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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE, Petitioner,	:	
v.	:	Civil Action No. 05-392 (ESH)
BARACK OBAMA, *et al.*, Respondents.	:	

REPLY IN FURTHER SUPPORT OF MOTION FOR ORDER OF RELEASE AND OTHER RELIEF

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Petitioner Djamel Ameziane, by and through his undersigned counsel, respectfully submits this reply in further support of his motion for an order of release and other relief.

Preliminary Statement

At the August 14th hearing, the Court ordered the government to file a factual and legal response to Mr. Ameziane's motion. The Court said it was not satisfied with the government's platitudes and vague representations about efforts to transfer Mr. Ameziane, and instructed the government to provide [redacted] more facts about efforts to repatriate or resettle him. The Court specifically directed the government to address efforts since [redacted] the injunction barring Mr. Ameziane's forcible transfer to Algeria expired, and provide more than generalities about [redacted] The Court wanted to know what the government means when it says that [redacted] whether it will actually attempt to transfer him [redacted] whether [redacted] whether there are other obstacles to his transfer; and when he will be transferred. In addition, the Court cautioned that the government's factual response would have some bearing on whether it had acted in good faith or misled the Court about efforts to transfer Mr. Ameziane, particularly given that it blocked his resettlement [redacted] – a fact the government does not dispute.

The government has failed to comply with the Court's order. Apparently ignoring the Court's instructions to move forward rather than look backward, the government's brief largely rehashes the procedural history of this case and recycles complaints about the injunction that barred Mr. Ameziane's transfer to Algeria several years ago. The government also repeats the same non-specific assertions about its focus, desire and intention to transfer Mr. Ameziane that it

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has made since at least 2009, and laments the NDAA transfer restrictions but provides no evidence that it has attempted to use the certification and waiver mechanism to transfer him.

The opposition is supported by [redacted] useful only to confirm that the government has no idea when or where Mr. Ameziane will be transferred. *Id.*; Gvt. Br. at 12.

The Court should therefore proceed on the factual record as it exists now concerning the government's transfer efforts, and draw from that record the only reasonable conclusion – that the government has not made any meaningful efforts to transfer Mr. Ameziane since this case was stayed in 2009, and that he will not be released in the near future absent a court order. There is simply no basis to conclude that the government will do what it promised to do on its own more than four years ago – release him. Accordingly, the Court should exercise its statutory and equitable habeas authority to grant his habeas petition and order his release without further delay. Alternatively, the Court should enter an order declaring that he falls within the court-order exception to the transfer restrictions set forth in NDAA § 1028(a)(2), which would have the

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practical effect of eliminating a significant obstacle to his transfer, and/or should order the government to show cause why it should not be held in contempt for failing to transfer him if he is not released within thirty of the Court's ruling on this motion.

Argument

As set forth in Mr. Ameziane's motion for release, the Court is confronted with a situation unique to the particular facts and circumstances of this case. The question to be decided by the Court is not *whether* Mr. Ameziane should be released from Guantánamo, or *where* he should be sent, but whether the Court should enter an order to effectuate the result desired by all parties. The government has exercised its discretion to release Mr. Ameziane and affirmatively disclaimed any need or desire to continue to detain him. Indeed, the government's opposition does not dispute its longstanding determination that there are no "military rationales" for his continued detention; his detention is "no longer at issue"; "the only issue truly remaining is the country to which [he] should be sent"; and "steps are [being] taken to arrange for the end of such custody." Mot. to Stay (filed Dec. 17, 2008). Those matters are conclusively resolved; whatever the case may have been when Mr. Ameziane was sent to Guantánamo more than a decade ago, no one contends that his detention continues to serve any ostensible purpose (*e.g.*, to prevent return to the battlefield). The problem is that for more than four years the government has failed to execute its discretion to release him. The government told the Court that it would transfer him; the Court relied on that representation to stay his habeas case; and the government has failed to do what it said it would do without a court order. Mr. Ameziane's detention is indefinite, arbitrary and perpetual by any measure, and will remain so absent a court order. The government's contention that the Court lacks jurisdiction to remedy this miscarriage of justice is meritless and should be rejected for the following reasons.

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I. The Government Does Not Respond to Mr. Ameziane's Request for an Order Declaring that He Falls Within the Court-Order Exception of NDAA § 1028(a)(2)

In his motion for release, Mr. Ameziane argues that the Court should issue an order declaring that he falls within the court-order exception of NDAA § 1028(a)(2), and thus shall not be subject to the transfer restrictions of NDAA § 1028(b), which form of order would have the practical effect of removing a significant obstacle to his transfer. The government admits that its failure to transfer Mr. Ameziane has been due in part to the transfer restrictions, *see* Gvt. Br. at 23; [redacted] and does not dispute that placing him within the court-order exception would hasten his transfer. But the government claims that the NDAA does not create any new authority for the Court to "enter an order of release." Gvt. Br. at 31-33. It contends that reading the NDAA to confer authority for the Court to "issue orders of release" would conflict with its AUMF detention authority. *Id.* at 32. The government misses the point entirely, and on that basis the Court should grant Mr. Ameziane's actual request for relief absent objection.

