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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MUHAMMADI DAVLIATOV (ISN 257),	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 15-1959 (CRC)
	)	
BARACK OBAMA, et al.,	)	
	)	
Respondents.	)	
	)	

RESPONDENTS' COMBINED MOTION TO DISMISS THE PETITION AND OPPOSITION TO PETITIONER'S MOTION FOR JUDGMENT AND ORDER GRANTING WRIT OF HABEAS CORPUS

Petitioner Muhammadi Davliatov has been detained at Guantanamo Bay since 2002. In this, his second petition for a writ of habeas corpus, Petitioner challenges not the government's reasons for detaining him—namely that he was part of al Qaeda, Taliban, and associated forces—but rather his continued detention based solely on the government's designation of him as eligible for "[t]ransfer to Tajikistan subject to appropriate security measures." See Resps.' Not. Lifting Protected Info. Desig. of Decs. by Guantanamo Bay Rev. Task Force, Ex. 1 (July 8, 2013) (ECF No. 2007).[1] Because, among other reasons, binding precedent establishes that this designation is irrelevant to the government's authority to continue to detain him, Almerfedi v. Obama, 654 F.3d 1, 4 n.3 (D.C. Cir. 2011), Petitioner's Motion for Judgment and Order Granting Writ of Habeas Corpus should be denied, and his Petition should be dismissed.[2]

[1] Unless otherwise noted, citations to docket entries throughout this brief will be to the docket in Petitioner's original habeas case, Mohammon v. Bush, Civil Act. No. 05-2386 (RBW).

[2] This combined opposition and motion has been filed under seal because it contains information that Respondents deem protected under the standard protective order that governs these Guantanamo Bay

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At the outset, the government notes that Petitioner's petition and motion are grounded on a false factual premise. Contrary to his contention, since 2008 the government has pursued sustained and substantial efforts to transfer Petitioner, first to his native Tajikistan and [REDACTED] to other countries. The government's efforts to transfer him have been hampered, initially by a preliminary injunction that Petitioner himself sought to bar his repatriation, which remained in force until December 2010; then by congressional restrictions on detainee transfers; and currently by the revelation in late 2013 that Petitioner had been concealing his identity, a fact that has affected the two-year effort [REDACTED] to resettle him in a third country.

More fundamentally, Petitioner is not entitled to habeas relief because he remains lawfully detained. In relevant part, the Authorization for Use of Military Force (AUMF) authorized the President to use "all necessary and appropriate force" against those nations, organizations, or individuals who planned, authorized, committed, or aided the terrorist attacks of September 11, 2001. See Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2008). Pursuant to that authority, the Executive has captured and detained individuals who were part of or substantially supported al Qaeda, Taliban, and their associated forces. And the Supreme Court has determined that such individuals may remain detained for the duration of the conflict with those organizations. See Hamdi v.

habeas cases. See In re Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 143 (D.D.C. 2008) ("Protective Order and Procedures For Counsel Access To Detainees At The United States Naval Base In Guantanamo Bay, Cuba"). Simultaneously with this filing, Respondents have filed an unopposed motion for entry of that protective order in this case. See Resps.' Unopposed Mot. for Entry of the Protective Order Governing Guantanamo Bay Habeas Litig. (Dec. 23, 2015).

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Rumsfeld, 542 U.S. 507, 518 (2004) (plurality op.); al Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010). This detention authority is fully consistent with the laws of war, which generally only require the release and repatriation of prisoners of war after the cessation of active hostilities. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316 (GC III). Here, Petitioner was detained as part of al Qaeda, Taliban, or associated forces. See Am. Factual Ret (Dec. 22, 2010) (ECF 1794). And because the conflict against those organizations persists, including in Afghanistan, Petitioner remains lawfully detained under the AUMF as informed by the laws of war.

Petitioner's legal arguments in his bid for habeas relief do not support a different result. First, contrary to Petitioner's assertion, by designating him as eligible for transfer, the government has not conceded that it has no reason to detain him. Rather, as the designation itself explicitly states, Petitioner's designation as eligible for transfer by the government reflects its view that he may be transferred if appropriate security guarantees are obtained to ensure Petitioner will not constitute a post-transfer threat to the security of the United States and its coalition partners. Second, the government's authority to continue to detain Petitioner has not "unraveled." To the contrary, the government retains authority to detain Petitioner because hostilities in that conflict during which he was captured and detained have not ceased.

Third, Petitioner's continued detention does not violate the Due Process clause because (a) the Court of Appeals has established that the Due Process Clause does not run to alien belligerents detained at Guantanamo Bay and (b) Petitioner's continued detention is neither arbitrary, in that it is authorized by the AUMF to prevent his return to

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the battlefield, nor indefinite as it is bounded by the eventual cessation of active hostilities. And finally, because Petitioner retains the right to challenge the merits of the government's reasons for detaining him, namely that he was part of al Qaeda, Taliban or associated forces, there is no legal basis for Petitioner's argument that the Court should exercise its equitable habeas powers to correct what he describes as a miscarriage of justice.

But even more practically, there is simply no need for the Court to exercise any power and grant an order of release. Petitioner's fundamental mistake is to ignore the sustained and substantial efforts that the government has undertaken to transfer him. From 2008 through January 2014, those efforts focused on repatriating Petitioner to his native Tajikistan. In the intervening two years [REDACTED] the government has discussed potentially resettling Petitioner with at least five countries, [REDACTED] but that fact provides no reason for this Court to grant an order of release.

For these reasons and those stated herein, the Court should deny Petitioner's Motion for Judgment and Order Granting Writ of Habeas Corpus and should dismiss the Petition.

BACKGROUND

Petitioner is lawfully detained under the AUMF, as informed by the laws of war, because he was part of or substantially supporting al Qaeda, Taliban, or associated forces. See Factual Return (Nov. 25, 2008) (ECF No. 716); Am. Factual Return (Dec. 22, 2010)

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(ECF No. 1794) (detailing the evidence establishing Petitioner's involvement in and support for those organizations). Petitioner has been detained at Guantanamo Bay since February 2002. Petitioner filed his initial petition for a writ of habeas corpus challenging the legality of his detention in 2005. Pet. (Dec. 12, 2005) (ECF No. 1). Petitioner voluntarily withdrew that petition in 2013. Stip. Mot. for Voln. Dismissal Without Prej. & for Continued Access to the Prot. Order (Feb. 21, 2013) (ECF No. 1985); Order (Feb. 22, 2013) (ECF No. 1986).

While prosecuting his first petition, Petitioner identified himself as a Tajik national who went by the names of Umar Hamzayevich Abdulayev or Abdullah Bo Omer Hamza Yoyej. In 2013, after he withdrew that petition, the government learned, and in March 2014 Petitioner confirmed, that his actual identity was Muhammadi Davliatov, the name under which he has filed his second petition.

Petitioner's current petition challenges not the underlying grounds for his detention but the meaning of the government's designation of him as eligible for transfer and the sufficiency of its efforts to consummate that transfer. Petitioner's Motion for Judgment recites many aspects of the procedural background of his first petition. It omits, however, certain key facts and important context concerning both the government's sustained and substantial efforts to transfer him and the government's motions to stay his first petition. Those omissions are addressed below.

