No. 08-368

IN THE
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EXPERTS IN THE LAW OF WAR

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are scholars and other experts in the field of international humanitarian law, also commonly referred to as the "law of war" or the "law of armed conflict." Their interest in this case stems from deeply held concerns about the Court of Appeals' interpretation and application of the law of war. *Amici* view it as imperative that this Court have before it a comprehensive explanation of the manner in which the law of war applies—and does not apply—to Petitioner's case.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

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SUMMARY OF ARGUMENT

Whatever domestic law may have to say about the military detention of Petitioner Ali Saleh Kahlah al-Marri, there is no clearly established law-of-war principle that furnishes affirmative, independent authorization for that detention.

As a threshold matter, the law of war applies only in and to situations of *armed conflict*—either of an international character or of a non-international character. Petitioner plainly is not being detained incident to a war between nations; if any "armed conflict" exists between the United States and al Qaeda in the United States, it must be a *non*-international one. But the definition of "armed conflict" in the non-international context, though fact-bound and debatable at the margins, is not infinitely malleable. The state of affairs in Peoria, Illinois (or even the United States more broadly) at the time Petitioner was first detained as an "enemy combatant" falls well outside even the outer boundaries of that definition.

But even if Petitioner's detention *were* incident to a non-international "armed conflict," there is no law-of-war rule that would furnish affirmative authorization for that detention. The law-of-war rules governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention of someone in Petitioner's situation. Authorization, if any, must instead be found in domestic law.

Finally, even if international humanitarian law furnished affirmative authorization for detention incident to the classic non-international armed conflict (*i.e.*, the civil war), that authorization could not extend to Petitioner's detention. The "global war" against al Qaeda is a novel beast—one that can be claimed to reach every corner of the globe, that is defined

not by territory or by the existence of actual hostilities but by the presence of suspected terrorists, and that has no discernable ending point. Given the unprecedented nature of the conflict, and, hence, the unprecedented circumstances of the detention at issue, the well-established law of war cannot be understood to authorize that detention—much less recognize it as a "fundamental and accepted . . . incident to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

ARGUMENT

To support its indefinite military detention of Petitioner Ali Saleh Kahlah al-Marri, the Government has relied on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF"), which it views as having activated the President's war powers. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 594, 629-31 (2006) (assuming, without deciding, "that the AUMF activated the President's war powers" at least in connection with the armed conflict between al Qaeda and the United States in Afghanistan).

The AUMF does not explicitly mention detention. Nonetheless, a plurality of this Court held in *Hamdi v. Rumsfeld* that the statute must be understood to authorize the detention of "enemy combatants" in the international armed conflict between the United States and the Taliban government forces in Afghanistan—individuals 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." 542 U.S. at 510, 516 (quotation marks omitted). The plurality explained that the absence of explicit legislative authorization was no barrier to detention of individuals falling within this "limited category" for the duration of the "particular conflict" in which they were captured because such detention was "so fundamental and accepted an incident to war as to be an

exercise of the 'necessary and appropriate force' Congress [through the AUMF] has authorized the President to use." *Id.* at 518; *see also id.* at 519 ("In light of [established law-of-war] principles, it is of no moment that the AUMF does not use specific language of detention. . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

In reaching this conclusion, the *Hamdi* plurality was careful to distinguish the case there at hand, in which "a clearly established principle of the law of war" could properly be treated as incorporated by reference into the AUMF, from a situation in which "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," in which case the AUMF might well not be viewed as furnishing detention authority. *Id.* at 520, 521. In other words, the AUMF authorizes only what established law-of-war principles clearly and unmistakably authorize; to view it as authorizing more would be highly problematic, especially as applied to individuals (like Yaser Hamdi and Petitioner here) who unquestionably are entitled to the protections of the U.S. Constitution.

The circumstances of the military detention at issue in this case differ in crucial respects from those surrounding the detention of Yaser Hamdi. Petitioner here is not alleged ever to have taken up arms against the United States in Afghanistan—or indeed in any theater of active hostilities. He is being detained not in connection with the international armed conflict against the Taliban government forces that took place in Afghanistan, or with any other armed conflict on any recognizable battlefield, but rather in connection with the so-called "global war" against al Qaeda. As discussed below, there is no law-of-war principle—much less a well-established one—that furnishes independent authorization

for his military detention in such circumstances. Any such authorization, if it exists, must come from domestic law.

