UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED ZAID SALEM ZUHAIR, *Petitioner*, v. GEORGE W. BUSH, ROBERT GATES, REAR ADM. MARK H. BUZBY, and ARMY COL. BRUCE VARGO, *Respondents*.	Civil Action No. 08-864 (EGS)

TRAVERSE IN SUPPORT OF AHMED ZUHAIR'S PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTORY STATEMENT

Petitioner Ahmed Zaid Salem Zuhair is a national of Saudi Arabia detained unlawfully by the United States Government thousands of miles from his home for the better part of a decade. He respectfully submits this Traverse in support of his Petition for the Great Writ. Mr. Zuhair has never engaged in or supported any hostile activity against the United States or its allies. This Court should accordingly order his prompt release and repatriation to his homeland and family.

Respondents have attempted to justify their unlawful and indefinite detention of Mr. Zuhair by using three tactics. First, they seek to distort Mr. Zuhair's past travel as a merchant and humanitarian aid worker by implausibly portraying him as a roving international terrorist of almost mythical status, stitching together uncorroborated rumors proffered by discredited fabricators and statements extracted through torture. The intent is to create a cloud of guilt, though it dissipates when the evidence is subjected to the slightest scrutiny. Second, they attempt to bolster this narrative with sweeping and long-rejected assertions of presidential authority that plainly exceed Congress' mandate to use military force, flout international law, and disregard the Constitution's separation of powers and guarantee of fundamental rights. Third, they hope to hide the weaknesses of their case by relying extensively on classified evidence kept from Mr. Zuhair, thereby preventing undersigned counsel from enlisting the client in his own defense.

These habeas proceedings have also been impeded by Respondents' attempts to break Mr. Zuhair's hunger strike of nearly four years—a form of peaceful protest against his unlawful detention—by subjecting him to needlessly excruciating forms of force-feeding and denying him desperately needed medical treatment. Guantánamo personnel originally responded to the hunger strike by feeding Mr. Zuhair humanely. But for the past several years, Mr. Zuhair has

spent four hours every day violently strapped into a "restraint chair" while nurses—and sometimes medically unqualified riot squad personnel—forcibly insert a feeding tube into his stomach via his nose without anesthesia or lubricant and pump his stomach with liquid nutrients at such velocity that he is often induced to vomit all over himself. Such torture under the guise of "force-feeding" has on several occasions forced Mr. Zuhair and other hunger strikers to smear themselves with their own excrement as a last resort in order to deter the most violent excesses of Guantánamo personnel. Mr. Zuhair's health has also deteriorated dramatically as a result of these measures—with his weight at one point dropping to barely more than 100 pounds—and he has sought measured forms of relief before this Court in order to be able to participate meaningfully in these proceedings.

Mr. Zuhair hereby refutes the factual allegations against him, which are based on secondhand media reports, rumors offered as "intelligence" but which cannot be evaluated for reliability, the claims of known perjurers, and, most disturbingly, statements obtained from men subjected to beatings, electric shock, and other abject methods of torture and coercion. Furthermore, the Government takes a "kitchen-sink approach" to the deprivation of Mr. Zuhair's liberty by resorting to allegations that even if true—which they emphatically are not—are so far removed in space and time from any armed conflict with the United States that they would not justify his detention under any reasonable definition of "enemy combatant."

Due to the Government's extensive reliance on classified evidence and its improper attempts to withhold unclassified evidence as well from the public—which Petitioner separately contests—this Traverse incorporates by reference a Classified Annex responding directly to those secret materials.

I. FACTUAL BACKGROUND

Mr. Zuhair is a Saudi national from Jeddah born in 1965. He has worked as a merchant and a humanitarian aid provider, occupations that have led him to areas where Arab travelers have been subject to racial profiling by the United States and other nations as possible Islamist fighters. The weakness of Respondents' factual allegations against Mr. Zuhair vividly demonstrates the consequences of allowing such stereotypes to form the basis of indefinite and judicially unreviewable deprivations of liberty.

Mr. Zuhair completed his primary schooling in Saudi Arabia, achieved a high school equivalency in Yemen, and studied at a university in Lahore, Pakistan. *See* Declaration of Ramzi Kassem[1] ("Kassem Decl.") ¶¶ 10-12, attached as Ex. 1. He has worked as a merchant trading in various goods and livestock, including sheep, motorcycle parts, gold, sporting goods and textiles. *Id.* ¶¶ 14-17. Though for a short time Mr. Zuhair owned and ran a supermarket with its own bakery, Mr. Zuhair did not regularly have a dedicated shop of his own. *Id.* ¶ 16. Instead, Mr. Zuhair typically used the money he earned in order to cover travel and in-country expenses. *Id.* ¶ 14.

While studying and working in Pakistan in the early 1990s, Mr. Zuhair married a Pakistani woman from Lahore and continued to visit her family there in subsequent years. *Id.* at ¶ 13; *see also* Declaration of [redacted] ("[redacted] Decl.") ¶ 29, attached as Ex. 2.[2]

A. Mr. Zuhair's Charitable Activities and False Imprisonment in the Balkans

[1] A declaration from Mr. Zuhair himself is forthcoming but could not be prepared in time for the filing of this Traverse due to Respondents' misplacing of attorney-client notes at Guantánamo, resulting in a three-week delay in their delivery to the Secure Facility. *See* Pet'r's Am. Consent Mot. for Ext. of Time to File Habeas Traverse (dkt. no. 101). After these notes are confirmed unclassified, the draft declaration based on them must be translated into Arabic and mailed back to Guantánamo for Mr. Zuhair's review and signature—at which point it must be transmitted again to the Secure Facility for a second classification review under the Protective Order. *See* Kassem Decl. ¶¶ E-J.

[2] Certain declarations, though they contain no classified information, contain sensitive information that requires redaction to protect the privacy of the declarants. *See, e.g.*, [redacted] Decl. ¶ 55.

In or around 1993, Mr. Zuhair traveled to Germany for leisure and to explore business opportunities there. He remained in Germany for a month and a half, spending time in Frankfurt and Munich. Kassem Decl. ¶ 20. After the outbreak of civil war and mass atrocities in Bosnia-Herzegovina, Mr. Zuhair was deeply moved by the plight of victims of ethnic cleansing and decided to participate in charitable relief activities in the Balkans. *Id.* ¶ 22. He was introduced to this work by Turks living in Germany who were organizing a humanitarian relief trip to Croatia in order to aid the Bosnian refugees. *Id.* ¶ 20. Together, they traveled by land to Zagreb, Croatia. *Id.* At no time before or during his time in Croatia did Mr. Zuhair ever carry a weapon, participate in combat, or support any militant activities. *Id.* ¶ 34; *see also* [redacted] Decl. ¶ 49.

When visiting a mosque in Zaghreb, Mr. Zuhair met a group of young Saudis who, like Mr. Zuhair, were originally from Jeddah. *Id.* ¶ 21. One of these men had founded a charitable organization to provide for Bosnian refugee orphans in Croatia and Mr. Zuhair soon began assisting him as a volunteer. *Id.* The charity was called the Foundation for the Sponsorship of Orphans (al-Mu'assasa li-kifaalat al-aytaam, in Arabic). This charity was the only organization Mr. Zuhair worked for while in Croatia. *Id.* ¶ 23. The Foundation was a minor organization. *Id.* ¶ 24. Mr. Zuhair shared an apartment with the founder and two other individuals. *Id.* The apartment doubled as the Foundation's office. *Id.* The Foundation was registered with the Croatian government and all the volunteers had residency permits issued by the Croatian government to allow them to work for the Foundation. *Id.*

The Foundation's primary purpose was to provide for refugee orphans, Muslim and Christian alike. *Id.* ¶ 25. The Foundation would send photos of individual orphans to Saudi Arabia and, through mosques and local organizations in Saudi Arabia, it would enlist Saudi sponsors for each child. *Id.* ¶ 26. Those sponsors would then send funds on a regular basis to

help support the orphans. *Id.* ¶ 26. At the time, a monthly donation of 60 German Marks, a currency then widely used in Croatia and the equivalent of 36 U.S. Dollars, was enough to sponsor an orphan. *Id.* ¶ 26.

The Foundation quickly realized that there were other needs in the population of refugees and began distributing aid and finding housing for refugee families. *Id.* ¶ 27. In the course of this work, the Foundation would sometimes coordinate with other, larger, locally-implanted NGOs such as Al-Haramain and the main Kuwaiti relief group in order to obtain surplus foodstuffs, clothes and other goods from them for distribution to needy families resettled in Croatia. *Id.* ¶ 28. Both of those charitable organizations were well-established in Croatia and were registered with local authorities and the United Nations. *Id.* To Mr. Zuhair's knowledge, the Foundation never took funds from Al-Haramain or any other NGO in Croatia. *Id.* ¶ 29.

At first, because Mr. Zuhair had no car of his own and did not speak the local language, Mr. Zuhair's primary task was to interface between the Foundation and other relief NGOs in Croatia. *Id.* ¶ 32. However, Mr. Zuhair quickly picked up enough of the local language to get by and became sufficiently independent to be able to move around by himself, visiting shelters, orphanages and refugee camps. *Id.* ¶ 33.

Mr. Zuhair and his colleagues rented a house outside of the Croatian capital, Zagreb, for use by Bosnian refugees—both Christian and Muslim—and provided for their needs. [redacted] Decl. ¶ 11. During this time, Mr. Zuhair met a Bosnian refugee whose father was in a Serbian concentration camp inside Bosnia who "liked [Mr. Zuhair] immediately because of his funny, sweet, and unselfish personality." *Id.* ¶ 16.

The two later wed and lived briefly together with Mr. Zuhair's Pakistani wife in Saudi Arabia. *Id.* at ¶¶ 21-25; Kassem Decl. ¶ 36. Mr. Zuhair and his Bosnian wife separated when

she resettled in the United States with her immediate family, including the son she had with Mr. Zuhair. [redacted] ¶¶ 32-33; Kassem Decl. ¶ 36. They remained in intermittent contact afterwards. [redacted] Decl. ¶ 46.

Shortly after their separation, the Foundation where Mr. Zuhair worked closed down and he traveled to Bosnia for the first time with several friends. Kassem. Decl. ¶ 39. He spent his time there doing freelance charity work—purchasing goods with the left over money from the Foundation and distributing them to hospitals and needy families around Zenica and Travnik. *Id.* ¶ 44. During this time, Mr. Zuhair never participated in nor was in any way associated with any armed group. *Id.* ¶ 45. While staying with his host family in Zenica, Mr. Zuhair met a woman, whom he later married. *Id.* ¶ 47. The two moved close to Begov Han. *Id.*

Mr. Zuhair's charitable activities entailed considerable personal risk—not only because of the dangers inherent in any war zone, but also because Arab aid workers such as himself were frequently mistaken for foreign volunteers ("mujahids") from other Muslim countries fighting on the side of the Bosnian government. In the winter of 1995/1996, after driving through a checkpoint manned by Bosnian Croat militia near Novi Travnik, the Croat-controlled area of Bosnia-Herzegovina, Mr. Zuhair was chased by a car that crashed into his vehicle. *Id.* ¶ 53. The cars were promptly surrounded by armed men who transported him and his car to the local police station. *Id.* ¶ 55. While waiting at the precinct, one of the armed men led him to his car and instructed him to open the back door. *Id.* Mr. Zuhair saw an AK-47 which the officer had planted. *Id.*

Mr. Zuhair believes that his arrest and subsequent conviction for arms possession was orchestrated by the Bosnian Croat militia so they could claim to have captured a mujahid. *Id.* ¶ 56. He never carried a weapon while in Bosnia. *Id.* ¶ 34; [redacted] Decl. ¶ 49.

Mr. Zuhair's arrest is consistent with a pattern of unlawful seizures of Arab aid workers by Bosnian Croat forces (Croatian Defense Council—Hrvatsko Vijeće Obrane, HVO) during and after the war in order to exchange them for captured fighters. In one set of well-known cases, HVO military police seized a group of Arab U.N. employees and university students in February 1996, around the time of Mr. Zuhair's arrest in the same canton. *See Hermas v. Federation of Bosnia-Herzegovina,* Case No. CH/97/45 (H.R. Chamber of Bosn. & Herz. 1998); *H.R. and Momani v. Federation of Bosnia and Herzegovina*, Case No. CH/98/46 (H.R. Chamber of Bosn. & Herz. 1999), attached as Exs. 3 & 4. During their six months in captivity, these Arabs were paraded before journalists as "mujahids" by HVO authorities, who exchanged them for captured Croat fighters in August 1996.[3] The Human Rights Chamber for Bosnia-Herzegovina—a special international human rights court—found that they had been detained without any legal basis, beaten, and subjected to forced labor on account of their religion and national origin. *Id.*

During his second week in prison, Mr. Zuhair was summoned to a court which sentenced him the same day to five years in prison. Kassem Decl. ¶ 59. He spent time in two different prisons and was at one point interrogated by U.S. military intelligence personnel who promised quick release in exchange for testimony incriminating other Arabs. *Id.* ¶¶ 60, 61. In the first prison, Mr. Zuhair was beaten by interrogators who informed him that they had recently meted out similar treatment to another group of Arabs. *Id.* ¶ 58. After being moved to the second prison, the prison director informed Mr. Zuhair that he was supposed to have been part of a prisoner exchange of three Bosnian Muslims and five Arabs (including himself) for eight Bosnian Croat prisoners, but the exchange had taken place shortly before his arrival. *Id.* ¶¶ 62,

[3] The official in charge of HVO detention and exchange operations during much of this relevant period, Berislav Pušić, is currently on trial for war crimes before the U.N. International Criminal Tribunal for ex-Yugoslavia for, *inter alia*, approving the use of forced labor in detention centers and misusing prisoner exchange and release policies in order to facilitate ethnic cleansing of Muslims from HVO-controlled areas. *See Prosecutor v. Prlić*, Case No. IT-04-74-PT, Am. Indictment, ¶ 17.6 (Nov. 16, 2005), attached as Ex. 5.

