IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, et al. *Petitioners*, v. GEORGE WALKER BUSH, et al. *Respondents*.	Civil Action No. 04-cv-1166 (RJL) **ORAL ARGUMENT REQUESTED**

PETITIONERS' MEMORANDUM REGARDING THE DEFINITION OF "ENEMY COMBATANT"

Petitioners hereby submit this memorandum regarding the definition of "enemy combatant" pursuant to the Court's order of October 8, 2008.

INTRODUCTION

As the Supreme Court stated, this habeas case turns on "whether the AUMF authorizes" Petitioners' indefinite detention as "enemy combatants." *Boumediene v. Bush*, 128 S. Ct. 2229, 2271-2272 (2008). The AUMF—Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)—contains no express authorization for military detention; any such authority must be inferred from the authorization to use "force." The plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), set forth the principles by which any such inference must be guided. The plurality concluded that military detention of "enemy combatants"—a category the Government had then limited to persons actually engaging in hostilities against the United States in Afghanistan as part of the Taliban—was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized." *Id.* at 518 (quoting AUMF § 2(a)). Critically, the Court rested its conclusion on "longstanding law-of-war principles." *Id.* at 521; *see also id.* at 518 (military detention of enemy soldiers was recognized by "'universal agreement and practice'" (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942))).

As *Hamdi* reflects, the power to detain "combatants" inferred from the AUMF's authorization of "force" goes no further than the situations in which the laws of war themselves authorize military "force" (including military detention). *See, e.g.*, AUMF § 2(a) (authorizing only such force as is "necessary *and appropriate*" (emphasis added)); Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2094 (2005) ("Since the international laws of war can inform the powers that Congress implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.").

The term "combatant" has an established meaning in the law of armed conflict. It refers to a person whom the military may lawfully kill or capture and, if captured, detain for the duration of hostilities. The law of armed conflict treats two categories of people as "combatants": (1) members of a State armed force that is engaged in hostilities (a category not implicated in this case), and (2) civilians directly participating in hostilities as part of an organized armed force. Neither the AUMF nor Article II of the Constitution authorizes the President to order the use of military force—whether in the form of deliberate targeting or indefinite military detention—against persons who are not "combatants" on the enemy side (or "enemy combatants") under the law of armed conflict. The definition of "enemy combatant" proffered by the United States here is inconsistent not only with precedent and authority but also with the very purpose for which the term is defined in the laws of war. None of the Petitioners is an enemy combatant.

ARGUMENT

A. An "Enemy Combatant" Is Either (1) A Member Of A State Military That Is Engaged In Hostilities Against The United States Or (2) A Civilian Directly Participating In Hostilities Against The United States As Part Of An Organized Armed Force

The well-established definition of "combatant" includes two categories of persons. The first consists of persons who are members of a State military that is engaged in hostilities against the United States. Individuals in this category are presumed to be enemy combatants whether or not they are individually taking up arms. Traverse Exhibit ("Trav. Ex.") 18 ¶ 6.c-d (Solis Decl.); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316 (Third Geneva Convention) (defining "prisoners of war" as "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces"); Protocol Additional to the Geneva Conventions of 12

August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 (Additional Protocol I) (defining "combatants" as "[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel). None of the Petitioners could possibly fit this category, and the Government does not allege otherwise.

The second category consists of civilians who give up the protections of civilian status by participating directly in hostilities as part of an organized armed force and thus personally threaten United States or allied forces. *See, e.g.*, Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 11.3 (1995) (U.S. Navy Handbook) ("Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked."). Such persons may be lawful targets of military force, including killing or, if captured, military detention consistent with the laws of war. *See* Trav. Ex. 18 ¶ 6.c (Solis Decl.) (citing U.S. Army General Orders Number 100 of 1863, commonly known as the Lieber Code).

