IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID KHAN, Petitioner,	:	
v.	:	Civil Action No. 06-1690 (RBW)
BARACK OBAMA, *et al.*, Respondents.	:	

MAJID KHAN'S SUPPLEMENTAL MEMORANDUM
REGARDING THE GOVERNMENT'S DETENTION AUTHORITY

Petitioner Majid Khan, by and through his undersigned counsel, respectfully submits this supplemental memorandum addressing whether the Executive may detain him at Guantánamo Bay under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), given that the conflict between the United States and "those nations, organizations, or persons" named in the AUMF is a "non-international armed conflict." Mar. 18, 2009 Order.

PRELIMINARY STATEMENT

Majid Khan is not responsible for the September 11th attacks. He is not a member of Al Qaeda, an enemy of the United States, or a combatant of any kind. The government has properly abandoned its contention that he may be detained indefinitely at Guantánamo Bay as an "enemy combatant" – a term not recognized under international law, including the laws of war, or under U.S. law until after the September 11th attacks, when the prior presidential administration reverse-engineered that designation in order to justify its detention of prisoners held for purposes

of interrogation.[1] Indeed, Khan was a victim of that unprecedented regime. He was abducted in Karachi, Pakistan in March 2003, and forcibly disappeared by the United States despite his legal status and other substantial and voluntary ties to this country. He was imprisoned and tortured in secret CIA detention for more than three years until his transfer to Guantánamo Bay in September 2006. Khan's detention was, and continues to be, unlawful by any standard of U.S. or international law.

The government has properly abandoned its contention that the President has inherent power under Article II of the Constitution to detain Khan indefinitely at Guantánamo Bay – a contention that no court recognized or accepted. Instead, the government bases its new purported detention authority on the AUMF, which it contends is "informed by principles of the laws of war." Resp'ts' Mem. at 1. Yet in seeking to articulate its new standard, the government fundamentally misapprehends the scope of the laws of war, or what the laws of war require if they apply to Khan. The government is correct that the laws of war "have evolved primarily in the context of international armed conflicts," but it wrongly asserts that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized for the current armed conflict" against the Taliban and Al Qaeda. Resp'ts' Mem. at 1. Assuming *arguendo* that the United States is engaged in an "armed conflict" of any sort with the Taliban and Al Qaeda, that conflict is a "non-international armed conflict," which is governed by discrete law of war principles.

The government cites no authority – and we are aware of none – to support the proposition that the law of war principles governing "international armed conflicts" apply in any

[1] Around the time of World War II, the term "enemy combatant" appeared in case law only as a generic term to describe members of the armed forces of an enemy government. *See Ex Parte Quirin*, 317 U.S. 1 (1942). It was not a status or category of prisoner separate and apart from the categories of "combatant" and "civilian" recognized under the laws of war. *See infra* pp.14-15.

fashion to "non-international armed conflicts" such as the conflict with the Taliban and Al Qaeda. The government effectively concedes as much by arguing that its detention authority is "informed by" – but not required by – law of war principles applicable to international armed conflicts, and by retreating to analogy to such principles rather than citing affirmative legal authority. Resp'ts' Mem. at 1. Accordingly, it is not surprising that the government goes to great lengths to avoid any actual mention of "non-international armed conflict" in its brief, and instead argues cryptically that the body of law applicable to the "novel" conflict with the Taliban and Al Qaeda is "less well-codified" than the law of war rules applicable to international armed conflict. *Id.* The government's position is meritless.

ARGUMENT

There are no recognized law of war principles that affirmatively authorize Majid Khan's indefinite detention at Guantánamo Bay. If the Executive seeks to continue to detain him, his detention must be authorized by domestic law – the Constitution and laws of the United States, including treaties and other international law obligations binding on the United States. Neither the AUMF nor the Supreme Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942), provide the required authorization.