Although Mr. Ameziane surely seeks an order granting his habeas petition, *see infra* Part III, he does not seek that relief pursuant to the NDAA. He requests an order declaring that he falls within the NDAA court-order exception *in the alternative* to his request for an order of release.[1] To be clear, his NDAA argument has no bearing on the government's detention authority because it merely asks the Court to remove an obstacle that prevents the government from doing what it claims in its opposition that it has already decided to do in the exercise of its discretion – release him. It is difficult to understand why the government would not join this request, except perhaps because politically it may be afraid of upsetting members of Congress who oppose the closure of Guantánamo, or perhaps because the transfer restrictions are too

[1] *See also* Mot. for Release, [Proposed] Order #2.

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convenient an excuse for President Obama to blame Congress for his own failure to resettle Mr. Ameziane and close the prison.[2] But whatever the government's motivation may be is ultimately irrelevant because the Court plainly has lawful authority to grant the limited relief requested.

As set forth in Mr. Ameziane's motion, the plain language of the NDAA court-order exception authorizes a court to enter an order declaring that the transfer restrictions do not apply to an individual detainee based on the particular facts and circumstances of his case. There is no serious dispute that the exception encompasses more than orders granting habeas petitions. *See* Mot. for Release at 18-19 & n.7. The statute does not reference habeas petitions. It applies broadly to orders "affecting the disposition" of a detainee, which surely include but are not limited to habeas grants. Indeed, nothing about that language indicates that it is limited to orders resolving cases on their merits, or that that was Congress's intention in drafting the exception. Arguments about Congress's intentions are irrelevant as a matter of law given the plain language of the statute, *see United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989), but it would be entirely reasonable to conclude that Congress drafted the exception to allow for flexibility in circumstances where a court (rather than the Executive) concludes it is necessary to declare the transfer restrictions inapplicable to a particular detainee. *See* 28 U.S.C. § 2243.

As further indication that the statute applies to more than habeas grants, the exception references not only orders issued by a "court" but also orders issued by a "competent tribunal." What is meant by "competent tribunal" is unclear; the government contends that this refers to military commissions, although that is merely speculation because nothing in the relevant text or

[2] *See, e.g.*, *Text of President Obama's May 23 Speech on National Security*, Wash. Post, May 23, 2013 ("As president, I have tried to close GTMO. . . . before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them in the United States."), available at http://goo.gl/9fGA9X.

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legislative history refers to commissions. *See* Aug. 14, 2013 Hearing Tr. (Sealed Portion) at 26. In any event, it is a concession that the exception applies to more than habeas grants. If Congress had intended to limit the statute to habeas grants, it would have done so in clear terms. *Cf.* Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1005(e), 119 Stat. 2680, 2741-42 (attempting to strip habeas jurisdiction); Military Commission Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (same). The government's opposition does not address these points, however.

Nor does the government seriously dispute that separate and apart from the legal authority supplied by the NDAA itself, the Court may exercise its independent, equitable habeas authority to enter an order declaring that Mr. Ameziane falls within the court-order exception without actually ordering him released. The government's only response in this regard is to argue that there is no gap to be filled in the NDAA such that the Court could use its equitable habeas authority "to provide the ultimate habeas relief of an order of release." Gvt. Br. at 33 n.10. Again, an order of release is not what Mr. Amezaine seeks pursuant to the NDAA. The government also misapprehends the broad scope of the Court's equitable habeas authority, including its authority to fashion a practical remedy that may not have been applied previously but is necessary and appropriate based on the particular facts and circumstances of the case.

As set forth in Mr. Ameziane's motion, since the 17th Century courts with authority to dispose of habeas petitions have been governed by equitable principles, including the power to impose remedies that are flexible, pragmatic and designed to cut through to the heart of the matter. *See* Mot. for Release at 16-17 (citing cases). Above all, habeas ensures that "errors [are] corrected and 'justice should be done' . . . even where law ha[s] not previously provided the means to do so. . . . There was and is another word for this vast authority to do justice, even in

the absence of previously existing rules or remedies: equity." Paul D. Halliday, *Habeas Corpus: From England to Empire* 87 (2010); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (habeas courts not constrained by black-letter rules from providing greater protection in cases of non-criminal detention). Equity is a concept "associated with the provision of mercy [and] attention to the specifics of every case." Halliday, *supra*, at 89-90. "The key to making judgments about infinitely variable circumstances [is] the consideration of details about why, when, how and by whom people [are] imprisoned." *Id.* at 102. The point is that habeas is an adaptable remedy, the application and scope of which change depending on the totality of facts and circumstances of a case. *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). This makes sense in the separation of powers context, too, of course, because judicial power must include authority to impose a remedy disposing of a matter as law and justice require.

The law is equally clear that courts have habeas authority to enter any form of order, including declaratory relief, where, as here, the requested relief directly compels or indirectly "affects" or hastens the petitioner's release from custody. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release."); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (emphasizing that habeas statute "does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *see also, e.g., Edwards v. Balisok*, 520 U.S. 641 (1997) (after determining that true nature of relief sought is speedier release from imprisonment, Court assumes that habeas court had authority to adjudicate claim); *Brownwell v. Tom We Shung*, 352 U.S. 180, 181 (1956) (non-citizen may test legality of inadmissibility determination in declaratory judgment action or through habeas

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corpus); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 809 (D.C. Cir. 1988) (holding that habeas is available for petitioner challenging parole eligibility even though he is "not laying claim to immediate release or release in the near future"); *Bourke v. Hawk-Sawyer*, 269 F.3d 1072, 1074 (D.C. Cir. 2001) (holding that habeas is appropriate remedy for petitioner seeking to challenge his eligibility for a sentence reduction); *cf. Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013) (suggesting that habeas may not be available for claims that have only a "probabilistic" impact on custody). *See generally* Halliday, *supra*, at 101 (common law habeas judgments "did not just happen; they were made. Judges, not rules, made them. . . . By negotiating settlements, by constraining – sometimes undermining – the statutes or customs on which other magistrates acted, and by chastising those who wrongfully detained others, the justices defined what counted as jurisdiction and what counted as liberties."). Here, again, the government does not dispute that an order declaring that Mr. Ameziane falls within the NDAA exception would hasten his release.

