[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5067

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOATH HAMZA AHMED AL-ALWI,
Petitioner-Appellant,

v.

DONALD J. TRUMP, President of the United States, *et al.*,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT MOATH HAMZA AHMED AL-ALWI

John J. Connolly
ZUCKERMAN SPAEDER LLP
100 East Pratt Street, Suite 2440
Baltimore, Maryland 21202-1031
410 332 0444 (T)
410 659 0436 (F)
jconnolly@zuckerman.com

Beth D. Jacob
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
212 808 7624 (T)
212 808 7897 (F)
bjacob@kelleydrye.com

Ramzi Kassem
MAIN STREET LEGAL SERVICES, INC.
CUNY School of Law
2 Court Square
Long Island City, NY 11101
718 340 4558 (T)
718 340 4478 (F)
ramzi.kassem@law.cuny.edu

Attorneys for Petitioner-Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Petitioner-Appellant is Moath Hamza Ahmed al-Alwi, a Yemeni national imprisoned at the U.S. Naval Station at Guantánamo Bay, Cuba since 2002. The named Respondents-Appellees are President Donald J. Trump (formerly Barack H. Obama), Secretary of Defense James Mattis (formerly Ashton B. Carter), Commander of Joint Task Force-Guantanamo Rear Admiral Edward B. Cashman (formerly Rear Admiral Kyle J. Cozad), and Commander of Joint Detention Operations Group, JTF-GTMO Colonel Stephen Gabavics (formerly Colonel David Heath), who were named as the persons with immediate physical custody over Petitioner. All Respondents were sued in their official capacities.

No amici appeared in the district court in this matter.

Rulings under Review

Petitioner appeals from the Memorandum Opinion and Order dated February 21, 2017 (filed February 22, 2017), issued by the United States District Court for the District of Columbia (Hon. Richard J. Leon), denying the Petition for Writ of Habeas Corpus and dismissing the action, and from the judgment in this case. The district court's opinion is reported at 236 F. Supp. 3d 417 (D.D.C. 2017).

Related Cases

This case has not previously been on review before this or any other court apart from the district court.[1] Petitioner's prior habeas petition was before this Court in No. 09-5125 on distinct issues. *See Al Alwi* v. *Obama*, 653 F.3d 11 (D.C. Cir. 2011). Petitioner is aware of other cases that raised similar issues in this Court but believes none was decided by or is currently pending in this Court. Petitioner is aware of only one case currently pending before the district court that raises substantially the same or similar issues: *Guled Hassan Duran* v. *Donald J. Trump*, No. 16-CV-2358.

[1] Mr. al-Alwi filed a petition for mandamus (No. 16-5368) with this Court in an effort to have the district court rule on the government's motion to dismiss, but he dismissed that petition without prejudice and without a substantive ruling by this Court after the district court scheduled oral argument on the motion to dismiss.

TABLE OF CONTENTS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES[2]

CASES

[2]Authorities upon which we chiefly rely are marked with asterisks.

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

GLOSSARY

AIA – Afghan Interim Authority

ANDSF – Afghan National Defense and Security Forces

AUMF – Authorization for the Use of Military Force (reprinted in Statutory Addendum)

BSA – Bilateral Security Agreement between United States and Afghanistan (2014)

IAC – International Armed Conflict

ICRC – International Committee of the Red Cross

JA – Joint Appendix

NIAC – Non-international Armed Conflict

OEF – Operation Enduring Freedom

OFS – Operation Freedom's Sentinel

TISA – Transitional Islamic State of Afghanistan

JURISDICTIONAL STATEMENT

Petitioner-Appellant Moath al-Alwi asserts that the district court had jurisdiction over his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and the Suspension Clause, U.S. Const. art. I, § 9, as interpreted by *Boumediene* v. *Bush*, 553 U.S. 723 (2008). Petitioner also invoked the general federal question jurisdiction under 28 U.S.C. § 1331, and other federal statutes and constitutional provisions. I.JA.12.

The district court dismissed the petition in a final order dated February 21, 2017. III.JA.1349. The order disposed of all parties' claims. Petitioner filed his notice of appeal on April 6, 2017, within 60 days of the order. III.JA.1350. The notice is timely because respondents are U.S. officers sued in their official capacities. Fed. R. App. Pro. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the statutory authority of the United States to detain Mr. al-Alwi has unraveled because the practical circumstances of the conflict in Afghanistan are too unlike those that informed the development of the law of war and, if not, whether continued and potentially lifelong detention violates the Constitution.

2. Alternatively, whether the authority of the United States to detain Mr. al-Alwi has expired because the conflict in which he was captured more than fifteen years ago has ended.

3. Whether the Constitution requires heightened procedural protections to ensure the continued legality of indefinite detention that has exceeded fifteen years and has no end in sight.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum.

STATEMENT OF THE CASE

Mr. al-Alwi has been indefinitely detained by the U.S. military at Guantánamo Bay, Cuba, since January 16, 2002. I.JA.14. He was in his early-twenties when he arrived at Guantánamo and is now in his late-thirties. During this period some 780 prisoners are known to have passed through Guantánamo; only 41 remain. The Bush and Obama administrations each released hundreds of detainees. Mr. al-Alwi, one of the earliest Guantánamo detainees (his Internment Serial Number is 028), has seen all of them go. Many were accused of far worse, so it's baffling why the military continues to hold him.

Because his indefinite detention has effectively become a life sentence without trial, Mr. al-Alwi filed a second petition for habeas relief with the district court, arguing that detention authority has lapsed for a number of reasons. The

district court dismissed the petition, holding that "the duration of a conflict does not somehow excuse it from longstanding law of war principles." III.JA.1348. For the reasons set forth below, this Court should reverse.

A. Mr. al-Alwi's Detention and First Habeas Petition

Mr. al-Alwi is a Yemeni citizen, but he was born and raised in Saudi Arabia, where his large and supportive family still resides. I.JA.14. In late-2000 or early-2001, Mr. al-Alwi left Saudi Arabia for Afghanistan. He was in northern Afghanistan on October 7, 2001, when the United States began its post-9/11 bombing operation. *Id.* Mr. al-Alwi fled for safety to Pakistan, arriving as the United States flooded the area with flyers offering bounties for "suspicious" people. *Id*. Bounty hunters delivered some 369 persons—often captured on the basis of their Arab ethnicity—to the United States, many for $5000 each. *See* Mona Samari, *Bounties Paid for Terror Suspects*, Amnesty Int'l (Jan. 16, 2007); Pervez Musharraf, IN THE LINE OF FIRE: A MEMOIR 239-43 (2006). Mr. al-Alwi was seized and delivered to U.S. custody. He was rendered to Guantánamo, where he remains. I.JA.14.

In his initial habeas petition, Mr. al-Alwi argued that the United States wrongly categorized him as a Taliban or al-Qaida fighter based on flimsy evidence that courts of law wouldn't credit under ordinary standards of proof. The standard that eventually emerged in Guantánamo litigation, however, gave broad deference

to hearsay and other questionable forms of evidence, and permitted negative inferences (if not irrebuttable presumptions) from potentially innocuous acts such as brief stays at guesthouses that the military associated with the Taliban or al-Qaida. The district court denied Mr. al-Alwi's first habeas petition based on such evidence.

This Court affirmed, citing the district court's findings that Mr. al-Alwi had stayed in "several guesthouses associated with the Taliban … [or] al Qaeda," and traveled to "a Taliban-linked training camp near Kabul, where he was trained to fire a rocket-propelled grenade launcher" and was issued a rifle. *Al Alwi* v. *Obama*, 653 F.3d 11, 14 (D.C. Cir. 2011). But neither the district court nor this Court found any evidence that Mr. al-Alwi ever used arms against the United States or its coalition partners, I.JA.15, much less that he had anything to do with the September 11, 2001 attacks or any other plots.

B. The Evolution of the Afghan Conflict

On September 18, 2001, Congress authorized the President to

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

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 225 (Sept. 18, 2001) ("AUMF"). The military campaign, named Operation Enduring Freedom, began with bombings on October 7, 2001, after the Taliban refused President Bush's demand to expel al-Qaida and turn over Usama bin Laden, offering instead to extradite him to a third country. *See* Associated Press, *Bush Rejects Taliban Offer to Hand Bin Laden Over*, The Guardian (Oct. 14, 2001). The objectives of the campaign were to remove the Taliban regime from power and dismantle al-Qaida. *See* The 9/11 Commission Report 337-38 (2004).[3]

By early-December 2001 the Taliban were driven from power, and by December 22, 2001, the United Nations-sponsored Bonn Conference had established an Afghan Interim Authority (AIA) to govern the country pending elections. *See* Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, U.N. Sec. Council S/2001/1154 (Dec. 5, 2001). Hamid Karzai became the Chairman of the AIA, K. Katzman & C. Thomas, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 8 (Congressional Research Service 7-5700, Aug. 22, 2017) ("CRS Afg. Rep't"), and the U.S. Department of State recognized the AIA as the representative of Afghanistan in international relations. In June 2002, Karzai was elected president by the Transitional Islamic State of Afghanistan (TISA). *See* CRS

[3] *Available at* https://9-11commission.gov/report/911Report.pdf (all links herein were last visited Oct. 1, 2017).