64. It is highly likely that the Arabs referred to by the prison director were the petitioners in the cases brought before the Human Rights Chamber of Bosnia-Herzegovina mentioned above, as Mr. Zuhair arrived in Mostar prison around August 1996, when they were exchanged. Mr. Zuhair was released in May 1997. *Id.* ¶ 66. After several years of living apart from his family in Saudi Arabia and his experiences in Bosnian prisons, Mr. Zuhair decided approximately two months after his release to leave Bosnia-Herzegovina and return to Saudi Arabia. *Id.* ¶ 71.

B. Mr. Zuhair's Abduction, Detention, and Torture in Pakistan and Afghanistan

After returning home in 1997, Mr. Zuhair sought to put his experiences in the Balkans behind him. He resumed his commercial work, including in the sheep trade between Saudi Arabia and Yemen, for the next few years. Kassem Decl. ¶¶ 78, 79. In late October or early November 2001, shortly before Ramadan, Mr. Zuhair traveled to Lahore, Pakistan to visit his wife's family and also to purchase spare parts for motorcycles that he could then sell in Saudi Arabia. *Id.* ¶ 82.

Unfortunately, Mr. Zuhair would soon once again fall victim to the practice of racial profiling of Arab travelers in certain areas that led to his imprisonment in Bosnia-Herzegovina, except this time with far more disastrous results. In December 2001, Mr. Zuhair was abducted by Pakistani agents in plainclothes from a crowded market in downtown Lahore, hundreds of miles from any battlefield. *Id.* ¶ 86. The Pakistani men confiscated all of his possessions, including his passport, motorbike, clothes, and all of his cash. *Id.* ¶ 87. At this time Pakistani authorities and bounty hunters were engaged in indiscriminate roundups of Arabs and other foreign Muslims for transfer to U.S. custody in exchange for bounties. *See* Pet. for Writ of Habeas Corpus and Compl. for Declaratory and Injunctive Relief (dkt. no. 1) at ¶ 14 (citing publicly available Department of Defense statistics indicating that 66% of Guantánamo detainees

were captured in Pakistan and former President Pervez Musharraf's boast that such captures "earned bounties totaling millions of dollars").

Mr. Zuhair was held in a safe house in an affluent section of Lahore where he was fed only once per day. Mr. Zuhair's captors beat and threatened him with an AK-47 and hit him with sticks so savagely that they broke several sticks in the process. *See* Kassem Decl. ¶¶ 87-90. The torture was so severe that Mr. Zuhair fabricated stories that he thought would please his captors based on the questions they were asking him. Despite never having traveled to Afghanistan, he told them he had traveled there and met Usama Bin Ladin. *Id.* ¶ 93. At one point the beatings became so severe he told his tormentors that he was Usama Bin Ladin. *Id.*

Mr. Zuhair spent the next 2½ months held *incommunicado* without charge in an underground military prison in Rawalpindi, Pakistan, during which time he could not lie on his back due to his injuries. *Id.* ¶ 96. At one point, he was taken to an office in Islamabad and interrogated by individuals who identified themselves as FBI agents. *Id.* ¶ 100. A prison official told Mr. Zuhair that the details he had given about his identity and the purpose of his trip to Pakistan had been confirmed by investigators and that he would soon be released. *Id.* ¶ 99. Instead, he was handed over to U.S. authorities and transferred to the detention facility at Bagram airfield in Afghanistan in April 2002, his first time ever in that country. *Id.* ¶¶ 102-04.

While in Bagram, Mr. Zuhair was held in a communal cell with wire mesh walls along with other detainees. *See* Declaration of Sa'd Iqbal Madani ("Madani Decl.") ¶¶ 20-22, attached as Ex. 6; Declaration of Mamdouh Habib ("Habib Decl.") ¶¶ 4-5, attached as Ex. 7; Declaration of Moazzam Begg ("Begg Decl.") ¶ 5, attached as Ex. 8. Mr. Zuhair was interrogated every single day, often by shifts of 10 interrogators who would ask him repeatedly about the October 2000 attack on the U.S.S. Cole, and who insisted on calling him "Mullah Bilal," a name he had

never answered to. *See* Kassem Decl. ¶¶ 106-07, 125-26. Teams of guards would drag Mr. Zuhair along the ground to interrogation sessions while beating him with baseball bats. *See* Habib Decl. ¶ 6; Madani Decl. ¶ 27. An interrogator with an Egyptian accent had Mr. Zuhair stripped naked and told him that if he did not cooperate, he would be sent to a country where he would be raped. *See* Begg Decl. ¶ 17; Kassem Decl. ¶ 105. Interrogators also denied Mr. Zuhair medicine because of his refusal to "cooperate" with interrogators. *See* Begg Decl. ¶ 18.

To stop the torture, Mr. Zuhair fabricated a story about entering Afghanistan to rescue an abducted cousin. *Id.* ¶ 110. Mr. Zuhair based this story on discussions he overheard amongst his former Pakistani captors of an incident that was widely reported in the Pakistani media at the time. He reasoned that this story might enable him to please his interrogators and convince them to release him, but without falsely incriminating himself. *Id.* ¶ 111. In order not to appear inconsistent and risk further torture, Mr. Zuhair later repeated this story to American interrogators at Bagram, at Qandahar, and at Guantánamo. *Id.* ¶ 112-13. After approximately two months at Bagram, Mr. Zuhair was transferred to Qandahar, where he was also subject to daily interrogations for several weeks. *Id.* ¶¶ 115-16.

C. Mr. Zuhair's Detention, Hunger Strike, and Torture in Guantánamo

On June 14, 2002, Mr. Zuhair was transferred to the U.S. Naval Station in Guantánamo Bay. *Id.* ¶ 116. He has remained there since, without any meaningful review of his detention until now.

In October 2004—nearly three years after Mr. Zuhair's initial abduction—the Government revealed the first of many, ever-shifting bases for detaining him when a Combatant Status Review Tribunal (CSRT) designated him as an "enemy combatant." The allegations against Mr. Zuhair mostly concerned alleged acts in Bosnia-Herzegovina during the 1990s that

were unrelated to any armed conflict with the United States, as well as an accusation of involvement in the bombing of the U.S.S. Cole. *See* Summ. of Evidence for Combatant Status Review Tribunal – ZUHAYRI, Ahmad Zayid Salim (Oct. 26, 2004) ("CSRT Summ. of Evidence"), attached as Ex. 9. The weakness of these allegations and Mr. Zuhair's inability to challenge them before the CSRT validate the Supreme Court's concern that the factual findings of those tribunals are plagued by "considerable risk of error." *Boumediene v. Bush*, 128 S. Ct. 2229, 2238 (2008).

In June 2005—more than three years after his abduction—Mr. Zuhair began a hunger strike that continues to this day, longer than any other at Guantánamo. *See* Kassem Decl. ¶ 138. For Mr. Zuhair,

> This hunger strike is the only way I have to speak out. I do not strike because I enjoy hunger, thirst, fever, fatigue, pain, lightheadedness, or my body consuming itself. I do it to protest the injustice all the prisoners endure—the attacks on my religion, the disrespect shown to the Qur'an, the denial of medical treatment, the torture, and the cruelty of the interrogators. My strike is a form of peaceful protest against this injustice.

Id. ¶ 139. Mr. Zuhair has vowed to continue the hunger strike until he is repatriated. *See* Habeas Pet. ¶ 51. Guantánamo personnel initially force-fed Mr. Zuhair in a bed, a technique Respondents concede he did not resist. *See, e.g.,* Pet'r's Reply in Further Supp. of Emergency Mot. to Compel Immediate Medical Relief 3 (dkt. no. 100).

Soon thereafter, Guantánamo personnel escalated attempts to break the will of hunger strikers, primarily through three means. First, Guantánamo personnel began regularized, indiscriminate use of a specialized restraint chair designed only for use on those who violently resist force-feeding. The chair has six-point restraints that personnel often apply in an excruciatingly tight manner on Mr. Zuhair's forehead, limbs, and torso. Guantánamo personnel forcibly insert a feeding tube into Mr. Zuhair's stomach via his nose without using anesthesia or

lubricant and often administer feeding in a manner that causes him to vomit afterwards. The process is needlessly painful. *See, e.g.*, Kassem Decl. ¶¶ 41, 42; Habeas Pet. ¶¶ 53-59. Second, medical personnel at Guantánamo have explicitly told Mr. Zuhair on multiple occasions that he will not receive medical treatment unless and until he ends his hunger strike. *See* Kassem Decl. ¶ 144; *see also, e.g.*, Pet'r's Mot. to Compel Complete Prod. of Med. Records and for Order Permitting Indep. Med. Exam. (dkt. no. 37). Third, in August 2008, riot squad personnel began to administer force-feedings instead of medics, acting in a wantonly violent and medically unsound manner that has left detainees shackled to restraint chairs for hours on end covered in their own blood and vomit. *See* Kassem Decl. ¶¶ 148-49; Ex. 1 to Factual Supp. R. (dkt. no. 66) (letter from Mr. Zuhair describing August 14 incident of violent force-feeding by Guantánamo riot squads). This brutal practice was curbed only after detainees smeared themselves with their own excrement in protest. *See* Kassem Decl. ¶ 152; Emergency Mot. to Compel Immediate Med. Relief 2 (dkt. no. 92).

II. PROCEDURAL HISTORY

Mr. Zuhair petitioned this Court for a writ of habeas corpus, along with a complaint for declaratory and injunctive relief, on May 19, 2008 (dkt. no. 1), ten months after his petition before the Court of Appeals for the District of Columbia Circuit pursuant to the Detainee Treatment Act of 2005 failed to produce any judicial review—meaningful or otherwise—of his unlawful detention. *See Zaid v. Gates*, 07-1221 (D.C. Cir. June 19, 2007). On June 12, 2008, the Supreme Court held that this Court had jurisdiction over Mr. Zuhair's habeas petition and that Mr. Zuhair was "entitled to a prompt habeas corpus hearing." *Boumediene*, 128 S. Ct. at 2275. Despite *Boumediene*'s admonition that after more than six years of confinement without charge or process, "the costs of delay can no longer be borne by those who are held in custody,"

id., at every turn in these proceedings, Respondents have sought to place the costs of delay solely on the detained petitioner through attempts to block scrutiny by Mr. Zuhair, this Court, and the public.

First, Respondents have concealed most of the evidence used to support the allegations against Mr. Zuhair, as well as many of the allegations themselves. Respondents filed their Factual Return stating the alleged bases for Mr. Zuhair's detention on September 19. *See* Resp'ts' Not. of Filing Factual Return (dkt. no. 69). A public version of the Factual Return that could be shared with Mr. Zuhair and the world at large was not docketed until one month later, on October 22. *See* Factual Return (dkt. no. 85). That version is so heavily redacted that it is essentially useless in allowing Mr. Zuhair to participate in his own defense. Nearly all of the evidentiary exhibits are redacted, except for news articles and Mr. Zuhair's own statements. Even many of the allegations against Mr. Zuhair are secret; 19 of the 26 substantive paragraphs in the narrative portion of the Government's Factual Return contain allegations that are redacted, 13 of them in their entirety. One of the redacted paragraphs was withdrawn by the Government as a basis for detention on October 20. *See* Resp'ts' Not. of Withdrawal of Assertions in Factual Return (dkt. no. 84). Respondents have since publicly acknowledged that the withdrawn allegation relates to the murder of William Jefferson. *See* Resp'ts' Opp. to Mot. to Compel Disc. of Records and Set a Disc. Sched. 21 (dkt. no. 110) ("Documents Relating to the Jefferson Murder are Irrelevant . . . for the reasons explained in respondents' motion for reconsideration [of order to produce exculpatory information relating to withdrawn allegation].").

Second, Respondents have failed to produce exculpatory information[4] ordered by this Court that is crucial to Mr. Zuhair's ability to present his case. Respondents made limited

[4] This Court on October 8 ordered the Government to produce "all exculpatory evidence that is reasonably available to the government and that bears on the Petitioner's detention." At the December 18, 2008 hearing, the Government

disclosures pursuant to the Court's October 8 Order on October 22 and 23. However, Petitioner's counsel have independently obtained documents that are fatal to the credibility of sources relied upon by the Government to justify Mr. Zuhair's detention and are therefore clearly exculpatory but were never produced, thus demonstrating the woeful inadequacy of Respondents' disclosures. *See* Classified Annex to Pet'r's Mot. to Compel Disc. of R. and Set a Disc. Sched. Further, Respondents have sought reconsideration of this Court's order insofar as it related to the withdrawn allegation. *See* Not. of Filing Resp'ts' Mot. for Recons. (dkt. no. 89).

Third, Respondents have categorically rejected all discovery requests. Mr. Zuhair has moved this Court to compel Respondents to comply with three discovery requests so far refused by Respondents. *See* Pet'r's Mot. to Compel Disc. of R. and Set a Disc. Schedule (dkt. no. 102). Mr. Zuhair hereby reserves the right to supplement this Traverse with any additional discovery that this Court may order.

Throughout the course of this litigation, Respondents have also sought to augment their already considerable power to classify information by redacting or concealing *unclassified* material through blanket and conclusory "designations" that arrogate this Court's exclusive authority to seal judicial records as protected information. Among the unclassified pieces of information that Respondents have improperly concealed as "protected" are the identities of several of the most important sources of accusations relied upon by Respondents[5] to justify Mr.

represented that it had complied with both the terms of the Court's order and the requirement for production of exculpatory information as established by the D.C. Circuit in *Parhat v. Gates*. *See Parhat v. Gates*, 532 F.3d 834, 841 (D.C. Cir. 2008) (defining exculpatory information as "evidence to suggest that the detainee should not be designated as an enemy combatant").