I. PETITIONER WAS NOT DETAINED IN A THEATER OF "ARMED CONFLICT" AND IS NOT ALLEGED TO HAVE PARTICIPATED IN AN "ARMED CONFLICT."

The law of war—also known as the laws of war, the law of armed conflict, and international humanitarian law ("IHL")—is the body of law that regulates the methods and means of waging armed conflict and stipulates the protections due to those caught up in armed conflict. *See* U.S. Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶¶ 2-3 (1956) ("*The Law of Land Warfare*"). It consists of treaties—principally, the Hague Conventions[2] and the four 1949 Geneva Conventions[3]—and customary international law. *See The Law of Land Warfare* ¶ 4.[4]

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[2] *See, e.g.*, Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2301.

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. There are two Articles common to all four Conventions and discussed herein: Articles 2 and 3 (referred to below as "Common Article 2" and "Common Article 3").

[4] *The Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative statement of the law of war, and although it lacks

(cont'd)

Putting aside for the moment the *content* of this law, its *scope* is circumscribed by a critical predicate requirement for its application: the existence of an "armed conflict." This is an important limitation, and one on which IHL furnishes concrete guidance. *See* Allen S. Weiner, Hamdan, *Terror, War*, 11 Lewis & Clark L. Rev. 997, 1017 (2007) ("'War' and 'armed conflict' are concepts with defined legal meanings.").

A. The Two Types of "Armed Conflict"

There are two kinds of armed conflict recognized under IHL: international armed conflict and non-international armed conflict. As discussed below, the law-of-war rules applicable to, the tests for identifying the existence of, and the scope of these two types of armed conflict differ in important respects.

1. International Armed Conflict

The first kind of armed conflict, which has long been the subject of international regulation, is an *international* armed conflict—an "armed conflict . . . between two or more of the High Contracting Parties." Common Article 2. This resort to armed force between nations is the principal subject of the Geneva Conventions' extensive regulations, which provide, for example, particularized requirements for the detention and treatment of "prisoners of war" captured during hostilities. *See, e.g.*, Third Geneva Convention, arts. 12-16 (general protections, including humane treatment); arts. 17-20 (protections afforded immediately upon capture); arts. 21-57 (particularized protections regarding conditions of internment); arts. 58-68 (provisions regarding prisoners'

(cont'd from previous page)

binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* ¶ 1.

financial resources); arts. 69-78 (rules regarding prisoners' relations with the outside world). International armed conflicts are also subject to the terms of an instrument commonly referred to as Additional Protocol I[5]—a treaty that the United States has not ratified, but much of which the United States has long recognized as having the status of customary international law. *See* Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, *Law of War Workshop Deskbook* 32 (Brian J. Bill ed., 2000) ("*Law of War Workshop Deskbook*"); Michael J. Matheson, *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, 420 (1987) (remarks of former Deputy Legal Advisor to the U.S. Department of State).

The term "armed conflict" is not expressly defined in the Geneva Conventions or in any other law-of-war treaty. The circumstances in which an *international* armed conflict can be said to exist are, however, explained as follows in the authoritative commentary to the Conventions:

> *Any difference arising between two States and leading to the intervention of members of the armed forces* is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces . . . .

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[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 23 (1960) ("*Commentary on Third Geneva Convention*") (emphasis added) (footnote omitted). This is a straightforward, somewhat formal test that sets a relatively low threshold meant to maximize international regulation in the arena of *inter-state* conflict.