I. The Government's Efforts to Transfer Petitioner

Prior to October 2008, the Department of Defense designated Petitioner as eligible for transfer and began efforts towards repatriating him to his native Tajikistan. On October 9, 2008, and in accordance with a now-vacated court order, (ECF Nos. 421,

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1853), the government provided Petitioner with a 30-day notice of its intention to transfer him to the custody of the Government of Tajikistan, (see ECF No. 620) (filed under seal). Petitioner immediately renewed his previously held-in-abeyance motion for a preliminary injunction that had sought to bar his transfer to Tajikistan. (ECF No. 626) (Oct. 14, 2008) (filed under seal). That renewed motion was granted by Judge Hogan on October 20, 2008, Order (ECF No. 657) (filed under seal), pending the decision by the Court of Appeals in Kiyemba v. Bush, Appeal No. 05-5487, a case that raised the question of whether the district courts could review decisions by the Executive concerning whether a transfer would pose a risk of subsequent mistreatment to a detainee by the receiving country. Thus, as of October 20, 2008, the Court had prohibited the United States from transferring Petitioner to Tajikistan, based on his own motion.

Three months later, President Obama established the Guantanamo Bay Review Task Force. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009). The purpose of that task force was to evaluate, among other things, "whether [a Guantanamo Bay detainee's] continued detention is in the national security and foreign policy interests of the United States." Id. § 2(d), 74 Fed. Reg. 4897-99. In June of 2009, the Task Force designated Petitioner as eligible for "[t]ransfer to Tajikistan subject to appropriate security measures," (ECF No. 2007). As the Task Force's Final Report noted, in general, this designation did not imply that Petitioner was not properly detainable under the AUMF, nor "reflect a decision that the detainee poses no threat or risk of recidivism," but rather reflected a judgment that the "threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country."

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See Final Report—Guantanamo Review Task Force (Jan. 22, 2010) at 17, available at http://1.usa.gov/IjaULP (GTMO Task Force Report).

Petitioner continued to object to any transfer to Tajikistan. In September 2009, Petitioner's counsel met with representatives of the Department of State to discuss Petitioner's concerns. See Joint Status Report (Jan. 8, 2010) (ECF No. 1545). In February 2010, the government represented to the Court that the repatriation of Petitioner to Tajikistan would be consistent with the United States Government's policies on post-transfer humane treatment. See Joint Status Report (Feb. 17, 2010) (ECF No. 1575). In September 2010, as Petitioner continued to object to his transfer, the government represented that it would consider any evidence submitted by Petitioner, together with other relevant information, to determine if his transfer to Tajikistan would be consistent with the government's humane-transfer policy. Ex. 1, Decl. of Lee Wolosky ¶ 5.

During this period, however, the government could not transfer Petitioner to Tajikistan because of questions regarding the continuing viability of Judge Hogan's preliminary injunction. The Court of Appeals had decided Kiyemba v. Bush in April 2009, holding, in pertinent part, that the decision of whether a transfer posed any risk of mistreatment of a detainee was reserved for the Executive branch. 561 F.3d 509, 513-516 (D.C. Cir. 2009). Any uncertainty regarding Judge Hogan's preliminary injunction was resolved on December 17, 2010, when the Court of Appeals clarified that the injunction had expired by its own terms upon issuance of the Kiyemba mandate. See Sanani v. Gates, No. 08-5515 Order (D.C. Cir. Dec. 17, 2010) (filed in Mohammon v. Bush, Civ. Action No. 05-2386 (Feb. 10, 2011) (ECF No. 1812)).

Three weeks later, on January 7, 2011, the President signed the National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011) (2011 NDAA). In the 2011 NDAA, Congress had conditioned funding for transfers on the satisfaction of certain certification requirements by the Department of Defense prior to the transfer of detainees to foreign countries. Wolosky Decl. ¶ 6. Following the 2011 NDAA's enactment, no transfers of Guantanamo detainees occurred during the remainder of 2011. Id.[3] The NDAA for Fiscal Year 2012 revised the 2011 certification requirements, permitting the waiver of certain requirements in narrow circumstances. Id.[4] The NDAA for Fiscal Year 2013 included the same restrictions as the 2012 NDAA. Id. From the time the certification requirements came into effect in January 2011 until August 2013, only four detainees were transferred from Guantanamo Bay, all four of whom fell under the narrow exceptions to the certification requirements. Id.[5]

In May 2013, the President sought to reinvigorate the government's transfer efforts, publicly reaffirming that "to the greatest extent possible, we will transfer detainees who have been cleared to go to other countries." See Wolosky Decl. ¶ 7 (referring to President Barack H. Obama, Address at the National Defense University: The Future of Our Fight Against Terrorism (May 23, 2013)). Accordingly, he called for

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[3] Also in January 2011, Respondents informed Petitioner's counsel that efforts to repatriate Petitioner were no longer ongoing because the Government of Tajikistan did not recognize Petitioner (who was then going by a false name) as a citizen of Tajikistan. Ex. 2, Letter from Andrew Warden, United States Department of Justice, to Mathew O'Hara, Hinshaw & Culbertson (Jan. 14, 2011).

[4] The exceptions were for court-ordered releases and military commission plea agreements. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298 (2011).

[5] See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013). And the same restrictions were included in the 2014 NDAA. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013). Additional restrictions were added to the NDAA for Fiscal Year 2016. See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. __, S. 1356, 114th Cong. (signed Nov. 25, 2015).

the appointment of Special Envoys at the State Department and the Defense Department to coordinate those efforts. Id. The transfer of the first two detainees from Guantanamo Bay under the Congressional certification requirements occurred in August 2013, and nine more detainee transfers followed that year. Id.

With respect to Petitioner, the government [REDACTED] In October 2013, the Department of Justice informed Petitioner's counsel that [REDACTED] The next month, November 2013, however, the United States was informed by the Government of Tajikistan that it could not verify Petitioner—who still falsely identified himself as either Abdulayev or Yoyej—was a citizen of Tajikistan. Mot. at 12. [REDACTED]

[REDACTED] the Department of State shifted its focus and has since undertaken sustained efforts to locate a third-country for Petitioner's potential resettlement. Wolosky Decl. ¶ 10. Although the government has had success resettling 80 Guantanamo detainees in third countries since 2009, id. ¶ 9, such transfers are more challenging than repatriations because of, among other things, a detainee's typical lack of legal ties or other connections to a resettlement country, id. Beginning in January 2014, the government undertook sustained diplomatic outreach to third countries [REDACTED]

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seeking to resettle Petitioner. Wolosky Decl. ¶10. As a result of such outreach, United States officials travelled to several of these countries to engage in high-level discussions with foreign officials about the possibility of their governments accepting Petitioner for resettlement. Id.

Unfortunately, for various reasons, each of these countries ultimately declined to accept Mr. Davliatov for resettlement. Id.

Resettlement efforts have been complicated by Petitioner's prior concealment of his true identity. In late 2013, the government learned that Petitioner, previously known to the government as Umar Hamzayevich Abdulayev or Abdullah Bo Omer Hamza Yoyej, had been providing a false identity from the time of his capture in 2001 and that his real name was Muhammadi Davliatov. Wolosky Decl. at ¶ 11. Petitioner confirmed that Davliatov was his true name in March 2014. Id.

