UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FALEN GHEREBI, **Petitioner,** **v.** **BARACK H. OBAMA,** **President of the United States,** **and ROBERT M. GATES,** **Secretary of Defense,** **Respondents.**	)	**Civil Action No. 04-1164 (RBW)**
TAJ MOHAMMAD, **Petitioner,** **v.** **BARACK H. OBAMA,** **President of the United States, et al.,** **Respondents.**	)	**Civil Action No. 05-879 (RBW)**
KARIN BOSTAN, **Petitioner,** **v.** **BARACK H. OBAMA,** **President of the United States, et al.,** **Respondents.**	)	**Civil Action No. 05-883 (RBW)**

NASRULLAH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 05-891 (RBW)**
	)	
BARACK H. OBAMA,	)	
President of the United States, et al.,	)	
	)	
Respondents.	)	
	)	
ASIM BEN THABIT AL-KHALAQI,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 05-999 (RBW)**
	)	
BARACK H. OBAMA,	)	
President of the United States, et al.,	)	
	)	
Respondents.	)	
	)	
MOHAMMED AMON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 05-1493 (RBW)**
	)	
BARACK H. OBAMA,	)	
President of the United States, et al.,	)	
	)	
Respondents.	)	

ABDULLAH M. AL-SOPAI ex rel. ABDALHADI M. AL-SOPAI, **Petitioner,**	)	
v.	)	**Civil Action No. 05-1667 (RBW)**
BARACK H. OBAMA, President of the United States, et al., **Respondents.**	)	
KADEER KHANDAN, **Petitioner,**	)	
v.	)	**Civil Action No. 05-1697 (RBW)**
BARACK H. OBAMA, President of the United States, et al., **Respondents.**	)	
ISSAM HAMID ALI BIN ALI AL JAYFI, et al., **Petitioners,**	)	
v.	)	**Civil Action No. 05-2104 (RBW)**
BARACK H. OBAMA, President of the United States, et al., **Respondents.**	)	

SHARAF AL SANANI, et al.,	)	
Petitioners,	)	
v.	)	**Civil Action No. 05-2386 (RBW)**
BARACK H. OBAMA, President of the United States, et al.,	)	
Respondents.	)	
WASIM and QAYED,	)	
Petitioners,	)	
v.	)	**Civil Action No. 06-1675 (RBW)**
BARACK H. OBAMA, President of the United States, et al.,	)	
Respondents.	)	
RABIA KHAN ex rel. MAJID KHAN,	)	
Petitioner,	)	
v.	)	**Civil Action No. 06-1690 (RBW)**
BARACK H. OBAMA, President of the United States, et al.,	)	
Respondents.	)	

MUHAMMAD MUHAMMAD SALEH NASSER ex rel. ABDULRAHMAN MUHAMMAD SALEH NASSER,	)	
Petitioner,	)	
v.	)	**Civil Action No. 07-1710 (RBW)**
BARACK H. OBAMA, President of the United States, et al.,	)	
Respondents.	)	
ABDUL RAHMAN UMIR AL QYATI and SAAD MASIR MUKBL AL AZANI,	)	
Petitioner,	)	
v.	)	**Civil Action No. 08-2019 (RBW)**
BARACK H. OBAMA, President of the United States, et al.,	)	
Respondents.	)	

PETITIONERS' JOINT MEMORANDUM IN REPLY TO RESPONDENTS' MEMORANDUM OF MARCH 13, 2009[1]

[1] As directed by the Court's Order of February 19, 2009, this memorandum is filed as a joint memorandum and for the specific purpose of addressing the arguments made in respondents' memorandum of March 13, 2009. Several petitioners plan to assert that the law of war is not applicable to the circumstances of their particular cases or, if applicable, must be applied in a different way from that in which it is applied in the cases of other petitioners. Petitioners do not read the Court's Order as foreclosing future arguments of that nature.

Introduction and Summary of Argument

Respondents' memorandum of March 13, 2009 represents a partial retreat from the legal position articulated by the prior administration. The claimed detention power is no longer said to be justified, even in the alternative, by the President's Article II status as commander-in-chief of the armed forces. Nor is that power asserted to derive from, or to be confirmed by, the Military Commissions Act of 2006. Rather, respondents now rely on Congress's 2001 Authorization for the Use of Military Force ("AUMF") as the sole source of authority for petitioners' continued detention.

However, the substantive language used to "define" the claimed detention power varies only in degree from that used by respondents' predecessors. While respondents have tinkered with the edges of the earlier formulation, the conceptual approach they now advance has not greatly changed. "Supporting" has given way to "substantially supported" or "directly supported," but the concept of support remains undefined and highly elastic, as does the carryover phrase "part of . . . Taliban or al-Qaida forces or associated forces." At base, both the earlier and revised formulations represent a marked departure from and expansion of the military detention authority recognized by the traditional law of war.[2]

The fundamental and fatal problem with respondents' current formulation is that, like the earlier one, it represents a legislative determination based entirely on executive fiat, rather than

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[2] The international "law of war" is also referred to as the "law of armed conflict" and is a branch of "international humanitarian law," such terms often being used interchangeably. The law of war is based on a combination of treaties and customary international practice. As the Supreme Court confirmed in *Hamdi v. Rumsfeld*, it is the subject of "'universal acceptance and practice.'" 542 U.S. 507, 518 (2004) (plurality opinion). *See also,* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (25 MARCH 2002), para. 5a (supporting the interchangeable use of the terms Law of Armed Conflict (LOAC) and Law of War to describe that part of international law that regulates the conduct of armed hostilities). "The law of war encompasses all international law for the conduct of hostilities, which is binding on the United States or its citizens. It includes treaties and international agreements to which the United States is a party, as well as customary international law."

on explicit Congressional authorization or a clear or permissible Congressional delegation of legislative power, and thus violates the separation of powers doctrine. As noted in petitioners' earlier briefing, the Constitution vests all legislative power in Congress. While Congress may delegate such power, its authority to do so is circumscribed. Moreover, where, as here, delegation is said to be implicit rather than explicit, important canons of statutory construction very sharply limit the circumstances under which delegation may be found to have occurred.

Two Supreme Court decisions, *Hamdi v. Rumsfeld*[3] and *Hamdan v. Rumsfeld*,[4] have rejected broad interpretations of the AUMF. The former, which dealt directly with military detention power, founded its ruling squarely on the already existing law of war, and emphasized the narrow scope of that ruling. It contains no suggestion that the AUMF granted the President broad authority to rewrite the law of war; indeed, if the Court had been of that view, the rationale it chose would have been unnecessary and inappropriate. *Hamdan*, although decided in a slightly different context (military commissions, rather than military detention) found no authorization in the AUMF to depart from prior practice.

Respondents themselves concede that their formulation is more than a simple restatement of the law of war. Rather, it is an attempt to create a new legal standard to deal with what respondents contend are new and different circumstances. Under the Constitution and relevant legal authority, that policy choice is one that must be resolved by Congress, not by the executive branch. The Court should follow *Hamdi's* lead, and rule that the scope of the executive's detention power in these cases will be that authorized by the traditional law of war. The Court

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[3] 542 U.S. 507 (2004).

[4] 548 U.S. 557 (2006)

may appropriately interpret and apply that existing body of law in the context of case-specific determinations.

Argument

I. Respondents' Approach Represents Impermissible Executive Law-Making

Respondents concede on the very first page of their memorandum that they are ploughing new legal ground. They assert that the United States is not engaged in a traditional international armed conflict, and that the law of war does not provide clear guidance for situations such as "our current novel type of armed conflict against al-Qaida and the Taliban." They suggest, reasonably enough, that

> [U]nder the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks.[5]

But they then go on to assert that the AUMF authorizes the President to develop a new body of law by considering who would be detainable "in appropriately analogous circumstances" if the present conflict were in fact "a traditional international armed conflict." Resp. Mem. at 1. They erroneously characterize this new standard-setting as "*interpretation* of the detention authority Congress has authorized for the current armed conflict." *Id.* (emphasis added).

A. The AUMF Contains No New or Broad Grant Of Detention Authority

The threshold problem with respondents' position is that, as eight of the nine justices who sat in *Hamdi* noted, the AUMF is completely silent on the subject of detention authority.[6]

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[5] The limited category of individuals referred to in this sentence are almost certainly chargeable with crimes, either as principals or accessories before or after the fact. Moreover, except for its use of the word "detain," the sentence tracks virtually *verbatim* language actually used in the AUMF.

[6] As Justices Souter and Ginsburg pointed out in their partial concurrence, the AUMF "never so much as uses the word detention . . . ." 507 U.S. at 547

Because the AUMF contains no language with respect to detention authority, there is simply nothing to "interpret."

The plurality opinion in *Hamdi* nevertheless concluded that because the traditional law of war has always recognized that military authorities may detain someone who, like Hamdi, was allegedly captured while carrying arms on the battlefield, detention under such circumstances was necessarily implicit in Congress's authorization to use military force. That very precise ruling, premised squarely on pre-existing law, offers no support whatever for the notion that the AUMF implicitly contained some broad new grant of authority to the President to detain whatever individuals he chose to detain pursuant to whatever standards he chose to adopt.

Justice O'Connor, the author of the plurality opinion, repeatedly took pains to emphasize that *Hamdi's* reading of the AUMF was a restricted one. Her opinion uses the word "narrow" at no fewer than four places to describe the scope of the opinion, and the word "limited" in a fifth instance. In sum, there is simply nothing in the AUMF or in *Hamdi* that can be read as Congressional authority or judicial blessing for military detention power that goes beyond that recognized by the traditional law of war, much less as a plenary grant of detention power that the President may then "interpret" as he sees fit.

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court took a similarly narrow view of the authority granted by the AUMF. In response to Hamdan's challenge to the President's asserted authority to try him by military commission, the government argued that the AUMF had implicitly delegated to the President the power to establish such tribunals. The Court flatly rejected that contention, holding that even after enactment of the AUMF military tribunals were limited to the scope and powers that they had historically possessed. The *Hamdan* Court observed that

> while we assume that the AUMF activated the President's war powers [citing *Hamdi*], and that those powers include the authority to convene military commissions in appropriate circumstances [citations omitted], there is nothing in the text or the legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.

Id. at 594.[7] That observation is equally applicable in the current context.

One fact does, however, emerge clearly from the legislative history. The Joint Resolution passed by Congress was substantially narrower and more focused than the resolution sent to Congress by the President. The text of the original resolution provided:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, *and to deter and preempt any future acts of terrorism or aggression against the United States*.

The Joint Resolution as passed provided:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*

Congressional Research Service Report for Congress, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, (updated 1/16/07), at CRS 5-6.

The original resolution sought broad authorization for the preventative use of military force anywhere in the world against anyone. Congress sharply curtailed the scope of that authorization, limiting the approved targets of military force to those responsible for the events of 9/11. While that fact by itself does not answer the issue being litigated, it clearly indicates that Congress did not intend the AUMF as a blank check to the President.

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[7] The passage of the Military Commissions Act of 2006 was, of course, a direct response to *Hamdan*.

B. Federal Courts Have Historically Refused To Find Implicit Delegations Of Power Under Analogous Circumstances

The prior administration's claim of detention powers also relied on an assertion of implied authority under the AUMF. In response to that argument, petitioners submitted a brief citing three canons of statutory construction that demonstrate a consistent hostility of federal courts to implied delegation arguments, especially where the power allegedly delegated was (1) not constrained by any Congressional guidance for its exercise, (2) directly affected liberty interests, or (3) was inconsistent with international law. *See* Petitioner Hidar's Memorandum of Law Concerning the Appropriate Definition of "Enemy Combatant" (hereinafter "Hidar brief"), at pp. 13-17.[8] As demonstrated in that brief (which petitioners incorporate by reference rather than repeating), all three canons of statutory construction – each of which requires a clear statement of Congressional intent -- apply here.

The constitutional concern that underlies the "clear statement" requirement is Article I's vesting of all legislative powers exclusively in Congress. While Congress may expressly delegate certain powers to the President – something it has clearly not done here – even express delegations require some degree of Congressional guidance as to the exercise of such powers. Here, where Congress has been silent on the issue of detention power and has provided no guidance at all in that regard, it would be inconsistent with Supreme Court jurisprudence for a court to find an implicit delegation of legislative power, especially where liberty interests are directly affected and the powers asserted are at odds with established international law. [9]

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[8] The Hidar brief, a copy of which is attached as Exhibit A hereto, was filed on December 29, 2008 as Dkt. No. 823 in *Mohammon et al.*, No. 1:05-cv-2386. A number of other petitioners adopted that brief by reference in their own filings. Rather than repeating its arguments *verbatim* in this supplemental brief, petitioners ask the Court to treat it as incorporated by reference in this submission.

[9] In *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 2009 U.S. LEXIS 1777, 77 U.S.L.W. 3502 (March 6, 2009), four Fourth Circuit judges based their rejection of the government's

C. Contemporary Contextual Considerations Also Militate Against Finding In The AUMF An Implied Delegation of Broad Detention Powers

In addition to the silence of the AUMF's text and legislative history on the subject of military detention and the restrictive force of the interpretative canons referred to above, the Court may consider the legislative environment of the post 9/11 period. As noted in the Hidar brief, the AUMF was not the only statute that Congress passed in that time frame to address the problems created by international terrorism. It dealt directly with the problem of "support" for terrorist activities by enacting or updating several statutes that specifically targeted for detention and trial persons who fell into certain defined categories. 18 U.S.C. § 2339A criminalizes "material support" for terrorist acts, § 2339B criminalizes "material support" to a foreign terrorist organization, and § 2339C criminalizes financing of terrorist acts. In each case, the statute relies on defined terms, including a definition of "material support," and are capable of reaching conduct abroad. In addition, the PATRIOT Act, passed in the same time frame, included substantially-expanded detention powers aimed at aliens suspected of connections to terrorist or other activities dangerous to U.S. security. Congress also specifically defined the activities providing a factual predicate for detention.[10]

Both the criminal terrorist statutes cited above and the PATRIOT Act detention provisions implied significant procedural protections for individuals arrested or detained thereunder. Any citizen or alien charged with a terrorist crime or with material support for terrorism is entitled to the full panoply of protections provided by American law, including the

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position conclusion on the fact that "the AUMF lacks the particularly clear statement from Congress that would, at a minimum, be necessary to authorize the indefinite military detentions of civilians as enemy combatants." 534 F.3d at 239 (citing cases that, "absent 'explicit authorization,'" reject Executive Branch interpretations of statutes to authorize detention). The other judges did not invoke this standard, but nonetheless refused to accept the broad detention power asserted by the government.

[10] 115 Stat. 272 (2001).

right to remain silent, the right to trial by jury, conviction only upon proof beyond a reasonable doubt, and normal evidentiary rules. Persons detained under the PATRIOT Act may be held only for a limited period, after which time they must be criminally charged, deported, or released.

Two conclusions follow from this analysis. First, it is clear that Congress was entirely prepared in the post 9/11 period to pass detailed legislation defining standards of conduct warranting arrest or detention, and in fact did so. In light of that activity, it would be inaccurate to infer that Congressional silence in the AUMF on the subject of detention meant that it intended the AUMF to delegate to the President broad rule-making powers in that area.

