IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 04-CV-1166 (RJL)

RESPONDENTS' MEMORANDUM ADDRESSING THE DEFINITION OF ENEMY COMBATANT

Respondents respectfully submit this memorandum in response to petitioners' pre-hearing memorandum addressing the definition of enemy combatant. The Court should reject the petitioners' effort to place crippling judicial limits on the United States's authority to detain militarily members or supporters of al-Qaida's terrorist network, the Taliban, or associated forces.

INTRODUCTION

As the Supreme Court observed in *Hamdi v. Rumsfeld*, the capture and detention of enemy combatants by "'universal agreement and practice,' are 'important incident[s] of war.'" 542 U.S. 507, 518 (2004) (plurality opinion). In adopting the Authorization for Use of Military Force ("AUMF"), in the immediate aftermath of the worst attacks on American soil by a foreign force, Congress gave the President the broad authority to use all necessary and appropriate force – including capture and detention – against those "organizations" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." It is beyond dispute that al-Qaida is such an organization. Congress has, thus, authorized and the President has prosecuted a global war against an unconventional non-state enemy, whose worldwide network of combatants wear no uniforms and carry no identity cards; are connected by a complex and ever-evolving web of interlinked terrorist organizations and cells that operate with great autonomy but take direction from al-Qaida leadership; and reject all laws of warfare.

The Court need look no further than the AUMF itself for the authority to detain persons who were members or supporters of al-Qaida. Petitioners' attempt to limit the President's detention authority to persons acting on behalf of nation-states, unless they personally directly participated in hostilities against U.S. forces, is simply contrary to the plain text of the AUMF and founders upon this express grant of authority from Congress. Moreover, the use of force

against al-Qaida – including capturing and detaining its members and supporters – is entirely consistent with the traditional law of war.

The law of war in no way limits the U.S.'s application of necessary and appropriate force to non-state actors, and American history is replete with examples of military force being used against irregulars such as al-Qaida. Petitioners' proposed limitation on U.S. power – dividing the universe of detainable enemy combatants into those who are part of a nation-state's armed forces, and "civilians" who "directly participate in hostilities as part of an organized armed force" – is based on a fundamental misapplication of the law of war, and ignores the plain text of the AUMF itself. Petitioners, who had effectively signed up to travel to Afghanistan to engage U.S. forces alongside al-Qaida, but had simply not yet done so, lie in the heartland of those properly detained as enemy combatants under the traditional law of war. Just as those enlisted in the German Army during World War II could be detained as enemy combatants, regardless of whether they had personally picked up arms or even approached an active battlefield, the same is true regarding petitioners, who were connected with al-Qaida and who planned to join al-Qaida's battle against U.S. forces. Enemy combatants include individuals "who associate themselves with the military arm of the enemy government" – or with a belligerent organization such as al-Qaida – even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *see also Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *vacated on other grounds, Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

Both the AUMF and the traditional law-of-war principles that justify petitioners' detention are reinforced by the President's authority under the Constitution as commander-in-

chief. As this Court has observed, "there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act." *Khalid*, 355 F. Supp. 2d at 319-20 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Constitution unquestionably empowers the United States to defend itself militarily from the threat posed by al-Qaida and its global terrorist network.

In sum, the President's power to detain must include the ability to detain as enemy combatants those individuals who are or were part of, or supporting, al-Qaida, the Taliban, and associated forces who were engaged in hostilities against the United States or its coalition partners or allies. The Government's definition of enemy combatancy, under which detaining petitioners is justified, is consistent with the President's authority under the AUMF, core principles of the law of war, and the President's constitutional authority as Commander in Chief. As the information provided to the Court demonstrates by at least a preponderance of the evidence, and as will be further reinforced during the merits hearings currently scheduled in this proceeding, petitioners had clearly associated themselves with an al-Qaida member, facilitator and fighter and had planned to join the fight against the United States on a battlefield. The United States was empowered to take military action to remove the threat they posed, including through detention for the duration of hostilities. Simply put, intercepting enemies who plan to join the battle saves the lives of American soldiers on the battlefield, as well as citizens back home.