In summary, the government focused on repatriating Petitioner to Tajikistan—consistent with his transfer designation by the Guantanamo Task Force—

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Over the intervening two years, the State Department has reached out to at least five countries seeking to resettle Petitioner. Despite the lack of success to date, the government's sustained effort to resettle Petitioner continues. Wolosky Decl. ¶ 10.

II. The Government's Motions to Stay Petitioner's First Petition

Petitioner's Motion correctly notes that the government twice sought to stay the proceedings on his first habeas petition, first in a motion denied by Judge Hogan, see Order (Oct. 20, 2008) (ECF No. 657) (filed under seal), and second in a motion subsequently granted by Judge Walton, see Order (June 12, 2009) (ECF No. 1292). Both motions corresponded directly to the two decisions that Petitioner was eligible for transfer, the first by the Department of Defense in 2008, and the second—designating him for potential transfer to Tajikistan—by the GTMO Task Force in June 2009.

But Petitioner neglects to inform the Court why the government stated that it sought those stays. In light of the Supreme Court's decision in June 2008 in Boumediene v. Bush, 553 U.S. 723 (2008), granting the detainees at Guantanamo Bay the privilege of seeking a writ of habeas corpus, the government and this Court were suddenly faced with litigating the merits of approximately 200 petitions. By these motions to stay, the government merely sought to prioritize the handling of the petitions brought by those detainees who were not designated as eligible for transfer over those who were:

[6] Petitioner alleges that the government refused a request by the Government of Spain to interview him for resettlement in 2010. Mot. at 13. Even if true, which the government does not concede, any refusal was justified by the GTMO Task Force's explicit designation of him for transfer to Tajikistan and the then ongoing efforts to pursue such a transfer.

> Because Respondents have determined to relinquish custody over Petitioner but have been prevented from doing so by the Court's order, the only issue truly remaining is the country to which Petitioner should be sent—an issue that, in the Court's view, could be impacted or resolved by a decision in the Kiyemba case in the Court of Appeals. Accordingly, **the need to conduct proceedings and otherwise pursue the merits of Petitioner's habeas case is less pressing than that of the remaining detainees not set for transfer or release**. [In re Guantanamo Bay Detainee Litigation, Misc. Act No. 08-442 (TFH), Resps.' Mot. to Stay all Proceed. for Pet'r Who Is Approved for Transfer or Release at 4-5 (Dec. 18, 2008) (ECF No. 1344) (under seal) (also filed in Mohammon v. Bush, Civ. Act. No. 05-2386 (RBW) (ECF No. 793) (under seal)) (emphasis added) (First Stay Motion)]

and

> Respondents should not be forced to litigate the merits of this case, or other cases involving petitioners approved for transfer, when such cases may present sensitive legal issues, and **will detract from litigating other cases involving petitioners who are not approved for transfer, when the Government is seeking to relinquish Petitioner for custody**. [Resps.' Mot. for a Stay of Proceed. as Pet'r Has Been Approved for Transfer by the Gov't at 2 (June 25, 2009) (ECF 1306) (emphasis added) (Second Stay Motion)]

Notably, the government acknowledged Petitioner's right to seek to lift the stay and proceed with the merits of his petition if conditions subsequently warranted it, emphasizing that "should the status or circumstances of this case change such that further litigation is necessary or appropriate as compared to other Guantanamo cases, the Court may lift the stay and promptly resume the proceedings." First Stay Mot. at 6; see Second Stay Mot. at 3 (same).

Nowhere in these motions did Respondents concede that Petitioner was not lawfully detained under the AUMF as informed by the laws of war. Nor did it equate Petitioner's designation as eligible for transfer with an order for release. To be sure, Respondents' motions are replete with statements such as "the detention of a petitioner

whom Respondents no longer wish to detain," First Stay Mot. at 4; "Respondents have already determined to release Petitioner," id. at 5 n.4; or "[i]ndeed, DOD has already attempted to provide the very relief that is ultimately appropriate in habeas," id. at 5. But in making those assertions, Respondents were merely calling to the Court's attention the fact that a designation of a detainee as eligible for transfer meant that Respondents were already determined to transfer the detainee out of United States custody, consistent, at least in part, with the relief sought in habeas. But nothing in these statements indicates that Respondents considered Petitioner's transfer designation to carry with it the substantive effect of a judicial order for release, namely a finding that he was no longer lawfully detained under the AUMF.

As Petitioner notes, Mot. at 9, he appealed Judge Walton's Order granting the government's motion for a stay. See Yovej v. Obama, No. 09-5274 (D.C. Cir.). Ultimately, the Court of Appeals remanded the case after Judge Walton indicated that he would lift the stay, see Yovej, No. 09-5274, Order (Apr. 7, 2010) (filed in Mohammon v. Bush, No. 05-2386 (D.D.C. Apr. 7, 2010) (ECF No. 1630)), which Judge Walton proceeded to do after the remand, Order (Apr. 7, 2010) (ECF 1628). Petitioner and the government thereafter litigated Petitioner's first petition for nearly three years, which included the production of discovery and the filing by the government of an Amended Factual Return in December 2010. Am. Factual Return (Dec. 22, 2010) (ECF No. 1974). Judge Walton granted the government's motion to amend the factual return in February 2011 and ordered Petitioner to file his Amended Traverse by May 16, 2011. See Order (Feb. 28, 2011) (ECF No. 1816). Ultimately, however, having never filed his Amended Traverse, Petitioner requested, and the government did not oppose, the withdrawal of the

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habeas petition without prejudice in February 2013. Stip. Mot. for Voln. Dismissal Without Prej. & for Continued Access to the Prot. Order (Feb. 21, 2013) (ECF No 1985).

ARGUMENT

As the government has explained in prior proceedings in this case, Petitioner is legally detained under the AUMF, as informed by the laws of war, as part of al Qaeda, the Taliban, or associated forces. See Factual Return (Nov. 25, 2008) (ECF No. 716); Am. Factual Return (ECF No. 1794); Resps.' Opp'n to Petr.'s Mot. for Expedited Jt. (May 14, 2009) (ECF No. 1213) (filed under seal). In Boumediene v. Bush, the Supreme Court held that Guantanamo Bay detainees may challenge the legality of their detention, ruling that "the privilege of habeas corpus entitled [a detainee] to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." 553 U.S. 723, 779 (2008) (citation and internal quotation marks omitted); see also Uthman v. Obama, 637 F.3d 400, 408 (D.C. Cir. 2011) (instructing the district court to deny the writ because the government had established that petitioner was part of al Qaeda, Taliban, or associated forces at the time of his capture). In his first habeas petition Petitioner raised just such a challenge. See Pet. (Dec. 21, 2005) (ECF No. 1).