Second, adoption of respondents' approach would mean that the executive branch, in its sole discretion, could effectively eliminate the procedural protections intended by Congress by detaining someone as an "enemy combatant" rather than by charging him with a crime. Using respondents' current formulation: someone who "substantially supported" al-Qaeda by providing it with weapons, money or other material support could be held in indefinite military detention rather than being criminally charged or deported. Indeed, that is exactly what occurred in the *al-Marri* case, now mooted by a belated decision to charge Mr. al-Marri rather than continue to hold him in a military prison.

D. Congressional Action Is Required To Expand Previously-Recognized Powers of Military Detention

For all of the foregoing reasons, the AUMF should not be read to have granted broad rule-making power to the executive branch. In considering the AUMF, both *Hamdi* and *Hamdan* went out of their way to underscore the constitutional restraints on executive law-making, even in time of war. *Hamdi* directly quoted *Youngstown Steel & Tube Co. v. Sawyer,* a seminal case on wartime power:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."

343 U.S. 579 at 587 (1952). And *Hamdan* quoted Chief Justice Chase's comments from *Ex parte Milligan*, 71 U.S. 2, 139-40 (1866):

> The powers to make the necessary laws is in Congress; the power to execute in the President . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.[11]

For the reasons discussed above, the notion that the AUMF contained an implicit blank check for a Presidentially-controlled preventive detention program, operated by the military but without regard to an individual's actual participation in hostilities, is simply untenable. This is especially so where, as both respondents and their predecessors have repeatedly asserted, a central purpose of that program is intelligence gathering. *Hamdi* specifically noted that:

> *The purpose of detention is to prevent captured individuals from returning to the field of battle* and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, *the only purpose of which is to prevent the prisoners of war from further participation in the war*'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947) . . . .

542 U.S. at 518 (emphasis added; additional citations omitted). The Court then stated flatly that "indefinite detention for purposes of interrogation is not authorized." *Id.* at 521.

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[11] *Hamdan* also noted that where "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute of by the Constitution. *Cf. Loving v. United States*, 517 U.S. 748, 771 (1996) (acknowledging that Congress 'may not delegate the power to make laws') . . ." 548 U.S. at 601.

Nonetheless, respondents have argued that this very purpose justifies their claimed detention power. *See, e.g.*, respondents' memorandum at 7. Similarly, a Department of Justice attorney told Judge Hogan at a plenary hearing on December 10, 2008 that "Guantanamo is first and foremost an intelligence operation." Tr. of 12/10/2008 hrg. in *In Re: Guantanamo Detainee Litigation*, Docket No. MS 08-442, at 28. Three days ago, on March 17, 2009, Lawrence Wilkerson, a former Bush administration official, published an article entitled *Some Truths About Guantanamo Bay,* reporting that senior administration officials were aware "very early on . . . of the reality that many of the detainees were innocent of any substantial wrong-doing, had little intelligence value, and should be released." Notwithstanding this awareness, the administration decided that "as many people as possible had to be kept in detention for as long as possible for this philosophy of intelligence gathering to work. The detainees' innocence was inconsequential." http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/. The executive branch decision to rewrite the law of war – first announced in 2004 -- was thus necessitated not by "new" conditions of combat, but rather by the need to find some excuse for indefinite detention for intelligence purposes – a purpose specifically rejected by the Supreme Court.

The verbal formulations advanced by the prior administration and the current administration both represent improper attempts at executive law-making and go far beyond the traditional scope of military detention in wartime. The Court should, therefore, decline respondents' invitation to read into the AUMF a broad delegation of legislative power.[12]

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[12] Respondents suggest in a footnote (at p. 6) that this Court should simply defer to executive branch judgments concerning the AUMF, citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Their relegation of this argument to a footnote underscores its weakness. In both *Hamdi* and *Hamdan* – two Supreme

II. Respondents' "Refined" Formulation Is Inconsistent With The Law Of War

Respondents assert that the law of war is inapplicable to the conflict in Afghanistan. Nevertheless, they contend that their formulation is drawn directly from and by analogy to established law of war principles. Resp. Mem. at 1, 2. That is inaccurate, for the following reasons.

As discussed in the Hidar brief (Exhibit A) and in the previously-filed expert declaration of Prof. Gary D. Solis (Exhibit B hereto), the law of war distinguishes between "combatants," who may be properly detained, and "non-combatants," who may not. The term "combatants" comprises two categories of individuals: first, members of State armed forces and other forces described in Article 4 of the Third Geneva Convention, who are presumptively "lawful combatants," and second, civilians who actively and directly participate in hostilities and are recognized as "unlawful combatants." See Hidar Br. at 5-10 and authorities cited; Solis Decl. at ¶6. Individuals in the first category may be detained based solely on their *status*, while those in the second category are detainable only if their *conduct* meets certain requirements.[13] *See, e.g.,*

Court cases that considered the scope of the AUMF – the government made the same argument. Nevertheless, the Court ruled in both instances that the President's reading of the AUMF was incorrect. The government also made the "deference" argument in *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 2009 U.S. LEXIS 1777, 77 U.S.L.W. 3502 (March 6, 2009), another case where the AUMF was at issue. Not a single judge of the Fourth Circuit sitting *en banc* accepted the detention standard asserted by the government.

Moreover, *Curtiss-Wright* is clearly inapposite. There, Congress had passed a Joint Resolution that expressly and specifically authorized the President to proclaim an embargo on arms sales to belligerents in the Chaco War (the conduct for which appellees were indicted). The President then did so. Appellees successfully argued to the district court that the Joint Resolution was an unconstitutional delegation of legislative authority because it contained no standards governing its exercise. The Supreme Court reversed on the ground that the President's constitutional responsibility for foreign affairs justified a broader delegation of authority than might have been permissible in a domestic context. The key difference here is that there has been *no* express delegation of authority, as there was in *Curtiss-Wright*. Consequently, that case provides no escape from the "clear statement" requirement previously discussed.

[13] Neither the present nor the prior administration has ever asserted that any of the Guantánamo detainees falls into the first category: if that were the case, such individuals would be subject to full Geneva Convention protections as prisoners of war. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316 (Third Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August

Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 11.3 (1995) (U.S. Navy Handbook) ("Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked."), and other authorities cited in the Hidar brief at pp. 6-10.[14]

The formulation adopted by respondents abandons this clear distinction. While the administration still regards petitioners as "unlawful" combatants, it seeks the right to detain them based solely on their status as alleged "members" of Taliban or al-Qaeda "forces" (or as alleged members of other groups with an alleged relationship to the foregoing), rather than having to show that the individual engaged in the specific kind of individual conduct that international law regards as necessary in the case of persons who are not members of a state armed force. Respondents are not following the international law of war; rather, they are rewriting it by deliberately conflating two distinct analytical categories: lawful combatants (as defined in the Third Geneva Convention) and unlawful combatants. Lawful combatants are privileged, and are entitled to full Geneva Convention protections as prisoners of war. Respondents classify all detainees as unlawful (i.e., unprivileged) combatants but ignore the fact that under the law of war individuals enter that category based only on their actual conduct, not based on their status as "members" of an informal "armed force." As the United States military explained to its field commanders in the 2006 edition of its Operational Law Handbook, "unprivileged belligerents" include only those "who are participating in the hostilities or who otherwise engage in

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1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 (Additional Protocol I).

[14] Respondents' brief makes no effort to rebut petitioners' prior briefs concerning the scope of the law of war, or to contradict the expert declaration of Professor Solis.

unauthorized attacks or other combatant acts." Operational Law Handbook, The Law of War, Chapter 2, VIII.A.1.c. (2006).

Next, respondents' abandonment of the term "enemy combatant" underscores the fact that they claim the power to detain individuals who were not involved in combat and in some cases were never present in Afghanistan. Thus, while the prior administration tried to expand the enemy "combatant" category by redefining it to include anyone perceived to be guilty of "supporting" al-Qaeda or the Taliban in any way, the current administration simply ignores the "combatant/non-combatant" distinction that is central to the established law of war and enunciates its own novel definition of the categories of individuals it claims it is entitled to detain.

It is critical to recall in this regard that the Supreme Court expressly stated in *Hamdi* that "our opinion only finds legislative authority to detain under the AUMF *once it is sufficiently clear that the individual is, in fact, an enemy combatant*." 542 U.S. 507 at 523 (emphasis added). That ruling was specifically tied to the categories long recognized by the law of war, but respondents now seek to revise those categories in a way that eliminates focus on the "combatant" issue.

Respondents, like their predecessors in the prior administration, also seek to expand the detention powers recognized by the law of war by adding the concept of "support." Although respondents have now qualified their use of that term to some degree, their position still represents an impermissible broadening of the law of war.[15] As argued previously in the Hidar

[15] Respondents cite as support for their new contention a case (Mr. Bensayah's) that was decided under the standard advocated by the prior administration. This makes no sense. Moreover, respondents no longer advance the MCA-based legal rationale relied on by Judge Leon at the time he accepted that standard. *See* Hidar brief at pp. 17-20 for a critique of the earlier argument.

brief, the traditional law of war contains no authority for military detention based on mere "support" of opposing enemy forces, and respondents cite none in their brief. Here too, the Court is faced with unauthorized legal innovation by the executive branch. And because respondents offer no definition of either "support" or "substantial," definitional issues that should have been addressed by statutory means will, if respondents' position is accepted, devolve upon individual members of the judiciary, who are likely to reach inconsistent results.

In this connection, the Court may find it instructive that not a single Fourth Circuit judge in the now-vacated *al-Marri* case accepted the government's position with respect to the "support" issue.[16] Moreover, the Congressional Research Service observed in a 2005 report to Congress that "We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not quality as a legitimate belligerent, with or without the authorization of Congress." *See* CRS Report for Congress, Detention of American Citizens as Enemy Combatants (updated March 31, 2005) at 11.[17]

Respondents' formulation further departs from law of war principles by ignoring considerations both of time and geography. Under the law of war, military detention of persons not accused of crimes is appropriate only as to persons who were "combatants" during the period of actual hostilities. Hostilities in Afghanistan did not commence until October 2001, after the

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[16] Petitioners strongly commend to the Court the persuasive concurrence in *al-Marri* written by Judge Motz and joined by three of her colleagues (*see* 534 F.3d at 217 *ff.*), as well as the panel decision that preceded the *en banc* review (*see* 487 F.3d 160 (2007)). But it is a striking fact that *no* Fourth Circuit judge accepted the government's asserted standard. Those who found al-Marri's detention to be warranted did so on substantially narrower grounds than the government claimed then or now. *See* discussion in the Hidar brief at pp. 24-26.

[17] While the title of the CRS report might suggest that it dealt only with the circumstances under which U.S. citizens might be detained, that is not in fact the case. The report is a broad review of the history and governing law of *all* forms of military detention in wartime, and the comment quoted above is not limited in its scope.

AUMF was passed. Respondents cite no authority for the notion that the law of war authorizes military detention for non-criminal conduct that antedates the beginning of war.[18] Moreover, even as to earlier criminal activities, the Supreme Court noted in *Hamdan v. Rumsfeld* that

> Neither the purported agreement with Usama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 20001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

548 U.S. 557 at 599-600.[19]

Moreover, military detention for non-criminal activity is permissible only in the geographic theater of war: i.e., on or in propinquity to the battlefield. Respondents cite no precedent in the law of war for military detention of persons who were not members of a State armed force and who were captured far from the battlefield. Nor do they cite law of war precedent for the notion that a belligerent power may offer rewards to nations not directly involved in the conflict to arrest and then turn over to the belligerent's military arm people who are merely suspected of some connection to terrorism somewhere. If there is legal authority for doing so, it certainly does not stem from the law of war.

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[18] This observation does not preclude the capture and criminal prosecution of individuals who plotted or participated in the 9/11 attacks, precisely because those attacks were criminal in nature. Military detention, however, is not designed for criminal behavior and, as the Supreme Court has observed, is inherently non-punitive in nature.

[19] Respondents' new formulation is also deficient in failing to recognize that, under the law of war, the status or conduct that can justify detention is not permanent. To illustrate: a retired soldier would not be detainable even if he engaged in hostilities before his retirement, if retirement meant that his membership in the military organization had ended. The same is true of members of demobilized military units so long as they have not been assigned to a new unit and are not subject to an obligation to join one. As to "unlawful combatants," flight might mean that a fighter is merely hiding among civilians waiting to strike again. It may also mean that he has completely abandoned the fight and is no longer part of a belligerent group. In that case, he is no longer detainable under the law of war. Whether a particular petitioner fits into one category or the other will depend on the facts. But it is inconsistent with the law of war to claim, as respondents do, that if a petitioner engaged in hostilities at some point, he is automatically detainable if he is captured later no matter where, when, or what other circumstances there may be.

In sum, the military detention power claimed by respondents is neither consistent with nor derived from the traditional law of war. Rather, it represents an attempt by respondents to legislate new and far broader standards for a conflict that respondents assert is not appropriately governed by the standards that are a matter of "'universal agreement and practice.'" *Hamdi,* 542 U.S. at 518.[20]

III. Determining Who Is Subject To the Law of War

As previously noted, the United States has taken the position that the post 9/11 conflict with the Taliban-dominated government of Afghanistan was an international armed conflict because Afghanistan was a party to the Geneva Conventions. But as the Supreme Court noted in *Hamdan*, the conflict with al-Qaeda is not of an international character. 548 U.S. at 630. That being so, a threshold question arises as to whether a person detained solely on the basis of alleged membership in or association with al-Qaeda is subject to the law of war at all. This issue was specifically noted in the Congressional Research Service report cited earlier:

> Inasmuch as the President has determined that Al-Qaeda is not a state but a criminal organization to which the Geneva Convention does not apply, . . . it may be argued that Al-Qaeda is not directly subject to the law of war and therefore its members may not be detained as "enemy combatants" pursuant to it solely on the basis of their association with Al-Qaeda.

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[20] Objectively viewed, the post-9/11 hostilities in Afghanistan comprised three distinct conflicts. The conflict between the United States and the Taliban-dominated government, who had been the *de facto* government of Afghanistan for some years and fully controlled the apparatus of that state, was a traditional international conflict – the *casus belli* being the Afghan government's continued "harboring" of al-Qaeda after receiving and rejecting a U.S. ultimatum. The United States recognized this when it announced that because "Afghanistan is a party to the Geneva Convention . . . the President has determined that the Taliban members are covered under the treaty . . . ." (Statement by the Press Secretary on the Geneva Convention, May 7, 2003). The post 9/11 conflict between the *de facto* Afghan government and the largely ethnically Tajik and Uzbekh forces comprising the so-called "Northern Alliance" was merely the resumption of a domestic civil war that had continued, off and on, for years. As explained in the *Bostan* brief attached hereto as Exhibit C, residents of Afghanistan, including even belligerents in this second war, are not detainable by the United States under the international law of war. And the conflict between the United States and al-Qaeda members was not a "war" in any commonly recognized sense of that term, but rather the use of force by the U.S. to apprehend and punish a group of criminals. Petitioner Khan will submit further argument on this issue in his separate brief.