[5] Respondents have conceded that FM40 (Nov. 8, 2004), FM 40 (Jan. 5, 2005), and FM 40 (Mar. 15, 2005), relied on to support the Factual Return ¶¶ 22, 29, 34, 37, are not classified, yet Respondents purport to have the ability to redact portions thereof as "protected." *See* Letter from James E. Cox, Counsel for Resp'ts to Ramzi Kassem, Counsel for Pet'r (Dec. 17, 2008) ("Dec. 17 Cox Letter"), attached as Ex. 10.

Zuhair's detention, as well as *all* unclassified exculpatory materials.[6] Unclassified information can be designated as presumptively "protected" only after counsel for Respondents first seek the consent of Petitioner's counsel and then move this Court accordingly. *See* Procedures for Filing Protected Information. Moreover, the Government can only seek protection of *discrete* pieces of information, and must provide *specific* justifications for these requests. *See Bismullah v. Gates*, 501 F. 3d 178, 188 (D.C. Cir. 2007), *vacated Gates v. Bismullah*, 128 S. Ct. 2960 (2008), *reinstated* Order, *Bismullah v. Gates*, 06-1997 (D.C. Cir. Aug. 22, 2008) ("It is the court, not the Government, that has discretion to seal a judicial record . . . insofar as a party seeks to file with the court nonclassified information the Government believes should be 'protected,' the Government must give the court a basis for withholding it from public view."); *see also Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008) ("Without an explanation geared to the information at issue . . . we are left with no way to determine whether that specific information warrants protection other than to accept the government's own designation."). By ignoring the procedures outlined in the Protective Order, Respondents have unilaterally created an additional and cumbersome layer of secrecy in this case without any legal basis whatsoever.

III. SUMMARY OF ARGUMENT

Each of the numerous allegations brought by Respondents against Mr. Zuhair is marred by legal, evidentiary, and factual flaws and none can justify the continued detention of Mr. Zuhair as an "enemy combatant." As explained in Part VI, *infra*, and in the Classified Annex to this Traverse, Mr. Zuhair contests each of these allegations on factual grounds. Mr. Zuhair is innocent of all the allegations brought against him by Respondents.

[6] *See* Letter of James E. Cox, Counsel for Resp'ts to Ramzi Kassem, Counsel for Pet'r (Nov. 12, 2008), attached as Ex. 11 (effectively classifying all unclassified exculpatory materials not marked because an unspecified subset "contain[s] information that is classified and/or protected, regardless of whether the individual documents were marked as such").

However, this Court need not reach the facts of each and every allegation brought against Mr. Zuhair (though, if it should choose to do so, Mr. Zuhair should certainly prevail). First, many of Respondents' allegations, even if true, cannot justify Mr. Zuhair's continued detention as a matter of law. As explained in Part IV, the Government has legal authority to detain only those individuals who directly participated in armed conflict against the United States within the scope of Congress' authorization of the AUMF. The Government cannot detain Mr. Zuhair for alleged acts that do not fall within the scope of the Government's legal authority.

Second, as explained in Part V, the Government's factual return relies extensively on evidence that either lacks sufficient indicia of reliability to be accorded any weight by this Court or is the product of tortured statements that are both *completely* unreliable and inadmissible as a matter of law. Allegations that cannot justify Mr. Zuhair's detention and those constructed from an edifice of unreliable and inadmissible evidence must be dismissed.

IV. LEGAL AUTHORITY FOR DETENTION

The term "enemy combatant" is not an empty terminological catch-all that provides the Government roving authority to order the indefinite military detention of any civilian in the world considered a possible threat to the United States. The Government's authority to detain has been conferred by Congress in the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224. As the Supreme Court has made clear, and lower courts have recognized, this authority is grounded in the laws of war and it is the laws of war that give content to the term "enemy combatant." Under the laws of war, the Government's detention power is limited by a simple principle: the Government may only detain as an "enemy combatant" a person properly determined to have acted as a member of a state military engaged

in hostilities against the United States or to have directly participated in hostilities against the United States.

To determine if the Government may detain someone under the AUMF, the Court must answer two questions. First, was the alleged action part of the war with the United States defined by the AUMF? Second, if so, did the alleged action rise to the level of direct participation in hostilities that would qualify the individual an "enemy combatant"? Those allegations that, on their face, do not meet this test are, as a matter of law, unable to support Mr. Zuhair's detention.

These limiting rules do not impinge on the Government's power to detain individuals who are properly implicated in terrorist attacks on the United States or her allies. An individual who planned the September 11th attacks is detainable as an "enemy combatant." Similarly, an individual actively participating in hostilities against the United States in Afghanistan is detainable as an "enemy combatant." However, an individual alleged to have committed a crime in Bosnia-Herzegovina, during peacetime, not directed against the United States or its allies *cannot*, as a matter of law, be detained as an "enemy combatant." An individual alleged to be loosely associated with an organization itself alleged to be loosely associated with al-Qa'ida cannot be detained as an "enemy combatant." The laws of war draw clear distinctions between civilians and combatants. Congress and the Courts have stated that the Executive cannot supersede the laws of war and erode this distinction, as it seeks to do here by presenting allegations that could not possibly justify detention as an enemy combatant.

A. Detention authority under the AUMF is limited to persons who are enemy combatants under the laws of war

When Congress authorized military action after September 11, 2001, it did not hand the Executive license to violate the laws of war. Instead, the Supreme Court in *Hamdi* used

"longstanding law-of-war principles" to derive and define the authority to detain "combatants" under the AUMF. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). The Supreme Court has long used the law of war to establish limits on the treatment of detainees. *See also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) (relying on law of war to interpret Article 21 of Uniform Code of Military Justice); *In re Quirin*, 317 U.S. 1, 27-8 (1942) (Court has "recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals"); Bradley & Goldsmith, 118 Harv. L. Rev. at 2108 ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.").

Because the AUMF contains no express authorization for detention, the *Hamdi* plurality inferred, based on "longstanding law-of-war principles," *id.*, authority to detain a "narrow category" of persons, *id.* at 517, who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who '*engaged in an armed conflict* against the United States' there." *Id.* at 526 (quoting Resp'ts' Br. 3) (emphasis added).[7] The plurality said that the "only purpose" justifying military detention of such persons was the traditional one of preventing a "combatant" from returning to the battlefield and resuming hostile military operations. *See id.* at 518, 521 (noting that detention for intelligence gathering purposes,

[7] At the time *Hamdi* was decided, Respondents relied upon a definition of an enemy combatant as someone who "was part of or supporting forces hostile to the United States or coalition partners, *and* engaged in an armed conflict against the United States." Resp'ts' Br. 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (emphasis added). Mr. Zuhair can only presume that Respondents are attempting to apply here a new and sweeping definition of "enemy combatant" that they have advanced in other cases. *See, e.g.*, Resp'ts' Resp. to Sept. 8, 2008 Order Requiring Concise Statement of Def. of "Enemy Combatant," *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). This novel definition attempts to dispense with the requirement that an individual directly participate in hostilities against the United States to qualify as an "enemy combatant." However, as explained in Part IV(D), *infra*, the Government cannot dispense with this requirement, which is a necessary component of the Government's detention power as authorized by the AUMF and enabled by the laws of war. This Court should follow the example set by other courts and apply the limiting principle that the Government would deny exists.

revenge, or punishment is not permissible). The plurality emphasized that persons are subject to detention only if they have or are "engaged in an armed conflict against the United States." *Id.* at 521. In short, the Supreme Court found that the laws of war are the source of and provide the structure for the detention authority implicit in the AUMF.

The plain text of the AUMF makes clear that the implicit authority to detain is limited to persons who are enemy combatants in the well-established sense under the law of armed conflict. The AUMF only authorizes military force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the [September 11, attacks] or harbored such organizations or persons." Thus, the AUMF is tied to actual hostilities, namely against parties and persons with a nexus to the September 11 attacks. The President is not authorized to use a military response to any other threat to the United States that the President may discern. On the contrary, when the President first requested broader authority to use force against persons unconnected with September 11 "to deter and pre-empt any future acts of terrorism or aggression against the United States," Congress refused and passed the narrower AUMF instead. *See* 147 CONG. REC. S9949-51 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd contrasting the Proposed Joint Resolution Authorizing the Use of Force with the AUMF as actually passed). Congress defined the enemy in one way and *not* another, and accordingly authorized the use of military force (including detention) against that enemy only. When Congress has spoken and defined the limits of the conflict, those limits control and those "who are authorized to commit hostilities . . . can go no farther than to the extent of their commission." *Bas v. Tingy*, 4 U.S. 37, 40 (1800). The Department of Defense has no power to revoke this constitutional prerogative by rule.

Every Court to consider this issue has followed *Hamdi*'s interpretation of the AUMF and

read it in line with the laws of war. Notably, when the Fourth Circuit recently addressed this issue *en banc*, not one of the seven separate opinions adopted a definition remotely as broad as that which the Government apparently continues to maintain in this case; indeed, one judge remarked that the court had to search for "the limiting principle on enemy combatant detentions that the Government has failed to suggest." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 322 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part). Although no single definition commanded a majority of that court, each of the four opinions to address the proper definition of "enemy combatant" under the AUMF was careful to include some requirement of personal engagement in a hostile act against the United States on behalf of an enemy force.[8]

B. The AUMF Does Not Authorize Enemy Combatant Detention for Acts Unrelated to an Armed Conflict with the United States

The AUMF does not allow the United States to detain an individual for acts unrelated to an armed conflict with the United States. The AUMF only authorized military force against "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." This authority clearly does not extend to actions that are not part of a war with the United States, let alone those not part of the armed conflict delineated by the AUMF.

[8] Judge Motz, along with four judges would have adopted the standard of "a person affiliated with an enemy nation, *captured on a battlefield*, and engaged in armed conflict against the United States." *Al-Marri*, 534 F.3d at 242 (Motz, J., concurring in the judgment) (citing *Hamdi*, 542 U.S. at 516-519) (emphasis added). Chief Judge Williams defined "enemy combatant" as an individual who "(1) … *attempts or engages in belligerent acts* against the United States, either *domestically or in a foreign combat zone*; (2) on behalf of *an enemy force*." *Al-Marri*, 534 F.3d at 285 (Williams, C.J., concurring in part and dissenting in part) (emphasis added). Judge Wilkinson wrote that, to be classified as an enemy combatant, a person must "(1) be a member of (2) *an organization or nation against whom Congress has declared war* or authorized the use of military force, and (3) *knowingly plan[] or engage[] in conduct that harms or aims to harm persons* or property for the purpose of furthering the military goals of the enemy nation or organization." *Id.* at 325 (Wilkinson, J., concurring in part and dissenting in part) (emphasis added). And Judge Traxler held that the AUMF would authorize detention of civilians who "associate[d] themselves 'with al Qaeda' … and 'travel[ed] to the United States with the avowed purpose of *further prosecuting [] war* on American soil.'" *Id.* at 259 (Traxler, J., concurring in the judgment) (emphasis added). This Court need not determine whether Judge Motz's opinion states the correct standard, for even under the *broadest* definition of "enemy combatant" articulated by any of the judges in *Al-Marri*, Mr. Zuhair could not be detained.

The logic is so fundamental as to border on the tautological, and yet the Government ignores it by arguing that Mr. Zuhair may be held as an enemy combatant based on alleged acts that did not even involve a war to which the United States or its allies were parties. For example, the Government attempts to link Mr. Zuhair to a car bombing in Mostar, Bosnia-Herzegovina in September 1997. *See* Factual Return Narrative ¶ 26. Respondents fail to allege any link between this act and "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Respondents fail to allege any link between this attack and the United States. Respondents fail to allege any link between this act and *any* armed conflict at all, as it occurred in Bosnia-Herzegovina during peacetime. To extend the U.S. Government's wartime detention authority to a criminal act that occurred overseas more than a decade ago would be to stretch the AUMF beyond recognition.

Other allegations concern acts that took place in Bosnia-Herzegovina during the 1992-1996 war, *see* Factual Return Narrative ¶¶ 20, 22, a conflict to which the United States was not a party. Indeed, to the extent that the U.S. was involved in the war at all, it consisted of the United States' limited military involvement in bombing the Serb *opponents* of the Bosnian Muslim forces and their Arab fighter allies. North Atlantic Treaty Organization, *Operation Deliberate Force Factsheet*, *available at* http://www.afsouth.nato.int/factsheets/DeliberateForceFactSheet.htm.

Respondents appear to suggest that alleged activities of foreign Muslim volunteers in the Bosnian conflict such as fighting as part of the "Zubair Group" or participation in the activities of the al-Haramain charity nevertheless fall under the umbrella of the AUMF on the theory that "Al-Qaida viewed Bosnia-Herzegovina . . . as a base in Europe from which it could ultimately launch attacks against the United States." Factual Return Narrative ¶ 5. Yet whatever al-

Qa'ida's "views" may have been, there is widespread agreement amongst experts that the organization's involvement in the war was minimal at best. *See* Declaration of Tim Ripley, *Boumediene v. Bush* ¶ 20, attached herein as Ex. 12 ("Any purported links between Al Qaeda and the foreign volunteers in the Bosnian conflict have never been definitively established by any respected expert."). In order to support its unusual theory, the Government relies almost exclusively on the work of "terrorism" hobbyist Evan Kohlmann.[9] Factual Return Narrative ¶¶ 5, 13, 14 (relying on Evan Kohlmann, *Al-Qaida's Jihad in Europe: The Afghan-Bosnia Network* (Berg 2004)). Mr. Kohlmann's claims concerning al-Qa'ida's involvement in the Bosnian conflict, *id.* 18-19, are themselves almost wholly based on allegations made by the Government itself in the course of a criminal prosecution. Moreover, those allegations were made in an evidentiary proffer that was ruled inadmissible. *See U.S. v. Arnaout*, 2003 WL 255226 (N.D. Ill. 2003).[10] Respondents' reliance on Mr. Kohlmann's work adds up to little more than repetition of their own allegations through the only willing mouthpiece they could hire.

