IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS THE PETITION

As explained in the government's opposition brief,[1] Court of Appeals precedent defeats the two main positions urged by Petitioner's current petition, namely that his continued detention is no longer statutorily authorized and that it violates the Due Process Clause. Resps' Opp'n at 17-34 (specifying precedent); see Pet. for Writ of Habeas Corpus ¶¶ 30-50 (ECF No. 1) (Nov. 5, 2015) (listing bases for relief). Petitioner's opposition to Respondents' motion to dismiss[2] cannot distinguish that precedent. Accordingly, Petitioner's petition for a writ of habeas corpus should be dismissed.

Specifically, Petitioner's continued detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2008) ("AUMF"), as informed by the laws of war, remains lawful during ongoing hostilities despite his long-standing designation for transfer. See, e.g., Uthman v. Obama, 637 F.3d 400, 401-402 (D.C. Cir. 2011) (an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces); al-

[1] Resps' Combined Mot. to Dismiss the Pet. & Opp'n to Petr's Mot. for Jt. and Order Granting Writ of Habeas Corpus ("Respondents' Opposition"), (ECF Nos. 18, 19) (Dec. 23, 2015) (under seal).

[2] Petr's Reply Brief in further Supp. of Mot. for Jt. & in Opp'n to Cross-Mot. to Dismiss ("Petitioner's Opposition"), (ECF No. 25) (Jan. 20, 2016) (under seal).

Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) (the government may continue to lawfully detain individuals under the AUMF while active hostilities are ongoing); Almerfedi v. Obama, 654 F.3d 1, 4 n. 3 (D.C. Cir. 2011) (a discretionary designation of a detainee for possible transfer does not affect the legality of his continued detention under the AUMF pending that transfer). Petitioner cannot evade this precedent by arguing for a change in the applicable standard pertaining to the legality of detention. In particular, this Court, in an opinion issued in Petitioner's first habeas case, has already disposed of Petitioner's contention that he must be considered a civilian under the laws of war, as opposed to a member of enemy armed forces. Gherebi v. Obama, 609 F.Supp.2d 43, 65-66 (D.D.C. 2009).

Similarly, binding Court of Appeals precedent also establishes that Petitioner's continued detention does not violate the Due Process Clause because Guantanamo Bay detainees may claim no due-process rights under the Fifth Amendment. Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (Kiyemba I), vacated and remanded, 599 U.S. 131 (2010) (per curiam), reinstated, 605 F.3d 1046 (D.C. Cir. 2010); see Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) (confirming that Kiyemba I remains binding); al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (same). And even if this were not the case, Petitioner's continued detention despite his designation for transfer since 2008 is neither arbitrary nor indefinite and, so, does not violate the Due Process Clause. See al-Wirghi v. Obama, 54 F.Supp.3d 44, 47 (D.D.C. 2014) (denying on similar facts the same constitutional claims raised by Petitioner).

Lastly, neither of the two new arguments raised in Petitioner's Opposition are well placed. First, as to Petitioner's argument that the government be judicially estopped from arguing that Petitioner's only avenue to a court order for release is through a successful

challenge to the merits of his detention under the applicable detention standard, the criteria for judicial estoppel are not met. Second, there is no proper legal basis for a court order setting aside the statutorily mandated certification requirements pertaining to a detainee's transfer from United States custody.

Accordingly, for the reasons stated herein and in Respondents' Opposition, Petitioner's request for an order of release should be denied, and his petition for a writ of habeas corpus should be dismissed.

ISSUES RELATED TO BACKGROUND FACTS

The government provides the following updates to, and responds to Petitioner's critiques of, the background facts provided in Respondents' Opposition. As an initial matter, since the government filed its opposition, an additional 16 detainees have been transferred from Guantanamo. Ex. 9, Decl. of I. Moss ¶ 4.[3] This brings the total number of detainees released since August 2013 to 75. Id.; Resps' Opp'n Ex. 1, Decl. of L. Wolosky ¶ 7.

As Petitioner points out, Respondents' Opposition contained two factual errors. [redacted] See Petr's Opp'n at 5. [redacted] Id. The government regrets these misstatements, which were inadvertent. See Moss Decl. ¶ 2.[4] The government notes, however, that the remaining information concerning its contacts with foreign governments seeking to arrange a transfer for Petitioner, [redacted]

[3] For continuity, the government has numbered the exhibits attached to this reply brief sequentially beginning with the last exhibit number from Respondents' Opposition.

[4] As explained in the declaration, [redacted] Moss Decl. ¶ 2.

[redacted] remains accurate. Id. ¶ 3. [redacted] Id. ¶ 4.

