IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULLATIF NASSER,	Petitioner,	
v.		Civil Action No. 05-cv-0764 (CKK)
BARACK OBAMA, *et al.*,	Respondents.	

REPLY BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR ORDER EFFECTING RELEASE

Thomas Anthony Durkin (IL. Bar No. 697966)
DURKIN & ROBERTS
2446 N. Clark St.
Chicago, IL 60614
(312) 913-9300
tdurkin@durkinroberts.com
Attorney for Petitioner Nasser

> *Neither prisoners nor persons accused, but simply "detainees," they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi Lager [camps], who along with their citizenship, had lost every legal identity, but at least retained their identity as Jews. As Judith Butler has effectively shown, in the detainee at Guantanamo, bare life reaches its maximum indeterminacy.*
>
> — Giorgio Agamben, *State of Exception*[1]

Bare life in its maximum indeterminacy, indeed. A man's life hangs in the balance because we have no Secretary of Defense. The government admits that on December 28, 2016, the Department of State and the Department of Defense received an affirmative response to State's diplomatic note regarding the security assurances required for Petitioner's transfer to be effectuated. Nevertheless, as the government also concedes in its Response, "because of the timing of this response, which was less than 30 days before the Secretary of Defense would leave office, *the Secretary of Defense did not make a final decision regarding the transfer…as he elected to leave that decision to his successor*." (Dkt. #259, pp. 6-7) (emphasis added) In short, the United States appears now to have no Secretary of Defense until next week—or at least one willing to exercise his sworn official duties. As such, as a matter of equity, law and simple decency, this Court should act for him and order Petitioner's immediate release.

Due to the little window of time left for this important and extraordinary issue to be resolved; that is, the wrongful and continued detention of a man who as the September 9, 2016, Joint Status Report of this pending habeas case stated was no longer necessary, counsel would respectfully ask leave to adopt the legal arguments filed in the Reply Brief (Dkt. #284, filed

[1] The University of Chicago Press (2003), pp. 3-4.

01/17/17) of co-detainee, Sufyian Barhoumi (ISN 694) in the companion case simultaneously filed before Judge Collyer in Civil Action No. 05-1506 (RMC). A copy of said pleading is attached hereto as Exhibit A.

Counsel further acknowledges that this morning, Barhoumi's motion was denied in a Memorandum Opinion issued by Judge Collyer. (Dkt. #285) A copy of said opinion is also attached hereto as Exhibit B. Nevertheless, counsel strongly suggests that the factual differences between Barhoumi's case where the Secretary of Defense affirmatively decided not to accept the recommendation of the PRB—as compared to the Secretary's refusal to act in this instance only because of the 30 day requirement of the NDAA—necessitates a different conclusion. That conclusion, the only equitable one under the totality of these circumstances, is that this court should use the "court order" exception of the NDAA to effectuate Petitioner's immediate release.

A decision to permit Petitioner's continued detention will only render Petitioner, as Agamben suggests, "entirely removed from the law and from judicial oversight." *Id.* For once, if only once, a detainee should be released by way of judicial oversight. To do nothing is to permit him to fall into what can only be considered a "legal black hole." *See, e.g.*, Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs,* 115 COLUM. L. REV. 1029, 1030, 1034 n.23 (2015) (quoting the terms "legal black hole" and "legal grey hole," and also attributing the creation of the terms to professor David Dyzenhaus who stated "there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit the government to do as it pleases"). Judicial oversight is the only restraint left. It is the right thing to do.

Dated: January 18, 2017

Respectfully Submitted,

/s/ Thomas Anthony Durkin
Thomas Anthony Durkin (IL. Bar No. 697966)
DURKIN & ROBERTS
2446 N. Clark St.
Chicago, IL 60614
(312) 913-9300
tdurkin@durkinroberts.com
Attorney for Petitioner Nasser

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUFYIAN BARHOUMI, Petitioner, v. BARACK OBAMA, *et al.*, Respondents.	:	Civil Action No. 05-cv-1506 (RMC)

REPLY BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR ORDER EFFECTING RELEASE

Shayana D. Kadidal (D.D.C. Bar No. 454248)
Omar Farah (pursuant to LCvR 83.2(g))
J. Wells Dixon (pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6438
kadidal@ccrjustice.org
ofarah@ccrjustice.org
wdixon@ccrjustice.org

Attorneys for Petitioner Barhoumi

Sufyian Barhoumi has been detained without charge at Guantánamo for fourteen years—longer than the duration of any prior military conflict in U.S. history or, to our knowledge, the history of modern warfare. His detention has gone on for too long, and is arbitrary and perpetual by any reasonable measure. This is particularly so where, as here, the individual whose liberty has been restrained has been approved for transfer but remains in custody because of bureaucratic delay rather than what he allegedly did or who he allegedly associated with more than a decade ago, and where—as the government does not dispute—he will likely remain detained, at minimum for the next four years, but perhaps for life absent a timely judicial order effectuating his release from Guantánamo.

