IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MUHAMMADI DAVLIATOV a/k/a UMAR HAMZAYEVICH ABDULAYEV (ISN 257), *Petitioner*,	:	Civil Action No. 15-1959 (RBW)
v.	:	
BARACK OBAMA, *et al.*, *Respondents*.	:	

PETITIONER'S REPLY IN FURTHER SUPPORT OF MOTION FOR JUDGMENT, AND IN OPPOSITION TO CROSS-MOTION TO DISMISS

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Petitioner Muhammadi Davliatov a/k/a Umar Hamzayevich Abdulayev (ISN 257) respectfully submits this reply in further support of his motion for judgment and in opposition to the government's cross-motion to dismiss his habeas petition.[1] Petitioner's motion should be granted and the government's cross-motion should be denied. Petitioner should be released.

Preliminary Statement

Petitioner has been detained without charge at Guantánamo for fourteen years—longer than the duration of any prior military conflict in U.S. history or, to our knowledge, the history of modern warfare. His detention, now beginning its fifteenth year, has gone on for too long, and is arbitrary and perpetual by any reasonable measure. Indeed, Petitioner is aware of no other instance in which a U.S. court (or a court at common law) has sanctioned non-criminal detention for such a lengthy period of time, and without foreseeable end. This is particularly so where, as here, the person has been approved for transfer for half the period of his detention but remains in custody because of bureaucratic intransigence rather than what he allegedly did or who he allegedly associated with more than a decade ago. Not only has Petitioner been approved for transfer since at least 2008, but the government has made repeated representations to this Court and Petitioner for more than seven years that his detention is no longer at issue; there are no longer any military reasons to hold him; he will be released expeditiously; and this determination is final. The government does not dispute these representations or retreat from its purported commitment to release Petitioner. Nor does it dispute that the Court and Petitioner relied on these representations, or that Petitioner has suffered substantial prejudice resulting from the government's failure to do what it said it would do without a court order—transfer him.

[1] Petitioner has filed through the Court Security Office a supplement to this reply brief.

The government attempts to minimize the effect of the unambiguous litigation position that it took to avoid Petitioner's challenge to the legality of his initial capture and detention—that a habeas hearing was unnecessary because there was no practical distinction between a transfer based on a Task Force clearance and the relief that he would have obtained with a habeas grant—but which no longer serves the exigencies the present situation caused by its failure to do what it said it would do seven years earlier. First, the government frames its opposition in terms of the Guantánamo Review Task Force's discretionary decision to transfer Petitioner in 2009, which it claims was not an admission that he posed no threat or that his detention served no purpose. But the government does not address its unqualified decision to transfer him in 2008, or its various other admissions including (among others) that there were no longer any military rationales for his detention and his detention was no longer at issue. The government's brief is conspicuously silent as to the additional arguments that it made to the Court and Petitioner when moving to stay his habeas case over his objections. Second, where the government does briefly acknowledge its many promises to release Petitioner, it argues "nothing in these statements indicates that Respondents considered Petitioner's transfer designation to carry with it the substantive effect of a judicial order for release." Gvt. Br. at 13. But as cited throughout Petitioner's motion for judgment, this is precisely what the government told this Court and Petitioner many years ago when it undermined his initial attempt to litigate his habeas case—that Petitioner was receiving by executive action *all of the relief* that he would be entitled to if he prevailed in his habeas case and obtained a court order of release. *See* Mot. at 5-10.

The government attempts to absolve itself of responsibility for its failure to transfer Petitioner over more than seven years. It blames Judge Hogan for entering an injunction barring Petitioner's transfer to Tajikistan in October 2008, where he would face persecution including

torture and possible death, but offers no explanation as to why it did not try to resettle him elsewhere before the injunction expired by its own terms at least by December 2010. Gvt. Br. at 7. The government also concedes that prior to this time the Tajik government had communicated its refusal to accept Petitioner because it did not recognize him as a Tajik citizen. Wolosky Decl. ¶ 5 (attached as Ex. 1 to Gvt. Br.).[2] Again, however, the government apparently took no steps to resettle him. Indeed, the government does not dispute its refusal to permit Spain to interview Petitioner for resettlement in May 2010. Gvt. Br. at 11 n.6. In other words, the government took no meaningful action to transfer Petitioner anywhere between October 2008 and December 2010, and in at least one instance blocked his potential transfer.