Furthermore, the insinuations in Petitioner's brief and the speculations in his counsel's declaration as to why Petitioner believes he has not been transferred should be rejected. First, with regard to Petitioner's true identity, it is certainly true that the government suspected for many years that Petitioner, like many other Guantánamo detainees, was using an alias, and the government has not contended otherwise. Rather, as explained in Respondents' Opposition, the government did not learn that the name he had been using was an alias until that fact was inadvertently revealed in late 2013, after which it was not confirmed that the name revealed in late 2013 was his actual name and not just another alias until Petitioner admitted to the deception in the spring of 2014. Resps' Opp'n at 10. Nothing in the 2010 Radio Free Europe article cited by Petitioner alters these facts: that a Tajik family claimed Petitioner was their son may have been consistent with the government's suspicions of an alias, but it did not constitute sufficient evidence to conclude definitely that Petitioner was Muhammadi Davliatov. Of note, Petitioner maintained his deception for over three years after the 2010 article was published and his own counsel became aware of it, three years in which he continued to prosecute his first petition in this Court under an assumed name.

As for counsel's speculations as to why Petitioner has yet to be accepted for transfer [redacted] counsel has no foundation for his conclusions. See Petr's Opp'n Ex. A, Decl. of M. O'Hara ¶¶ 11, 13. Moreover, counsel's speculation that Petitioner's long-standing, recently recanted concealment of his identity has not impacted efforts to resettle him [redacted]

[redacted]

[redacted] Wolosky Decl. ¶ 11; Moss Decl. ¶ 2.

ARGUMENT

I. Petitioner's Continued Detention Remains Consistent With The Laws Of War

Binding precedent establishes that Petitioner's continued detention remains authorized by the AUMF as informed by the laws of war. Petitioner's attempts to distinguish or limit this precedent fail. Most notably, Petitioner cannot be considered a civilian under the laws of war, Gherebi, 609 F.Supp.2d at 65-66, but rather, as part of enemy armed forces, he is properly detainable until the cessation of active hostilities, Hamdi, 542 U.S. at 521. Those hostilities remain ongoing. Similarly, Petitioner's contentions that the support of the traditional laws of war for his continued detention has "unraveled," and that the government has cherry-picked the laws of war upon which it relies, are not accurate. Accordingly, Petitioner's continued detention despite his long-standing designation for transfer remains fully authorized under the AUMF.

1. As the government has argued, binding precedent establishes that Petitioner's continued detention is fully consistent with the laws of war. Resps' Opp'n at 17-18. To reiterate briefly, 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. Uthman, 637 F.3d at 401-402; al-Bihani, 590 F.3d at 872. The Supreme Court has held that the government may 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 of war as to be an exercise of the 'necessary and

appropriate force' Congress has authorized the President to use"); 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."). Directly pertinent here, the Court of Appeals has held that a discretionary designation of a detainee for possible transfer by the Executive does not affect the legality his continued detention under the AUMF as informed by the laws of war pending that transfer. Almerfedi, 654 F.3d at 4 n. 3. Further, the level of threat a detainee may pose to the United States or its coalition partners if released—and the extent to which that threat may be mitigated by appropriate security assurances—does not affect the legality of his continued detention under the AUMF. Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2011) (question of whether a detainee would pose a risk to national security if released is irrelevant to whether he may continue to be detained under the AUMF).

Petitioner fits squarely within this precedent. First, the government has determined that he was a part of al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Accordingly, he is detainable under the AUMF. See, e.g., Uthman, 637 F.3d at 401-402. Second, hostilities in the conflict for which Petitioner is detained continue in Afghanistan against al Qaeda, the Taliban, and associated forces. Resps' Opp'n at 26-32. Consequently, he may continue to be detained until those hostilities end. Hamdi, 542 U.S. at 518, 521; al-Bihani, 590 F.3d at 874. And third, although Petitioner has been designated for transfer, pursuant to Almerfedi that designation does not alter the legality of his continued detention. 654 F.3d at 4 n. 3.[5] For these

[5] Petitioner appears to also claim that, by his designation for transfer, the government has conceded he no longer would pose a threat if released. Of course, as the government has explained, Petitioner's designation for transfer does not reflect a decision that he poses no threat, but rather a judgment that any threat he poses can be mitigated through appropriate security measures in the receiving country. Resps' Opp'n at 19-20. Moreover, regardless of the validity of Petitioner's assertion, the holding in Awad renders it irrelevant. 608 F.3d at 11; see Resps. Opp'n at 21-22 & n.9; infra section II.2.

reasons alone, the Court should deny Petitioner's request for an order of release and dismiss his second habeas petition. United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district judges are obligated to apply controlling Circuit precedent until that precedent is overturned by the Court of Appeals sitting en banc or by the Supreme Court).

2. That the government's detention authority under the AUMF is informed by the laws of war provides no basis to disregard this precedent. Rather, Petitioner's continued detention despite his designation for transfer is fully consistent with the laws of war.

As the government explained, because Petitioner is an unprivileged enemy belligerent detained in a non-international armed conflict, he is entitled to the protections of Common Article Three of the Geneva Conventions,[6] that is, to humane treatment. Resps' Opp'n at 24-25; see Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006) (noting that Common Article Three applies to Guantanamo Bay detainees through the AUMF). As the Supreme Court has explained, such detention is, "by universal agreement and practice, [an] important incident[] of war," the purpose of which is not to punish but merely "to prevent captured individuals from returning to the field of battle." Hamdi, 542 U.S. at 518. Nothing in Common Article Three prohibits detention until the cessation of hostilities, notwithstanding a detaining power's discretionary determination that it may be able to release a detainee before that time under appropriate conditions. See Resps' Opp'n at 22-26; see also al-Bihani, 590 F.3d at 874.[7] Further, as with the

[6] E.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316 (GC III).