For purposes of his second petition, however, Petitioner does not renew his factual challenge, but rather concedes that initially he was properly detained under the AUMF. See Petr's Mot. at 15. Instead, Petitioner now seeks an order of release based on various arguments—that his continued detention violates the AUMF, the laws of war, or the Due Process Clause, or that it is a miscarriage of justice—all of which are grounded on one or both of two faulty premises. Contrary to his repeated assertions, his

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designation by the Executive as eligible for transfer does not establish that there is no longer any reason to detain him, nor is the legality of his detention affected by the fact that he continues to be detained while the government is attempting to negotiate his transfer. In fact, both of Petitioner's asserted premises have been definitively rejected by the Court of Appeals. E.g., Almerfedi, 654 F.3d at 4 n.3 (designation for transfer is "irrelevant" to whether a Guantanamo Bay detainee may continue to be lawfully detained); Ali v. Obama, 736 F.3d 542, 552 (D.C. Cir. 2013) (in addressing length of continued detention at Guantanamo Bay, "AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities" and "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention"); al Wirghi v. Obama, 54 F.Supp.3d 44, 46-47 (D.D.C. 2014) (Lamberth, J.) (rejecting both premises argued by Petitioner).

The flaws in his premises exposed, Petitioner's arguments all fail. First, Petitioner's detention remains "necessary and appropriate" under the AUMF; his designation as eligible for transfer does not imply that the military has no basis or reason to detain him, and the government has never conceded otherwise. To the contrary, the designation highlights the need, before any transfer may take place, to negotiate for security measures to mitigate the threat that Petitioner may pose post-transfer.

Second, and similarly, Petitioner's detention is fully consistent with the laws of war, which permit the detention of combatants until the end of active hostilities to prevent their possible return to the battlefield. Here, the conflict against al Qaeda, the Taliban, and their associated forces—the very conflict in which Petitioner was detained—continues, including in Afghanistan. Petitioner's assertion that the government is

continuing to detain Petitioner for a conflict to which he was not a part, specifically a "war on terror," Mot. at 31, has no basis. Accordingly, the application of the law-of-war principles that inform the government's authority to continue to detain Petitioner under the AUMF, has not unraveled.

Third, Petitioner's detention is neither arbitrary nor indefinite. He was initially detained as a member of al Qaeda, the Taliban, or an associated force, and he remains detained today because that conflict is ongoing. And although the maximum possible length of his detention is not yet calculable, it still remains bound by the ultimate cessation of hostilities and, so, is not indefinite.

And finally, Petitioner's appeal to the proposition that the Court's habeas authority should be guided by equitable principles to correct a "miscarriage of justice" provides no basis for ordering his release. Here, Petitioner's detention remains lawful, as explained above, and he retains the ability to challenge the basis for that detention, but has chosen not to do so. Further, as the rigorous efforts detailed above establish, the government has not been idle in attempting to find a suitable transfer location for Petitioner. Accordingly, Petitioner's situation does not constitute a "miscarriage of justice" and provides no equitable basis for an order of release.

Consequently, Petitioner remains lawfully detained unless and until he successfully challenges the factual basis for his detention, i.e., that he was part of al Qaeda, Taliban, or associated forces, a challenge he remains free to renew at his convenience. But his second habeas petition, as currently framed, provides no basis for the Court to grant an order of release. Accordingly, Petitioner's motion for judgment should be denied, and his petition should be dismissed.

I. Petitioner's Detention Remains "Necessary and Appropriate" Under The AUMF

As noted above, the government contends, and Petitioner concedes for purposes of this motion, that he was initially detainable under the AUMF because he was at the time of capture part of al Qaeda, Taliban, or associated forces. Contrary to his assertion, Petitioner's designation as eligible for transfer does not establish that he does not constitute a threat, or that there is no reason to continue to detain him. Nor does that designation entitle Petitioner to an actual transfer (though, as set out above, the government has made great efforts to arrange his transfer). Moreover, Petitioner's designation for transfer does not alter the government's authority to continue to detain him. Rather, as the Court of Appeals has determined, a detainee's designation for transfer is irrelevant to the legality of his continued detention. Consequently, Petitioner's fails to establish that his continued detention is unlawful.

The AUMF authorizes the President to "use all <u>necessary and appropriate force</u> against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [of September 11, 2001]" or who "harbored such organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 22 (emphasis added). Pursuant to that authority, the President ordered the military to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. And the Court of Appeals has consistently held that an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. <u>E.g.</u>, <u>Uthman</u>, 637 F.3d at 401-02; <u>al Bihani</u>, 590 F.3d at 872.[7] Further, the government may

[7] <u>See</u> <u>also</u> 2012 NDAA, Pub. L. No. 112-81, § 1021, 125 Stat. at 1562 (Congress affirming that the authority granted by the AUMF includes the authorization to detain, "under the laws of war," any "person

continue to lawfully detain such individuals under the AUMF, as informed by the laws of war, while active hostilities are ongoing. See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality op.) (detention "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use");[8] see id. at 521 (AUMF "includes the authority to detain for the duration of the relevant conflict, and . . . is based on longstanding law-of-war principles."); see also Boumediene, 553 U.S. at 733 (noting that Hamdi recognized the government has the authority to detain "individuals who fought against the United States in Afghanistan 'for the duration of the particular conflict in which they were captured.'"); Ali, 736 F.3d at 544 ("Detention under the AUMF may last for the duration of hostilities"). The law-of-war rationale for detaining combatants is to prevent their return to the battlefield. Hamdi, 542 U.S. at 518; see infra at § II.

As set out in more detail below, see infra § III, there is no doubt that the armed conflict in which Petitioner was captured—the armed conflict with al Qaeda, the Taliban, and their associated forces in Afghanistan—persists. al Warafi v. Obama, No. CV 09-2368 (RCL), 2015 WL 4600420, at *2, 7 (D.D.C. July 30, 2015) ("the Court concludes that active hostilities continue" and "Respondents have offered convincing evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped"); al Kandari, No. 15-CV-329 (CKK), Slip Op. at 21 (D.D.C. Aug.

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who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.").

[8] Justice Thomas wrote separately and provided a fifth vote for upholding law-of-war detention authority under the AUMF, but he would have gone further than the plurality, stating that "the power to detain does not end with the cessation of formal hostilities." Hamdi, 542 U.S. at 587-88 (Thomas, J., dissenting).

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31, 2015) (ECF No. 24) ("A review of the documents submitted by Respondents supports the President's assertion that fighting has not stopped in Afghanistan and that active hostilities remain ongoing at this time."); see also Ali, 736 F.3d at 552 ("The war against al Qaeda, the Taliban, and associated forces obviously continues."). Consequently, under Hamdi and its progeny, Petitioner's continued detention remains authorized by the AUMF.

Petitioner's designation as eligible for transfer does not alter this authority. Petitioner has twice been approved for a potential transfer from Guantanamo Bay, first by the Department of Defense and second by the Guantanamo Review Task Force. But neither Boumediene nor any other judicial opinion contemplates the issuance of an order for release for a Guantanamo Bay detainee whom the government has determined is lawfully detained under the AUMF merely because the petitioner continues to be detained after receiving a discretionary approval for transfer. To the contrary, that very argument has been explicitly rejected by the Court of Appeals as "irrelevant" to any evaluation of the legality of detention. Almerfedi, 654 F.3d at 4 n.3; see also al Wirghi, 54 F.Supp.3d at 47 (designation for transfer does not mean that government concedes that it no longer needs to detain a petitioner).