The government also concedes it took no action to transfer Petitioner anywhere between January 2011 and August 2013, purportedly because of foreign transfer restrictions enacted by Congress beginning in January 2011. The government contends that an onerous requirement for the Secretary of Defense to issue a written certification prior to transferring a detainee from Guantánamo, which was included in the National Defense Authorization Act for Fiscal Years 2011, 2012 and 2013, "substantially delayed the progress of transferring Guantanamo detainees." Wolosky Decl. ¶ 6. The government notes that once the certification requirement went into effect on January 7, 2011, only four detainees were transferred until August 2013, and all four fell under legislative exceptions to these restrictions. But the government offers no explanation as to why it did not attempt to certify Petitioner (or other detainees) during this time or invoke one of the legislative exceptions, including in particular the court-order exception addressed below. *See infra* IV.

[2] This is because he had been outside of Tajikistan for more than five years, which under Tajik law divests individuals of their citizenship. *See, e.g.*, O'Hara Decl. ¶ 6 (Ex. A, attached hereto.)

The government further concedes that it made no efforts to resettle Petitioner between August 2013 and January 2014, during which time approximately eleven detainees were certified and transferred from Guantánamo. Instead, between August 2013 and the end of October 2013, the government apparently took no action at all to transfer Petitioner anywhere. And for two months thereafter, the government hoped that [redacted] Wolosky Decl. ¶ 8; *see supra* note 2.

In addition, the government suggests that Petitioner himself is to blame for its failure to resettle him in the last two years. The government contends that "intervening events outside of the Executive Branch's control have complicated and delayed his transfer, including revelations about his identity not made by him until March 2014." Wolosky Decl. ¶ 2. In particular, the government asserts that it learned in late 2013, and Petitioner confirmed in March 2014, that "Omar Abdulayev" was not Petitioner's true name, which has complicated efforts to resettle him. *Id.* ¶ 11. But those assertions are factually incorrect. Tajik and U.S. officials have known for many years that Omar Abdulayev was an alias adopted by Petitioner at Guantánamo out of fear that he and his family would be identified and persecuted by Tajik officials. *See* O'Hara Decl. ¶¶ 4-8, 14 & Exs. 1-6; *see also* Mot. at 3. Petitioner's given name—Muhammadi Davliatov—has been a matter of public record since at least May 26, 2010. *See* O'Hara Decl. ¶¶ 4-8 & Exs. 1-2. Indeed, Petitioner's family had informed the Tajik government that their son was detained at Guantánamo—which they apparently verified through an International Committee of the Red Cross photograph of him taken at Guantánamo—and confirmed that his name was Muhammadi Davliatov. There is no serious dispute that the Tajik government knew who he was at the time

they refused to repatriate him in 2010—a fact later communicated by the Tajik ambassador to Petitioner's counsel in 2013. O'Hara Decl. ¶¶ 6-7. The U.S. government certainly knew or should have known by this time as well—a time when the government was making repeated representations to this Court and Petitioner that his detention no longer served any military rationale and was no longer at issue.

Moreover, while Petitioner appreciates the State Department's efforts to resettle him since January 2014, the government regrettably overstates those efforts and the reasons for their failure. [redacted] Petitioner understands that opportunity was reserved for a Yemeni detainee who was the subject of a failed resettlement in Luxembourg in 2010. *See* Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* 320-24 (2015). Fourth, Petitioner is informed and believes that [redacted] not because of concerns about his identity but rather due to interference and delay caused by Pentagon officials—precisely the sort of administrative and bureaucratic obstacles that a court order of release would eliminate. *See* O'Hara Decl. ¶¶ 12-13; Mot. at 13 (citing articles quoting government sources).

In sum, while the government offers general assertions about its desire and intent to transfer Petitioner, it provides no assurance that he will actually be transferred in the near future without a court order. To the contrary, the government now admits that "the maximum possible

length of his detention is not yet calculable," and claims sweeping authority to detain him until "the ultimate cessation of hostilities," which it further suggests throughout its brief may not occur within Petitioner's lifetime. Gvt Br. at 16. The Court should reject this sweeping claim of unlimited detention authority and order the government to do what it said it would do many years ago without a court order—release Petitioner. The Court should exercise its statutory and equitable habeas authority to grant his motion for judgment and order his release without delay.

Alternatively, as explained below the Court should enter an order declaring that Petitioner falls within the court-order exception to the transfer restrictions set forth in the National Defense Authorization Act for Fiscal Year 2016, which would have the practical effect of eliminating what the government indicates is a significant obstacle to his transfer.

Argument

I. The Government Does Not Contend that Recognition of a Due Process Limit on the Duration of Petitioner's Indefinite Detention Would Be Impractical or Anomalous, and D.C. Circuit Precedent Does Not Preclude This Court From Granting Relief.