Afg. Rep't 8; U.S. Dep't of State, Afghanistan, Int'l Religious Freedom Report 2004.[4] By January 2004, TISA had drafted and approved a new constitution, and by November 2004, Karzai was elected as Afghanistan's new leader. *Id.* Afghanistan today is a sovereign nation with no legal connection to the Taliban.

On May 1, 2003, the United States declared an end to "major combat" in Afghanistan. CRS Afg. Rep't at 7. Fighting nevertheless continued for the next decade, with U.S. involvement waxing and waning. At the peak of the conflict, the United States had 100,000 troops on the ground in Afghanistan. I.JA.258. Throughout this period the United States took the leadership role in military operations, and U.S. forces sustained significant casualties. I.JA.181.

On May 1, 2011, U.S. forces killed Usama bin Laden. The Taliban's leader, Mullah Omar, died in 2013 (although his death was not revealed until 2015). CRS Afg. Rep't 18. In June 2011, President Obama announced a plan to withdraw U.S. troops at a steady pace, intending to hand over security operations to Afghanistan by 2014. *A Timeline of U.S. Troop Levels in Afghanistan Since 2001*, Military Times (July 6, 2016) ("Troop Timeline"). U.S. troop numbers steadily declined from 2011 through 2014. The United States also began transitioning security operations—including detention—to the Afghan government. On March 25, 2013, the United States signed a Memorandum of Understanding ("MOU") "under which

[4] *Available at* https://www.state.gov/j/drl/rls/irf/2004/35513.htm.

the United States transferred all Afghan nationals detained by U.S. forces in Afghanistan to the custody and control of the Afghan government." I.JA.66.

In 2014, President Obama began declaring that "combat operations" in Afghanistan had ended and that the war was "over." *See, e.g.*, I.JA.108 ("Now, thanks to the extraordinary sacrifices of our men and women in uniform, our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion."); II.JA.582 ("Last December—more than 13 years after our nation was attacked by al Qaeda on 9/11—America's combat mission in Afghanistan came to a responsible end."); II.JA.550 ("Tonight, for the first time since 9/11, our combat mission in Afghanistan is over.").

On September 14, 2014, the United States and Afghanistan entered into a Bilateral Security Agreement (BSA) that still governs "the terms of the United States' military presence in Afghanistan beyond 2014." Resp'ts' Mot. Dism. [ECF 15], at 9. The BSA provides flatly that "United States forces shall not conduct combat operations in Afghanistan," I.JA.81, and may not engage in unilateral U.S. military counterterrorism operations there. I.JA.82. The BSA further provides that "United States forces shall not arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan." I.JA.83. Upon request by Afghan authorities, the United States must remove members of its armed forces or civilian employees from Afghanistan. I.JA.96.

The United States not only ended its original campaign in Afghanistan, it launched a new one under another name. Operation Freedom's Sentinel is intended to train, advise, and assist Afghan forces. I.JA.63. Troop withdrawals continued until October 2015, when the President announced plans to retain a force of about 9800 troops in Afghanistan through much of 2016. *See* Troop Timeline, *supra*; *see also* I.JA.258. In July 2016, the President decided to keep U.S. troop levels at about 8400 through the end of his term in January 2017. *Id.* The current administration intends to increase U.S. troop numbers in Afghanistan, but reports indicate that the numbers won't approach those seen earlier.

The enemy in Afghanistan consists of a collection of tribal and religious groups and alliances that has fragmented and morphed so often it is difficult to follow. CRS Afg. Rep't at 18-21. Although the declared enemy includes Taliban and al-Qaida fighters and associated groups, it also includes groups that had nothing to do with the 9/11 attacks and were not even formed at the time. For instance, in early 2016, President Obama "expanded U.S. counterterrorism objectives in Afghanistan to include targeting ISIL-K[horasan] as part of the broader fight against ISIL." Dep't of Defense, *Enhancing Security and Stability in Afghanistan* 8 (Dec. 2016). ISIL-K was not named as a foreign terrorist organization by the State Department until January 14, 2016. CRS Afg. Rep't 21. The government justifies applying the AUMF to ISIL based on an alliance that

formed in 2004—three years after the 2001 attacks—and *ended* in 2014. *See* White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 5 (Dec. 2016). The military has also used the 2001 AUMF to justify military operations against numerous other groups in at least six different countries. *See id.* at 5, 15-19 (stating that AUMF supports operations against al-Qaida, the Taliban, and affiliates, as well as al-Qaida in the Arabian Peninsula, al-Shabaab, al-Qaida in Libya, al-Qaida in Syria, and ISIL, and identifying operations in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen); *see also* Congressional Research Service, *Presidential References to the 2001 [AUMF] in Publicly Available Executive Actions and Reports to Congress*, at 2 (May 11, 2016) (identifying 37 occurrences in which Presidents Bush and Obama cited AUMF to support military operations).

Although hostilities in Afghanistan continue against some of these groups, the United States now serves in a supportive and subordinate role—in a fight that looks nothing like the combat operation that began in 2001. Indeed, it is now Afghanistan's fight, being waged with U.S. backing. The United States has even ceded authority to end the war. "The United States continues to support an Afghan-led, Afghan-owned reconciliation process and supports any process that includes violent extremist groups laying down their arms." Dep't of Defense, *Enhancing Security and Stability in Afghanistan* 6 (June 2017). But, unfortunately, if

Afghanistan's long and plaintive history is any guide, armed conflict of some kind may never end.

C. Second Habeas Petition

On May 4, 2015, Mr. al-Alwi filed a second habeas corpus petition in the district court. I.JA.10. Combined with the petition was a complaint for declaratory and injunctive relief, contending that Mr. al-Alwi's continued imprisonment violates the Constitution, the AUMF, the law of war, and customary international law. *Id.*

The government moved to dismiss. Mr. al-Alwi opposed the government's motion on October 30, 2015. The case thereafter languished. The government's motion was heard in the district court on December 20, 2016, after Mr. al-Alwi filed a petition for mandamus with this Court seeking to compel the district court to act. (Mr. al-Alwi dismissed the petition without prejudice after the district court scheduled argument.)

D. The District Court Decision

On February 22, 2017, the district court issued an order denying Mr. al-Alwi's petition and granting the government's motion to dismiss. III.JA.1338-49. The court described the issue as "not whether the government had the initial authority to detain [petitioner], but whether that authority has lapsed in the fifteen years since." III.JA.1342. Citing *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the

court concluded that detention authority may last no longer than "active hostilities," and therefore the court had to determine "whether 'active hostilities' have ceased, such that Al-Alwi's detention is no longer permitted." III.JA.1342.

The court then relied on this Court's decision in *Al-Bihani* v. *Obama*, 590 F.3d 866, 873 & n.2 (D.C. Cir. 2010), *reh'g denied*, 619 F.3d 1 (D.C. Cir. 2010), for the proposition that "determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." III.JA.1343. The court found that both Congress and the President "agree that the military is engaged in active hostilities in Afghanistan against al Qaeda, the Taliban, and their associated forces." III.JA.1344. The President's statements to the contrary "when viewed in their proper context," could not be construed as a presidential declaration that the conflict had ended. III.JA.1345. The court focused on the continued U.S. involvement in counterterrorism operations in Afghanistan. III.JA.1346. It did not mention the BSA. Nor did it explicitly address petitioner's argument that the *relevant* conflict had ended. Instead, the court treated hostilities in Afghanistan as a monolithic event, authorizing continued detention by the United States no matter how different the conflict looked fifteen years earlier.

The court also briefly considered Mr. al-Alwi's first argument here, that detention authority had lapsed even assuming the continuation of a single conflict,

as suggested by Justice O'Connor in *Hamdi*. The fact that some U.S. troops remained in Afghanistan and engaged in some use of force against al-Qaida, Taliban, and associated forces was enough for the court. "To say the least," it concluded, "the duration of a conflict does not somehow excuse it from longstanding law of war principles." III.JA.1348.

SUMMARY OF ARGUMENT

Moath al-Alwi has been in U.S. military custody at Guantánamo for over fifteen years. He was never charged or sentenced. Hundreds of his fellow prisoners—many facing far worse accusations, some even convicted of war crimes—now live free. The government claims statutory authority to keep Mr. al-Alwi incarcerated until active hostilities have ceased. But the government's expansive view of the relevant hostilities has created the realistic prospect of lifetime imprisonment without trial for Mr. al-Alwi—a situation so repellent to basic principles of justice that the Court should now wield its constitutional authority over petitions for habeas corpus to limit the length of military detention.