CRS Report of March 31, 2005, at CRS-12. As one scholar has correctly pointed out:

> According to their terms, the Geneva Conventions apply *symmetrically* – that is to say, they are either applicable to both sides in a conflict, or to neither. Therefore the White House statement that the Geneva Conventions do not extend to al-Qaeda is effectively a declaration that the entire military campaign against terrorism is not covered by the Geneva Conventions.

A. Dworkin, *Law and The Campaign Against Terrorism*, at http://www.crimesofwar.org/onnews/news-pentagon.html. The logical consequence of this position is that persons allegedly associated with al-Qaeda or similar groups may not be detained under the law of war at all unless they played a direct role in armed combat and thus became "unlawful combatants". Authority for their detention would have to be found in U.S. criminal law.

It is unclear how many petitioners before this Court are affected by the above considerations. But because the applicability or non-applicability of the law of war turns on the facts of each case, it is unnecessary for the Court to address that issue at this time. The Court does, however, need to decide whether the AUMF provides legal authority for the position articulated by respondents.

IV. The Issues Presented For Decision Are Limited in Scope

None of the petitioners before this Court in these cases was involved with the attacks of 9/11; and none was involved in any meaningful way with "harboring" the former. In light of *Hamdi,* petitioners do not contest respondents' right to capture and properly detain individuals who actually and directly engaged in the armed conflict against the United States in Afghanistan. *Cf. Hamdi*, 542 U.S. at 516. Petitioners do dispute the power of the executive, without explicit and appropriate Congressional authorization, to unilaterally expand or redefine the categories of persons properly detainable under the law of war. The executive's attempt to do so amounts to

impermissible legislation on the subject of military detention powers in derogation of accepted international law.

It may also be helpful to suggest what the Court is and is not required to decide at this point in time. The Court need not, at this juncture, declare in detail the precise content of the law of war: there is little dispute over the relevant issues, and respondents have not contradicted the relevant summary of those issues provided by Prof. Solis. Nor is it necessary for the Court to decide now how that body of law should be applied in the case of any particular petitioner. The Court need only recognize that the position advanced by respondents, as they themselves admit, is not a direct application or literal restatement of the detention powers recognized by the law of war, but represents instead an attempt at innovation in this area. That being so, the Court must then decide whether or not that innovation was authorized by the AUMF. *Hamdi* and *Hamdan* clearly suggest that it was not, and the canons of statutory construction and contextual evidence previously discussed also militate against any such finding.

Respondents argue that the scope of military detention authority recognized by the law of war is inadequate to the allegedly novel circumstances of international terrorism.[21] Whether or not this is correct is a matter that has been and continues to be hotly debated by scholars and policy makers. But political debates over the necessity of legal change are not resolved in a democratic society by executive fiat; rather they are resolved in the halls of Congress, which is the sole repository of legislative power. In a constitutional system of government, respect for the

[21] Respondents advert, for example, to non-uniformed combatants who may vanish into civilian populations or temporarily withdraw across an international frontier. But the United States, like other nations, has faced this kind of problem for a century or more without pressing for different military detention standards. The war in Vietnam, discussed by Prof. Solis in his declaration, is merely one example.

rule of law demands respect for the constitutionally-prescribed methods for making or changing law.

Ultimately, as the Court well knows, its decision will not be the final word on this subject. But that is all the more reason for it to decide the issue squarely on the basis of constitutional principle rather than perceived expediency. The separation of powers doctrine and the cautionary canons of construction previously referred to do not permit respondents' construction of the AUMF.

Conclusion

For the reasons given above and in previously-filed briefs on the subject, the Court should decline to rule that respondents' claim of detention powers was authorized by the AUMF. Instead, consistently with the approach followed in *Hamdi*, it should rule that it will decide individual petitioners' cases in accordance with recognized law of war standards.

Dated: March 20, 2009

Respectfully submitted,

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This brief is filed with the assent of counsel for all petitioners before this Court.

CERTIFICATE OF SERVICE

I, Usha-Kiran K. Ghia, certify that on March 20, 2009, I caused Petitioners' Joint Memorandum in Reply to Respondents' Memorandum Dated March 13, 2009 to be electronically filed with the Clerk of the Court, using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record registered with the Court.

DATED: March 20, 2009

By: /s/ Usha-Kiran K. Ghia
Counsel for Petitioner

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AHMED SAEED HIDAR a.k.a. MOHAMMED AHMED SAID HAIDEL, ISN #498,	CIVIL ACTION NO. 05-02386 (RBW)
Petitioner,	**ORAL ARGUMENT REQUESTED**
v.	
GEORGE W. BUSH, et al.,	
Respondents.	

PETITIONER'S RESPONSE TO THE COURT'S DECEMBER 19, 2008 ORDER; MEMORANDUM OF LAW CONCERNING THE APPROPRIATE DEFINITION OF "ENEMY COMBATANT"; AND UNOPPOSED REQUEST FOR NOTICE OF HEARING

Petitioner Mohammed Ahmed Saeed Hidar (ISN 498) responds herewith to Paragraph C-1 of the Court's Order of December 19, 2008. Because Respondents have not made the disclosures required by that Order and because counsel for Petitioner have not had the opportunity to discuss Respondents' factual allegations with Mr. Hidar, counsel deem it premature to move for expedited judgment based solely on those allegations.

However, any such motion by any party to these cases will turn in material part on a purely legal issue: the scope of the term "enemy combatant." The Court has indicated that it may hear argument on that issue as early as January 12, 2009. Petitioner does not

wish to be foreclosed from argument on the legal issue, and therefore respectfully submits the following memorandum of law.

In view of the importance of this issue, Petitioner's counsel also request notice of any hearing at which the "enemy combatant" issue will be addressed. The government has indicated that it does not oppose this request.

Moreover, because counsel will be in Guantánamo from January 14 to January 18, they respectfully request that any hearing on this issue be set for an alternative date.

Petitioner Hidar's Memorandum of Law follows.

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Introduction

Under the traditional law of war, a civilian may be properly deemed an enemy "combatant" if captured while directly and actively participating in hostilities. At least until late 2001, that definition was accepted and followed by the United States, and it should control here. Respondents, however, have advanced a novel and legally unprecedented definition of the term "combatant." They contend that:

> At a minimum, the President's power to detain includes the ability to detain as enemy combatants those individuals who were part of, *or supporting*, forces engaged in hostilities against the United States or its coalition partners or allies.

DE146:3 (emphasis added). This expansive and vague formulation has not been authorized by Congress, lacks any other legal basis, and conflicts with established domestic and international norms.

Earlier this year, the Supreme Court noted that habeas challenges brought by Guantánamo detainees turn on "whether the AUMF authorizes" petitioners' indefinite detention as "enemy combatants." *Boumediene v. Bush*, 128 S. Ct. 2229, 2271-72 (2008).[1] The AUMF contains no express authorization for military detention; thus, any such power must be inferred from the authorization to use "force." In an earlier case, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the plurality opinion set out the principles by which that inference must be guided. There, the government alleged that Hamdi had been captured while "carrying a weapon against American troops on a foreign battlefield; that is, he was an enemy combatant." *Id.* at 522 n.1 (2004). The Court ruled that

[1] Referring to Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

"[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident to waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention *in the narrow circumstances of this case*." *Id.* at 519 (emphasis added).

Critically, the Court rested its conclusion on "longstanding law-of-war principles," *id.* at 521, noting that military detention of both lawful and unlawful enemy combatants was recognized by "'universal agreement and practice.'" *Id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)). As *Hamdi* suggests, the power to detain "enemy combatants" implicit in the AUMF's authorization of "force" extends no further than the situations in which the laws of war themselves authorize military "force," including military detention.

Respondents now assert a detention power far broader than that recognized by the traditional law of war, which governs the scope of authority accorded by the AUMF. They claim that the President is free to detain not only actual combatants such as Hamdi, captured with weapons on the battlefield, but *anyone*, *anywhere*, who in the President's view is guilty of "*supporting*" forces hostile to the United States, its coalition partners, or its allies. Respondents do not define, nor do they suggest any limits on, the ambiguous and almost infinitely-elastic word "supporting."

Summary of Argument

Respondents' position is legally unprecedented and unauthorized by Congress. Under established legal principles, any broader definition of "enemy combatant" required an express grant of authority from Congress. No such delegation occurred, and

Respondents' verbal formulation is therefore not binding on this Court. Indeed, their argument ignores no fewer than three separate canons of statutory construction.

Consistently with *Hamdi*, this Court should rule that the appropriate legal framework for judging the legality of petitioners' detention is that recognized by the law of war: a far more concrete standard that, according to the Supreme Court, enjoys "universal practice and acceptance."[2] As shown in Section I below, that standard encompasses (1) members of a uniformed enemy force, and (2) civilians directly engaged in combat against the United States at the time of their capture.

Section II of this memorandum demonstrates that the executive branch's unilateral effort to expand the scope of the traditional standard is constitutionally impermissible and must be rejected. Congress, the sole repository of legislative power under the Constitution, has never delegated to the executive the authority to redefine the term "enemy combatant." Nor has Congress provided the clear guidance that would be a necessary part of any such delegation. Moreover, while Respondents baldly assert that the President has inherent authority to promulgate a new and radically expanded definition of "enemy combatant," that argument is both legally unprecedented and erroneous as a matter of constitutional law. In the absence of unambiguous action by Congress to depart from the definition of "enemy combatant" historically recognized by the United States and the international community, this Court should – indeed, it must – judge the legality of petitioners' detention by that standard rather than the novel and expansive formula advanced by Respondents.

[2] *Hamdi v. Rumsfeld, supra.*

Argument

I. The Proper Standard for Determining the Legality of Petitioners' Detention Under the AUMF is the Definition of "Enemy Combatant" Recognized by the Laws of War

As noted above, the Supreme Court in *Hamdi* ruled that, by authorizing the use of military force, the AUMF implicitly authorized the executive branch to detain "enemy combatants" consistently with the principles universally recognized by the laws of war. The term "combatant" has an established meaning in the law of armed conflict: it refers to a person whom the military may lawfully kill or capture and, if captured, detain for the duration of hostilities. Neither the AUMF nor Article II of the Constitution authorizes the President to order the use of military force—whether through deliberate targeting or indefinite military detention—against persons who are not "combatants" on the enemy side (i.e., "enemy combatants") under the law of armed conflict.

The well-established definition of "combatant" includes two categories of persons. The first (not relevant here) consists of members of a State military that is engaged in hostilities against the United States. Individuals in this category are presumed to be enemy combatants whether or not they individually take up arms. *See* Declaration of Gary D. Solis ("Solis Decl.") at ¶ 6.c-d (Exh. 1 hereto); *see also,* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316 (Third Geneva Convention) (defining "prisoners of war" as "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces"); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 (Additional Protocol I) (defining "combatants" as

"[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel).

The second category – pertinent here -- consists of civilians who give up the protections of civilian status by participating actively and directly in hostilities as part of an organized armed force. *See, e.g.*, Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 11.3 (1995) (U.S. Navy Handbook) ("Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked."). Such persons may be lawful targets of military force, including killing or, if captured, military detention consistent with the laws of war. *See* Solis Decl. ¶ 6.c (citing U.S. Army General Orders Number 100 of 1863, commonly known as the Lieber Code).

U.S. military doctrine and practice make clear, however, that civilians who are not participating in hostilities at the time of their capture may not be treated as "combatants." As noted by Gary D. Solis, former Marine officer, judge advocate, and director of the Law of War program at the United States Military Academy, "[a]bsent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant." Solis Decl. ¶ 6.f. U.S. military publications, treaties, and authoritative commentary confirm this established rule. *See, e.g.*, U.S. Air Force Pamphlet 110-31, § 5-3(a)(1)(c), at 5-8 (Nov. 19, 1976) ("Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities."); *see also,* Third Geneva Convention art. 3(1) (prohibiting attacks on civilians "taking no active part in the hostilities"); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International

Armed Conflicts, June 8, 1977, art. 13(2)¬(3), 1125 U.N.T.S. 609, 615 (Additional Protocol II) (civilian population "shall not be the object of attack" "unless and for such time as they take a direct part in hostilities"); 1 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* 19-20 (2005) (noting that State practice "establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts"); Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113-2114 (2005) ("The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities.").

The "direct participation in hostilities" standard is a critical distinction in the law of armed conflict, as it determines when and under what circumstances civilians may be treated as "combatants" and when they may not. The consequences of that determination are important: "combatants" may be deliberately targeted with deadly force, whereas civilians who are not participating in hostilities may not. Similarly, combatants may also be imprisoned by the opposing military in order to prevent their return to the battlefield. *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The purpose of detention is to prevent individuals from returning to the field of battle and taking up arms once again."). The same is not true of civilians, though civilians may, of course, be charged with crimes for conduct that does not amount to direct participation in hostilities. *See, e.g.*, 18 U.S.C. §§ 2339A (criminalizing material support for terrorist acts), 2339B (criminalizing material support to a foreign terrorist organization), 2339C (criminalizing financing of terrorist acts); *cf.* 1 Henckaerts & Doswald-Beck 23 (law of armed conflict "does not prohibit States from adopting legislation that makes it a punishable offence for anyone to

participate in hostilities, whether directly or indirectly."). But they may not be targets of military force (including detention until the end of conflict) if they have not given up the protections of civilian status by actively engaging in combat. *See* Solis Decl. ¶ 6.f.

While the phrase "direct participation" may require further interpretation in its application to a specific fact pattern, State interpretation and practice have made clear that the standard is a narrow one requiring far more than mere "support" of an enemy. Thus, civilians who are doing paperwork for an enemy force, manufacturing supplies, growing victory gardens, shouting encouragement, or personally planning to join the fray at some time in the future are not "enemy combatants." *See* Solis Decl. ¶ 6.g. Neither the U.S. military nor the militaries of other nations may lawfully target such persons for killing, capture, or detention; they must be dealt with, if at all, through ordinary civil or criminal processes. *See, e.g., Public Comm. Against Torture in Isr. v. Israel*, 46 I.L.M. 375, 391-392 (Isr. S. Ct. 2007) (stating that a civilian who "*generally* supports the hostilities against the army," who "sells food or medicine to an unlawful combatant," or who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid" is not directly participating in hostilities (emphasis added)).

It is only when a civilian participates in an armed conflict in a manner calculated to cause direct harm to the enemy that the civilian becomes targetable or subject to military detention. This doctrine has been expressly endorsed by the United States, which "understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy." Message

from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37 (2000), available at 2000 WL 33366017, at *3 (S. Treaty Doc. No. 106-37). *See also,* International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 516 (Sandoz et al. eds. 1987) ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.").

Authorities on the law of war and military practice describe other key characteristics of "direct participation" that are especially relevant here. First, a civilian is not converted into an enemy combatant by supporting an armed force in a manner that is only tangentially related to combat operations. *See, e.g.*, S. Treaty Doc. No. 106-37 (2000), available at 2000 WL 33366017, at *3 ("The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment."). Next, "[d]irect participation in hostilities" must be *intentional* in order for a civilian to become a lawful target of force. *See, e.g.*, International Committee of the Red Cross 618 (describing direct participation as "acts which by their nature *and purpose are intended* to cause actual harm to the personnel and equipment of the armed forces" (emphasis added)); Schmitt, 5 Chi. J. Int'l L. at 538 ("[T]he *mens rea* of the civilian involved is the seminal factor in assessing whether an attack or other act against military personnel or military objects is direct participation."). Finally, a civilian may be targeted with force only when and for such time as he engages in hostilities. U.S. Air Force Pamphlet 110-31, § 5-3(a)(1)(c), at 5-8; 1 Henckaerts & Doswald-Beck 20-21.