To the extent that Respondents justify Mr. Zuhair's detention on the basis of alleged acts that occurred during the Bosnian war, they must still establish a specific nexus between those

[9] Mr. Kohlmann did not conduct any fieldwork in Bosnia-Herzegovina for his book, has had no academic training or professional intelligence experience in relevant fields, and does not speak any of the relevant research languages (Arabic, Bosnian). Moreover, Mr. Kohlmann has misrepresented his credentials in several court cases where he was proffered as an expert witness by the Government. In a filing in *U.S. v. Mubayyid*, Mr. Kohlmann listed his 2006 article in *Foreign Affairs* magazine as an example of a "paper that [has] been subject to peer discussion and review." Ex. 4 to Gov't's Opp. to Def.'s Mot. Preclude Test. of Gov't's Expert Witnesses, *U.S. v. Mubayyid*, 04-40026 (D.Ma. Nov. 5, 2007) 3 (dkt. no. 334). Yet *Foreign Affairs* is not a peer-reviewed publication, nor does it even employ fact checkers, as non-academic magazines such as *The Atlantic Monthly* and *The New Yorker* do. See "Notes on Manuscript Submissions," available at http://www.foreignaffairs.org/about/guidelines ("We do not have fact checkers, and rely on authors to ensure the veracity of their statements."). During a *Daubert* hearing in another case, Mr. Kohlmann cited Dr. Mohammed Hafez of the University of Kansas as a "close colleague" who helps to ensure the quality of his translations. Yet according to an affidavit by Dr. Hafez, he "would not consider Mr. Kohlmann a close colleague" and has "never peer reviewed Mr. Kohlmann's work." Post Hear'g Br. in Supp. of Mot. to Exclude Test. of Evan Kohlmann, *U.S. v. Amawi*, 06-CR-719 (N.D. Ohio, Feb. 29, 2008) 21 and Exs. 1-2 (dkt. no. 636).

[10] Such sloppiness is hardly surprising, as Mr. Kohlmann's book also recycles many of the discredited allegations against the petitioners in the *Boumediene* case that were later rejected by Judge Richard J. Leon. *See Al-Qaida's Jihad in Europe*, 20, 199, 221.

acts and the proper scope of the AUMF—namely the "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 many cases addressed individually *infra* at Part VI, it has failed to do so.

C. The AUMF Does Not Authorize Enemy Combatant Detention in the Absence of Direct Participation in Hostilities

In situations of armed conflict that fall under the scope of the AUMF, the Government does not enjoy unbounded discretion to detain whomever it pleases. In *al-Marri*, both the plurality and Chief Judge Williams' dissent recognized that a broad reading of the AUMF could lead to "absurd results"—including a claim that the President could indefinitely detain anyone he believed "aided" or "was associated with" any organization linked to the attacks of September 11, 2001. *Al-Marri*, 534 F.3d at 226, 286 & n.4. The D.C. Circuit was similarly skeptical in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), observing that "even under the Government's own definition, the evidence establish a connection between [the group supported] and al Qaida or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word 'associated.'" *Id.* at 844.

Under the laws of war, combatants are members of regular armed forces of a government engaged in the conflict[11] or other persons who directly participate in hostilities.[12] Direct

[11] Individuals in this category are presumed to be enemy combatants whether or not they are individually taking up arms. Geneva Prisoner of War Convention art. 4(A)(1) (defining "prisoners of war" as "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces"); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 [hereinafter "Additional Protocol I"] (defining "combatants" as "[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel). Mr. Zuhair does not fit this category, and the Government does not allege otherwise.

[12] This rule applies regardless of whether an armed conflict is considered to be international or non-international. *See* ICTY, *The Prosecutor v. Duško Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995 ¶¶ 100-27 (discussing customary protections for civilians in non-international armed conflict dating back to the Spanish Civil War); *see also id.* ¶ 127 ("These rules, as specifically identified in the preceding discussion, cover such areas as . . . protection of all those who do not (or no longer) take active part in hostilities. . . ."); Linsay Moir, *The Law of Internal Armed Conflict* 133-92 (2002). Regardless of how

participation requires a direct causal relationship to harm done to the United States. *See, e.g.*, Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37 (2000), *available at* 2000 WL 33366017, at *3 (S. Treaty Doc. No. 106-37) (United States "understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy"); *Law of War Handbook* at 143 (describing U.S. policy as one restricting loss of civilian status to "those intending to cause actual harm to the personnel and/or equipment of the enemy"); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 516 (Sandoz et al. eds. 1987) [hereinafter ICRC Additional Protocol I Commentary] ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."). Abandoning the requirement of direct participation in hostilities in favor of vague notions of support or association would produce precisely the "absurd results that Congress could not have intended," *Al-Marri*, 534 F.3d at 226 (Motz, concurring), that the law of war does not permit, and that the Supreme Court and the Fourth Circuit have refused to recognize.

State interpretation and practice have made clear that the "direct participation" standard is a narrow one requiring far more than mere "support" of an enemy or even involvement in training activities. *See e.g.*, S. Treaty Doc. No. 106-37 (2000), *available at* 2000 WL 33366017, at *3 ("The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons,

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the conflict is categorized, individuals not directly participating in hostilities—a category which includes Mr. Zuhair—are protected by the laws of war from either targeting or indefinite military detention as a combatant.

munitions and other supplies, or forward deployment."). Civilians who are doing paperwork for an enemy force, manufacturing supplies, growing victory gardens, shouting encouragement, or personally planning to join the fray at some time in the future are not "enemy combatants." *See* ICRC Additional Protocol I Commentary at 619 ("There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees.");[13] *see also* International Committee of the Red Cross, *Third Expert Meeting on the Notion of Direct Participation in Hostilities, Summary Report*, Geneva, October 23-25, 2005, at 21 ("There appeared to be general agreement among the experts that the concept of 'hostilities' did not include activities of a merely 'war sustaining' nature and that 'hostilities' had to be clearly distinguished from the general 'war effort'."). The U.S. military (and the militaries of other nations) may not lawfully target such persons for killing, capture, or military detention. *See, e.g.*, HCJ 769/02 Public Comm. Against Torture in Isr. v. Gov't of Isr. [2006], 46 I.L.M. 375, 391-92 (Isr. S. Ct. 2007) (stating that a civilian who "generally supports the hostilities against the army," who "sells food or medicine to an unlawful combatant," or who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid" is not directly participating in hostilities under the law of war).

Respondents seek to justify Mr. Zuhair's indefinite detention as a combatant on the basis of allegations that can in no way be construed as participation—direct or otherwise—in hostilities, such as "participation" in the work of a charitable organization that was designated as a terrorist group by the U.S. Government seven years later. *See* Factual Return Narrative ¶ 20.

[13] Although not a party to Additional Protocol I, the United States considers the protection of civilians not directly participating in hostilities enshrined in article 51 of the Protocol (with the exception of the prohibition on reprisals, which is not relevant here) to reflect customary international law. *See* Michael J. Matheson, Deputy Legal Adviser, United States Department of State, *The United States Position on the Relation of Customary international Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987).

If the laws of war do not consider persons involved in maintenance of weapon systems as combatants, then it cannot possibly sanction the targeting or indefinite detention of individuals who, as part of legitimate charitable activities, occasionally coordinated with other charities that years later were accused of supporting terrorism.[14] *See* Joint Chiefs of Staff, Joint Pub. 4-0 Doctrine for Logistic Support of Joint Operations V-1 & V-2 (2000) (defining combatants to exclude civilians performing such functions as maintenance of weapon systems, C2 infrastructure, and communication systems; construction of roads, airfields, other important infrastructure, transportation services, and prison facilities).

The Government has ample powers to detain individuals to protect national security without violating the laws of war and Congress' will. For example, the laws of war authorize the internment of civilians in occupied or enemy territory who are unaffiliated with enemy forces but who may pose a security threat. *See e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516. The Government can prosecute individuals suspected of terrorist activities at home or abroad, including but not limited to direct participation in hostilities. *See e.g.*, 18 U.S.C. §§ 2339A (criminalizing material support for terrorist acts), 2339B (criminalizing material support to a foreign terrorist organization), 2339C (criminalizing financing of terrorist acts); *cf.* 1 Henckaerts & Doswald-Beck 23 (law of armed conflict "does not prohibit States from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly"). The Government's failure to utilize any of these powers here further underscores

[14] One of the few points of agreement across the deeply fractured Fourth Circuit in *al-Marri* was the rejection of any interpretation of the AUMF under which, "if some money from a nonprofit charity that feeds Afghan orphans made its way to al Qaeda, the President could subject to indefinite military detention any donor to that charity." *Al-Marri*, 534 F.3d 213, 246 (4th Cir. 2008) (Motz, concurring); *see accord*., *Al-Marri*, 543 F.3d 213, 272 ("[S]omeone who sends money to a nonprofit charity that feeds Afghan orphans that unknowing makes its way to al Qaeda would not be a member of the al Qaeda organization.") (Williams, dissenting) (internal quotations and citations removed).

the lack of any viable basis for detaining Mr. Zuhair, no matter what the standard.

D. The Constitution Does Not Authorize the President to Detain Civilians Contrary to the AUMF and the Laws of War

The Government's recourse to constitutional powers under the Commander-in-Chief clause is unavailing. *See* Gov't's Br. Regarding Prelim. and Proced. Framework Issues 13-18 (dkt. no. 39). Neither the text nor the interpretation of the Commander-in-Chief Clause suggests that the President has a roving authority to order the indefinite military detention of any civilian in the world whom he considers a possible threat to the United States. And as a threshold matter, any argument that the President possesses residual, concurrent power to defend the nation from attack is relevant only where the Congress is silent; here, in contrast, the Congress has spoken and set limits. The President has no plenary authority to surpass those limits, and no authority to disregard the laws of war in his conduct of authorized hostilities.

The Supreme Court has repeatedly rejected the expansive conception of military power that Respondents advance here. *See e.g.*, *Loving v. United States*, 517 U.S. 748, 760 (1996) ("[T]he Framers harbored a deep distrust of executive military power and military tribunals."); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law."); *see also Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II.").

While the President may have limited independent authority to defend the Republic in the

face of Congressional silence, *see, e.g.*, *Prize Cases*, 67 U.S. (2 Black) 635, 669-70 (1862), he has no power to surpass the objectives Congress has set, or to disregard the limits Congress has imposed. Once Congress has defined the scope of U.S. military action, its limits control, and in the words of Justice Marshall, "[t]he whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry." *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) (Marshall, J.); *accord Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (Marshall, J.); *Bas v. Tingy*, 4 U.S. 37, 40 (1800). Having here specifically *refused* to authorize the use of force against organizations or individuals not connected with the September 11th attack, the President's authority is at its "lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The "President . . . may not disregard limitations that Congress has, in proper exercise of its own powers, placed on [the President's] powers," *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), and his power to command the armed forces does not confer a plenary power to militarize the Nation's treatment of any civilian, wherever found, regardless of legislative disapproval.[15]

The President likewise has no authority to disregard the laws of war. The *Hamdi* plurality recognized that the AUMF's reference to "necessary and *appropriate* force," AUMF § 2(a) (emphasis added), incorporates longstanding law-of-war principles. Actions contrary to the law of war are also contrary to the implied will of Congress. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 637. In the face of statutory disapproval, the President's power plainly does not

[15] The Supreme Court recently appeared dubious of the Government's claim of presidential authority to detain combatants outside the context of a congressionally-authorized armed conflict. As the Court stated, the authority to detain "turns on *whether the AUMF authorizes— and the Constitution permits*—the indefinite detention of 'enemy combatants' as the Department of Defense defines that term." *Boumediene*, 128 S. Ct. at 2272 (emphasis added). The Court's use of the word "and" indicates that, to be lawful, military detention must be *both* authorized by the AUMF *and* permitted by the Constitution; the Court did not mention any presidential power to detain that did *not* derive from the AUMF, although the Government had contended for one.

include the power to take military actions in violation of the law of war—against civilians who have *not* directly participated in hostilities—merely because the President deems it desirable to stop their activities. *See, e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (stating the point, undisputed by the majority, that the President "to whom the execution of the war is confided … has a discretion vested in him, as to the manner and extent; but *he cannot lawfully transcend the rules of warfare established among civilized nations*") (emphasis added); *The Prize Cases*, 67 U.S. (2 Black) at 665 (noting that the issue was whether the President has "a right to institute a blockade … on the principles of international law, as known and acknowledged among civilized States"); *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873) (holding that a military commander and representative of the constitutional commander-in-chief was vested with the power to "do all that the laws of war permitted").

V. RELIABILITY OF EVIDENCE

The Government rests its case against Mr. Zuhair mainly upon two types of evidence: raw intelligence that lacks any indicia of reliability and statements extracted under torture that are not only inherently unreliable but so repugnant to Constitutional protections of dignity and fairness as to require them to be struck.[16] As a matter of law, this Court can accord neither sort

[16] The Government also offers this Court as evidence excerpts from foreign newspapers. This Court should not take seriously Respondents' outsourcing of its investigative responsibilities to newspapers of suspect quality. The intelligence community is not supposed to make decisions of consequence based on reporting by CNN, much less newspapers with a public reputation for bias and misinformation. For example, the return provides as a basis for allegations excerpts from Croatian news sources including HINA, *see* FTS19971227000395, attached as Ex. 23, the state-run Croatian National News Agency that is renowned for being subject to "excessive party political influence." See Zdenko Duka, "Croatia," Association of European Journalists 3, *available at* http://www.aej-uk.org/survey.htm. A report written by an independent journalistic association finds that in Croatia "[s]ensationalist journalism has become commonplace, with reporters often abandoning any pretence of objectivity or truthfulness in their pursuit of headlines and big audiences." *Id.* 2. To the extent that individual allegations depend on extracts from foreign newspapers, these issues are addressed on a case by case basis in Part VI, *infra*.

of evidence any persuasive weight. The Court must, furthermore, strike from the record any statements the Government has elicited through the use of torture.

