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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR JUDGMENT AND ORDER GRANTING WRIT OF HABEAS CORPUS

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Petitioner Muhammadi Davliatov a/k/a Umar Hamzayevich Abdulayev (ISN 257) respectfully moves for judgment and an order granting his habeas corpus petition. The motion should be granted pursuant to 28 U.S.C. §§ 2241 and 2243, and the Court's equitable habeas powers, because Petitioner's detention is arbitrary and violates U.S. and international law.

Preliminary Statement

Petitioner, a native of Tajikistan who has become stateless, has been detained without charge at the U.S. Naval Station at Guantánamo Bay, Cuba, for more than thirteen years. Nearly ten years ago he filed a habeas corpus petition challenging the legality of his initial capture and detention, which was never resolved on the merits. More than six years ago, the government deemed his detention no longer necessary and for that reason stated that it would exercise its discretion to release him. The government obtained a stay of Petitioner's habeas case, over his objections, based on its repeated representations to the Court that: (1) his detention was no longer at issue; (2) he would be transferred expeditiously; (3) he would not suffer undue prejudice because transfer efforts were unlikely to be affected by further litigation of his case; and (4) the government had already agreed to provide the only relief that he could obtain in habeas, *i.e.*, release from Guantánamo. Petitioner's habeas case was subsequently withdrawn without prejudice more than two years ago while he awaited his promised transfer. But since then the government has made few if any meaningful efforts to transfer him to any country, and he is unlikely to be transferred in the foreseeable future without a court order. Petitioner therefore has filed a new habeas petition challenging the legality of his continuing indefinite detention, and moves for a court order compelling the government to do what it said it would do more than six years ago without a court order—release him.

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At this point the reasons why Petitioner was arrested at a refugee camp in Pakistan, sold to U.S. forces for a bounty, and brought to Guantánamo are long forgotten and legally irrelevant. Petitioner remains in detention not because of anything that he allegedly did, or anyone who he allegedly associated with, but because of bureaucratic inaction and the government's failure to implement its discretionary decision to release him. Petitioner's continuing detention is fundamentally unfair, classically arbitrary, and unlawful in several respects.

First, Petitioner's continuing detention is not authorized by the Authorization for Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001). Even if Petitioner was once part of the Taliban, Al Qaeda or associated forces more than a decade ago, as the government has claimed—but which he disputes—the AUMF's authorization of only "necessary and appropriate" force limits the duration of his detention and requires release without further delay. The AUMF does not authorize Petitioner's continuing indefinite detention, potentially for his lifetime, where the government concedes that detention no longer serves its ostensible purpose, *i.e.*, to prevent return to the battlefield, and he should be released. The AUMF does not permit the government to continue to detain him simply because it has failed through administrative neglect, for more than six years, to make meaningful efforts to implement its discretionary decision to transfer him. Indeed, applying ordinary canons of statutory construction, the AUMF must be read narrowly to avoid a contrary interpretation that would raise serious constitutional concerns.

Second, the Due Process Clause of the Constitution applies at Guantánamo and limits the duration of Petitioner's detention. The Supreme Court has concluded that due process and habeas corpus are inextricably intertwined, and imposition of due process limits on Petitioner's indefinite detention without foreseeable end is not otherwise impractical or anomalous.

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Third, whatever traditional law-of-war detention authority may have existed at the time of Petitioner's initial capture and detention has unraveled. To the extent that an armed conflict with the Taliban, Al Qaeda or associated forces continues, which Petitioner does not concede, the practical circumstances of that conflict have become entirely unlike those of the conflicts that have informed the development of the laws of war. No other conflict in American history has continued for more than thirteen years without foreseeable end against armed groups that did not exist at the time the conflict began, or that no longer exist. The president has also determined that U.S. combat operations in Afghanistan have ended, and any remaining conflict with Al Qaeda or its successors or franchise groups outside of Afghanistan bears no resemblance to the particular conflict in which Petitioner was captured. If Petitioner was ever at war, that war has long ended.

Fourth, this Court has broad equitable authority to dispose of this case as justice and law require. Habeas corpus is an equitable writ, and the mandate of a court confronted with a claim of unlawful imprisonment is to exercise its independent judicial judgment as to what justice requires in the totality of circumstances and to fashion appropriate relief, including declaratory relief or other interim relief.

As the length of Petitioner's non-criminal detention drags on without foreseeable end—for reasons the government concedes are unrelated to any ostensible need for continued detention—the scope of this Court's equitable habeas review must adapt to the changed circumstances and the corresponding, increased risk of an erroneous deprivation of his liberty. The Court should grant Petitioner's habeas petition and order his release from Guantánamo.

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Background

Petitioner was born in 1978 in the Soviet Union, in what was then called the Soviet Socialist Republic of Tajikistan. Tajikistan became an independent nation in 1992 after the collapse of the Soviet Union, but a civil war quickly embroiled the country. Petitioner and members of his family fled across the border into northeastern Afghanistan in 1992 to escape the fighting, but later returned home after some months later when they determined that the area around their hometown of Panj, just across the Panj River from Afghanistan, had calmed down enough for them to return safely. Petitioner also returned home because one of his sisters had remained in hiding in Tajikistan rather than flee with the rest of their family.

In 1997, a tenuous peace was negotiated between the warring factions in Tajikistan, ending the civil war. In the late 1990s, Petitioner became an employee of a Tajik government ministry responsible for dealing with emergencies such as national disasters; that ministry was headed by the person who led the military opposition to the government during the 1992-1997 civil war and the political opposition to the ruling faction of the Tajik government thereafter.

In early 2001, Petitioner abandoned his government position at the ministry and left Tajikistan. He traveled to Afghanistan to see if there were better opportunities for him there, but soon found himself unable to return to Tajikistan. After the United States invaded and began bombing Afghanistan in October 2001, Petitioner fled to Pakistan with thousands of other refugees. He fled to Pakistan rather than return to Tajikistan because the Tajik government, with the assistance of Russian troops, had firmly shut the border. Moreover, as a member of the political opposition who was associated with its leader, it was also too dangerous for him to return to Tajikistan.

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In November 2001, Petitioner was arrested by Pakistani authorities in a refugee camp and turned over to U.S. military forces for a bounty. The United States transferred him to Kandahar Air Base in Afghanistan, and then to Guantánamo in February 2002. Petitioner has been held at Guantánamo, without charge, for more than thirteen years. He is referred to at Guantánamo by Internment Serial Number (ISN) 257.