These judicial holdings directly reflect the discretionary nature of the Executive's transfer decision in this context and that a detainee approved for transfer may still pose a threat to the United States. As explained in the final report of the Guantanamo Review Task Force, "[i]t is . . . important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee," nor does "a decision to approve a detainee for transfer reflect a decision

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that the detainee poses no threat or risk of recidivism," but rather, it is a judgment that the "threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country." See GTMO Task Force Report at 17. To that end, "if a detainee was approved for transfer to a foreign country as a result of the [Task Force's] review, the Department of State and Department of Defense work together to make appropriate arrangements to effect the transfer in a manner consistent with the national security and foreign policy interests of the United States." Id. at 5. Indeed, the report emphasized that "all transfer decisions [by the Task Force] were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented." Id. at 17.

Contrary to Petitioner's suggestions, the government has never conceded otherwise. To be sure, when seeking to stay Petitioner's first petition—a stay that was eventually set aside (with the government's acquiescence)—the government did argue that a stay was appropriate because the right to challenge continued detention through habeas could not "reasonably extend so far as to require that the Government defend the merits of the detention after the Executive determines that the military rationales for enemy combatant detention no longer warrant such custody." First Stay Motion at 6. But that phrase by its own terms does not establish, as Petitioner contends, that his designation for transfer means that there were no appropriate legal bases to continue to detain him. Nor does it establish that Petitioner would pose no threat if released or that he would be entitled to an unconditional release. Rather the phrase has a similar if not the exact meaning that the Task Force Report attributes to the transfer designation,

namely, that a transfer may be consistent with national security and other national interests if the "threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country." GTMO Task Force at 17; see al Wirghi, 54 F.Supp. 3d at 47. This interpretation is confirmed by the declaration of a State Department official that was attached to the government's stay request, in which he stated that once a detainee was approved for transfer by the Department of Defense, the "primary purpose" of the ensuing diplomatic negotiations concerning possible relocation was "to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies." Ex. 4, First Stay Motion ex. 1, Decl. of C. Williamson at ¶ 6.

Petitioner's error is to truncate the government's statement "after the Executive determines that the military rationales for enemy combatant detention no longer warrant such custody" to the catch phrase "no military rationale," which obscures the statement's context and allows him to suggest, improperly, that the government concedes that it has no reason to continue to detain Petitioner.[9] As the declaration by the State Department official, the Task Force Report, and the unanimous rulings by every court to have considered the matter establish, Petitioner's suggestion is wrong. Designation for transfer means that a detainee may be transferred under certain conditions; it does not establish that there is no basis or reason to continue his detention pending fulfillment of those conditions. Rather, the designation is merely a discretionary act by the government

[9] Even if the Court were to accept Petitioner's characterization of the "military rationale" language, it would not entitle him to an order for release. The logical implication of Petitioner's position is that a lack of military rationale means that Petitioner would pose no threat to the United States if released. But the Court of Appeals has held that whether or not a Guantanamo Bay detainee would pose a threat to the national security if released is irrelevant to the question of whether he may continue to be legally detained under the AUMF. Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010).

indicating its intent to attempt to transfer a detainee under appropriate security and humane-treatment conditions. Consequently, the government's lack of success thus far in successfully negotiating a transfer for Petitioner—despite its rigorous efforts to do so—provides no basis for this Court to order his release. See also Exec Order No. 13492, 74 Fed. Reg. at 4900 (providing that the Guantanamo Bay Review Task Force executive order was "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party").

In summary, Petitioner is simply wrong that an approval for transfer takes a detainee outside the scope of the appropriate detention authority under the AUMF, as informed by the laws of war. See GTMO Task Force Report at 17 ("It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee."). Despite his designation as eligible for transfer, Petitioner remains lawfully detained pending that transfer unless and until he successfully challenges the underlying merits of his detention.

II. Petitioner's Continued Detention Is Consistent With The Laws Of War

Petitioner argues that because the government's detention authority under the AUMF is informed by the laws of war, Petitioner is entitled to an order for his release as his detention is contrary to those laws. Specifically, he states that a detainee must be released in circumstances where detention is no longer necessary to prevent his return to the battlefield, and suggests that he is such a detainee. The government does not dispute that the purpose of detaining belligerents under the laws of war is to prevent their return to the battlefield. Petitioner is mistaken, however, in suggesting that his own likelihood of returning to the battlefield determines the permissible duration of his detention.

Instead, the relevant law-of-war principles allow for the detention of individuals who belong to a party to a conflict "for the duration of the relevant conflict." See Hamdi, 542 U.S. at 521.[10]

For example, under the Third Geneva Convention, a prisoner of war in an international armed conflict may be detained until the "cessation of active hostilities." GC III, Art. 118, 6 U.S.T. at 3406; see Hamdi, 542 U.S. at 520 (plurality) (citing Article 118 for the point that detention may last no longer than the end of hostilities). This is so, as the Supreme Court has noted, to prevent the prisoner of war from, once released, returning to the battlefield against the Detaining Power, its allies, or co-belligerents. Hamdi, 542 U.S. at 518 (quoting Ex Parte Quirin, 317 U.S. 1, 28, 30 (1942)); see also al Bihani, 590 F.3d at 874 (concluding that the "Geneva Conventions require release and repatriation only at the 'cessation of active hostilities'") (quoting GC III, art. 118); id. ("The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops."); Dept. of Defense Law Of War Manual at 634 (June 2015), (available at http://www.defense.gov /Portals/1/Documents /pubs/Law-of-War-Manual-June-2015.pdf) (explaining that "cessation of active hostilities" is "a situation of complete end of the war, if not in a legal sense, at least in a material one with *clearly no probability of resumption of hostilities in a near* future.") (citing Christiane Shields Delessert, Release and Repatriation of Prisoners of War at the End of Active

[10] Moreover, even if an individualized threat determination were required or relevant, that the government's detention authority is informed by the laws of war would not alter the analysis explained supra § I that Petitioner remains lawfully detained. Whether viewed under the law-of-war provisions granting protections to enemy prisoners of war detained during certain international armed conflicts or, as applicable here, the humane treatment guarantee for unprivileged combatants detained in non-international armed conflicts, Petitioner remains lawfully detained despite his long-standing designation as eligible for transfer. For in either case, the purpose of detaining combatants under the laws of war is to prevent their return to the battlefield. Accordingly, combatants generally may be legally detained for the duration of the conflict.

Hostilities - A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War 71-72 (1977)) (emphasis added).

Petitioner, however, is not a prisoner of war, and the conflict with al Qaeda, Taliban, and associated forces is not an international armed conflict.[11] Rather, Petitioner is an unprivileged enemy belligerent detained during a non-international armed conflict.[12] Nevertheless, because the United States is a signatory to the Third Geneva Convention, Petitioner remains entitled to the protections of Common Article Three thereunder, in particular that he be treated humanely. GC III, Arts. 3, 4; see also Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006). And although the International Committee of the Red Cross has interpreted Common Article 3's privilege of humane treatment to include freedom from arbitrary detention, ICRC Customary Int'l Human. R. 99 (available at

[11] The Third Geneva Convention applies to international armed conflicts between nations that have ratified the treaty and, so, are "High Contracting Parties." GC III, Art. 2. The Convention also applies to any conflict between a High Contracting Party and a nation who is not a party to the treaty, if that non-party nation agrees to be bound by the provisions of the treaty. Id. Here, the President has determined that al Qaeda was not a High Contracting Party and that, although Afghanistan was a party to the Conventions, the Taliban would not be entitled to prisoner-of-war status under the Third Geneva Convention because they had not adhered to the prerequisite conditions for that status in their combat operations. See White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), available at http://www.state.gov/s/l/38727.htm (Al Qaeda "is an international terrorist group and cannot be considered a state [High Contracting] party to the Geneva Convention[s].") ("President's Determination"); id. (noting that the Taliban failed to adhere, among other things to the conditions that they "effectively distinguish[] themselves from the civilian population of Afghanistan," and "conduct their operations in accordance with the laws and customs of war."). Consequently, individuals detained as part of al Qaeda, Taliban, or associated forces are not entitled to prisoner-of-war status under the Third Geneva Convention. See United States v. Hamidullin, 2015 WL 4241397 (E.D.Va.) at *19-*20 (holding member of Taliban associated force was not entitled to prisoner-of-war status).