U.S. military doctrine and practice are clear, however, that civilians who do not directly participate in hostilities cannot be treated as "combatants." As stated by Gary D. Solis, former Marine armor officer, judge advocate, and director of the law of war program at West Point, "[a]bsent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant." Trav. Ex. 18 ¶ 6.f (Solis Decl.). U.S. military publications, treaties, and authoritative commentary confirm this established rule. *See, e.g.*, U.S. Air Force Pamphlet 110-31, § 5-3(a)(l)(c), at 5-8 (Nov. 19, 1976) ("Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities."); *see also* Third Geneva Convention art. 3(1) (prohibiting attacks on civilians "taking no active

part in the hostilities"); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 13(2)-(3), 1125 U.N.T.S. 609, 615 (Additional Protocol II) (civilian population "shall not be the object of attack" "unless and for such time as they take a direct part in hostilities"); 1 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* 19-20 (2005) (noting that State practice "establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts"); Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113-2114 (2005) ("The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities.").

The "direct participation in hostilities" standard is a critical distinction in the law of armed conflict, as it determines which people may be treated as "combatants" and which may not. The consequences of that determination are important: "combatants" may be deliberately targeted with deadly force, whereas civilians taking no part in hostilities may not. Combatants may also be imprisoned by the opposing military in order to prevent their return to the battlefield. *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The purpose of detention is to prevent individuals from returning to the field of battle and taking up arms once again."). The same is not true of civilians who never "[took] up arms" on a "field of battle." Such persons may, of course, be charged with crimes for conduct that does not amount to direct participation in hostilities. *See, e.g.*, 18 U.S.C. §§ 2339A (criminalizing material support for terrorist acts), 2339B (criminalizing material support to a foreign terrorist organization), 2339C (criminalizing financing of terrorist acts); *cf.* 1 Henckaerts & Doswald-Beck 23 (law of armed conflict "does not prohibit States from adopting legislation that makes it a punishable offence for anyone to

participate in hostilities, whether directly or indirectly.").[1] But they may not be targets of military force (including detention for the duration of the conflict) if they have not given up the protections of civilian status by direct engagement in armed conflict. *See* Trav. Ex. 18 ¶ 6.f (Solis Decl.).

As with any legal standard, "direct participation" in hostilities is not entirely free from ambiguity, but State interpretation and practice have made clear that the "direct participation" standard is a narrow one requiring far more than mere "support" of an enemy. Thus civilians who are doing paperwork for an enemy force, manufacturing supplies, growing victory gardens, shouting encouragement, or personally planning to join the fray at some time in the future are not "enemy combatants." *See* Trav. Ex. 18 ¶ 6.g (Solis Decl.). The U.S. military (and the militaries of other nations) may not lawfully target such persons for killing, capture, or military detention; they must be dealt with, if at all, under ordinary civil or criminal processes. *See, e.g.*, *Public Comm. Against Torture in Isr. v. Israel*, 46 I.L.M. 375, 391-392 (Isr. S. Ct. 2007) (stating that a civilian who "*generally* supports the hostilities against the army," who "sells food or medicine to an unlawful combatant," or who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid" is not directly participating in hostilities (emphasis added)).[2]

However, if a civilian takes up arms or takes part in an armed conflict in a way that has a direct causal relationship to harm done to the enemy, the civilian becomes targetable. *See, e.g.*, Message from the President Transmitting Two Optional Protocols to the Convention on the

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[1] Petitioners were subject to such a system under the criminal law of Bosnia, where authorities arrested them, investigated them, ordered them released, and subsequently terminated the investigation. *See* Pet'rs Public Traverse 12-20 (filed Oct. 17, 2008).

[2] It bears mention that the war against al Qaeda, though new and unconventional to the United States, bears many similarities to the armed conflict that the State of Israel has been engaged in for decades against a variety of armed groups and terrorist organizations.

Rights of the Child, S. Treaty Doc. No. 106-37 (2000), *available at* 2000 WL 33366017, at *3 (S. Treaty Doc. No. 106-37) (The United States "understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy."); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* at 516 (Sandoz et al. eds. 1987) ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."); *Public Comm. Against Torture,* 46 I.L.M. at 391 (concluding that a "*civilian bearing arms* (openly or concealed) who is on his way to the place *where he will use them against the army*, at such place, or on his way back from it" satisfies the direct participation standard and may be a lawful target of military force (emphasis added)); Trav. Ex. 18 ¶ 6.g (Solis Decl.).