[7] Petitioner's characterization of al-Bihani's holding on this issue as non-binding dicta, see Petr's Opp'n at 16 n.9, need not distract the Court. Other Court of Appeals panels have held that detention pending the cessation of hostilities is legal. See, e.g., Aamer v. Obama, 742 F.3d 1023, 1041 (D.C. Cir. 2014) ("this court has repeatedly held that under the [AUMF], individuals may be detained at Guantanamo so long as they are determined to have

Supreme Court's holding in Hamdi, the government's understanding and exercise of its detention authority—including its duration—is informed directly by the laws of war, specifically Article 118 of the Third Geneva Convention. Resps' Opp'n at 23-24; see Hamdi, 542 U.S. at 520 (citing GC III, art. 118). Although that provision, which requires the release of prisoners of war upon the cessation of active hostilities, is inapplicable as a matter of law to individuals, like Petitioner, who are detained in the context of a non-international armed conflict, it reflects the same rationale for detention that operates in both international and non-international armed conflict, namely to prevent the return of captured fighters to the battlefield.

Petitioner cannot escape this result by now suggesting that he should be considered a civilian and, so, that the Fourth Geneva Convention,[8] rather than the Third, should inform the basis for his detention. Petr's Opp'n at 18-20. First, in Gherebi v. Obama, 609 F.Supp.2d 43 (D.D.C. 2009), this Court squarely rejected the very premise that Petitioner asserts here, namely that there are no "combatants" in non-international armed conflicts such as the one involved here, but only government forces and civilians. Id. at 62-66.[9] Rather, as the Court made clear, the proper distinction for non-international armed conflicts is between enemy armed forces and civilians. Id. at 65-66. The Court noted that enemy armed forces are those parties and individuals in actual armed conflict with each other, which may include government forces on one side and intra-national rebels (in a civil war) or transnational fighters (in a conflict such as

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been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."); Ali v. Obama, 736 F.3d 542, 544, 552 (D.C. Cir. 2013) (same).

[8] Geneva Convention (IV) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3516.

[9] Gherebi is a composite opinion addressing various issues, including the detention-authority standard to be applied, that had been raised in multiple Guantanamo detainee cases, among them the case that included Petitioner's first habeas petition, Mohammon v. Bush, Civ. Action No. 05-2386 (RBW). 609 F.Supp.2d at 44 & 45 n.2.

this) on the other. See id. at 66-67. Civilians, in contrast, are those who are not members of enemy armed forces (either formally or functionally by their actions). See id.[10] The government detained Petitioner as part of enemy armed forces—al Qaeda, the Taliban, or associated forces—and he does not challenge the basis of his detention here. See Petr's Mot. at 15 (noting he does not concede but does not challenge the merits of his detention here). Accordingly, Petitioner cannot claim here to be a civilian.

To be sure, the Court of Appeals subsequently established the detention-authority standard applicable in the Guantánamo cases, rejecting any requirement, such as imposed in Gherebi, that an individual must be shown to be part of the "command structure" of enemy forces. See Awad, 608 F.3d at 11. But the Court of Appeals did not disturb this Court's understanding of the parties to this conflict, namely enemy armed forces and civilians. Rather, that understanding is fully consistent with the detention standard applicable in this Circuit, which permits the detention of individuals who are part of or substantially supporting al Qaeda, the Taliban, or associated forces. Id. Consequently, Petitioner's argument that he should be considered a civilian under the laws of war should be rejected for the reasons explained in Gherebi.

And lastly, there is also no merit in Petitioner's contention that his detention should be assessed under the Fourth Geneva Convention because he does not qualify as a prisoner of war under the Third Geneva Convention. In holding that the AUMF authorizes detention until the end of hostilities, the Supreme Court in Hamdi specifically cited to Article 118 of the Third

[10] The Court's reasoning in Gherebi on this issue was fully adopted by Judge Bates in Hamlily v. Obama, 616 F.Supp.2d 63, 73 (D.D.C. 2009).

Geneva Convention, without regard to whether Hamdi was entitled to prisoner-of-war status. 542 U.S. at 520. Far from "cherry picking" international-armed-conflict principles, as Petitioner contends, Petr's Opp'n at 16, the government is adhering to Supreme Court precedent by looking to the Third Geneva Convention to inform its authority to detain Petitioner.

3. Nor has the support of the traditional laws of war for Petitioner's continued detention "unraveled." See Petr's Opp'n at 14-15. First, the length of the current conflict is irrelevant to the legal analysis. The laws of war permit detention until the cessation of hostilities for both prisoners of war and unprivileged enemy combatants. Resps' Opp'n at 22-26 (noting that Petitioner's detention is consistent with the laws of war, including Common Article Three). The purpose of this continued detention is to prevent detained combatants from returning to the battlefield after their release. Hamdi, 542 U.S. at 518. Here, the conflict and hostilities for which Petitioner is detained continue, see Resps' Opp'n at 28-32 & n.18, so this rationale remains fully applicable. See Ali, 736 F.3d at 552 ("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"). Further, that the end date of the current conflict is not known is also irrelevant: the lengths of all armed conflicts are indeterminate until the fighting stops.