BACKGROUND

In response to the devastating attacks of September 11, 2001, which killed nearly 3,000 Americans and struck two of the most prominent symbols of American economic and military power – the World Trade Center and the Pentagon – Congress authorized the use of military force against al-Qaida and its global, clandestine network of supporters. Pursuant to its power under Article I, Section 8 of the Constitution, Congress authorized the President "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*." Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, §2(a), 115 Stat. 224 (2001) (emphasis added).

The AUMF is extremely broad. Its sweeping scope does not limit the use of force against state actors, and it also authorizes force against "organizations." It does not limit the geographic scope or duration of the authorization. And it does not purport to limit the President's inherent power to determine how to fight the war. Rather, the AUMF recognizes the President's "authority under the Constitution to deter and prevent acts of international terrorism against the United States." *Id.*, preamble. The AUMF states that, because the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.*

The President, pursuant to his authority under the AUMF, and as Commander in Chief under Article II, Section 2 of the Constitution, determined that the attacks of September 11 "created a state of armed conflict" with al-Qaida and its allies. Military Order, 66 Fed. Reg. 57,833, § 1(a) (Nov. 13, 2001). It is, of course, beyond doubt that al-Qaida inflicted the September 11th attacks and that the Taliban regime in Afghanistan gave al-Qaida support and sanctuary. The President ordered an invasion of Afghanistan to remove the Taliban and kill or capture members of the al-Qaida network. The United States removed the Taliban government in Afghanistan, and killed or captured numerous Taliban and al-Qaida operatives and supporters in Afghanistan, Pakistan, and elsewhere who fought the United States and its coalition partners. The United States also captured al-Qaida and Taliban facilitators outside Afghanistan who had arranged for recruits to travel there. And the United States continues to fight against the Taliban and al-Qaida in Afghanistan, and to fight al-Qaida and its network of supporters militarily elsewhere throughout the world.

In detaining al-Qaida members, supporters and associates, the United States has throughout the war on terror used essentially the same definition of enemy combatancy as the one relied upon by the Government here:

> An enemy combatant is an individual who was part of or supporting forces engaged in hostilities against the United States or its coalition partners. This includes an individual who was part of or supporting Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. This also includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Respondents' Response to Sept. 8, 2008 Order Requiring Concise Statement of Definition of "Enemy Combatant" (Sept. 9, 2008) ("Resp.'s EC Def."). That definition, in significant

respects, is similar to the one adopted by Congress in the Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a) (1), 120 Stat. 2601 (codified at 10 U.S.C. 948a(1) (i)) (defining an "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces)").

For reasons explained in Respondents' classified Amended Factual Return, petitioners are lawfully detained. The evidence at the hearing will show that they were part of or supporting al-Qaida forces engaged in ongoing hostilities against the United States and its coalition partners.

ARGUMENT

THE CONSTITUTION AND AUMF PERMIT THE NATION TO WAGE WAR AGAINST AL-QAIDA AND ITS WORLDWIDE NETWORK OF SUPPORTERS AND ASSOCIATED FORCES WHEREVER THEY ARE FOUND

A. The Definition Of Enemy Combatancy at Issue Here Is Consistent With the Sweeping Terms and Clear Purpose of the AUMF.

The enemy combatant definition at issue here is authorized under the AUMF and is reasonable considering the nature of the enemy threat to which the AUMF responded. The definition provides that an "enemy combatant is an individual who was part of or supporting forces engaged in hostilities against the United States or its coalition partners," including "an individual who was part of or supporting Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners" and "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Resp.'s EC Def. Al-Qaida plainly committed the September 11 attacks, and thus its members or

supporters are subject to the use of military force under the AUMF. The United States is not powerless to detain individuals as enemy combatants who became members or supporters of the al-Qaida organization (or its harboring ally, the Taliban) by plotting to travel to join the battle against U.S. forces.

