UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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

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

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

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

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

Introduction and Summary of Argument

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

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

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

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

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

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

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

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

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

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

Argument

I. Respondents' Approach Represents Impermissible Executive Law-Making

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Joint Resolution as passed provided:

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] 115 Stat. 272 (2001).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Determining Who Is Subject To the Law of War

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

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

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

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

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

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

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

IV. The Issues Presented For Decision Are Limited in Scope

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

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

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

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

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

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

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

Conclusion

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

Dated: March 20, 2009

Respectfully submitted,

/s/ Peter B. Ellis
Peter B. Ellis
Mass. BBO #153500
Andrew Loewenstein
Mass. BBO #648074
Usha-Kiran K. Ghia
Mass. BBO #666711
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
617.832.1000

Counsel for Petitioner Mohammed Ahmed Saeed Hidar, a/k/a Mohammed Ahmed Said Haidel (ISN #498)

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

CERTIFICATE OF SERVICE

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

DATED: March 20, 2009

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