[12] The United States' armed conflict against the Taliban in Afghanistan currently is considered a non-international armed conflict. See, e.g., ICRC, Int'l Humanitarian Law & The Challenges of Contemporary Armed Conflicts, at 725 (Sept. 2007), available at https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf.

https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99),[13] neither Petitioner's initial detention nor his continuing detention may be considered arbitrary for the reasons previously explained. Rather, as he concedes for purposes of this motion, he was lawfully detained initially as a person who was part of al Qaeda, Taliban, or an associated force. Mot at 15. And, just as the case would be were he a prisoner of war, his continuing detention, despite his designation as eligible for transfer, is lawful pending a cessation of hostilities. See al Bihani, 590 F.3d at 874.

Petitioner's attempt to cloud the applicable framework for his detention by reference to article 75(3) of Additional Protocol I to the Geneva Conventions[14] is also unavailing. Article 75(3) does not specify the reasons why a combatant may be detained but does note that detainees should be released "'with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment cease to exist.'" Mot. at 19 (quoting Add'l Protocol I, art. 75(3)).[15] Article 75, however, does not alter the well-settled rule that law-of-war detention may last for the duration of active hostilities. See ICRC, Commentary on the Additional Protocols to the Geneva

[13] The United States has expressed concerns with the methodology used by the ICRC in this study and has stated that "the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law." Letter from John Bellinger, III, Legal Adviser, United States Dept. of State, and William J. Haynes, General Counsel, United States Dept. of Defense, to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), 46 I.L.M. 514 (2007).

[14] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391, 1410.

[15] Respondents do not interpret Petitioner's Motion as arguing that Article 75 provides a direct claim for relief, only that it should inform the Court's interpretation of the AUMF. Respondents note that they have several defenses should the Petitioner argue that Article 75 provides an independent basis for relief. These include that any direct claim would be barred by section 5 of the Military Commissions Act, which provides, in relevant part, that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action" against the government. See Pub. L No. 109-366, 120 Stat. 2600, 2631 (codified in statutory note following 28 U.S.C. § 2241).

Conventions of 12 August 1949 at 877 (Sandoz et al. eds., 1987) (stating that this provision is "concerned with periodic review of internment decisions[;]" it says nothing about requiring release before the cessation of active hostilities). Moreover, even though the United States has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual that it detains in an international armed conflict, Respondents do not concede that such principles would apply as a legal matter to individuals, such as Petitioner, who are detained during the non-international armed conflict at issue here. Even assuming Article 75 would apply, however, the circumstances justifying Petitioner's detention still exist, as active hostilities against al Qaeda, Taliban, and associated forces remain ongoing, including in Afghanistan, and the delay in implementing the government's voluntary decision to transfer him before the end hostilities is anything but the result of a lack of diligence on the government's part.[16]

Accordingly, the laws of war, which generally only require the release and repatriation of prisoners of war after active hostilities have ceased, provide no basis for an order of release for Petitioner.

III. The Authority To Detain Petitioner Consistent With The Laws Of War Has Not "Unraveled"

Petitioner alternatively argues that traditional law-of-war principles regarding the detention of Petitioner have now "unraveled" such that his detention is no longer legally appropriate. Mot. at 28-31. Petitioner asks the Court to revise completely the standards

[16] Petitioner additionally argues that his continued detention violates the rationales underlying the International Covenant on Civil and Political Rights. Mot. at 20. Because that treaty does not address the detention of combatants during armed conflict, it is inapposite here. Further, as Petitioner cites the treaty merely for the proposition that detention under human rights law cannot be arbitrary and unlawful, Petitioner's argument fails for the reasons stated herein, as Petitioner's continuing detention is neither.

established by the Court of Appeals for determining the legality of his detention. Id. at 31 (citing Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (GC IV)). As an initial matter, Petitioner cites no authority to support his request that this Court ignore or reject binding Court of Appeals decisions regarding the scope of the government's detention authority in these Guantanamo cases. See United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[d]istrict judges . . . are obligated to follow controlling circuit precedent until either . . . [the Court of Appeals], sitting en banc, or the Supreme Court, overrule it."). As explained above, the government may continue to detain Guantanamo detainees like Petitioner under the AUMF until the end of active hostilities. See Hamdi, 542 U.S. at 521 (detention under the AUMF permitted so long as the conflict remains ongoing) (plurality op.); Aamer v. Obama, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (" [T]his court has repeatedly held that under the[AUMF] individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."); al Bihani, 590 F.3d at 875 (concluding that "[i]n the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified."); al Warafi, 2015 WL 4600420, at *7; al Kandari, No. 15-CV-329, Slip Op. at 21. Thus, under both the law of war and binding precedent, the passage of time has not undermined the authority of the government to detain Petitioner because the conflict remains ongoing. See Ali, 736 F.3d at 552 ("AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities" and "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention").

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Furthermore, there is no reason for the Court to consider Petitioner's suggestion. Simply put, to the extent that there may be new opponents and additional geographic fronts in what Petitioner refers to as "the war against terrorism," the particular conflict in which Petitioner was detained—namely the conflict against al Qaeda, Taliban, and associated forces—remains ongoing, as explained in further detail below. al Kandari, No. 15-CV-329, Slip Op. at 16 ("the "relevant conflict at issue in the instant action is the conflict in Afghanistan involving al-Qaeda, the Taliban, and its associated enemy forces."); id. at 21 ("A review of the documents submitted by Respondents supports the President's assertion that fighting has not stopped in Afghanistan and that active hostilities remain ongoing at this time."). Accordingly, whatever the merits might be were the government to continue to detain Petitioner once that conflict ends, that situation does not exist today, and the government's authority under the AUMF as informed by the laws of war to continue to detain Petitioner has not in any sense "unraveled."

And there can be no question that the conflict against al Qaeda, Taliban, and associated forces continues to this day, including in Afghanistan. In general, the determination of when hostilities have ended is a decision reserved for the political branches. al Bihani, 590 F.3d at 874 ("[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.").[17] Here, just twelve days ago, the President has reiterated that "[t]he United

[17] As the Supreme Court has explained, vesting this decision in the political branches make sense from a practical perspective, given the "inherent difficulty of determining" when hostilities end and the absence of "clearly definable criteria for decision" by courts, and also to ensure there is "finality in the political determination" involving such an important question of national security. See United States v. Anderson, 76 U.S. 56, 70-71 (1869); Baker v. Carr, 369 U.S. 186, 213-14 (1962).