Far from offering a persuasive opposition to Petitioner's motion, the government concedes his essential arguments warranting relief. The government does not dispute that Petitioner has been approved for transfer because his detention is "no longer necessary," and no longer serves the only ostensible basis for his initial capture and detention, i.e., to prevent his return to the battlefield. The government's response confirms that the government intends, and has been trying, to transfer him to Algeria; that Algeria wants him back; that he wants to go back to Algeria; and that he has not yet been transferred because the Secretary of Defense has refused to sign the certification paperwork "at this time" due to factors including those "not related to Petitioner himself." Nor does the government dispute that absent a judicial order effecting release, Petitioner will suffer substantial prejudice because the incoming administration intends to end all transfers immediately. He will, in the estimation of all parties, become a victim of the calendar. The certification-and-notice requirement will have cost Petitioner his chance at freedom—a chance which, as is uncontested by the government, may not recur for four or more years. In that regard his detention will be classically arbitrary, perpetual, and unlawful.

Argument

As an initial matter, it does not appear from the government's brief that it has made preparations to transfer Petitioner in the event that the Court grants his motion, as required by the Court's Order to Show Cause dated January 13, 2017 (dkt. no. 280). If that is correct, it could possibly warrant a contempt order, but in any event, if the Court grants the motion and orders Petitioner's release from Guantánamo before noon on Friday, the government should not be heard to complain that it did not know how to set about preparing for Petitioner's transfer when it has transferred hundreds of Guantanamo detainees over the years, including ten over the weekend, or that it would be unduly burdensome at this late date to do so because of the government's own dilatory actions.

I. The Government Response to Petitioner's Request for an Order Declaring that He Falls Within the Court-Order Exception of NDAA Is Meritless

In his motion, Petitioner argues that the Court should issue an order declaring that he falls within the court-order exception to the NDAA, and thus shall not be subject to the certification and notice provisions in the NDAA, which form of order would have the practical effect of removing a significant obstacle to his transfer. The government cites the transfer restrictions as an obstacle to Petitioner's transfer, and essentially admits that the Secretary of Defense's refusal to transfer Petitioner at this time is due to the onerous certification requirement. *See* Response at 5-6. The government also does not dispute that placing Petitioner within the court-order exception would hasten his transfer.[1] But the government claims that the NDAA does not create any new authority for the Court to enter an order of release. It contends that reading the NDAA to confer

[1] The government contends that it is speculative whether removing the NDAA transfer restrictions would accomplish anything given the Secretary's decision. But that argument is circular; again, counsel understand that the Secretary's reluctance is because of those restrictions, and that understanding is consistent with the presentation in their brief, *see* Response at 4-6.

authority for the Court to issue orders of release would conflict with its AUMF detention authority. The government misses the point entirely, and on that basis the Court should grant Petitioner's actual request for relief absent objection.

First, although Petitioner surely seeks an order granting his habeas petition, he does not seek that relief pursuant to the NDAA. He requests an order declaring that he falls within the NDAA court-order exception *in the alternative* to his request for an order of release. The Court plainly has lawful authority to grant the limited relief requested.

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

As further indication that the statute applies to more than habeas grants, the exception references not only orders issued by a "court" but also orders issued by a "competent tribunal." What is meant by "competent tribunal" is unspecified; the government may believe that this re-

fers to military commissions, or something else, but that is merely speculation because nothing in the relevant text or legislative history refers to any particular form of tribunal. What is clear is that the exception applies to more than habeas grants. If Congress had intended to limit the statute to habeas grants, it would have done so in clear terms. *Cf.* Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1005(e), 119 Stat. 2680, 2741-42 (attempting to strip habeas jurisdiction); Military Commission Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (same). The government's opposition does not address these points, however.

Nor does the government seriously dispute that separate and apart from the legal authority supplied by the NDAA itself, the Court may exercise its independent, equitable habeas authority to enter an order declaring that Petitioner falls within the court-order exception without actually ordering him released. If anything, the government appears to misapprehend the broad scope of the Court's equitable habeas authority, including its authority to fashion a practical remedy that may not have been applied previously but is necessary and appropriate based on the particular facts and circumstances of the case.

It bears emphasis that, above all, habeas ensures that "errors [are] corrected and 'justice should be done' ... *even where law ha[s] not previously provided the means to do so*. ... There was and is another word for this vast authority to do justice, even in the absence of previously existing rules or remedies: equity." Paul D. Halliday, *Habeas Corpus: From England to Empire* 87 (2010) (emphasis added); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (habeas courts not constrained by black-letter rules from providing greater protection in cases of non-criminal detention). Equity is a concept "associated with the provision of mercy [and] attention to the specifics of every case." Halliday, *supra*, at 89-90. "The key to making judgments about infinitely variable circumstances [is] the consideration of details about why, when, how and by whom people

[are] imprisoned." *Id.* at 102. The point is that habeas is an adaptable remedy, the application and scope of which change depending on the totality of facts and circumstances of a case. *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). This makes sense in the separation of powers context, too, of course, because judicial power must include authority to impose a remedy disposing of a matter as law and justice require.