2. Non-International Armed Conflict

The other kind of "armed conflict" recognized by IHL is a conflict "not of an international character." Common Article 3. As evidenced by the phrase in Common Article 3 describing such a conflict as "occurring in the territory of one of" the parties to the Geneva Conventions, the drafters of the Conventions likely understood this class of conflict to consist largely of civil wars. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (acknowledging that "the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' *i.e.*, a civil war"). This Court has concluded, however, that the category described is much broader—that it encompasses all "armed conflicts" that cannot be classified as "conflict[s] between nations." *Id.*

Unlike international armed conflicts, non-international armed conflicts are not subject to extensive regulation under the Geneva Conventions. Only Common Article 3 applies by its terms to these armed conflicts. That Article specifies certain "minimum" standards governing the treatment and trial of "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *See Hamdan*, 548 U.S. at 629 (discussing Common Article 3).

Common Article 3 represented the first concerted—albeit very limited—effort to formulate international standards for the conduct of armed conflict other than between nation states. Until 1949, the conduct of armed conflict between a nation state and a non-state group, or between non-state groups, within the territory of a sovereign state, was generally viewed as a matter of exclusively domestic concern—at least insofar as the law of war was concerned. *See* Lindsay Moir, *The Law of Internal Armed Conflict* 19-21 (2002) ("*Internal Armed Conflict*"). A residue of this understanding is reflected in the drafting history of Common Article 3: Although it was originally proposed that *all* provisions of the Geneva Conventions be made applicable to non-international conflicts, that proposal was rejected on the basis that it impinged too heavily on nation-states' sovereignty. *See Commentary on Third Geneva Convention* 33.[6]

The trigger for the existence of "armed conflict" under Common Article 3—"armed conflict not of an international character"—is somewhat less formal and more closely tied

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[6] Additional international regulation of a limited subset of non-international armed conflicts was introduced in 1977 in the form of the instrument commonly known as Additional Protocol II. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; *see also Law of War Workshop Deskbook*, 32 (noting that Additional Protocol II, like Additional Protocol I, largely has the status of customary international law in the United States). Additional Protocol II applies only to those non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, art. 1(1).

to particular geography than that for international armed conflict. *See, e.g.*, *HH & Others v. Sec'y of State for the Home Dep't*, Somalia CG [2008] UKAIT 00022, ¶ 321 (United Kingdom: Asylum & Immigration Tribunal) (noting that an international armed conflict is "usually easier to establish" than a non-international one). After all, if mere "intervention of the armed forces" sufficed to trigger application of the law of war to a conflict not between nations, *see Commentary on Third Geneva Convention* 23, a vast array of domestic deployments would become subject to the law of war, making them at once fair game for international regulation and potential excuses for displacement of normal domestic law. That result is not contemplated by IHL, which excludes "internal disturbances and tensions" and "isolated and sporadic acts of violence" from the definition of "armed conflict." Additional Protocol II, art. 1(2). *See also* Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (1960) (listing non-exclusive criteria for identification of non-international armed conflict and observing that such "criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection"); Comm. on the Use of Force, Int'l Law Ass'n, *Initial Report on the Meaning of Armed Conflict in Int'l Law* 11-12 (2008) ("*ILA Report*"), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (follow "Conference Report Rio 2008 (206kb)" hyperlink).

The definition of "armed conflict" in the non-international context is based upon two minimum criteria: that the groups using armed force be relatively well-organized, and that the hostilities be sufficiently intense. These two criteria are clearly reflected in the influential jurisprudence of the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In the seminal *Tadić* case, the ICTY Appeals Chamber stated that "armed conflict exists

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995) ¶ 70; *see also, e.g.*, *Prosecutor v. Haradinaj*, Case No. IT-4-84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008) (explaining that the test for whether there is an "armed conflict" triggering the law of war in a non-international context rests on "whether (i) the armed violence is protracted and (ii) the parties to the conflict are organized," and distinguishing "armed conflict" from "banditry, riots, isolated acts of terrorism, or similar situations").[7] The use of the word "protracted" in this definition has since been clarified, with the Appeals Chamber explaining that it is intended to exclude, for example, cases of civil unrest and single acts of terrorism, and is properly regarded as a measure of *intensity*; even a days-long campaign can qualify as sufficiently "protracted" if it involves intense exchanges of firepower. *See Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶¶ 333-41 (ICTY Appeals Chamber Dec. 17, 2004); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 17 (ICTY Appeals Chamber June 16, 2004); *see also Haradinaj*, *supra*, ¶¶ 40-49 (surveying ICTY jurisprudence