Petitioners' response is to attempt to limit the President's authority either to members of the regular forces of a nation-state or to those individuals in irregular forces who "directly participate" in hostilities against the United States. That argument flies in the face of the plain language of the AUMF, which clearly contemplates the use of military force (including the authority to detain) against *organizations* that committed the September 11 attacks. The AUMF could not be more clear: it specifically authorizes the use of force against those "organizations" who "planned, authorized, committed, or aided" the September 11 attacks or "harbored" them. It is enough that someone was associated with an organization that committed the September 11 attacks – i.e., al-Qaida. They need not be part of the regular forces of a nation-state nor have engaged in "direct participation" on a battlefield in order to be detained. Moreover, because al-Qaida does not abide by the laws of war, and does not identify "members" as such with cards or insignia, the AUMF necessarily permits the use of force against those who support al-Qaida's military objectives, including by effectively "enlisting" in irregular forces and planning to join the battle, whether or not they have yet done so. The law of war neither protects them from attack nor prohibits their detention for the duration of the conflict. The statutory language makes plain that Congress did not intend to limit its authorization of force to only those who carried weapons on the battlefield – but rather it clearly intended to reach individuals, such as the 9/11 hijackers, who actively planned to engage in hostilities against the United States in association

with al-Qaida and its allies, *before* they complete their objectives. Here, as the evidence will show, petitioners were not simply distant supporters of al-Qaida's goals in some abstract manner, they were planning to join the battle.

In rejecting the well-settled principle that enemy forces may be captured and detained, petitioners instead offer a "direct participation" requirement, citing two protocols to the Geneva convention that the United States has not ratified. *See* Pet.'s Mem. at 5-6. In any event, these protocols – which address the use of *lethal force against individual civilians* when they take a direct part in hostilities – in no way address the *detention of combatants* who have not yet entered the battlefield. In essence, petitioners argue that the AUMF does not authorize capture and detention of enemy combatants unless they have taken up arms on conventional battlefields. This Court in *Khalid*, however, rejected "[a]ny interpretation of the AUMF that would require the President and the military to restrict their search, capture, and detention to the battlefields of Afghanistan." 355 F. Supp. 2d at 320. Such an approach "would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." *Id.* Yet, in proposing to restrict detention to persons (other than members of a nation-state's armed forces, which petitioners concededly are not) who "directly participate in hostilities," that is precisely what petitioners envision. As this Court concluded, "when Congress, through the AUMF, authorized the President 'to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks [of 9/11]' 'to prevent any future acts of international terrorism against the United States by such . . . persons[,]' *see* AUMF § 2, it, in effect, gave the

President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks" on behalf of al-Qaida. The Court rightly concluded that "the President's war powers could not be reasonably interpreted otherwise." *Khalid*, 355 F. Supp.2d at 318-19.

This Court also rejected petitioners' effort to limit the authority to detain enemy combatants "captured on or near the battlefields of Afghanistan," because "the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists." *Id.* at 320. Finally, the Court rejected petitioners' attempt to limit the Nation's military detention authority to only those enemies directly participating in battle on a conventional battlefield, and held that it reaches "attempt[s] to commit acts of violence outside of the 'theatre or zone of active military operations'." *Id.* (quoting *Quirin*, 317 U.S. at 38). The Court observed that "the 9/11 attacks were orchestrated by a global force operating in such far-flung locations as Malaysia, Germany, and the United Arab Emirates." *Khalid*, 355 F. Supp. 2d at 320. Indeed, this is a war in which the active "battlefield" has already included New York City, Arlington, Virginia, and rural Pennsylvania. *See id*. at 315.

B. The Law of War Does Not Prohibit the Nation from Defending Itself Militarily Against International Terrorism.

Petitioners' suggestion that the law of war somehow limits the President's detention authority to members of the regular forces of nation-states or to persons who have actually taken up arms and "directly participated" in hostilities on a traditional battlefield – despite the plain language of the AUMF – is simply wrong. Neither the "necessary and appropriate" force authorized by the AUMF, nor the President's constitutional power as Commander in Chief, is limited to pursuing the al-Qaida terrorist network militarily only where its members and

associates directly participate in ongoing hostilities on a conventional battlefield. Petitioners' attempt to limit the use of U.S. military force abroad is based on a fundamental misunderstanding of law of war principles which, in fact, ultimately support the United States's authority to fight global terrorism as a war on or off conventional battlefields.