Procedural History

I. Prior District Court Proceedings

In December 2005, Petitioner was one of many detainees at Guantánamo who filed a habeas corpus petition captioned *Mohammon v. Bush*, Case No. 05-CV-2386 (RBW) (D.D.C. filed Dec. 21, 2005).[1] In January 2006, the District Court stayed the *Mohammon* litigation, believing that it lacked jurisdiction to hear the claims under a habeas jurisdiction-stripping provision of the Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (Dec. 30, 2005). *See* Dkt. No. 6.

In March 2008, Petitioner filed a motion for a preliminary injunction barring his transfer to Tajikistan, and requiring the government to provide 30-days' prior notice of his transfer from Guantánamo to any country, based on his well-founded fear of torture and other persecution if he were repatriated to his home country. *See* Dkt. No. 412. Following the D.C. Circuit's decision in *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008), the District Court granted Petitioner's request for 30-days' prior notice of transfer and held his request for a preliminary injunction barring his transfer to Tajikistan in abeyance. *See* Dkt. Nos. 416, 421.

After the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the District Court (Walton, J.) transferred the *Mohammon* case to Senior U.S. District Judge Thomas

[1] All docket entries refer to the *Mohammon* case unless noted otherwise.

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F. Hogan for coordination and management, pursuant to a Resolution of the Executive Session of the U.S. District Court for the District of Columbia adopted on July 1, 2008. *See* Dkt. No. 463.[2] On July 29, 2008, Judge Hogan entered an order vacating the stay previously imposed on all petitioners in the *Mohammon* case. *See* Dkt. No. 524.

[redacted] On October 14, 2008, Petitioner filed a motion for a preliminary injunction barring his transfer to Tajikistan based on his well-founded fear of torture and other persecution. *See* Dkt. No. 626. Judge Hogan entered a preliminary injunction on October 20, 2008, barring the government from transferring Petitioner to Tajikistan based in part on his well-founded fear of torture and inhumane treatment there. *See* Dkt Nos. 656-59.[3]

A. The Government's First Approval of Petitioner for Transfer and Request to Stay His Habeas Case

On November 25, 2008, the government filed its factual return to Petitioner's habeas petition. *See* Dkt. No. 716. In addition, on December 18, 2008, the government filed a sealed motion to stay Petitioner's habeas case on the ground that he was approved for transfer and the government should not be forced to litigate the merits of his case. Although by that time a preliminary injunction barred Petitioner's transfer to Tajikistan, the government represented:

[redacted]

[2] Guantánamo detainee cases transferred for coordination were also captioned under *In re: Guantánamo Bay Detainee Litigation*, Case No. 08-MC-442 (TFH) (D.D.C.). For purposes of this motion, Petitioner cites only to the *Mohammon* case except where noted otherwise.

[3] The existence and substance of the injunction were initially sealed, but later disclosed publicly. *See, e.g.*, Dkt. Nos. 1306, 1575, at 2 n.1. The transfer injunction was vacated following the D.C. Circuit's decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

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[redacted]

[redacted] Judge Hogan denied the motion by minute order on January 9, 2009.[4]

[4] The general substance of the stay motion and the District Court's ruling were later disclosed publicly. *See, e.g.*, Dkt. No. 1279, at 5 & n.2. Petitioner urges the government or the Court to disclose the parties' pleadings publicly.

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Petitioner subsequently filed his traverse of the government's factual return on February 17, 2009, and, shortly thereafter, two short supplements to his traverse, which the District Court (Walton, J.) permitted to be filed over the government's objection. *See* Dkt. Nos. 1002, 1008, 1061, 1235. Petitioner also moved for expedited judgment on the record, which was fully briefed and argued on May 29, 2009. *See* Dkt. Nos. 904, 1188, 1244.

B. The Government's Second Approval of Petitioner for Transfer and Request to Stay His Habeas Case

On June 2, 2009, before Petitioner's motion for expedited judgment was decided, the government again approved him for release. The six military, intelligence and law enforcement agencies that comprised the president's Guantánamo Review Task Force determined unanimously that Petitioner may be released "consistent with the national security and foreign policy interests of the United States." Exec. Order 13,492, § 4(c)(2), 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009). The government specifically concluded that he no longer posed a risk of future harm that would require his continued detention. *See* Final Report, Guantánamo Review Task Force 7 (Jan. 22, 2010) (the first factor in transfer determinations is whether detainee poses threat that can be sufficiently mitigated to permit transfer). The government informed Petitioner of this decision, and again promised to take diplomatic steps to transfer him from Guantánamo. *See* Dkt. No. 1279-1 (notice of approval for transfer).

On June 3, 2009, the government also moved to stay Petitioner's habeas case again, claiming that the District Court could grant him no relief other than that which the Task Force decision afforded him, and further promising that he would be promptly transferred from Guantánamo. The government specifically represented that "Petitioner has been approved for

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transfer from Guantanamo Bay." Dkt. No. 1306, at 1.[5] The government also argued that "it is highly unlikely that a ruling by this Court will affect the timing or substance of any transfer, in light of the existing requirements in the President's Executive Order to expeditiously provide for the transfer of detainees to facilitate the closure of the Guantanamo detention facility." *Id.* at 2. Therefore, the government contended, it "should not be forced to litigate the merits of this case . . . when the Government is seeking to relinquish Petitioner from custody." *Id.* Finally, the government promised that a stay "will not unduly prejudice Petitioner" because "the Government will take appropriate diplomatic steps to facilitate his expeditious transfer. Such negotiations and release options are unlikely to be affected by further litigation of this case." *Id.* at 3.

Petitioner objected, arguing among other things that a court order granting his habeas petition would speed his release, and that a stay would frustrate his purpose in seeking the Great Writ, *i.e.*, to be free from unlawful imprisonment. In other words, the harm caused by each day that Petitioner remained in detention at Guantánamo without a ruling on his habeas petition was substantive, not procedural, because it effectively denied the very relief that he had filed his case in order to obtain—release. *See* Dkt. No. 1279.

Although it had promptly denied the government's first stay motion filed six months earlier, the District Court held a hearing on the renewed stay motion on June 10, 2009. The government further represented at the hearing that its decision to approve Petitioner for transfer was "the final decision." App. to Br. for Appellant at A.6, *Yoyej v. Obama*, No. 09-5274 (D.C. Cir. filed Nov. 10, 2009) (dkt. no. 1215290) (unsealed hearing transcript). The District Court also commented that proceeding with Petitioner's habeas case "really may be totally meaningless" in light of his approval for transfer and the court's inability to direct his transfer to

[5] The government moved to seal its stay motion, but the District Court denied that request and ordered the motion to be placed on the public docket. *See* Dkt. Nos. 1266, 1271.