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[7] The ICTY's definition of "armed conflict" in the non-international context has gained broad acceptance. *See, e.g.*, Moir, *Internal Armed Conflict* 42-45; Natasha Balendra, *Defining Armed Conflict*, 29 Cardozo L. Rev. 2461, 2475 (2008) (describing *Tadić* as "perhaps the most frequently cited decision on what constitutes an armed conflict"); *ILA Report* 13 ("The ICTY *Tadić* decision is nowadays widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts … [and] focused on two aspects of a conflict: the intensity of the conflict and the organization of the parties to conflict.").

on existence of "armed conflict"). Among the factors relevant to gauging intensity are the "[l]ength or protracted nature of the conflict and seriousness and increase in armed clashes"; the "[s]pread of clashes over the territory" in which the armed conflict is alleged to have occurred; the number of forces deployed to the territory; and the size and force of the weapons used. *See Milošević*, ¶¶ 28-31.

B. Petitioner Is Not Alleged to Have Been Involved in, nor Was He Detained During, Any "Armed Conflict" in the United States.

Applying the above-described criteria for the existence of the two kinds of "armed conflict," it is clear as an initial matter that Petitioner has not been detained incident to an *international* armed conflict. *Cf. Hamdan*, 548 U.S. at 628-29 (noting Government's argument that the armed conflict with al Qaeda—as opposed to the Taliban government forces—in Afghanistan was not an international armed conflict because it was not between nations). Petitioner, a citizen of Qatar, is not alleged to belong to or to have fought alongside the armed forces of any enemy nation. *See Al Marri v. Pucciarelli*, 534 F.3d 213, 231 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment) ("[U]nlike Hamdi and Padilla, al-Marri is not alleged to have been part of a Taliban unit [and] not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation . . . ."); *cf.* Common Article 2 (stating that the full panoply of Geneva Conventions' provisions apply to "armed conflict . . . between two or more of the High Contracting Parties"); *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (holding that "combatants" fighting on behalf of an enemy nation in an international armed conflict could be subject to trial by military commission if they violated the laws of war). The only other form of armed conflict to which Petitioner's detention might be incident is a *non*-international armed conflict.

Application of the *Tadić* test for existence of a non-international armed conflict may be debated at the outer edges—for example, where the hostilities are not at all "protracted" in the usual sense of the term. Some have argued, for instance, that the events of September 11, 2001 qualified not just as an "armed attack" triggering the right to engage in self-defense under Article 51 of the Charter of the United Nations[8] but as a full-fledged "armed conflict." *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 33-38 (2003). *But see, e.g.*, Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 Colum. J. of Transnat'l L. 435, 452-56 (2005); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 326-28 (2003); Reservation by the United Kingdom to Article 1.4 and Article 96.3 of Additional Protocol II, *reprinted in Documents on the Laws of War* 510 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) ("[T]he term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.").

But Petitioner here is not detained in connection with the September 11 attacks (in which he is not alleged to have participated), nor is he alleged to have taken part in any armed conflict in, for example, Afghanistan. He is instead alleged to have taken part in acts in preparation for an unrealized terrorist attack at some undetermined point. To suggest that there was a non-international "armed conflict" in Peoria, Illinois, or even in the United States generally,

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[8] *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?,* 59 Stan. L. Rev. 415, 430 (2006). *But see* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 144 n.30 (2004).

years after the September 11 attacks, when Petitioner was first detained as an "enemy combatant" (on June 23, 2003), stretches the concept of "armed conflict" beyond its breaking point. There were no acts of hostilities, much less intense or sustained hostilities, occurring in this country at the time.[9] *Cf. Prosecutor v. Kunarac*, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 58 (ICTY Appeals Chamber June 12, 2002) ("What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed.").

