

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

MAJID KHAN,)	
)	
Petitioner,)	Civil Action No. 06-1690 (RBW)
v.)	
)	
BARACK OBAMA, <i>et. al.</i> ,)	
)	
Respondents.)	
)	

**RESPONDENTS’ REPLY TO MAJID KHAN’S SUPPLEMENTAL MEMORANDUM
REGARDING THE GOVERNMENT’S DETENTION AUTHORITY**

The Government hereby responds to petitioner’s supplemental memorandum regarding the Government’s authority to detain him. Petitioner Khan, whom the Government has detained based on evidence that he was part of al-Qaida, is a Pakistani citizen captured in Pakistan in 2003. He argues that he cannot be detained unless he is criminally prosecuted, notwithstanding Congress’s express authorization in the Authorization for Use of Military Force (“AUMF”) to use “all necessary and appropriate force” against organizations responsible for the September 11 attacks (including al-Qaida), and the Supreme Court’s holding in *Hamdi v. Rumsfeld*, 548 U.S. 507, 518 (2006), that military detention is a necessary incident to that use of force. Contrary to his argument, in expressly authorizing the use of all necessary and appropriate military force against non-state actors such as al-Qaida, the AUMF cannot be read to *sub silentio* exclude military detention of such non-state actors. The interpretation of the Government’s detention authority under the AUMF is necessarily informed by principles derived from the law of war developed in, among other things, international armed conflicts, but the Government’s detention authority is not contingent upon the existence of an *international* armed conflict with respect to

any given actor. Any other interpretation would ignore the AUMF's plain language and obvious purpose to eliminate the threat posed by the Taliban and al-Qaida.

ARGUMENT

THE GOVERNMENT'S DETENTION AUTHORITY UNDER THE AUMF PLAINLY REACHES AL-QAIDA FORCES

Petitioner's argument that the AUMF does not authorize detention of al-Qaida forces is without merit. First, contrary to petitioner's argument, the force authorized in the AUMF, which was clearly directed in large part *at al-Qaida forces*, expressly reaches non-state actors such as al-Qaida. Congress authorized the President to use all necessary and appropriate force against "the nations, *organizations*, or *persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations." 115 Stat. 224 (emphasis added). The AUMF includes no limitation as to the type of conflict in which the United States may use such force. AUMF, § 2(a).

Second, that the AUMF does not expressly mention detention is irrelevant. The Supreme Court expressly held in *Hamdi* that detention is a necessary incident to the use of force authorized in the AUMF. *See* 542 U.S. at 518 (longstanding law-of-war principles recognize that the capture and detention of enemy forces "are 'important incident[s] of war'") (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)). *Hamdi* did not limit the detention authorized by the AUMF to cases of international conflict or to cases in which enemy forces satisfy the prisoner-of-war provisions of Article 4 of the Third Geneva Convention, the limits petitioner urges here. Rather, the Court determined that the scope of detention authority would have to be decided in future cases. *Id.* at 522 n.1.

Third, petitioner's argument that whatever detention authority the Government had at the

beginning of Operation Enduring Freedom has now vanished due to a change in the character of the conflict – from international to non-international – defies commonsense and is contrary to the purpose of the AUMF. The purpose of the AUMF is to “prevent any future acts of international terrorism.” 115 Stat. 224. Congress therefore authorized the President to “take action to deter and prevent acts of international terrorism against the United States.” *Id.* Hostilities in Afghanistan are ongoing. More than 500 Americans have been killed since the war began. Last year was the deadliest for American troops, due to a sharp increase in attacks by Taliban militants and its al-Qaida allies.¹ Under the plain language of the AUMF, and consistent with the law of war, the Government can detain enemy forces to prevent them from returning to the battle. Because the statute’s principal purpose is to eliminate the threat posed by al-Qaida and the Taliban, individuals who are part of al-Qaida forces are legally detainable under the AUMF.²

Moreover, regardless of the characterization of the conflict, as the Government established in its initial brief Common Article 3 of the Geneva Conventions and Additional Protocol II contemplate detention in non-international armed conflicts.³ *See* Gov’t Mem at 9-10. And the AUMF itself authorizes detention of non-state actors. Because the use of force is governed by the laws of war, it is appropriate and necessary to look to applicable principles of

¹ *See* Jason Straziuso, *2008 Now Deadliest Year in Afghanistan*, Associated Press (September 11, 2008), <http://www.washingtontimes.com/news/2008/sep/11/us-death-in-afghanistan-makes-2008-deadliest-year/>.

² Under traditional law-of-war principles, it does not matter that petitioner allegedly was not personally involved in the September 11 attacks. It is sufficient that he is a member of the enemy forces, namely al-Qaida. *See* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), ¶ 4789, <http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument>.

³ The United States did not ratify Additional Protocol II. Certain of its provisions, however, may constitute customary international law.

the Geneva Conventions and the customary laws of war in exercising that authority. Adherence to those principles in non-international armed conflict is expressly encouraged in Common Article 3. *See* Article 3, Convention (III) Relative to the Treatment of the Prisoner of War, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. (“The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”). Indeed, petitioner’s suggestion that the rules governing international armed conflict are inapposite because the conflict with al Qaeda is non-international in character misunderstands that the restrictions applicable to States in international armed conflict are more extensive than those applicable in non-international armed conflict. Thus, to the extent that the rules in international armed conflict clearly permit military detention in international armed conflict, states can resort to analogous forms of military detention in non-international armed conflict.

Finally, petitioner argues that *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), establishes that he must be criminally tried or released. In that case, the Court granted the habeas petition of an American citizen who was detained in Indiana, outside the Confederacy. The issues there included whether a citizen, with full constitutional rights, and not acting under the direction of Rebel armed forces, could be militarily detained and subjected to a summary military commission trial and hanged, even though he was arrested in Indiana, where the civil courts were open and available. That case is irrelevant here. Almost all of the individuals at issue here were captured in and around Afghanistan, incident to an armed conflict against a foreign enemy force. Not even petitioner questions the Government’s right to detain members of militias associated with a foreign state who are apprehended outside the United States. Longstanding law-of-war principles support the detention of such enemy forces for the duration of hostilities, and the

AUMF itself explicitly authorizes force against such armed groups *whether or not* they belong to a state within the meaning of Article 4. Accordingly, *Ex Parte Milligan* is inapposite.

CONCLUSION

For the foregoing reasons, petitioner's arguments should be rejected.

Dated: March 23, 2009

Respectfully submitted,

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