As an initial matter, no serious thinkers believe that the use of military force is limited to conflicts among nation-states. As Bradley and Goldsmith observe:

> a number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes. In addition, during the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy. Presidents also have used force against non-state actors outside of authorized conflicts. President McKinley's use of military force to put down the Chinese Boxer Rebellion was primarily directed at non-state actors. President Wilson sent more than seven thousand U.S. troops into Mexico to pursue Pancho Villa, the leader of a band of rebels opposed to the recognized Mexican government. And President Clinton authorized cruise missile strikes against al Qaeda targets in Sudan and Afghanistan. In all of these instances, presidents as commanders-in-chief exercised full military powers against non-state actors--sometimes with congressional authorization, and sometimes without.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2066-67 (2005). Al-Qaida is another irregular or guerrilla-like force, against which the United States has used, and will continue to use, its full military might.

The use of military force (including capture and detention) against persons planning to join irregular forces on the battlefield is entirely consistent with background law of war principles. It is long-settled that individuals "prepar[ing] for combat" or "return[ing] from combat" qualify as participants in hostilities, and may be properly detained as enemy combatants. ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at ¶ 1943 (Yves Sandoz et al. eds., 1987); *accord* ICRC Report:

Direct Participation in Hostilities (2005) (www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation -hostilities-ihl-311205); *see also Al-Marri v. Pucciarelli*, 534 F.3d 213, 319 & n.7 (4th Cir. 2008) (Wilkinson, J., concurring and dissenting); Bradley & Goldsmith, 118 Harv. L. Rev. at 2116.

Indeed, the Supreme Court in *Hamdi* expressly recognized as a core element of the use of force "detention . . . to prevent captured individuals *from . . . taking up arms*" against the United States. 542 U.S. at 518 (plurality opinion) (emphasis added). Intercepting and detaining persons planning to join the battle against American forces serves precisely this function, whether or not they have yet taken up arms. Thus, as the Supreme Court explained in *Quirin*, 317 U.S. at 37-38, individuals "who associate themselves" with military forces "are enemy belligerents within the meaning of the Hague Convention and the law of war," even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Id*. at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons."); *see also, e.g., Al-Marri*, 534 F.3d at 261 (Traxler, J., concurring) ("[L]imiting the President's authority to militarily detain soldiers or saboteurs as enemy combatants to those who are part of a formal military arm of a foreign nation or enemy government is not compelled by the laws of war, and the AUMF plainly authorizes the President to use all necessary and appropriate force against al Qaeda."). By contrast, petitioners' approach would seriously undermine the broad purpose of the AUMF, which is to "prevent any future acts" of terrorism against the United States. 115 Stat. 224.

Moreover, the law of war has long recognized that even individuals who simply accompany enemy armed forces, but who do not fight with them, have also routinely been

subject to detention. *See, e.g.*, Third Geneva Convention, art. 4(A)(4) (recognizing right of detaining power to seize and confine "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); Digest of Opinions of the Judge Advocate General of the Army 392 (William Winthrop ed., 1880) (synopsizing Civil War era decision: "An engineer captured while doing duty on a steamer of the enemy, held properly detained as a prisoner of war; civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army."). *A fortiori*, would-be fighters seeking to join the battle may also be detained.

To be sure, the current war is not an international armed conflict between conventional armed forces.[1] However, petitioners' assertion that they are "civilians" is based on a false dichotomy assuming that persons are either members of the military of a nation-state or a civilian. Not so. A civilian (i.e., a non-combatant) is simply defined as an individual who is not a combatant. As a leading authority explains, the definition of civilian "follow[s] a 'negative approach,' " because it "do[es] not tell us who or what the protected persons and objects are." Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 114 (2004) (footnotes omitted). Rather, " 'the concepts of the civilian population and of the armed forces are only conceived in opposition to each other,' " so "that there is no undistributed middle

[1] *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316 ("Third Geneva Convention").

between the categories of combatants (or military objectives) and civilians (or civilian objects)." *Id*. (footnotes omitted).