It is axiomatic that the laws of war only apply during times of war or "armed conflict."[2] Under the laws of war, there are two principal types of armed conflict – international and non-international – from which different rights and protections flow to persons impacted by the conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006). As set forth below, Khan is not

[2] Khan also refers to the "laws of war" as "international humanitarian law" or "IHL." The purpose of this body of law is to "limit the effects of armed conflict," so as to protect persons not participating in hostilities and limit the methods of warfare. Int'l Comm. of the Red Cross, *What Is International Humanitarian Law?* (July 2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf.

being detained incident to a war between nations, and any "armed conflict" that exists between the United States and the Taliban or Al Qaeda must be a "non-international armed conflict." Brief for *Amici Curiae* Experts in the Law of War at 4, *Al-Marri v. Spagone*, S. Ct. No. 08-368 (Jan. 28, 2009) [hereinafter Law of War Experts] (attached hereto as Exhibit A). But, contrary to the government's argument concerning the "novel" and "less well-codified" nature of the conflict with the Taliban and Al Qaeda, the parameters of what constitutes a "non-international armed conflict" are neither "infinitely malleable" nor do such conflicts lack discrete governing principles. *Id.* "The law-of-war rules governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention . . . Authorization, if any, must be found in domestic law." *Id.* (emphasis in original).

There is no authority under the AUMF or Supreme Court precedent for Khan's indefinite detention. Even if the government were authorized under the AUMF to use force against him – which he obviously does not concede – that power would not provide related authority to detain him in the context of the non-international armed conflict with the Taliban or Al Qaeda. Khan is a "civilian" under the laws of war, and the government does not contend otherwise. Assuming the military were authorized to use force against Khan while he was directly participating in hostilities,[3] the government's authority to target and kill him under the AUMF would not by definition mean that it had equivalent authority to detain him under the AUMF because civilians, unlike combatants, may not be held indefinitely until the end of hostilities. Rather, whether a conflict is international or non-international in nature, the military must turn over civilians

[3] The government concedes "direct participation in hostilities" is the recognized standard under which "civilians" lose their protections such that force may be used against them under the laws of war applicable to international armed conflicts. Resp'ts' Mem. at 8 n.3.

captured during the conflict to domestic authorities or release them. The power to use force and the power to detain are simply not the same under the laws of war.

Moreover, Khan would not be subject to indefinite detention even in the context of an international armed conflict because he is a Pakistani citizen who was captured in Pakistan in 2003, and because Pakistan and the United States are allies with ongoing diplomatic relations, which place him outside the detention authority of the Geneva Conventions.

Finally, the laws of war do not authorize the government to target or detain *anyone* it wants, *whenever* it wants, and *wherever* it wants because they are suspected of being terrorists. Armed conflicts, whether international or non-international in nature, are limited in scope and require some nexus between the relevant zone of conflict and the law of war powers being exercised. Law of War Experts at 17 (citing authority). The purpose of that limitation is clear – to maintain the clear distinction between combatants and civilians, and to carry out the most fundamental purpose of the laws of war – protection of civilian populations. The Court should reject the government's invitation to rewrite the laws of war and undermine these principles.

I. IF KHAN IS DETAINED PURSUANT TO AN ARMED CONFLICT, THAT CONFLICT IS A NON-INTERNATIONAL ARMED CONFLICT WHICH LOOKS TO DOMESTIC LAW FOR DETENTION AUTHORITY

As set forth above, there are two principal types of armed conflict – international and non-international – from which different rights and protections flow to persons impacted by the conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006).

A. International Armed Conflict and the Third and Fourth Geneva Conventions

An "international armed conflict" is defined as a conflict between two nation-states which are signatories to the Geneva Conventions leading to the intervention of forces, even if one party denies the existence of a state of war. Geneva Convention (III) Relative to the

Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316 ("Third Geneva Convention"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516 ("Fourth Geneva Convention"); Int'l Comm. of the Red Cross, *Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* at 32 (Prictet ed. 1994) [hereinafter ICRC Commentary]; Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 237 (2009) [hereinafter Rona] (attached hereto as Exhibit B). An "international armed conflict" is triggered when one state uses force against another, and it is in such conflicts that the Third and Fourth Geneva Conventions apply, including the limited power to detain combatants as an incident to international armed conflict recognized by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). ICRC Commentary at 32; Rona at 236-37; Law of War Experts at 8-10.