The only escape from the legal import of these undeniable facts is in a claim that the existence of a non-international armed conflict *somewhere* in the world necessarily triggers application of the laws of war *everywhere*—or at least everywhere a suspected al Qaeda terrorist might be found. That is, to say the least, a novel proposition as far as the law of war is concerned.[10] As discussed above, the existence of a

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[9] There is some uncertainty in IHL concerning the territorial application of the law of war once an armed conflict has been found to exist. The ICTY has at times suggested that the law of war would apply only within the "zone of hostilities" within a state, but at others suggested that the law of war would apply to the entire territory of the state in which an armed conflict is found. *Compare, e.g.*, *Kordić and Čerkez*, *supra*, ¶ 341 (finding existence of armed conflict in "Central Bosnia"); *Milošević*, *supra*, ¶ 29 (finding existence of armed conflict in Kosovo region), *with Tadić*, *supra*, ¶ 70 (suggesting armed conflict is deemed to exist in "whole territory" of the state). This uncertainty is of no moment here, where there cannot be said to have existed an armed conflict in *any* part of the United States at the relevant time.

[10] It is also inconsistent with the approach that other countries around the world have taken in response to al Qaeda's terrorist acts—for example, in London and Madrid. *See* Mary Ellen O'Connell, *When is a War not a War? The Myth of the Global War on Terror*, 12 ILSA J. of Int'l & Comp. L. 535, 538 (2006).

non-international "armed conflict" is determined by facts on the ground in the territory in which the purported fighter (or, as is often the case in the ICTY jurisprudence, the purported war criminal) is alleged to have operated. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (observing that, in state where petitioner resided (Indiana), the facts on the ground were not such as to justify resort to military procedures);[11] *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone,* 43 U. Rich. L. Rev. 101, 118-119 (2009), *available at* http://ssrn.com/abstract=1332096.

This Court has recognized the need for some nexus between the relevant "armed conflict" and the law-of-war powers being exercised, particularly in the detention context. In *Hamdi*, the plurality concluded that the purpose of detaining "combatants" (a term of art discussed further below) in international armed conflicts is to prevent return to the *battlefield*, *i.e.*, the zone of hostilities. *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."); *see also Rasul v. Bush*, 542 U.S. 466, 488 (2004) (opinion of Kennedy, J.) (referencing detention in connection with the "zone of hostilities"); International Military Tribunal at Nuremberg, Judgment and Sentences, HMSO cmd 6964 (Oct. 1, 1946) p. 48, *reprinted in* 41 Am. J. of Int'l L. 229 (1947) (approving

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[11] As noted in *Milligan*, the existence of armed conflict at a particular time in a particular territory is what necessitates and constitutionally justifies the resort to the law of war. *See Milligan*, 71 U.S. at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.").

the "principle[] of general international law on the treatment of prisoners of war" that "war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war").[12] Detention as "combatants" of individuals who are not members of the armed forces of a nation state or who have never even been in a zone of hostilities cannot of course be justified on these grounds.

For all of these reasons, to the extent the Government here claims to draw its authority from well-settled IHL principles, the fact that by its own terms IHL does not apply to situations like that of Petitioner is fatal to that claim.[13]

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[12] This is not to say that the detention itself must be at or near the battlefield. In *Hamdi*, the petitioner was being detained in the United States to prevent his return to the battlefield in Afghanistan. By contrast, here, Petitioner is being detained in the United States yet is not alleged ever to have been on any identifiable battlefield.

[13] The Government's own actions, moreover, belie the existence of any supposed "war" within the United States at or around the time of Petitioner's detention. Of those individuals resident in the United States at the time of their arrest, *no one* other than Petitioner has been subject to military detention based solely on allegations of suspected terrorism plans, absent any allegation of prior engagement in active hostilities outside the United States. As discussed above, Yaser Hamdi was alleged to have taken up arms against the United States as part of a Taliban unit in Afghanistan. Another individual, José Padilla, was subjected to military detention based in part on allegations of having taken up arms against the United States alongside the Taliban in Afghanistan, and was later transferred to civilian custody before this Court could review the legality of his military detention. *See Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005), *rev'd in part*, 546 U.S. 1084 (2006), *and cert. denied*, 547 U.S. 1062 (2006) (Kennedy, J., concurring). Numerous others—including some not even captured in the United States—have been prosecuted criminally in the United States. *See, e.g.*, Neil A. Lewis, *(cont'd)*

