[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, et al.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

PUBLIC BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The petitioner-appellant is Moath Hamza Ahmed Al-Alwi, a Guantanamo Bay detainee also identified by Internment Serial Number (ISN) 28. The respondents-appellees are Donald J. Trump, in his official capacity as President of the United States of America; James Mattis, in his official capacity as Secretary of the United States Department of Defense; Rear Admiral Edward Cashman, in his official capacity as Commander of the Joint Task Force Guantanamo (JTF-GTMO); and Colonel Stephen Gabavics, in his official capacity as Commander of the Joint Detention Group, JTF-GTMO.

There were no amici in district court. A group of lawyers and law professors have filed an amicus brief in this Court in support of the petitioner.

B. Rulings Under Review

Al-Alwi seeks review of the district court's order denying his petition for a writ of habeas corpus, in which he claimed that the government lacks authority to detain him under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). See *Moath Hamza Ahmed Al-Alwi v. Trump*, No. 15-681 (D.D.C. Feb. 22, 2017) (Leon, J.), Dkt. No. 34.

C. Related Cases

This Court affirmed the district court's denial of a prior habeas petition by Al-Alwi, holding that the 2001 AUMF authorizes his detention. See *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011).

Counsel for appellees are not aware of any additional related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Respectfully submitted,

s/ Sonia K. McNeil

SONIA K. MCNEIL

TABLE OF CONTENTS

Page(s)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

GLOSSARY

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUES 3

PERTINENT STATUTES 3

STATEMENT OF THE CASE 4

A. United States Military Operations in Afghanistan Against Al Qaeda, the Taliban, and Associated Forces 4

B. This Court Held that the 2001 AUMF Authorizes Al-Alwi's Detention Because He Was Part of Al Qaeda or the Taliban 7

C. The District Court Denied Al-Alwi's Second Habeas Petition 8

SUMMARY OF ARGUMENT 10

STANDARD OF REVIEW 13

ARGUMENT 13

I. THE 2001 AUMF AUTHORIZES AL-ALWI'S DETENTION BECAUSE THE UNITED STATES IS ENGAGED IN ACTIVE HOSTILITIES IN AFGHANISTAN AGAINST AL QAEDA, THE TALIBAN, AND THEIR ASSOCIATED FORCES 13

II. AL-ALWI'S ASSERTION THAT THE GOVERNMENT'S DETENTION AUTHORITY HAS "UNRAVELED" LACKS MERIT 27

III. AL-ALWI'S REQUEST FOR HEIGHTENED PROCEDURAL PROTECTIONS IS FORFEITED AND FORECLOSED BY CIRCUIT PRECEDENT 33

CONCLUSION 35

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s)**

Al Odah v. United States,
611 F.3d 8 (D.C. Cir. 2010) 13, 34

Al-Alwi v. Bush,
593 F. Supp. 2d 24 (D.D.C. 2008) 7

Al-Alwi v. Obama,
653 F.3d 11 (D.C. Cir. 2011),
cert. denied, 567 U.S. 907 (2012) 1, 7, 8, 13
567 U.S. 907 (2012) 8

Al-Bihani v. Obama,
590 F.3d 866 (D.C. Cir. 2010),
cert. denied, 563 U.S. 929 (2011) 2, 8-9, 10, 11, 13, 14, 15, 19, 21, 25, 26, 28, 29, 33, 34

Al-Madhwani v. Obama,
642 F.3d 1071 (D.C. Cir. 2011) 12, 30

Ali v. Obama,
736 F.3d 542 (D.C. Cir. 2013) 16, 23, 29, 34

Almerfedi v. Obama,
654 F.3d 1 (D.C. Cir. 2011) 33

Awad v. Obama,
608 F.3d 1 (D.C. Cir. 2010) 19, 33, 34

Baker v. Carr,
369 U.S. 186 (1962) 15, 16, 24

Bensayah v. Obama,
610 F.3d 718 (D.C. Cir. 2010) 33

Boumediene v. Bush,
553 U.S. 723 (2008) 21, 28, 30

* Authorities upon which we chiefly rely are marked with asterisks.

Commercial Trust Co. of N.J. v. Miller,
262 U.S. 51 (1923) 16

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 1, 8, 9, 10, 11, 13, 20, 21, 22, 25, 26, 27, 28, 29, 30, 34

Hamilton v. Kentucky Distilleries & Warehouse Co.,
251 U.S. 146 (1919) 23

Home Building & Loan Association v. Blaisdell,
290 U.S. 398 (1934) 23

Huron v. Colbert,
809 F.3d 1274 (D.C. Cir. 2016) 33

Hussain v. Obama,
134 S. Ct. 1621 (2014) 28

Kiyemba v. Obama,
555 F.3d 1022 (D.C. Cir. 2009),
vacated and remanded, 559 U.S. 131,
reinstated, 605 F.3d 1046 (D.C. Cir. 2010) 12, 30

Latif v. Obama,
666 F.3d 746 (D.C. Cir. 2011) 33

Ludecke v. Watkins,
335 U.S. 160 (1948) 16, 23, 34

Maqaleh v. Hagel,
738 F.3d 312 (D.C. Cir. 2013), *vacated as moot by*
Al-Najar v. Carter, 135 S. Ct. 1581 (2015) 10, 15, 19

Martin v. Mott,
25 U.S. (12 Wheat.) 19 (1827) 10, 16

Ex parte Milligan,
71 U.S. (4 Wall.) 2 (1866) 23

People's Mojahedin Org. of Iran v. Department of State,
182 F.3d 17 (D.C. Cir. 1999) 34