As set forth in Petitioner's motion, the law is equally clear that courts have habeas authority to enter any form of order, including declaratory relief, where, as here, the requested relief directly compels or indirectly "affects" or hastens the petitioner's release from custody.[2] Here, again, the government does not seriously dispute that an order declaring that Petitioner falls within the NDAA exception would hasten his release. The Court should therefore fashion

[2] *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release."); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (emphasizing that habeas statute "does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *see also, e.g.*, *Edwards v. Balisok*, 520 U.S. 641 (1997) (after determining that true nature of relief sought is speedier release from imprisonment, Court assumes that habeas court had authority to adjudicate claim); *Brownwell v. Tom We Shung*, 352 U.S. 180, 181 (1956) (non-citizen may test legality of inadmissibility determination in declaratory judgment action or through habeas corpus); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 809 (D.C. Cir. 1988) (holding that habeas is available for petitioner challenging parole eligibility even though he is "not laying claim to immediate release or release in the near future"); *Bourke v. Hawk-Sawyer*, 269 F.3d 1072, 1074 (D.C. Cir. 2001) (holding that habeas is appropriate remedy for petitioner seeking to challenge his eligibility for a sentence reduction); *cf. Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665 (D.C. Cir. 2013) (suggesting that habeas may not be available for claims that have only a "probabilistic" impact on custody). *See generally* Halliday, *supra*, at 101 (common law habeas judgments "did not just happen; they were made. Judges, not rules, made them. . . . By negotiating settlements, by constraining – sometimes undermining – the statutes or customs on which other magistrates acted, and by chastising those who wrongfully detained others, the justices defined what counted as jurisdiction and what counted as liberties.").

appropriate relief in order to effectuate the result sought by all parties – Petitioner's transfer to Algeria – and end his Guantánamo nightmare.[3]

II. The Government Does Not Contend that Recognition of a Due Process Limit on the Duration of Petitioner's Indefinite Detention Would Be Impractical or Anomalous, and D.C. Circuit Precedent Does Not Preclude This Court From Granting Relief

In his motion for judgment, Petitioner contends that the Due Process Clause applies at Guantánamo and limits the duration of his detention, which the government appears to believe

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[3] The government cites to the Intelligence Authorization Act of 2012 (IAA), Intelligence Authorization Act for Fiscal Year 2012, Pub. L. No. 112-87, § 308, 125 Stat. 1876, 1883 (2012), which required advance notice to Congress of transfers and contains no judicial order exemption. (See Respondents' Response at 6, 13.) But the IAA does not impose a separate requirement, independent of the series of certification-and-notice requirements in the various NDAA enactments over the years; it is by its own terms part of that series of restrictions, starting with the prior 2012 NDAA, Pub. L. 112-81, § 1028 (2011), and has long been superseded by subsequent iterations of the transfer restrictions in the 2013, 2014, and 2016 NDAAs. As noted in Petitioner's motion, the currently-operative certification-and-notice provision of the 2016 NDAA is entitled "Reenactment and Modification of Certain Prior Requirements for Certifications Relating to Transfer of Detainees at United States Naval Station, Guantanamo Bay, Cuba, to Foreign Countries and Other Foreign Entities," a clear sign that Congress believed it was creating a single operative set of notice-and-certification requirements. The IAA itself says that it was not meant to "supersede or otherwise affect" the 2012 NDAA, *see* IAA § 308(d), a strong indication that it was meant to stand in line with the succession of NDAA restrictions rather than stand separate and apart from them.

Notably, when this administration defended its May 2014 transfer of five Afghan prisoners in exchange for Army Sgt. Bowe Bergdahl, nothing in the extensive analyses provided by the administration (both NSC and DOD) and the Government Accountability Office (Congress' investigative arm) after the transfers, *see* https://www.documentcloud.org/documents/1697125-gitmo-transfer-bergdahl-notice-law-dispute.html, makes any reference to the Intelligence Authorization Act; *both political branches of government* deemed its provisions a dead letter in relation to that otherwise quite contentious transfer. Instead, both sets of analyses treat the 2014 NDAA as the sole source of the operative certification and notification requirements. And the 2014 NDAA is clearly modified and superseded by the 2016 NDAA provisions cited in our motion—the only operative restrictions here, which are clearly drawn up in a manner that allows them to be overridden by judicial order.

In any event, even if the IAA were otherwise applicable, the Court could exercise it's equitable habeas authority to declare the IAA provisions inapplicable in the unique circumstances of this case. Indeed, a congressional notice provision (and one that would be at most duplicative of the NDAA) can no more suspend or limit this Court's broad habeas authority to fashion relief to remedy unlawful detention than a king could dictate when or how or under what circumstances he would comply with a writ of habeas corpus issued by a court at common law requiring the immediate release of a prisoner from the dungeon at the Tower of London.

may last for his lifetime despite the undisputed fact he remains in custody because of its failure to implement its discretionary decision to transfer him rather than anything he allegedly did or anyone he allegedly associated with more than a decade ago. He argues that *Boumediene v. Bush*, 553 U.S. 723, 769-71 (2008), requires a functional analysis to determine whether due process rights apply at Guantánamo, and that it would not be impractical or anomalous to grant him a due process liberty right at least to the extent necessary to limit the duration of his indefinite detention. *Boumediene* did not state a new constitutional rule but rather reaffirmed the Supreme Court's longstanding jurisprudence to determine what constitutional standards apply when the government acts with respect to non-citizens within its sphere of foreign operations. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

The government does not address that body of Supreme Court precedent. It also does not dispute that due process and habeas corpus are inextricable intertwined, as recognized in *Boumediene* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In addition, the government does not argue that it would be impractical or anomalous to grant Petitioner due process rights, or that there are any practical barriers to the application of due process rights at Guantánamo, at least to the extent necessary to limit the duration of Petitioner's detention given the unique facts and circumstances of his case. Petitioner respectfully submits that the Court should deem those issues conceded.