In particular, the extensive regulations of the Third and Fourth Geneva Conventions govern the authority of a state to detain prisoners in an international armed conflict. The Third Geneva Convention applies to "combatants," including members of a state's military that are engaged in hostilities against the United States. Individuals in this category are presumed to be combatants whether or not they have individually taken up arms. *See Hamdi*, 542 U.S. at 519 (enemy combatants include individuals who "associate themselves with the military arm of the enemy government") (citing *Quirin*, 317 U.S. at 37-38); Third Geneva Convention, art. 4(A)(1)-(2) ("prisoners of war" include, among others, "[m]embers 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").

All aspects of the detention of "combatants" are highly regulated by numerous articles of the Third Geneva Convention. Law of War Experts at 8-10. Detention is also governed by an

additional treaty known as the Additional Protocol I, which the United States has signed, but not ratified, and has recognized as having the status of binding customary international law. 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); *see* Law of War Experts at 9; Rona at 236-37 n.16.

Among other things, these authorities require that combatants in an international armed conflict must be treated humanely, and are entitled to combat immunity (*i.e.*, immunity from prosecution for engagement in belligerency) as long as they do not commit war crimes such as attacking civilians. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 227 n.11 (4th Cir.) (Motz, J., concurring) (discussing combatants and combat immunity), *cert. granted*, 129 S. Ct. 680 (2008), *judgment vacated and remanded with instructions to dismiss as moot*, 2009 U.S. LEXIS 1777 (Mar. 6, 2009). In addition, combatants in a traditional international armed conflict ordinarily may be detained until the end of hostilities, but only for the limited purpose of preventing their return to the battlefield. *Cf. Hamdi*, 542 U.S. at 520-21 (where "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," the rationale for detention until the end of hostilities may "unravel").

It is also well-established under the laws of war governing international armed conflict that anyone who is not a "combatant," or whose status as a combatant is in doubt, is considered a "civilian." Additional Protocol I, art. 50. The treatment of "civilians" in international armed conflict is governed by the Fourth Geneva Convention. A civilian who directly participates in hostilities may lose his protections against direct attack for such time as he takes a direct part in

hostilities, and thus may be targeted with lethal force. However, unlike an enemy soldier or combatant, a civilian who directly engages in hostilities *may not* be held indefinitely in military detention until the end of hostilities. Such a person may be detained without charge or trial only briefly, and only so long as that person poses a serious, imminent security risk to the detaining power. And such person must be promptly afforded an opportunity to challenge his status as an enemy soldier or his direct participation in hostilities. Fourth Geneva Convention, arts. 5, 79; Additional Protocol I, arts. 45(3), 75.

Further, a civilian who directly participates in hostilities is not lawfully entitled to do so or to claim the privilege of combat immunity, and thus may be detained and tried for crimes such as engaging in unlawful belligerency pursuant to domestic laws. *See Al-Marri*, 534 F.3d at 227 n.11, 235 (Motz, J. concurring); *see also* Rona at 240, 241.[4]

B. Non-International Armed Conflict and Common Article 3 of the Geneva Conventions

Non-international armed conflicts, by contrast, include conflicts that are not waged between nation-states but reach a threshold of violence that exceeds mere "internal disturbances and tensions" such as riots or sporadic violence. ICRC Commentary at 32; Rona at 237-38; 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(2), 16. I.L.M. 1442 ("Additional Protocol II")[5]; *see also Al-Marri*, 534 F.3d at 227-28, 235 (Motz, J., concurring). Unlike international armed conflicts, non-international armed conflicts are not subject to the

[4] The treatment of "combatants" and "civilians" under the Third and Fourth Geneva Conventions is addressed in greater detail in the memoranda concerning the "enemy combatant" standard filed by the other petitioners before this Court, which Khan incorporates herein by reference.