The Supreme Court foresaw this possibility as early as 2004, when a plurality in *Hamdi* observed that the nature of a given conflict may become so divorced from earlier conflicts that conventional understandings of longstanding principles—including the authority to detain for the duration of the conflict—would unravel. Thirteen years after *Hamdi*, that day has arrived. The Afghan

conflict has morphed and evolved, oozed across borders and chased distant targets, absorbed new parties and ejected old ones, dwindled to embers and flickered back to life. Its identifying feature is that it doesn't end. Meanwhile, Mr. al-Alwi approaches middle age. He has no ability or interest in "returning" to a fight that he wouldn't recognize, that is nowhere near his homeland, and that he was never found to have played a combat role in anyway.

Mr. al-Alwi urges this Court to declare that the open-ended, boundless conflict presently being waged is so unlike past conflicts that informed the development of the law of war that conventional understandings of wartime detention authority no longer hold. The government's statutory authority to continue detaining Mr. al-Alwi indefinitely has now unraveled and it must charge or release him. Barring such an order, the Court would have to resolve the weighty question whether continued imprisonment of this sort violates the Constitution's guarantee of due process.

In the alternative, Mr. al-Alwi asserts that the particular conflict that led to his captivity—a war in Afghanistan conducted by the United States under the broad banner of Operation Enduring Freedom—is now over. With that conflict, the government's statutory authority to detain Mr. al-Alwi expired, a conclusion this Court is empowered to reach in order to command the government to charge or release him. While U.S. forces remain active in Afghanistan today, they act in

support of the Afghan government as it leads its own fight. That mission—to advise and assist an ally in the pursuit of common objectives—mirrors many other U.S. military operations around the world and doesn't justify the government's claim to unlimited statutory wartime detention authority. Should any doubt persist about the differences between today's conflict in Afghanistan and the earlier one out of which Mr. al-Alwi's detention arose, then the Court should remand for focused discovery.

Finally, if the Court doesn't compel the government to charge or release Mr. al-Alwi, then it should remand with instructions to reconsider his habeas corpus petition applying heightened procedural safeguards. With the passage of so many years, both the Suspension Clause and the Due Process Clause require more robust habeas review of indefinite imprisonment without prior judicial process. Over fifteen years after Mr. al-Alwi's capture, neither the preponderance of the evidence burden nor the other permissive standards sanctioned by this Court pass constitutional muster and can fairly justify what may amount to a *de facto* life sentence. The Court should direct the government to demonstrate, reliably and, at the very least, by clear and convincing evidence, that Mr. al-Alwi's imprisonment is lawful.

ARGUMENT

A. Standard of Review

On appeal from denial of a habeas petition, this Court "review[s] the district court's findings of fact for clear error, its habeas determination *de novo*, and any challenged evidentiary rulings for abuse of discretion." *Barhoumi* v. *Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). In this case, it isn't clear whether the district court made findings of fact or issued evidentiary rulings. Although the court relied upon declarations and documents submitted by the government, the court didn't permit discovery, notify the parties that the government's response would be treated as a motion for summary judgment, conduct an evidentiary hearing, or otherwise suggest that it was ruling based on an adversarial presentation of facts. Thus, petitioner contends that the district court issued a habeas determination as a matter of law, and this Court should therefore review that determination *de novo*. Alternatively, if this Court concludes that the district court's decision turned on findings of fact, since petitioner did not have a fair opportunity to rebut those facts, this Court should vacate the judgment and remand for further proceedings.

B. The United States' Authority to Detain Mr. al-Alwi Has Unraveled

The current conflict differs entirely from past conflicts that informed the development of the law of war. A number of Supreme Court pronouncements therefore compel this Court to limit the government's statutory authority under the AUMF to continue to detain Mr. al-Alwi. Not limiting that authority would require

this Court to resolve weighty constitutional questions, which it should avoid. *See Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) (construing statute to limit detention of non-citizens "to *avoid* the decision of constitutional questions"); *Al Bahlul* v. *United States*, 767 F.3d 1, 16 (D.C. Cir. 2014) ("If the statute's text is ambiguous, we choose a constitutional construction over an unconstitutional one."). Indeed, the alternative of continued, potentially lifelong imprisonment would be unconstitutional and inconsistent with humanitarian and human rights norms. Accordingly, after his more than fifteen years in captivity at Guantánamo without trial, the Court should order the government to charge or release Mr. al-Alwi.

1. The Duration and Other Practical Circumstances of the Current Conflict Require the Court to Limit the Government's Detention Authority

On three occasions over the span of a decade—in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and *Hussain* v. *Obama*, 134 S. Ct. 1621 (2014) (Breyer, J.)—the Supreme Court or individual justices have declared that the passage of time, among other considerations, bears on the vitality of detention authority pursuant to the AUMF. Writing for the plurality in *Hamdi*, Justice O'Connor anticipated a conflict so unlike previous ones that conventional law of war principles governing wartime detention would no longer apply.

> [W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.

Hamdi, 542 U.S. at 521.

After fifteen years, the scenario Justice O'Connor described has come to pass and conventional understandings of longstanding principles—including the authority to detain for the duration of the conflict—have unraveled. Mr. al-Alwi's indefinite imprisonment has become unlawful and the Court should order him charged or released.

The practical circumstances of the Afghan conflict are entirely unlike those of previous conflicts that informed the development of the law of war. The Afghan conflict, if viewed as a single, continuous event, began in October 2001, making it the longest in U.S. history. *Cf. Boumediene*, 553 U.S. at 771 (noting that Guantánamo cases "lack any precise historical parallel" as "[t]hey involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history"). Consistent with *Hamdi*, this unprecedented duration has eroded the United States' detention authority under the AUMF.

Four years after *Hamdi*, in 2008, the Supreme Court reiterated that the judiciary's understanding of detention authority flowed from conflicts of limited duration and that one day the judiciary might have to define the limits of the government's AUMF detention authority. *See Boumediene*, 553 U.S. at 797-98 ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."). Indeed, the finite duration of past conflicts imposed a natural limit on detention authority.

Most recently, in his statement accompanying the denial of certiorari in *Hussain*, Justice Breyer paraphrased Justice O'Connor's statement for the *Hamdi* plurality, observing how "[s]he explained […] that the President's power to detain under the AUMF may be different when the 'practical circumstances' of the relevant conflict are 'entirely unlike those of the conflicts that informed the development of the law of war.'" 134 S. Ct. at 1622. Echoing the *Boumediene* majority six years earlier, Justice Breyer then noted that the *Hussain* petition didn't ask, nor has the Supreme Court considered, the crucial question "whether […] either the AUMF or the Constitution limits the duration of detention." *Id*.

The instant appeal poses that question. Mr. al-Alwi has been imprisoned at Guantánamo since January 16, 2002—over fifteen years. He has been in U.S.

custody even longer. This Court no longer has the "luxury" of "leav[ing] the outer boundaries of war powers undefined." *Boumediene*, 553 U.S. at 797-98. The current conflict, open-ended as it is, lacks the natural limiting principle that obtained in other historical contexts. It is now incumbent on the Court to address Justice Breyer's question and to set a limit on the government's statutory authority to continue to detain Mr. al-Alwi without trial.

The Afghan conflict, if seen as a single event, doesn't only depart from its predecessors in duration. Other practical circumstances, such as the conflict's geographical scope and even the identity of combatant parties, also differ from the circumstances of previous conflicts that informed the development of the law of war. The "battlefield" in the current conflict is not confined to a single nation-state or even any single region. Under the auspices of the AUMF, military operations have been conducted in countries as disparate as Afghanistan, Iraq, Libya, Somalia, Syria, and Yemen. Moreover, the amorphous and shifting identities of the adversaries facing the current government of Afghanistan and its U.S. advisers also set this conflict apart from its predecessors. Over the course of the conflict, organizations have emerged, formed, recombined, and dissolved. *See*, *e.g.*, Thomas Joscelyn & Bill Roggio, *Discord Dissolves Pakistani Taliban Coalition*, FDD's Long War Journal (Oct. 18, 2014); Steve Coll, *Name Calling*, THE NEW YORKER (Mar. 4, 2013) ("The conflict presents a problem of definition: as long as there are

bands of violent Islamic radicals anywhere in the world who find it attractive to call themselves Al Qaeda, a formal state of war may exist between Al Qaeda and America."). Taken together, these practical circumstances make this a conflict unbounded by duration, place, and even participants.