Law of war authorities and military practice also identify characteristics of "direct participation" that are especially relevant here. First, a civilian is not converted into an enemy combatant merely by supporting an armed force in a manner only tangentially related to combat operations. *See, e.g.*, S. Treaty Doc. No. 106-37 (2000), *available at* 2000 WL 33366017, at *3 ("The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment."); Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,* 5 Chi. J. Int'l L. 511, 535 n.93 (2005) (listing "cooking" and "providing personal legal advice" among "functions that would not constitute direct participation by civilians"). Second, "[d]irect participation in hostilities" must

be *intentional* in order for a civilian to become a lawful target of force. *See, e.g.*, International Committee of the Red Cross 618 (describing direct participation as "acts which by their nature *and purpose* are *intended* to cause actual harm to the personnel and equipment of the armed forces" (emphasis added)); Schmitt, 5 Chi. J. Int'l L. at 538 ("[T]he mens rea of the civilian involved is the seminal factor in assessing whether an attack or other act against military personnel or military objects is direct participation."). Finally, a civilian may be targeted with force only when and for such time as he engages in hostilities. U.S. Air Force Pamphlet 110-31, § 5-3(a)(l)(c), at 5-8; 1 Henckaerts & Doswald-Beck 20-21.

Military personnel engaging in the use of force must, and regularly do, make judgments about whether a particular civilian is directly participating in hostilities at a given time. *See* U.S. Navy Handbook 11.3 ("Direct participation in hostilities must be judged on a case-by-ease basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time."); Trav. Ex. 18 ¶ 6.h (Solis Decl.) (describing how, in Vietnam, U.S. military officers distinguished Viet Cong combatants from the villagers who were merely supporting them and, therefore, could not be treated as combatants). The standard is accepted and applied by the United States and allied nations as the correct standard—indeed, the *only* standard—for determining whether a civilian may be treated as a "combatant" in an armed conflict, including for purposes of military detention and targeting with military force.

B. The AUMF Does Not Authorize The President To Subject To Indefinite Military Detention Civilians Who, Like Petitioners, Have Not Directly Participated In Hostilities As Part Of An Organized Armed Force

The AUMF authorizes the use of "all necessary and appropriate force" against "nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks

that occurred on September 11, 2001," and those who "harbored such organizations or persons." AUMF § 2(a), Pub. L. 107-40, 115 Stat. 224. The AUMF contains no express authorization for detention, but the *Hamdi* plurality inferred from the words "all necessary and appropriate force" an implicit authorization to detain "Taliban combatants who '*engaged in an armed conflict* against the United States." *Hamdi*, 542 U.S. at 521 (plurality opinion) (emphasis added). The inferred detention authority was very specific in extent and purpose. The *Hamdi* plurality inferred, based on "longstanding law-of-war principles" (*id.*), authority to detain a "narrow category" of persons (*id.* at 517) who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who '*engaged in an armed conflict* against the United States' there" (*id.* at 526 (quoting Respondents' Br. 3) (emphasis added)). The plurality said that the "only purpose" justifying military detention of such persons was the traditional one of preventing a "combatant" from returning to the battlefield and resuming hostile military operations. *See id.* at 518, 521 (noting that detention for intelligence gathering purposes, revenge, or punishment is not permissible). That limited authority to detain enemies is, the plurality said, an "important incident[] of war" *Id.* at 518 (internal quotation marks omitted). But the plurality also emphasized that persons are subject to detention only if they have or are "engaged in an armed conflict against the United States." *Id.* at 521.