[5] Additional Protocol II also largely reflects binding customary international law. Rona at 236-37 n.16; *see also* Law of War Experts at 11 n.6, 12.

extensive regulations of the Third and Fourth Geneva Conventions. Law of War Experts at 10. The only provision of the Geneva Conventions which applies to non-international armed conflicts is Common Article 3 of the Third and Fourth Geneva Conventions, which makes no mention of detention power. *Id.*; *Hamdan*, 548 U.S. at 628-32.[6] Common Article 3 neither authorizes nor prohibits detention; it merely sets forth a minimum baseline of human rights protections to individuals in non-international armed conflicts. 548 U.S. at 631.[7]

Indeed, the inapplicability of the extensive regulations of the Third and Fourth Geneva Conventions to non-international armed conflicts does not mean that civilians may not be detained during non-international armed conflicts. They may be detained, but the legal basis for detention is located in domestic law, not international law. *Id.* at 632 (quoting International Committee of the Red Cross); Rona at 240-41. Like a civilian who takes direct part in hostilities during an international armed conflict, fighters in non-international armed conflict remain civilians under IHL and are not entitled to "prisoner of war" status or combat immunity. Law of War Experts at 22. Because they remain civilians and unprivileged belligerents, they are "mere criminals under domestic law" who may be prosecuted for engaging in belligerency. Rona at 241. "It is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-

[6] "Common Article 3" refers to Article 3 which appears in each of the four Geneva Conventions.

[7] This was no mere oversight by the drafters of the Geneva Conventions. Rather, they specifically rejected a proposal to extend all provisions of the Geneva Conventions to non-international armed conflicts because it could "impinge[ ] too heavily on nation-states' sovereignty." Law of War Experts at 11. Because non-international armed conflicts are typically conducted within the territory of only one nation, it was thought that the extension of the IHL of international armed conflict to situations of non-international armed conflict would be unnecessary to authorize or regulate detention (subject to certain limitations such as the requirement of humane treatment) and would also interfere with the "sovereign prerogatives" of the nation in which the conflict was occurring. *Id.* at 20.

international armed conflict should be silent, in deference to national law, on questions of detention." *Id.*

C. Even Assuming the Conflict with the Taliban and Al Qaeda Qualifies as an Armed Conflict, it Is a Non-International Armed Conflict

The government does not contend that Khan was captured pursuant to an international armed conflict. Nor could it given the circumstances of his capture, as well as what happened to him in secret CIA detention, or his legal status in the United States and his attendant entitlement to full constitutional rights.[8] Nonetheless, even assuming the conflict with the Taliban and Al Qaeda qualifies as an armed conflict, that conflict is a non-international armed conflict.

There is little doubt that an international armed conflict existed between the United States and the Taliban government of Afghanistan – both signatories to the Geneva Conventions – after the U.S. invasion in October 2001. *Hamdan*, 548 U.S. at 628-29. However, the international armed conflict ended as a matter of law on December 21, 2001, after the fall of Kabul and the collapse of the Taliban government, when the United States "formally recognized and extended full diplomatic relations to the new government of Hamid Karzai." *United States v. Prosperi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008). "That recognition signaled the cessation of a state of war with Afghanistan." *Id.*; *cf.* News Transcript, U.S. Dep't of Defense, May 1, 2003 (Secretary Rumsfeld announcing end of "major combat activity" in Afghanistan and shift to "period of stability and stabilization and reconstruction and activities"), *available at* http://www.defenselink.mil. Accordingly, because the United States is no longer at war with the government of Afghanistan, Common Article 3 applies to the continuing detention of individuals

[8] Because the Court has indicated that it will resolve arguments unique to Khan at a later date, he does not present those arguments here. Instead, he presents arguments of possible general applicability concerning the non-international armed conflict with the Taliban and Al Qaeda. Mar. 18, 2009 Order at 6. Khan reserves his additional arguments.

captured during the conflict with resurgent Taliban forces rather than the extensive regulations of the Third and Fourth Geneva Conventions. The continuing detention of those individuals must be authorized by domestic law otherwise they are entitled to release from military custody.

In addition, as the Supreme Court has recognized, the conflict with Al Qaeda is not and has never been an international armed conflict. *Hamdan*, 548 U.S. at 628-29; *Al-Marri*, 534 F.3d at 233 (Motz, J., concurring). Accordingly, as set forth above, to the extent a detainee like Khan is purportedly held in connection with that conflict, his detention must be authorized by domestic law or he is entitled to immediate release. Khan must be held, if at all, pursuant to the Constitution and laws of the United States, including treaties and other international law obligations binding on the United States. *Al-Marri*, 534 F.3d at 234-35 (Motz, J., concurring) (applicable law in conflict with Al Qaeda is the Constitution and laws of the United States). Indeed, while it may be "the understandable instincts" of some to treat suspected terrorists as "combatants" in a "global war on terror," "[a]llegations of criminal activity in association with a terrorist organization . . . do not permit the Government to transform a civilian into an enemy combatant subject to indefinite military detention, just as allegations of murder in association with others while in military service do not permit the Government to transform a civilian into a soldier subject to trial by court martial." *Id.* at 235.