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any particular country. *Id.* at A.7. The government agreed: "This does effectively become a meaningless process now that this petitioner has been cleared for transfer." *Id.* at A.9. Thus, the District Court concluded, "I don't see how I could redress the relief that he's requesting considering the fact that I'm just not going to have the authority to order that he be sent to a particular country. . . . And so I just don't see any meaningful purpose in forging ahead with this case at this time." *Id.* at A.11.

On June 12, 2009, the District Court granted the government's motion to stay. The District Court also denied Petitioner's motion for expedited judgment on the record without prejudice based on its order staying Petitioner's habeas case. *See* Dkt. No. 1292.

II. Prior Appellate Court Proceedings

Petitioner appealed the District Court stay order to the D.C. Circuit in the case captioned *Yoyej v. Obama*, No. 09-5274 (D.C. Cir. filed Aug. 7, 2009) [hereinafter *Yoyej*]. In its brief, the government reiterated that Petitioner's Task Force clearance was tantamount to habeas relief:

> Executive Order 13,492 requires the Government to transfer petitioner promptly, and thus provides petitioner with essentially the same relief to which he would be entitled if he prevailed in his habeas case. . . . petitioner is already effectively receiving the relief he would be entitled to under habeas.

Br. for Resp'ts-Appellees at 8-9, *Yoyej* (filed Dec. 10, 2009) (dkt. no. 1220199). The government also acknowledged repeatedly that the District Court's stay order was predicated on its representations that "the relief petitioner is currently receiving pursuant to Executive Order 13,492 is substantially the same as the relief to which he would be entitled if the court were to grant his habeas petition and order his release." *Id.* at 11; *see id.* at 15, 22. Indeed, the government emphasized that "[P]etitioner is essentially receiving—by Executive Order—*all of the relief* he would be entitled to if he prevailed in his habeas petition." *Id.* at 12 (emphasis added); *see also id.* at 21, 28. For that reason, the government said, it was already "taking the

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necessary diplomatic steps to relinquish custody of petitioner." The government conceded that it was obligated by virtue of its decision to approve Petitioner for transfer to act "promptly" and "expeditiously" to effectuate his transfer. *Id.* at 20, 21, 25, 28. Finally, the government argued that Petitioner's "liberty interest of obtaining release from custody" was no longer at stake because he had been approved for transfer and would be released expeditiously. *Id.* at 28.

After his appeal was fully briefed, on March 9, 2010, Petitioner filed a motion to summarily vacate the stay order and remand the case in light of a sealed order entered by the District Court on March 3, 2010. *See* Pet'r-Appellant's Mot. for Summary Remand, *Yoyej* (dkt. no. 1234171). [redacted] The Court also held a sealed status conference on March 25, 2010, and issued an indicative ruling in which it concluded that these "recent events had undermined the basis for its prior decision to stay the proceedings" in Petitioner's case. Dkt. No. 1623. The District Court denied without prejudice Petitioner's request to lift the stay on April 1, 2010, however, but indicated that it would vacate the stay if the matter were remanded by the D.C. Circuit. *Id.*

On April 7, 2010, the D.C. Circuit granted Petitioner's motion for summary remand in part and sent the case back to the District Court to reconsider its June 12, 2009 stay order. *See* Order, *Yoyej* (dkt. no. 1238557). The District Court immediately lifted the stay, *see* Dkt. No. 1628, and the D.C. Circuit dismissed the appeal as moot on May 10, 2010. *See* Order, *Yoyej* (dkt. no. 1243860).

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III. The Government's Failure to Transfer Petitioner

Petitioner's habeas case continued thereafter. In February 2011, over Petitioner's objection, the District Court gave the government leave to file an amended factual return, citing supposed "newly discovered evidence" ten years into his incarceration. *See* Dkt. No. 1816. The government alleged that Petitioner was part of the Taliban, Al Qaeda and/or associated forces, including the Islamic Movement of Uzbekistan, but did not allege that he had engaged in hostilities against the United States in Afghanistan prior to his capture. Petitioner denied the allegations against him. But in any event the government's factual filing did not undermine or contradict its previous admissions that Petitioner's detention was no longer necessary and he should be released. The government did not change its discretionary decision to release him.

On January 14, 2011, the government sent Petitioner's counsel a letter stating that after considering evidence submitted by Petitioner's counsel to substantiate his fear of persecution in Tajikistan, the United States was no longer seeking to transfer him to that country. It informed Petitioner's counsel that it had recently concluded its discussions with Tajikistan, and Tajikistan had informed the United States that it does not recognize Petitioner as a citizen of Tajikistan. The letter also informed Petitioner's counsel that the United States had not made a decision with regard to alternate transfer dispositions. The letter was sent under seal. *See* Letter from Andrew Warden, Esq., to Matthew J. O'Hara, Esq., dated Jan. 14, 2011 (attached hereto as Exhibit C).

By 2013, the government's claims concerning the legality of Petitioner's capture and initial detention had become moot. The government had affirmatively disclaimed any military reason to continue to detain him, exercised its discretion to release him, and promised to afford him all of the relief to which he would be entitled in habeas. The government had also abandoned efforts to force him back to Tajikistan. Although the injunction barring Petitioner's

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transfer to Tajikistan had since expired, the government had apparently concluded that he could not be forcibly repatriated due at least in part to humane treatment concerns.

In November 2013, the Ambassador of Tajikistan to the United States also informed Petitioner's counsel at a meeting in Washington, D.C. that Tajikistan, in fact, no longer considers Petitioner to be a citizen of that country.[6] Petitioner was, and remains today, stateless.

Petitioner thus became a candidate for third-country resettlement.[7] And in light of the government's repeated representations that it was making efforts to transfer him, and when no longer faced with the possibility of forcible transfer to the one country he feared—Tajikistan—he agreed to voluntarily withdraw his habeas case to await transfer and release. *See* Dkt. No. 1986. That was more than two years ago.

In the meantime, the U.S. government has not made sufficient, meaningful efforts to transfer Petitioner from Guantánamo. Although the government has had more than six years to fulfill its repeated representations to Petitioner and the Court that he would be transferred expeditiously, and about two years with a specific focus on resettling Petitioner in a third country, it has failed to take meaningful action to release him from Guantánamo such that he might be expected to be released in the near future without a court order.

[redacted]

[6] Although the information in Exhibit C was initially deemed "protected" by the government, it no longer is. The government later agreed to lift the "protected" designation as to the statement that it was no longer seeking to repatriate Petitioner to Tajikistan. In addition, the government authorized Petitioner's counsel to disclose to the government of Tajikistan what Tajikistan had conveyed to the United States, and to inquire whether it was accurate. The government stated that if Tajikistan confirmed that it no longer considered Petitioner a citizen of that country, that fact would also no longer be deemed "protected."

[7] The government did not rule out resettling Petitioner in earlier discussions with human rights NGO representatives in 2009 and 2010.