In addition, the Supreme Court has held repeatedly that statutes will not be construed to displace courts' traditional, equitable habeas authority absent the clearest command. *See* Mot. for Release at 16 (citing *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (citing cases)). Here, of course, the NDAA does not purport to displace the Court's traditional habeas authority, and no court including the D.C. Circuit has held otherwise.[3] To the contrary, the language of the court-order exception ("affecting the disposition" of a detainee) closely tracks the language of 28 U.S.C. § 2243, which recognizes a court's equitable authority to "dispose of [a] matter as law and justice require."

[3] The D.C. Circuit would not likely have occasion to address this Court's authority to declare that Mr. Ameziane or any other detainee falls within the exception to the transfer restrictions because such an order would not constitute a final judgment or otherwise present an appealable issue.

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Finally, the government offers no serious response to Mr. Ameziane's argument that the Court must read the NDAA court-order exception broadly to avoid serious constitutional issues that would otherwise arise. *See* Mot. for Release at 19-20. The government does not dispute this well-established canon of statutory construction, but merely points out that Mr. Ameziane has not identified in his motion the constitutional violations that might arise from a narrower reading of the NDAA. Indeed, Mr. Ameziane did not enumerate the violations because they are plainly obvious. For example, as in *Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001), and *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (involving non-citizens outside the United States), a statute causing indefinite detention without any reasonable limitation would raise serious due process concerns. In addition, if the Court were to conclude that it lacked jurisdiction to declare the NDAA transfer restrictions inapplicable to Mr. Ameziane, those restrictions would be facially unconstitutional because they would interfere with the Executive's commander-in-chief power to transfer detainees in military custody. *See* Mem. of Law in Supp. of Pet'r's Mot. for Partial Summ. J. on the First Claim of Pet'r's Am. Pet. for Writ of Habeas Corpus at 10-21, *Ajam v. Obama*, No. 09-cv-745 (RCL) (D.D.C. filed Aug. 16, 2013) (attached hereto as Ex. A); *see also* Statement by the President on H.R. 4310 (Jan. 2, 2013) (NDAA transfer restrictions "hinder[ ] the Executive's ability to carry out its military, national security, and foreign relations activities"), available at http://goo.gl/TR6tjt.

To be clear, although the Court does not need to reach the constitutionality of the NDAA transfer restrictions, Mr. Ameziane adopts the *Ajam* arguments in the alternative, and contends that the Court should decide the constitutionality of the transfer restrictions if it concludes that it lacks authority to declare those restrictions inapplicable to him.

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II. The Government Should Be Judicially Estopped from Changing Its Litigation Position to Argue that Mr. Ameziane's Only Remedy Is to Litigate a Full Habeas Hearing to Obtain an Order of Release

The government opposes Mr. Ameziane's request for an order to show cause why it should not be held in contempt on the grounds that it has not violated any clear order or misled the Court about its efforts to transfer Mr. Ameziane, and has otherwise undertaken meaningful efforts to transfer him. Little more needs to be said here about the government's transfer efforts. It was not Mr. Ameziane's contention that the government lied to or intentionally misled the Court – although as the Court itself has noted the government's factual response bears on those issues.[4] Rather, the point is simply that the government has not done what it said it would do four years ago, causing substantial harm to Mr. Ameziane, and the Court must issue an order to show cause to preserve the integrity of the judicial process and ensure effectiveness of the Great Writ if he is not released within thirty days of the Court's ruling on this motion.

Although the government affirms its commitment to transferring Mr. Ameziane, it concedes that it still has no idea when or where he will actually be transferred. It also contends that an order to show cause is not necessary to vindicate the Court's authority for two reasons. First, the government attempts to exculpate itself from its failure to transfer Mr. Ameziane by blaming the Court, Mr. Ameziane, and Congress -- everyone but itself – for the horrible situation that now exists. Second, the government argues that if Mr. Ameziane is not content to remain at Guantánamo until some undetermined point in the future his only remedy is to move to lift the stay and conduct a full habeas hearing to determine whether he is "part of" the Taliban, Al Qaeda

[4] A finding of bad faith is not required for contempt. *See, e.g., Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.D.C. 1999) ("In this circuit, a finding of bad faith by the contemnor is not required.").

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or associated forces based on alleged events that occurred 15 or 20 years ago. *See* Gvt. Br. at 18-24. But the government is wrong on the facts and the law.