In his motion for judgment, Petitioner contends that the Due Process Clause applies at Guantánamo and limits the duration of his detention, which the government concedes may last for his lifetime, despite the undisputed fact that he remains in custody because of the government's failure to implement its discretionary decision to transfer him rather than anything he allegedly did or anyone he allegedly associated with more than a decade ago. He argues that *Boumediene v. Bush*, 553 U.S. 723, 769-71 (2008), requires a functional analysis to determine whether due process rights apply at Guantánamo, and that it would not be impractical or anomalous to grant him a due process liberty right at least to the extent necessary to limit the duration of his indefinite detention. *Boumediene* did not state a new constitutional rule but rather reaffirmed the Supreme Court's longstanding jurisprudence to determine what constitutional

standards apply when the government acts with respect to non-citizens within its sphere of foreign operations. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

The government does not address that body of Supreme Court precedent. It also does not dispute that due process and habeas corpus are inextricably intertwined, as recognized in *Boumediene* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *See* Mot. at 25. In addition, the government does not argue that it would be impractical or anomalous to grant Petitioner due process rights, or that there are any practical barriers to the application of due process rights at Guantánamo, at least to the extent necessary to limit the duration of Petitioner's detention given the unique facts and circumstances of his case. Petitioner respectfully submits that the Court should deem those issues conceded.

The government argues instead that D.C. Circuit precedent forecloses recognition of constitutional due process rights at Guantánamo under any circumstance. The government is wrong in several respects. First, the government suggests that *Boumediene*'s functional analysis extending the Suspension Clause to Guantánamo does not apply to "other constitutional provisions." Gvt. Br. at 34. But it fails to acknowledge its own concession in *Al Bahlul v. United States* that the Ex Post Facto Clause also applies at Guantánamo after *Boumediene*. *See* 767 F.3d 1 (D.C. Cir. 2014) (en banc). Indeed, the D.C. Circuit held unanimously in *Al Bahlul* that ex post facto rights extend to Guantánamo and foreclose military commission prosecutions for providing material support for terrorism based on pre-2006 conduct. *See id.* at 63

(Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("Of the seven judges on the *en banc* Court for this case, five judges (all but Judge Henderson and Judge Brown) agree in light of *Boumediene v. Bush* that the Ex Post Facto Clause applies at Guantanamo. Indeed, the Government concedes as much. Given the Government's concession, all seven judges on the *en banc* Court (including Judge Henderson and Judge Brown) therefore apply the Ex Post Facto Clause to analyze the offenses that were charged against Bahlul under the Military Commissions Act of 2006.").[3]

The cases cited in the government's brief do not foreclose a constitutional due process limit to the duration of Petitioner's detention. *See* Gvt. Br. at 33-34. Contrary to the government's suggestion, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), did not hold that *Boumediene* limited the extraterritorial reach of the Constitution to the Suspension Clause. As noted, the government has since conceded as much in *Al Bahlul*. *Rasul*, which was a damages action by former detainees for their torture and abuse at Guantánamo, was decided on qualified immunity grounds. The court expressly declined to address the plaintiffs' due process claims, and concluded instead that no reasonable government official would have been on notice prior to *Boumediene* that detainees at Guantánamo have due process rights. *Id.* at 530-32. *Al Madhwani v. Obama*, also cited by the government, likewise specifically avoided a due process challenge by a Guantánamo detainee (who was not approved for transfer) to an evidentiary issue that arose

[3] The government does not explain why it would concede the application of constitutional provisions other than the Suspension Clause at Guantánamo, or why the Circuit would accept such a concession, if *Boumediene* did not extend beyond the Suspension Clause to protect detainees without presence or property in the United States. Nor does the government explain why numerous panels of the D.C. Circuit have assumed without deciding that detainees have constitutional rights, including due process rights, following the panel decision in *Kiyemba I*, unless that decision were limited to the narrow question of whether due process authorizes the entry of a detainee into the United States. *See* Mot. at 26-27.

during his habeas corpus hearing (and which the panel deemed "obscure"). 642 F.3d 1071, 1077 (D.C. Cir. 2011). The D.C. Circuit has never directly addressed a constitutional due process challenge to the duration of detention at Guantánamo, and certainly not in the context of a case involving unique facts and circumstances similar to Petitioner's. *See also Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (the Supreme Court has not "considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention").[4]

The government's further claim that even if due process principles apply they would not limit the duration of Petitioner's detention is meritless. *See* Gvt. Br. at 34-35. The government's argument rests on *Hamdi*, which it contends authorizes detention for as long as hostilities continue regardless of the circumstances or length of detention. But *Hamdi*, which was decided more than a decade ago under very different circumstances, *see infra* Part III, did not involve a challenge to continuing detention authority, and certainly not after fourteen years of indefinite detention under circumstances similar to those here. To the contrary, *Hamdi* held that "indefinite or perpetual detention" was impermissible. 542 U.S. at 521.[5] Yet that is precisely what the government argues is permitted in this case when it claims the right to hold Petitioner in non-