Al-Qaida and its supporters are wholly unlike civilian populations; rather, they are a clandestine enemy force. Petitioners' approach would reward those who, rather than openly fight in uniforms, hide among civilian populations. Where there is evidence, as here, that individuals are part of or supporting al-Qaida or an associated terrorist organization, they are combatants, and may be detained. Indeed, two of the authors who petitioners cite acknowledge that the AUMF explicitly authorizes the use of force against organizations, including al Qaida, and their members. *See* Bradley & Goldsmith, 118 Harv. L. Rev. at 2109 ("The AUMF obviously applies to the terrorist organization known as al Qaeda, since this organization was directly responsible for the September 11 attacks. This means that Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11. Such members are not, as we explained above, covered by the AUMF in their individual capacities as 'persons' because they had no nexus to the September 11 attacks. Nevertheless, they come within the terms of the AUMF because they are part of an 'organization' that is covered by it.").[2]

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[2] The authors also reject petitioners' requirement of direct participation on a battlefield. *See id.* at 2116 (traditional law of war criteria for combatancy "include both individuals who take up arms for purposes of attacking the United States on a covered terrorist organization's behalf, and also those who are in the process of "*prepar[ing] for combat and return[ing] from combat*") (emphasis added). One of the other authors petitioners cite also explicitly rejects petitioners' argument. *See* Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, in *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* 505, 523 (2004) ("[T]he bulk of international humanitarian law, including that involving direct

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Moreover, even accepting petitioners' characterization of terrorists and their supporters as no different than innocent civilians (until they actually start shooting at U.S. forces), the law of war does not produce the self-defeating result of prohibiting *all* measures necessary for a nation to prevent its forces from being attacked – including preventative detention. The "direct participation" standard found in two protocols that the United States refused to ratify, but that petitioners nonetheless invoke, is intended to protect non-combatants from *lethal* force, but even there, the contours of "direct participation" are fact-specific and reach certain efforts to prepare for combat.[3] The law of war permits nations to protect themselves through detention, as necessary, from those who are preparing to take up arms, whether or not they have yet done so.[4]

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[2](...continued)
participation in hostilities, is inapplicable to counterterrorist operations occurring outside the confines of either a non-international or an international armed conflict. Certain fundamental principles of humanitarian law such as necessity and proportionality would apply generally to the use of force, as would human rights norms, *but it would be overreaching to suggest the notion of direct participation does*.") (emphasis added), http://www.michaelschmitt.org/Publications.html.

[3] *See Al-Marri*, 534 F.3d at 319 & n.7 (Wilkinson, J., concurring and dissenting) (noting that the inquiry is fact-specific); ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at ¶ 1943 (Yves Sandoz et al. eds., 1987) (forces "prepar [ing] for combat" or "return[ing] from combat" qualify as participants in hostilities); *accord* ICRC Report: Direct Participation in Hostilities (2005), http://www.icrc.org/Web/ eng*40/ siteeng0.nsf/htmlall/participation-hostilities-ihl-311205.

[4] If persons attached to fighting forces, but who do not themselves take up arms, may be properly detained as enemy combatants, surely then those connected with the enemy command structure or planning to join the battle (even if they have not yet done so), may be detained as enemy combatants. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3316, 3320 (recognizing detaining power's right to seize and confine "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); 2 William Winthrop, *Military Law and Precedents* 789 (2d ed. 1920) (individuals such as clerks, laborers, and even "civil[ian] persons engaged in military duty or in immediate connection with
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And, of course, other courts have repeatedly upheld the President's authority to detain enemy combatants in the war on terror. In *Hamdi*, five Justices agreed that the United States can lawfully detain enemy combatants in the war against al-Qaida because the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" 542 U.S. at 518; *accord id.* at 587-88 (Thomas, J., dissenting). That the plurality in *Hamdi*, in a case involving the detention of a U.S. citizen with full constitutional rights that petitioners do not possess, left "[t]he permissible bounds of the [enemy combatant] category [to] be defined by the lower courts as subsequent cases are presented to them," 542 U.S. at 518, is not an invitation for judges to veto such wartime decisions about the appropriate breadth of the enemy combatant definition. To the contrary, the power of detention plainly extends to al-Qaida operatives and supporters who plan to engage in hostilities against the United States in this country or abroad, not only those who "directly participate" in conventional armed conflict. *SeeAl-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc).[5]