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[redacted]

[redacted] In addition, transfers from Guantánamo have slowed to a trickle—a problem that would be obviated by court orders to release cleared detainees like Petitioner—and the likelihood that the president will close Guantánamo in the remaining fifteen months of his administration is increasingly unlikely. *See, e.g.*, Missy Ryan & Adam Goldman, *Time Is Running Out for Obama to Fulfill Promise to Close Guantanamo*, WASH. POST, Oct. 7, 2015 (discussing "byzantine process across multiple agencies" to transfer cleared detainees that "has been choked by bureaucratic infighting"); Editorial, *How to Close Guantánamo*, N.Y. TIMES, Sept. 19, 2015 (discussing bureaucratic inaction on transferring cleared detainees and proposing court orders of release to bypass administrative obstacles); Charlie Savage, *U.S. Is Poised to Oppose Freeing Guantánamo Hunger Striker*, N.Y. TIMES, Aug. 14, 2015 (discussing "incongruity of sending diplomats to ask other countries to take in such detainees while also fighting to prolong their detention in court").

The government also blocked at least one resettlement opportunity generated by Petitioner's counsel. In May 2010, Petitioner's counsel learned from the Government of Spain that it was about to send a delegation to Guantánamo to consider accepting several detainees for resettlement. Spain's Foreign Minister had stated earlier that year that Spain would resettle five Guantánamo prisoners, and Spain made a request to the United States to interview Petitioner. The request was made by Spain at the request of Petitioner's counsel, for the purpose of considering him as a candidate for resettlement in that country. But according to Spanish officials, the U.S. State Department refused to allow Spain to interview Petitioner, falsely telling a senior Spanish official charged with resettling Guantánamo detainees that Petitioner was not cleared for transfer.

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Accordingly, Petitioner has filed this new action challenging his ongoing, indefinite detention without foreseeable end.[8]

Argument

The Court is confronted with a situation unique to the particular facts and circumstances of this case. The question to be decided by the Court is not *whether* Petitioner should be released from Guantánamo, or *where* he should be sent, but whether the Court should grant his habeas petition and order his release—the result desired by all parties. The government has exercised its discretion to release Petitioner and affirmatively disclaimed any need or desire to continue to detain him. [redacted] The government represented that its discretionary decision to release Petitioner was final, and there was no practical distinction between that decision and a court order granting his initial habeas petition. Those matters are conclusively resolved.

Whatever the case may have been when Petitioner was sent to Guantánamo more than a decade ago, no one contends that his detention continues to serve any ostensible purpose (*e.g.*, to prevent return to the battlefield). The problem is that for more than six years the government has failed to execute its discretion to release him. The government told the Court that it would transfer him; the Court relied on that representation to stay his habeas case; Petitioner relied on that representation in withdrawing his case; and the government has failed to do what it said it

[8] Because he raises new claims in support of his request for an order of release, Petitioner has filed a new habeas petition rather than moving to reinstate his prior petition. *Cf.* Resp'ts' Opp'n to Pet'r's Mot. to Reinstate Habeas Pet'n and for Judgment on the Record at 2 n.1, *Ba Odah v. Obama*, No. 06-CV-1668 (TFH) (D.D.C. filed in redacted form Aug. 24, 2015) (dkt. no. 283-1).

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would do without a court order. Petitioner is detained not because his detention continues to serve any military necessity or other ostensible purpose, but rather merely because of bureaucratic inaction or inertia that is self-perpetuating. His detention is indefinite, arbitrary and perpetual by any measure, and will likely remain so absent a court order.

To be clear, Petitioner does not in this proceeding challenge the basis for his initial capture and detention; his argument is that whatever the case may have been more than a decade ago, he may no longer be detained under U.S. and international law. Nor does Petitioner ask the Court to order the government to prove that he is not a "threat"—because the government has already decided that he is not. And Petitioner does not ask the Court to direct his transfer to any particular country. He simply seeks an order granting his petition and ordering his release, which will have the practical effect of eliminating any legislative or bureaucratic obstacles to his transfer. The government has had more than enough time to transfer him but has failed; its inaction entitles it to no further deference. The Court should exercise its equitable habeas authority and order his release without delay.

I. Petitioner's Arbitrary Detention Violates the AUMF.

Petitioner's detention is unlawful because it is arbitrary, indefinite, and perpetual by any reasonable measure. Instead, he continues to be detained because the government has not made sufficient, meaningful efforts to execute its discretion to release him. His detention therefore violates the AUMF's qualified force authorization and the Supreme Court's holding in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), that indefinite or perpetual detention for no purpose is unlawful. Indeed, under the laws of war that the government concedes limit its AUMF detention authority, a detainee must be released where detention is no longer necessary to prevent return to the battlefield. The Court should also construe the AUMF not to authorize his detention under

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these circumstances in order to avoid serious constitutional issues that would arise from a statute sanctioning non-criminal detention that no longer serves any ostensible purpose.

A. Petitioner Must Be Released Under the AUMF Because His Detention Is No Longer Necessary or Appropriate.

The government has claimed authority to detain Petitioner pursuant to the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), which permits the use of "necessary and appropriate force [against a narrow set of groups or individuals] in order to prevent any future acts of international terrorism against the United States." But the AUMF "does not authorize unlimited, unreviewable detention." *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009); *cf. Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009) (Leon, J.) (granting the writ where the purpose of AUMF detention is not served).

In *Hamdi*, the Supreme Court stated unequivocally that the AUMF does not authorize indefinite or perpetual detention, and "indefinite detention for the purpose of interrogation is not authorized." 542 U.S. at 521. Even in circumstances where detention may be "necessary and appropriate" to prevent a combatant's return to the battlefield, that justification may "unravel" if the practical circumstances of the conflict are entirely unlike those that informed the development of the laws of war. *Id.* at 521; *see also Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (noting, that by 2008, that post-September 11 conflict was already among the longest wars in American history); *id.* at 785 (hostilities may last a generation or more); *id.* at 797-98 (courts may be required to define the outer boundaries of war powers if terrorism continues to pose a threat for years to come). "[A] state of war is not a blank check for the President." *Hamdi*, 542 U.S. at 536.

