UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, et al., Petitioners, v. BARACK H. OBAMA, et al., Respondents.	Civil Action No. 04-1254 (HHK)

PETITIONERS' RESPONSE TO RESPONDENTS' MEMORANDUM REGARDING THE GOVERNMENT'S DETENTION AUTHORITY RELATIVE TO DETAINEES HELD AT GUANTÁNAMO BAY

On March 13, 2009, the Government in this case and in the other Guantánamo habeas cases filed the same Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay (Doc. 462). On March 23, 2009, the petitioners in a case pending before this Court, *Anam v. Bush*, No. 04-CV-1194 (HHK), submitted a response (Doc. 416) to the Government's memorandum. That response, including its attachments, contains a detailed analysis of issues relevant to the Government's asserted authority to detain.

Petitioners adopt and incorporate by reference the *Anam* petitioners' response to the Government's memorandum concerning detention authority. The remainder of this memorandum supplements the *Anam* response's discussion of certain issues.

A. The Relevant Conflicts

The Government bases its detention authority solely on the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). (Resp. Mem. at 2.) It

asserts, however, that this authority is "necessarily informed by principles of the laws of war." (*Id.*) In fact, as explained in detail in the *Anam* response, the AUMF does not authorize the Guantánamo detentions, and the legality of the detentions should be determined by reference to traditional law-of-war principles.

Certain international law-of-war principles are set forth in the "Geneva Conventions," which consist of four multilateral conventions (and applicable protocols) entered into by the United States and other nations. Articles 2 and 3 are common to all of the Geneva Conventions. Article 2, "Application of the Convention," discusses the application of the Geneva Conventions and their law-of-war principles with respect to "cases of declared war or of any other armed conflict which may arise between two High Contracting Parties."[1] Article 3, titled "Conflicts not of an international character," establishes minimum standards of humane treatment to be followed "in the case of armed conflict not of an international character."[2] In a non-international conflict, detention authority must necessarily be found in the domestic law of the detaining party.

There are three conflicts that may allegedly be relevant to a particular detainee. First, there was an Afghan conflict in existence prior to the American invasion of Afghanistan in

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 (hereinafter First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 (hereinafter Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention). "High Contracting Parties" includes any of the signatories to the Geneva Conventions, including both the United States and Afghanistan. "High Contracting Parties" include any of the signatories to the Geneva Conventions, including both the United States and Afghanistan.

[2] First Geneva Convention, *supra* note 1, Art. 3; Second Geneva Convention, *supra* note 1, Art. 3; Third Geneva Convention, *supra* note 1, Art. 3; Fourth Geneva Convention, *supra* note 1, Art. 3.

October 2001. This conflict was between the then-ruling Taliban government and anti-government forces within Afghanistan, often referred to as the Northern Alliance. The United States was not a party to that conflict, and it was not an international armed conflict. Nothing in the Geneva Conventions or the AUMF gives the United States authority to detain individuals simply because they were involved in that conflict on behalf or in support of the Afghan government.

Second, there was a conflict that began in October 2001, between the United States (and its coalition partners) and the nation of Afghanistan, which at the time was under the rule of the Taliban. This was a traditional international armed conflict.[3] Any persons who were combatants in this conflict would have been subject to detention under the Geneva Conventions until the cessation of hostilities. The precise date when this conflict ended may be subject to debate, but it is clear that the Taliban government has long since been ousted and replaced by a new government, headed by Hamid Karzai. Participation as a combatant in this completed conflict no longer provides authority for ongoing detention.

Third, there is an ongoing conflict in Afghanistan between the United States (and coalition partners) and non-state actors and organizations, which includes persons who may be engaged in criminal terrorist activities. The conflict involves al-Qaida as well as those who may seek to restore Taliban rule in Afghanistan. This is not an "international armed conflict," making inapposite the law-of-war authority to detain combatants in such a conflict until the cessation of hostilities. For such a non-international conflict, as discussed above, the Government should be required to establish its detention authority based on legal standards found in United States

[3] A majority of justices in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), found that the U.S.-Taliban conflict that began in 2001 was an international armed conflict, because the United States and Afghanistan are both signatories to the Geneva Conventions. *See* 542 U.S. at 549.

domestic law, such as 18 USC § 2339A (criminalizing material support for terrorist acts) and 18 USC § 2339B (criminalizing material support to foreign terrorist organizations).

B. The Government's Detention Standard

The Government sets forth its detention standard on page 2 of its memorandum. The first part of the standard -- which deals with those involved in the 9/11 attacks, or who harbored those who were involved -- has no relevance to petitioners in this case. The second part of the standard is a vague and malleable concoction, which purports to authorize detention of those who "were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." The Government provides no real guidance as to how this should be applied in practice, arguing that "the detainability of a particular individual will necessarily turn on the totality of the circumstances." (Mem. p. 7.)

Even if one were to assume that the AUMF authorized some type of detention (and such an assumption would be incorrect, as explained in the *Anam* response), there is no justification for reading it to authorize endless detention, without process or trial. Congress knew when it adopted the AUMF that the so-called "Global War on Terror" might not end for years and years, if it ever ended, but there is no indication that Congress intended to authorize peremptory life-imprisonment, without trial, of anyone, particularly on such flimsy bases as sympathy for the Taliban or staying at a so-called Taliban "safe-house" or involvement in conflicts not related to the United States or the 9/11 attacks. If such an extreme position were adopted, then a teenage Yemeni seized by Pakistanis in Pakistan in 2001 because he was an Arab in a non-Arab country, at a place miles and mountains removed from any battlefield involving United States forces, might be detained until he died of old age based on nothing more than

evidence (even contradicted or hearsay evidence if the Government has its way) that the teenager once stayed in a building where Taliban or al-Qaida members also stayed, or showed sympathy with Taliban religious principles, or had some training in handling small arms. There is no justification for concluding that the AUMF was intended to authorize such draconian results.

Respectfully submitted,

/s/

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