A. The Government Cannot Justify Mr. Zuhair's Detention With Unevaluated Intelligence Documents

Respondents cannot justify their decision to hold Mr. Zuhair as an "enemy combatant" by trotting out a cherry-picked set of uncorroborated records that cannot be evaluated for reliability. The Government must present "*credible* evidence" that constitutes "*meaningful* support" for the Government's allegations. *Hamdi v. Rumsfeld*, 542 U.S. 507, 543 (2004) (plurality opinion) (emphases added). In *Parhat*, the Court of Appeals elaborated that the Government may not justify the detention of an alleged "enemy combatant" with documents that are not "presented in a form, or with sufficient additional information, that permits the . . . court to assess its reliability" and that are not documents that "the [Government's] departments rely on . . . for decision making purposes in the form in which they were presented."[17] *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008). The raw, unverified evidence the Government offers this Court in support of its allegations is neither.

The unclassified return provides the Court with three forms of raw and unverified evidence: Information Intelligence Reports (IIRs), FM40s, and FD-302s. FM40s and FD-302s are interview reports by the military Criminal Investigation Task Force and the FBI, respectively. These documents are essentially interrogators' notes summarizing the uncorroborated statements a subject makes during an interrogation session. IIRs constitute the bulk of the Government's evidence. An IIR is a generalized reporting vehicle that collects unprocessed and unverified

[17] Notably, *Parhat* reviewed the Government's case for detention under the Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, 119 Stat. 2680, which both the Supreme Court and the D.C. Circuit recognized involves *less* searching review than is required on habeas. *See Boumediene*, 128 S. Ct. at 2266 ("[T]he procedures adopted [in the DTA] cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceedings."); *Parhat*, 532 F.3d 834, 851 ("The habeas proceeding will have procedures that are more protective of Parhat's rights than those available under the DTA."). If this sort of intelligence is insufficient to meet the lower standard of DTA review, it is doubly insufficient to meet the comparatively stringent standards of habeas.

summaries of claims made to U.S. intelligence agencies, usually by foreign sources. Nearly all IIRs display some variation on the clear legend: "WARNING: INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE." *See, e.g.*, Unclassifed, Redacted Version of IIR7 133 0023 01, attached as Ex. 16; Unclassified, Redacted Version of IIR 2 340 6384 02, attached as Ex. 17 (all caps in original). The Court should take this warning seriously. The intelligence community does not consider these raw reports, which "lack sufficient indicia of the statements' reliability," as reliable and would not in the absence of exigent circumstances detain or hold an individual based on them. *Parhat v. Gates*, 532 F.3d at 849. The Court should adopt the wisdom of the intelligence community and reject Respondents' suggestion that it accord this raw intelligence information greater weight than experts and other courts have given them.

1. Raw Intelligence of the Sort Provided by the Government Contains Insufficient Indicia of Reliability and Should not be Accorded Any Weight by this Court

Raw intelligence reports do not provide sufficient indicia of reliability to allow courts to assess the reliability of the source or the reliability of the information contained therein. *See* Declaration of Arthur Brown ("Brown Decl.") ¶ 24, *Boumediene v. Bush,* attached herein as Ex. 13. The Government's own declaration makes clear that the production of raw intelligence reports, like the IIRs, FM40s, and FD-302s offered in the factual return, is the very first step in an "Intelligence Cycle" that *ends* with reliability assessments made by intelligence analysts. *See* "Background Declaration—Intelligence 101" ("Intel. 101 Decl.") 1, 6, attached as Ex. 14.

When assessing the value of raw intelligence data, trained source analysts do not defer to the reliability assessments provided by the collecting agent. The analyst must take "additional steps to determine source reliability." *Id.* 8-9. Only once the analyst has completed this "rigorous" process of analysis is a "finished intelligence product" written and disseminated. *Id.*

9. It is only in that "finished" product—not prior—that "any credibility issues are addressed." *Id.* Raw intelligence is essentially unusable until analyzed by a trained source intelligence analyst, who uses the intelligence reports to "write finished intelligence (FINNTEL) products." *Id.* 6.

In assessing a record's reliability, intelligence personnel must perform tasks that neither the Court nor Petitioner's counsel can replicate with the raw reporting provided in the Factual Return. First, intelligence personnel must examine "the source of intelligence while reading intelligence reports," and especially the source's "placement and access to the information," the source's "motivation for reporting," and his or her reporting history. *Id.* 8. Such scrutiny is impossible where—as is often the case in the Factual Return—Respondents redact the source information or refuse to turn over supplemental information necessary to assessing the source's placement and reliability.

Second, when making their final assessments of the intelligence, analysts must consider "all available data" in order to "integrate data from multiple sources into a coherent whole and form judgments about its collective meaning." *Id.* 5. But the Factual Return and the limited exculpatory productions thus far provide the Court and counsel with little more than a cherry-picked snapshot of the universe of relevant information. Disturbingly, on several occasions Petitioner's counsel have independently obtained reports from that broader universe within the Government's exclusive control suggesting that, contrary to the Respondents' representations, the intelligence agencies have profound doubts about the reliability of key sources. *See* Reply to Resp't's Opp. to Mot. to Compel Disc. (filed under classified seal). This underscores the perils of attempting to evaluate reliability and assign weight with only a sliver of the relevant information.

2. Analysts Do Not Accord Raw Intelligence a Presumption of Reliability and Neither Should This Court

Respondents' narrative in the Factual Return does what an intelligence analyst never would: It asserts that the appearance of a claim in a raw report is sufficient proof of its validity. In doing so, Respondents "come[] perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous" judicial review. *Parhat*, 32 F.3d at 849. The notion that the mere dissemination of a raw report says anything about its reliability reveals a fundamental misunderstanding—or deliberate mischaracterization—of the intelligence-gathering process. Intelligence collection is the open end of the funnel and even profound doubts about the reliability of a piece of raw reporting are resolved in favor of circulating the report: "intelligence agencies err on the side of disseminating any reporting they cannot positively disprove, even if they have no other indication whether the allegations in the reporting are true or not." Declaration of Paul Pillar ("Pillar Decl.") ¶ 21, attached herein as Ex. 15. Whereas circulating raw and unverified reports is an understandable part of the intelligence-gathering process, it is the antithesis of the deliberative approach necessary to ascertaining reliability for the purposes of this Court's fact-finding role.

Indeed, the presumption in favor of disseminating even the most questionable intelligence reports was especially pronounced after September 11, 2001, when "the intelligence community was palpably concerned about the 'next' possible terrorist attack and the risk that the community would be blamed for failing to detect it." Brown Decl. ¶ 11. This caused intelligence collectors to record and disseminate virtually any and all raw information they received, regardless of reliability or quality, so that the intelligence community could not be accused of having withheld information later deemed relevant to counterterrorism efforts. *Id.* ¶¶ 11-12. The problem with

such an approach is obvious: Mr. Brown compares it to "evaluating marksmanship by measuring rounds fired on a shooting range, rather than measuring how many rounds actually hit their targets." *Id.* ¶ 21. "More is more, but it is not necessarily better. In the case of intelligence reporting on terrorist threats after September 11, more was worse." *Id.*[18]

As a result, the intelligence databases are now awash with "tens of thousands, if not hundreds of thousands" of unreliable reports which make it possible for a person attempting to support a particular narrative or agenda to cherry-pick snippets of reports that appear to support that agenda." *Id.* ¶ 22.[19] As the "Intelligence 101" and Brown Declarations make clear, it is for this very reason that the contents of a raw report will never be certified as reliable until subjected to a rigorous process of vetting and verification by a trained analyst.[20]

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[18] Mr. Brown explains that although current CIA management may have taken steps to correct the quality of their reporting after 2005, the intelligence community still has not undertaken to review all of the 2001 – 2005 sources. *Id.* ¶ 23.

[19] Two illustrative examples, from many, of the quality of the raw reporting: unsubstantiated intelligence reports distributed into the intelligence community's message traffic included a CIA report disseminated nine months after September 11 "about a kamikaze-style air attack on a United States Navy Base in a South Pacific island location." *Id.* ¶ 14. The report originated from a CIA office in the Middle East and cited a source by first name only. *Id.* "At the time of the report, the United States Navy did not have a base on that island, had never had [a base] there, nor had a single ship from the Navy's Seventh Fleet—the Pacific fleet—ever visited the island's port. Nonetheless, the raw report was disseminated in the message traffic to the U.S. intelligence community worldwide." *Id.* In the winter of 2001, Mr. Brown "received a report from a United States military investigations unit stating that Osama bin Laden had been spotted [shopping] in the Post Exchange on a U.S. military base in East Asia." *Id.* ¶ 15. "The report was utterly unbelievable, yet it was disseminated to the intelligence community." *Id.*

[20] Even if this Court were to decide, over Petitioner's objections, *see* Resp. to Gov't's Br. Regarding Prelim. and Procedural Framework Issues 8-9, 25-29 (dkt. no. 44), that Respondents were entitled to a general presumption in favor of their evidence, raw intelligence could not qualify for that presumption. The part of *Hamdi* on which the Government grounds its supposed entitlement to such a presumption states plainly that the presumption would not pass constitutional muster unless it "remained a rebuttable one and a fair opportunity for rebuttal were provided." 542 U.S. 507, 534 (2004). But if neither the Court nor Mr. Zuhair is able to assess the reliability of the Government's evidence, "the 'rebuttable' presumption becomes effectively irrebuttable." *Parhat*, 532 F.3d at 847, *quoting Bismullah v. Gates*, 501 F.3d 178, 186 (D.C. Cir. 2007) (noting that a rebuttable presumption of regularity "would be irrebuttable, in effect, if neither petitioners' counsel nor the court could ever look behind the presumption to the actual facts"). Much of the Government's evidence is effectively irrebuttable: several of the allegations rest on reports where the source information is redacted even from the classified Return, rendering it impossible to identify much less impeach the source's reliability. Other allegations rest on statements made by individuals whose identity was improperly concealed as protected, making it impossible for Petitioner's counsel to enlist the assistance of Mr. Zuhair in confronting and impeaching his accusers. Furthermore, given that the Government has flatly refused Mr. Zuhair's requests for discovery, Petitioner has no means to supplement the record with yet more intelligence reporting that would rebut the accusations contained in the Return. Even if the Government provided limited discovery, it would be impossible for Petitioner to do the necessary cross-checking of raw intelligence against the relevant subset of documents on certain subjects. Intelligence 101 Decl.8.

Whether before or after September 11, the presumption of *un*reliability toward raw intelligence is also warranted in the case of FM40s and FD-302s. These documents contain only interrogators' notes summarizing the information conveyed during an interrogation. Without further processing, "the most that can be said about information in an FM40 or FD-302 is that it represents statements that were accurately heard and recorded by the interrogator"[21]—not that those statements contain any truth. Pillar Decl. ¶ 18. "Intelligence analysts would not assume without further corroboration that information conveyed in an FM40 or FD-302 was necessarily factually accurate."[22] *Id.*

Unvetted interview notes cannot be taken at face value without an assessment of the sources, background, motivations, and the circumstances under which questioning took place. Courts reviewing interrogation reports in much more prosaic contexts have uniformly found them inadmissible where they rely on witnesses with potential biases or a plausible motivation for giving inaccurate testimony. *See e.g., U.S. v. Connolly*, 504 F.3d 206 (1st Cir. 2007) (excluding FD-302 where confidential source was a "notorious mobster" with an incentive to give false testimony); *U.S. v. Trujillo*, 136 F.3d 1388 (10th Cir. 1998) (affirming exclusion of FD-302 reports where "the record reveals no self-evidence, particularized guarantees of trustworthiness attributable to the proffered reports"); *United States v. Benson*, 961 F.2d 707 (8th Cir. 1992) (finding unsigned and unsworn FBI report summarizing defendant interviews to be inadmissible hearsay); *United States v. Lanese*, 890 F.2d 1284, 1290-91 (2d Cir. 1989) (excluding a police report containing statements by declarant whose trustworthiness was

[21] In considering interrogation reports, courts have rejected even this best-case scenario. *See, e.g., United States v. Graves*, 428 F.2d 196 (5th Cir. 1970) (affirming district court's holding that FD-302 reports were not "substantially verbatim" recitals of oral statements and that they contained the editorializing of the interrogator).

[22] The same holds true for the many IIRs that do nothing more than summarize the contents of an FM40 or FD-302 without any intervening assessment of the information. Brown Decl. ¶ 11. The repackaging of interrogation reports into IIRs "means only that the Department of Defense found the information of interest, possibly in guiding the collection of additional information, not that it necessarily has deemed it reliable." *Id.*

suspect); *Dallas & Mavis Forwarding Co., Inc. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981) (same).

Even if such unvetted intelligence reports are deemed admissible here, they merit no weight under the *Parhat* standard. In *Parhat*, the Court of Appeals refused to accept as valid reports that the Government's own agencies did not appear to consider completely reliable. *See Parhat*, 532 F.3d at 849 (observing that "repeated insertion of qualifiers indicating that events are 'reported' or 'said' or 'suspected' to have occurred suggests at least some skepticism"). To demand that this Court treat as presumptively true an unverified statement by an individual whose reliability is at best undetermined and at worst suspect is worse than saying that "what the government says must be treated as true." *Parhat*, 532 F.3d at 849. It is saying that what the Respondents assert someone said—whether or not the Government's own intelligence agencies believe the claim—must be treated as true by the Court.