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[4](...continued)
an army" are subject to detention); *accord In re Territo*, 156 F.2d 142, 156 (9th Cir. 1946) (noting, and not disturbing on appeal, district court's conclusion that "whether petitioner was a combatant or non-combatant member of the armed forces of the Italian army" was immaterial to legality of American military authorities' detention of Italian private who served doing manual labor in army engineers corps); *Digest of Opinions of the Judge Advocate General of the Army* 392 (William Winthrop ed., 1880) (synopsizing Civil War era decision: "An engineer captured while doing duty on a steamer of the enemy, *held* properly detained as a prisoner of war; civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army.").

[5] Petitioners contend (at 14-15) that the the various opinions issued by the Fourth Circuit in *Al-Marri* proposed narrower definitions than the one proposed here, but this case does not implicate issues about the scope of Executive power exercised within this Country. Moreover, in (continued...)

In sum, the power to defend the Nation against the al-Qaida organization necessarily includes the power to detain its supporters and associated forces, whether or not they have yet joined the battle. The President is entrusted with broad authority under the AUMF and nothing in the law of war remotely suggests that the AUMF should be construed to say otherwise. To the contrary, as set forth below, Article II of the Constitution reinforces that the AUMF must be construed broadly, consistent with the President's powers and duties in defending the nation as Commander in Chief.

C. The Constitution Permits the Nation to Use Military Power to Defend Itself Effectively from al-Qaida's Stateless Global Terrorism.

Nothing in the Constitution limits the country's ability to fight al-Qaida's stateless global terrorism as a war, despite the absence of state actors and a uniformed military adversary. As Justice Grier observed nearly 150 years ago in the *Prize Cases*, war is defined "by its accidents – the number, power, and organization of the persons who originate and carry it on." *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1863). The Constitution specifically vests the political branches with the power necessary to respond effectively to this new threat and to "provide for the common defense." U.S. Const. preamble. Article I, Section 8 of the Constitution gives Congress the power to authorize military force, without limitation. Article II, Section 2 gives the

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Al-Marri, the en banc court held that the AUMF authorizes the detention of individuals associated with al-Qaida who were captured away from a traditional battlefield, but planning to conduct attacks against the United States. Thus, the judgment of the en banc court belies the notion that persons need have directly participated in conventional hostilities to be enemy combatants. *See* 534 F.3d at 253-62, 284-88, 293-303. And even those dissenting judges did not dispute the President's "plenary authority to deploy our military against terrorist enemies overseas," *id.* at 251, which would, of course, include the present use of force against petitioners.

President the power to exercise such force as "Commander in Chief of the Army and Navy of the United States."

It is "of course" the case that the textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). Just as obviously, "[t]he war power of the national government 'is the power to wage war successfully.'" *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (quoting Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238). Thus, the President has the authority to "employ [U.S. forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *see also Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command . . . to repel and defeat the enemy . . . ."). As this Court has determined, where, as in the war on terrorism, Congress has provided a broad mandate to defeat the enemy and protect the nation, "there can be no doubt that the President's power to act at a time of armed conflict is at its strongest." *Khalid*, 355 F. Supp. 2d at 318 (citing *Youngstown*, 343 U.S. at 635) (Jackson, J., concurring).