[4] Nor have the judges of this Court decided such a challenge to the duration of detention. *Rabbani v. Obama*, 76 F. Supp. 3d 21 (D.D.C. 2014), was a force-feeding challenge by a detainee not approved for transfer. *Ameziane v. Obama*, 58 F. Supp. 3d 99 (D.D.C. 2014), was an action in habeas to recover personal property retained by the government at the time of the detainee's forced transfer to Algeria. *Al Wirghi v. Obama*, 54 F. Supp. 3d 44 (D.D.C. 2014), was decided on questionable standing grounds—so much so that he was quickly transferred to Uruguay to moot his appeal—rather than statutory or constitutional grounds. And *Bostan v. Obama*, 674 F. Supp. 2d 9 (D.D.C. 2009), was an uncleared detainee's challenge to the reliability of evidence that, as in *Al Madhwani*, was ultimately resolved on other grounds.

[5] Like Hamdi, Petitioner's central challenge is "not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention." *Id.* at 520.

criminal detention potentially for the remainder of his lifetime, even though it represented to this Court more than seven years ago that his detention no longer serves any ostensible military purpose and he would be released. "The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious." *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).

Whatever the case may be with respect to due process rights to enter the United States, challenge conditions of confinement at Guantánamo, or challenge the admissibility of evidence in a habeas hearing, the Court should conclude that Petitioner's indefinite detention, which now extends beyond any reasonable time limitation, violates due process and requires his release.

II. The Government Does Not Address Petitioner's Constitutional Avoidance Argument Concerning the Narrow Scope of AUMF Detention Authority, and Should Be Estopped From Arguing that the Only Remedy for His Indefinite Detention Is to Litigate a Full Habeas Hearing.

In his motion for judgment, Petitioner argues that the Court should construe the Authorization for Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), narrowly to limit the duration of his detention in order to avoid the serious constitutional concerns that would be raised by a statute that authorizes his non-criminal detention for a period of fourteen years (during half of which he has been approved for transfer) and potentially for the remainder of his life. *See Zadvydas*, 533 U.S. at 689-90 (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). The government does not respond directly to Petitioner's constitutional avoidance arguments. Instead, it claims that it may continue to hold Petitioner under the AUMF

and *Hamdi* until the end of hostilities, which the government concedes it cannot predict, and indicates could last for Petitioner's lifetime, without limitation on the duration of his detention. *But see Hamdi*, 542 U.S. at 536 ("[A] state of war is not a blank check for the President."); *cf. also Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari).

The government also argues that Petitioner's release pursuant to his 2009 Task Force clearance is conditioned on various security and logistical constraints, some of which it notes were legislated by Congress years after the government said it would transfer him and therefore fail to explain why he was not transferred many years ago.[6] Again, however, the government does not address its unqualified decision to approve Petitioner for transfer in 2008, or the added admissions and representations that accompanied its motions to stay his habeas case.

It is clear that the government has attempted to use Petitioner's approval for transfer as both a sword and a shield in order to preserve its ability to continue to hold him for as long as it wants without judicial interference. When seeking to avoid litigation of his habeas case, the government took certain unambiguous positions, including that a judicial order of release was unnecessary because its discretionary decision to transfer Petitioner was tantamount to a habeas grant, and there was no further relief this Court could order. Yet now that those representations are no longer convenient and the government again seeks to avoid a judicial order of release, it claims that its discretionary decision to transfer Petitioner in 2009 was essentially meaningless. The government goes so far as to disingenuously suggest that Petitioner bears responsibility for the horrible current state of affairs, and that his only remedy is to litigate the question of whether

[6] The government still does not contend that Petitioner poses a threat to national security.

he is part of or substantially supported Al Qaeda, the Taliban or associated forces engaged in hostilities against the United States.[7]

The Court should reject any suggestion that the only remedy available to Petitioner is to move to reinstate his prior habeas petition and conduct a full habeas hearing as if the last seven years never happened and this case could somehow be transported back in time to June 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 his habeas case on that basis. The government should be judicially estopped from changing its litigation position now to argue that if Petitioner is not content to remain at Guantánamo until some undetermined point in the future, and possibly forever, that 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

[7] The government's claim that Petitioner has conceded the legality of his initial capture and detention is wrong. *Compare* Gvt. Br. at 14, *with* Mot. at 1. Petitioner's contention is that whether his detention was once lawful is irrelevant as a matter of law because he is no longer detainable. The government's reliance on *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), and *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), is also misplaced. *See* Gvt. Br. at 1, 15, 19. Those cases involved challenges to the legality of initial capture and detention, not continuing detention authority, and neither involved facts or circumstances similar to Petitioner's, where the

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).[8]

In sum, the government's attempts to avoid litigating Petitioner's habeas case, over his objections, based on representations to the Court that he would be transferred, have had inescapable consequences both for the government and him. It is no longer 2009, and Petitioner simply cannot relive the intervening years that he has suffered and lost in custody through no fault of his own. The government has had more than seven years to try and release him, and it

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government previously disclaimed any continuing military need or rationale for continuing detention. The additional language from *Ali* cited by the government was also plainly *dicta*.