Here, again, Petitioner continues to be held for no reason other than the government has failed over the course of six years to make reasonable efforts to send him somewhere, as it

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represented to the Court it would do as long ago as 2008 in order to obtain a stay of his habeas case. If indefinite detention for the purpose of interrogation is not authorized, Petitioner's indefinite detention without foreseeable end is surely impermissible where the government has [redacted] and yet no substantial efforts have been made over several years to try to send him anywhere. In the simplest of terms, absent an order of the Court, Petitioner is likely to continue to languish at Guantánamo long after the president leaves office, if not for the duration of his lifetime as the prison remains open. Whether or when that might happen is unknown, but under no circumstances could such arbitrary detention be authorized by the AUMF.[9]

B. Petitioner Must Be Released Under the Laws of War Because His Detention No Longer Serves Its Ostensible Purpose.

It bears emphasis that the AUMF does not directly authorize detention. As *Hamdi* held, the power to detain may be inferred from the right to use force under "longstanding law-of-war principles." 542 U.S. at 518, 521. The Court further explained that detention is nonpunitive and its sole purpose is "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518; *id.* at 519 (although the AUMF "does not use specific language of detention," detention "to prevent a combatant's return to the battlefield is a fundamental

[9] Although foreclosed by D.C. Circuit precedent, *see Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012), Petitioner also preserves the argument that his detention is not authorized by the AUMF because the government has never contended or established that he was engaged in armed conflict against the United States in Afghanistan prior to his capture. *See Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) ("The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed conflict against the United States' in Afghanistan prior to his capture.'").

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incident of waging war" and thus permitted).[10] The Court concluded that detention is authorized in the "narrow circumstances" where necessary to prevent return to the battlefield, but may last "no longer than active hostilities." *Id.* at 520 (citing Third Geneva Convention art. 118).

The government has long acknowledged that its AUMF detention authority is informed and limited by these law-of-war principles. *See* Resp'ts' Mem. Regarding the Gvt's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In Re Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (dkt. no. 1689) ("Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.") (citing Geneva Conventions). Under the laws of war, regardless of the nature of the armed conflict, a detainee must be released in circumstances where detention is no longer necessary to prevent his return to the battlefield.

In international armed conflicts, fought between nation-states and governed by the Third and Fourth Geneva Conventions,[11] "[t]he grounds for initial or continued detention have been limited to valid needs," and detention is not authorized where it no longer serves an imperative security purpose (in the case of civilians) or where a detainee is "no longer likely to take part in hostilities against the Detaining Power" (in the case of combatants). Jean-Marie Henckaerts & Louise Doswald-Beck, 1 *Customary International Humanitarian Law*, Rule 99, at 344-45 (Int'l

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

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

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Comm. of the Red Cross, Cambridge Univ. Press reprtg. 2009) [hereinafter Henckaerts]. Additional Protocol I to the Geneva Conventions, which the United States has signed (but not ratified) and recognizes as binding customary international law, also specifies that "[a]ny person . . . detained or interned for actions related to the armed conflict . . . shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 16 I.L.M. 1391, 1410 ("Additional Protocol I").[12]

This limit on detention is even stricter in the context of non-international armed conflicts, which are waged not between nation-states but with armed groups resulting a threshold of violence that exceeds mere "internal disturbances and tensions" such as riots or sporadic violence. Non-international armed conflicts are not subject to the extensive regulations of the Third and Fourth Geneva Conventions. Non-international armed conflicts, including the conflict with Al Qaeda,[13] are instead governed by Common Article 3 of the Conventions, which sets forth a minimum baseline of human rights protections, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006), and Additional Protocol II of the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 16. I.L.M. 1442 ("Additional Protocol II"). In non-international armed conflicts, "the need for a valid reason for the deprivation of liberty

[12] The government concedes that it is legally bound by Article 75 of Additional Protocol I. *See* Fact Sheet: New Actions on Guantánamo and Detainee Policy, The White House, Mar. 7, 2011, available at http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

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

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concerns both the initial reason for such deprivation and the continuation of such deprivation." Henckaerts, *supra*, Rule 99, at 348; *id.*, Rule 128(C), at 451 ("Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.").[14]

International human rights law likewise supports the rule that continuing indefinite detention that no longer serves its ostensible purpose is arbitrary and unlawful. *See* International Covenant on Civil and Political Rights art. 9.1, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). As discussed, there can scarcely be a clearer case of arbitrary detention than one such as this in which Petitioner remains imprisoned for lack of meaningful efforts to try to release him, but not because anyone thinks he should still be held.

C. The Court Should Apply Constitutional Avoidance Principles and Construe AUMF Detention Authority Narrowly.

As Justice Souter explained in his opinion concurring in the *Hamdi* judgment, when a court is asked to infer detention authority from a wartime resolution such as the AUMF, it must assume that Congress intended to place no greater restraint on liberty than was unmistakably indicated by the language it used, which, given the qualified "necessary and appropriate" force language of the AUMF, necessarily suggests that AUMF detention authority is equally limited. 542 U.S. at 544 (quoting *Ex Parte Endo*, 323 U.S. 283, 300 (1944)). The Court should similarly construe the AUMF narrowly in order to avoid the obvious, serious constitutional problems that

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

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

Indeed, there can be no serious question that Petitioner's non-criminal detention would violate the Due Process Clause because it serves no ostensible purpose, and is indefinite and without foreseeable end. The Supreme Court has repeatedly emphasized that the core purpose of the Due Process Clause is to protect against unlawful detention, regardless of the context. *See, e.g.*, *Zadvydas*, 533 U.S. at 690; *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (upholding statute requiring civil confinement for sex offenders in part because it provided for immediate release once an individual no longer posed a threat to others); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (ordering petitioner's release from commitment to mental institution because there was no longer any evidence of mental illness); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (even if civil commitment was founded upon a constitutionally adequate basis, it "[cannot] constitutionally continue after that basis no longer existed"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (state may no longer hold an incompetent criminal defendant in pretrial civil confinement when probability that defendant might regain capacity to stand trial becomes remote because "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). *See also 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.").

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The D.C. Circuit's substantial body of precedent holding that the AUMF authorizes the detention of individuals who are "part of" the Taliban, Al Qaeda or associated forces, and who the government has determined it is necessary and appropriate to detain as part of ongoing armed conflict, does not foreclose this Court from granting relief. Although D.C. Circuit case law unquestionably affords the government broad authority to hold Guantánamo detainees, no decision of that court has addressed the narrow question presented here—whether indefinite detention without foreseeable end is lawful in circumstances where the government has exercised its discretion and has disclaimed any need or desire to hold a detainee, convinced a court to deny the detainee a habeas hearing on the basis that it would release the detainee, and then failed over the course of many years to take any serious action to execute its discretion and release him, thereby causing him substantial harm.[15] *See also Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (Supreme Court has not "considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention").