The government contends throughout its opposition brief that it bears no responsibility for the indefinite stay of Mr. Ameziane's habeas case because the Court entered the stay order *sua sponte*. But the fact of the matter is that the government took an unambiguous position in 2008 and 2009 that a habeas hearing was unnecessary because there was no practical distinction between a transfer based on a detainee's Task Force clearance and the relief that he would have obtained with a habeas grant, and convinced the Court to stay Mr. Ameziane's habeas case on that basis. The record in this case is clear.[5] The government advocated for the stay in this case on the ground that "[c]onducting merits proceedings where the United States is seeking to end its custody of Petitioner is not appropriate, where, at the end of the day, even if Petitioner prevails, the parties will be in a similar situation as they are in now, with Respondents seeking to transfer Petitioner out of U.S. custody."[6] The government took the same position in 2009 with respect to

[5] *See, e.g.*, Mot. to Stay (filed Dec. 17, 2008); Mot. for Release at 5, 12-13 (citing record); July 7, 2009 Hearing Tr. at 25-26 ("He gave up his habeas, not voluntarily but because [the government] wanted a stay, and [the Court] agreed that it ought to be stayed because it's a waste of everyone's time. But for him to give that [right] up and be in a worse position than somebody who exercises their habeas rights, [the government] can't have it both ways. It's just not fair."); *see also* Opening Br. for Appellants at 39, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Aug. 6, 2009) (notice of Task Force clearance provided to allow court to stay habeas case pending transfer).

[6] Resp'ts' Reply in Supp. of Mot. to Confirm Designation and Opp'n to Pet'r's Mot. to Unseal or, in the Alternative, for Hr'g to Address Whether to Lift the Stay at 8 (filed June 24, 2009); *see also* Gvt. Br. at 6.

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other cleared Algerian detainees.[7] Indeed, throughout much of 2009 the government went so far as to argue to the Judges of this Court that they lacked jurisdiction to proceed with habeas cases involving detainees who had been approved for transfer by the Task Force because D.C. Circuit and Supreme Court precedent barred them from granting relief beyond that which the government had already determined in the exercise of its discretion to provide – its best efforts to transfer a detainee from Guantánamo.[8]

The record is equally clear that Mr. Ameziane opposed the indefinite stay of this case. As the government notes he filed a motion to unseal his Task Force clearance or lift the stay, arguing among other things that he should not be required to "sit and do nothing" while waiting for the government to transfer him at some undetermined point in the future.[9] As addressed above, the Court also recognized the inherent risk of requiring Mr. Ameziane to give up his habeas rights and end up in a worse position than if he had litigated his habeas case. In addition, the government was well-aware of Mr. Ameziane's objections. The parties litigated this case

[7] *See, e.g.*, Resp'ts' Mot. for Stay of Proceedings and Continuance of Briefing Schedule as Pet'r Has Been Cleared for Transfer by the Gvt., *Naji v. Obama*, No. 05-cv-2386 (RBW) (D.D.C. filed May 20, 2009) ("Respondents should not be forced to litigate the merits of this case when they are presently seeking to relinquish Petitioner from custody.") (attached hereto as Ex. B); J. Status Report, *Mohammed v. Obama*, No. 05-cv-1347 (GK) (D.D.C. filed July 13, 2009) (attached hereto as Ex. C); Resp'ts' Mot. to Reconsider Stay of Proceedings, *Mohammed v. Obama*, No. 05-cv-1347 (GK) (D.D.C. filed July 20, 2009) (attached hereto as Ex. D) (arguing courts can order no more relief than government's best efforts to transfer detainee).

[8] *See, e.g., id.*; Resp'ts' Mem. in Supp. of Stay of Proceedings Involving Pt'rs Who Were Previously Approved for Transfer at 1, *Sanani v. Obama*, No. 05-cv-2386 (RBW) (D.D.C. filed in multiple cases Mar. 9, 2009) (arguing that "cases involving certain petitioners who were previously approved for transfer by the Government are non-justiciable after *Kiyemba*") (attached hereto as Ex. E).

[9] The government points out that Mr. Ameziane had no desire to litigate unnecessarily and was generally amenable to a stay. *See* Gvt. Br. at 20. That is true, and he still has no desire to litigate any issue unnecessarily, but it does not change the fact that he objected to the stay because in 2009, as now, the government could provide no actual evidence that he would be transferred.

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through the D.C. Circuit on the question of whether Mr. Ameziane could publicly disclose his approval for transfer specifically in circumstances where his habeas case had been stayed over his objections.[10] The government never questioned whether Mr. Ameziane had objected sufficiently to the stay – until now, when its longstanding position regarding stays of habeas cases involving cleared detainees no longer serves the exigencies of its current litigation position.

The government should therefore be judicially estopped from taking a fundamentally inconsistent legal position from the one it prevailed on more than four years ago to stop this case. The government represented to Your Honor and the other Judges of this Court that Task Force-cleared detainees including Mr. Ameziane would receive the same relief as a result of the government's discretionary decision to approve them for transfer as they would from orders granting their habeas petitions. The government said that an order of release was not needed, and, further, would be outside the Court's jurisdiction, and it prevailed on that claim and obtained stays of many detainee cases. Some of those detainees have since been released, but Mr. Ameziane remains in Guantánamo without foreseeable end because the government has not executed its discretion to release him without a court order.