The government argues instead that D.C. Circuit precedent forecloses recognition of constitutional due process rights at Guantánamo under any circumstance. The government is wrong

in several respects. First, the government suggests that *Boumediene*'s functional analysis extending the Suspension Clause to Guantánamo does not apply to other constitutional provisions including the Due Process Clause. But it fails to acknowledge its own concession in *Al Bahlul v. United States* that the Ex Post Facto Clause also applies at Guantánamo after *Boumediene*. *See* 767 F.3d 1 (D.C. Cir. 2014) (en banc). Indeed, the D.C. Circuit held unanimously in *Al Bahlul* that ex post facto rights extend to Guantánamo and foreclose military commission prosecutions for providing material support for terrorism based on pre-2006 conduct.[4]

The cases cited in government's brief do not foreclose a constitutional due process limit to the duration of Petitioner's detention. Contrary to the government's suggestion, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), did not hold that *Boumediene* limited the extraterritorial reach of the Constitution to the Suspension Clause. As noted, the government has since conceded as much in *Al Bahlul*. *Rasul*, which was a damages action by former detainees for their torture and abuse at Guantánamo, was decided on qualified immunity grounds. The court expressly declined to address the plaintiffs' due process claims, and concluded instead that no reasonable government official would have been on notice prior to *Boumediene* that detainees at Guantána-

[4] *See id.* at 63 (Kavanaugh, concurring in the judgment in part and dissenting in part) ("Of the seven judges on the *en banc* Court for this case, five judges (all but Judge Henderson and Judge Brown) agree in light of *Boumediene v. Bush* that the Ex Post Facto Clause applies at Guantanamo. Indeed, the Government concedes as much. Given the Government's concession, all seven judges on the *en banc* Court (including Judge Henderson and Judge Brown) therefore apply the Ex Post Facto Clause to analyze the offenses that were charged against Bahlul under the Military Commissions Act of 2006.").

The government does not explain why it would concede the application of constitutional provisions other than the Suspension Clause at Guantánamo, or why the Circuit would accept such a concession, if *Bounediene* did not extend beyond the Suspension Clause to protect detainees without presence or property in the United States. Nor does the government explain why numerous panels of the D.C. Circuit have assumed without deciding that detainees have constitutional rights, including due process rights, following the panel decision in *Kiyemba I*, unless that decision were limited to the narrow question of whether due process authorizes the entry of a detainee into the United States.

mo have due process rights. *Id.* at 530-32. *Al Madhwani v. Obama*, also cited by the government, likewise specifically avoided a due process challenge by a Guantánamo detainee (who was not approved for transfer) to an evidentiary issue that arose during his habeas corpus hearing (and which the panel deemed "obscure"). 642 F.3d 1071, 1077 (D.C. Cir. 2011). The D.C. Circuit has never directly addressed a constitutional due process challenge to the duration of detention at Guantánamo, and certainly not in the context of a case involving unique facts and circumstances similar to Petitioner's. *See also Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (Supreme Court has not "considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention").[5]

The government's further claim that even if due process principles apply they would not limit the duration of Petitioner's detention is meritless. The government's argument rests on *Hamdi*, which it contends authorizes detention for as long as hostilities continue regardless of the circumstances or length of detention. But *Hamdi*, which was decided more than a decade ago under very different circumstances, did not involve a challenge to continuing detention authority, and certainly not after fourteen years of indefinite detention under circumstances similar to those here. To the contrary, *Hamdi* held that "indefinite or perpetual detention" was impermissible. 542 U.S. at 521.[6] Yet that is precisely what the government argues is permitted in this case when it claims the right to hold Petitioner in non-criminal detention potentially for the remainder of his lifetime, even though it has concluded his detention no longer serves any ostensible military pur-

[5] Nor have the judges of this Court decided such a challenge to the duration of detention. *Rabbani v. Obama*, 76 F. Supp. 3d 21 (D.D.C. 2014), for example, was a force-feeding challenge by a detainee not approved for transfer.

[6] Like Hamdi, Petitioner's central challenge is "not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention." *Id.* at 520.

pose and concedes in its brief that it wants to transfer him to Algeria. "The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious." *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).

Whatever the case may be with respect to due process rights to enter the United States, challenge conditions of confinement at Guantánamo, or challenge the admissibility of evidence in a habeas hearing, the Court should conclude that Petitioner's indefinite detention, which now extends beyond any reasonable time limitation, violates due process and requires his release.

III. The Government Does Not Address Petitioner's Constitutional Avoidance Argument Concerning the Narrow Scope of AUMF Detention Authority

In his motion, Petitioner argues that the Court should construe the Authorization for Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), narrowly to limit the duration of his detention in order to avoid the serious constitutional concerns that would be raised by a statute that authorizes his non-criminal detention for a period of fourteen years and potentially for the remainder of his life.[7] The government does not respond directly to Petitioner's constitutional avoidance arguments. Instead, it claims that it may continue to hold Petitioner under the AUMF and *Hamdi* until the end of hostilities, which the government apparently cannot predict, and all but asserts could last for Petitioner's lifetime, without limitation on the duration of his detention. *But see Hamdi*, 542 U.S. at 536 ("[A] state of war is not a blank check for the President."); *cf. also Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari).