[15] *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), and *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), are not to the contrary. Those cases involved detainees who the government had not affirmatively disclaimed any need or desire to continue to detain; they were not approved for transfer and the government wanted to hold them. Those detainees argued instead that they should be released because the government had failed to prove that they were too dangerous to release, which the Circuit held was not required because they were determined to be "part of" the Taliban, Al Qaeda or associated forces and thus presumed to present a continuing threat. In *Al-Bihani* specifically, the D.C. Circuit rejected the petitioner's contention that he was no longer detainable under the laws of war by remarking that this would constitute a "prelude to defeat" because the initial success of the U.S. war effort would be lost and "the victors would be commanded to constantly refresh the ranks of the fledgling [Afghanistan] democracy's most likely saboteurs." 590 F.3d at 874. Far from being a "likely saboteur," the government has said that there are no military reasons for Petitioner's continued detention and he should be released.

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II. Petitioner's Arbitrary Detention Violates Due Process.

If the Court determines it is necessary to decide the constitutional question presented by Petitioner's detention, it should conclude that the Due Process Clause applies at Guantánamo and limits on the duration of Petitioner's detention. The government long ago determined there was no longer any need to detain Petitioner, and promised that he would receive without a court order the same relief that he would otherwise be entitled to if he prevailed in his habeas case—release. But that has not happened, and as noted above transfers of cleared men from Guantánamo have stalled due to bureaucratic dysfunction and inter-agency squabbling. Petitioner remains in indefinite detention, without any foreseeable end, because of the government's failure to implement its discretionary decision to release him. Indeed, more than thirteen years after he was captured and transferred to Guantánamo, Petitioner faces the increasing likelihood that he will be held for the duration of life without charge or trial. His detention plainly violates due process. *Cf. Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013) (Edwards, J., concurring) ("It seems bizarre, to say the least, that [a detainee], who has never been charged with or found guilty of a criminal act and who has never 'planned, authorized, committed, or aided [any] terrorist attacks,' is now marked for a life sentence. . . The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF . . . so far beyond the terms of these statutory authorizations that habeas corpus proceedings . . . are functionally useless.")

In *Boumediene v. Bush*, 553 U.S. 723, 770 (2008), the Supreme Court held that the Suspension Clause of the Constitution protects the right of detainees such as Petitioner to challenge the legality of their detention at Guantánamo. In reaching this conclusion, the Court did not state a new constitutional rule but rather made clear that it was reaffirming its long-standing jurisprudence to determine what constitutional standards apply when the government

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acts with respect to non-citizens within its sphere of foreign operations. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). In *Boumediene*, the Court applied a functional test in determining that the Suspension Clause restrains the Executive's conduct as to Guantánamo detainees like Petitioner, and concluded that it would not be "impractical and anomalous" to grant detainees habeas review because "there are few practical barriers to the running of the writ" at Guantánamo. *See* 553 U.S. at 769-1; *id.* at 784-85 (addressing due process). The Court reasoned that "Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* at 768-69; *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory" where our "unchallenged and indefinite control . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction.").

After *Boumediene*, there can be no serious question that the Due Process Clause also applies at Guantánamo to the extent necessary to limit the duration of Petitioner's detention. Although the Court considered the application of the Suspension Clause at Guantánamo, its functional analysis leads inevitably to recognition of a due process liberty right for Guantánamo

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detainees, at least to the extent of the right to be relieved of unlawful imprisonment.[16] Indeed, due process and habeas are inextricably intertwined. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525-26 (2004) (plurality opinion) (discussing interaction of habeas and due process); *id.* at 555-57 (Scalia, J., dissenting) (same). To the extent habeas jurisdiction has been recognized at Guantánamo, at least some measure of the Due Process Clause also reaches there because there are plainly no practical barriers that would apply to one provision but not the other. *See id.* at 538 (plurality opinion) ("[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."); *Boumediene,* 553 U.S. at 784-85 (addressing due process). *Cf. Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (Court has not determined whether the Constitution may limit the duration of detention at Guantánamo). That is especially so where, as in this case, a court order granting Petitioner's habeas petition on the ground that his continuing detention violates due process would achieve what the government has already said that it wants to do—release Petitioner—notwithstanding is failure to do so because of administrative neglect. This simply is not a case where foreign interests or similar considerations would make it impractical or anomalous to grant relief. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) ("All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."). If anything, application of

[16] Even prior to the Bill of Rights and addition of the Due Process Clause to the Constitution, a habeas court would have equitable power to grant relief from imprisonment as justice requires. *See* Eric M. Freedman, *Habeas Corpus in Three Dimensions, Dimension III: Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. (forthcoming 2016) (manuscript at 144) ("The inherent authority to grant writs of habeas corpus in the absence of a valid suspension is one of the attributes of the 'judicial power' that Article III grants."), *available at* http://ssrn.com/abstract=2647623). *See also infra* Part IV.

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the Due Process Clause would help the president achieve his stated goal of closing Guantánamo without further delay.

Nor can the D.C. Circuit's decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (*Kiyemba I*), be fairly read to preclude the application of due process entirely at Guantánamo. That decision addressed only the narrow question of whether due process authorizes entry into the United States of non-citizens without property or presence in the country. *Id.* at 1026-27. Indeed, there is no other way to read *Kiyemba I* consistently with *Boumediene* or even subsequent panel decisions of the D.C. Circuit. *See Kiyemba v. Obama*, 561 F.3d 509, 514 n.* (D.C. Cir. 2009) (*Kiyemba II*) ("[W]e assume arguendo these alien detainees have the same constitutional rights . . . as . . . U.S. citizens" detained by the U.S. military in Iraq); *id.* at 518 n.4 (Kavanaugh, J., concurring) ("[A]s explained in the opinion of the Court and in this concurring opinion, the detainees do not prevail in this case even if they are right about the governing legal framework: Even assuming that the Guantanamo detainees . . . possess constitutionally based due process rights" they would not prevail); *Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) (*Kiyemba III*) ("[P]etitioners never had a constitutional right to be brought to this country and released."); *id.* at 1051 (Rogers, J., concurring) ("Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States."); *cf. Kiyemba v. Obama*, 131 S. Ct. 1631, 1631-32 (2011) (Breyer, Kennedy, Ginsburg, Sotomayor, JJ., statement respecting the denial of certiorari) (third country's offer to resettle detainees transformed their due process claim seeking entry into the United States, which, should circumstances change in the future, may be raised again before the Court). *See also Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014) ("As the

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government does not press the issue, we shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo").