[8] Petitioner does not contend that the government lied or intentionally misled the Court concerning its intentions to transfer him in 2008 and 2009. The point is simply that it has not done what it said it would several years ago, causing him substantial harm, and the Court must grant relief to preserve the integrity of the judicial process and ensure effectiveness of the Great Writ. Allowing the government to escape legal positions that it prevailed on years earlier to avoid a habeas hearing because they are no longer convenient would sanction what the Supreme Court clearly held in *Boumediene* was impermissible—further inordinate delay. Moreover, by arguing that Petitioner could have moved to reinstate his habeas case 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* 553 U.S. at 783, 795 (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"); *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.'"). As explained in his motion, Petitioner withdrew his initial habeas case in part in reliance on the government's repeated representations that he would be transferred. *See* Mot. at 12.

has failed, if only for lack of sufficient, meaningful effort. It is not entitled to further deference. 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 Petitioner's Guantánamo nightmare.

III. The Government Misconstrues Petitioner's Law of War Arguments, Including His Contention that Any Traditional Law of War Detention Authority that May Have Existed Has Now Unraveled.

Petitioner contends that he must be released under the AUMF, as construed by *Hamdi*, because his detention violates the laws of war. He contends that regardless of the nature of the armed conflict pursuant to which he is detained, if any, there could scarcely be a clearer case of arbitrary and perpetual detention than one such as this in which Petitioner remains imprisoned for lack of sufficient, meaningful efforts to try to release him, but not because anyone thinks that he should continue to be held, possibly for the duration of his life. Petitioner also contends that the practical circumstances of any armed conflict in which he may be detained have now reached the point where they are so unlike those of the conflicts that have informed the development of the laws of war that any traditional law-of-war detention authority that once may have justified his detention has unraveled. *See Hamdi*, 542 U.S. at 521 ("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.").

As an initial matter, the government essentially conflates Petitioner's unraveling argument with an argument that the conflict in which he was captured has ended. *See* Gvt. Br. at 18, 28-32. Although Petitioner does not concede that hostilities continue, *see* Mot. at 2, 28, his argument is that the practical circumstances of any continuing armed conflict have changed significantly in the last several years the point wbere they have become entirely unlike those of the conflicts that have informed the development of the laws of war. He cites several examples

such as the length of the conflict and the likelihood that it may continue for more than a generation, the changed nature of the enemy, including Al Qaeda, and the shift in U.S. military involvement in Afghanistan from a combat mission to one involving assistance to Afghan national forces and counterterrorism operations, none of which the government disputes. *Id.* at 28-30. Nor does the government dispute Petitioner's contention that there is no analogue or precedent under the traditional laws of war for potentially life-long detention under circumstances similar to his. *Id.* at 30. The government's argument is simply that Petitioner's detention is lawful because Afghanistan remains a dangerous place because fighting continues there with the Taliban, Al Qaeda and associated forces, which may continue for the remainder of Petitioner's lifetime.[9] The government misses the point of Petitioner's unraveling argument.

The government likewise misconstrues Petitioner's law of war arguments. In his motion for judgment, Petitioner argues that his continuing detention violates the laws of war because the government has conceded, that his detention is no longer at issue, there are no longer any military rationales for his continued detention, and he should be released expeditiously, but has remained in custody for an additional seven years due solely to its failure to make sufficient, meaningful efforts to transfer him. He argues this is so regardless of whether the armed conflict in which he is detained, if any, is international or non-international in nature. Indeed, Petitioner maintains—and the government agrees—that any continuing armed conflict is non-international

[9] The government's reliance on the panel decision in *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), which held that release is required only when the fighting stops, is misplaced. *See* Gvt. Br. at 23. In addition to other factors distinguishing *Al-Bihani*, *see* Mot. at 22 & n.15, the portion of *Al-Bihani* cited is also 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 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)).

in nature. Gvt. Br. at 24. As such, Petitioner's detention is properly governed by Common Article 3 and Additional Protocol II of the Geneva Conventions, which set forth minimum baseline human rights protections but do not specifically authorize detention or prescribe extensive regulations governing detention in the same fashion as the Third and Fourth Geneva Conventions applicable in international armed conflict. *See* Mot. at 18-20. Nonetheless, although there are fewer non-international armed conflict rules governing detention,[10] there are certain customary international law rules and principles applicable in non-international armed conflict that are binding on the United States. As cited in Petitioner's motion, for example, Customary International Humanitarian Law Rule 128(C) applies in non-international armed conflict and limits the duration of non-criminal detention. *See* Mot. at 19-20. The government ignores such principles entirely, however.