The above standard is accepted and applied by the United States and allied nations as the correct legal standard—indeed, the *only* legal standard—for determining whether and when a civilian may be treated as a "combatant" in an armed conflict, either for purposes of military detention or targeting with military force.[3] Congress has not passed any law that alters or abandons this standard, and the President has no authority to do so unilaterally.[4]

II. Respondents' Expansive "Justification" For Detention Is Unsupported By The AUMF

A. The AUMF Did Not Authorize Respondents To Redefine The Traditional Law of War.

Respondents contend that the verbal formula they now advance was authorized by Congress's 2001 Authorization for the Use of Military Force ("AUMF"). They also assert, without analysis, that the Supreme Court confirmed that authority in the *Hamdi* case. Both arguments are demonstrably wrong.

First, the AUMF authorized use of "all necessary and appropriate force" only against a very specific and limited set of targets: those "nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and those who "harbored such organizations or persons." AUMF, *supra*, § 2(a). It is precisely because most Guantánamo detainees do not fall into

[3] Military personnel engaging in the use of force must and regularly do make judgments as to whether a particular civilian is directly participating in hostilities at a given place and time. *See* U.S. Navy Handbook 11.3 ("Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time."); Solis Decl. ¶ 6.h (describing how, in Vietnam, U.S. military officers distinguished Viet Cong combatants from the villagers who were merely supporting them and, therefore, could not be treated as combatants).

[4] The standard discussed above does not pertain to *unlawful* combatants: *i.e.*, those who commit crimes that are subject to prosecution under international or domestic law. As the Court is undoubtedly aware, most Guantánamo detainees (including Petitioner here) have not been charged with any crime and therefore do not fall into the category of "unlawful combatants".

those categories that the executive branch is now unilaterally attempting to expand its detention powers. Quite apart from the rules of statutory construction discussed in Section II.B below, there is simply no textual basis in the AUMF for concluding that Congress intended to abandon traditional U.S. and international standards governing military captures, much less to write the President a blank check in that regard.

As noted above, the AUMF says nothing on the subject of detention powers. Nevertheless, the *Hamdi* plurality inferred from the phrase "all necessary and appropriate force" an implicit authorization to detain "Taliban combatants who '*engaged in an armed conflict* against the United States.'" *Hamdi*, 542 U.S. at 521 (plurality opinion) (emphasis added). The Court noted that

> in light of [traditional law of war] principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention *in the narrow circumstances considered here*.

Id. at 509 (emphasis added).

The Court expressly based its decision on "longstanding law-of-war principles" (*id.*) that enjoyed "'universal agreement and practice'" (*id.* at 517): precisely those principles articulated in the previous section of this brief. It emphasized that its ruling pertained only to the "narrow category [of individuals] we describe" (*id.* at 517). Because Mr. Hamdi was alleged to have been a member of a Taliban unit and to have been captured while carrying a weapon in a zone of active combat, his detention as an "enemy combatant" was presumptively proper under the law of war.[5]

[5] The plurality noted that the "only purpose" justifying military detention of such persons was the traditional one of preventing a "combatant" from returning to the battlefield and resuming hostile military

In sum, as any careful reading of the opinion confirms, the "narrow" authority to detain approved in *Hamdi* was very specific both as to its extent and purpose. Most importantly, *Hamdi* makes clear that this detention power is governed by the traditional law of armed conflict, which provided both the basis for inferring that power and – of particular importance here -- its limiting principle. *See* Bradley & Goldsmith, 118 Harv. L. Rev. at 2108: "Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers." Thus, under *Hamdi*, it is the universally accepted and "longstanding law-of-war principles" that provide the appropriate standard in this case.

Hamdi does not suggest that the AUMF delegated any detention powers beyond that recognized in the traditional law of war, or that it set forth any "intelligible principle" to guide the executive with respect to the detention of persons who were *not* captured in actual combat against the United States in Afghanistan. As shown below in Section II.B, absent a clear authorization from Congress, unprecedented executive action cannot be judicially upheld, particularly when, as here, it involves questions of major political significance.

Strict interpretation of the AUMF is doubly appropriate because Congress refused the President's first request for broader authority to use force against persons unconnected to the September 11 attacks in order "to deter and pre-empt any future acts of terrorism or aggression against the United States." Rather, it chose to pass a statute containing much narrower language. *See* Abramowitz, *The President, the Congress and*

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operations. *See id.* at 518, 521 (noting that detention for intelligence gathering purposes, revenge, or punishment is not permissible).

Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism, 43 Harv. Int'l L. J. 71, 73 (2002). Similarly, when Congress passed the Patriot Act[6] shortly after enacting the AUMF, it specifically authorized the detention of terrorist aliens, but only for a *limited* period pending trial or deportation, and subject to *civilian* law enforcement processes.

Notably, the AUMF does not use the ambiguous words "supporting" or "supported." The authorized targets are only those nations, organizations, or persons who (i) "aided" the September 11 terrorist attacks (a term that, especially following the words "planned," "authorized," or "committed" those attacks, plainly connotes only those entities or persons who intentionally assisted the actual perpetrators), and (ii) those who "harbored" the organizations or persons responsible for the attacks (a term that connotes the intentional giving of shelter to wrongdoers). Moreover, the anti-terrorism statutes passed by Congress in the same time frame target only persons who knowingly provide "material support" for terrorism, a specifically defined (if still very broad) term. *See, e.g.,* 18 U.S.C. §§ 2339A, 2339B. Unlike petitioners here, individuals accused of violating those statutes receive all the protections of a civilian trial, including the "beyond a reasonable doubt" standard. If Respondents may imprison, indefinitely and without trial, anyone who is alleged merely to have provided some kind of undefined "support" to the country's adversaries, the anti-terrorism statutes are largely nugatory.

In sum, Respondents' assertion that the AUMF and *Hamdi* support their expansive approach is fallacious. Consistently with the approach actually followed in

[6] Pub. L. No. 107-56, 115 Stat. 272 (2001).

Hamdi, this Court should determine, in each case, whether a petitioner's continued detention is justified by the detention powers recognized by the traditional law of war.[7]

B. Respondents' Approach To The AUMF Ignores Fundamental Canons Of Statutory Construction

Respondents' AUMF-based argument ignores three key canons of statutory construction.

1. Congressional Delegation Of Law-Making Powers Requires Both A Clear Statement of Intent and Substantive Guidance by Congress.

Under Article I, Section 1 of the Constitution, Congress is the sole repository of legislative authority. Moreover, Article I, Section 8 specifically states that it is the responsibility of Congress, not the President, to "make Rules concerning Captures on Land and Water." The Supreme Court has repeatedly held that the constitutional separation of powers bars Congress from engaging in excessive delegation of its lawmaking power to other branches of government. A corollary of the same doctrine requires Congress to set forth an "intelligible principle" by which any delegation of power must be guided. *See Whitman v. American Trucking Association*, 531 U.S. 457, 472 (2001) ("[W]e have repeatedly said that when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible

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[7] The government has argued in other habeas cases that its asserted justification for detention should be accorded what is often referred to as "*Chevron* deference." (*cf. Chevron U.S.A. Inc, v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). But that deference "is warranted only when Congress has clearly given the agency an express or implied delegation of authority. *Railway Labor Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("It is only legislative intent to delegate [a claimed] authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*."); *Aid Ass'n for Lutherans v. U.S.P.S.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003) ("*Chevron* deference is due only when the agency acts pursuant to 'delegated authority'); Merrill, *Rethinking Article I*, 104 Colum. L. Rev. at 2173-74 ("courts should not give *Chevron* deference to agencies with respect to questions that implicate the scope of the agency's jurisdiction"). Here, as shown above, the AUMF did *not* delegate, either expressly or impliedly, the power to redefine traditional international law principles relating to "enemy combatants." Consequently, *Chevron* is inapposite.

principle to which the person or body authorized to act is directed to conform.") (emphasis in original) (citations and brackets omitted). Here, as determined in *Hamdi*, Congress may have intended the AUMF to authorize military detentions in accordance with established principles of the law of war. But it did *not* grant the executive branch authority to go beyond that traditional doctrine, nor did it lay down any "intelligible principle" for so doing.

Constitutional concerns about excessive delegations of power to the executive are most commonly satisfied through restrictive statutory construction. As the Supreme Court observed in *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989): "In recent years, our application of the nondelegation doctrine principally has been limited to interpretation of statutory texts, and, more particularly, to giving *narrowing constructions* to statutory delegations that might otherwise be thought to be unconstitutional") (emphasis added).[8]

This canon of construction requires that any assertion by the executive branch of unprecedented authority be supported by a clear statement from Congress delegating *and* guiding the use of that power. In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Supreme Court invalidated FDA tobacco regulations because the FDA had never previously tried to regulate tobacco, and the new regulations were unauthorized by a clear delegation from Congress. 529 U.S. 120, 160 (2000) ("we are confident that

[8] *Accord*, Bressman, Schechter Poultry *at the Millenium, A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399, 1409 (2000) ("The Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine."); Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 242 (2000) ("The Court's modern strategy [consists] of using the canon of avoidance to promote nondelegation interests. Where a statute is broad enough to raise serious concerns under the nondelegation doctrine, the Court simply cuts back on its acceptable bounds."); Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) (arguing that numerous canons of statutory construction implement nondelegation doctrine).

Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). *See also, Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) ("In the absence of a *clear mandate* in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over industry that would result from the Government's view [of the statutes].") (emphasis added); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) ("the [nondelegation] hurdles . . . lead us to read the Act narrowly to avoid constitutional problems").[9] Even more recently, nondelegation principles influenced the Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). As Justice Breyer observed: "*Hamdan*'s conclusion ultimately rests upon a single ground: Congress has not issued the President a 'blank check.'" 548 U.S. at 636.

2. A Second Canon of Construction Requires Statutes To Be Narrowly Construed When Individual Liberty Is At Stake.

The Supreme Court has repeatedly cautioned that statutes should be construed narrowly when assertions of executive power impinge directly on individual liberty. *Kent v. Dulles*, 357 U.S. 116 (1958), for example, involved a challenge by the artist Rockwell Kent to a State Department regulation denying passports to Communists. In

[9] *See also,* Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 So. Cal. L. Rev. 405, 457-458 (2008) (*Brown & Williamson* and *Industrial Union* "limited the range of issues on which an agency could act, based at least in part on its conclusion that the relevant decisions ought presumptively to be made by Congress [and thereby] serve to enforce the principles underlying the nondelegation doctrine without resort to constitutional invalidation."); Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. at 223-28 (*Brown & Williamson* best explained as part of the Court's effort to avoid improper delegation issues through statutory construction); Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2173 (2004) (in *Brown & Williamson*, the Supreme Court "declined to defer to interpretations that would significantly change the scope of agency power").

sustaining Kent's challenge, the Supreme Court ruled that it was appropriate to "construe[] narrowly all delegated powers that curtail or dilute [a fundamental liberty]." Because there was no "clear statement" by Congress authorizing the restrictions at issue, the regulation was invalid.[10] This approach to statutory construction has been consistently followed in cases where the government has sought to restrict an individual's liberty rights. *See, e.g., Webster v. Doe*, 486 U.S. 592, 608 (1988) (Congressional intent "must be clear"); *INS v. St. Cyr*, 533 U.S. 289, 308-309 (2001) (requiring "clear, unambiguous and express statement"); *Green v. McElroy*, 360 U.S. 474- 508 (1959) (requiring "explicit authorization"). Here, it simply cannot be argued that the AUMF provided clear or explicit authorization to the President to adopt a radical redefinition of the term "combatant."

3. Constructions That Depart From Accepted Norms Of International Law Must Be Avoided Absent A Clear Indication of Congressional Intent.

For more than two centuries it has been a maxim of statutory construction that "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing Chief Justice Marshall's opinion in *Murray v. The Charming Betsy*, 2 Cranch 64, 188 (1804)); *see also, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372, U.S. 10, 20 (1963) (same). While Congress is free to override customary international law, is it not lightly presumed to have done so, absent a clear indication of such intent. *See, Restatement (Third) Of Foreign Relations Law of the United States*, § 403 (1986).

[10] *See* Bressman, Schechter Poultry *at the Millennium*, 109 Yale L. J. at 1409-14 (noting that *Kent v. Dulles* exemplifies how the Court "used the constitutional clear statement canon to avoid a delegation that would impinge on the individual rights of certain passport applicants").

Here, the executive branch's unilateral decision to vastly enlarge the scope of the enemy "combatant" classification represented a deliberate departure from international law, as did its nearly simultaneous determination not to honor the Geneva Conventions with regard to petitioners' imprisonment. There is no support in either the text or the legislative history of the AUMF for concluding that Congress intended to authorize the President to abandon the United States' long-standing commitment to the traditional law of war, or to ignore the country's existing treaty obligations.

C. Contrary to Judge Leon's View In *Boumediene*, the Military Commissions Act Does Not Add To The Limited Authority Implicitly Conferred by the AUMF.

In *Boumediene v. Bush*, 2008 WL 4722127 * 1, Judge Leon recently concluded that, by passing the Military Commissions Act of 2006 ("MCA"),[11] Congress implicitly "blessed" the enemy combatant definition crafted in 2004 by the Department of Defense for the Combatant Status Review Tribunals ("CSRTs") to review the status of Guantánamo detainees.[12] Notably, Respondents' recently-filed factual return does not invoke or refer to the MCA as providing legal justification for petitioners' detention: rather, they rely solely on the AUMF and their assertion that the President has inherent power to craft his own legal standards. For that reason, the Court should not entertain an argument based on the MCA. Moreover, Judge Leon erred in at least three respects: (i) his ruling was manifestly incorrect as a matter of statutory interpretation; (ii) it ignored the established principle that executive authority to impose fundamental restraints on

[11] 10 U.S.C. §§ 948a *et seq.*

[12] The CSRT definition is similar, but not identical to, the definition offered by the government in the instant case. *Compare Boumediene*, 2008 4272217 * 2, *with* DE146:3.

liberty may not be inferred from ambiguous statutory circumstances, and (iii) it overlooked the constitutionally-based bar to standardless delegations of power.

Judge Leon's conclusion was based solely on the MCA's definition of "unlawful enemy combatant," 10 U.S.C. § 948a:

> The term "unlawful enemy combatant" means—
> **(i)** a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> **(ii)** a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Judge Leon failed to recognize, as the Supreme Court pointed out in *Hamdi*, that there is a distinction between "*lawful* combatants," who may be captured and detained, and "*unlawful* combatants," who may be captured, detained and tried. *See* 542 U.S. at 518 (emphasis added). The latter term refers to those individuals who have committed war crimes, and who are therefore eligible for prosecution by military commissions. Indeed, this was the express and sole purpose of the MCA:

> This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions.