Second, as for Petitioner's claim that the character of this conflict has changed—that the fighting now includes new enemies in new locations—the fact remains that hostilities continue against al Qaeda, the Taliban, and associated forces in Afghanistan. Resps' Opp'n at 26-32 & Exs. 5-8. (confirming that hostilities against al Qaeda and the Taliban continue in Afghanistan).

So long as that remains true, this Court need not decide if the new opponents and locations undermine the government's detention authority vis-à-vis Petitioner.

Third, while the United States forces in Afghanistan have transitioned from a combat mission to one of support and counterterrorism, that transition does not change the one fact pertinent here: United States military forces continue to actively engage al Qaeda, Taliban, and associated forces in Afghanistan. Id. And though Petitioner does not "concede" that the conflict in which he is detained continues, he offers no evidence to rebut the substantial evidence offered by the government for the rather self-evident proposition that hostilities against al Qaeda, the Taliban, and associated forces have yet to abate in Afghanistan. Resps' Opp'n at 26-32 & Ex. 8. Indeed, no court to date has ruled otherwise. Resps' Opp'n at 18, 28.[11] Thus, because hostilities against the relevant enemies continue, there is simply no question that the laws of war continue to support Petitioner's detention under the AUMF.

And lastly, Petitioner's accusation that the law of war principles informing detention authority under the AUMF in this Circuit have been "cherry pick[ed]," Pet'r Opp'n at 16, reflects no more than Petitioner's dissatisfaction with the decisions of this Court and the Court of Appeals concerning detention authority under the AUMF as informed by the laws of war. Indeed, Petitioner acknowledges that the decisions of the Court of Appeals on these issues are

[11] Respondents' Opposition cites, among other cases, al-Warafi v. Obama, No. CV 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015) and al-Kandari v. Obama, No. 15-CV-329 (CKK), Slip Op. (D.D.C. Aug. 31, 2015) (ECF No. 24). Petitioners in both these cases appealed these decisions but, because of their subsequent transfers from United States custody, have now moved to dismiss those appeals and to vacate the underlying decisions. Even if these decisions are vacated, however, Circuit precedent establishes they still retain their persuasiveness on the factual and legal issues decided. See National Black Police Ass'n v District of Columbia, 108 F.3d 346, 354 (D.C.Cir.1997); Coalition to End Permanent Cong. v. Runyon, 979 F.2d 219, 221 (D.C.Cir.1992) (Silberman, J., dissenting); Rabbani v. Obama, 76 F.Supp.3d 21, 24-25 n.3 (D.D.C. 2014) ("even if [a Guantanamo detainee's] release subjects [another district judge's] Memorandum Opinion to vacatur, the persuasiveness of [that judge's] factual findings and legal reasoning remains intact."). The result of vacatur will be merely to remove any preclusive effect between the parties to those decisions. Id.

contrary to his argument. Id. at 16, 19-20. Thus, rather than "cherry picking," the government has established that the laws of war simply do not support Petitioner's assertion that his continued detention is unlawful.

II. Petitioner's Continued Detention Does Not Violate The Due Process Clause

Petitioner's attempt to invoke the Due Process clause as a possible basis for this Court to order his release also remains unavailing. Petr's Opp'n at 6-10. First, binding circuit precedent establishes that Petitioner may claim no due-process rights under the Fifth Amendment in challenging his detention, let alone any that might authorize his release from detention. Second, even if he had such rights, his continued detention would not violate the Due Process Clause because Petitioner's detention during ongoing hostilities in the conflict in which he was captured is neither indefinite nor arbitrary. Accordingly, for either of the foregoing reasons, there is simply no need for the Court to reinterpret the government's detention authority under the AUMF, as Petitioner urges, to avoid a potential constitutional impediment. To the contrary, Petitioner's continuing detention pursuant to the AUMF remains constitutional.

1. As the government had argued, Resps.' Opp'n at 32-33, the binding law of this Circuit is that unprivileged enemy belligerents detained at Guantanamo Bay are not within the reach of the Fifth Amendment's Due Process Clause. See Kiyemba I, 555 F.3d at 1026. As with the binding precedent noted above regarding the validity of Petitioner's continued detention under the AUMF, see supra section I.1, unless and until that decision is reversed by either the Court of Appeals sitting en banc or the Supreme Court, this Court is bound to follow that controlling precedent. Torres, 115 F.3d at 1036.