As shown above, the AUMF's authorization of detention follows the traditional law of armed conflict, which provides both the basis for inferring a detention power and its limiting principle. *See* Bradley & Goldsmith, 118 Harv. L. Rev. at 2108 ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers."). The Government's explanation of the basis for detention specifically invokes detention of combatants under the laws of armed

conflict. *See, e.g.*, Gov't's Brief Stmts. of Legal Basis for Detention of Pet'rs (unclassified versions provided Sept. 5, 2008) (relying on *Quirin* and *Hamdi*). Accordingly, "longstanding law-of-war principles" determining whether someone may be treated as a "combatant" provide the appropriate standard in this case, as they did in *Hamdi*. 542 U.S. at 521 (plurality opinion).[3]

The very words of the AUMF make it clear that the implicit authority to detain is limited to persons who are enemy combatants in the well-established sense under the law of armed conflict. The AUMF only authorizes military force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the [September 11, attacks] or "harbored" such organizations or persons. Thus, the AUMF is tied to highly concrete actual hostilities, namely against parties and persons with a nexus to the September 11 attacks. The President is not authorized to use a military response to every other threat to the United States that the President may discern. On the contrary, when the President first requested broader authority to use force against persons unconnected with September 11 "to deter and pre-empt any future acts of terrorism or aggression against the United States," Congress refused and passed the narrower AUMF instead. Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 Harv. Int'l L.J. 71, 73 (2002). And the AUMF never uses the word

[3] Military force remains subject to the principle of proportionality, meaning that even where a civilian is directly participating in hostilities, the laws of war do not authorize killing if arrest, interrogation, and trial would accomplish the same purpose. *See, e.g.*, U.S. Air Force Pamphlet 110-31, § 1-3(a)(2) (recognizing "the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes," which includes "a specific prohibition against unnecessary suffering" and "a requirement of proportionality"); 1 Henckaerts & Doswald-Beck 46-50 (similar). Therefore, there might be cases, such as in the specific circumstances of Hamdi's detention itself (*see* 542 U.S. at 513 (Hamdi detained when he "'surrender[ed] his Kalishnikov assault rifle'" to Northern Alliance forces (quoting App. 148-149))), where the AUMF authorizes detention but not targeting with lethal force.

"support"; it speaks only of nations, organizations, or persons who (i) "aided" the terrorist attacks that occurred on September 11, a term that, especially following the words "planned," "authorized," or "committed" those attacks, plainly refers only to entities or persons who intentionally assisted the actual perpetrators, and (ii) who "harbored" the organizations or persons responsible for the attacks, a term that connotes the intentional giving of shelter to wrongdoers.

The war with al Qaeda is different in many ways from prior wars, including not least its potential duration. But those differences do not fundamentally change the meaning of the words "enemy combatant," nor do they justify killing or indefinitely imprisoning civilians for conduct falling short of direct participation in hostilities against the United States—a position that would violate the law-of-war rule that civilians may not be the subject of military force if they take no direct part in hostilities. Congress has stated no intent to deviate from the law-of-war protections for civilians, and there is no basis for this Court to do so either.

Petitioners are indisputably not citizens of a "nation" at war with the United States, nor were they personally involved in the September 11 attacks. AUMF § 2(a). Accordingly, in order for them to lawful targets of military force in the current armed conflict, they must have directly participated in hostilities as part of an "organization" that "planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001." *Id.* This Court should therefore determine whether Petitioners took a direct part in hostilities as part of an organized armed force against which the United States is engaged in armed conflict (namely, under the AUMF, an organization that has a nexus to the September 11 attacks).

Petitioners' Traverse, filed on October 17, 2008 in classified and unclassified parts, demonstrates that the Government has failed to meet this burden. No Petitioner directly

participated in hostilities against the United States, nor was any of them part of an "organization" against which the AUMF authorizes an armed conflict. Even the Government's *allegations*—assuming they had been proven, which they have not—do not establish these elements. Petitioners accordingly may not be treated as "combatants" and should be released from military detention forthwith.[4]

C. The Government's Loose Definition Of "Enemy Combatant" Conflicts With Traditional Definitions, Precedent, And The Very Purpose For Which The Term Is Defined

In its effort to justify continuation of its detention of Petitioners, which now approaches seven years, the Government offers a new definition of "enemy combatant" that has no basis in any law-of-war source or other authority. The Government's definition notably is not limited to State military personnel and civilians who directly participate in hostilities, as the laws of war provide, but turns on an undefined and unlimited concept of "support":

> 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.