10 U. S.C. § 948b(a) (emphasis added).

Section 948a, invoked by Judge Leon, refers solely to *unlawful* combatants. It says nothing at all about the appropriate standard for classifying individuals not accused of crimes as lawful enemy combatants – and it is this other category into which the great majority of Guantánamo detainees, including Petitioner, allegedly fall. Moreover, subsection (ii), which refers only to the standard used by the CSRTs to designate certain

detainees as "unlawful enemy combatants," does not expressly endorse or approve that standard: rather, simply as a procedural matter, it authorizes trial by military commission of persons who have been so classified. But even if subsection (ii) could be fairly read as a conscious "blessing" by Congress of the substantive standard used by the CSRTs to designate "unlawful enemy combatants" (and it cannot), it manifestly does not express any Congressional view on the standard used to determine which detainees were "lawful enemy combatants." Judge Leon erred in conflating these two distinct categories.

In fact, the CSRT definition of "enemy combatant" is distinct from the MCA's definition of "unlawful enemy combatant." Any characterization of a particular detainee as an "unlawful enemy combatant" necessarily entails a determination that the individual had committed a war crime under international law or some other crime properly punishable under U.S. law. No such determination was made in CSRT cases that classified other individuals simply as (lawful) "enemy combatants." *See United States v. Khadr*, C.M.C.R. 2007, No. 07-001, which specifically rejected the government's argument that Congress' definition of "unlawful enemy combatant" in the MCA "adopted" the CSRT definition of "enemy combatant." *Id.* at 10-16. "Mr. Khadr's 2004 C.S.R.T. classification as an "enemy combatant" failed to meet the M.C.A.'s jurisdictional requirements in that it did not establish that Mr. Khadr's was in fact an "*unlawful* enemy combatant" to satisfy the jurisdictional prerequisite for trial by military commission." *Id.* at 9 (emphasis in original).[13]

[13] It is important to note that while the MCA authorized the prosecution of alleged war criminals by military tribunals, it did not authorize the indefinite detention of even those individuals without prosecution. The government's claimed authority to hold petitioners – who have not been charged with crimes – for an indefinite period of time at the pleasure of the President presents an entirely different situation. *See United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

Judge Leon's conclusion also ignored the established principles that Congressional authority for executive action that represents a radical departure from traditional practice, or impinges on fundamental liberties, or departs from accepted norms of international law, may not be inferred from ambiguous statutory language. In such circumstances, a clear and unambiguous statement is required. *See* discussion at Section II.B, *supra.*

Finally, even if one were to assume, *arguendo*, that Congress actually intended -- in a statute whose sole purpose was to create a mechanism for the trial of war criminals -- to adopt a standard for detaining persons who are *not* accused of war crimes – that intention would run afoul of the limitations on delegation of Congressional power to the executive that have been discussed previously. Congress did *not* clearly state an intention either to delegate to the executive the power to radically redefine the concept of a "lawful enemy combatant" as reflected in the traditional law of war, or an endorsement of any such redefinition. Nor did it provide any "intelligible principle" or standards to guide the executive in exercising that power. Indeed, the formula now advanced by Respondents -- which relies on the open-ended term "supporting" -- is itself standardless. It is a "definition" that lacks any definition.

Put another way: if Congress had enacted a statute expressly granting to the President the power to detain anyone he determined to be an "enemy combatant," as well as the power to define that term as loosely and ambiguously as he saw fit, that statute would be held unconstitutional, not least due to its potentially arbitrary effects on individual liberty. But this Court is not faced with that situation: rather, it should simply

conclude that Congress did not, through the MCA, indirectly and retroactively accord such authority to the executive.

III. The President Has No Independent or Inherent Constitutional Authority To Expand The Traditional Definition Of An "Enemy Combatant"

Respondents' Statement Of Legal Justification For Detention asserts that "the President's power . . . to detain those determined to be enemy combatants . . . exists as a matter of the President's authority under Article II of the Constitution . . . ." *Id.* at 2. This statement clearly implies the view that the President's expansive assertion of power does not require Congressional authorization. Respondents have not to date offered any legal argument, much less any legal authority, in support of this proposition. Presumably, they will claim that their assertion is justified by the President's role under Article II as "commander in chief" of the country's armed forces.

It is difficult to rebut an argument that has not been clearly articulated, but Respondents' position should be rejected for a number of reasons. First, it is absurd to suggest that the commander in chief of any nation's military has, by virtue of that status, the implicit authority to ignore or rewrite the internationally-accepted law of war principles invoked in *Hamdi,* and there is no precedent for such a proposition. Next, the Supreme Court has clearly indicated that the military commander in chief in a democratic society is not an autocrat, even for the term of office. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). Rather, as George Washington, the original commander in chief, would readily have acknowledged, the President remains subject to direction and control by Congress.

While the inherent powers of a "commander in chief" have not been fully explicated by the Supreme Court, certain fundamental constitutional principles must

inform any analysis. First, Article I makes clear that Congress retains "all legislative powers." It is also Congress's responsibility "to declare war" and -- of special relevance here -- to "make rules concerning captures on land and water." Further, it is Congress's function, not the President's, "to make rules for the government and regulation of the land and naval forces." Still further, it is Congress's responsibility, not the President's, "to define and punish . . . offenses against the law of nations." These express constitutional directives lead inescapably to the conclusion expressed by Justice Scalia in his *Hamdi* dissent, 542 U.S. at 569: "[e]xcept for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II."

Moreover, although *Hamdi* did not rule on the executive's assertion that it had independent constitutional authority to detain whomever it chose to categorize as an "enemy combatant," it contains numerous observations (in addition to those by Justice Scalia) that leave little doubt as to the Court's likely approach as and when circumstances require it to address that contention. As Justice O'Connor's plurality opinion noted: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. at 536. Similarly, "it was 'the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.'" *Id.* (citing *Mistretta* v. *United States,* 488 U.S. 361, 380 (1989)). Further, "[t]he war power 'is a power to wage war successfully, and thus it permits the harnessing of the entire energies

of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Id.* (citing *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 426 (1934)). The writ of habeas corpus thus remains "a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Id.* at 525.

To similar effect, the Court's decision in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008) describes at length the distrust of unchecked monarchical/executive power that led to the evolution of the so-called Great Writ and the careful separation of powers that is the hallmark of our Constitution. *See* discussion at 128 S.Ct. 2229, 2244-47. Justice Kennedy noted that

> The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.

Id. at 2246. He then cited Alexander Hamilton's comment in The Federalist (No. 84) that "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." *Id.*

It is hard to imagine a doctrine more pernicious to separation-of-powers doctrine or more conducive to "arbitrary imprisonment" than one that would permit the President to justify the indefinite detention of a person simply by announcing a new category of conduct allegedly warranting detention, and that would limit the judiciary to determining whether or not the detainee fits the category so defined. That is exactly the position advanced by Respondents, and it is one that finds no support in precedent or in the Constitution.

Fundamentally, "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings . . . must be authorized by law." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936). For that reason, as stated in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), "[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief or on any theory of martial law." Respondents' assertion of inherent executive power to detain petitioners indefinitely and without trial must be rejected.

IV. The Courts Should Not Step In Where Congress Has Declined To Act.

Respondents may argue that the traditional law-of-war definition of "combatant" is inadequate to deal with the problems posed by the so-called "war on terror." The relative force of that argument is a matter as to which reasonable people may differ. However, any expansion of the scope of the term "combatant" must emanate from Congress, the sole authority with legislative power. It is manifestly *not* the province of the federal judiciary to fill any perceived inadequacy in existing law. The judiciary's function is simply to find and declare what the existing law *is*.

Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *cert. granted*, __S.Ct.__, 2008 WL 4326285 (Dec. 5, 2008), illustrates the risks involved in judicial attempts to redefine the scope of "lawful enemy combatant" when Congress itself has declined to do so. There, the Fourth Circuit heard *en banc* a challenge to the government's detention, purportedly pursuant to the AUMF, of an individual who was a legal resident of the United States. The court split 5-4 on the issue, with five judges ruling that the AUMF in fact provided authority for the detention.

Those judges, however, could not agree on a rationale for their conclusion. Four members of the majority issued four separate opinions relying on individually crafted re-definitions of the term "enemy combatant." Chief Judge Williams defined "enemy combatant" as an individual who "(1) . . . *attempts or engages in belligerent acts* against the United States, either *domestically or in a foreign combat zone*; (2) on behalf of *an enemy force*." *Id.*, 534 F.3d at 285 (Williams, C.J., concurring in part and dissenting in part) (emphasis added). Judge Wilkinson wrote that, to be classified as an enemy combatant, a person must "(1) be a member of (2) *an organization or nation against whom Congress has declared war* or authorized the use of military force, and (3) *knowingly plan[] or engage[]* in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization." *Id.* at 325 (Wilkinson, J., concurring in part and dissenting in part) (emphasis added).[14] And in Judge Traxler's expansive view, the AUMF would authorize detention of civilians who "associate[d] themselves 'with al Qaeda' . . . and 'travel[ed] to the United States with the avowed purpose of *further prosecuting [] war* on American soil.'" *Id.* at 259 (Traxler, J., concurring in the judgment) (emphasis added).[15]

Notwithstanding this exercise in judicial creativity, not one of the *al-Marri* opinions accepted a definition remotely as broad as that advanced by Respondents: indeed, one judge remarked that the court had to search for "the limiting principle on enemy combatant detentions that the Government has failed to suggest." *Id.* at 322

[14] Judge Wilkinson noted that his reading of the AUMF, though significantly narrower than the Government's, nonetheless raises "serious constitutional issues." *Al-Marri*, 534 F.3d at 296 (Wilkinson, J., concurring in part and dissenting in part).

[15] Four judges would have followed an even narrower standard limited to "a person affiliated with an enemy nation, captured on a battlefield, and engaged in armed conflict against the United States." *Al-Marri*, 534 F.3d at 242 (Motz, J., concurring in the judgment) (citing *Hamdi*, 542 U.S. at 516-519).

(Wilkinson, J., concurring in part and dissenting in part). But the sheer diversity of opinion even among the five-judge majority in *al-Marri* underscores the danger of judicial attempts to remedy Congressional silence.

In a highly persuasive opinion, Judge Motz and three other Fourth Circuit judges criticized the *al-Marri* majority for "inventing novel definitions of enemy combatant" and aptly observed that "the determination of who should be classified as an enemy combatant is a task best left in the first instance to the political branches." *Id.* at 242, 246.[16] At base, the concerns of the *al-Marri* dissenters stemmed from classic separation of powers and nondelegation doctrines. As Judge Motz observed, exceptions to detention outside the domestic criminal process are permitted "only when a *legislative* body has explicitly authorized the exception." *Id.* at 239 (emphasis in original). In the detainee context, "the AUMF lacks the particularly clear statement from Congress that would, at a minimum, be necessary to authorize the indefinite military detentions of *civilians* as enemy combatants." *Id.* (citing cases that, "absent 'explicit authorization,'" reject Executive Branch interpretations of statutes to authorize detention) (emphasis in original).[17]

In his concurring opinion in *Industrial Union Dep't, supra*, 448 U.S. at 645 (1980), Justice Rehnquist observed that requiring a clear statement serves to ensure "that

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[16] The flaw in the *al-Marri* approach was succinctly identified by Judge Leon: "it is [not] the province of the judiciary to *draft* definitions." *Boumediene v. Bush*, __F. Supp. 2d __, 2008 WL 4722127 * 1 (D.D.C. Oct. 27, 20008) (emphasis in original). Yet, as shown above, Judge Leon's eagerness to correct what he apparently perceived as the inadequacy of the traditional definition of a lawful combatant led him to embrace too readily a strained and illogical construction of the MCA and to overlook the constitutional perils of doing so.

[17] *See* Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2128 (2002) (a statute which delegated to the President the power to redefine the terms of the statute would likely fail the nondelegation test, because "*[t]he power to define legislative terms is a core legislative power, inseparable from the power to legislate itself*") (emphasis added).

important choices of social policy are made by *Congress.*" (emphasis added). Similarly, the requirement that Congress provide intelligible guidance to the executive whenever it delegates legislative power ensures "that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Id.* at 685.

In sum, this Court must consider whether Respondents' asserted legal justification for detention comports with constitutional requirements, including the nondelegation canon of statutory construction. If it does not, the Court should reject that justification, and, rather than attempting to craft its own definition, should rely on the well-established law of war principles that informed the Supreme Court's decision in *Hamdi.*

Conclusion

Hamdi provides clear guidance as to the scope of and limits on Respondents' power to classify Petitioners as lawful "enemy combatants." Respondents have not shown and cannot show that Congress has delegated to them any broader power to detain than *Hamdi* found implicit in the AUMF. Nor do Respondents have inherent power to act independently of Congress. Utilizing the definition of "enemy combatant" recognized by the law of war, the Court should proceed to determine whether, on the facts of each case, a petitioner's conduct falls within what *Hamdi* characterized as the "permissible bounds" of that category.[18]

[18] 542 U.S. at 522 n. 1.

Dated: December 29, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Usha-Kiran K. Ghia, certify that on December 29, 2008, I electronically filed Petitioner's Response to the Court's December 19, 2008 Order; Memorandum of Law Concerning the Appropriate Definition of "Enemy Combatant"; and Unopposed Request for Notice of Hearing, using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record registered with the Court.

DATED: December 29, 2008

By: /s/ Usha-Kiran K. Ghia
Counsel for Petitioner

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AHMED SAEED HIDAR a.k.a. MOHAMMED AHMED SAID HAIDEL, ISN #498,	CIVIL ACTION NO. 05-02386 (RBW)
Petitioner,	
v.	
GEORGE W. BUSH, et al.,	
Respondents.	

DECLARATION OF GARY D. SOLIS

The attached declaration has been submitted previously to other judges of this Court. It is submitted herewith with the consent of Professor Solis.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, et al. *Petitioners,*	) Civil Action No. 04-cv-1166(RJL)
v.	
GEORGE WALKER BUSH, et al. *Respondents.*	

DECLARATION OF GARY D. SOLIS, J.D., Ph.D.

I, Gary D. Solis, hereby declare:

1. My name is Gary D. Solis. I am over 18 years old and I am prepared to testify to the facts and opinions stated herein, if called upon to do so.

2. This Declaration is a complete statement of opinions that I hold in connection with this case, as well as the bases and reasons for them, including information that I considered in forming my opinions. I am prepared to testify about the knowledge, skill, training, education and experiences that I have acquired which informs my opinions, and the principles and methods I applied in reaching them.

3. I have not received any compensation or benefit of any kind for providing this Declaration.

4. I am a citizen of the United States. I am an adjunct professor of law at Georgetown University Law Center, and at the United States Military Academy, at West Point, New York. A copy of my *curriculum vitae* is attached as Exhibit A. My qualifications are summarized in this Declaration and are also contained in my *curriculum vitae*, which includes all publications I have authored in the previous ten years

Background and Experience

5.a. I hold a Juris Doctorate (1971) from the University of California at Davis, where I am a Distinguished Graduate. My LL.M. (1978, criminal law) is from George Washington University law school. My Ph.D. (1992, law of war) is from The London School of Economics & Political Science, where I taught law for three years.