II. NEITHER THE AUMF NOR SUPREME COURT PRECEDENT PROVIDES THE REQUIRED AUTHORITY TO DETAIN KHAN

The government argues that its new purported detention authority is authorized by the AUMF as informed by the laws of war. Resp'ts' Mem. at 3-8. The government also relies heavily on the Supreme Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942), as domestic authority to detain Khan indefinitely in military custody. Resp'ts' Mem. at 3, 5-6, 7. The government's arguments are meritless.

The AUMF is limited by its plain terms to the September 11th attacks, and does not authorize military detention beyond the limited authority to detain that is incident to the use of force under the law of war principles governing *international armed conflict*. The AUMF authorizes the President to

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

AUMF § 2(a). By its plain terms, the authorization is limited to persons or entities responsible for the September 11th attacks.[9] Yet the government does not contend that Khan had any prior knowledge of, or connection whatsoever to, those attacks.

The AUMF also contains no express authorization for military detention; its focus is clearly on the use of military force. *See Hamdi*, 542 U.S. at 547 (Souter, J., concurring) (concluding AUMF does not authorize detention).[10] In *Hamdi*, the Supreme Court held that the AUMF only provides legislative authority to detain individuals falling into the "limited category" of "enemy combatant" at issue in the "narrow circumstances" of that case – a detainee

[9] The legislative history confirms such limitation. *See*, *e.g.*, 147 Cong. Rec. S9417 (Sen. Feingold) (AUMF is "appropriately limited to those entities involved in the attacks that occurred on September 11.") (daily ed. Sept. 14, 2001); *id.* at S9416 (Sen. Levin) ("[The AUMF] is limited to nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks."). Indeed, contrary to the government's argument (at p.7) that the AUMF provides broad authority for President Obama to use force and detain suspected terrorists throughout the world in order to protect the country from future acts of terrorism not connected to September 11th, it is important to note that President Bush specifically proposed – and Congress rejected – an earlier version of the AUMF that would have authorized the President to use force to "deter and pre-empt any future acts of terrorism or aggression against the United States" that are unrelated to the September 11th attacks. Richard F. Grimmett, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, CRS Report for Congress (Jan. 16, 2007).

[10] Justice Souter's concurrence is controlling because it is the narrowest opinion necessary to effect the plurality's judgment in the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*).

who fought against the United States, on the battlefield in Afghanistan, as part of the Taliban – because such detention is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518, 519 (plurality). Critically, the Court based its decision on "long-standing law of war principles" related to the detention of combatants and prisoners of war, and noted that military detention of such individuals is recognized by "universal agreement and practice" as "important incidents of war." *Id.* at 518, 521 (quoting *Ex Parte Quirin*, 317 U.S. at 30).

In reaching its conclusion, the Supreme Court merely interpreted the AUMF to authorize that which was already an incident of the laws of war applicable to international armed conflict – the power under the Geneva Conventions to detain "combatants" in the international armed conflict between the United States and the Taliban government forces of Afghanistan. Indeed, in contrast to Khan and most other Guantánamo detainees, it is important to note that Yaser Hamdi was captured during an *international armed conflict* in 2001, when his "Taliban unit surrendered" to Northern Alliance forces allied with the United States against the Taliban government of Afghanistan, and after which Hamdi surrendered his "assault rifle" to them. *Id.* at 510, 513 (internal quotation marks omitted). Again, the Court explained that the absence of legislative authorization was no barrier to detention of individuals falling within this "limited category" for the duration of the "particular conflict" in which they were captured because detention was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress [through the AUMF] has authorized the President to use." *Id.* at 518. *Hamdi* therefore cannot be said to apply to or govern detention in non-international armed conflict because the AUMF is silent on such detention and the law of war principles for detention applied by the Court in *Hamdi* are absent from the laws of war applicable

to non-international armed conflict. *Hamdi* simply had no occasion to consider detention in the context of non-international armed conflict.