The district court aptly observed that this conflict "could go on forever." III.JA.1327. That is precisely the concern the Supreme Court envisioned: a conflict that can no longer be considered "of limited duration." *Boumediene*, 553 U.S. at 797. The question whether the judiciary must limit the duration of detention under such circumstances was raised in 2004 in *Hamdi* and in 2008 in *Boumediene*. By 2014, three years ago, it was already ripe in one Justice's view. *Hussain*, 134 S. Ct. at 1622. The conventional analysis, developed in connection with past conflicts, looked chiefly to the state of active hostilities in connection with "the relevant conflict," *Hamdi*, 542 U.S. at 521, and found that detention authority persisted as long as those hostilities were ongoing. *See* Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 3406, Art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). In this unending conflict, however, that conventional understanding has now unraveled. Because the practical circumstances of past conflicts—such as limits in time and place which

would inherently circumscribe detention authority—clearly no longer obtain in the present conflict, this Court must impose a limit.[5]

2. Potentially Lifelong Imprisonment Would Be Unlawful

The alternative to a narrowing judicial construction of AUMF detention authority at this advanced stage is potentially lifelong imprisonment, which would be inconsistent with both constitutional safeguards as well as the law of war. If the Court deems it necessary to decide the constitutional questions presented by Mr. al-Alwi's detention, it should conclude that the Due Process Clause applies at Guantánamo to limit the duration of his detention.

a. Mr. al-Alwi's Continued Imprisonment Violates Substantive Due Process Protections

Hamdi is again instructive, as the government's position with respect to Mr. al-Alwi mirrors the one it adopted in that case. There, the Supreme Court recognized that "[i]f the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States," then the upshot would be "that Hamdi's detention could last for the rest of his life." *Hamdi*, 542 U.S. at 520.

[5] The district court asked if "Congress is in a better position to assess whether they should give limitations on duration of detention than a judiciary." III.JA.1328. While it was and is within Congress's power to legislate further in this area, that possibility doesn't nullify the Court's own authority and responsibility. *Hamdi*, *Boumediene*, and the statement accompanying the denial of certiorari in *Hussain* all contemplate the present situation, where it is now incumbent on the judiciary, as the guardian of individual liberty, to limit the executive's authority to impose lifetime incarceration in connection with an unprecedented "forever war."

Noting that Hamdi "contends that the AUMF does not authorize indefinite or perpetual detention," the Supreme Court agreed "that indefinite detention for the purpose of interrogation is not authorized." *Id*. at 521.

Of course, *Hamdi* was decided in 2004, when AUMF detention was still relatively young. Today, the grim prospect of Mr. al-Alwi's lifelong imprisonment is far less speculative.[6] Continued imprisonment at this point—like "indefinite detention for the purpose of interrogation," *id.*—shocks the conscience and can no longer be authorized consistent with *Hamdi*, *Boumediene*, and the statement in *Hussain*, as well as other relevant jurisprudence.

The Supreme Court has long held government action that "shocks the conscience" to offend the Constitution's guarantee of substantive due process. *See, e.g.*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."); U.S. Const. Amend. V. Nothing in

[6] Moreover, it appears that the Trump Administration intends to keep the prison open. *See* David Welna, *Trump Has Vowed to Fill Guantanamo*, NPR (Nov. 14, 2016) (quoting then-candidate Donald J. Trump stating "Guantanamo Bay, which by the way […] we are keeping open […] and we're gonna load it up with some bad dudes"), *available at* http://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who; Amy Davidson Sorkin, *Another 9/11 Anniversary at Guantánamo*, The New Yorker (Sept. 11, 2017) (reporting that U.S. Secretary of State "announced that the job of the State Department official assigned to work on closing Guantánamo would be eliminated"), *available at* https://www.newyorker.com/news/daily-comment/another-911-anniversary-at-guantanamo-amid-hurricane-irma.

the Supreme Court's or this Court's relevant jurisprudence forecloses application of the Due Process Clause. *See Boumediene*, 553 U.S. at 784-85 (assuming without deciding "that the CSRTs satisfy due process standards" but without questioning Due Process Clause's application to non-citizens detained at Guantánamo); *Hussain*, 134 S. Ct. at 1622 (statement of Breyer, J., respecting denial of certiorari) (Court hasn't determined whether Constitution may limit duration of detention at Guantánamo); *Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014) ("We shall … assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo."); *cf. Al Bahlul* v. *United States*, 767 F.3d 1, 49 (D.C. Cir. 2014) (*en banc*) (Rogers, J., concurring) (noting that government concedes Ex Post Facto Clause applies at Guantánamo); *id.* ("[*Boumediene*'s] analysis of the extraterritorial reach of the Suspension Clause applies to the Ex Post Facto Clause because the detainees' status and location at Guantanamo Bay are the same, and the government has pointed to no distinguishing 'practical obstacles' to its application.").

In the analogous context presented by pretrial detainees who, like Mr. al-Alwi, never received the protections of a criminal trial, the proper substantive due process inquiry is whether their conditions of confinement "amount to punishment." *Bell* v. *Wolfish*, 441 U.S. 520, 535-37 (1979). While Mr. al-Alwi challenges here the fact rather than the conditions of his confinement, his indefinite

and potentially lifelong imprisonment without prospect of trial for over fifteen years, even viewed apart from its often horrendous conditions, can be fairly characterized as "genuine privations and hardship over an extended period of time." *Id.* at 542; *cf. Ali* v. *Obama*, 736 F.3d 542, 553 (D.C. Cir. 2013) (Edwards, J., concurring) ("It seems bizarre, to say the least, that [a detainee], who has never been charged with or found guilty of a criminal act and who has never 'planned, authorized, committed, or aided [any] terrorist attacks,' is now marked with a life sentence."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005) ("Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term."), *vacated*, *Boumediene* v. *Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008).

Moreover, where "a restriction … is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. Here, Mr. al-Alwi's continued imprisonment smacks of arbitrariness when scores of other Guantánamo detainees facing far more troubling allegations have been released.

Some were repatriated by mere virtue of their nationality. *See* Farah Stockman, *Nationality Plays Role in Detainee Release: More Saudis Are Freed from Guantanamo*, Bos. Globe, Nov. 22, 2007, at A2. Others found freedom through the military commissions, even though, unlike Mr. al-Alwi, they had been charged with and convicted of ostensible war crimes. *See* Ian Austen, *Ex Guantánamo Inmate Is Freed on Bail in Canada*, N.Y. Times, May 8, 2015, at A4 (Canadian Omar Khadr pled guilty in military commission proceeding to killing American soldier); *see also The Guantánamo Docket: David Hicks*, N.Y. Times.[7] And others still were unilaterally released by the government following findings by its Periodic Review Board, although they faced allegations of wrongdoing in those proceedings that dwarfed those advanced regarding Mr. al-Alwi in that setting or in these habeas proceedings. *See, e.g.*, Adam Goldman, *Saudi Detainee at Guantánamo Bay is Repatriated*, Wash. Post, Sept. 23, 2015, at A12 (detainee allegedly served as bodyguard for Usama bin Laden and was previously deemed too dangerous to repatriate by U.S. officials).

Courts have found that the imposition on civil detainees of conditions more severe than those meted out to the criminally detained amounts to punishment in violation of the Constitution's substantive due process guarantee. *See, e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307, 321-22 (1982) (finding civil detainees

[7] Available at https://www.nytimes.com/interactive/projects/guantanamo/detainees/2-david-hicks?mcubz=3.

"entitled to more considerate treatment" than "criminals whose conditions of confinement are designed to punish"); *Jones* v. *Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (noting that when civil detainees are confined in conditions "identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment'"). While those cases implicated comparative conditions of confinement, and this one attacks the fact of confinement, that distinction only strengthens Mr. al-Alwi's position. If civil detainees must be held in more lenient conditions than their criminally-detained counterparts, *a fortiori* Mr. al-Alwi cannot continue to languish in supposedly "nonpunitive" law-of-war detention while Guantánamo prisoners who were once also law-of-war detainees and were convicted of war crimes now live as free men. *Cf. Blanas*, 393 F.3d at 933 ("Or, to put it more colorfully, purgatory cannot be worse than hell."). That would be the definition of arbitrary punishment, which cannot be squared with the Constitution's substantive due process guarantee.

b. Humanitarian and Human Rights Law Don't Support Mr. al-Alwi's Continued Imprisonment

The AUMF itself doesn't directly authorize detention. The Supreme Court read that authority into the statute drawing on law-of-war principles. *See, e.g.*, *Hamdi*, 542 U.S. at 521. But the potentially lifelong imprisonment the government seeks to impose was never a feature of humanitarian law. The framers of the Geneva Conventions' requirement that prisoners of war be "repatriated without

delay after the cessation of active hostilities" did not envision a generational, open-ended conflict that includes amorphous non-state groups. The Geneva standards were based on traditional wars between states, which were typically limited in time, "normally" terminated "in the form of a treaty of peace," and in which "[h]ostilities generally would not be deemed to have ceased without an agreement." Dep't of Defense, *Law of War Manual* §§ 3.8.1, 3.8.1.2 (2016).