5.b. For seven years (1996-2001, 2004-2006) I taught at the United States Military Academy, from where I retired as a Professor of Law in 2006. For six of those

years I headed West Point's law of war program. Courses I taught included the law of war, advanced law of war, and military law. I continue to teach the USMA Philosophy Department's law of war instruction block. For my teaching I was awarded the Army's Meritorious Civilian Service, Superior Civilian Service, and Outstanding Civilian Service Medals, and was selected West Point's 2006 outstanding instructor.

5.c. At the Georgetown University Law Center I teach a law of war seminar for LL.M. candidates. I taught a semester-long law of war course at Catholic University's Columbus School of Law. I am on the teaching staff of the International Institute of Humanitarian Law, in San Remo, Italy, where I teach law of war courses, including one for military and diplomatic officers responsible for training their nations' armed forces in the law of armed conflict.

5.d. I was the 2007-2008 scholar in residence at the Law Library of the Library of Congress, in Washington D.C.

5.e. I have written two books: *Marines and Military Law in Vietnam;* and, *Son Thang: An American War Crime*, the U.S. Naval Institute's 1997 Book of the Year. I am writing a law school textbook, *The Law of Armed Conflict*, to be published by Cambridge University Press in 2009. An incomplete draft of my textbook is currently in use in the Law Departments of West Point and the U.S. Air Force Academy. I have published war-related book chapters and peer-reviewed articles. A recent piece on targeted killing was selected the *Naval War College Review's* best 2007-2008 article.

5.f. I lecture on law of war topics at the Army's Judge Advocate General's School, the Marine Corps' Command and Staff College, the U.S. Naval War College, National Defense University, Canadian Forces College, the Royal Military College of Canada, the Council on Foreign Relations, the Aspen Institute, the Library of Congress, the Smithsonian Institution, the Rand Corporation, and various law schools, universities and institutions, including Harvard University Law School, Columbia University, and the University of Virginia Law School.

5.g. I have testified as an expert witness in two Marine Corps general courts-martial involving law of war crimes against detainees. In *U.S. v. Sgt. Gary Pittman*, (Camp Pendleton California, 22-25 August 2004), involving charges of dereliction of duty and multiple assaults resulting in the death of an Iraqi prisoner. I provided expert testimony for the government regarding the standard of care due a detainee. In *U.S. v. Cpl. Marshall Magincalda*, (Camp Pendleton California, 31 May 2007), a general court-martial Article 32 investigation involving the homicide of an Iraqi noncombatant. I testified telephonically for the defense regarding the effect extended combat might have on an individual's judgment and the place such effect should have in a subsequent trial. I have also been consulted on other war-related courts-martial and civilian cases.

5.h. I am an inactive member of the bars of Virginia, Maryland, the District of Columbia, Pennsylvania, and Texas, and the bars of the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. For five years I was an appointed member, and vice-chairman, of the Board of Governors of the Virginia bar's Military Law Section.

5.i. I am a retired United States Marine Corps lieutenant colonel with twenty-six years active service, including seventeen months in Vietnam, where I was a platoon commander and company commander. I dealt with enemy prisoners on a frequent basis.

Opinions

6.a. I have been asked to state my opinion regarding State practice – particularly United States practice – under the law of armed conflict with respect to the treatment of combatants and civilians.

6.b. At the outset I note that the law of armed conflict concepts of combatants, "enemy combatants," and prisoners of war, arise only in international armed conflicts – conflicts involving combat between two States. Nevertheless, I accept the government's predicate that it seeks to detain "enemy combatants" under the law of armed conflict, and I tender my opinions based on the concept of "combatant" as it is used in the law of armed conflict applicable in international armed conflicts, including the 1949 Geneva Conventions in their entirety, and 1977 Additional Protocol I thereto.

6.c. In the law of armed conflict, the definition of "combatant" is found in Additional Protocol I, Article 43.2: "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains...) are combatants; that is to say, they have the right to participate directly in hostilities." The United States has signed but has not ratified Additional Protocol I, but the Department of State has not objected to this article, as it has several others. The United States has accepted and applied this definition since at least 1988. The International Committee of the Red Cross (ICRC) identifies this definition as being customary international law. Further indicating its customary status, binding all States, Additional Protocol I has been ratified by 168 States, including every ally of the United States, save Israel and Turkey.

The import of being a combatant was first clarified for U.S. forces in the 1863 Lieber Code, adopted as Army General Orders 100. Lieber wrote that the "combatant's privilege" is that he or she may kill or wound opposing combatants, and destroy lawful enemy targets or objects, without penalty. Concomitantly, a combatant is a lawful target for opposing combatants, and may be killed or wounded whenever and wherever he/she may be identified. Upon capture in an international armed conflict, a combatant is entitled to treatment as a prisoner of war (POW).

In the war on terrorism, the term "enemy combatant" has come into use. The addition of the word "enemy" has no particular significance in the law of armed conflict, other than to specify that the combatant is a member of a group in armed conflict with the United States or its allies, and is a lawful target who may be killed by United States and allied combatants.

6.d. A civilian, on the other hand, is essentially anyone not a member of the armed forces of a State. Additional Protocol I, Article 50.1 defines "civilian" in the negative as anyone not entitled to POW status upon capture, adding, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Thus, combatants are, in most cases, members of the armed forces of a Party to the conflict. Civilians are not members of any State's armed forces and they may not lawfully be targeted, except in circumstances described in the following paragraph.

6.e. The law of armed conflict recognizes two instances in which civilians lose their protected status. Additional Protocol I , Article 51.3 provides: "Civilians shall enjoy the protection afforded by this Section [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities." Civilians who take a direct part in hostilities in international armed conflict are commonly referred to as "unlawful combatants," although that term is not found in the 1949 Geneva Conventions or 1977 Additional Protocols. The consequence of being an unlawful combatant in an international armed conflict is that the individual loses his/her civilian immunity and becomes a lawful target who may be killed by opposing combatants. If captured, unlawful combatants are not entitled to POW status and they may be tried for their unlawful acts by a military tribunal or a domestic court.

The second instance is a *levée en masse*. Upon invasion by an enemy force, civilians not having time to form into military units may take up arms and they are lawful combatants. This circumstance is obviously not a factor in the present case and will not be further discussed.

6.f. As stated in Additional Protocol I, Article 51.3, a civilian may be treated as a combatant (albeit an unlawful combatant) whenever he/she takes a direct part in hostilities. This position is adopted in the U.S. Army's 1956 Field Manual, FM 27-10, *The Law of Land Warfare*, paras. 80-81, and in the United Kingdom's 2004 *Manual of the Law of Armed Conflict*, para.5.3.2., and all other law of war references with which I am familiar. Absent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant, and he is not subject to prosecution in a military forum.

6.g. Commentators, military and civilian, have offered numerous descriptions and examples of conduct that constitutes taking "a direct part in hostilities." The United States has indicated agreement with the ICRC definition that "direct participation in hostilities" implies a direct causal relationship between the

activity engaged in and the harm done to the enemy at the time and the place where the activity takes place. In my opinion, conduct of a civilian that has a direct harmful effect on the enemy's combat operations constitutes "taking a direct part in hostilities." Conduct having only a tangential effect on an enemy's combat operations does not constitute "taking a direct part in hostilities."

For example, firing a weapon at opposing forces clearly *is* taking a direct part in hostilities. A frequently raised example of taking a direct part in hostilities is the civilian who volunteers to drive an ammunition truck to re-supply combatants engaged in armed conflict. While he drives that truck, he loses his civilian immunity and may be targeted, for he clearly *is* taking a direct part in hostilities because his actions have an immediate harmful effect on the enemy's combat operations. Similarly, a civilian contractor clearing enemy landmines during an engagement *is* directly participating in hostilities. However, when a civilian clearly ends his direct participation in hostilities, the law of armed conflict is clear that he no longer may be targeted. His actions no longer have any effect on combat operations. Thus, the civilian contractor clearing mines in an area in which there is no enemy present at the time and place of his activities would *not* be taking a direct part in hostilities.

At the other end of the continuum, a civilian going peacefully about her daily business clearly is *not* directly participating in hostilities. Many forms of support civilians commonly provide their State's armed forces do not constitute direct participation in hostilities. As long as the civilian's support does not have a direct harmful effect on the enemy's combat operations that civilian may not be considered, or be treated as, a combatant. Thus, a woman growing vegetables in a victory garden for later donation to the armed forces is *not* directly participating in hostilities. A civilian budget analyst employed by the U.S. Navy and working in the Pentagon is *not* directly participating in hostilities. Supporting a military cause through financial contributions or public speeches does *not* constitute direct participation in hostilities. An individual considering, planning, or even en route to a combat zone with the intention of becoming a participant in hostilities is not directly participating in hostilities because his considerations, plans and travels do not produce a direct harmful effect on the enemy's combat operations.

There are debatable cases. For example, may the civilian volunteer driver of the military ammunition truck be targeted as he first walks toward the truck? In my opinion, he begins his direct participation in hostilities when he unequivocally commits to an action that has a direct harmful effect on enemy combat operations – driving the truck. May a civilian government employee remotely piloting an armed drone over Afghanistan be targeted? In my opinion, the drone's pilot, no matter where located and whether or not he launches a missile, is directly participating in hostilities and may be targeted because his actions have a direct harmful effect on enemy combat operations.

In my opinion, senior terrorist leaders and terrorist weapons specialists and fabricators should be considered to continually be taking a direct part in

hostilities. (In this limited respect, I take a broader view of "for such time as" than does 1977 Additional Protocol I, Article 51.3.) Osama bin Laden, for example, is continually taking a direct part in hostilities and is always a lawful target, no matter where located, no matter what his activity. Such persons, by virtue of their ongoing special skills or senior leadership positions and involvement in or planning of combat operations, are always combatants, albeit unlawful combatants. Like the uniformed individuals *they* target, they should be considered legitimate targets whenever found. However, individuals whose involvement is unconfirmed, or unrelated to combatant operations, such as financial supporters and vocal advocates of terrorist aims are *not* subject to targeting.

Over the past several years, the ICRC and The Hague's Asser Institute have sponsored several meetings of experts to discuss and define what constitutes "direct participation in hostilities." Their report is due in early 2009. But I agree with the International Criminal Tribunal for the former Yugoslavia's *Tadić* Trial Chamber decision that an exact definition of taking "a direct part in hostilities" is often unnecessary, because in most cases an examination of the facts will indicate the answer.

6.h. My opinion is formed, in part, by my experience in the Vietnam conflict where I was a Marine officer (armor) commanding at first a platoon and, eventually, a company of Marines. We often encountered enemy combatants and occasionally captured armed enemy personnel as they approached or entered or departed villages, their status confirmed by informants, by former VC, by recent wounds, or by their weaponry. We also daily encountered Vietnamese civilians who we were confident were supporting the enemy by providing him shelter, food, and concealment. Captured enemy personnel were apprehended and passed to MPs for processing. The families or villagers with whom our captives were living and associating were sometimes questioned but rarely seized, as we required evidence of the villagers' direct participation in hostilities to do so. It did not take a judge advocate to inform us that our authority to apprehend and detain did not extend to anyone we encountered in the combat zone who might have in any way associated with, or even provided support for, the enemy in hostilities. As does the law of armed conflict, I required my Marines to have knowledge of a specific instance of engagement in hostilities before acting. The mere threat of possible future hostile action was, and remains, an insufficient basis for military apprehension and detention.

6.i. I have read the Government's unclassified legal basis for the detention of the Petitioners in this case, filed 5 September 2008, particularly its description of an "enemy combatant," and I have read the Government's definition contained in its 9 September 2008 filing. Neither of the descriptions/definitions is in accord with accepted law of armed conflict definitions of "enemy combatant." Both reach too broadly to be reasonable, and both are too vague to comport with law of armed conflict notions. No member of the Armed Forces could be expected to implement the full scope of either.

The Government's description contained in its 5 September 2008 filing allows the application of enemy combatant status to civilians who have never been in any combat zone or theater of operations, and who have never committed or attempted any conflict-related act – ("...even if 'they have not actually committed or attempted to commit any act...'"). I am aware of no customary law of war, no law of war multinational treaty, and no case law that supports such an expansive view. The classic little old lady in Dubuque who donates money to a mosque discovered to be funding al Qaeda operations in Iraq would be within the Government's original description as supporting enemy forces, and thus be targetable as an enemy combatant. If an enemy combatant can exist outside any combat zone, without committing or attempting any hostile activity or act, or by merely associating with the enemy, then the use of military force against civilians has virtually no limit. An insubstantial connection between a civilian and an activity a military commander considered to be supporting the enemy would be sufficient for him to order that civilian captured or, if capture was not feasible, killed.

The Government's 5 September 2008 filing refers to persons "who associate themselves with the military arm of the enemy government," a phrase employed in *Ex Parte Quirin*. But, *Quirin*, in its two references to the "military arm" refers to the uniformed armed forces of an enemy State in an international armed conflict, not to international or domestic criminal groups, no matter how well armed. The Government misleadingly expands the meaning of the *Quirin* term by adding the phrase, "or enemy organization." I am unaware of any authority in the law of armed conflict that permits such an expansion. As the law of armed conflict now stands, there is no basis for asserting that merely being a member of, or associating with, an enemy organization is a legal basis for the application of military force.

The Government's 5 September 2008 filing contains the phrase, "directly supporting hostilities." It is unclear to me what is meant by those words in the context of the filing. If the Government refers to individuals who are members of groups in armed conflict with the United States and its allies who directly participate in hostilities – that is, individuals who direct large or small groups in actual combat, who fire a weapon, who manufacture a bomb, who actually commit a belligerent act, or who otherwise take a direct part in hostilities within the meaning of Additional Protocol I, Article 51.3 – I agree with the description. But if the Government refers to individuals who do less than directly participate in hostilities, its reference conflicts with the law of armed conflict, which prohibits treating as a combatant any civilian who does not meet the "direct participation" standard.

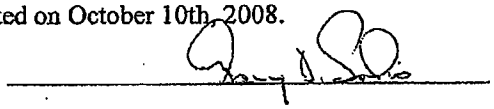
For similar reasons, the Government's 9 September 2008 definition, which defines an enemy combatant as an individual "who was...*supporting* Taliban or al Qaeda or associated forces," or who "directly *supported* hostilities," sweeps more broadly than any law of armed conflict definition.

6.j. For the foregoing reasons, I believe the Government's description and definition of an enemy combatant are incorrect and not in accord with the law of armed conflict, the laws and customs of war, or with U.S. military practice. In my opinion, other than members of the armed forces of an enemy State, a *levée en masse*, and members of enemy State militias and volunteer groups meeting the preconditions of Geneva Convention III, Article 4A. (2), individuals may be considered "combatants" only to the extent that they directly participate in hostilities, as that term is recognized and applied in military and state practice.

7. I have expressed the opinions stated herein in writings, lectures, and law courses in America and Europe, and have passed them to, and continue to pass them to U.S. Military Academy cadets who are dealing with detainees in combat zones world-wide. In my professional view, and to the best of my knowledge, these opinions accurately reflect generally accepted law of armed conflict principles, and are recognized and generally practiced by the United States and its allies.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 10th, 2008.