The government instead resorts to cherry-picking international armed conflict rules and applying them by analogy to non-international armed conflict, which Petitioner concedes various panels of the D.C. Circuit have thus far endorsed but has not been addressed *en banc* or by the Supreme Court. *See* Mot. at 30 & n.24. For example, the government claims authority to hold Guantánamo detainees such as Petitioner until the end of hostilities, which properly applied is a concept derived from Article 118 of the Third Geneva Convention that applies only to prisoners of war in international armed conflict. Gvt. Br. at 23. It does so notwithstanding the "narrow circumstances" addressed in *Hamdi*, 542 U.S. at 520, where the detainee was captured fighting U.S. forces on a battlefield in what was then international armed conflict, and the existence of

[10] "It is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the [law] of non-international armed conflict should be silent, in deference to national law, on questions of

binding customary international humanitarian law rules limiting detention in international armed conflict to valid needs. *See* Mot. at 18-19. Indeed, the end of hostilities properly 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. *See, e.g.*, *Al-Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) (expressly recognizes 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).

At the same time, the government seeks to deny Petitioner any of the protections applicable to detainees in international armed conflict. For example, although it claims authority to hold him until the end of hostilities like a prisoner of war in international armed conflict—and potentially for the rest of his life—it contends Petitioner is not entitled to the legal protections of Article 75(3) of Additional Protocol I to the Geneva Conventions because he is held pursuant to non-international armed conflict.[11] In other words, the government picks and chooses which rules or principles of international or non-international armed conflict that it wishes to apply to Guantánamo detainees like Petitioner in order to suit its needs, but it does so selectively and

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detention." Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 241 (2009).

[11] The government has conceded that Article 75(3) is legally binding on the United States and other nations as a matter of customary international law. *See* Dep't of Defense, Law of War Manual § 8.1.4.2, at 490 & n.17 (June 2015), *available at* http://www.dod.mil/dodgc/images/law_war_manual15.pdf; *see also* Law of Armed Conflict Documentary Supplement 234 (5th ed.), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Documentary-Supplement-2015.pdf.

always to the detriment of those detainees, which renders Petitioner's detention classically arbitrary and plainly violates U.S. and international law.

The government likewise argues that Petitioner is an "unprivileged belligerent"[12]—a combatant not entitled to combat immunity upon capture for failure to satisfy the requirements for prisoner of war status—even though combatant status exists only in international armed conflict.[13] There are no combatants in non-international armed conflict; there are only government forces and civilians.[14] And in international armed conflict, combatants who are not afforded prisoner of war status under the Third Geneva Convention are by default considered civilians subject to the protections of the Fourth Geneva Convention, who nonetheless may be subject to criminal prosecution for their participation in hostilities because they lack combat

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[12] Gvt. Br. at 24. The current administration replaced the term "unlawful enemy combatant," previously used to describe the purported status of detainees, with the term "unprivileged enemy belligerent." *Compare, e.g.*, 10 U.S.C. §§ 948a(1)(A), 948c (2006), *with* 10 U.S.C. §§ 948a(7), 948c (2009).

[13] *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 227 n.11 (4th Cir.) (Motz, J., concurring) (discussing combatants and combat immunity), *cert. granted*, 555 U.S. 1066 (2008), *judgment vacated and remanded with instructions to dismiss as moot*, 555 U.S. 1220 (2009).

[14] *See* U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum*, ¶ 58, U.N. Doc. A/HRC/14/24/Add.6 (28 May, 2010) (*prepared by* Philip Alston) ("In non-international armed conflict, there is no such thing as a 'combatant.'"); Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War* 191 (2010) ("The traditional view is that, . . . there are no 'combatants,' lawful or otherwise, in common Article 3 conflicts. There may be combat in the literal sense, but in terms of [the laws of war] there are fighters, rebels, insurgents, or guerrillas who engage in armed conflict, and there are government forces, and perhaps armed forces allied to the government forces. There are no combatants as that term is used in customary law of war, however. Upon capture such fighters are simply prisoners of the detaining government; they are criminals to be prosecuted for their unlawful acts, either by a military court or under the domestic law of the capturing state."); Int'l Comm. of the Red Cross, Statement, *The Relevance of IHL in the Context of Terrorism* (July 21, 2005) (last visited Jan. 17, 2016) ("In non-international armed conflict, combatant and prisoner of war status are not provided for . . . . In non-international armed conflict combatant status does not exist."), *available at* https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm [hereinafter *Relevance of IHL*].