It should come as no surprise, therefore, that the government has conceded, and subsequent decisions of the D.C. Circuit have assumed, that the Ex Post Facto Clause of the Constitution, U.S. Const. art. I, § 9, cl. 3, applies at Guantánamo in light of *Boumediene* and notwithstanding *Kiyemba I*. *See Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc) (noting that government concedes Ex Post Facto Clause applies at Guantánamo); *id.* at 49 (Rogers, J., concurring) ("[*Boumediene*'s] analysis of the extraterritorial reach of the Suspension Clause applies to the Ex Post Facto Clause because the detainees' status and location at Guantanamo Bay are the same, and the government has pointed to no distinguishing 'practical obstacles' to its application."); *id.* at 65 n.3 (Kavanaugh, J., dissenting) ("As the Government concedes, the *Boumediene* analysis leads inexorably to the conclusion that the ex post facto right applies at Guantanamo."). As Judge Kavanaugh explained, "[d]etermining whether the Constitution applies to non-U.S. citizens in U.S. territories requires a 'functional' rather than 'formalistic' analysis of the particular constitutional provision and the particular territory at issue. . . . In *Boumediene*, the Court determined that Guantanamo was a *de facto* U.S. territory—akin to Puerto Rico, for example, and not foreign territory." *Id.* (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763, 777-81 (1950)); *see also Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) (Due Process Clause applies in Puerto Rico); *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) (application of Fifth Amendment at Guantánamo would not be impractical or anomalous), *vacated as moot*, *Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993).

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III. Any Authority to Detain Petitioner Under the Laws of War Has Unraveled.

Alternatively, the Court should grant this motion and order Petitioner released from Guantánamo because whatever traditional law-of-war detention authority may have existed at the time of Petitioner's initial capture and detention has unraveled. To the extent an armed conflict with the Taliban, Al Qaeda or associated forces continues, which Petitioner does not concede, the practical circumstances of that conflict have become entirely unlike those of the conflicts that have informed the development of the laws of war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.")

This point is clear in several respects: First, to the extent the government claims there is an ongoing fight against terrorism, that fight is now the longest military conflict in U.S. history, bar none.[17] "[T]his conflict has come to feel like a Forever War: it has changed the nature of our foreign policy and consumed our new Millennium. It has made it hard to remember what the world was like before September 11." Harold H. Koh, Legal Adviser (2009-2013), U.S. Dep't of State, *How to End the Forever War?*, Speech Before the Oxford Union, May 7, 2013.[18] Second, Osama Bin Laden and Al Qaeda's core leadership are dead, imprisoned or detained, and the United States is drawing down troops from Afghanistan.[19] Third, the president has stated

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

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

[19] *See, e.g.*, *Text of President Obama's May 23 Speech on National Security*, WASH. POST, May 23, 2013, *supra* note 2 ("Today, Osama bin Laden is dead, and so are many of his top lieutenants. There have been no large-scale attacks on the United States, and our homeland is

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repeatedly that the conflict in Afghanistan has come to an end.[20] Fourth, the fighting that does continue globally largely involves Al Qaeda-inspired "franchise" groups that likely did not exist or no one had heard of at the time that Petitioner was brought to Guantánamo more than a decade ago.[21] Notably, for example, the government now invokes the AUMF as justification for

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more secure. . . . Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. . . . They have not carried out a successful attack on our homeland since 9/11. "); Remarks by the President in the State of the Union Address, Feb. 12, 2013 (announcing withdrawal of 34,000 U.S. troops from Afghanistan over the next twelve months, and stating "the organization that attacked us on 9/11 is a shadow of its former self," and "by the end of next year, our war in Afghanistan will be over"), available at http://www.whitehouse.gov/ the-press-office/2013/02/12/remarks-president-state-union-address; Scott Wilson & David Nakamura, *Obama Announces Reduced U.S. Role in Afghanistan Starting This Spring*, WASH. POST, Jan. 11, 2013 (President Obama: "We achieved our central goal, or have come very close to achieving our central goal, which is to de-capacitate al-Qaeda, to dismantle them, to make sure that they can't attack us again."); Leon E. Panetta, Sec'y of Def., *The Fight Against Al Qaeda: Today and Tomorrow*, Speech at The Center for a New American Security, Nov. 20, 2012 ("Over the last few years, al-Qaeda's leadership, their ranks have been decimated. . . . As a result of prolonged military and intelligence operations, al-Qaeda has been significantly weakened in Afghanistan, and Pakistan. Its most effective leaders are gone. Its command, and control have been degraded, and its safe haven is shrinking. Al-Qaeda's ability to carry out a large scale attack on the United States, has been seriously impacted. And as a result, America is safer from a 9/11 type attack."), available at http://www.defense.gov/speeches/speech.aspx?speechid=1737; *see also* Mark Mazzetti & Matthew Rosenberg, *U.S. Considers Faster Pullout in Afghanistan*, N.Y. TIMES, July 8, 2013; Inaugural Address by President Barack Obama, Jan. 21, 2013 ("A decade of war is now ending."), available at http://goo.gl/8JFl4V.

[20] *See* Mot. to Grant Pet'n for Writ of Habeas Corpus, *Al Warafi v. Obama*, No. 09-CV-2368 (RCL) (D.D.C. filed Feb. 26, 2015) (dkt. no. 80) (collecting statements by President Obama). Although the government contends that it retains detention authority under the AUMF because fighting continues in Afghanistan, it concedes that the U.S. combat mission has ended, and U.S. involvement has transitioned to training, advising and assisting Afghan national forces and counterterrorism operations. *See* Resp'ts' Opp'n to Pet'r's Mot. to Grant Pet'n for Writ of Habeas Corpus, *Al Warafi v. Obama*, No. 09-CV-2368 (RCL) (D.D.C. filed Apr. 24, 2015) (dkt. no. 84-1).

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

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attacking the Islamic State in Syria even though that group did not exist until recently and is currently fighting *against* Al Qaeda.[22] However, the problem is one of definition. "[A]s long as there are bands of violent Islamic radicals anywhere in the world who find it attractive to call themselves Al Qaeda, a formal state of war may exist between Al Qaeda and America. The Hundred Years War could seem a brief skirmish in comparison."[23] And the government, for its part, offers no indication that it intends to release Petitioner or the other Guantánamo detainees before President Obama leaves office. It simply cannot be that Petitioner's ongoing, indefinite detention—potentially for life—has any analogue or precedent under the traditional laws of war. We are certainly aware of none.

Moreover, in light of the changed practical circumstances, to the extent that the D.C. Circuit has accepted the government's argument that AUMF detention authority should be informed by law-of-war rules governing international armed conflicts (fought between nation-states),[24] it is no longer appropriate to borrow or analogize to international armed conflict rules that apply only to *prisoners of war*. Those rules are set forth in the Third Geneva Convention and generally authorize a combatant's detention until the end of hostilities to prevent his return

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[22] *See* Marty Lederman, *The Legal Theory Behind the President's New Military Initiative Against ISIL*, JustSecurity.org, Sept. 14, 2014 (posting statement from senior administration official).

[23] Steve Coll, *Name Calling*, THE NEW YORKER, Mar. 4, 2013, available at http://www.newyorker.com/talk/comment/2013/03/04/130304taco_talk_coll; *see also* Koh, *supra*. ("[I]f we are too loose in who we consider to be 'part of' or 'associated with' Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever.").