[4] Moreover, the length and indefinite nature of Petitioners' detention are not authorized in any event. As the *Hamdi* plurality recognized, "the AUMF does not authorize indefinite or perpetual detention." 542 U.S. at 521. Given the practical realities of a conflict that has no end in sight, the assumption that detention may last until the conflict is entirely over "may unravel." *Id.* Petitioners were in their thirties, with wives and families, when they were first imprisoned seven years ago in Bosnia, a country 1300 miles away from the theater of conflict in Afghanistan. They are now in their late thirties to mid-forties, and as a result of their years in captivity have been physically and mentally diminished in ways that far exceed the ordinary toll taken by the passage of seven years. If anything should cause an "unraveling" of the assumption that detention may last this long, it is the Government's planned *lifelong* detention of men who have *not* directly engaged in belligerent acts against the United States.

Respondents' Resp. to Sept. 8 Order Requiring Concise Statement of Definition of "Enemy Combatant" (Sept. 10, 2008) (Dkt # 170) (emphases added). The Government provides no detail on what it believes constitutes "support," and the nature of its allegations against Petitioners suggests that the Government would include alleged financial support, indirect logistical support, moral or emotional support, or mere plans to support in the future. If that is what the Government means, its definition reaches persons well outside the established definition of "enemy combatant" and well outside the category of persons who may be militarily killed or imprisoned. Moreover, the Government apparently does not believe that even this definition marks the outer limit of its detention authority.

The Government's definition would sweep up persons who never took up "arms" (or helped anyone else to do so) and hence were never in a "field of battle," however conceived. *Hamdi*, 542 U.S. at 518 (plurality opinion). The Government's definition would appear to authorize the killing or indefinite military detention of persons remote from any hostilities who were, for example, manufacturers of nonmilitary supplies, providers of services (such as religious counselors, civilian clerical personnel, or civilian lawyers who counsel military service members), taxpayers, buyers of war bonds, persons who write or speak in favor of a hostile position, and an almost unlimited category of others who "support" military action. Additionally, the Government's definition is not bounded by the armed conflict as to which Congress authorized the use of force, namely against "nations, organizations, or persons" responsible for the September 11 attacks; instead, it extends to anyone "supporting" any kind of "hostilities."

The Government appears to embrace this extraordinarily broad position, arguing that those who support an enemy's war efforts "are no less enemy combatants than those actually on

the front lines." Gov't's Brief Stmts. of Legal Basis for Detention of Pet'rs (unclassified versions provided Sept. 5, 2008). But neither the Government nor the laws of war provide any support for such a claim—which, if accepted, would justify large-scale assaults on civilians whose work somehow promotes the war effort. *See* Bradley & Goldsmith, 118 Harv. L. Rev. at 2115 (noting that, in modern wars, the category of people who "support[] the war effort … would include everyone"). There is no justification for using military force to disable, detain, or kill civilians whose "support" does not directly affect combat operations. If the U.S. Government's arguments were to lead the world to a new law of war under which civilians—and virtually *all* civilians—could be treated as "combatants" merely because they support the war effort, then ordinary U.S. citizens will become *lawful targets* for the military force of our enemies. Such a regime would be contrary to, and directly undermine, the protection of civilians that the Geneva Conventions and the modern law of armed conflict were meant to enshrine. Trav. Ex. 18 ¶ 6.i. (Solis Decl.) (finding "no customary law of war, no law of war multinational treaty, and no case law that supports such an expansive view" of the "enemy combatant" category as the Government's).

Notably, when the Fourth Circuit recently addressed this issue *en banc*, not one of the seven separate opinions adopted a definition remotely as broad as the Government's; indeed, one judge remarked that the court had to search for "the limiting principle on enemy combatant detentions that the Government has failed to suggest." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 322 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part). Although no single definition commanded a majority of the court, each of the four opinions that addressed the proper definition of "enemy combatant" under the AUMF was careful to include some requirement of personal engagement in a hostile act against the United States on behalf of an enemy force.