The government's extensive reliance on *Ex Parte Quirin* as providing authority for detention is equally misplaced. 317 U.S. 1 (1942). Like *Hamdi*, *Quirin* only addressed the authority to detain enemy soldiers pursuant to the laws of war applicable to *international armed conflict*. The decision had nothing at all to do with detention under the laws of war applicable to non-international armed conflict.

Quirin involved German Marines – members of the military of an enemy government – who entered the United States to commit hostile acts during the international armed conflict of World War II. Although the German Marines were ordinary enemy soldiers, they cast off their uniforms – a violation of the laws of war – thus losing their combat immunity and exposing themselves to war crimes prosecutions. It was their treacherous acts – the war crime of perfidy – which rendered their belligerency unlawful and made them "unlawful combatants." Although *Quirin* references "lawful and unlawful combatants," as well as "enemy combatant[s]," it used those terms in relation to the *conduct* of the accused, not their *status*. *Id.* at 31. The Court explained that the accused were subject to military detention and trial not because of their status as "enemy combatants" or even for attempting to enter the United States for hostile purposes, but "for *acts* which render[ed] their belligerency unlawful," *i.e.*, discarding their uniforms. *Id.* (emphasis added). *Quirin* simply did not involve a category of belligerent other than the category of "combatant" recognized in the context of international armed conflict, nor did it involve "associated" forces except in terms of forces associated with the "military arm of the enemy government," *i.e.*, service in an enemy government's military. *Id.* at 37. *Quirin* is therefore largely irrelevant to Khan's case because he is not alleged to have been a member or

associate of any nation's military, and, again, the decision provides no authority for detention of anyone outside the context of international armed conflict.

In contrast to *Hamdi* and *Quirin*, the Supreme Court's decision in *Ex Parte Milligan* squarely addresses the authority of the Executive to detain civilians under law of war principles applicable to *non-international armed conflict*. 71 U.S. (4 Wall.) 2 (1866). There, the Supreme Court considered whether the government could deal militarily with Lambdin Milligan, who had allegedly aided the enemy (the Confederacy) and plotted military action against the United States during the Civil War.[11] The Court recognized that Milligan had allegedly committed an "enormous crime" during a "period of war" when he communicated with "a secret political organization, armed to oppose the laws, and [sought] by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." *Id.* at 130. Yet the Court concluded that constitutional due process required that Milligan be tried in a civilian court as long as those courts were open and functioning. *Id.* at 121-22.[12]

The concurring Justices of the Court likewise concluded that Milligan must be tried criminally or released, not because the Constitution required it, but because Congress had not authorized military detention of civilians even though the United States was at war and Congress had suspended the writ of habeas corpus. *Id.* at 136-37 (Chase, J., concurring); *cf. Quirin*, 317 U.S. at 28 (concluding that the laws of war applicable to international armed conflict authorized military detention, but nevertheless emphasizing that Congress had "explicitly provided" for

[11] Civil wars are a commonly recognized form of non-international armed conflict. *Hamdan*, 548 U.S. at 631; Law of War Experts at 10.

[12] "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522.

petitioners' trial by military commission under the Articles of War). The Court in *Milligan* thus affirmed the longstanding principle under U.S. law that absent a clear statement from Congress, military jurisdiction over civilians is prohibited and cannot supersede the role of civilian courts. That need for clear legislative authorization of detention is particularly important where, as here, detention without trial is indefinite. *Zadvaydas v. Davis*, 533 U.S. 678, 699-701 (2001) (refusing to interpret statute to authorize indefinite detention of non-citizens).[13]

Accordingly, absent a clear statement from Congress in the AUMF authorizing Khan's detention in a non-international armed conflict, and absent any other domestic legal authority for his indefinite detention, Khan, like Milligan, must be charged in a civilian court or released.