Gary D. Solis, J.D., Ph.D.

Attachment A

GARY D. SOLIS

Adjunct Professor of Law, Georgetown University Law Center and the United States Military Academy
522 Bellvue Place; Alexandria, Virginia 22314
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EDUCATION

Ph.D.	The London School of Economics & Political Science Overseas Research Student Award, for "outstanding merit and research potential"	1992	Dissertation: The Uniform Code of Military Justice and the 1949 Geneva Conventions
LL.M.	The George Washington University National Law Center	1978	Criminal Law
J.D.	The University of California at Davis, King Hall Distinguished Alumnus Award, October 2001	1971	Law
B.A.	San Diego State College	1963	Sociology

PROFESSIONAL POSITIONS

Scholar in Residence, Law Library of The Library of Congress, Washington D.C. 2006 – 2008

Visiting Professor of Law, United States Military Academy, West Point, New York 2004 – 2006
Program Director, Law of War instruction
2006 Apgar Award, given to one professor annually, for excellence and innovation in teaching
Awarded Army's Outstanding Civilian Service Medal (2006)

Adjunct Professor of Law, Georgetown University Law Center, Washington, D.C. 2002 – present
Seminar in The Law of Armed Conflict.

Adjunct Professor of Law, Catholic University's Columbus School of Law, Washington, D.C. 2004
Seminar in The Law of Armed Conflict

Chief of Oral History, United States Marine Corps 2001 – 2004
Awarded Navy's Meritorious Civilian Service Medal (2004).

Associate Professor of Law, United States Military Academy, West Point, New York 1996-2001
Program Director, Law of War instruction. Phi Kappa Phi Distinguished Teaching Award (1998); awarded Army's Superior Civilian Service Medal (2000), and Meritorious Civilian Service Medal (2001).

Law Teacher, Department of Law, The London School of Economics & Political Science 1993-1996
Courses taught: British Criminal Law; British Commercial Law

PUBLICATIONS

Books:

Law of Armed Conflict: International Humanitarian Law in Combat. Cambridge University Press. Forthcoming, 2009.

Son Thang: An American War Crime (Annapolis, MD: Naval Institute Press, 1997) 340 pp., photos, maps, append., notes, index. Bantam paperback edition, 1998. Marine Corps Heritage Foundation's Greene Award as year's best book; U.S. Naval Institute's Author of the Year; nominated: U.K.'s Royal United Services Institute For Defense Studies' Westminster Medal

Marines and Military Law in Vietnam: Trial By Fire (Washington D.C.: GPO, 1989)295 pp., photos, maps, append., notes, index. An official U.S. Marine Corps history

Book chapters:

"Law of War Issues in Ground Combat in Afghanistan," *U.S. Naval War College International Law Studies*, vol. 84. Forthcoming.

"The Oxford Companion to International Criminal Justice" (12 entries) Antonio Cassesse, general editor (Oxford: Oxford University Press, 2008). Forthcoming.

"Military Justice and Civilian Clemency," in John Norton Moore, Robert Turner, eds., *The Real Lessons of the Vietnam War* (Durham NC: Carolina Academic Press, 2002).

"Military Commissions and Terrorists," in Eugene R. Fidell, Dwight H. Sullivan, eds., *Evolving Military Justice* (Annapolis, MD: Naval Institute Press, 2002).

Peer reviewed articles:

"The Removal of Protected Persons from Occupied Territory," *Georgetown Journal of International Affairs.* Forthcoming.

"Targeted Killing and the Law of Armed Conflict," *Naval War College Review*; 60, no. 2 (Spring 2007), 127-46. Awarded the Capt. Hugh Nott Award as best *Review* article of 2007-2008.

"Obedience to Orders: History and Abuses at Abu Ghraib Prison," 2 *Journal of International Criminal Justice* (Dec. 2004) 988-998.

"Military Justice, Civilian Clemency: The Sentencing of Marine Corps War Crimes in Vietnam," 10:1 *Transnational Law & Contemporary Problems*, 59-84 (Apr 2001).

"Obedience of Orders and the Law of War: Judicial Application in American Forums," 15:2 *American University International Law Review*, 481-526 (March 2000).

"CAAF Roping at the Jurisdictional Rodeo: *Clinton v. Goldsmith*," co-authored with Professor John Winkle, 162 *Military Law Review* 219 (Dec. 1999).

"*Sub Judice* Rules and Perceptions of the Law: Another Viewpoint," 11 *Commonwealth Judicial Journal* 6 (Dec. 1995)

Other Articles:

"Judge Advocates, Courts-Martial, and Operational Law Advisors: The Inaugural George Prugh Lecture in Military History," 190/191 *Military Law Review* (Winter 2006/Spring 2007)

"Is Military Justice Broken?" *Los Angeles Times* op-ed, 10 Sept. 2007.

"Was the Lieutenant A War Criminal?"in Marine Corps History Division,*Small Unit Actions* (Quantico VA: USMC, 2007).

"Military Justice?" U.S. Naval Institute's *Proceedings*, Oct. 2006.

"Rules of Engagement – Forum," *Time* magazine (12 June 2006), 42.

"Dialysis for a Prisoner of War." *Hastings Center Report*,vol. 34,no. 6 (Dec. 2004).Co-authored with Col. Dan Zupan.

"Duty, Honor, Country and *Semper Fidelis*."*Naval History* magazine (Oct., 2003). 2004 Marine Corps Heritage Foundation's Heinl Award nominee for the year's best non-fiction article.

"The Last Marine Out of Kosovo," *Fortitudine* magazine, 2001, Oct. 2003.

Commentary: "'Enemy Combatants' Should Worry Us." U.S. Naval Institute's *Proceedings*, 2 (Dec. 2002).

"Even A 'Bad Man' Has Rights," *The Washington Post*, op-ed, A-19, 25 June 2002.

"Terrorists, Due Process, and Military Commissions." *Marine Corps Gazette*, 46-48 (Feb. 2002)

"Are We Really At War?" U.S. Naval Institute's *Proceedings*, 34-40 (January, 2002).

"The Law of War," *The Washington Post*, op-ed, A-17, 30 April 2001.

Book reviews (within last four years):

Jungle Rules: A True Story of Marine Justice in Vietnam, by Charles W. Henderson. *Vietnam Magazine*, 62 (Dec. 2007).

Of War and Law, by David Kennedy. April 2007*The Journal of Military History*, 606.

Traditions of War: Occupation, Resistance, and the Law, by Karma Nabulsi. July 2006 *The Journal of Military History*, 893.

Kimmel, Short, and Pearl Harbor, by Fred Borch and Daniel Martinez. Oct. 2005 *The Journal of Military History*, 1244.

Commandants of the Marine Corps, Allan Millett, Jack Shulimson, eds. Jan. 2005 *The Journal of Military History*.

Judge Advocates in Vietnam: Army Lawyers in Southeast Asia, 1959-1975, by Col. Frederic L. Borch. July 2004 *The Journal of Military History*.

EXPERT WITNESS TESTIMONY

United States v. Sgt. Gary Pittman, a Marine Corps general court-martial involving charges of dereliction of duty and multiple assaults resulting in the death of an Iraqi prisoner at Camp White Horse, Iraq. 22-25 August 2004.

United States v. Cpl. Marshall Magincalda, a Marine Corps UCMJ article 32 investigation involving charges of multiple homicides of Iraqi noncombatants at Hamdinia, Iraq. 31 May 2007.

MILITARY EXPERIENCE

Twenty-six years U.S. Marine Corps commissioned service (1963-1989), eighteen as a judge advocate. Seventeen months Vietnam field duty as an armor officer. As a judge advocate, tried 433 criminal cases. Chief prosecutor, 1st Marine Division and 3d Marine Division. Staff Judge Advocate, Headquarters, Fleet Marine Forces, Atlantic. As court-martial judge, presided in 330 trials. Chief of Marine Corps' Military Law Branch.

PAPERS, SPEECHES, LECTURES (within last four years)

The Hague Initiative on Law and Armed Conflict. T.C.M. Asser Institute & the Netherlands Red Cross. Lecture: "The Removal of Protected Persons from Occupied Territories." 15 July 2008.

American Red Cross Headquarters, Washington D.C. "Exploring Humanitarian Law": Institute for Teachers, Speaker: The U.S. Military and the Law of Armed Conflict. 8 July 2008.

U.S. Naval War College, Center for Naval Warfare Studies. The War in Afghanistan: A Retrospective Legal Analysis. "Conduct of Hostilities," panel moderator, rapporteur. 25-27 June 2008.

American University, Washington College of Law & ICRC. Instructor, Teaching IHL Institute. 4-5 June 2008.

The Judge Advocate General's Legal Center & School, Charlottesville, Virginia. Guest lecture, The Law of War in History. 24 April 2008.

Georgetown University. Guest lecturer, Walsh School of Foreign Service: "Torture." 18 April 2008.

Georgetown University. Guest lecturer, Walsh School of Foreign Service: "Detainee Status in the Law of War." 11 April 2008.

Georgetown University Law Center. Panelist: "Toward a New International Law for the 21st Century." 10 April 2008.

Georgetown University Law Center. Panelist: "Accountability of Private Security Contractors." 11 March 2008.

National Defense University, Industrial College of the Armed Forces, Washington D.C. Lecture: "What Law of War Applies?" 20 Feb. 2008.

Marine Corps University, Quantico Virginia. Seminar discussion, "Foundations of jus in bello," 31 Jan., 2008.

American University, Washington School of Law. Panelist: "Assessing the Impact of the ICRC Customary Law Study." 8 Nov. 2007.

The Judge Advocate General's Legal Center & School, Charlottesville, Virginia. Keynote speaker, 13th annual Criminal Law Developments Course: "Trying War Crime Cases." 6 Nov. 2007.

United States Naval Academy. Lecture, USNA Scholarship Prepatory course. "Haditha, Crimes, and Leadership" Annapolis, Maryland, 17 Oct. 2007.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 9th Specialized Course on the Law of Armed Conflict. 8-12 Oct. 2007.

Appellate Military Judges' Conference, George Mason Law School, Arlington Virginia: "Judge Advocates and Courts-Martial," 21 Sept. 2007.

Library of Congress. Panel moderator, "Torture, Detainees, and the U.S. Military." Library of Congress Law Library. 11 July 2007.

Marine Corps University, Quantico Virginia. Lecture: "Torture and the Law," followed by seminar discussion. 2 May 2007.

United States Military Academy. Lecture: "Torture and Civil Rights." Conference on Law and Terrorism. 26 April 2007.

The Judge Advocate General's Legal Center & School, Charlottesville, Virginia. The First Annual George S. Prugh Lecture in Military Legal History: "Judge Advocates, Courts-Martial & Operational Law Advisors." 18 April 2007.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 7th Military Academies LOAC Competition. 26-30 March 2007.

New York Military Affairs Society. Paper: "Targeted Killing and the Law of War." 2 March 2007.

American University, Washington School of Law. National Institute of Military Justice Conference: Current Issues in Military Law. Paper: "Targeted Killing and the Law of Armed Conflict." 18 Nov. 2006.

University of Virginia School of Law, Center for National Security Law. Lecture: "The law of Armed Conflict: Black letter law." 8 Nov. 2006.

Rand Corporation/ Los Angeles Terrorism Early Warning Group. Panelist: International Law and U.S. Detention Policies, 20 Oct. 2006.

National Defense University, Industrial College of the Armed Forces, Washington D.C. Lecture: "What Constitutes A War Crime?" 17 Oct. 2006.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 8th Specialized Course on the Law of Armed Conflict. 9-13 Oct. 2006.

Canadian Forces College. Paper and lecture: "Targeted Killing and the Law of Armed Conflict." 25 Sept. 2006.

The Association of the Bar of the City of New York. Paper and panel: "Preemptive War, Preventive War." 12 June 2006.

Columbia University, School of Law. "Military Necessity, *Kraigsraison*, and the War on Terror." Paper and panel member: Jurisprudence & the Law of War. New York City, 22 April 2006.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 6th Military Academies LOAC Competition. 20-24 March 2006.

American University, Washington College of Law. "The U.N. and Regional Systems' Legal Framework on Torture." Panel member. The Military Viewpoint. Washington D.C., 3 March 2006.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 6th Military Academies Competition, 3-7 April 2006.

Council on Foreign Relations. Talk followed by round-table discussion, "Treatment of detainees in the war on terror." New York City. 24 Jan. 2006.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 6th Specialized Course on the Law of Armed Conflict. 10-14 Oct. 2005.

The Aspen Institute. Panel participant: The United States, International Justice, and the International Criminal Court: Darfur and Beyond. Aspen Colorado. 16-19 September 2005.

United States Naval Academy. Lecture, Naval Postgraduate School's Leadership Education and Development Program: "When Things Go Wrong." Annapolis, Maryland, 2 Sept. 2005.

Harvard University Law School. Conference speaker/panelist. "Humanity Under Fire: Time to Revise the Geneva Conventions?" Boston, Massachusetts. 11 April 2005.

Georgetown University Law Center. Conference speaker and panelist. "Outsourcing Warfare: Defense Contractor Accountability for Human Rights Abuses" Washington D.C. 9 April 2005.

American University, Washington College of Law. Conference: The Geneva Conventions & the Rules of War in the Post-9/11 World. Panel chair and participant on two panels: "The Role of Private Contractors in 21st Century War," and "Protection of Civilians in Hostilities." Washington D.C., 24 March, 2005.

University of Mississippi. Guest lecturer, Honors seminar, Genocide and Memory: "International Humanitarian Law, War Crimes and Societal Responses." Oxford. 2 March, 2005.

Society for Military History, annual conference. Panel chair and commentator: "Meeting Terrorism: Military Approaches, New and Old." Charleston, S.C. 25 Feb. 2005.

The Association of the Bar of the City of New York, Military Law Section. Lecture. "The Law of Armed Conflict, *Hamdan v. Rumsfeld*, and the United States." 1 Dec. 2004.

U.S. Marine Corps Command & Staff College. Lecture: "Command Responsibility in Combat." Quantico, Virginia, 29 Oct. 2004.

International Institute of Humanitarian Law, San Remo, Italy. Instructor, 5th Specialized Course on the Law of Armed Conflict. 11-15 Oct. 2004.

Georgetown University Law Center. Lecture to Joint Seminar in Law and Philosophy: War. 13 September 2004.

United States Naval Academy. Lecture, Naval Postgraduate School's Leadership Education and Development Program, "When Things Go Wrong." Annapolis, Maryland, 27 August 2004.

The Smithsonian Institution. Resident Associate Lecture Series. Six-lecture series, "Battlefield Law of War." Washington D.C., 8 June - 13 July, 2004.

PROFESSIONAL MEMBERSHIPS

The Bar of the Supreme Court of Virginia (Vice-chair, Military Law Section Board of Governors, Virginia State Bar, elected to 1998-2001 and 2001-2004 terms); and the bars of Maryland, Pennsylvania, Texas, and the District of Columbia; also, the U.S. Court of Appeals for the Armed Forces; U.S. Court of Appeals for Veterans Claims; Supreme Court of the United States. State bar memberships, other than Virginia, are inactive.