The government's attempt to justify Mr. al-Alwi's indefinite imprisonment also ignores international human rights law. As the International Court of Justice has held, human rights law "does not cease in times of war." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Op., 1996 I.C.J. 226, ¶ 25 (July 8, 1996). Instead, the two bodies of law complement one another and both inform Mr. al-Alwi's detention. Under human rights law, indefinite detention is unlawful. *See, e.g.*, International Covenant on Civil and Political Rights, Art. 9 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, 36th Sess. May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2, ¶22 (2006) ("[D]etaining persons indefinitely without charge [at Guantánamo] constitutes per se a violation of the Convention [Against Torture.]"); *A.* v. *Sec'y of State of the Home Dep't*, [2005] 2 AC 68, ¶ 222 (H.L.) ("[N]either the common law … nor

international human rights law allows indefinite detention at the behest of the executive, however well-intentioned.").

In sum, be it because the relevant precedents require it or because continued, potentially lifelong imprisonment would be unconstitutional and unlawful, this Court should impose a statutory or constitutional limit on the government's AUMF detention authority and rule that, after more than fifteen years of captivity, Mr. al-Alwi must be charged or released.[8]

C. Alternatively, Detention Authority Has Expired Because the Conflict in Which Mr. al-Alwi Was Detained Has Ended

1. The Legality of Continued Detention Turns on Whether the Relevant Conflict Has Ended

In *Hamdi*, the plurality explained that "Congress' grant of authority for the use of 'necessary and appropriate force' … include[s] the authority to detain for the duration of the relevant conflict." 542 U.S. at 521. As Justice Breyer later explained, the *Hamdi* plurality "concluded that the 'detention of individuals falling into the *limited category we are considering, for the duration of the particular conflict in which they were captured*,' is 'an exercise of the 'necessary and appropriate force'' that Congress authorized under the AUMF." *Hussain*, 134 S.

[8] Today, there are only forty-one prisoners left at Guantánamo. Human Rights First, *Guantanamo by the Numbers*, http://www.humanrightsfirst.org/resource/guantanamo-numbers. Ten of them are facing charges before the military commissions or have already been convicted. *Id*. While this case concerns only Mr. al-Alwi, it is worth noting that, more than fifteen years after the prison's opening, a requirement that the government charge or release thirty-one prisoners would not be unduly onerous.

Ct. at 1622. Whether the relevant conflict has ended for purposes of determining the vitality of detention authority is a legal question for judicial resolution. The district court erred by deferring completely to the executive's determination concerning the existence of the *relevant* conflict, and summarily determining that the relevant conflict in Afghanistan endures, without considering facts suggesting the contrary.

2. In Habeas Cases, the Judiciary, Not the Executive, Must Decide Facts Relevant to the Legality of Detention

Courts must decide any factual questions that would inform whether the relevant conflict—and, by extension, detention authority—endures. To be sure, the judiciary is usually reluctant to intrude upon executive authority in military affairs. Nevertheless, the courts' constitutional authority to issue writs of habeas corpus applies to military detention—as well it should, because no other form of detention poses a greater threat to liberty. *See, e.g.*, *Hamdi*, 542 U.S. at 530 (citing *Ex parte Milligan*, 4 Wall. 2, 125 (1866)).

As *Hamdi* recognized, military detention is permissible only when "the record establishes" that the relevant conflict persists. *See id.* at 521. What a "record" might establish is typically a question for the judiciary. *Townsend* v. *Sain*, 372 U.S. 293, 312-13 (1963), for instance, held that federal courts must resolve relevant factual disputes that had not been adjudicated in state courts. And

Boumediene made clear that, absent valid suspension of the writ, courts cannot cede their habeas authority over wartime detention. *See, e.g.*, 553 U.S. at 745.

Two judges have concluded that *Hamdi* and *Boumediene* require habeas courts to determine, based on relevant facts, whether a conflict endures. *See Al Razak* v. *Obama*, 174 F. Supp. 3d 300, 307-08 (D.D.C. 2016) (Kessler, J.), *vacated as moot*, No. 16-5074 (D.C. Cir. Oct. 5, 2016); *Al Warafi* v. *Obama*, No. 09-2368, 2015 WL 4600420, at *3 (D.D.C. July 30, 2015) (Lamberth, J.) ("A 'record' implies a court, and though *Hamdi* does not explicitly say that the record in such cases must be reviewed … by a court rather than the Executive, no other reading makes sense."), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).[9]

The government relied below on *Al-Bihani*, 590 F.3d at 874, where a panel of this Court concluded that active hostilities in Afghanistan had not ceased. Nearly eight years have elapsed since that decision, however, and its resolution of the question based on the facts then at hand cannot control under the present circumstances. Moreover, in denying rehearing *en banc*, seven judges of this Court concluded that the panel decision on this point was dicta. *See Al-Bihani*, 619 F.3d at 1 (finding discussion of role of law-of-war principles in AUMF interpretation at page 874 of panel opinion unnecessary to disposition); *see also* III.JA.1343

[9] Both cases became moot with petitioners' release. Although both judges, for different reasons, concluded that active hostilities weren't over, they agreed that the judiciary should make that determination.

(decision below relying on *Al-Bihani* panel decision without mentioning rehearing denial).

The *Al-Bihani* panel decision also stated that "[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." 590 F.3d at 874 (citing *Ludecke* v. *Watkins*, 335 U.S. 160, 168-70 & n.13 (1948)). The district court interpreted this to give the political branches plenary discretion to decide when active hostilities have ceased. III.JA.1343. That was error. *Ludecke* expressly left open the question of when it would be incumbent upon the judiciary to find that a war "had in fact ended." 335 U.S. at 169; *cf. El-Shifa Pharm. Indus.* v. *United States*, 607 F.3d 836, 848 (D.C. Cir. 2010) (*en banc*) ("[T]he political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area."). Such excessive deference by the judiciary might grant "the political branches … the power to switch the Constitution on or off at will." *Boumediene*, 553 U.S. at 765. Whether a given conflict endures cannot be left exclusively to the political branches because "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934).

The court below added that it was "conceivable" that the political branches' declarations were so counterfactual as to permit input from the judiciary. III.JA.1343-44 n.2. It nevertheless relied on "overwhelming evidence that active hostilities *are in fact ongoing*." *Id.* But the district court failed to appreciate Mr. al-Alwi's argument that, although fighting continues in Afghanistan, active hostilities in connection with the relevant conflict are not ongoing.

To be clear, Petitioner isn't arguing that courts have the authority to declare war, or its end. But habeas is "an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. If the judiciary yields to executive declarations in the face of contrary facts, then habeas is no check at all, and the courts fail to play their "necessary role in maintaining this delicate balance of governance." *Id.*

3. Active Hostilities in the *Relevant* Conflict, Operation Enduring Freedom, Have Ended

Mr. al-Alwi was captured during Operation Enduring Freedom (OEF), a U.S.-led war in Afghanistan consisting of combat missions conducted pursuant to AUMF authority. During OEF, the United States deployed hundreds of thousands of troops to Afghanistan and incurred significant casualties. I.JA.181. The United States also engaged in unilateral combat operations—or active hostilities—against the Taliban and al-Qaida, and targeted individuals based on their membership in either group.

The United States achieved its objectives in OEF. It displaced the Taliban, decimated al-Qaida, and decapitated both organizations. An entirely new government was installed in Afghanistan, which has run the country for over a decade. The United States steadily withdrew troops in accordance with its plan to cede security operations to Afghanistan. At the time of the hearing below, the number of U.S. troops in Afghanistan was less than one-tenth what it was at OEF's peak, and casualties had dropped dramatically. I.JA.75.[10]

The President declared that the combat mission was over and that it had succeeded. Nor was it an empty boast: the Obama administration ended the combat mission by terminating OEF and launching a new mission named Operation Freedom's Sentinel (OFS). I.JA.63. The principal combatants are now the Republic of Afghanistan, a sovereign entity that didn't exist in 2001, and the remnants of old terrorist organizations combined with a few new ones.

Significantly, the United States voluntarily entered into a binding treaty, the Bilateral Security Agreement (BSA), marking the end of the original armed conflict and the commencement of a new one. *See supra* at 7-10. Under the BSA, the United States no longer unilaterally or actively conducts hostilities, but plays a

[10] The current administration's recent announcement of a troop increase wouldn't constitute a material change. Although the administration isn't announcing the size of the increase, press reports indicate that it will amount to about 4000 additional troops. Mujib Mashal, *U.S. Troop Increase in Afghanistan Is Underway, General Says*, New York Times (Aug. 24, 2017).

subordinate role in the current Afghanistan conflict. The relevant conflict giving rise to Mr. al-Alwi's capture was characterized by unilateral U.S. military action in Afghanistan—in other words, *active* hostilities. The BSA drastically constrains the United States' current, reduced involvement in Afghanistan and limits U.S. military activity to an advisory and supportive role.

When President Obama announced the end of OEF, the BSA became the controlling legal framework for U.S. involvement in Afghanistan. The President stated that "[the BSA] provides our military service members the necessary legal framework to carry out two critical missions after 2014." I.JA.76.