Chief Judge Williams defined "enemy combatant" as an individual who "(1) … *attempts or engages in belligerent acts* against the United States, either *domestically or in a foreign combat zone*; (2) on behalf of *an enemy force*." *Al-Marri*, 534 F.3d at 285 (Williams, C.J., concurring in part and dissenting in part) (emphasis added). Judge Wilkinson wrote that, to be classified as an enemy combatant, a person must "(1) be a member of (2) *an organization or nation against whom Congress has declared war* or authorized the use of military force, and (3) *knowingly plan[] or engage[] in conduct that harms or aims to harm persons* or property for the purpose of furthering the military goals of the enemy nation or organization." *Id.* at 325 (Wilkinson, J., concurring in part and dissenting in part) (emphasis added).[5] And Judge Traxler held that the AUMF would authorize detention of civilians who "associate[d] themselves 'with al Qaeda' … and 'travel[ed] to the United States with the avowed purpose of *further prosecuting [] war* on American soil.'" *Id.* at 259 (Traxler, J., concurring in the judgment) (emphasis added).[6]

Notably, each of the opinions in *Al-Marri* rejected the Government's argument that mere "support" for or "association" with al Qaeda—let alone the non-al Qaeda organizations that figure in the Government's allegations against Petitioners—would justify treatment as a combatant. Each opinion requires something more, namely some form of individual participation in *hostilities* as part of an organized armed force against which the United States was engaged in an authorized armed conflict. The Government's definition, by contrast, would

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[5] Judge Wilkinson noted that his reading of the AUMF, though significantly narrower than the Government's, nonetheless raises "serious constitutional issues." *Al-Marri*, 534 F.3d at 296 (Wilkinson, J., concurring in part and dissenting in part).

[6] Four judges would have followed an even narrower standard limited to "a person affiliated with an enemy nation, captured on a battlefield, and engaged in armed conflict against the United States." *Al-Marri*, 534 F.3d at 242 (Motz, J., concurring in the judgment) (citing *Hamdi*, 542 U.S. at 516-519). This Court need not determine whether Judge Motz's opinion states the correct standard, for even under the *broadest* definition of "enemy combatant" articulated by any of the judges in *Al-Marri*, Petitioners could not be detained.

sweep into the "combatant" category anyone who in some way "supported" al Qaeda, even without knowledge or in a manner unrelated to combat. Gov't Resp. to September 8, 2008 Order Requiring Concise Statement of Definition of Enemy Combatant 1 (Sept. 10, 2008). Even Judge Wilkinson's definition, perhaps the most expansive, still appears very circumscribed beside the Government's proposal.

In *Al-Marri,* both the plurality and Chief Judge Williams' dissent recognized that a broad reading of the AUMF could lead to "absurd results"—including a claim that the President could indefinitely detain anyone he believed "aided" or "was associated with" any organization linked to the attacks of September 11, 2001. *Al-Marri*, 534 F.3d at 226, 286 & n.4. The D.C. Circuit was similarly skeptical in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), observing that "even under the Government's own definition, the evidence must establish a connection between [the group supported] and al Qaida or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word 'associated.'" *Id.* at 844. Here, in seeking license to detain indefinitely anyone who "support[ed]" any force "associated" with the Taliban or al Qaeda, the Government contends for just those "absurd results that Congress could not have intended." *Al-Marri*, 534 F.3d at 226. This Court, like the Fourth Circuit, should reject the Government's definition of "enemy combatant," which provides no limiting principles and has no basis in any law-of-war doctrine or state practice. Trav. Ex. 18 ¶ 6.i. (Solis Decl.) (observing that the Government's redefinition of an "enemy combatant" is unreasonably broad, impossible

for members of the Armed Forces to implement, and "too vague to comport with law of armed conflict notions").[7]