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States currently remains in an armed conflict against al-Qaeda, the Taliban, and associated forces, and active hostilities against those groups remain ongoing."[18] See Ex. 7, Letter from the President of the United States to the Speaker of the House of Representatives, Six Month Consolidated War Powers Resolution Report (Dec. 11, 2015).

The President's conclusion is amply supported by the facts on the ground. In testimony before Congress in October 2015, General John F. Campbell, Commander, United States Forces-Afghanistan, explained that U.S. forces in Afghanistan "continue to impose considerable pressure on what remains of the terrorist networks that attacked us." See Ex. 8, Statement of Gen. John F. Campbell, Before the Senate Armed Services Committee on the Situation in Afghanistan at 1 (Oct. 6, 2015) (Gen. Campbell Statement). General Campbell stated that "the Taliban has increased the tempo of their operations in order to reassert their prominence within the insurgent syndicate after the announced death of their spiritual leader, Mullah Omar[.]" Id. at 5. During the 2015 fighting season, General Campbell explained that the Taliban had been "partially successful" in accomplishing its goals of seizing and controlling more territory." Id. at

[18] To be sure, the President has also made public statements such as "our combat mission in Afghanistan is over, and American's longest war has come to a reasonable and honorable end." Ex. 5, Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015). These statements reflect an important milestone, not the least of which is the return home for thousands of service men and women and the United States' transition to a support and counter-terrorism mission in Afghanistan. See Ex. 6, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014). But in none of these statements has the President declared that active hostilities against al-Qaeda, the Taliban, and their associated forces have ceased because such a declaration would not be consistent with the facts on the ground. See al Kandari, 15-CV-329, Slip Op. at 13-14 ("However, notably, none of these statements nor the other statements relied on by Petitioner discuss the end of 'active hostilities.' Rather, the statements indicate that the war is 'coming to a responsible conclusion,' and note the end of the 'combat mission' and the 'ground war.'").

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12. For example, on September 28, 2015, Taliban insurgents violently overtook Kunduz, Afghanistan's sixth-largest city. See Tim Craig, U.S. Troops Dispatched to Kunduz to Help Afghan Forces, Washington Post, Oct. 1, 2015. Coalition and Afghan forces joined in a counteroffensive to drive the Taliban from the city, which included multiple airstrikes and ground combat involving U.S forces. Id. After about two weeks of fighting, the Taliban withdrew from Kunduz, but casualties and injuries were significant. See Sayed Salahuddin, Taliban Announces Pullout from Kunduz, Washington Post, Oct. 14, 2015; Rob Norland, Taliban End Takeover of Kunduz After 15 Days, New York Times, Oct. 13, 2015 (reporting 57 killed and 630 wounded).

In addition, al Qaeda has worked to "rebuild its support networks and planning capabilities with the intention of reconstituting its strike capabilities against the U.S. homeland and Western interests." See Gen. Campbell Statement at 11-13 (noting the Taliban's "renewed partnership with al Qaeda"). As a result of this threat, U.S. forces continue to exert "constant pressure" to prevent "Afghanistan from once again becoming a safe haven for al Qaeda, other international extremist groups, and their hosts." See id. at 3, 11. Recently, United States forces conducted air and ground strikes in October 2015 that destroyed "probably the largest" al Qaeda training camp discovered inside Afghanistan since the hostilities began in 2001. See Dan Lamothe, "Probably the Largest" al-Qaeda Training Camp Ever Destroyed in Afghanistan, Washington Post, Oct. 30, 2015. This multi-day air and ground assault involved scores of airstrikes, U.S. Special Forces soldiers, and resulted in the death of approximately 160 al-Qaeda fighters. Id. (quoting General Campbell's explanation that the training camp's existence was

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discovered after a raid in the summer of 2015 on another al Qaeda facility in Eastern Afghanistan).

Hostilities are a two-way street, of course, and al-Qaeda, Taliban, and associated forces continue to attack U.S. forces in Afghanistan. Just two days ago, a Taliban suicide bomber attacked a NATO patrol, killing six United States service personnel. Missy Ryan and Pamela Constable, Blast Near Kabul Kills Six U.S. Troops, Washington Post, Dec. 22, 2015. That attack was just one of a number that have occurred over the last several months. See Barbara Starr, U.S. Fighter Jet Hit During Afghanistan Mission, CNN, Oct. 21, 2015 (reporting small arms attack on U.S. F-16 fighter jet); Dan Lamothe, Meet The Impressive Guns Protecting U.S. Bases from Rocket Attacks in Afghanistan, Washington Post, Oct. 21, 2015 (reporting that rocket attacks at the U.S. base at Bagram have historically been launched about every other day); Dan Lamothe, In Afghanistan, a Series of Attacks on U.S. Service Members, Washington Post, Nov. 22, 2015 (reporting recent attacks on U.S. service members).

To date, the courts have agreed that the conflict with al Qaeda, Taliban, and associated forces remains ongoing, recognizing that those hostilities are in fact not yet at an end. See Ali, 737 F.3d at 552 (the war against al Qaeda, the Taliban, and associated forces obviously continues); al-Warafi, 2015 WL 4600420 at *7 ("Respondents have offered convincing evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped"); al-Kandari, No. 15-CV-329, Slip Op. at 21.

Thus, in short, al Qaeda, the Taliban, and their associated forces remain active on the battlefield, including in Afghanistan. Accordingly, whatever the merits of

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Petitioner's claim that he may someday be detained solely because the AUMF continues in force against other enemies on other battlefields, Mot. at 28-31, that day has not yet come.[19] This case, thus, does not present a situation in which Petitioner's detention would be inconsistent with "the clearly established principle of the law of war that detention may last no longer than active hostilities" or the rationales underlying that principle. Hamdi, 542 U.S. at 520; see al Kandari, No. 15-CV-329, Slip Op. at 18 (rejecting the same argument that Petitioner makes in this case and holding that "while the plurality in Hamdi did caution that the facts of a particular conflict may unravel the Court's understanding of the government's authority to detain enemy combatants, the Court does not agree with Petitioner that such a situation exists at this point in time").

IV. Petitioner's Continued Detention Does Not Violate Due Process

Petitioner also asserts that his continued detention violates Due Process, claiming that the Supreme Court's extension of Suspension Clause protections to detainees at Guantanamo Bay leads to the conclusion that Guantanamo detainees may also avail themselves of Due Process protections through habeas corpus. See Mot. at 23-27. The Court of Appeals, however, has held that unprivileged belligerent aliens detained at Guantanamo, such as Petitioner, do not have constitutional due process rights. In any event, for all the reasons explained above, Petitioner's continued detention under the AUMF despite his designation as eligible for transfer is neither arbitrary nor indefinite.

The Court of Appeals has held that "the due process clause does not apply to aliens" detained at Guantanamo Bay who have no "property or presence in the sovereign

[19] Because al Qaeda continues to threaten the United States in Afghanistan and the continuing existence of active hostilities there, the Court need not address whether U.S. counterterrorism efforts against al Qaeda in countries other than Afghanistan would be sufficient to justify Petitioner's continued law of war detention under the AUMF, which does not limit the geographic scope of its authorization.

territory of the United States." Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (Kiyemba I), vacated and remanded, 559 U.S. 131 (2010) (per curiam), reinstated, 605 F.3d 1046 (D.C. Cir. 2010). Petitioner's suggestion that this holding has been recognized as narrowly limited and has not been relied upon by subsequent decisions, see Pet. Mot at 26-27, is not correct. That some opinions found no Due Process violation "even assuming" that the Due Process Clause could apply to Guantanamo Bay does not establish that the Clause might apply there. Rather, it was a simple statement that the petitioner in those cases had not set out a Due Process violation at all.