The first is training, advising, and assisting the Afghan National Defense and Security Forces. The second is supporting Afghan counterterrorism operations. Indeed, the Afghan armed forces are now fully "responsible for securing the people and territory of Afghanistan." I.JA.81, ¶ 3; *see also id.* ¶ 2 ("[T]he United States shall undertake supporting activities, as may be agreed."). The BSA further provides that, unless otherwise mutually agreed, "United States forces shall not conduct combat operations in Afghanistan." I.JA.81, ¶ 1. Although the BSA permits U.S. forces to support Afghan forces in counterterrorism combat operations, the agreement also specifically prohibits the U.S. military from conducting unilateral counterterrorism operations:

> The Parties agree to continue their close cooperation and coordination toward [defeating al-Qaida and its

> affiliates], with the intention of protecting U.S. and Afghan national interests without unilateral U.S. military counter-terrorism operations.

I.JA.82, ¶ 4. The BSA further constrains U.S. counterterrorism operations in Afghanistan as follows:

> U.S. military counter-terrorism operations are intended to complement and support ANDSF's counterterrorism operations, with the goal of maintaining ANDSF lead, and with full respect for Afghan sovereignty and full regard for the safety and security of the Afghan people, including in their homes.

Id. Under the BSA, therefore, the United States is prohibited from engaging in both unilateral combat and counterterrorism operations.

President Obama acknowledged that the United States is no longer in a combat role in Afghanistan. II.JA.558. Rather, U.S. forces simply "support[] counterterrorism operations against the remnants of al Qaeda." I.JA.75. Further establishing that the U.S. combat role has ended in Afghanistan, the United States handed over custody of Afghan nationals to the Afghan government as early as March 2013, as the phased drawdown of the U.S.-led war and of active hostilities commenced. I.JA.66. Today, the United States wields no wartime detention authority inside Afghanistan: the BSA provides that "United States forces shall not arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan." I.JA.83, ¶ 3. Indeed, shortly after executing the BSA, the United States officially ceded exclusive control of the Bagram prison to the Afghan

government. *See* Frank Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees in Afghanistan*, Reuters (Dec. 11, 2014). In other words, if Mr. al-Alwi had been held by the United States in Afghanistan all these years, or if he were captured there today, the United States would have been compelled to release him after it signed the BSA. It makes no sense that the United States would retain authority to detain him in Cuba in connection with the Afghan conflict.

Although the United States continues to support Afghan forces in military operations, it is no longer a party leading unilateral, active hostilities inside Afghanistan. Its power to imprison Mr. al-Alwi was incident to the particular conflict that led to his capture. Under the BSA, the United States would be unable to imprison Mr. al-Alwi inside Afghanistan today. Thus, the U.S. military no longer retains lawful authority to detain Mr. al-Alwi and this Court should order him charged or released.

4. Customary International Law and the Law of War Reinforce Domestic Authorities Requiring Courts to Decide if Hostilities and Detention Authority Have Ceased

a. Mr. al-Alwi Retains His Rights Under Customary International Law

Mr. al-Alwi asserted and invoked his rights under the norms enshrined in customary international law, which include Article 75 of Additional Protocol I to the Geneva Conventions. I.JA.20-22. The government conceded that "the United States has chosen … to treat the principles set forth in Article 75 as applicable to

any individual it detains in an international armed conflict." Resp'ts' Mot. Dism. [ECF 15], at 40. The government contended, however, that the conflict at issue here is a non-international armed conflict (NIAC). The district court did not reach the question. Nevertheless, this Court should make clear that Mr. al-Alwi retains his rights under customary international law.

Mr. al-Alwi was captured during an international armed conflict (IAC) and retains all of the protections afforded by customary international law to prisoners of his condition. Whether measured by the date Mr. al-Alwi was rendered to Guantánamo (January 16, 2002) or by his earlier date of capture, there is no question that the Afghan conflict at the time was an IAC, as the government has conceded from time to time. *See* Resp'ts' Opp'n to Mot. to Compel Mixed Med. Comm'n at 28, *Aamer* v. *Obama*, No. 04-CV-2215 (D.D.C. July 2, 2015); ICRC, *News Release: Geneva Convention on Prisoners of War*, Feb. 9, 2002 (welcoming "United States' reaffirmation of the applicability of the Third Geneva Convention to the international armed conflict in Afghanistan"); *see also* Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities*, 93 INT'L REV. RED CROSS 11, 13 (2011) (stating it is "widely accepted" that there was an "international armed conflict" between U.S. forces and "the Taliban governing Afghanistan, lasting from 7 October 2001 to 18 June 2002"); Gary D. Solis, THE LAW OF ARMED CONFLICT: INTERNATIONAL

HUMANITARIAN LAW IN WAR 211 (2010) (stating that U.S. invasion of Afghanistan in October 2001 initiated "an armed conflict between two state parties to the 1949 Geneva Convention, a common Article 2 international armed conflict" to which "the 1949 Geneva Conventions in their entirety" applied).

Irrespective of whether the conflict in Afghanistan remained international in nature after June 2002, Mr. al-Alwi retains today the protections he enjoyed pursuant to customary international law at the time of his capture during an international armed conflict. *See* Third Geneva Convention art. 118 (stating that captives retain protections "until their final release and repatriation"). The Third Geneva Convention was crafted to ensure that captives like Mr. al-Alwi could not be stripped of their protections and benefits, a concern that loomed large during and after World War II. *See*, *e.g.*, Third Geneva Convention art. 5; 3 ICRC, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, 73-77 (J. Pictet gen. ed. 1960) ("Third Convention Commentary").[11]

Moreover, there is no controlling authority that the conflict in Afghanistan became non-international in nature after June 2002. The Supreme Court specifically did not reach the question because it found that *at least* Common

[11] The Commentaries to the Geneva Convention are not part of the Conventions themselves, and therefore have not been ratified by Congress or the President. Nevertheless, the Commentaries provide helpful context for understanding the Conventions because they were drafted by staff members of the ICRC who worked on the revision of the Conventions.

Article 3 of the Geneva Conventions applies, since that provision reaches both international and non-international armed conflicts, and that was enough for the Supreme Court to decide the case before it. *See Hamdan* v. *Rumsfeld*, 548 U.S. 557, 628-29 (2006) ("We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories."). Nor has this Court squarely addressed the characterization of the conflict at issue, and a 2013 concurring opinion suggests it is an open question. *See Al Warafi* v. *Obama*, 716 F.3d 627, 633 n.1 (D.C. Cir. 2013) (Brown, J., concurring) ("Because Al Warafi has failed to produce the requisite indicia of protected status, however, we need not reach the vexing questions whether Al Warafi was a member of a transnational terrorist organization or the armed forces of a High Contracting Party [...].").

Finally, courts may decide what constitutes an international armed conflict regardless of the government's assessment. *See United States* v. *Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992) (determining over government objection that U.S. invasion of Panama was an international armed conflict two years after that conflict ended; that Third Geneva Convention applied; and that Noriega remained a prisoner of war).

b. Customary International Law and the Law of War Also Support Judicial Resolution

Commentators agree that the existence of an armed conflict and the cessation of active hostilities are mixed questions of fact and law, not political judgments or declarations. *See* Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT'L REVIEW OF THE RED CROSS 163, 166-70 (2014); Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUMAN RTS. L. REV. 204, 206, 219, 221 n.61, 233 (2016) ("As with identifying the existence of an armed conflict, under international law, it is the factual situation, rather than political statements or acts, which determines the end of an armed conflict."). Indeed, the "main point of the 1949 Geneva reform was precisely to do away with the subjectivity and formalism of war, and to make the thresholds of application objective and factual." Milanovic, *supra* at 168. Relying on political statements had proven too malleable, enabling politicians to switch the law of war on and off at will. *See id.*

The Geneva Conventions themselves support the commentators' views. The Fourth Geneva Convention uses the term "close of hostilities." Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) Aug. 12, 1949, Art. 133. The principal commentary to Article 133 clarifies that close of hostilities "should be taken to mean a state of fact rather than

the legal situation covered by laws or decrees fixing the date of cessation of hostilities." 4 ICRC, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 514-15 (J. Pictet gen. ed. 1958).

It is also settled that "the cessation of active hostilities" is a term of art that contemplates the possibility that some conflict might continue after the bulk of the fighting has subsided; again, an objective fact that is not answered solely by declarations, armistices, or peace treaties. Weizmann, *supra*, at 206, 219, 221 n.61, 233; Milanovic, *supra* at 173. Commentators have suggested several constructs grounded in the law of war. For non-international armed conflicts (NIACs)—the label the government now applies to the Afghan conflict—the test may turn on whether the conflict continues to meet the criteria for NIAC classification in the first place. The chief criteria are the "level of organization" of the armed forces and the "intensity" of violence. *See* Weizmann, *supra* at 211-12. Thus, a decimated al-Qaida might no longer meet the organizational test. Milanovic, *supra*, at 187 ("The degradation that the US military operations have inflicted on the 'core' Al Qaeda organization further threatens to push it below the NIAC organizational threshold."). The intensity of the fighting likewise cannot be ascertained without an objective review of the facts. *See* Weizmann, *supra* at 211.