American Society of International Law

Phi Kappa Phi national academic honor society. Elected to membership from U.S.Military Academy, 1999.

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KARIM BOSTAN, Petitioner, v. BARACK H. OBAMA President of the United States, et al., Respondents.	:	CASE NO. 05-cv-883 (RBW)

EXHIBIT "C" TO
PETITIONERS' JOINT MEMORANDUM IN REPLY TO
RESPONDENT'S MEMORANDUM OF MARCH 13, 2009

AFGHAN INHABITANTS ARE NOT PROPERLY DETAINED UNDER THE AUMF

Respondents assert that the position articulated in their memorandum is derived by analogy to the laws of war, which govern international armed conflicts. But the laws of war specifically recognize the primacy of domestic law in non-international armed conflicts. This fact has special significance for detainees who were inhabitants of Afghanistan. They are not lawfully detained for two reasons. First, as to Afghans, the fight against the Taliban and Al Qaeda is not an international armed conflict, but rather it is a civil war, governed by Afghanistan domestic law, not international laws of war. Second, assuming arguendo that the fight against the Taliban and Al Qaeda qualifies as an international armed conflict, Afghans who fought the invading forces of the United States have the full protection of the Third Geneva Convention, art. 4 A, including the protection which allows inhabitants to resist an invading force. Id. at 4 A(6).

1. **As to Afghans, the Conflict Against the Taliban and Al Qaeda is Not an International Armed Conflict.**[1]

The law of war (LoW)–also known as the laws of war, the law of armed conflict, and international humanitarian law–is the body of law that regulates the methods and means of waging armed conflict and stipulates the protections due to those caught up in armed conflict. See U.S. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶¶ 2-3 (1956) ("The Law of Land Warfare"). It consists of treaties-principally, the Hague Conventions[2] and the four 1949 Geneva Conventions[3]–and customary international law. See "The Law of Land Warfare" ¶ 4.[4]

The scope of this law is circumscribed by a critical predicate requirement for its application: the existence of an "armed conflict." This is an important limitation, and one on

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[1] Section 1 relies in large part upon the "Brief of Amici Curiae Experts in the Law of War," filed January 28, 2009, in Al-Marri v. Spagone, Sup. Ct. Case No. 08-368, available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-368_PetitionerAmCuExpertsintheLawofWar.pdf.

[2] See, e.g., Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2301.

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. There are two Articles common to all four Conventions and discussed herein: Articles 2 and 3 (referred to below as "Common Article 2" and "Common Article 3").

[4] The Law of Land Warfare "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative statement of the law of war, and although it lacks binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." Law of Land Warfare ¶ 1.

which the LoW furnishes concrete guidance. See Allen S. Weiner, Hamdan, Terror, War, 11 Lewis & Clark L. Rev. 997, 1017 (2007) ("'War' and 'armed conflict' are concepts with defined legal meanings.").

A. The Two Types of "Armed Conflict"

There are two kinds of armed conflict recognized under LoW: international armed conflict and non-international armed conflict. As discussed below, the law-of-war rules applicable to, the tests for identifying the existence of, and the scope of these two types of armed conflict differ in important respects.

i. International Armed Conflict

The first kind of armed conflict, which has long been the subject of international regulation, is an international armed conflict–an "armed conflict . . . between two or more of the High Contracting Parties." Common Article 2. This resort to armed force between nations is the principal subject of the Geneva Conventions' extensive regulations, which provide, for example, particularized requirements for the detention and treatment of "prisoners of war" captured during hostilities. See, e.g., Third Geneva Convention, arts. 12-16 (general protections, including humane treatment); arts. 17–20 (protections afforded immediately upon capture); arts. 21–57 (particularized protections regarding conditions of internment); arts. 58-68 (provisions regarding prisoners' financial resources); arts. 69-78 (rules regarding prisoners' relations with the outside world). International armed conflicts are also subject to the terms of an instrument commonly referred to as Additional Protocol I[5]–a treaty that the United States has not ratified, but much of

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

which the United States has long recognized as having the status of customary international law. See Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, Law of War Workshop Deskbook 32 (Brian J. Bill ed., 2000) ("Law of War Workshop Deskbook"); Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419, 420 (1987) (remarks of former Deputy Legal Advisor to the U.S. Department of State).

The term "armed conflict" is not expressly defined in the Geneva Conventions or in any other law-of-war treaty. The circumstances in which an international armed conflict can be said to exist are, however, explained as follows in the authoritative commentary to the Conventions:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces . . . .

Int'l Comm. of the Red Cross, Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War 23 (1960) ("Commentary on Third Geneva Convention") (emphasis added) (footnote omitted). This is a straightforward, somewhat formal test that sets a relatively low threshold meant to maximize international regulation in the arena of inter-state conflict.

ii. Non-International Armed Conflict

The other kind of "armed conflict" recognized by LoW is a conflict "not of an international character." Common Article 3. As evidenced by the phrase in Common Article 3 describing such a conflict as "occurring in the territory of one of" the parties to the Geneva Conventions, the drafters of the Conventions likely understood this class of conflict to consist

largely of civil wars. See Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (acknowledging that "'the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' i.e., a civil war"). The Supreme Court has concluded, however, that the category described is much broader–that it encompasses all "armed conflicts" that cannot be classified as "conflict[s] between nations." Id.

Unlike international armed conflicts, non-international armed conflicts are not subject to extensive regulation under the Geneva Conventions. Only Common Article 3 applies by its terms to these armed conflicts. That Article specifies certain "minimum" standards governing the treatment and trial of "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention." See Hamdan, 548 U.S. at 629 (discussing Common Article 3).

Common Article 3 represented the first concerted–albeit very limited–effort to formulate international standards for the conduct of armed conflict other than between nation states. Until 1949, the conduct of armed conflict between a nation state and a non-state group, or between non-state groups, within the territory of a sovereign state, was generally viewed as a matter of exclusively domestic concern–at least insofar as the law of war was concerned. See Lindsay Moir, The Law of Internal Armed Conflict 19-21 (2002) ("Internal Armed Conflict"). A residue of this understanding is reflected in the drafting history of Common Article 3: Although it was originally proposed that all provisions of the Geneva Conventions be made applicable to non-international conflicts, that proposal was rejected on the basis that it impinged too heavily

on nation-states' sovereignty. See Commentary on Third Geneva Convention 33.[6]

The trigger for the existence of "armed conflict" under Common Article 3–"armed conflict not of an international character"–is somewhat less formal and more closely tied to particular geography than that for international armed conflict. See, e.g., HH & Others v. Sec'y of State for the Home Dep't, Somalia CG [2008] UKAIT 00022, ¶ 321 (United Kingdom: Asylum & Immigration Tribunal) (noting that an international armed conflict is "usually easier to establish" than a non-international one). After all, if mere "intervention of the armed forces" sufficed to trigger application of the law of war to a conflict not between nations, see Commentary on Third Geneva Convention 23, a vast array of domestic deployments would become subject to the law of war, making them at once fair game for international regulation and potential excuses for displacement of normal domestic law. That result is not contemplated by LoW, which excludes "internal disturbances and tensions" and "isolated and sporadic acts of violence" from the definition of "armed conflict." Additional Protocol II, art. 1(2). See also Int'l Comm. of the Red Cross, Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 36 (1960) (listing non-exclusive criteria for identification of non-international armed conflict and observing that such "criteria are useful as a means of

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[6] Additional international regulation of a limited subset of non-international armed conflicts was introduced in 1977 in the form of the instrument commonly known as Additional Protocol II. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8,1977,1125 U.N.T.S. 609; see also Law of War Workshop Deskbook, 32 (noting that Additional Protocol II, like Additional Protocol I, largely has the status of customary international law in the United States). Additional Protocol II applies only to those non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, art. 1(1).

distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection"); Comm. on the Use of Force, Int'l Law Ass'n, Initial Report on the Meaning of Armed Conflict in Int 'I Law 11-12 (2008) ("ILA Report"), available at http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (follow "Conference Report Rio 2008 (206kb)" hyperlink).

The definition of "armed conflict" in the non-international context is based upon two minimum criteria: that the groups using armed force be relatively well-organized, and that the hostilities be sufficiently intense. These two criteria are clearly reflected in the influential jurisprudence of the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In the seminal Tadic case, the ICTY Appeals Chamber stated that "armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995) ¶ 70; see also, e.g., Prosecutor v. Haradinaj, Case No. IT-4-84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008) (explaining that the test for whether there is an "armed conflict" triggering the law of war in a non-international context rests on "whether (i) the armed violence is protracted and (ii) the parties to the conflict are organized," and distinguishing "armed conflict" from "banditry, riots, isolated acts of terrorism, or similar situations").[7] The use of the word "protracted" in this

[7] The ICIY's definition of "armed conflict" in the non-international context has gained broad acceptance. See, e.g., Moir, Internal Armed Conflict 42-45; Natasha Balendra, Defining Armed Conflict, 29 Cardozo L. Rev. 2461, 2475 (2008) (describing Tadic as "perhaps the most frequently cited decision on what constitutes an armed conflict"); ILA Report 13 ("The ICIY Tadic decision is nowadays widely relied on as authoritative for the meaning of armed conflict in

definition has since been clarified, with the Appeals Chamber explaining that it is intended to exclude, for example, cases of civil unrest and single acts of terrorism, and is properly regarded as a measure of intensity; even a days-long campaign can qualify as sufficiently "protracted" if it involves intense exchanges of firepower. See Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Judgment, ¶ 1333-41 (ICTY Appeals Chamber Dec. 17, 2004); Prosecutor v. Milosevic; Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 17 (ICTY Appeals Chamber June 16, 2004); see also Haradinaj, supra, ¶¶ 40-49 (surveying ICTY jurisprudence on existence of "armed conflict"). Among the factors relevant to gauging intensity are the "[l]ength or protracted nature of the conflict and seriousness and increase in armed clashes"; the "[s]pread of clashes over the territory" in which the armed conflict is alleged to have occurred; the number of forces deployed to the territory; and the size and force of the weapons used. See Milosevic, ¶ 28-31.

B. The Law of War Does Not Furnish Affirmative Authorization for Detention Incident to a Non-International Armed Conflict.

Non-international armed conflicts (paradigmatically, civil wars) historically have been conducted wholly within the territory of only one party to the conflict. That sovereign party is fully authorized to detain enemy fighters. There is no need on the state's part to resort to international law to justify detention and no desire to permit its invocation by rebels or insurgents. In the absence of any felt need, and in deference to the sovereign prerogatives of nation-states, therefore, LoW has left detention authorization to domestic law in

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both international and non-international armed conflicts . . . [and] focused on two aspects of a conflict the intensity of the conflict and the organization of the parties to conflict.").

non-international armed conflicts. See, e.g., John Cerone, Misplaced Reliance on the "Law of War," 14 New Eng. J. Int'l & Comp. L. 57, 66 (2007) ("As the central case of non-international armed conflict is an internal conflict, [detention] authorization is unnecessary. Of course the state is free to detain insurgents operating within its territory."'); Marco Sassoli, Query: Is There a Status of "Unlawful Combatant?", 80 Int'l L. Stud. 57, 64 (2006) ("In [non-international armed conflicts], [LoW] cannot possibly be seen as providing a sufficient legal basis for detaining anyone."); Jenny S. Martinez, Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant, 98 Am. J. Int'l L. 782, 787 (2004) (observing that LoW does not provide the "independent authority for detention of individuals" in non-international armed conflicts that it does in international armed conflicts).

Fighters in non-international armed conflict are not automatically entitled to prisoner-of-war immunities under the laws of war but would potentially be subject to criminal prosecution pursuant to domestic law. Thus, "[i]t 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 [LoW] of non-international armed conflict should be silent, in deference to national law, on questions of detention." Gabor Rona, An Appraisal of U.S. Practice Relating to "Enemy Combatants", 10 Y.B. of Int'l Humanitarianism L. 232, 241 (2009), available at http://papers.ssrn.com/so13/papers?.sfm?abstract_id=1326551; see also Sassoli, supra, at 64 (LOW "applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained.").

Respondents originally sought to detain Afghans petitioners as "enemy combatants," although that term disappeared with its recently-filed refinement of its basis for detention. Under any name, LoW does not furnish authority for the United States' military detention of Afghan petitioners. Their detention, if any, is authorized only under the domestic law of Afghanistan, which preempts any implicit authority that may otherwise exist under the AUMF.

2. Assuming Arguendo that the Fight Against the Taliban and Al Qaeda Qualifies as an International Armed Conflict, The Third Geneva Convention Recognizes the Right of Inhabitants to Resist a Foreign Invading Military Force and Governs the Detention of Such Inhabitant Combatants.

Assuming, for the sake of argument, that the conflict with the Taliban and Al Qaeda is an international armed conflict, respondents' claim of right to detain Afghan inhabitants is limited by international law, including the Third Geneva Convention, Part I, art. 4 A(6). This provision recognizes the right of inhabitants to take up arms against an invading foreign force. If captured, they are prisoners of war, with all of the additional protections afforded by the Geneva Conventions:

> Art. 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the military:
> . . .
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Convention III, Relative to the Treatment of Prisoners of War, Geneva 12 August 1949.

Article 4 A(6) codifies the historical protection of inhabitants commonly known as levée en masse, or mass uprising, the right of a country's inhabitants to resist an invasion by foreign troops. "Crimes of War," available at http://www.crimesofwar.org/thebook/mevee-en-

masse.html (last viewed Feb. 17, 2009). Levée en masse "refers especially to situations in which the populace takes up what weapons it has and, without having time to organize, resists the invasion." Id. Although levée en masse took place with regularity in the nineteenth century, a more current example occurred in Warsaw in the early days of the Nazi invasion during World War II. Id.

Levée en masse "first became an international legal term at the Brussels Conference in 1874." Id. It was incorporated into the Third Geneva Convention, as set forth above. "Those who join in a levée may under certain circumstances claim the combatant's privilege, that is, the right to fight the enemy. Captors may not prosecute combatants for their hostile acts but must grant them prisoner of war status upon capture." Id.

The protection of levée en masse applies to Afghan inhabitants detained in the present cases. They are, by definition, inhabitants. Their territory was not occupied.[8] The United States was an invading foreign force. Moreover, many Afghans regarded the Tajik and Uzbekh ethnic groups that dominated the so-called "Northern Alliance" as invaders of Afghan territory, especially because they were perceived to have Russian backing. Those Afghans who became involved in response to the invading force took up arms spontaneously, without time to form regular units. They carried their arms openly and fought within the laws and customs of war.

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[8] Occupation is defined in the Hague Conventions of 1907, "Laws and Customs of War on Land" (Hague IV) "Military Authority over the territory of the hostile state." Article 42 provides: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." available at http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#41. The United States has not asserted the authority of an occupying force in Afghanistan.

To the extent that the AUMF permits detention of combatants of an international armed conflict, it must be read together with the protections of the laws of war. In this instance, inhabitant combatants are protected by the Third Geneva Convention, which limits their detention and limits their captors' rights and conduct during any authorized period of detention.

Dated: March 20, 2009

Respectfully submitted,

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