Accordingly, it is entirely within the President's authority under the AUMF and commander-in-chief power to target those who actively support or associate with the "organizations" against which the AUMF explicitly authorizes the use of all necessary and appropriate military force. Absent that power, the war against al-Qaida would be fundamentally undermined – limited legally, in Petitioner's view, to at most removing the Taliban as the *de facto* government of Afghanistan, and limited to detaining only those al-Qaida associates who have directly participated in attacks against the United States. Not even the 9/11 attackers

themselves would have been subject to military force and detention as they plotted, under petitioners' distorted view of the law, until too late. Moreover, had the Taliban acceded to the United States's pre-invasion demand to expel al-Qaida, petitioners' argument would, with rare exception, have limited the United States's lawful authority to the pursuit of criminal cases and extradition requests, despite the fact that the al-Qaida network was the primary target of the military campaign. Nothing in the Constitution, much less the AUMF, places such a dangerous limitation on U.S. military power.

By seeking to limit the authority of the United States to detain militarily al-Qaida members, supporters, and associates captured away from a traditional battlefield, petitioners fundamentally question the legitimacy of prosecuting the global war against al-Qaida terrorism as a war, rather than as a police operation seeking criminal charges. Petitioners would have courts prohibit the United States from using any force, including even the measured force of capture and detention, whenever a terrorist who was part of al-Qaida – an organization that inflicted the worst attack on American soil by foreign forces in our Nation's history – has not yet personally taken up arms on a traditional battlefield, such as Afghanistan. Pet's Mem. at 4. The Constitution, however, permits the Nation to defend itself from al-Qaida's far-flung network using military force, not just criminal process. It not only provides broad authority for Congress's authorization of the use of military force against the al-Qaida terrorist network, but also independent authority for the President to use military force in this context. Indeed, contrary to petitioners' argument, it is critical to national security for the United States to detain those enemy combatants who are not among members of another country's armed forces, beyond conventional battlefields, beyond a few "senior" "specialist" members of al-Qaida (who one of

petitioners' proposed experts allows are detainable in the war irrespective of traditional indicia of combatancy)[6], and not only in circumstances where there is direct evidence that an attack is imminent or has already occurred.

In enacting the AUMF, Congress recognized the President's inherent "authority under the Constitution to deter and prevent acts of international terrorism against the United States." Thus, to the extent there were any doubt about the scope of the President's authority under the AUMF, it should be interpreted consistent with, not in derogation of, the authority vested in him by the Constitution. Because the "capture and detention" of enemy combatants is "by 'universal agreement and practice" an important incident of war, *Quirin*, 317 U.S. at 28, it is unquestionably encompassed within the President's Article II authority as Commander in Chief. Thus, the Constitution itself confirms the President's authority to detain those who associate themselves with al-Qaida and its senior leadership, and who plan to join the battle, even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Quirin*, 317 U.S. at 37-38; *see also Khalid*, 355 F. Supp. 2d at 320.

[6] *See* Traverse Exhibit ("Trav. Ex.") 18 at 6 ¶ 6.g (allowing that a limited group of "senior terrorist leaders and terrorist weapons specialists and fabricators should be considered to continually take a direct part in hostilities" and are therefore "civilians" who are nevertheless subject to military force).

CONCLUSION

For the reasons stated above, the Government's definition of "enemy combatant" fully comports with the AUMF, the law of war, and the President's authority as Commander in Chief. The evidence in Respondents' Amended Factual Return, and evidence that will be presented at the hearing, establishes that petitioners are lawfully detained as enemy combatants.

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Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JOHN C. O'QUINN
Deputy Assistant Attorney General

/s/ *Christopher Hardee*
JOSEPH H. HUNT (D.C. Bar No. 431134)
TERRY M. HENRY
NICHOLAS A. OLDHAM (D.C. Bar No. 484113)
PAUL E. AHERN
FREDERICK S. YOUNG (D.C. Bar No. 421285)
DAVID C. BLAKE (D.C. Bar No. 976977)
CHRISTOPHER HARDEE (D.C. Bar No. 458168)
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 514-3367
Fax: (202) 616-8470
Email: Nicholas.Oldham@usdoj.gov

Attorneys for Respondents