Although domestic law on when an "armed conflict" exists is limited, courts have focused on comparable fact-bound inquiries, including:

> the length, duration, and intensity of the hostilities between the parties; whether there was protracted armed violence between the governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant

United States v. *Al Bahlul*, 820 F. Supp. 2d 1141, 1190 (U.S.C.M.C.R. 2011), *vacated on other grounds*, 792 F.3d 1 (D.C. Cir. 2015).

In short, the "cessation of active hostilities" in connection with the relevant armed conflict is a question for the judiciary in a habeas proceeding.

5. Limited Discovery Would Show the Scope of the Differences Between Operation Enduring Freedom and Operation Freedom's Sentinel

The district court abused its discretion when it dismissed the action below without affording Mr. al-Alwi a chance to elicit information that was germane to the question whether active hostilities in the relevant conflict had ceased. *See Maqaleh* v. *Hagel*, 738 F.3d 312, 326 (D.C. Cir. 2013) (denial of discovery in habeas cases reviewed for abuse of discretion). Nor did the court give notice that it intended to rely on materials outside the pleadings—the vast majority of them hearsay—submitted by the government.

Hamdi and *Boumediene* require courts in Guantánamo habeas cases to review "the record." Mr. al-Alwi should have a reasonable opportunity to develop a record on whether active hostilities are ongoing in the relevant conflict. That opportunity should include a right to conduct focused discovery regarding the present conflict. Deference to the executive's detention decisions may make sense for a time, but that time surely has passed. *See Hamdi*, 542 U.S. at 534. After more than fifteen years, the judiciary has an obligation, as it exercises its constitutional authority to adjudicate habeas petitions, to review a complete record of whether the relevant conflict has ended.

D. If the Court Doesn't Compel the Government to Charge or Release Mr. al-Alwi, Then He Is Now Entitled to Heightened Procedural Protections

Should the Court not find that the government must now charge or release Mr. al-Alwi, then it should at least impose heightened procedural protections on any renewed adjudication of his continuing detention. As the duration of indefinite imprisonment stretches, both the Suspension Clause and the Due Process Clause require that habeas review become more robust. Especially where, as here, there was no pre-detention judicial process, the Court must be willing to revisit and strengthen the architecture of judicial review of potentially lifelong imprisonment.

The reasons are clear. A decade ago, the Supreme Court held that the Suspension Clause gave non-citizens detained at Guantánamo the right to habeas corpus, and therefore their detention was constitutionally permitted only upon

"meaningful" review by an independent judiciary. *Boumediene*, 553 U.S. at 779 (2008). Several years earlier, in *Hamdi*, 542 U.S. 507, the Court emphasized the need for procedural due process before lengthy imprisonment, even when the government invokes national security. To determine what process was due, the Court looked to its established analysis set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 341 (1976), which balanced the extent of the deprivation against the government interest asserted.

In keeping with the Supreme Court's longstanding requirement of proof by at least clear and convincing evidence before upholding substantial and lengthy deprivations of liberty, the adjudication of Mr. al-Alwi's petition on remand should require no less of a showing after the passage of so many years. This case also calls for the Court to revisit the rest of the procedural framework it has developed in its Guantánamo jurisprudence so that, after fifteen years, the government's arguments for Mr. al-Alwi's continued and potentially lifelong detention are held to an appropriately demanding standard.[12]

[12] The rule of interpanel accord doesn't require the Court to follow earlier decisions setting different standards, since, as discussed here, the Constitution mandates reconsideration at this point in time.

1. The Suspension Clause Now Requires More Robust Habeas Review for Mr. al-Alwi

Boumediene set forth minimum standards, holding that under the Suspension Clause, the habeas court must have "some authority to assess the sufficiency of the Government's evidence against the detainee." *Id*. at 786; *see also* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 125-26 (2012) (explaining that "[t]he Suspension Clause ensures that habeas corpus serves a powerful, independent, and unappreciated role standing alone," requiring courts "in more troubling cases" to ask if they have "an adequate and effective ability" to examine the legality of detention). *Boumediene* pointed to the length of detention, noting that "[t]he intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry." 553 U.S. at 783. The Supreme Court found shocking that the petitioners had been imprisoned for six years without adequate judicial review. *See, e.g.*, *id*. at 794, 797, 801 (concurrence).[13] After the passage of fifteen years, the Suspension Clause by itself entitles Mr. al-Alwi to more rigorous judicial scrutiny of the basis for his continuing detention than he has received so far.

[13] *See also Rasul* v. *Bush*, 542 U.S. 466, 487-488 (2004) (Kennedy, J., concurring) (overruled by statute) (pointing to "critical" fact that "detainees at Guantanamo Bay are being held indefinitely" which "suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus").

Lack of heightened procedural protections creates a risk of error, and "given the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore." *Id*. at 785. *Boumediene* identified procedural failings in the CSRTs, rejecting that procedure as it didn't provide the requisite "meaningful review." *Id.* at 783-84. And whether a review of detention meets constitutional habeas standards does not depend on a check-list. "What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Id*. at 783. Habeas review must be "more than an empty shell." *Id*. at 785 (quoting *Frank* v. *Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)).

Another significant factor is that detention at Guantánamo does not come after a criminal jury trial or the equivalent. When reviewing detention that isn't based on a "rigorous adversarial process," the role of the habeas court has increased importance and the stringency of the review is heightened. *Boumediene*, 553 U.S. at 767, 781-83. This increased scrutiny is based in the history of the writ: "[i]t appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention." *Id*. at 780.

The "risk of error" highlighted in *Boumediene* becomes harder to tolerate as Mr. al-Alwi enters the latter half of his second decade at Guantánamo. In the

absence of pre-detention judicial process, this Court should be all the more vigilant and ready to revisit the procedural protections afforded him. Asking if Mr. al-Alwi received the "meaningful review" required by the Supreme Court is a different inquiry today from five or ten years ago. Given factors such as the passage of time and the lack of earlier adversarial process, the Suspension Clause's guarantee of "meaningful" review depends on this Court's sustained vigilance and its willingness to ensure that the process and procedures it applies remain meaningful in light of the consequences of possible error.

2. Procedural Due Process Now Requires Heightened Protections for Mr. al-Alwi

Hamdi detailed the procedural due process required when reviewing the military detention without charge of a U.S. citizen held in the United States (after a brief period at Guantánamo). Overall, the Supreme Court looked twice to "[t]he ordinary mechanism that we use for balancing such serious competing interests[,] the test that we articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)." *Hamdi*, 542 U.S. at 528-529; *see also Boumediene*, 553 U.S. at 781-82 (citing *Mathews* in holding that the "necessary scope of habeas review in part depends on the rigor of any earlier proceedings"). As recognized in *Hamdi*, "the most elemental of liberty

interests [is] the interest in being free from physical detention by one's own government."[14] 542 U.S. at 529.

The potential length of detention is significant in determining the procedural adequacy of review. *See Mathews*, 424 U.S. at 341 (holding that "the degree of potential deprivation" must be considered in determining adequacy of process). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The "particular situation" here is possible lifelong imprisonment after more than fifteen years without charge at Guantánamo, and it cries for stronger procedural protections on further habeas review, lest the constitutional analysis discount Mr. al-Alwi's heavy individual interest in liberty and his natural, human desire not to die in a prison far from home and family.

In other words, as the length of detention past "initial captures on the battlefield" increases, *Hamdi*, 542 U.S. at 534, the Constitution requires that so too must the scope of judicial oversight.

[14] Of course, "there is no practical difference between incarceration at the hands of one's own government and incarceration at the hands of a foreign government." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465. *See also* Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 U. CONN. L. REV. 879 (2015) (*Mathews* protections and analysis apply to non-citizens as well as citizens).

3. The Government Should Be Required to Prove by Clear and Convincing Evidence that Mr. al-Alwi's Detention Is Lawful

Given the importance of individual liberty and the Great Writ, the nature of prior proceedings and, in particular, the length and likely continuation of Mr. al-Alwi's detention without charge or trial, the government should be required to establish the basis for continuing his detention by (at least) clear and convincing evidence. The *Hamdi* Court rejected the "some evidence" standard. 542 U.S. at 537. The Supreme Court has never approved anything less than proof by clear and convincing evidence for prolonged detention.