[24] *See* Resp'ts' Mem. Regarding the Gvt's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In Re Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (dkt. no. 1689) ("Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict."); *see also, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

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to the battlefield. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 2, 4, 118, Aug. 12, 1949, 6 U.S.T. 3316. Any remaining armed conflict is non-international in nature (fought with non-state armed groups), and will not end with a peace treaty or armistice. The conflict is also not likely to end within our lifetime if, as the government has claimed, the AUMF authorizes the use of force against any new or evolving terrorist group that claims affiliation or allegiance to Al Qaeda and aspires to harm U.S. interests.[25]

If the war on terror is to continue forever, like the war on drugs, courts should now adopt a new detention standard and interpret AUMF detention authority at Guantánamo by analogy to international armed conflict rules that apply to *civilians*, which are set forth in the Fourth Geneva Convention and authorize detention only for as long as a civilian presents an imperative security threat. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 2, 78, Aug. 12, 1949, 6 U.S.T. 3516. Applying this standard, Petitioner must be released because the government has already affirmatively disclaimed and military rationale for continuing to detain him, and has repeatedly represented to Petitioner and the Court that he can and will be released without delay.[26]

IV. The Court Has Equitable, Common-Law Habeas Authority to Fashion Relief.

A final points bears emphasis. Even if Petitioner's indefinite detention without foreseeable end were authorized, this Court would retain its equitable, common law habeas authority to dispose of this case as justice and law require—not only to grant his habeas petition, but also to fashion additional relief necessary to effectuate his transfer from Guantanamo, which

[25] *See, e.g.*, Resp'ts' Opp'n to Pet'r's Mot. to Grant Pet'n for Writ of Habeas Corpus, *Al Warafi v. Obama*, No. 09-CV-2368 (RCL) (D.D.C. filed Apr. 24, 2015) (dkt. no. 84-1).

[26] Petitioner preserves the argument that he is not detainable until the end of hostilities in any event because he is a civilian under the laws of war regardless of whether he is detained in connection with international or non-international armed conflict. (*See* Pet. ¶¶ 44-47.)

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is the result desired by all parties—based on its unique facts and circumstances. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."). Indeed, for example, Congress has recognized—and continues to recognize—that legislative restrictions on detainee transfers from Guantánamo do not apply where transfer or release is ordered by a court. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(a)(2), 127 Stat. 851 (Dec. 26, 2013) (transfer restrictions do not apply where "transfer or release outside the United States is to effectuate an order affecting disposition of the individual by a court or competent tribunal of the United States having jurisdiction"). Thus, the Court may order declaratory relief or other interim relief necessary to eliminate any such restrictions or break the bureaucratic, inter-agency logjam that has significantly burdened and delayed Petitioner's transfer despite the fact that the parties agree he should be released.

Since the 17th Century, courts in England and America with authority to dispose of habeas corpus petitions have been governed by equitable principles. *See Sanders v. United States*, 373 U.S. 1, 17 (1963); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (citing *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). "Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). In exercising habeas jurisdiction, courts have equitable discretion to correct a miscarriage of justice. *See McClesky v. Zant*, 499 U.S. 467, 502 (1991). Habeas courts also have not hesitated to fill perceived gaps in a statutory scheme, place a central focus on justice rather than law, and impose flexible, pragmatic remedies. *See Brecht v. Abrahamson*, 507 U.S.

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619, 633 (1993); *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.") (internal quotation marks omitted); Brief of Eleven Legal Historians as *Amici Curiae* Supporting Petitioner, *Holland v. Florida*, 130 S. Ct. 2549 (No. 09-5327) (citing cases); *see also Boumediene*, 553 U.S. at 780 (common-law habeas courts often did not follow black-letter rules in order to afford greater protection in cases of non-criminal detention). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See generally* Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 87 (2010) ("Ensuring that errors were corrected and 'justice should be done' . . . even where law had not previously provided the means to do so, was the point of the prerogative writs. . . . There was and is another word for this vast authority to do justice, even in the absence of previously existing rules or remedies: equity."); *id.* at 89-90 (at common law, equity was conceived of as an idea "associated with the provision of mercy, attention to the specific facts of every case, and the imperative that all judgments fulfill the laws of God and nature. Pursuing such ideas in practice was to open 'the hidden righteousness' of the grounds of law."); *id.* at 102 ("The key to making judgments about infinitely variable circumstances was the consideration of details about why, when, how and by whom people were imprisoned.").

The government has had more than six years to transfer Petitioner without a court order and has failed, if only for bureaucratic gridlock or lack of sufficient effort. A flexible, pragmatic remedy is acutely and unquestionably necessary in this exceptional case in order to cut right to the heart of this matter, end Petitioner's indefinite detention, and correct a miscarriage of justice. *See also* THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

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("The practice of arbitrary imprisonment[ ] [has] been, in all ages, [among] the favorite and most formidable instruments of tyranny."); *Boumediene*, 553 U.S. at 744 (quoting this passage).

Conclusion

For all of these reasons, the Court should grant this motion for judgment and order Petitioner's release from Guantánamo.

Dated: Chicago, Illinois
November 5, 2015

Respectfully submitted,

MUHAMMADI DAVLIATOV

By: s/ Matthew J. O'Hara
One of His Attorneys

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[Proposed] ORDER

This cause coming before the Court on Petitioner's Motion for Judgment and Order Granting Writ of Habeas Corpus, the Court hereby orders as follows. The government has conceded that Petitioner's indefinite detention no longer serves any ostensible purpose, and represented to the Court and Petitioner that he would be transferred from Guantánamo without a court order, but many years later he still has not been released. Accordingly, construing the Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), as interpreted by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and in conjunction with 28 U.S.C. § 2243, the Court's equitable, common-law habeas authority recognized in *Boumediene v. Bush*, 553 U.S. 723 (2008), and further in order to avoid serious constitutional issues that would otherwise be raised by Petitioner's continuing indefinite detention, the Court concludes that based on the unique facts and circumstances of this particular case, Petitioner's habeas corpus petition shall be and hereby is GRANTED.

IT IS SO ORDERED.

Enter:

_____
United States District Judge

CERTIFICATE OF SERVICE

The undersigned states that on November 5, 2015, I filed the foregoing **Motion for Judgment and Order Granting Writ of Habeas Corpus Notice** by Petitioner Muhammadi Davliatov a/k/a Umar Hamzayavich Abdulayev under seal with the Clerk of the Court using the court's ECF filing system. I certify that I have served the foregoing motion to the following counsel for Respondents via electronic mail on the same date:

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/s/ Matthew J. O'Hara

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