immunity.[15] There is no internationally recognized status other than combatant and civilian.[16] Petitioner thus contends he is a civilian regardless of the nature of the conflict in which he is held. *See* Mot. at 30-31 & n.26; Pet. ¶¶ 44-47.[17] And although the D.C. Circuit thus far has

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[15] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 50, June 8, 1977, 16 I.L.M. 1391, 1410 ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 . . . of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."); *see also* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 26 ("The approach of customary international law is that 'civilians' are those who are not 'combatants' . . . . That definition is 'negative' in nature. It defines the concept of 'civilian' as the opposite of 'combatant.'") (citing International Criminal Tribunal for the former Yugoslavia); Int'l Comm. of the Red Cross, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958) ("*There is no* intermediate status.") (emphasis in original); Solis at 191 (civilians subject to domestic criminal prosecution for participation in hostilities).

[16] *See* Solis, *The Law of Armed Conflict*, ch. 6.7.2; *id.* at 187 (quoting Francis Lieber: "All enemies in regular war are divided into two general classes—that is to say, into combatants and noncombatants"); *id.* at 207 ("Recall that there are only two categories of individuals on the battlefield: combatants and civilians."); *see also* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 28 (concluding there is no third category of unlawful combatants); ICRC, *Relevance of IHL*. *Ex Parte Quirin*, 317 U.S. 1 (1942), cited by the government, Gvt. Br. at 23, is not to the contrary. *Quirin* references "lawful and unlawful combatants," and "enemy combatant[s]," but it used those terms in relation to the *conduct* of the accused, who were members of the German military, not their *status*. *Id.* at 31. The Court explained that the accused were subject to military detention and trial not because of their status as "enemy combatants" but "for *acts* which render[ed] their belligerency unlawful," *i.e.*, discarding their uniforms. *Id.* (emphasis added). *Quirin* simply did not involve a category of belligerent other than the category of "combatant" recognized in the context of international armed conflict, nor did it involve "associated" forces except in terms of forces associated with the "military arm of the enemy government," *i.e.*, service in an enemy government's military. *Id.* at 37.

[17] While it may be "the understandable instincts" of some to treat suspected terrorists as "combatants" in a "global war on terror," *Al-Marri*, 534 F.3d at 235 (Motz, J., concurring), even if everything the government previously alleged against Petitioner were true, which he denies, that would not transform him from a civilian into a combatant and thereby subject him to indefinite for detention for the duration of hostilities like a prisoner of war. *See* HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] ¶ 25 ("The terrorists and their organizations . . . do not fall into the category of combatants. . . . [They] are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoner of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army."); *id.* ¶ 26 ("The result is that an unlawful combatant is not a

endorsed the government's selective borrowing and application of international armed conflict principles to govern Petitioner's detention at Guantánamo, given the practical circumstances of the conflict in which he was allegedly captured as they have evolved and currently exist, the Court should no longer analogize to or borrow from the Third Geneva Convention, but rather the Fourth Geneva Convention, which authorizes detention only for so long as a civilian presents an imperative security need, which, of course, no one contends Petitioner does.

As Guantánamo enters its fifteenth year, and given the nature of the conflict as it may exist now, which bears no resemblance in practical terms to prior conflicts that have informed the development of the laws of war, a new detention standard is necessary and appropriate, and should be adopted by this Court pursuant to *Hamdi*'s recognition that detention authority may change with the changing nature of the conflict, even if the conflict continues. Nothing in existing D.C. Circuit prohibits such relief as that court has never before considered such a challenge under circumstances similar to those presented here, nor held that a court may look only to the Third Geneva Convention when applying international armed conflict principles by analogy in non-international armed conflict. Indeed, because the length of Petitioner's non-criminal detention continues without foreseeable end—for reasons the government concedes are unrelated to any ostensible, continuing military need—the scope of this Court's equitable habeas review must adapt to the changed circumstances and the corresponding, increased risk of an erroneous deprivation of his liberty. *See Boumediene*, 553 U.S. at 780 (explaining "common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention"); *see also, e.g.*,

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combatant; rather a 'civilian.'"); *see also* CrimA 6659/06, *A. v. Israel* [2008] ¶ 12 ("[T]he finding that 'unlawful combatants' belong to the category of 'civilians' in international law is

Abdel-Muhti v. Ridge, 314 F. Supp. 2d 418, 430 (M.D. Pa. 2004) (holding that "as the length of confinement grows, so must the amount of evidence supporting" indefinite detention to ensure a reasonable limitation on such detention as required by *Zadvydas*).