In any event, the Court of Appeals declined to apply the functional analysis undertaken by the Supreme Court in Boumediene v. Bush, 553 U.S. 723 (2008), beyond the Suspension Clause to the Due Process Clause in the Guantanamo-detention context. In Rasul v. Myers, a case specifically remanded by the Supreme Court to the D.C. Circuit with an instruction to reconsider a prior opinion in light of Boumediene, the Court of Appeals' confirmed its prior holding that Guantánamo detainees do not have due-process rights arising under the Fifth Amendment Due Process Clause. 563 F.3d at 529. The panel noted that in Boumediene the Supreme Court had "explicitly confined" its holding to the extraterritorial reach of "only" the Suspension Clause. Id. (citing Boumediene, 553 U.S. at 795 ("Our decision today holds only that petitioners before us are entitled to seek the writ; . . .."). And it noted that the Supreme Court had also disclaimed any intention to disturb other existing laws governing the extraterritorial reach of any other constitutional provisions. Id. Accordingly, the Court of Appeals concluded that until the Supreme Court ruled otherwise, it was bound to adhere to prior precedent, which until Boumediene had uniformly held that constitutional rights did not run to aliens located overseas. Id. (citing, among other cases, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), and Kiyemba I). And in al-Madhwani, the Court of Appeals again noted that law of this Circuit remains that detainees at Guantanamo Bay have no Fifth Amendment due-process rights. 642 F.3d at 1077. Thus, even though the ultimate decisions in Rasul and al-Madhwani may have rested on other grounds, through both of those cases the Court of Appeals has continued to acknowledge that the law in this Circuit is that Guantanamo detainees have no rights arising under the Fifth Amendment Due Process Clause.

The government's position in al-Bahlul v. United States, 767 F.3d 1, 18 (D.C. Cir. 2014), that the Ex Post Facto clause applies to criminal trials of detainees at Guantanamo Bay before military commissions does not vitiate the Due Process holding of Kiyemba I. First, the controlling en banc opinion in al-Bahlul accepted the government's position, but merely assumed without deciding that the clause applied to detainee criminal trials. Id.[12] More to the point, the government's position was premised on "the unique combination of circumstances in this case," only one of which alluded to Boumediene (and solely for the proposition that the United States "maintains de facto sovereignty" over Guantanamo Bay). Brief of the United States (D.C. Cir. No. 11-1324), 2013 WL 3479237 at *64 (quoting Boumediene, 553 U.S. at 755). Of note, the primary circumstance was the Ex Post Facto Clause's "structural function in U.S. law" as a check on the Legislature's power to punish. Id. Additionally, that the appeal of al-Bahlul's conviction lay ultimately with the Court of Appeals, an Article III court, counseled strongly in favor of applying the clause there just as it would apply in any criminal appeal. Id. But of note the United States never conceded that Boumediene—or its functional analysis—compelled a finding that the clause must apply. See id. Accordingly, Petitioner's reference to the government's litigation position in al-Balul cannot support the weight that he seeks to place on it.

In sum, Petitioner asks this Court to do what the Court of Appeals has foreclosed, that is, hold that a detainee at Guantanamo Bay has Fifth Amendment due-process rights arising from his detention. Indeed, this Court, other judges of this District, and the Court of Appeals, based

[12] To be clear, a majority of the en banc court indicated that it would apply the Ex Post Facto clause to Guantanamo detainees. 767 F.3d at 18 n. 9.

on the holding of Kiyemba I, have rejected due-process claims in a variety of procedural and substantive detention-related contexts.[13]

2. In any event, Petitioner's detention is neither arbitrary nor indefinite under due-process principles. As Respondents made clear in their Opposition, Petitioner has been detained pursuant to the AUMF because he was part of or substantially supported al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Petitioner has chosen not to challenge that determination here, thereby conceding for purposes of this motion that his capture and detention were not arbitrary. Petr's Mot. at 15. More pertinently, that he remains detained despite the government's discretionary designation of him for transfer does not alter that conclusion. In claiming that his designation for transfer means that there is "no military rationale for detention," that his "detention [is] no longer an issue," or that no one thinks he should continue to be held, possibly for the duration of his life," Petr's Opp'n at 2, 14, & 15, Petitioner simply refuses to acknowledge that both his designations for transfer in 2008 and in 2009 were conditioned on negotiating appropriate security measures with the receiving country, measures designed to prevent a detainee's return to the battlefield. Resps' Opp'n at 20-21 (as to the 2008 designation, citing Ex. 4, Decl. of C. Williamson)[14] & at 6-7 (as to 2009 designation, citing Final Report—

[13] See al-Madhwani, 642 F.3d at 1077 (rejecting due process claim to be free from court considering non-record evidence); Rasul, 563 F.3d at 529 (rejecting due process claim to be free from alleged illegal detention and mistreatment); Rabbani, 76 F.Supp.3d at 25 (rejecting due process claim to enteral feeding procedures); Ameziane v. Obama, 58 F.Supp.3d 99, 103 n.2 (D.D.C. 2014) (rejecting due process claim to statutory bar depriving courts of jurisdiction over non-habeas claims for the return of property); Bostan v. Obama, 674 F.Supp.2d 9, 29 (D.D.C. 2009) (due process claim concerning use of allegedly coerced testimony).