Contrary to Petitioner's suggestion, the Court of Appeals has—post-Kiyemba I—noted that the Due Process Clause does not extend to alien detainees at Guantanamo Bay. See al Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (citing Kiyemba I's due process holding and stating that it did "not accept" the "premise[]" that the petitioner "had a constitutional right to due process"); see also al Bahlul v. United States, 767 F.3d 1, 33 (D.C. Cir. 2014) (Henderson, J, concurring) (noting that "it remains the law of this circuit that, after Boumediene, aliens detained at Guantanamo may not invoke the protections of the Due Process Clause of the Fifth Amendment").

Furthermore, other judges on this Court have continued to follow this holding as binding Circuit precedent. See, e.g., Rabbani v. Obama, 2014 WL 7334117 at *3 (D.D.C. Dec. 19, 2014) (Lamberth, J.) ("[E]xisting Circuit precedent forecloses any remedy for an alleged Fifth Amendment due process violation."); Ameziane v. Obama, 58 F. Supp. 3d 99, 103 n.2 (D.D.C. 2014) (noting that petitioner's Due Process Clause arguments "fail" "[u]nder Circuit precedent"); al Wirghi, 54 F. Supp. 3d at 47 (finding that the petitioner had no "judicially cognizable [liberty] interest" to support standing to

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assert a Due Process Clause claim); Bostan v. Obama, 674 F. Supp. 2d 9, 29 (D.D.C. 2009) (Walton, J.) ("The detainees at Guantanamo Bay . . . have no due process rights.").

Petitioner's attempt to circumvent this binding precedent by invoking the functional analysis relied on in Boumediene is unavailing. The Court of Appeals has expressly rejected that argument, refusing to extend the functional analysis beyond the Suspension Clause to other constitutional provisions. In Rasul v. Myers, the Court of Appeals determined that "the Court in Boumediene disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." 563 F.3d 527, 529 (D.C. Cir. 2009). Relying on Rasul, other judges of this Court have thus rejected the same argument that Petitioner makes here. E.g., Rabbani, 2014 WL 7334117 at *3 n.5; Bostan, 674 F.Supp.2d at 29 n.10.

Even considering Due Process principles, however, any doubt as to the constitutional validity of Petitioner's continued detention is definitively resolved by Hamdi. There, in a case of a United States citizen detained within the United States and, so, to whom the Due Process Clause clearly applied, the Supreme Court upheld his detention under the AUMF. In doing so, the Court specifically weighed Hamdi's substantial Due Process interest to be free from detention, but found that interest counter-balanced by "the weighty and sensitive governmental interests in ensuring that those who in fact fought with the enemy during a war do not return to battle against the United States." 542 U.S. at 531. And the Court also approved detention pending the upper bound that is the future cessation of hostilities, noting that "[i]f the record establishes the United States troops are still involved in active combat in Afghanistan, those detentions

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are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."[20] Id at 521.

Accordingly, there is no basis to conclude that an alien detainee held under the AUMF at Guantanamo Bay has a Due Process right to an order for release.

V. The Court's Equitable Habeas Authority Cannot Support An Order of Release

Petitioner's final argument is an appeal to the proposition that the Court's habeas authority should be guided by equitable principles. Mot. at 31-34. Petitioner asks the Court to wield that power to release him and correct what he describes as a "miscarriage of justice." Petitioner's appeal to the proposition that the Court's habeas authority should be guided by equitable principles, however, provides no basis for ordering his release. First, as a matter of law, precedent does not support the extraordinary relief that Petitioner seeks here. Second, and more practically, the sustained and substantial, albeit to date unsuccessful, efforts made by the government to transfer Petitioner belie the need for that relief.

First, the Supreme Court's "miscarriage of justice" jurisprudence in the habeas context does not support the extraordinary relief that Petitioner seeks here. As explained by the Supreme Court, the "fundamental miscarriage of justice exception[] [to procedural bars to relief] is grounded in equitable discretion of habeas corpus to see that federal constitutional errors do not result in the incarceration of innocent persons." McQuiggan

[20] None of the cases cited by Petitioner to claim that his detention is unlawful as a matter of Due Process involved the detention of alien unprivileged enemy belligerents in the context of ongoing hostilities. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (in construing immigration detention authority to avoid potential constitutional violation, Court specifically stated that it was not announcing a rule that would necessarily apply to cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to national security").

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v. Perkins, 133 S. Ct. 124, 131 (2013); see also Schlup v. Delo, 513 U.S. 298, 321-27 (1995) (limiting this doctrine to "rare" and "extraordinary" cases where a petitioner establishes his actual innocence). Even assuming this doctrine could apply to the wartime detention context of this case, Petitioner has not established that his detention is unlawful or any error or bar has prevented him from litigating his case or from otherwise presenting evidence that he is not part of al Qaeda, the Taliban, or an associated force. He remains free to challenge that determination at any time. His decision not to do so presents a compelling reason for this Court to avoid unnecessarily inserting itself into the government's ongoing attempts to transfer Petitioner.

But more fundamentally, there is simply no need for the Court to invoke its equitable powers to address Petitioner's situation. As set out in detail above, the government has actively been seeking to transfer Petitioner for over six years. As specified by his designation for transfer to Tajikistan subject to appropriate security measures, those efforts initially sought to repatriate him. Wolosky Decl. ¶¶ 4-5, 8. Petitioner himself initially thwarted those efforts, obtaining a preliminary injunction against his repatriation based on alleged concerns regarding mistreatment, concerns that the Executive took seriously and sought to address. Id. ¶ 4. That preliminary injunction barred the government's efforts to release Petitioner until December 2010, when the Court of Appeals finally indicated that injunction had expired. Id. Following the Court of Appeals determination, however, the Tajik government indicated that it would not accept Petitioner because it did not recognize him as one of its citizens. Id. ¶ 5. In January 2011, the 2011 NDAA had been enacted, impeding, for a time, most transfers from Guantanamo. Id. ¶ 6. After the President sought to reinvigorate the transfer process

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in 2013, [redacted]

[redacted] Id. ¶ 8. In the nearly two years since, the government has held high-level discussions with five countries regarding accepting Petitioner, [redacted]

[redacted] Id. ¶ 10. Given this high level of attention and effort, that Petitioner has not yet been accepted for resettlement, though unfortunate, cannot support any exercise of equitable power by this Court.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court deny Petitioner's Motion for Judgment and Order Granting Writ of Habeas Corpus and that the Court dismiss his second petition.

23 December 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JOSEPH H. HUNT
Branch Director

TERRY M. HENRY
Assistant Branch Director

/s/ Ronald J. Wiltsie
RONALD J. WILTSIE (DC Bar 431562)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Email: ronald.wiltsie@usdoj.gov
Tel: (202) 307-1401 Fax: (202) 616-8202
Attorneys for Respondent

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