II. EVEN IF THE LAW OF WAR APPLIES HERE, IT DOES NOT FURNISH INDEPENDENT AUTHORIZATION FOR PETITIONER'S DETENTION.

There is another reason why any resort to IHL by the Government in this case must fail: Even if the Government may properly invoke the law of war in relation to aspects of the "global war" against al Qaeda that do not fall within the parameters of what traditionally has been considered non-international "armed conflict," that law cannot be said to include affirmative authorization for Petitioner's detention.

A. The Law of War Does Not Furnish Affirmative Authorization for Detention Incident to a Non-International Armed Conflict.

As discussed above, if Petitioner is being detained incident to any "armed conflict," it must be a non-international armed conflict—a conflict governed not by the full panoply of provisions set forth in the bulk of the Geneva Conventions, but by the "Convention in miniature" that is Common Article 3. This is a critical point. As reflected in the plurality decision in *Hamdi*, IHL supplies definite authority for the detention as "combatants" of individuals fighting on behalf of an enemy nation. *See* 542 U.S. at 518;

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Moussaoui Given Life Term by Jury Over Link to 9/11, N.Y. Times, May 4, 2006, at A1; Pam Belluck, *Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, at A13; Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. Times, Oct. 5, 2002, at A1; *see generally* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts* (2008) (white paper for Human Rights First), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

see also Third Geneva Convention, art. 21 ("The Detaining Power may subject prisoners of war to internment."); Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 240-41 (2009) ("In international armed conflicts, the Geneva Conventions have long supplied a clearly defined and established legal framework for detention."), *available at* http://papers.ssrn.com/so13/papers.sfm?abstract_id=1326551. Such authorization makes sense in the context of inter-state conflict, which often is conducted outside the territory of the power seeking to prevent the return of fighters to the battlefield, far from the arena of domestic laws and institutions. *See, e.g.*, *id.* at 240-41; John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict*, 40 Isr. L. Rev. 396, 402 (2007).

By contrast, because non-international armed conflicts (paradigmatically, civil wars) historically have been conducted wholly within the territory of the only party to the conflict that could—from the sovereign state's perspective, at least—be *authorized* to detain enemy fighters, there has been no need on the state's part to resort to international law to justify detention and no desire to permit its invocation by rebels or insurgents. In the absence of any felt need, and in deference to the sovereign prerogatives of nation-states, therefore, IHL has left detention authorization to domestic law in non-international armed conflicts. *See, e.g.*, John Cerone, *Misplaced Reliance on the "Law of War,"* 14 New Eng. J. Int'l & Comp. L. 57, 66 (2007) ("As the central case of non-international armed conflict is an internal conflict, [detention] authorization is unnecessary. Of course the state is free to detain insurgents operating within its territory."); Marco Sassòli, *Query: Is There a Status of "Unlawful Combatant?"*, 80 Int'l L. Stud. 57, 64 (2006) ("In [non-international armed conflicts], IHL cannot possibly be seen as providing a sufficient legal basis for detaining anyone.");

Jenny S. Martinez, *Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant*, 98 Am. J. Int'l L. 782, 787 (2004) (observing that IHL does not provide the "independent authority for detention of individuals" in non-international armed conflicts that it does in international armed conflicts).

IHL's silence on this front is closely linked to its traditional silence concerning the status of fighters in non-international armed conflict. The Government here seeks to detain Petitioner as an "enemy combatant." The term "combatant," however, is generally regarded as a term of art in the law governing *international* armed conflict—a term used to describe a member of the armed forces (or group under a command responsible to the armed forces) of a warring nation, one who is privileged to use lethal force against others but also a legitimate target of opposing lethal force. *See, e.g.*, Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 45-47 (2003); *Quirin*, 317 U.S. at 45 (distinguishing status of "combatants" in international armed conflict, and their amenability to trial for violations of the law of war, from the petitioner in *Ex Parte Milligan*, 4 Wall. 2, on the basis that Milligan was not "a part of or associated with the armed forces" of an enemy government).[14] It