[14] The Williamson declaration originally had been attached as exhibit 1 to the government's first motion to stay, in 2008. See In re Guantanamo Bay Detainee Litig., Misc. Act No. 08-442 (TFH), Resps.' Mot. to Stay all Proceed. for Pet'r Who Is Approved for Transfer or Release, Ex. 1 (Dec. 18, 2008) (ECF No. 1344) (under seal). In it, a State Department official noted that the "primary purpose" of transfer negotiations was to ascertain what security measures would be put in place to ensure a detainee would not pose a continuing threat to the United States or its

Guantanamo Review Task Force (Jan. 22, 2010) at 17); see Hamdi, 542 U.S. at 518 (purpose for detaining combatants is to prevent their return to the battlefield). Of course, to date, [redacted] have even agreed to receive him, and thus the government must continue its efforts to find an appropriate transfer country. See Moss Decl. ¶ 2; Resps' Opp'n at 5-10. Accordingly, Petitioner's continued detention cannot be considered arbitrary.

Nor is Petitioner's continued detention unconstitutionally indefinite. Pursuant to Hamdi and the law of this Circuit, Petitioner's detention is bounded by the ultimate cessation of hostilities. 542 U.S. at 518. That limit, even though currently not determinable, renders his detention sufficiently definite to satisfy the Due Process Clause. See Kansas v. Hendricks, 521 U.S. 346, 363-64 (1997) (holding that civil commitment statute did not violate Due Process because, although the end of an individual's commitment could not be calculated, statute required the release of the committed individuals once they no longer posed a threat).

Recently, on facts that mirror those here—continued detention of a detainee despite his approval for transfer by the Department of Defense in 2008 and again by the President's Guantánamo Review Task Force in 2009—Judge Lamberth squarely rejected arbitrariness and indefiniteness claims identical to those Petitioner puts forward here. See al-Wirghi v. Obama, 54 F.Supp.3d 44, 47 (D.D.C. 2014). Although the Court rested its decision on standing grounds, it nevertheless directly addressed both prongs of the due process claim asserted by Petitioner here, concluding (1) that the continued detention of the petitioner in the case was not indefinite

allies. Id. at ¶ 6. Petitioner simply ignores this statement when he alleges that the 2008 approval of Petitioner for transfer was "unqualified." Petr's Opp'n at 11.

because Hamdi authorizes detention under the AUMF until the end of hostilities and those hostilities continue, and (2) that the detention was not arbitrary because the government's discretionary decision to approve the petitioner for transfer had always remained conditioned on the receipt of appropriate security assurances from the receiving country. Id.[15] The same result should obtain here.

Any doubts that Petitioner's continued detention is not unconstitutionally arbitrary or indefinite were definitively dispelled in Hamdi. In Hamdi, there was no question that the Due Process Clause applied, as the petitioner was a United States citizen detained within the country. 542 U.S. at 510. Nevertheless, the Supreme Court upheld the law-of-war detention of enemy armed forces under the AUMF pending the future end of hostilities. Id. at 521. In doing so, the Court specifically balanced Hamdi's substantial liberty interest to be free from detention, but found it outweighed by the government's interest in ensuring he did not return to the battlefield against the United States. Id. at 531.

Though Petitioner quotes Hamdi, asserting that "indefinite or perpetual detention" might be constitutionally suspect, Petr's Opp'n at 9, that quote refers not to a position of the Supreme Court but to Hamdi's own contention regarding the statutory limits on the AUMF's detention authority. See 542 U.S. at 521. Rather, the plurality's position, stated in the next sentence, was that "[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized." Id. Here, there has never been any contention that Petitioner has been detained solely for ongoing interrogations. To the contrary, Petitioner remains detained to prevent his

[15] Petitioner insinuates that Judge Lamberth's standing rationale was so "questionable" that the government subsequently transferred al-Wirghi to Uruguay to moot any appeal. Petr's Opp'n at 9 n. 4. The government denies this insinuation. To the contrary, al-Wirghi's transfer was the result of the government's continuing efforts to find a country that would agree to accept him and to provide appropriate security guarantees. It has been and remains the government's hope that a similar result might one day be possible for Petitioner.

return to the battlefield until an appropriate transfer may be negotiated and arranged. And detention pending such a transfer while hostilities remain ongoing does not violate the Due Process Clause. Hamdi, 542 U.S. at 518.

3. Lastly, for the reasons discussed above, the Court should reject Petitioner's argument that Respondents' detention authority under the AUMF should be reinterpreted to avoid constitutional issues. Because Petitioner's continued detention neither implicates a due process right nor violates one, there is no need to reinterpret the government's detention authority under the AUMF to avoid finding that authority unconstitutional.

III. The Government Should Not Be Judicially Estopped From Arguing That Petitioner Must Litigate The Merits Of His Detention If He Seeks An Order Of Release

Petitioner asserts that the government has taken inconsistent positions concerning the implications of Petitioner's designation for transfer on the need for merits proceedings in this case. Petr's Opp'n at 10-14. Specifically, he claims that the government has shifted its position to use as a sword or a shield as necessary and now should be judicially estopped from arguing that Petitioner should pursue merits proceedings on whether Petitioner was part of enemy forces if he wishes to obtain an order of release. See Petr's Opp'n at 11-13. Petitioner's argument is not well founded. Indeed, the government has always maintained that, although Petitioner's designation for transfer rendered a merits hearing unnecessary, he always retained his right to obtain one. And, in fact, Petitioner exercised that right before dismissing his prior habeas case. For these reasons, Petitioner cannot satisfy any of the factors that inform a judicial estoppel decision.