The simple fact of the matter is that regardless of its motive, the government has failed for years to abide by its commitment to transfer Mr. Ameziane without a court order mandating

[10] *See* Opening Br. for Appellee at 27, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Aug. 27, 2009) ("There is no serious dispute that Ameziane's approval for transfer is inextricably intertwined with the merits of his habeas petition. This habeas case has been stayed and administratively closed at the request of the government, over Ameziane's objections, based on his approval for transfer by the Task Force."); Corrected Reply Br. of Appellants at 4, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. filed Sept. 11, 2009) ("Petitioner has argued that he is harmed because he is unable to litigate his habeas case.").

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his release.[11] This has had inescapable consequences for Mr. Ameziane, causing him substantial unfair prejudice, and should likewise bind the government to its prior position.[12] It would undermine the integrity of these proceedings and ultimately the effectiveness of the Great Writ to allow the government to escape legal positions that it prevailed on more than four years earlier to avoid a habeas hearing because they are no longer convenient. Indeed, it would sanction what the Supreme Court clearly held in *Boumediene* was impermissible – further inordinate delay. Moreover, by arguing that Mr. Ameziane could have moved to lift the stay again at any point in time if he was unsatisfied with the government's failure to transfer him, the government rather disingenuously attempts to place the burden of delay squarely his shoulders, contrary to the Supreme Court's mandate that detainees shall not bear such costs. *See Boumediene v. Bush*, 553 U.S. 723, 783, 795 (2008) (holding that "the costs of delay can no longer be borne by those who are held in custody," "[t]he detainees in these cases are entitled to a prompt habeas corpus

[11] The government argues in part that its failure to transfer Mr. Ameziane should be excused because it could not have anticipated enactment of the NDAA transfer restrictions. Gvt. Br. at 18-19, 22-23. While it may be true that the restrictions were unexpected, that does not explain the government's efforts to block his resettlement [redacted] prior to enactment of the transfer restrictions, or the government's failure to attempt to certify or waive him for transfer to any country pursuant to the NDAA since its enactment.

[12] The government's claim that judicial estoppel is inappropriate because the stay does not involve a substantive issue, Gvt. Br. at 22, is baseless. The harm to Mr. Ameziane is substantive, not procedural. Delay means more indefinite detention, and that *itself* is the harm that Ameziane filed his habeas petition in order to remedy more than eight years ago. *See Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) ("This is a habeas corpus proceeding, and thus particularly inappropriate for any delay."). Nor is it necessary to assume that Mr. Ameziane would have prevailed at a full habeas hearing in 2009 in order to grant relief; the point is that he was denied the opportunity to try to obtain a court order, and that has caused him substantive harm that cannot be undone.

hearing," and "the writ must be effective"); *see also Harris v. Nelson*, 394 U.S. 286, 291-92 (1969) ("habeas corpus proceeding must not be allowed to founder in a 'procedural morass.'").[13]

It is no longer 2009, and Mr. Ameziane simply cannot relive the intervening years that he has suffered and lost in custody through no fault of his own. To quote this Court, it is time to move forward and unhelpful to look backward. *See* Aug. 14, 2013 Hearing Tr. (Sealed Portion) at 44. The Court should therefore exercise its discretion and order the government judicially estopped from proceeding on the basis that a full habeas hearing is necessary for Mr. Ameziane to obtain relief because it is now called by the Court to account for its failure over several years to transfer him – and worse, after blocking his resettlement [redacted].[14] And if Mr. Ameziane is still detained at Guantánamo thirty days after the Court rules on his motion for release, it should be ordered to appear and show cause why it should not be held in contempt.

III. Mr. Ameziane's Arbitrary, Indefinite Detention Violates the AUMF, *Hamdi* and the Laws of War, and D.C. Circuit Precedent Does Not Hold Otherwise

In asking the Court to grant his habeas petition, Mr. Ameziane argues that his detention is unlawful because it is arbitrary, indefinite, and perpetual. The government long ago renounced any need or desire to detain him, and his detention no longer serves any ostensible purpose (*e.g.*, to prevent return to the battlefield). Instead, he continues to be detained simply because the government has not made any meaningful efforts to execute its discretion to release him. His

[13] As explained at the August 14th hearing, throughout the stay the government continued to represent that it was working "diligently" to transfer Mr. Ameziane, and he relied on those representations, at least until receiving the government's status report that prompted his motion for release. *See, e.g.*, Letter from U.S. Dep't of State to Inter-American Comm'n on Human Rts., July 24, 2012 (attached as Exhibit A to Mot. for Status Conference (dkt. no. 302)); Jan. 19, 2012 Email from Gvt. Counsel (attached hereto as Ex. F).

[14] The government's claim that it should not be judicially estopped because its failure to transfer Mr. Ameziane touches on public policy, Gvt. Br. at 22, is also baseless. The government is no more entitled to play "fast and loose" with the Court than a private party in a situation like this that arises merely as a litigation tactic. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

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detention thus violates the AUMF's qualified force authorization and *Hamdi*'s clear holding that indefinite or perpetual detention for no purpose is unlawful; and, even if indefinite detention were authorized, the traditional law-of-war rationale has since unraveled. Mr. Ameziane further argues that the Court must construe the AUMF not to authorize his detention under these circumstances in order to avoid serious constitutional issues that would arise; and in any case the Court has broad, equitable habeas authority to order his release.