The cases cited by the Government are not to the contrary. Ironically, the Government's request that the Court abandon the "direct participation" requirement relies on two cases that involved direct participation. The *Hamdi* plurality found detention authorized because Hamdi was not only "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan," but also "*engaged in an armed conflict* against the United States' there." *Hamdi*, 542 U.S. at 516 (emphasis added). As the plurality made plain, Hamdi could be detained as an enemy combatant under the laws of war not because of "support" or "association," but because he "was carrying a weapon against American troops on a foreign battlefield." *Id.* at 522. The Government's claim that mere "support[]" or "associat[ion]" can justify detention even without direct engagement in hostilities finds no support in *Hamdi*.

The Government also misreads *Ex Parte Quirin*, 317 U.S. 1 (1942), which referred to "association" but only in the context of association with "the military arm of the *enemy government*," *i.e.* service with the military of an enemy State, such as (in *Quirin*) Nazi Germany.

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[7] The Court previously interpreted the AUMF to authorize the use of force against those who "were either responsible for the 9/11 attacks *or posed a threat of possible attacks*." *Khalid v. Bush*, 355 F. Supp. 2d 311, 319 (D.D.C. 2005) (emphasis added), *vacated*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 1229 (2008). However, the text of the AUMF authorizes force only against nations, organizations, or persons responsible for the September 11 attacks, "in order to prevent any future attacks *by such* nations, organizations, or persons." AUMF § 2(a), 115 Stat. 224, 224 (2001) (emphasis added). The Court's prior ruling also appears to have rested in part on the President's November 2001 military order (355 F. Supp. 2d at 315), on which the Government does not rely here. *See* Gov't's Brief Stmts. of Legal Basis for Detention of Pet'rs (unclassified versions provided Sept. 5, 2008). Indeed, the Government has conceded that the November 2001 military order does not apply to these Petitioners. Resp. to Pet. for Writ of Habeas Corpus and Mot. to Dismiss or for J. as a Matter of Law and Mem. in Supp. 7 n.6. (filed Oct. 4. 2004). Nor does the Government rely on the definition of "enemy combatant" put forward by the Deputy Secretary of Defense in 2004 for use in Combatant Status Review Tribunals.

Id. at 37 (emphasis added). The opinion nowhere suggested that mere "association" with a non-State organization, short of direct participation in hostilities, would suffice to turn a civilian into an enemy combatant. *Quirin* also defined an "enemy belligerent" as an individual who not only operated under the "aid, guidance, and direction" of an enemy government's military arm, but also "enter[ed] this country bent on hostile acts." *Id.* The Government claims that *Quirin* identifies "enemy belligerents" who "have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Id.* at 38. But the saboteurs were part of and acted under the direction of the German military, i.e., the armed forces of an enemy State, and therefore were clearly combatants under the laws of war. *See, e.g.*, Additional Protocol I art. 43(2) ("[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel are "combatants"); Trav. Ex. 18 ¶ 6.c. (Solis Decl.) (noting that, in the law of war, the concept of a combatant traditionally arises in the context of forces belonging to enemy States). Members of a State military engaged in armed conflict with the United States may be targeted with force at any time. Trav. Ex. 18 ¶ 6.c. (Solis Decl.) ("a combatant is a lawful target … and may be killed or wounded whenever and wherever he/she may be identified"). Civilians like Petitioners, however, can only be targeted if they take a direct part in hostilities. *Id.* ¶ 6.e. (recognizing that civilians enjoy protected status "unless and for such time as they take a direct part in hostilities"). Neither *Hamdi* nor *Quirin* supports the Government's new vision of an enemy combatant, which requires neither being part of an enemy State's armed forces nor direct participation in hostilities. Persons who do not meet either of those criteria have always fallen far outside "[t]he permissible bounds of the category." *Hamdi*, 542 U.S. at 522 n.1 (plurality opinion).