IV. The Court Should Exercise Its Equitable Habeas Authority to Declare that Petitioner Falls Within the Court-Order Exception to the NDAA Transfer Restrictions in Order to Remove a Significant, Practical Obstacle to His Release.

In its opposition brief, the government argues that detainee transfer restrictions in the National Defense Authorization Acts for Fiscal Years 2011, 2012 and 2013 substantially delayed Petitioner's transfer and interfered with the president's ability to close Guantánamo, which the president has said repeatedly is a national security and foreign policy priority. Wolosky Decl. ¶ 6. Indeed, it appears Petitioner continues to be held in part due to Congress's enactment of detainee transfer restrictions, most recently codified in section 1034 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015) ("NDAA"). Like the transfer restrictions included in earlier legislation, the current restrictions prevent the government from using funds allocated by Congress to transfer detainees to foreign countries unless the Secretary of Defense issues a multi-part certification attesting to certain factors such as the transferee country's capacity to accept the detainee, and complies with certain onerous reporting requirements. *Id.* § 1034(a)(1), (b)-(e). The only exception to the certification and reporting requirements is in instances where the detainee obtains an order "affecting the disposition of the individual [to be transferred] that is issued by a court or competent tribunal of the United States having lawful jurisdiction." *Id.* § 1034(a)(2).

As an alternative to granting his habeas petition, the Court should enter an order declaring that Petitioner falls within the court-order exception to the current transfer restrictions.

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consistent with the official interpretation of the Geneva Conventions").

An order granting this relief would, as a practical matter, remove a significant obstacle to Petitioner's release that the government itself has identified in its brief. This Court should construe the exception in NDAA § 1034(a)(2) to apply to the unique facts and circumstances of this case. By enacting the NDAA transfer restrictions, since January 2011 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. But Congress created a specific statutory exception to the certification requirement 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 habeas 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 orders that fall short of granting habeas petitions. 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.[18] Indeed, nothing about that language indicates that it is limited to orders resolving cases on their merits, or that this was Congress's intention in drafting the exception. 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

[18] 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; nothing in the relevant text or legislative history indicates this language was limited to any particular type of judicial, military or administrative proceeding. In any event, the reference to tribunals in addition to courts confirms that the exception applies to more than court orders granting release in habeas.

habeas cases); 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). There is likewise nothing in the legislative history of the NDAA to indicate that Congress intended to limit the court-order release exception to habeas grants.[19] Rather, the court-order release exception was first added to the 2011 NDAA during conference, apparently without debate, and the legislative history of the 2012 NDAA clarified that notwithstanding the imposition of the certification requirement 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."). Later versions of the NDAA simply reenacted or extended the restrictions, occasionally with some adjustments or modifications.

Second, the statutory exception should be read broadly to avoid serious constitutional problems that would otherwise arise if the NDAA were actually to block Petitioner'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); *see also*

[19] 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

Statement by the President on S. 1356 (Nov. 25, 2015) (noting NDAA restricts detainee transfers, could interfere with ability to transfer detainees who have obtained writs of habeas corpus, and may violate separation of powers), *available at* https://www.whitehouse.gov/the-press-office/2015/11/25/statement-president.

If there were any doubt about the sufficiency of the plain language of NDAA § 1034(a)(2) as a basis for the Court to enter an order triggering the exception and thereby avoid the transfer restrictions without granting Petitioner'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 Petitioner requests. *See* Mot. at 31-34; *see also Brecht v. 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 law is 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

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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.

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 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);. *See generally* Paul D. Halliday, Habeas Corpus: From England to Empire 101 (2010) (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, there can be no serious dispute that an order declaring that Petitioner falls within the NDAA exception would hasten his release.

The Court should therefore enter an order declaring, based on the unique facts and circumstances of this case, that Petitioner falls within the statutory exception set forth in NDAA § 1034(a)(2), and is not subject to the certification and reporting requirements of NDAA § 1034(a)(1), (b)-(e). This order is minimally necessary to sweep aside a substantial, practical obstacle to Petitioner's transfer and correct a miscarriage of justice.[20]

[20] To be clear, such an order need not be an order of *release*. Although Petitioner surely seeks an order granting his habeas petition, *see supra*, 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. His NDAA argument also 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.

Conclusion

Petitioner has been detained for too long, and for no good reason. The Court should grant his motion for judgment, deny the government's cross-motion to dismiss, and order Petitioner's release to ensure that justice is done.

Date: Chicago, Illinois
January 20, 2016

Respectfully submitted,

MUHAMMADI DAVLIATOV

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