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[14] *Quirin* was decided in 1942, seven years before the Geneva Conventions. Nonetheless, the Court's use of the term "combatant" in that case is generally consistent with the term's current use: A "combatant" is a soldier in the armed forces of an enemy nation with combat privileges (a "lawful combatant," or an "enemy combatant"). *See Quirin*, 317 U.S. at 31. A combatant, according to *Quirin*, may become an "unlawful combatant" if he or she engages in war crimes—"acts which render [his or her] belligerency unlawful." *Id.* In *Quirin* itself, the petitioners were alleged to have committed the war crime of perfidy by shedding their uniforms before crossing military lines, to give the impression of being civilians. *See id.*

denotes privileges and immunities as well as vulnerabilities. Because states whose armed forces are engaged in armed conflict against non-state groups typically are loath to enhance the status of rebels or insurgents or to afford them the combatant's immunity from punishment for killing, IHL has not imported the term "combatant," or the privileges it entails, into the non-international armed conflict context. *See* Dörmann, *supra*, at 47 ("The law applicable in non-international armed conflicts does not foresee a combatant's privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility)."). Fighters in non-international armed conflict are not automatically entitled to prisoner-of-war immunities under the laws of war but would potentially be subject to criminal prosecution pursuant to domestic law. And "[i]t is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention." Rona, *supra*, at 241; *see also* Sassòli, *supra*, at 64 ("The international humanitarian law applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained.").

Where a person has directly participated in hostilities, it could not be said that that the law of war would *prohibit* his detention incident to a non-international armed conflict, or even that it is entirely silent about detention in such a conflict. To the contrary, Common Article 3 affords certain humanitarian protections to those detained, as does article 5 of Additional Protocol II (insofar as it applies), which lists a number of provisions governing treatment of "[p]ersons whose liberty has been restricted." But neither treaty

furnishes independent *authorization* for the detention of any defined class of people.

Finally, it should be emphasized that this particular case does not present occasion to consider whether the authorization for detention found under the rules governing international armed conflict should, by virtue of similar military exigency, apply to detentions in aspects of the "war on terror" that involve "armed conflicts" in foreign territory, whether or not of an international character. The features of this case—the domestic detention of a U.S. resident suspected of planning to engage in domestic terrorist acts—bear much closer relation in important respects to the circumstances of a classic internal conflict than they do to a classic war between nation-states in which the detaining power is operating outside its own territory.

B. IHL Plainly Does Not Furnish Authority for the Military Detention of Petitioner.

Even if the case could be made that IHL furnished some independent authority to detain "fighters" in non-international armed conflict, that authority could not extend to Petitioner here. The circumstances of Petitioner's military detention are, as far as *amici* are aware, utterly unprecedented in the law of war.

As discussed above, it is clear there were no active hostilities in Peoria, Illinois or in the territory of the United States generally at the time of Petitioner's designation and detention as an "enemy combatant." It is likewise clear that Petitioner is not alleged to have directed any of his purported actions or plans toward any theater of war, to have directly participated in any armed hostilities, or to have participated in any aspect of the "global war on terror" that IHL would view as rising to the level of "armed conflict." He manifestly is not a battlefield detainee.

As noted above, the law governing non-international armed conflict originally was developed principally to address the problems posed by civil wars and other armed conflicts confined to the territory of a single state, not transnational conflicts. Even assuming that the "global war" against al Qaeda in its entirety qualifies as an "armed conflict," and assuming further that the existence of that conflict triggers application of *some* of the laws of war, it cannot trigger the battlefield detention authority recognized in *Hamdi*. Such authority, even when applicable, is inextricably intertwined with involvement in actual hostilities. The *Hamdi* plurality recognized as much; in finding authority for the detention in that case, the plurality stated that its holding stemmed from an "understanding . . . based on longstanding law-of-war principles"—an understanding that might "unravel" "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Hamdi*, 542 U.S. at 521.

CONCLUSION

For all of the foregoing reasons, *amici curiae* support Petitioner's request that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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