D. Article II Does Not Authorize The President To Detain Civilians Contrary To The AUMF And The Laws Of War

The Government's reliance on the President's Article II power as Commander-in-Chief of the armed forces is similarly unavailing. Neither the text nor the interpretation of the Commander-in-Chief Clause suggests that the President has a roving authority to order the indefinite military detention of any civilian in the world whom he considers a possible threat to the United States. The Framers, justifiably suspicious of Executive and military detention, chose not to give the President the power to subject individuals to military detention in a manner unauthorized by either Congress or the laws of war. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 760 (1996) ("[T]he Framers harbored a deep distrust of executive military power and military tribunals."); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law."); *see also Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II.").

The relevant presidential power is the power to command the Nation's armed forces; that plainly includes the power to target, kill, or detain opposing forces, including civilians who have chosen to participate directly in their hostile activities. But it equally plainly does not include the power to take such military actions against other civilians—civilians who have *not* directly participated in hostilities—merely because the President deems it desirable to stop their activities. *See, e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J.,

dissenting) (stating the point, undisputed by the majority, that the President "to whom the execution of the war is confided … has a discretion vested in him, as to the manner and extent; but *he cannot lawfully transcend the rules of warfare established among civilized nations*" (emphasis added)); *The Prize Cases*, 67 U.S. (2 Black) 635, 665 (1862) (noting that the issue was whether the President has "a right to institute a blockade … on the principles of international law, as known and acknowledged among civilized States"); *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873) (holding that a military commander and representative of the constitutional commander-in-chief was vested with the power to "do all that the laws of war permitted").

The Supreme Court recently appeared dubious of the Government's claim of presidential authority to detain combatants outside the context of a congressionally-authorized armed conflict. As the Court stated, the authority to detain "turns on *whether the AUMF authorizes—and the Constitution permits*—the indefinite detention of 'enemy combatants' as the Department of Defense defines that term." *Boumediene*, 128 S. Ct. at 2272 (2008). The Court's use of the word "and" indicates that, to be lawful, military detention must be *both* authorized by the AUMF *and* permitted by the Constitution; the Court did not mention any presidential power to detain that did *not* derive from the AUMF, although the Government had contended for one. While the President may react to address an immediate emergency without waiting for Congress to legislate (*see, e.g.*, *Prize Cases*, 67 U.S. (2 Black) at 669-670), there is no basis for suggesting that the Constitution would authorize continued indefinite military detention nearly seven years out.

Moreover, because Congress specifically *refused* to grant the President the authority to detain individuals who are not "combatants" under the laws of armed conflict (*see supra* p. 9),

the President's authority is at its "lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The AUMF's reference to "necessary and *appropriate* force" (AUMF § 2(a) (emphasis added)), which the *Hamdi* plurality read to incorporate longstanding law-of-war principles, shows that actions contrary to the law of war are also contrary to the express or implied will of Congress. *See id.* The "President … may not disregard limitations that Congress has, in proper exercise of its own powers, placed on [the President's] powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The President's Article II power to command the armed forces does not confer an inherent power, independent of legislative authority and even in the face of legislative disapproval, to militarize the Nation's treatment of any civilian, wherever found, regardless of whether he or she is directly engaged in hostilities.

CONCLUSION

The Court should employ the definition of "enemy combatant" established under longstanding law-of-war principles, namely to include: (1) a member of a State military that is engaged in an armed conflict against the United States, or (2) a civilian directly participating in hostilities as part of an organized armed force in an armed conflict against the United States. Only such people are on the "battlefield" and may be legitimately "removed" from it by use of military force. For the reasons stated in Petitioners' Traverse, the Government has failed to show that Petitioners fall into either category; indeed, it has not even alleged that they do. The writ of habeas corpus should be granted.

Respectfully submitted,

/s/ Allyson J. Portney

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Dated: October 20, 2008

CERTIFICATE OF SERVICE

I, Allyson J. Portney, hereby certify that on October 20, 2008, I electronically filed and served the foregoing PLAINTIFFS' MEMORANDUM REGARDING THE STANDARD FOR DETENTION OF ENEMY COMBATANTS.

/s/ Allyson Portney
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