3. Policymakers Do Not Make Decisions of Consequence Based on Raw Intelligence and Neither Should This Court

A key consideration in determining the reliability of intelligence reports is "whether the [Government's] departments rely on those documents for decision-making purposes in the form in which they were presented . . . or whether they supplement them with backup documentation and reliability assessments before using them to take actions of consequence." *Parhat*, 532 F.3d at 849. The Government's own declaration makes clear, however, that intelligence agencies and policymaking entities do not rely on raw reports such as IIRs, FM40s, or FD-302s to "take actions of consequence," but rather rely more appropriately on "finished intelligence products" that have been prepared and vetted by source intelligence analysts. Intel. 101 Decl. 3 (describing the intelligence cycle as "the process of developing raw information into finished products for use by the President, military, policy makers, law enforcement or other decision makers for

National Security purposes"); *id.* 4 (stating that "finished intelligence . . . supports policy decisions"); *id.* 5 (result of analysis is "finished intelligence assessments intended to inform policy makers of the implications of the information"). In the absence of exigent circumstances, raw intelligence "will not support affirmative steps to capture or detain the concerned individuals suspected of posing that threat without additional and convincing evidence." Brown Decl. ¶ 28. Contrary to the determinative weight Respondents accord the evidence, raw intelligence reports are "at best a basis for further investigation," not grounds for indefinite detention. Brown Decl. ¶ 30.

In limited circumstances, courts may give raw intelligence some weight in authorizing the initial decision to temporarily detain and interrogate a suspected enemy combatant on the battlefield. *See, e.g., Boumediene*, 128 S. Ct. at 2275 ("[P]roper deference can be accorded to reasonable procedures for screening and *initial* detention under lawful and proper conditions of confinement and treatment *for a reasonable period of time*.") (emphasis added). The Government's evidence is entitled to no such deference here. Mr. Zuhair, who was apprehended far from any battlefield and handed over to the United States by Pakistani authorities, approaches his seventh year at Guantánamo Bay. Respondents have had the benefit of over half a decade with Mr. Zuhair in their custody thousands of miles from the "active theatre of war" to process their raw reporting and assemble a case against him. The standards applicable to military commanders in the field have no application to habeas review of indefinite military detention in such circumstances.

The Government has proffered no basis for crediting raw field intelligence reports that have not been reviewed by a source analyst and reduced to a "finished product." Accordingly,

such reports, and the allegations that rest on them, cannot be treated as "credible" evidence in determining whether the Government has carried its burden of proof.

B. The Government Relies Extensively on Statements Obtained Through Torture and Coercion That Are Inherently Unreliable and Must Be Struck

Respondents have built much of their case against Mr. Zuhair on statements extracted through torture. This Court should not allow the Government to rest its case on such reprehensible evidence. The techniques the Government has used to produce such evidence are not only repugnant to the Constitution, but they have rendered the evidence itself inherently unreliable. The Court should strike any evidence elicited through torture from the record or, in the alternative, accord this evidence no weight.

1. *Statements Compelled Through Torture Should Be Struck Or, In the Alternative, Accorded No Weight*

Torture is one of "a handful of heinous actions . . .which violates definable, universal and obligatory norms." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 (D.C. Cir. 1984). The rule that "the judicial system of the United States will not permit the taint of torture in its judiciary proceedings" is without exception. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005), *affirmed* 528 F.3d 210, 227 (4th Cir. 2008). It makes no difference, for example, whether those who carried out the torture were U.S. or foreign agents. Even where the offending interrogation was conducted by foreign agents in a foreign country on a non-U.S. citizen, the fruits of torture are inadmissible. *See e.g., United States v. Cotroni*, 527 F.2d 708, 712 n.12 (2d Cir. 1975) (admitted statement given to official but noting that "[w]ere the conduct of foreign police so reprehensible as to shock the conscience, a different result might obtain"); *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006) (excluding statements made by aliens to Rawandan interrogators under torture); *United States v. Marzook*, 435 F. Supp. 2d 708, 774

(N.D. Ill. 2006) (courts will "not condone torture in any form and there is no place for statements made as a result of it in any American court" even where U.S. personnel had no role in the torture). *Cf. United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (fruits of conduct by foreign agents that "shock[s] the judicial conscience" is inadmissible). Nor could the Government salvage these statements by establishing their truthfulness because, as a matter of principle, "declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).[23]

Respondents have speciously suggested elsewhere that detainees have no constitutional rights and consequently there is no barrier to admitting testimony violently pried from them. *See* Opp. to Mot. to Compel Disc. 13-14 (dkt. 110). Ignoring for a moment the repugnance of the suggestion that the Government may profit from torture and the manifestly incorrect assertion that the Constitution affords detainees no protection against such heinous practices,[24] the inadmissibility of such testimony is mandated by considerations wholly independent of constitutional values. "[W]hile a confession obtained by means of torture may be excluded on due process grounds as '[in]consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' another legitimate reason to suppress it is the" 'likelihood that the confession is untrue.'" *United States v. Karake*, 443 F.

[23] The judicial proscription of statements compelled by torture is as applicable in the civil context as it is in the criminal. *See, e.g., Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (holding that, in civil deportation proceedings, court may exclude evidence that "transgresses notions of fundamental fairness" or "undermined the reliability of the evidence in dispute"); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1451 (9th Cir. 1994) (applying exclusionary rule to exclude evidence introduced in civil immigration proceedings where evidence introduced was product of racial profiling).

[24] It is also well established that U.S. agents are constrained by substantive due process in their treatment of aliens abroad. *See, e.g., Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980) ("[E]vidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or Miranda rights, must be suppressed in a subsequent trial in the United States."); *United States v. Abu Ali*, 528 F.3d 210, 228 (4th Cir. 2008) (same). The Supreme Court's decision to vacate and remand the D.C. Circuit's decision in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) demonstrates the continuing recognition that the Fifth Amendment of the Constitution prohibits the United States from engaging in torture, no matter who the subject of that torture may be. *Rasul v. Myers*, 2008 WL 3910997 (U.S. Dec. 15, 2008).

Supp. 2d 8, 50-51 (D.D.C. 2006), *quoting Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Linkletter v. Walker*, 381 U.S. 618, 638 (1965). *See also Jackson v. Denno*, 378 U.S. 368, 385-386 (1964) (coerced statements inadmissible in part because of their "probable unreliability"). The logic that induces courts to exclude on reliability grounds coerced confessions is doubly applicable to coerced testimony against others: the instinct to protect the interest of a third party pales in comparison to the interest in self-preservation.

Where statements are alleged to have been obtained under coercion, the burden rests on the Government to prove by "at least a preponderance of the evidence" that the statement was voluntary. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). To meet this burden, the Government must affirmatively prove that each statement was "the product of an essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). The law is clear that "[t]he rack and torture chamber may not be substituted for the witness stand." *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936). Accordingly, all statements made by these individuals should be struck.

2. The Torture of Sa'd Iqbal Madani (ISN 743)

Mr. Zuhair has strong reason to believe that a former Guantánamo detainee, Sa'd Iqbal Madani (ISN 743), is a source of information relied upon by the Government in its accusations against him. Several years ago, an interrogator in Guantánamo showed Mr. Zuhair a photograph of Mr. Madani and encouraged Mr. Zuhair to make false statements against him, since Mr. Madani had made false statements against Mr. Zuhair. Mr. Zuhair refused to make any statements regarding Mr. Madani. *See* Kassem Decl. ¶¶ 130-31. Prior to that, Mr. Zuhair had been told by other detainees that U.S. authorities had planned to release Mr. Zuhair while he was

detained at Bagram but changed their mind after Mr. Madani told them that he was a "terrorist." *Id.*

Although Mr. Zuhair was not aware of it at the time, Mr. Madani did indeed make statements during interrogations about Mr. Zuhair. While at Bagram, Mr. Madani was questioned by the same Egyptian-accented interrogator who threatened to send Mr. Zuhair "to a place where they'll make you their woman." Kassem Decl. ¶ 105; *see also* Madani Decl. ¶ 17, 25. The interrogator showed Mr. Madani a photograph of a man who he said was involved in the attack on the U.S.S. Cole and asked if Mr. Madani recognized him. *Id.* ¶ 28. Mr. Madani acknowledged that the man in the photograph resembled Mr. Zuhair, but did not implicate him in any wrongdoing. *Id.* ¶ 28-29.

Any statements made by Mr. Madani—whom Mr. Zuhair never knew or met prior to his detention—about Mr. Zuhair cannot be considered reliable. The saga of Mr. Madani's torture has been extensively documented and corroborated by multiple individuals. Mr. Madani, a Pakistani national whose father had married an Indonesian woman, was detained with his Indonesian stepmother in Jakarta in January 2002. *See* Madani Decl. ¶ 4. Interrogators threatened to have his stepmother sexually violated if he did not cooperate with them. *See* Begg Decl. ¶ 7. Mr. Madani was subsequently transferred to detention in Egypt, where he was confined in a tiny, "coffin-like" cell for three months while being interrogated by Egyptian and U.S. authorities. *See* Madani Decl. ¶¶ 7-9, 16; Begg Decl. ¶ 7. Interrogators in Egypt blindfolded Mr. Madani, tortured him with electric shocks to the lower part of his body and earlobes and mind-altering drugs. *See* Madani Decl. ¶¶ 13-15; Habib Decl. ¶ 11; *see also* Amnesty International, *Guantánamo: Lives Torn Apart – the Impact of Indefinite Detention on*

Detainees and their Families 6 (2006), attached as Ex. 18 (quoting Russian ex-detainee Rustam Akhiamarov, held in the cell next to Mr. Madani's in Guantánamo).

Mr. Madani was transferred to Bagram in or around April 2002, where U.S. interrogators attempted to pressure him into infiltrating Islamist groups in Indonesia for the CIA. *See* Madani Decl. ¶ 21; Begg Decl. ¶ 10. They also threatened him to send him to Egypt if he did not "cooperate." *See* Madani Decl. ¶ 26. Interrogators withheld medical care from Mr. Madani for bladder and knee problems linked to the use of electrodes on his knees in Egypt unless he cooperated. *See* Center for Constitutional Rights, *Composite Statement: Detention in Guantanamo Bay—Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed* 108-9 (2004), attached as Ex. 19 (quoting ex-detainee Asif Iqbal, held at Bagram with Mr. Madani). They also threatened to have his stepmother sexually violated if he did not cooperate and that giving false statements was his only hope of ever seeing his family again. *See* Begg Decl. ¶ 11; *see also* Habib Decl. ¶ 13; Madani Decl. ¶ 26. Mr. Madani told fellow detainees that he felt the interrogators had "destroyed . . . [his] mind" through prolonged solitary confinement, threats, and other forms of coercion. Begg Decl. ¶ 16.

Mr. Madani was later transferred to Guantánamo, where he attempted to commit suicide. *See* Unclassified CSRT Transcript for ISN 743 at 10, attached as Ex. 20. He was repatriated to Pakistan in September 2008. *See* Madani Decl. at ¶ 35.

VI. RESPONSES TO SPECIFIC PUBLIC ALLEGATIONS

A. Allegations Pertaining to Bosnia-Herzegovina

Mr. Zuhair denies the Government's allegations against him. Mr. Zuhair's status as an Arab in Bosnia and a trumped-up conviction for a relatively minor offense set the stage for an

unfortunate sequence of events that led him to be scapegoated by Bosnian and now U.S. authorities for several unsolved crimes.

1. Government Attempts to Link Mr. Zuhair to the al-Haramain Charitable Organization

As discussed above, Mr. Zuhair worked for the Foundation for the Sponsorship of Orphans, Kassem Decl. ¶¶ 23-27, a small Saudi-based charitable organization, in Croatia—a fact that the Government does not dispute. Instead, the Government attempts to tar Mr. Zuhair with the brush of associational guilt by claiming that he also "participate[d] in humanitarian relief programs such as . . . the al Haramain relief organization." Factual Return Narrative ¶ 20. Mr. Zuhair has never been employed by al-Haramain, *see* Kassem Decl. ¶ 29, an organization that was not even named as a Specially Designated Global Terrorist (SDGT) organization until 2002, *after* his abduction in Pakistan that led to his imprisonment in Cuba. While Mr. Zuhair's employer, the Foundation for the Sponsorship of Orphans, coordinated with al-Haramain and other NGOs on occasion to obtain humanitarian items such as foodstuffs and clothes for distribution to needy families, it was not funded by al-Haramain. *See* Kassem Decl. ¶¶ 28-29. And even if the Government's claim were factually correct, mere participation in al-Haramain's relief programs in 1995─seven years before it was named as an SDGT─cannot meet any reasonable standard for detention as an enemy combatant. *See supra* Part IV(C).

Even if one were to accept the Government's frighteningly expansive theory of detention authority, its factual claim represents a vague and slipshod use of uncorroborated reporting that cannot be accorded any weight. The Government cites three exhibits to support this claim, two of which are classified. The unclassified exhibit is a report of one of Mr. Zuhair's first interviews in Guantánamo. *See* ISN 669 FD-302 (Aug. 3, 2002), attached as Ex. 45. That document states in relevant part that Mr. Zuhair merely "associated with" Croatian Assistance, a

group "funded by" al-Haramain, without any further elaboration or detail. *Id.* Even if one ignores this uncorroborated report's lack of indicia of reliability and takes it at face value, Respondents improperly transform mere "association" with an al-Haramain-funded group—which could refer to almost any type of link, no matter how incidental—into "participation" in al-Haramain's work in the Factual Return Narrative. Such a leap is unsupported by any facts or analysis. There is no indication in this report or anywhere else that Mr. Zuhair perpetrated, supported, or was even aware of any armed or otherwise unlawful activities. Moreover, despite discovery requests, the Government has not produced a *single* record reflecting follow-up investigation or corroboration of this claim over six years later.