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[7] *See Zadvydas*, 533 U.S. at 689-90 (construing statute authorizing detention of admitted aliens to contain reasonable time limitation in order to avoid serious constitutional concerns raised by indefinite detention); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (construing statute to limit detention of aliens not formally admitted to the United States to avoid constitutional issues).

IV. The Government Misconstrues Petitioner's Law of War Arguments

Petitioner contends that he must be released under the AUMF, as construed by *Hamdi*, because his detention violates the laws of war. He contends that regardless of the nature of the armed conflict pursuant to which he is detained, if any, there could scarcely be a clearer case of arbitrary and perpetual detention than one such as this in which, absent judicial relief, Petitioner will become a victim of the calendar, and remain imprisoned due to the next administration's craven political promise to end all transfers regardless of their facts and circumstances, but not because anyone thinks that he should continue to be held, possibly for the duration of his life. In this context, the practical circumstances of Petitioner's detention have now reached the point where any traditional law-of-war detention authority that once may have justified his detention has unraveled. *See Hamdi*, 542 U.S. at 521 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

As in initial matter, the government largely ignores Petitioner's law of war arguments. But where it does allude to them, it appears to conflate his unraveling argument with an argument that the conflict in which he was captured has ended – something he agrees with but the Court need not resolve here – or otherwise misconstrues his arguments. In his motion for judgment, Petitioner argues that his continuing detention violates the laws of war because the government has decided to release him and made efforts to send him to Algeria, but he has remained in custody due solely to the paperwork required by the NDAA transfer restrictions (which again appears to be the sole basis for the Secretary of Defense's recent decision to delay his transfer). He argues this is so regardless of whether the armed conflict in which he is detained, if any, is international or non-international in nature. Indeed, Petitioner maintains – and the government

does not dispute – that any continuing armed conflict is non-international in nature. As such, Petitioner's detention is properly governed by Common Article 3 and Additional Protocol II of the Geneva Conventions, which set forth minimum baseline human rights protections but do not specifically authorize detention or prescribe extensive regulations governing detention in the same fashion as the Third and Fourth Geneva Conventions applicable in international armed conflict. Nonetheless, although there are fewer non-international armed conflict rules governing detention, there are certain customary international law rules and principles applicable in non-international armed conflict that are binding on the United States. As cited in Petitioner's motion, for example, Customary International Humanitarian Law Rule 128(C) applies in non-international armed conflict and limits the duration of non-criminal detention. The government ignores such principles entirely, however.[8]

V. Petitioner Has Standing to Challenge His Detention

Rather than respond directly to many of Petitioner's arguments, including in particular his NDAA arguments, the government asserts (at page 10) that he lacks standing to "challenge the lawfulness of those statutory provisions." In support of this argument, it cites the *Ahjam* and *Al-Wirghi* decisions by another judge of this Court. But the government misconstrues Petitioner's arguments. First, unlike Ahjam, he does not challenge the lawfulness of the NDAA transfer restrictions; he simply asks the Court to declare them inapplicable in the unique context of this

[8] The government instead cites various decisions by panels of the D.C. Circuit, which, although they authorize broad detention authority related to the legality of initial capture and detention, do not foreclose relief in the unique circumstances here. The government's reliance on *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), and *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), for example, is misplaced. Those cases involved challenges to the legality of initial capture and detention, not continuing detention authority, and neither involved facts or circumstances similar to Petitioner's, where the government has determined there is no longer any need or rationale for his continuing detention. The additional language from *Ali* cited by the government was also plainly dicta.

case. Second, both *Ahjam* and *Al-Wirghi* were mooted by transfers prior to consideration by the D.C. Circuit; although those detainees lost their motions, they prevailed in the sense that they obtained the very relief they sought – prompt release – something that will be denied to Petitioner here absent a court order.

It goes without saying that a habeas petitioner who is detained has standing to challenge his detention; he is injured as a result of that detention. He has a concrete, particularized injury; the government essentially contests whether this injury is owing to the NDAA's notice-and-certification requirements and whether it is redressable by the forms of relief he has asked for.

On the first point—causation—the government ambiguously claims that "DoD represents that on January 12, 2017, the Secretary of Defense determined that petitioner should not be repatriated at this time based on a variety of substantive concerns, shared by multiple agencies, relevant to Petitioner's circumstances, including factors not related to Petitioner himself." (Response at 13.) Nothing in this representation contests that Petitioner's detention is "no longer necessary," and no longer serves the only ostensible basis for his initial capture and detention: to prevent his return to the battlefield. The response confirms that the government intends, and has been trying, to transfer him to Algeria; that Algeria wants him back; that he wants to go back to Algeria; and that he has not yet been transferred because the Secretary of Defense has refused to sign the certification paperwork "at this time" due to factors including those "not related to Petitioner himself." Nor does the government dispute that absent a judicial order effecting release, Petitioner will suffer substantial prejudice because the incoming administration intends to end all transfers immediately.