Judicial estoppel may apply when a party (1) takes a certain position in a legal proceeding, (2) uses that position to succeed in the litigation, and (3) then attempts to change that position to succeed on a different piece of litigation (in the same or a different case). New Hampshire v. Maine, 532 U.S. 742, 749 (2001). It is a doctrine addressed to maintaining the integrity of the judicial system. Id. at 751. Several factors inform a decision to invoke judicial estoppel. First, the alleged inconsistency between the first and later positions taken by the party must be clear. Id. at 750. "'Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits.'" Comcast Corp. v. F.C.C., 600 F.3d 642, 647 (D.C. Cir. 2010) (quoting C. Wright, A. Miller, & E. Cooper, Fed. Practice & Proc. § 4477 at 594 (2d ed. 2002)). Second, the party taking the allegedly inconsistent positions must have successfully persuaded a court to accept its earlier position, or else no question arises that either the first or second court was misled. New Hampshire v. Maine, 532 U.S. at 750. And third, the party must have gained an unfair advantage from doing so. Id. at 751.

Here, Petitioner has failed to set out most of these factors, let alone analyze any of them. See Petr's Opp'n at 11-13. An analysis of the factors, however, undermines his suggestion that estoppel is warranted here.

First, the government has never taken an inconsistent position concerning the effect of Petitioner's designation for transfer on the need for a merits proceeding in this case should Petitioner seek to obtain an order for release. In 2008 and 2009, the government sought to stay Petitioner's first habeas case because there were over 200 Guantanamo habeas petitions then pending; Petitioner was approved for transfer, but many other detainees were not; and the

government urged the courts to prioritize hearing the cases of those who were not approved for transfer over those who were. See Resps' Opp'n at 11-13. In doing so, the government logically pointed out that its efforts to transfer Petitioner, if successful, would have the same practical result as if the Court ordered his release. Id. Of note, however, the government never conceded that Petitioner was not properly detainable under the AUMF and, so, never conceded that a merits hearing was not necessary before the Court could order Petitioner's release. See id. at 12. Nor did it ever concede that Petitioner's designation for transfer made him eligible for an order of release. Id.; see Ex. 10, Hussein v. Obama, Civ. Action No. 05-2104 (RBW), Mem. Op. at 12 (D.D.C.) (Jan. 27, 2010) (under seal) (noting a government assertion that the "remedy of release provided by a habeas order is materially identical to a release determination by the Task Force is in no way inconsistent with its position that the processes that lead to the granting of the remedy are different," and so judicial estoppel would not be proper). Moreover, in both motions to stay, the government emphasized that if conditions changed, Petitioner was free to move to lift the stay and proceed to the merits of his habeas claim, Resps' Opp'n at 12, which he in fact did, see id. at 13 (noting that Petitioner moved the Court of Appeals to remand his appeal of the stay so this Court could lift it, that the Court did so, and that the parties then litigated the merits of his first petition for nearly three years).

Petitioner attempts to fashion an inconsistency with these prior government assertions by alleging that the government now contends that if Petitioner wishes to leave Guantanamo he must litigate the merits of his claim. Petr's Opp'n at 12. This rather badly mischaracterizes the government's positions. To the contrary, the government's current position mirrors the one it took in 2008 and 2009, namely that Petitioner's designation for transfer renders a merits hearing

unnecessary, as Respondents are continuing their efforts to resettle Petitioner. If, however, as is apparent, Petitioner is displeased with the government's efforts, he remains free to litigate the merits of his petition to demonstrate that he is not legally detainable. This is the only proper basis for an order of release from this Court.[16] What Petitioner is not free to do, however, is to avoid that litigation by claiming his designation for transfer entitles him to an order for release. See Almerfedi, 654 F.3d at 4 n. 3 (designation for transfer not relevant to determination of whether a detainee may continue to be detained under the AUMF). Thus, the government's positions then and now are the same: Petitioner's designation for transfer renders a merits hearing unnecessary; but if Petitioner desires an order of release, his only path to that remedy lies through a merits hearing. Accordingly, there is simply no inconsistency—let alone a clear one—upon which the Court could estop the government from contesting Petitioner's position that his long-standing designation for transfer, alone, is sufficient for an order of release.