2. Government Allegation that Mr. Zuhair Fought in Bosnia-Herzegovina and Received Financing from Khalid Shaykh Muhammad

Almost as an aside, the Government tersely alleges that Mr. Zuhair was part of a group of Islamist fighters (mujahids) in Bosnia called the Zubair Group "that received financial support from Khalid Shaykh Muhammad," a self-described high-ranking member of al-Qa'ida. Factual Return ¶ 22. This allegation is false. Mr. Zuhair has never engaged in combat in Bosnia-Herzegovina or anywhere else. He was never part of the Zubair Group, nor did he associate with or knowingly receive any form of support from Khalid Shaykh Muhammad. *See* Kassem Decl. ¶ 45.

This allegation, besides being completely untrue, is a distraction: Mere participation in the Bosnian war on the side of the Bosnian government cannot serve as a basis for detention as an enemy combatant under any plausible reading of the AUMF. Respondents do not allege that the Zubair Group "planned, authorized, committed, or aided" the 9/11 attacks or harbored those who did so. Instead, Respondents only allege that the group received aid from Khalid Shaykh Muhammad years before the attacks. Indeed, the Zubair Group does not appear on a single

government terrorism list. Moreover, the United States was in no way a party to the 1992-1995 armed conflict in Bosnia-Herzegovina, except to the extent that U.S. forces participated in a brief wave of NATO airstrikes in August-September 1995 meant to force a negotiated settlement—all of which were directed against the Bosnian Serbs, the adversaries of the foreign Muslim volunteers whose ranks Mr. Zuhair is accused of joining. If the United States has never been at war with the Zubair Group, Mr. Zuhair cannot be detained as an enemy combatant based on alleged membership in it. *See* Part IV(C), *supra*.

Moreover, the allegation that Mr. Zuhair fought in Bosnia-Herzegovina is not backed by any credible evidence. The public, redacted version of the Government's Return makes clear that one of the sources for this claim is a convict in Zenica prison in Bosnia-Herzegovina. *See* [redacted] FM 40 (Nov. 8, 2004), attached as Ex. 40.[25] For reasons discussed in the Classified Annex to this Traverse, this source's credibility in particular is beyond repair.

3. Government Allegation that Mr. Zuhair was Responsible for the September 1997 Mostar Bombing

The Government alleges on the basis of "press reports" that Mr. Zuhair was involved in a car bombing in Mostar, Bosnia-Herzegovina on September 18, 1997. Factual Return Narrative ¶ 26. Mr. Zuhair was not involved with the Mostar bombing in any way. *See* Kassem Decl. ¶ 73. Moreover, condemnable though it was, this act was so far removed in space, time, and purpose from any armed conflict with the United States that it can in no way be reasonably counted as supporting detention as an enemy combatant in Guantánamo. *See* Part IV(D) *supra*. Moreover, the Government's allegations against Mr. Zuhair on this point are based on little more than secondhand media reports of a flawed trial and investigation.

[25] Respondents have already acknowledged that this document is not classified and they have not as of yet moved this Court to designate it as protected. *See* Dec. 17 Cox Letter. Accordingly, the Government's concealment of the identity of this source is improper.

Regardless of who was responsible for the Mostar bombing—and Mr. Zuhair emphatically was not—the act could not possibly support detention as an enemy combatant under the AUMF. Respondents have not alleged any nexus, direct or indirect, between the Mostar bombing and those who "planned, authorized, committed, or aided" the 9/11 attacks. Coming nearly two years after the end of the Bosnian war and four years before 9/11, the bombing was not part of *any* armed conflict anywhere in the world, let alone one with the United States. *See* Part IV(B) *supra.* Whether it was an act of war or a crime, the Mostar bombing was not directed against U.S. persons, property, or interests. Moreover, it was never claimed by or credibly attributed to any known terrorist group. At most, the Mostar incident might be relevant to an extradition request—had one been made—by Bosnia-Herzegovina for legal proceedings in that country's court system. Treating the Mostar bombing as an act supporting detention by the U.S. Government as an unlawful combatant would wrench detention authority out of the confines of the AUMF, the Constitution, the laws of war, and common sense altogether.

Moreover, the Government's only unclassified sources for this allegation are secondhand media reports. *See* FTS19980601000376, attached as Ex. 22; FTS19971227000395, attached as Ex. 23; Liberation Bosnian National Daily from Sarajevo (Dec. 26, 1997), attached as Ex. 24.[26]

[26] To bolster this proposition, the Government also cites *Al-Qaida's Jihad in Europe* 197-99, a book by self-described "terrorism expert" Evan Kohlmann. The relevant portion of the book, however, does no more than recycle more secondhand media reports, *see Al-Qaida's Jihad in Europe* 199, 213, and is riddled with inaccuracies and unsupported statements. For example, Mr. Kohlmann identifies the Mostar bombing as occurring in October rather than September 1997 and writes that it was "attributed to Al-Gama'at al-Islamiyya," an Egyptian organization. Mr. Kohlmann provides no citation for the attribution of the attack to that organization, and none of the sources proffered by the Government corroborate this claim.

The Government also relies on Mr. Kohlmann's book for background, for example to support the claim that al-Qa'ida viewed Bosnia as a European base for attacks against the United States. *See* Factual Return Narrative ¶ 13 (citing *Al-Qaida's Jihad in Europe* 19). As described in Part IV(B), *supra*, even this is unavailing, given that the relevant portion of Mr. Kohlmann's book cites only to an evidentiary proffer that he never mentions was ruled inadmissible and whose supporting exhibits were removed from the docket. *See U.S. v. Arnaout*, 2003 WL 255226 (N.D. Ill. 2003).

Such sloppiness is hardly surprising, as Mr. Kohlmann has had no academic training in relevant fields, does not speak any of the relevant research languages (Arabic, Bosnian), and did not conduct any fieldwork in Bosnia for his book. Moreover, Mr. Kohlmann has misrepresented his credentials in several court cases where he was proffered as

For reasons outlined in the Classified Annex to this Traverse, the probative value of such material for the purposes of individualized detention decisions is zero and the classified sources do not add any weight to the Government's allegation.

What these superficial press reports fail to mention is that Mr. Zuhair's *in absentia* conviction for the Mostar bombing was based on a compromised investigation that led to a trial in which the conviction rested essentially on the testimony of a sole witness who recanted his story and lacks all credibility in any event. The investigation took place in an extremely charged political environment in a city divided by bitter ethnic rivalries between local Bosniak (Muslim) and Croat authorities. *See, e.g.*, International Crisis Group, *Reunifying Mostar: Opportunities for Progress* 19 (2000), attached as Ex. 21 ("During [the post-war] period, both Bosniaks and Croats seem to have participated in ethnically motivated bomb attacks."). Despite an agreement that the U.N. International Police Task Force (IPTF) in Bosnia-Herzegovina would supervise the investigation, IPTF personnel were "effectively barred from visiting the bomb site." Transcript of October 10, 1997 NATO/SOFR Press Conference ("NATO/SFOR Press Conference"), attached as Ex. 25. IPTF publicly expressed its belief that forensic evidence had been improperly removed to a "neighboring state"─almost certainly a reference to Croatia, which exercised considerable *de facto* authority in the area at the time─and that "[u]nder these circumstances, the U.N. IPTF is not in a position to certify the results of this investigation,"

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an expert witness by the Government. In a filing in *U.S. v. Mubayyid*, Kohlmann listed his 2006 article in *Foreign Affairs* magazine as an example of a "paper that [has] been subject to peer discussion and review." Ex. 4 to Gov't's Opp. to Def.'s Mot. Preclude Test. of Gov't's Expert Witnesses, *U.S. v. Mubayyid*, 04-40026 (D. Mass. Nov. 5, 2007) 3 (dkt. no. 334). Yet *Foreign Affairs* is not a peer-reviewed publication, nor does it even employ fact checkers, as non-academic magazines such as *The Atlantic Monthly* and *The New Yorker* do. *See* "Notes on Manuscript Submissions," *available at* http://www.foreignaffairs.org/about/guidelines ("We do not have fact checkers, and rely on authors to ensure the veracity of their statements."). During a *Daubert* hearing in another case, Kohlmann cited Dr. Mohammed Hafez of the University of Kansas as a "close colleague" who helps to ensure the quality of his translations. Yet according to an affidavit by Dr. Hafez, he "would not consider Mr. Kohlmann a close colleague" and has "never peer reviewed Mr. Kohlmann's work." Post Hear'g Br. in Supp. of Mot. to Exclude Test. of Evan Kohlmann, *U.S. v. Amawi*, 06-CR-719 (N.D. Ohio, Feb. 29, 2008) 21 and Exs. 1-2 (dkt. no. 636).]

which would "not receive the U.N. IPTF's 'seal of approval.'" *Id.* Valentin Ćorić, the interior minister for the canton in which Mostar is located, confirmed the involvement of Croatian government "experts" in the investigation as well as the IPTF's refusal to certify the results.[27] *See* Investigation Obstructed, *Slobodna Dalmacija* (Dec. 29, 1997), attached as Ex. 26.

The Mostar bombing trial was also tainted by its almost exclusive reliance on statements made by one of Mr. Zuhair's co-defendants, Bahraini national Ali Hamad. *See* Ex. 22 (reporting that "Ali Ahmed Ali Hamad admitted committing the act, defending himself by stating that he was forced by the accused Zuhair"). Mr. Hamad is currently serving a 12-year prison sentence in Zenica prison for the Mostar bombing and for a robbery committed in Zenica on October 20, 1997. He is a notorious fabricator known for feeding false statements to U.S. and other authorities about alleged terrorist activities in Bosnia in order to win early release or more favorable treatment. *See* Pet'rs' Traverse, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008), 32-34 (dkt. no. 213).

After the 9/11 attacks, Mr. Hamad suddenly began presenting himself as a repentant ex-member of al-Qa'ida and offered to provide intelligence to the U.S. and other governments about the organization. *See* Letter from Ali Hamad to Glas Srpske Newspaper (Jan. 10, 2005), attached as Ex. 27 ("Ali Hamad 2005 Letter"). Mr. Hamad's bizarre epistolary rants from prison are proof enough of his own lack of credibility. He has boasted that "thanks to me and no one else," an alleged "top brain" of al-Qa'ida named as Khalid al-Shaykh was arrested in Qatar and sent to Guantánamo. *Id.* 2; *see also* Letter from Ali Hamad to Maj. Gen. Virgil Packett, SFOR Commander (Jul. 26, 2004) 2, attached as Ex. 28 ("Ali Hamad 2004 Letter") (referring to information given during a June 16, 2003 meeting with the FBI that led to the purported arrest of

[27] Mr. Ćorić is currently on trial for war crimes before the U.N. International Criminal Tribunal for Ex-Yugoslavia. *See Prosecutor v. Prlić, et al.*, IT-04-74.

Mr. al-Shaykh). There is no one in Guantánamo whose name or circumstances of capture match Mr. Hamad's claim.[28] Mr. Hamad has also boasted that in 2003 he provided information to the FBI "that can lead them to the perpetrators" of the 1995 murder in Bosnia of U.S. citizen William Jefferson and that "[i]f it were not for me, the FBI would never come to the perpetrators of this murder." Ali Hamad 2004 Letter 2. Since no one has been arrested for the murder of William Jefferson and the only arrest warrant issued for the crime was in 1998, *see infra*, Mr. Hamad's "assistance" seems to have been of limited value.

Mr. Hamad has openly acknowledged that senior U.S. officials long ago stopped regarding him as a credible source of information, if they ever did at all. In an open letter to U.S. Maj. Gen. Virgil Packett, the commander of NATO peacekeeping forces in Bosnia-Herzegovina, Mr. Hamad stated, "I know that you do not trust to what I have publicly stated about Al Qaeda and its engagement in [Bosnia-Herzegovina] . . . you think that I do not talk the truth." Ali Hamad 2004 Letter 1. Mr. Hamad's offers of assistance to Paddy Ashdown, then the High Representative of the international community in Bosnia-Herzegovina, were also ignored. S*ee* Ali Hamad 2005 Letter 3 ("I never received a real response [from Ashdown]. He never showed any interest in my program.").

Mr. Zuhair has also been one of Mr. Hamad's favored bogeymen. Mr. Hamad has bizarrely claimed that Mr. Zuhair was "directly linked to Al-Qaeda from its foundation . . . while at the same time working for the Croatian government with unknown authority, meeting with the Croatian president Franjo Tudjman several times . . . ." Ali Hamad 2005 Letter 5. Mr. Hamad makes no attempt to explain how or why Mr. Zuhair could have been an Islamist ideologue

[28] It is not possible to surmise that Mr. Hamad is referring—at least accurately—to Khalid Shaykh Muhammad, who was captured in Pakistan in February 2003, four months before Mr. Hamad's alleged FBI meeting that led to Mr. al-Shaykh's arrest.

working both on the side of Bosnian Muslims (through al-Qa'ida) and their Christian Croatian adversaries.

Mr. Hamad's fantastical attempts to exploit post-9/11 concerns over terrorism are part of an older pattern of self-serving fabrications stemming from his original arrest for robbery. On October 20, 1997, one month after the Mostar bombing, Mr. Hamad and several Arabs and Bosnians robbed an American contractor living in Zenica. Mr. Hamad was arrested for the crime one week later and found himself pressured by investigators to confess to the Mostar bombing as well and to falsely implicate Mr. Zuhair—by then outside of the country and a convenient scapegoat—in exchange for early release. *See* R. of Trial, Kz-53/98 at 4 (Zenica Cantonal Court July 13, 1998), attached as Ex. 29 ("Ali Hamad Recantation") ("[Investigators] were constantly pressuring me to admit to [the bombing], saying that there would be a secret trial, that I would be acquitted and that they would blame Handala, who was at large, for everything.").