The timing of this "determination" is curious. January 12th is two days after Petitioner first sought consent to the relief sought in this emergency motion from counsel for the govern-

ment, but is long after the December 21, 2016 deadline for 30-day advance notice of transfers to go to Congress and still leave time to permit transfer before January 20th. That the determination was claimed to have been reached on that late date merely confirms that attempts to repatriate Petitioner had been ongoing until the litigation of this motion began in earnest. Other public statements indicate that the government fully expected to send Petitioner home to Algeria, the only place he has wanted to go and the only transfer country that has been under consideration for him. Indeed, the State Department's Special Envoy for Guantanamo Closure stated that he intended and expected to move every cleared prisoner before the end of the summer. *See* Carol Rosenberg, *Guantánamo population plummets with transfer of 15 to UAE*, MIAMI HERALD (August 15, 2016) ("'We expect to substantially complete our mandate to repatriate or resettle all approved-for-transfer detainees in the coming weeks,' said Ambassador Lee Wolosky, soon after the Defense Department disclosed the [August 15, 2016] release [of detainees to the United Arab Emirates].), *available at* http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article95829247.html.[9] As noted above, the only sensible implication from the government's representation (and from the lengthy discussion of the transfer restrictions that precedes it, Response at 5-6), is that the government was in fact making efforts from the summer onward (indeed, through potentially as late as last week) to transfer Petitioner to Algeria, and that the sole reason for its failure to repatriate him is precisely the transfer restrictions at issue in this motion—restrictions that he asks this Court to set aside.

Many cases establish that "loss of chance" through, for example, impairment of a process, is an injury-in-fact sufficient for standing. For example, in *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1103 (D.C. Cir. 2005), a prisoner challenged parole hearing procedures that fore-

[9] Petitioner was formally declared cleared on August 9, 2016

closed legal representation. The procedures did not foreclose parole, and plaintiff could never have demonstrated that different procedures would have led, in his case, to a different outcome. It was enough that the process change made his objective more difficult to obtain. Congress's intrusion here is just the same. So, too, in *United States v. Lopez*, 650 F.3d 952, 960 n.7 (3d Cir. 2011), where prisoners complained that downward departures in their sentencing ranges were unavailable in the districts where they were prosecuted. The court held that the prisoners had standing to challenge the Department of Justice's failure to implement similar procedures in their districts, without any showing that those procedures would result in shorter sentences in their cases. Procedural impairment was a concrete injury. In *Settles*, the D.C. Circuit analogized to equal protection cases where the government erects barriers that arguably make it more difficult for a person to obtain a benefit. 429 F.3d at 1102. For example, in *Northeast Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 665 (1993), the Supreme Court held that contractors had standing to challenge an ordinance that gave preferential treatment to minority-owned businesses. They were not obliged to show that they would have been awarded contracts without the ordinance. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), the Supreme Court reaffirmed this principle, noting that "Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract." In *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003), the Supreme Court held that plaintiffs had standing to challenge affirmative action policies because the policies impaired the process by which they might compete for admission. Similarly, the dilution of a person's constitutional right to vote produced a cognizable injury, without any showing that, absent the dilution, election outcomes would differ. *Baker v. Carr*, 369 U.S. 186, 208 (1962). Similarly, here, Petitioner's detention is being prolonged because of factors "not related to Petitioner himself," which can only mean details of the

security arrangement with Algeria required to comprise part of the formal certification to Congress. The certification-and-notice requirement costs Petitioner his chance at freedom—a chance which, as is uncontested by the government, may not recur for four or more years.

That injury is sharpened by its constitutional context. As a prisoner in executive detention, Petitioner enjoys the privilege of habeas corpus, *Boumediene*, 553 U.S. at 771, that is, the right to be released unless the President points to a legal justification for his detention. *Id*. The President had previously pointed to Barhoumi's (contested) status as an enemy belligerent, but once the President decided to clear him for release through the Periodic Review Board process, the existence of a Congressional limitation on the release process is a concrete injury, felt presently and particularly. *See Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (explaining that any restriction on detainee transfers makes it more difficult for the President to arrange safe transfers for detainees and thus ultimately release the detainees); July 26, 2013 White House Statement (explaining that certification requirements significantly limit the President's ability to transfer detainees, even for detainees cleared for release), *available at* https://www.whitehouse.gov/the-press-office/2013/07/26/statement-press-secretary-guantanamo-bay

The injury need not flow exclusively or even directly from the challenged action. *Tozzi v. U.S. Dep't of Health & Human Servs*., 27I F.3d 301, 308 (D.C. Cir. 2001). All that is required is that the challenged conduct plays a substantial role in the resulting injury. *Id*. On that basis, causation is self-evident. Section 1034 of the 2016 NDAA imposes limits on transfers; it is the purpose of the statute. The injury Petitioner complains of is directly traceable to these transfer restrictions. Redressability, closely entwined with causation, requires only that there be a "substantial probability" that the relief requested will redress the injury claimed. *Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 264 (1977). As the Supreme Court has ex-

plained, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Meese v. Keene*, 481 U.S. 465, 476 (1987) (finding standing where requested injunction "would at least partially redress" plaintiff's injury); *Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007) (same). As nothing in the government's submission can plausibly be read to deny that the transfer restrictions were irrelevant to the failure to send Petitioner home, this relatively low bar is clearly met here.