III. EVEN IF THE AUMF AUTHORIZED THE USE OF FORCE AGAINST KHAN, THAT POWER WOULD NOT PROVIDE RELATED AUTHORITY TO DETAIN HIM IN THE CONTEXT OF A NON-INTERNATIONAL ARMED CONFLICT

Even if the government were authorized under the AUMF to use force against Khan – which he obviously does not concede – that power would not provide related authority to detain him in the context of the non-international armed conflict with the Taliban or Al Qaeda. Again, there are only two categories of persons in armed conflict – combatants and civilians – and fighters without a privilege to engage in belligerency are civilians, whether in international or non-international armed conflict. Nor is there any dispute that Khan is a civilian under the laws of war. He may therefore only be targeted or killed if he directly participates in hostilities. Yet such participation in hostilities, if proven, would not by definition mean that the government had equivalent authority to detain him indefinitely under the AUMF.

[13] *Milligan* has since been hailed by the Supreme Court as "one of the great landmarks in [its] history." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality). By contrast, *Quirin* "was not [the Supreme] Court's finest hour." *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting).

Neither *Hamdi* nor *Quirin* supports the government's sweeping and unprecedented assertion that the right to use force necessarily includes the authority to detain individuals who may be targeted with force, even if they have not actually committed or attempted to commit a hostile act or entered a zone of active military operations. Resp'ts' Mem. at 5-6. Even if the United States wants to state publicly that it is at war with the Taliban and Al Qaeda, and even if Congress has authorized the use of lethal force against Taliban and Al Qaeda forces wherever they are located throughout the world, that does not mean that the government may detain someone who is suspected of being a Taliban or Al Qaeda fighter indefinitely under the AUMF. The power to use force and the power to detain are simply not the same or even equivalent.

As *Hamdi* held clearly and unambiguously, the AUMF authorizes the use of force but *does not authorize detention* beyond what limited power to detain already exists under the laws of war applicable in international armed conflict. *Hamdi*, 542 U.S. at 521. Thus, by invoking *Hamdi* and the AUMF as the domestic law basis for its new purported detention authority, the government begs the very question of what the law of war allows or does not allow in terms of the detention of suspected Taliban and Al Qaeda forces. Further, as discussed above, because the conflict with the Taliban and Al Qaeda is at most a non-international armed conflict requiring domestic authority for detention, the government's reliance on *Hamdi* and the AUMF is ultimately entirely circular.

IV. KHAN IS NOT SUBJECT TO INDEFINITE DETENTION EVEN IN THE CONTEXT OF AN INTERNATIONAL ARMED CONFLICT

As a civilian, Khan is not subject to indefinite detention even in the context of an international armed conflict. He falls outside the detention authority provided by the Fourth Geneva Convention for one very simple, dispositive reason – because he is a Pakistani citizen who was captured in Pakistan in 2003, and because Pakistan and the United States are allied

nations with ongoing diplomatic relations. Article 4 of the Fourth Geneva Convention expressly excludes from its detention authority individuals like Khan who are "nationals of a co-belligerent State," at least "while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Thus, because Khan is a citizen of Pakistan, which is an ally of the United States in the fight against the Taliban and Al Qaeda, and because Khan is held by the United States which maintains diplomatic relations with Pakistan, he does not fall within the terms of the Fourth Geneva Convention. Rather, he once again falls within the terms of Common Article 3 which looks to domestic law for detention authority.

The reason that individuals like Khan are excluded from Fourth Geneva Convention because of their citizenship and the relationship between their country of citizenship and the detaining power is obvious – the Geneva Conventions are simply not needed to regulate detention until the end of hostilities because the two nations which are not in conflict with each other have the power to correct the illegal detention of a citizen of one of those nations through their ongoing diplomatic relationship.

V. THE GOVERNMENT'S ATTEMPT TO EXTEND LAW OF WAR PRINCIPLES GOVERNING INTERNATIONAL ARMED CONFLICT TO NON-INTERNATIONAL ARMED CONFLICT UNDERMINES THE INTENT AND PURPOSE OF THE LAWS OF WAR

"Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners . . . The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture." William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). The fundamental purpose of the laws of war has since remained the same:

> [S]ince war itself cannot be prevented, even though it may be legally prohibited, its horrors might at least be ameliorated through rules that limit the means and methods used, that require distinction between combatants and non-combatants

> (civilians), and that mandate the humane treatment and fair trials of detainees who are accused of crimes. Equally important has been the consensus that the laws of war apply only in and to armed conflicts.