The government does not dispute most of these points in its opposition. It does not dispute that Mr. Ameziane's continued detention no longer serves any ostensible purpose such as to prevent return to the battlefield. It does not dispute its longstanding determination that there are no "military rationales" for his continued detention; his detention is "no longer at issue"; "the only issue truly remaining is the country to which [he] should be sent"; and "steps are [being] taken to arrange for the end of such custody." Mot. to Stay (filed Dec. 17, 2008). And, as addressed above, it does not seriously dispute Mr. Ameziane's constitutional avoidance argument or the scope of the Court's statutory and equitable habeas authority. The government's only response is to contend that Mr. Ameziane's threat level is irrelevant to whether he continues to be lawfully detained, and to claim that he may be held until the end of hostilities regardless of the particular facts and circumstances of his case, including, specifically, whether his ongoing detention continues to serve any ostensible purpose. The government is wrong in each respect.

The government first argues that "[t]he threat posed by Petitioner is not a matter for the Court to address as part of the Petitioner's habeas case." Gvt. Br. at 26. But Mr. Ameziane does not ask the Court to evaluate his threat level. As explained at the outset of this reply, the issues to be decided by the Court are not whether he should be released or where he should be sent, but rather whether a court order is necessary to effectuate the result that all parties seek – his release.

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Whether Mr. Ameziane poses a threat and whether he can and should be safely released have already been conclusively resolved by the government itself in the exercise of its discretion; but again, those determinations have had serious, substantive consequences in terms of the conduct of this habeas case that bind the government. Relatedly, as explained in his motion for release, Mr. Ameziane does not rely solely on his approval for transfer as a basis for habeas relief, but rather on the totality of facts and circumstances unique to his particular case, including the government's conclusion that there are no continuing "military rationales" for his detention and the stay of this case for a period of several years without meaningful efforts to transfer him.

The government's second claim that Mr. Ameziane may be detained until the end of hostilities regardless of whether his detention continues to serve any ostensible purpose should also be rejected for several reasons.

As set forth in Mr. Ameziane's motion, the AUMF authorizes the use of "necessary and appropriate force [against a narrow set of groups or individuals] in order to prevent any future acts of international terrorism against the United States." Mot. for Release at 13-14. It does not authorize unlimited force, or force not tied to the express purpose of preventing future acts of terrorism. Nor does it directly authorize detention. As the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004), the power to detain may be inferred from the right to use force under "longstanding law-of-war principles." The Court further explained that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518; *id.* at 519 (although the AUMF "does not use specific language of detention," detention "to prevent a combatant's return to the battlefield is a

fundamental incident of waging war" and thus permitted).[15] The Court concluded that detention is authorized in the "narrow circumstances" where necessary to prevent return to the battlefield, but may last "no longer than active hostilities." *Id.* at 520 (citing Third Geneva Convention art. 118). It also concluded that indefinite or perpetual detention is not authorized. *Id.* at 521; *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009); *cf. Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).[16]

Yet indefinite and perpetual detention is precisely what the government advocates for here, where, again, it has disclaimed any need or desire to detain. In support of this contention, the government cites the D.C. Circuit's decision in *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), which held that "release is only required when the fighting stops." The government also cites *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), which merely quotes the same excerpt from *Al-Bihani*. But its reliance on those cases is misplaced for several reasons.

First, the portion of *Al-Bihani* cited is no longer binding law; it is dicta, as later explained by a majority of Judges of the D.C. Circuit in *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) ("[A]s the various opinions issued in the case indicate, the panel's discussion of [the role

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

[16] As Justice Souter explained in his opinion concurring in the *Hamdi* judgment, when a court is asked to infer detention authority from a wartime resolution such as the AUMF, it must assume that Congress intended to place no greater restraint on liberty than was unmistakably indicated by the language it used, which, given the qualified "necessary and appropriate" force language of the AUMF, necessarily suggests that AUMF detention authority is equally limited. 542 U.S. at 544 (quoting *Ex Parte Endo*, 323 U.S. 283, 300 (1944)). Constitutional avoidance also requires such a reading of the AUMF, as discussed in Mr. Ameziane's motion and essentially ignored in the government's opposition. Mot. for Release at 15 (citing *Zadvydas* and *Clark*); Gvt. Br. at 29 n.9 (arguing *Zadvydas* and *Clark* are irrelevant because this is not an immigration case).

of international law-of-war principles in interpreting the AUMF] is not necessary to the disposition of the merits." (citing *Al-Bihani*, 590 F.3d at 871, 873-74)).

Second, neither *Al-Bihani* nor *Awad* involve facts or circumstances like those present here. Those cases involved detainees who the government had not affirmatively disclaimed any need or desire to continue to detain; they were not approved for transfer and the government wanted to hold them. Those detainees argued instead that they should be released because the government had failed to prove that they were too dangerous to release, which the Circuit held was not required because they were determined to be "part of" the Taliban, Al Qaeda or associated forces and thus presumed to present a continuing threat. In *Al-Bihani* specifically, the D.C. Circuit rejected the petitioner's contention that he was no longer detainable under the laws of war by remarking that this would constitute a "prelude to defeat" because the initial success of the U.S. war effort would be lost and "the victors would be commanded to constantly refresh the ranks of the fledgling [Afghanistan] democracy's most likely saboteurs." *Id.* Again, far from being a "likely saboteur," the government has said that there are no "military rationales" for Mr. Ameziane's continued detention and he should be released. As addressed in his motion for release, *see* Mot. for Release at 15-16, no decision of the D.C. Circuit has addressed the narrow question presented here – whether indefinite detention without foreseeable end is lawful in circumstances where the government has exercised its discretion and has disclaimed any need or desire to hold a detainee, convinced a court to deny the detainee a habeas hearing on the basis that it would release the detainee, and then failed over the course of several years to take any

serious action to execute its discretion and release him, thereby causing him substantial harm. This case is unique.[17]