Neither of the other two factors relevant to judicial estoppel would support estoppel here. First, the government did not have sufficient success with its initial position—that Petitioner's designation for transfer renders a merits hearing unnecessary—to warrant judicial estoppel. As noted above, the government's first motion to stay was denied. See Resps' Opp'n at 11. And while this Court later granted a second stay motion, that grant was subsequently vacated just ten months later. Id. at 11, 13. The initial denial and the subsequent vacatur of the granted stay both undercut any claim that, even if the government had taken an inconsistent position, there is any

[16] In candor, however, the government notes that even were Petitioner to be successful on the merits, he will have done no more than have established he is entitled to—instead of merely eligible for—a transfer. The government will still have to locate a country willing to receive him because he cannot be repatriated. See Kiyemba I, 555 F.3d at 1026 (permitting continued limited detention of Guantanamo detainees no longer considered detainable under the AUMF, and who could not be repatriated, until they could be resettled); Petr's Mot. at 12 (asserting Petitioner is stateless).

risk that the Court could be perceived as having been misled. See New Hampshire v. Maine, 532 U.S. at 750.

Nor can it be said that the ultimately vacated stay granted the government an unfair advantage. The effect of the stay was to delay litigating the merits of Petitioner's first petition for 10 months. After the stay was lifted, the government promptly fulfilled its discovery obligations and amended its factual return within one year, thereby fully informing Petitioner of the case against him. See Resps' Opp'n at 13. When the Court thereafter instructed Petitioner to respond by filing his amended traverse, Petitioner refused to do so, ultimately withdrawing his petition three years after the stay was lifted. Id. Petitioner's refusal to go forward with a merits determination negates any possible advantage the government received from the brief stay of his first petition.

In summary, Petitioner remains approved for transfer, and the government is undertaking substantial efforts to arrange for a transfer for him. [redacted] During that time, 54 other Guantánamo detainees have been transferred out of United States custody, the vast majority resettled to other countries. See Wolosky Decl. ¶ 7; Moss Decl. ¶ 2. That Petitioner has not been one of those transferred is a result not of government intransigence or roadblocks, but simply a result of no country desiring to accept him. Government efforts to transfer Petitioner continue and, the government hopes, ultimately will be successful. Accordingly, the government continues to assert—as it did in 2008 and 2009—that a merits hearing is unnecessary; but if Petitioner nevertheless desires an order of release, then the proper path for that order lies through a merits determination. Because the government has never waivered from

this position, there is simply no inconsistency or other factor sufficient to warrant judicial estoppel.

IV. The Court Has No Basis To Exempt Petitioner From Congressionally Mandated Pre-Transfer Certification Requirements

Lastly, Petitioner notes, Petr's Opp'n at 21, that before a Guantanamo detainee may be transferred, the Secretary of Defense must certify to Congress that certain conditions regarding that transfer have been met, National Defense Auth. Act for Fiscal Year 2016 §§1034(b), Pub. L. No. 114-92, 129 Stat. 726 (2015) ("2016 NDAA"). And, as Petitioner also notes, Petr's Opp'n at 21, there is an exception to these certification requirements for any detainee transfer "to effectuate an order affecting the disposition of [an individual detained at Guantanamo] that is issued by a court or competent tribunal of the United States having lawful jurisdiction (which the Secretary shall notify the appropriate committees of Congress of promptly after issuance)." 2016 NDAA § 1034(a)(2). Petitioner incorrectly argues, however, that this Court both could and should invoke this exemption to issue an order precluding the Secretary of Defense from having to comply with the certification requirements as to any future transfer of Petitioner.

At bottom, Petitioner's argument is that the Court should order Petitioner's release simply because it can or because it considers the statutorily mandated certification requirements unwise or inconvenient. Indeed, as explained in Respondents' Opposition and above, there is no legal basis for a court order for Petitioner's release based on his approval for transfer. Furthermore, Judge Lamberth has previously considered and rejected on standing grounds a challenge by a Guantánamo detainee approved for transfer to analogous certification requirements imposed by the 2014 NDAA. See Ahjam v. Obama, 37 F. Supp. 3d 273, 278-80 (D.D.C. 2014) (rejecting challenge to certification requirements based on detainee's lack of a

"legally protected interest [in transfer] sufficient to support his standing to challenge the NDAA certification provisions," and noting that "barring a successful habeas petition, the Constitution confers no 'right to be free' . . . upon enemy belligerents detained at Guantánamo"). Accordingly, there is no legal basis for, and the Court should reject, Petitioner's argument that the Court issue an order declaring that Petitioner's transfer is not subject to the 2016 NDAA certification requirements.[17]

CONCLUSION

For the reasons stated herein and in Respondents' Opposition, Petitioner's request for an order of release should be denied, and his petition for a writ of habeas corpus should be dismissed

[17] Respondents note that Petitioner has failed to address any of their arguments that the Court's equitable habeas powers could not provide a separate basis for an order of release based solely on Petitioner's designation for transfer. Resps' Opp'n at 35-37; see Petr's Mot at 31-34. It is unclear whether Petitioner continues to assert that position or has now abandoned it in general, self-limiting it to justify only abrogating the 2016 NDAA certification requirements. In either event, both arguments fail for similar reasons: neither circumstance justifies an extraordinary and improper exercise of judicial power given that, as originally posited, Petitioner continues to refuse to challenge the merits of his detention under the AUMF, see Resps' Opp'n at 36, and, as noted above, the root reason he has not been transferred is that no third country has agreed to accept him.

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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