Rona at 248. Yet the government's new purported detention authority contravenes these well-settled principles.

Although *Hamdi* held that the detention authority implicit in the AUMF's authorization of force extends no further than situations in which the laws of war themselves would authorize military force and detention, the government continues to assert a detention power far broader than that recognized by traditional laws of law. The government continues to claim that the President is free to detain not only actual combatants such as Yaser Hamdi, captured with weapons on the battlefield, but anyone, anywhere, who in the President's sole determination was "part of," "substantially supported" or "associated" with forces hostile to the United States or its allies. The government does not define, nor does it suggest any limitations on, these vague and overbroad terms. Its purported detention standard simply replaces law of war principles with nothing more than the unilateral discretion of the Executive to guide military detention.[14]

In claiming such authority with respect to the struggle against terrorism, the government appears to contend that "the existence of a non-international armed conflict *somewhere* in the world necessarily triggers application of the laws of war *everywhere* – or at least everywhere a suspected al Qaeda terrorist might be found." Law of War Experts at 16 (emphasis in original). "That is, to say the least, a novel proposition as far as the law of war is concerned." *Id.* For it ignores the time-honored principle that armed conflicts, whether international or non-

[14] *See also Hamdan*, 548 U.S. at 593-95 (expressly refusing to read language of AUMF to "expand[ ] the President's authority to convene military commissions," and finding President's authority limited by traditional law-of-war principles "[a]bsent a more specific congressional authorization.").

international in nature, are limited in scope and require some nexus between the relevant zone of conflict and the law of war powers being exercised. *Id.* at 17 (citing authority).

Abandoning the clear lines of distinction between different types of armed conflict – international and non-international – further obscures the fundamental distinction between combatants and civilians, and the respective treatment of these individuals. That conflation places both combatants and civilians at unwarranted risk of harm, for it deprives them of the certainties of the privileges and protections that flow from their respective statuses. It also undermines the purpose of the Geneva Conventions, whose drafters assumed a need to create a set of comprehensive rules to govern detention in the context of international armed conflict, but also assumed that detention authority in non-international armed conflict would be supplied by domestic law because fighters in non-international armed conflict possess no privilege of combatancy and their hostile conduct is often per se criminal.

In the end, the government urges this Court to abandon these distinctions between combatants and civilians, and between international and non-international armed conflict, and to analogize and import one body of IHL into another body of IHL in clear contradistinction to the terms of each. The government does so on the assumption that the laws of war are somehow incomplete or inadequate (or "less well-codified") to accommodate the detention of prisoners captured during the ongoing non-international armed conflict with the Taliban and Al Qaeda. Yet that assumption is false. The law of war applicable to non-international armed conflict looks to domestic law for detention authority. Here, that domestic authority is the Constitution and laws of the United States, which provide all the authority that is needed to detain prisoners like Khan.[15] All that is lacking is the political will to employ domestic law.

[15] If Khan were imprisoned in Pakistan rather than at Guantánamo Bay, for example, then Pakistani law would have to authorize and regulate his detention.

As the Supreme Court held in *Ex Parte Milligan*:

> The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, and under all circumstances. . . [T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

71 U.S. at 120-21. This Court need not doubt the adequacy of the Constitution and laws of the United States to govern the detention of prisoners like Majid Khan. But it should resist the government's invitation to undermine the fundamental tenets of the laws of war to facilitate what every court has so far rejected – the unilateral right of the Executive to do whatever it wants, to whomever it wants, for as long as it wants, outside the authority and limitations established by the Constitution and laws of the United States.

CONCLUSION

For the foregoing reasons, because the government bases its new purported detention authority on law of war principles which by their terms do not apply to Khan, the Court should reject the government's detention standard. The Court should further require the government to show cause within 14 days why Khan should not be released or transferred to the custody of the Government of Pakistan, which affirmatively seeks his repatriation from Guantánamo Bay.

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March 20, 2009

Respectfully submitted,

/s/ J. Wells Dixon
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