Third, the portion of *Al-Bihani* that the government relies on merely recites the same law-of-war principle cited by the Supreme Court in *Hamdi*, *i.e.*, that detention may last "no longer than" the end of hostilities. *Compare Hamdi*, 542 U.S. at 520 (citing Third Geneva Convention art. 118), *with Al-Bihani*, 590 F.3d at 874 (citing Third Geneva Convention art. 118). In other words, the cases cite the same law-of-war authority for the uncontroversial proposition that the end of hostilities provides a presumptive end-point for wartime detentions. But nothing about that end-point suggests that the presumption may not be overcome based on the government's own discretionary actions, or that release of some detainees may not otherwise be required before the end of hostilities. Indeed, the D.C. Circuit's recent decision in *Al-Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013), expressly recognizes that there may be circumstances where a detainee who is determined by a court to be "part of" the Taliban may nonetheless be entitled to a grant of his habeas petition because his release is required by the laws of war, including the Geneva Conventions and U.S. laws or regulations incorporating the Conventions. It is simply incorrect to contend that the D.C. Circuit has authorized the continuing, indefinite detention of detainees until the last shot is fired in the so-called Global War on Terror without regard to military necessity or other intervening facts and circumstances in a particular case.

[17] The government's reliance on the Memorandum Opinion in *Alsawam v. Obama*, No. 05-cv-1244 (CKK) (D.D.C. Nov. 19, 2012), is equally misplaced. The detainee in that case, who is slated for prosecution rather than transfer, *see* Gvt. Br., Ex. 9, at 3, did not seek an order granting his habeas petition. He sought a preliminary injunction granting interim relief to speed his administrative Periodic Review Board hearing (which would determine whether he posed a continuing threat, *see* Exec. Order 13,567, § 2, 76 Fed. Reg. 13277, 13277 (Mar. 7, 2011), or a merits decision in his habeas case. It simply has no bearing on the issues here, except its citations to *Al-Bihani* and *Awad*, addressed above.

It also bears emphasis that under the laws of war a detainee must be released prior to the end of hostilities in circumstances where detention is no longer necessary to prevent return to the battlefield. In international armed conflicts, fought between nation-states and governed by the Third and Fourth Geneva Conventions,[18] "[t]he grounds for initial or continued detention have been limited to valid needs," and detention is not authorized where it no longer serves an imperative security purpose (in the case of civilians) or where a detainee is "no longer likely to take part in hostilities against the Detaining Power" (in the case of combatants). Jean-Marie Henckaerts & Louise Doswald-Beck, 1 *Customary International Humanitarian Law*, Rule 99, at 344-45 (Int'l Comm. of the Red Cross, Cambridge Univ. Press reprtg. 2009) [hereinafter Henckaerts]. Additional Protocol I to the Geneva Conventions, which the United States has signed (but not ratified), and recognizes as binding customary international law, also specifies that "[a]ny person . . . detained or interned for actions related to the armed conflict . . . shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 16 I.L.M. 1391, 1410 ("Additional

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

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Protocol I").[19]

This limit on detention is even more pronounced in non-international armed conflicts, which are waged not between nation-states but with armed groups resulting a threshold of violence that exceeds mere "internal disturbances and tensions" such as riots or sporadic violence, and which are not subject to the extensive regulations of the Third and Fourth Geneva Conventions. Non-international armed conflicts, including the conflict with Al Qaeda,[20] are instead governed by Common Article 3 of the Conventions, which sets forth a minimum baseline of human rights protections, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006), and Additional Protocol II of the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 16. I.L.M. 1442 ("Additional Protocol II"). In non-international armed conflicts, "the need for a valid reason for the deprivation of liberty concerns both the initial reason for such deprivation and the continuation of such deprivation." Henckaerts, *supra*, Rule 99, at 348; *id.*, Rule 128(C), at 451 ("Persons deprived of their liberty in

[19] The government concedes that it is legally bound by Article 75 of Additional Protocol I. *See* Fact Sheet: New Actions on Guantánamo and Detainee Policy, The White House, Mar. 7, 2011, available at http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. The government has also taken the position that international law-of-war principles limit its AUMF detention authority: "Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict." Resp'ts' Mem. Regarding the Gvt's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In Re Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (dkt. no. 1689) (citing Geneva Conventions).

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

relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.'").[21]

In the domestic context, too, of course, non-criminal detention violates due process where the purpose of detention is no longer served. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (upholding statute requiring civil confinement for sex offenders in part because it provided for immediate release once an individual no longer posed a threat to others); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (ordering petitioner's release from commitment to mental institution because there was no longer any evidence of mental illness); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (even if civil commitment was founded upon a constitutionally adequate basis, it "[cannot] constitutionally continue after that basis no longer existed"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (state may no longer hold an incompetent criminal defendant in pretrial civil confinement when probability that defendant might regain capacity to stand trial becomes remote because "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

International human rights law likewise further supports the rule that continued detention that no longer serves its ostensible purpose is arbitrary and unlawful. *See* International Covenant on Civil and Political Rights art. 9.1, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S.