Conclusion

Petitioner has been detained for too long, and for no good reason. The Court should grant his motion, declare that the NDAA transfer restrictions do not apply here and/or grant the writ of habeas corpus and order Petitioner's release to ensure that justice is done.

If the Court grants relief, it should likewise deny the government's request for a stay pending appeal on the grounds that, among other things, a stay would cause Petitioner substantial prejudice and irreparable harm. This is a habeas case, and such cases are particularly ill-suited to delay. That is because delay is substantive, not merely procedural, causing the very harm that Petitioner claims is unlawful and inequitable, and which he filed the instant motion in order to remedy.

Dated: January 17, 2017

Respectfully submitted,

/s/*Shayana Kadidal*

Shayana D. Kadidal (D.D.C. Bar No. 454248)
Omar Farah (pursuant to LCvR 83.2(g))
J. Wells Dixon (pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012

(212) 614-6438
kadidal@ccrjustice.org
ofarah@ccrjustice.org
wdixon@ccrjustice.org

Attorneys for Petitioner Sufyian Barhoumi

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUFYIAN BARHOUMI (ISN 694),	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 05-1506 (RMC)**
	)	
BARACK OBAMA, *et al.*,	)	
	)	
Respondents.	)	
	)	

MEMORANDUM OPINION ON MOTION FOR ORDER EFFECTING RELEASE

Sufyian Barhoumi is detained by the Department of Defense at Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). On his petition for release by *habeas corpus*, this Court, in a decision affirmed by the D.C. Circuit Court of Appeals, held that he was legally detained as "part of" an al-Qaida associated force. *See Barhoumi v. Obama*, 609 F.3d 416, 418, 432 (D.C. Cir. 2010). In August 2016, a Periodic Review Board (PRB) determined that detention of Mr. Barhoumi was "no longer necessary to protect against a continuing significant threat to the security of the United States." Respondents' Response to Order to Show Cause [Dkt. 282] at 1 (Resp.).[1] The Board recommended that Mr. Barhoumi be repatriated to Algeria subject to certain pre-conditions.

On Friday, January 13, 2017, facing the imminent end of the Obama Administration and fearing that the incoming Trump Administration will not allow any releases from Guantanamo, Mr. Barhoumi's counsel filed an Emergency Motion for Order Effecting Release. Counsel posited various legal bases for the motion and argued that Mr. Barhoumi's

[1] *See* Unclassified Summary of Final Determination, *available at* http://www.prs.mil/Portals/60/Documents/ISN694/160809_U_ISN694_FINAL_DETERMINATION_PUBLIC.pdf; Resp., Ex. A [Dkt. 282-1].

transfer has "been delayed due to bureaucratic obstacles unrelated to Petitioner[], the underlying facts of . . . [his] case[], or any serious substantive concerns about the ability of . . . [his] home countr[y,] [Algeria,] to receive and monitor" him. Mot. [Dkt. 279] at 1-2. On that same day, the Court issued an Order to Respondents to Show Cause by Tuesday, January 17, 2017, why Mr. Barhoumi's motion should not be granted. Respondents timely filed their response and Petitioner filed his reply on the same day.[2] Reply [Dkt. 284].

The motion must be denied. Mr. Barhoumi does not have standing to bring it. "The Constitution limits [the Court's] 'judicial Power' to 'Cases' and 'Controversies,' U.S. Const. art. III, § 2, cl. 1, and there is no justiciable case or controversy unless the plaintiff has standing." *West. v. Lynch*, No. 15-5107, slip op. at 2 (D.C. Cir. Jan. 18, 2017). To demonstrate standing, Mr. Barhoumi must show the existence of a case or controversy, which requires (1) an "injury in fact" that is (2) "fairly traceable to the challenged action of the defendant" and is (3) likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because Mr. Barhoumi's alleged injury is not "legally and judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), the Court has no jurisdiction to entertain his motion. "[A]n injury refers to the invasion of some 'legally protected interest' arising from constitutional, statutory, or common law." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (quoting *Lujan*, 504 U.S. at 578). Recently, the Supreme Court emphasized that "injury in fact" is the "'[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). But an interest is not "legally protected" or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common

[2] The Court expresses its thanks to Government Counsel for their work over a holiday weekend and to Mr. Barhoumi's counsel for their exceedingly prompt reply.

law or otherwise—does not apply or does not exist. The D.C. Circuit has explained "if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997); *see also McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that a group of litigants lacked standing because their interest was premised on a mistaken interpretation of legal precedent that did not apply; the group's "claim of injury . . . [was], therefore, not to a legally cognizable right"); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right.").

Petitioner's counsel present the issue as only the nuisance of the statutorily-mandated 30-day notice period before a Guantanamo detainee can be transported elsewhere. Reply at 2 ("The government cites the transfer restrictions as an obstacle to Petitioner's transfer [to Algeria], and essentially admits that the Secretary of Defense's refusal to transfer Petitioner at this time is due to the onerous certification requirement."); *id*. at 14 ("[T]he only sensible implication from the government's representation (and from the lengthy discussion of the transfer restrictions that precedes it, Response at 5-6), is that the government was in fact making efforts from the summer onward (indeed, through potentially as late as last week) to transfer Petitioner to Algeria, and that the sole reason for its failure to repatriate him is precisely the transfer restrictions at issue in this motion—restrictions that he asks this Court to set aside."); *see also* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(a)(1), 129 Stat. 726, 969 (2015) (2016 NDAA) (requiring 30-days' notice to Congress before using defense funds to transfer a Guantanamo detainee). Counsel contend that the Court can exercise its *habeas* jurisdiction or grant the motion pursuant to the court-order exception to the NDAA,

see 2016 NDAA § 1034(a)(2), which would then relieve Mr. Barhoumi of the certification and notice provisions of the law and allow—although not necessarily require—his immediate transfer.