Under this pressure, and hoping for favorable treatment, Mr. Hamad agreed to false statements implicating Mr. Zuhair in the bombing that were dictated to him by police and repeated them before an investigating magistrate on January 7, 1998. Ali Hamad Recantation 6 ("I had decided to lie because they promised that we would be released from prison."). Despite having agreed to the interrogators' demands in the Mostar investigation, Mr. Hamad was nevertheless convicted and sentenced to two years and eight months for the Zenica robbery on February 24, 1998, increased to five years after appeal on July 9, 1998. *See* KZ-275/98 (SC of Federation of Bosn. & Herz. July 9, 1998), attached as Ex. 30. Having realized that he had been double-crossed, Mr. Hamad promptly recanted his statements that he and Mr. Zuhair had constructed, transported, and detonated the car bomb together on July 13. *See* Ali Hamad Recantation 10-11 (". . . I gave a false report about everything that happened. . . . I do not know

whether Handala participated in [the explosion] or anybody else."). Nevertheless, the Zenica cantonal court brushed aside Mr. Hamad's recantation in its rush to find foreign scapegoats for this high-profile crime, in an effort to preserve fragile internal unity.

4. Government Allegation that Mr. Zuhair was Connected to the Murder of William Jefferson

Respondents have repeatedly, publicly, and falsely alleged that Mr. Zuhair was responsible for the murder of William Jefferson, an American employee of the United Nations, near Tuzla, Bosnia-Herzegovina, on the night of November 18-19, 1995. *See, e.g.*, CSRT Summ. of Evidence at ¶ 3(6). This claim has been publicly recycled, with varying degrees of certitude, in Mr. Zuhair's annual Administrative Review Board proceedings.[29] The highly incendiary nature of this accusation requires Mr. Zuhair to rebut it unless and until the Government publicly withdraws it. Mr. Zuhair has never been arrested or charged in connection with the Jefferson murder and has never even been to the Tuzla area. *See* Kassem Decl. ¶ 49-50. There is no indication Mr. Zuhair was ever seriously considered as a suspect in this crime; during the 17 months he spent incarcerated in Bosnia-Herzegovina *after* the Jefferson murder—including interrogation by U.S. authorities—he was never questioned about it. *Id.* ¶ 61.[30]

The Government's invocation of the Jefferson murder is not only baseless and incendiary, it could not furnish a basis for detaining Mr. Zuhair as an enemy combatant.

[29] *See* Unclassified Summ. of Evidence for Administrative Review Board in the Case of Ahmed Zaid Salim Zuhair at ¶ 3(a)(1) (Oct. 25, 2005), attached as Ex. 23 ("ARB 1") ("The detainee *is believed to be responsible* for the firearm murder . . . of William Jefferson); Unclassified Summ. of Evidence for Administrative Review Board in the Case of Zohair, Ahmed Zeid Salem at ¶ 3(a)(2) (Oct. 30, 2006), attached as Ex. 24 ("ARB 2") ("The detainee *is responsible* for 1994 or 1995 murder" of Jefferson); Unclassified Summ. of Evidence for Administrative Review Board in the Case of Zohair, Ahmed Zeid Salem at ¶ 3(a)(5) (Jan. 17, 2008), attached as Ex. 25 ("ARB 3") ("Military *reporting indicated* in 1994 or 1995 the detainee was responsible for the murder" of Jefferson); Unclassified Summ. of Evidence for Administrative Review Board in the Case of Zohair, Ahmed Zeid Salem at ¶ 3(a)(12) (Oct. 2, 2008), attached as Ex. 26 ("ARB 4") ("*Reportedly*, the detainee was responsible for the murder" of Jefferson) (emphases added).

[30] Notably, the only secondhand Bosnian media report purporting to link him to the incident is from March 8, 2002—six years after the killing, but at the same time as the torrent of media rumors in the aftermath of the Mostar bombing portraying him as a shadowy international terrorist. *See* EUP20020325000195, attached as Ex. 46.

Respondents have not alleged and do not offer any facts to suggest that the 1995 Jefferson killing is attributable to any person or organization that "planned, authorized, committed, or aided" the 9/11 attacks. Respondents do not even allege that the murder was carried out by any terrorist organization, designated as such by the United States or otherwise. And as the incident took place in Bosnia-Herzegovina in 1995, it was unrelated to any armed conflict against the United States, *supra* IV(B). Indeed, there is no evidence to suggest that this was anything other than an ordinary criminal act that happened to be committed during a war in which the United States was not a party.

Respondents have repeatedly leveled this scurrilous accusation against Mr. Zuhair despite the fact that Bosnian authorities—the authorities most directly concerned by this crime—in 1998 issued an arrest warrant and a corresponding INTERPOL Red Notice in connection with this crime, for another Saudi national, Fa'iz al-Shanbari. *See* INTERPOL Red Notice for Fa'iz al-Shanbari, attached as Ex. 35. This warrant was issued as part of the Bosnian government's investigation into the Jefferson killing. *See* Letter from Zdravko Knežević, Chief Prosecutor of the Federation of Bosnia-Herzegovina (Mar. 21, 2008), attached as Ex. 36.

Nor have Respondents mentioned anywhere before this Court the existence of an extensive investigation into the murder of Mr. Jefferson, a U.N. employee at the time, by a special U.N. Headquarters Board of Inquiry that drew upon reports by the U.N. Security Section. *See* Report of the Board of Inquiry, attached as Ex. 37. There is not a single mention, direct or indirect, of Mr. Zuhair in the over two hundred pages of the report, but it does cite unconfirmed reports that Bosnian authorities suspected Mr. al-Shanbari of the crime. *Id.* 3. The findings of the U.N. were shared with the U.S. government in August 2004 and should have been known to

Respondents. *See* Letter from Peter Taksøe-Jensen, U.N. Assistant Secretary-General in Charge of the Office of Legal Affairs to Ramzi Kassem (Dec. 30, 2008), attached as Ex. 38.

Finally, the FBI was investigating the Jefferson killing as early as 2003 and likely much earlier. *See* Ali Hamad 2004 Letter 1 ("I have told the FBI investigators about the murder of an American in Bosnia in 1995."). It has been thirteen years since William Jefferson was murdered, in a country U.S. investigators would have had no problems accessing, and Ahmed Zuhair has spent over half of that time in American custody. Under such circumstances, the lack of an indictment against Mr. Zuhair for this crime from either jurisdiction should speak for itself.

B. Government Allegations Pertaining to Afghanistan and Pakistan

Respondents make a series of allegations, whose details are nearly all withheld, that Mr. Zuhair supposedly "received military training at al-Qaida camps" in Afghanistan and Pakistan and "fought against the United States." Factual Return Narrative 13. These allegations are false and are mostly entirely based on statements obtained from detainees who were tortured and/or subjected to other forms of coercion. The torture of most of these individuals is a matter of well-established public record corroborated by other detainees and major international human rights organizations.

As discussed above, Mr. Zuhair never set foot in Afghanistan prior to his transfer to U.S. detention there in 2002. *See* Kassem Decl. ¶ 31. Mr. Zuhair did, however, fabricate a story under torture in Bagram, claiming that he made a brief excursion into Afghanistan to rescue a kidnapped relative, a story that he repeated in interrogations with U.S. authorities after arriving in Guantánamo in the hopes of avoiding further mistreatment. *Id.* ¶¶ 109-13; *see also* ISN 669 FD-302 (Jun. 15, 2002), attached as Ex. 39. Even if this story were true, however, the

Government fails to demonstrate how a four or five day trip to Afghanistan in late 2001 would support any of the outlandish claims against him.

Only three of these claims are unredacted and can be discussed here. The first, that Mr. Zuhair trained in Afghanistan in 1990 and 1991 at the Javar and Sadda camps in Pakistan and the al-Farouq and Khalden camps in Afghanistan, *see* Factual Return Narrative ¶ 29, is false. It relies in large part on an interview conducted thirteen years after the events in question with a convict in Zenica prison, Bosnia-Herzegovina. *See* Ex. 40. As discussed in the Classified Annex to this Traverse, this source—whose identity is not classified but is nevertheless being improperly withheld by the Government—is worthless.

Moreover, even if true, mere training at camps in Afghanistan in 1990 and 1991, when fighting was continuing between the Soviet-backed Kabul regime and U.S.-backed mujahidin, is not a basis for presuming membership in, affiliation with, or support of al-Qa'ida or participation in an armed conflict with the United States. *See, e.g.,* Declaration of Barnett R. Rubin, Ph.D., *Boumediene v. Bush* ¶ 13, attached herein as Ex. 41. Similarly, the Government's own evidence suggests that training at Khaldan camp did not necessarily make one a member of al-Qa'ida and that the camp did not train people to fight the United States. *See* IIR 6 034 0233 02, attached as Ex. 42 (quoting detainee who "disputed that the Khaldan camp was an al Q?aida camp [sic]" and "explained that Americans do not understand that being an Arab in Afghanistan is not necessarily the same as being involved or a member of the al Q?aida group.").

The second unredacted claim, that Mr. Zuhair was "definitely a member of al Qaida" and a "perfect soldier" before arriving in Bosnia-Herzegovina, also relies on the same discredited November 2004 interview conducted in Zenica. *See* FM40 (Nov. 20, 2004). For reasons laid out

in the Classified Annex to the Traverse it should carry no weight for reasons additional to the source's lack of credibility.

The third claim, that Mr. Zuhair had "fought in Bosnia, Chechnya, and Afghanistan," was seen as "al-Qaida guesthouses" in Qandahar and Kabul, "regularly met" with bin Ladin, and "had connections with Taliban leaders," Factual Return Narrative ¶ 37, comes from two interviews with a detainee held in Guantánamo. *See* [redacted] FM40 (Jan. 5, 2005), attached as Ex. 43; [redacted] FM 40 (Mar. 15, 2005), attached as Ex. 44. For reasons outlined in the Classified Annex to this traverse, this source is a notorious liar whose credibility has been fatally undermined by the Government's own evidence in Mr. Zuhair's case and in others.

The remaining allegations pertaining to Afghanistan and Pakistan are withheld from Mr. Zuhair and from the public. *See* Factual Return Narrative ¶¶ 30-33, 35-36, 38-41. Nearly all of these allegations rely on statements from detainees who were tortured. Although the horrific abuse that undoubtedly produced these statements is mostly a matter of public record, the Government's concealment of the allegations and their sources compels Mr. Zuhair's counsel to submit these public materials under classified seal in order to refute them.

C. Government Allegations Pertaining to the Attack on the U.S.S. Cole

Respondents have publicly—but inconsistently—implicated Mr. Zuhair in this attack. *See, e.g.,* CSRT Summ. of Evidence ¶ 3(8).[31] Strangely, there is no mention of the Cole in Mr. Zuhair's latest ARB evidence summary, which was prepared on October 2, nearly two weeks *after* the factual return was filed. *Compare* ARB 4 *with* Factual Return Narrative ¶ 44. Moreover, the unclassified Factual Return also refers to the October 2000 attack on the U.S.S. Cole, Factual Return Narrative ¶ 44. Any allegations that may or may not relate Mr. Zuhair to

[31] *See also* ARB 1 ¶ 3(a)(10) ("The detainee admitted to another detainee that he was involved in the planning of the attack on the USS Cole in October 2000."); ARB 3 ¶ 3(a)(20) ("The detainee was involved in the attack on the USS COLE.").

this incident are redacted. Unless and until Respondents publicly acknowledge that Mr. Zuhair was not involved in the Cole bombing, Mr. Zuhair is forced to treat it as an outstanding allegation, given its incendiary nature and because it was previously dropped from his ARB accusations only to resurface later. *Compare* ARB 2 (omitting any mention of the Cole) *with* ARB 3 ¶ 3(a)(20).

The Government's apparent inability to make up its mind as to Mr. Zuhair's purported connection to the Cole attack is unsurprising, as Respondents have never explained how Mr. Zuhair was involved with this attack or what role he is alleged to have played. The CSRT accusation appears to stem from an elementary confusion of Arabic names coupled with reliance on evidence obtained from detainees broken by torture and coercion. Habeas Pet. ¶¶ 35-37. This hopelessly vague, half-heartedly asserted, and ultimately baseless allegation exemplifies the "kitchen-sink" approach that Respondents have adopted in order to justify the unlawful detention of Mr. Zuhair in Guantánamo of nearly seven years.

INCORPORATION BY REFERENCE

This document contains only Petitioner's response to as much of the Government's Return as could be conveniently rebutted without discussion of classified information. Petitioner hereby incorporates by reference the Classified Annex submitted herewith under classified seal, as well as all classified and unclassified exhibits. Petitioner also incorporates the points made in his prior pleadings, motions, memoranda, and oral arguments before this Court.

SUPPLEMENTATION AND FURTHER DISCOVERY

Petitioner reserves the right to supplement this Traverse, including to take account of any additional information that may come to his attention or that of his counsel, such as (but not limited to) any discovery ordered by this Court or additional disclosure by the Government.

CONCLUSION

For the foregoing reasons and the further reasons stated in the Classified Annex and all exhibits submitted, Ahmed Zaid Salem Zuhair respectfully requests that this Court:

1. Grant his Petition for the Writ of Habeas Corpus;
2. Order and declare that Respondents have no lawful basis for detaining Mr. Zuhair;
3. Order Mr. Zuhair's immediate release, under appropriate conditions to safeguard his liberty, and his immediate repatriation to the Kingdom of Saudi Arabia; and
4. Grant or order such further relief as is just and proper.

Dated: December 31, 2008

Respectfully submitted,
____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, I caused a true and accurate copy of the Traverse in Support of Ahmed Zuhair's Petition for Writ of Habeas Corpus to be served upon the following counsel for Respondents by electronic filing via the Court's ECF system:

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