In upholding civil commitments, the Supreme Court has required robust judicial review. "[I]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision [to commit] and thereby perhaps to reduce the chances that inappropriate commitment will be ordered." *Addington* v. *Texas*, 441 U.S. 418, 427 (1979) ("clear and convincing" standard required for psychiatric civil commitment).[15] In *Kansas* v. *Hendricks*, 521 U.S. 346, 389-90 (1997), the Court upheld civil commitment of "sexually violent predators" because a court was required each year to find beyond a reasonable doubt that the standards

[15] While the *Boumediene* Court did not rule on the applicable burden of proof, it did note that the process before it, which it found inadequate, used a preponderance of the evidence standard. 553 U.S. at 788. In *Addington*, the Court found this standard appropriate for "a monetary dispute between private parties," not "a proceeding of such weight and gravity" as confinement. 441 U.S. at 423, 427.

for continued confinement were still met. *Jackson* v. *Indiana*, 406 U.S. 715, 733 (1972), held that a state could not detain someone indefinitely because he was incapable of standing trial; after a "reasonable period of time" the state had to institute civil commitment proceedings or release him.

Hamdi identified the government interest in the *Mathews* balance as "ensuring that those who have in fact fought with the enemy during a war do not return to battle," and therefore the relevant inquiry is "the appropriateness of continuing to detain an individual." 542 U.S. at 535. The risk that Mr. al-Alwi would "return to battle" is vanishingly small.[16] Fifteen years have passed since he was brought to Guantánamo. He no longer is a youth but a middle-aged man in poor health who spends his time creating sculptures and other works of art.[17] He has been cut off from most contact with the outside world for almost two decades, so that any connections he may have had must long since have lapsed. Whatever conflict is still being waged in Afghanistan involves different parties fighting for different purposes. And Mr. al-Alwi wasn't found to have fought against the

[16] The government may point to the Periodic Review Board ("PRB") process as a meaningful review of the decision to continue petitioner's detention, but that process lacks the same basic procedural protections that the *Boumediene* Court found lacking in the DTA-CSRT process. In any event, review by the PRB is not review by an independent judiciary of the legality of a petitioner's imprisonment.

[17] *See Art from Guantanamo Bay*, http://www.artfromguantanamo.com; https://www.theguardian.com/us-news/2017/oct/01/c#img-2.

United States or its partners. Against this background, due process cannot permit his continued detention without a stringent showing by the government of its current legality. *See Hussain*, 134 S. Ct. at 1622 (whether AUMF or Constitution permits detention on basis of membership alone hasn't been addressed).

The district court didn't independently assess any of this. Instead, it concluded that it must defer to the political branches and therefore accepted the government position concerning the conflict on the papers without question. But "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Hamdi*, 542 U.S. at 537.

4. The Procedural Framework Is No Longer Appropriate Given the Length and Nature of Detention

The standards developed by this Court in a series of decisions following *Boumediene* have formed a habeas remedy that doesn't align with the Supreme Court's vision or with the Constitution's dictates. Since the "duration of the detention … bear[s] upon the precise scope of the inquiry," *Boumediene*, 553 U.S. at 783, rulings which may have been appropriate years ago permit outcomes today that amount to a deprivation of habeas corpus, as indefinite detention stretches on for decades. Fifteen years after Mr. al-Alwi's imprisonment without charge, it is appropriate for this Court to reconsider that jurisprudence.

Under current rulings, lifelong detention may be based on an unconstitutionally minimal showing. For instance, hearsay "is always admissible" and the only question is "what probative weight to ascribe to whatever indicia of reliability it exhibits." *Al-Bihani*, 590 F.3d at 879. The reviewing court must focus on the evidence "collectively," instead of evaluating individual elements to gauge their strength. *Salahi* v. *Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010). This makes it possible that two pieces of unreliable evidence can seem to amount to a reliable whole. *Almerfedi v. Obama*, 654 F.3d 1, 3 (D.C. Cir. 2011); *Bensayah* v. *Obama*, 610 F.3d 718, 726 (D.C. Cir. 2010). Intelligence documents presented by the government are "entitled to a presumption of regularity, and … neither internal flaws nor external record evidence rebuts that presumption," which may minimize the significance of double and triple hearsay, internal inconsistencies, and the inaccuracies that can arise when unknown interrogators work through unknown interpreters. *Latif* v. *Obama*, 666 F.3d 746, 748-49 (D.C. Cir. 2011).[18] An earlier ruling allowed the government to "withhold from counsel, but not from the court, certain highly sensitive information" supporting its position. *Bismullah* v. *Gates*,

[18] Tragically, in separate earlier reviews the executive had concluded that Latif should be released, and his continued detention was the result of the fact that the government would not repatriate any detainee to Yemen. *See* Marc Falkoff, *A Death at Gitmo*, Los Angeles Times (Sep. 20, 2012), *available at* http://articles.latimes.com/2012/sep/20/opinion/la-oe-falkoff-gitmo-detainee-death-20120920.

501 F.3d 178, 180 (D.C. Cir. 2007). Even statistical principles seem to have been misapplied, allowing erroneous legal conclusions concerning possibly innocuous conduct and overstating the significance of patterns of behavior. *Uthman* v. *Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011); *Al Adahi* v. *Obama*, 613 F.3d 1102, 1110 (D.C. Cir. 2010).[19]

Even if such procedural features were adequate when Mr. al-Alwi's earlier case was before this Court in 2011, today—almost ten years after *Boumediene* and over fifteen years after his imprisonment—Mr. al-Alwi's detention must be held to higher standards if he is to receive a "meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene*, 553 U.S. at 783. Instead of a rigorous review of the stated bases for continued detention, the current standards could allow undue judicial deference, risking indefinite detention at the whim of the executive. *See Hamdan* v. *Rumsfeld*, 548 U.S. 557, 614 (2006) (criticizing procedure where "any evidence" including unsworn statements could

[19] One known logical fallacy concludes that, because some members of a group behave in a certain way, everyone who behaves in that way belongs to that group. This conclusion overlooks the absence of proof that everyone who behaves in that way—or even that most of those exhibiting that conduct—are members of the suspect group. The conclusion does not become stronger because more than one common behavior is seen, especially if these behaviors are related or normal for those not in the suspect group. *See, e.g.*, Charles R. Kingston, *Probability and Legal Proceedings*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 93 (1966), *available at* http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5359&context=jclc.

be admitted, and where accused and civilian counsel could be denied access to "protected" evidence); *see also* Jasmet K. Ahuja and Andrew Tutt, *Evidentiary Rules Governing Guantanamo Habeas Petitions: Their Effects and Consequences*, 31 YALE L. & POL'Y REV. 185 (2012). After so many years, this Court should reaffirm that habeas courts must have "some authority to assess the sufficiency of the Government's evidence against the detainee" and give Mr. al-Alwi a "meaningful review." *Boumediene*, 553 U.S. at 783-84, 786.

Especially in times of conflict, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. As *Boumediene* concluded, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." 553 U.S. at 798.

At the least, this Court should remand for a meaningful review of the bases of Mr. al-Alwi's detention.

CONCLUSION

For the reasons stated, this Court should reverse the judgment below and remand with instructions that the district court grant the petition and order the government to charge or release Mr. al-Alwi, or that the district court reconsider the petition applying heightened procedural protections.

DATE: October 2, 2017

Respectfully submitted,

John J. Connolly
ZUCKERMAN SPAEDER LLP
100 East Pratt Street, Suite 2440
Baltimore, Maryland 21202-1031
410 332 0444 (T)
410 659 0436 (F)
jconnolly@zuckerman.com

Beth D. Jacob
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
212 808 7624 (T)
212 808 7897 (F)
bjacob@kelleydrye.com

MAIN STREET LEGAL SERVICES, INC.

/s/ Ramzi Kassem
By: Ramzi Kassem

CUNY School of Law
2 Court Square
Long Island City, NY 11101
718 340 4558 (T)
718 340 4478 (F)
ramzi.kassem@law.cuny.edu

Attorneys for Petitioner-Appellant

STATUTORY ADDENDUM

U.S. Const. art. I, § 9, cl. 2 (the Suspension Clause):

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Judiciary Act of 1789, § 14, 1 Stat. 73 (Sep. 24, 1789):

> SEC. 14. *And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—— Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

28 U.S.C. § 2241 (excerpted):

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

* * * *

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 225 (Sep. 18, 2001):

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism

against the United States by such nations, organizations or persons.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Appellate Rule 32(a)(7)(B) because it contains 12,686 words, excluding the parts of the brief exempted by Rule 32(f). The undersigned has relied upon the word count feature of the word processing system in preparing this certificate. The brief has been prepared in proportionally spaced Times New Roman font, point size 14, using Microsoft Office Professional Plus 2010, Version 14.0.7181.5000 (32 bit).

/s/ John J. Connolly
John J. Connolly
ZUCKERMAN SPAEDER LLP
100 East Pratt St., Suite 2440
Baltimore, Maryland 21202-1031
410 332 0444
jconnolly@zuckerman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2017, I caused copies of the foregoing Brief for Appellant Moath Hamza Ahmed al-Alwi to be served on all counsel of record through the ECF system, and I also sent by hand delivery two hard copies of the brief and one copy of the Joint Appendix to the person listed below.

Sonia K. McNeil, Esquire
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W.
Room 7234
Washington, DC 20530-0001

/s/ John J. Connolly
John J. Connolly