Mr. Barhoumi's situation is not quite as portrayed by counsel. Rather, while the government agrees that the PRB recommended his release and transfer, subject to certain pre-conditions, the Secretary of Defense has not accepted that recommendation. Thus, the requirements of certification and 30-day prior notice are not the impediments to Mr. Barhoumi's transfer to Algeria. The government is quite clear in this regard: "With regard to Petitioner, who was deemed eligible for transfer by the PRB with a recommendation for repatriation to Algeria, [the Department of Defense] (DoD) represents that on January 12, 2017, the Secretary of Defense determined that Petitioner should not be repatriated at this time based on a variety of substantive concerns, shared by multiple agencies, relevant to Petitioner's circumstances, including factors not related to Petitioner himself." Resp. at 6. While counsel for Petitioner suggest that the timing of the Secretary's decision is "curious" because it came "two days after Petitioner first sought consent to the relief sought in this emergency motion from counsel for the government," Reply at 13-14, there is no basis to cast any doubt upon the decision or its timing. The Obama Administration has been interested in closing the prison at Guantanamo Bay since its first day in office in 2009; in the waning days of his presidency, it is no surprise that the President and his Cabinet are making the last decisions they can. The news media reported this week that ten detainees previously held at Guantanamo Bay just were released to Oman. *See* Paul Schemm, *Oman accepts 10 Guantanamo detainees at the request of the U.S.*, The Washington Post (Jan. 16, 2017), https://www.washingtonpost.com/world/oman-accepts-10-ex-

gitmo-detainees-at-the-us-request/2017/01/16/a2074d40-dbc8-11e6-ad42-f3375f271c9c_story.html?utm_term=.3edcb717beaa.

The fact that Mr. Barhoumi has not been released is due to the discretionary judgment call of the Secretary of Defense that "a variety of substantive concerns, shared by multiple agencies" counsel against his transfer "at this time." Resp. at 6. The PRBs and their review process were established by Executive Order 13,567 (E.O. 13,567) and were designed to end on the desk of the Secretary of Defense. That is exactly what happened here. Thus, Mr. Barhoumi "ha[d] no right to a transfer in the first instance [because] it is entirely within the discretion of the Executive . . . [and] it is not the place of the judiciary to police the discretion of the President." *Ahjam v. Obama*, 37 F. Supp. 3d 273, 280 (D.D.C. 2014).[3]

In point of fact, the Executive Order specifies:

> This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

E.O. 13,567 § 10(c). Further, the Secretary is "not . . . bound by any such [PRB] recommendation," 2012 NDAA § 1023(b)(2), and, as here, is fully empowered to reject it. The fact of the PRB recommendation assuredly raised hopes that Mr. Barhoumi would be repatriated to Algeria but at all times the Secretary had to agree and so notify Congress. In light of the express provisions in the Executive Order and the 2012 NDAA, the PRB recommendation gives Mr. Barhoumi no cognizable legal right on which to stand.[4]

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[3] The PRB process and its reviews "do[] not address the legality of any detainee's law of war detention." E.O. 13,567 § 8. Its purpose is "to make discretionary determinations" regarding detainees. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023(b)(1), 125 Stat. 1298, 1564 (2011) (2012 NDAA).

[4] Mr. Barhoumi asks the Court to rely on an exception to the certification requirement that applies to transfers of "any individual detained at Guantanamo to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction." 2016 NDAA § 1034(a)(2).

Secondly, his reliance on the possibility of relief under *habeas corpus* is also misplaced. In ruling on Mr. Barhoumi's formal *habeas* petition, the D.C. Circuit agreed with this Court that Mr. Barhoumi is lawfully detained at Guantanamo Bay. And the Supreme Court has held that such a detainee may be lawfully detained "for the duration of the relevant conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008); *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). Until there is "a determination by the political branches that hostilities in Afghanistan have ceased, [Mr. Barhoumi's] continued detention is justified." *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010). This Court is, of course, bound by these decisions.

As a result, without a legally protected right to challenge the Secretary's discretion or to obtain *habeas* relief for an immediate transfer, there is no law to apply here. Mr. Barhoumi has no cognizable legally protected interest that has been injured and, therefore, no standing to pursue his motion. The Court is without jurisdiction. The motion must be denied.

A memorializing order accompanies this memorandum opinion.

DATE: January 18, 2017

/s/
ROSEMARY M. COLLYER
United States District Judge

These provisions of the 2016 NDAA were not repealed or modified by the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, enacted on December 23, 2016. Because Mr, Barhoumi has no legally-protected right to such an order, he has no standing to seek one, and the Court has no jurisdiction to grant one. *See Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). This provision is of no assistance.