, Jan. 21, 2013 ("A decade of war is now ending."), available at http://goo.gl/8JFl4V.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

the time that he was brought to Guantánamo more than a decade ago.[25] However, the problem is one of definition. "[A]s long as there are bands of violent Islamic radicals anywhere in the world who find it attractive to call themselves Al Qaeda, a formal state of war may exist between Al Qaeda and America. The Hundred Years War could seem a brief skirmish in comparison."[26] And the government, for its part, offers no indication that it intends to release Mr. Ameziane or the other Guantánamo detainees when the last U.S. combat soldier leaves Afghanistan in 2014.[27] It simply cannot be that Mr. Ameziane's ongoing, indefinite detention – potentially for life – has any analogue or precedent under the traditional laws of war. We are certainly aware of none.

Conclusion

Mr. Ameziane has been detained for too long, and for no good reason. The Court should grant his motion and ensure that justice is done.

[25] Steve Coll, *Name Calling*, The New Yorker, Mar. 4, 2013 ("Experts refer to these groups by their acronyms, such as AQI (Al Qaeda in Iraq), AQAP (Al Qaeda in the Arabian Peninsula, mainly in Yemen), and AQIM (Al Qaeda in the Islamic Maghreb, the North African group that has recently been attacked by French forces in Mali). Each group has a distinctive local history and a mostly local membership. None have strong ties to 'core Al Qaeda'"), available at http://www.newyorker.com/talk/comment/2013/03/04/130304taco_talk_coll.

[26] *Id.*; *see also* Koh, *supra*. ("[I]f we are too loose in who we consider to be 'part of' or 'associated with' Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever.").

[27] It contends that continuing detention is authorized based on *Hussain v. Obama*, 718 F.3d 964 (2013), but the detainee in that case raised none of these issues.

~~PROTECTED INFORMATION – FILED UNDER SEAL~~

Date: New York, New York
September 20, 2013

Respectfully submitted,

J. Wells Dixon (Pursuant to LCvR 83.2(g))
Shayana D. Kadidal
Susan Hu (Pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499
wdixon@ccrjustice.org
skadidal@ccrjustice.org
shu@ccrjustice.org

Counsel for Djamel Ameziane

~~PROTECTED INFORMATION - FILED UNDER SEAL~~

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2013, I caused the foregoing Reply in Further Support of Motion for Order of Release and Other Relief, with attachments, to be filed with the Court under seal and served on counsel listed below via overnight mail. I also emailed the filing to counsel listed below on this date.

Andrew I. Warden, Esq.
Daniel M. Barish, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
Andrew.Warden@usdoj.gov
Daniel.Barish@usdoj.gov

Counsel for Respondents

J. Wells Dixon