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

171 (*entered into force* Mar. 23, 1976). As discussed, there can scarcely be a clearer case of arbitrary detention than one such as this in which Mr. Ameziane remains indefinitely detained for lack of meaningful efforts to try to release him, and because of efforts to block him from transfer opportunities that he has generated himself, but not because anyone thinks he should continue to be detained.

Finally, the Court should conclude that the government's proffered "until-hostilities-end" rationale for continuing detention has eroded in the particular context of this case, and use its equitable habeas authority, construed in conjunction with principles of constitutional avoidance, to grant Mr. Ameziane's petition and order his release. *See* Mot. for Release at 14-15, 16-17. The government's response to this argument is simply to point out that fighting continues in Afghanistan, and that the *Hamdi* plurality endorsed ongoing detention in 2004 because active combat continued there at that time. *See* 542 U.S. 507, 521 (2004). But again, Mr. Ameziane's point is not that "the war is over" and the fighting has ended, but rather that the practical circumstances of the conflict are at this point, and in his case particularly, so entirely unlike those that have informed the development of the traditional laws of war that any authority to detain for the duration of the relevant conflict has unraveled. *See id.* ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

This point is clear in several respects: First, the ongoing fight against terrorism is now the longest military conflict in U.S. history, bar none.[22] "[T]his conflict has come to feel like a

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

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Forever War: it has changed the nature of our foreign policy and consumed our new Millennium. It has made it hard to remember what the world was like before September 11." Harold H. Koh, Legal Adviser (2009-2013), U.S. Dep't of State, *How to End the Forever War?*, Speech Before the Oxford Union, May 7, 2013.[23] Second, Osama Bin Laden and Al Qaeda's core leadership are dead, imprisoned or detained, and the United States is drawing down troops from Afghanistan.[24] Third, the fighting that does continue globally largely involves Al Qaeda-inspired "franchise" groups that likely did not exist or no one had heard of (including Mr. Ameziane) at

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

[24] *See, e.g.*, *Text of President Obama's May 23 Speech on National Security*, Wash. Post, May 23, 2013, *supra* note 2 ("Today, Osama bin Laden is dead, and so are many of his top lieutenants. There have been no large-scale attacks on the United States, and our homeland is more secure. . . . Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. . . . They have not carried out a successful attack on our homeland since 9/11. "); Remarks by the President in the State of the Union Address, Feb. 12, 2013 (announcing withdrawal of 34,000 U.S. troops from Afghanistan over the next twelve months, and stating "the organization that attacked us on 9/11 is a shadow of its former self," and "by the end of next year, our war in Afghanistan will be over"), available at http://www.whitehouse.gov/ the-press-office/2013/02/12/remarks-president-state-union-address; Scott Wilson & David Nakamura, *Obama Announces Reduced U.S. Role in Afghanistan Starting This Spring*, Wash. Post, Jan. 11, 2013 (President Obama: "We achieved our central goal, or have come very close to achieving our central goal, which is to de-capacitate al-Qaeda, to dismantle them, to make sure that they can't attack us again."); Leon E. Panetta, Sec'y of Def., *The Fight Against Al Qaeda: Today and Tomorrow*, Speech at The Center for a New American Security, Nov. 20, 2012 ("Over the last few years, al-Qaeda's leadership, their ranks have been decimated. . . . As a result of prolonged military and intelligence operations, al-Qaeda has been significantly weakened in Afghanistan, and Pakistan. Its most effective leaders are gone. Its command, and control have been degraded, and its safe haven is shrinking. Al-Qaeda's ability to carry out a large scale attack on the United States, has been seriously impacted. And as a result, America is safer from a 9/11 type attack."), available at http://www.defense.gov/speeches/speech.aspx?speechid=1737; *see also* Mark Mazzetti & Matthew Rosenberg, *U.S. Considers Faster Pullout in Afghanistan*, N.Y. Times, July 8, 2013; Inaugural Address by President Barack Obama, Jan. 21, 2013 ("A decade of war is now ending."), available at http://goo.gl/8JFl4V.

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the time that he was brought to Guantánamo more than a decade ago.[25] However, the problem is one of definition. "[A]s long as there are bands of violent Islamic radicals anywhere in the world who find it attractive to call themselves Al Qaeda, a formal state of war may exist between Al Qaeda and America. The Hundred Years War could seem a brief skirmish in comparison."[26] And the government, for its part, offers no indication that it intends to release Mr. Ameziane or the other Guantánamo detainees when the last U.S. combat soldier leaves Afghanistan in 2014.[27] It simply cannot be that Mr. Ameziane's ongoing, indefinite detention – potentially for life – has any analogue or precedent under the traditional laws of war. We are certainly aware of none.

Conclusion

Mr. Ameziane has been detained for too long, and for no good reason. The Court should grant his motion and ensure that justice is done.

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

[26] *Id.*; *see also* Koh, *supra*. ("[I]f we are too loose in who we consider to be 'part of' or 'associated with' Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever.").

[27] It contends that continuing detention is authorized based on *Hussain v. Obama*, 718 F.3d 964 (2013), but the detainee in that case raised none of these issues.

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Date: New York, New York
September 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2013, I caused the foregoing Reply in Further Support of Motion for Order of Release and Other Relief, with attachments, to be filed with the Court under seal and served on counsel listed below via overnight mail. I also emailed the filing to counsel listed below on this date.

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