The Prize Cases,
67 U.S. (2 Black) 635 (1863) 22, 23

The Protector,
79 U.S. (12 Wall.) 700 (1872) 10, 16, 22, 23

Salahi v. Obama,
625 F.3d 745 (D.C. Cir. 2010) 33

The Three Friends,
166 U.S. 1 (1897) 10, 16

United States v. Anderson,
76 U.S. (9 Wall.) 56 (1870) 10, 16

Treaties:

Geneva Convention Relative to the Treatment of Prisoners of War,
Aug. 12, 1949, 6 U.S.T 3316 14

Statutes:

Authorization for Use of Military Force,
Pub. L. No. 107-40, 115 Stat. 224 (2001) 4

National Defense Authorization Act for Fiscal Year 2012,
Pub. L. No. 112-81, 125 Stat. 1298 (2011) 14

28 U.S.C. § 1291 2

28 U.S.C. § 2241(a) 2

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Fed. R. App. P. 4(a)(1)(B) 2

Fed. R. Evid. 201(b)(2) 18

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Julie Hirschfeld Davis & Mark Landler, *Trump Outlines New Afghanistan War Strategy with Few Details,* N.Y. Times (Aug. 21, 2017) 6

Def. Casualty Analysis Sys., U.S. Dep't of Def., U.S. Military Casualties: Operation Freedom's Sentinel (OFS) Casualty Summary, https://dcas.dmdc.osd.mil/dcas/pages/report_ofs_ month.xhtml (last visited Nov. 3, 2017) 6

Exec. Order No. 13,567, 76 Fed. Reg. 13, 277 (Mar. 7, 2011) 12

Letter from President Donald J. Trump (June 6, 2017), https://www.whitehouse.gov/the-press-office/2017/06/06/text-letter-president-speaker-house-representatives-and-president-pro 5-6

Mujib Mashal, *U.S. Troop Increase in Afghanistan Underway, General Says*, N.Y. Times (Aug. 24, 2017) 6

Periodic Review Board:

File Review (Public), No. ISN028 (June 7, 2017), http://www.prs.mil/Portals/60/Documents/ISN028/FileReview2/20170607_U_ISN_28_FINAL_DETERMINATION_MFR_PUBLIC.pdf 32

Final Determination (Public), No. ISN028 (Dec. 21, 2016), http://www.prs.mil/Portals/60/Documents/ISN028/FullReview/170109_ISN28_FINAL_DETERMINATION%20FORM_PUBLIC_V1.pdf (Dec. 21, 2016 32

Remarks by President Trump on the Strategy in Afghanistan and South Asia (Aug. 21, 2017), https://www.whitehouse.gov/the-press-office/2017/08/21/remarks-president-trump-strategy-afghanistan-and-south-asia 15

Security and Defense Cooperation Agreement (U.S-Afghanistan), Sept. 30, 2014 ..... 5, 26, 27

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GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001)
JA	Joint Appendix (unclassified)

INTRODUCTION

In 2011, this Court affirmed petitioner Moath Hamza Ahmed Al-Alwi's detention because his own statements showed that (among other acts) he received military-style training and weapons from the Taliban, served on multiple Afghan fronts in a Taliban combat unit commanded by a high-level Al Qaeda leader, and remained with his unit after September 11, 2001. *Al-Alwi v. Obama*, 653 F.3d 11, 20-25 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 907 (2012). In 2016, after an administrative hearing in which he participated, the United States determined that his continued detention remains necessary to protect against a significant threat to U.S. national security, for "his continued and recent extremist statements" (among other indicia) show that he would be "susceptib[le] to recruitment" by enemy forces if released.

Al-Alwi does not dispute in this case that he is an enemy belligerent, or that the United States is still fighting the same terrorist groups that he joined, in the same country where he served them. His habeas petition nonetheless contends that his detention is unlawful because the "relevant conflict" in which he was captured has ended. In the alternative, he claims that the duration and "practical circumstances" of the conflict in Afghanistan mean that the government's authority to detain him has "unraveled," and thus he must be tried or released even if hostilities continue.

The district court correctly rejected both arguments. The AUMF and the law of war authorize detention while hostilities endure. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Two Presidents have reported to Congress that the United States

remains engaged in active hostilities. Applying *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the district court properly refused to second-guess these determinations. Moreover, the government "provided overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. The notion that Al-Alwi must be released even if hostilities continue ignores binding precedent and turns law-of-war detention upside down: he effectively asks this Court to reward the enemy for stretching the conflict to historic lengths by persistently continuing its attacks. And the practical circumstances of the current conflict are the same that a plurality found relevant when the Supreme Court upheld detention under the AUMF in *Hamdi*: thousands of military personnel remain in Afghanistan, engaged in ongoing operations against enemy fighters.

Finally, this Court should reject Al-Alwi's argument—made for the first time on appeal—that the panel should abandon multiple precedents establishing standards for adjudicating Guantanamo habeas cases. In addition to forfeiting this argument, Al-Alwi does not explain how the rule he urges would make any difference in his case.

STATEMENT OF JURISDICTION

Al-Alwi invoked the district court's jurisdiction under 28 U.S.C. § 2241(a), among other provisions. On February 22, 2017, the district court denied Al-Alwi's petition, explaining that the 2001 AUMF authorizes his detention. Al-Alwi filed a timely notice of appeal on April 6, 2017. *See* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The 2001 AUMF authorizes the United States to detain enemy belligerents, such as individuals who were "part of" or substantially supported Al Qaeda, the Taliban, or their associated forces at the time of capture, for the duration of active hostilities. In 2011, this Court affirmed a district court ruling denying Al-Alwi's habeas petition, concluding that the record showed that he was "part of" Taliban or Al Qaeda forces at the time of his capture. Al-Alwi does not dispute those findings, nor does he dispute that fighting in Afghanistan continues. This appeal presents the following questions:

1. Whether the district court correctly ruled that Al-Alwi's detention is lawful because the United States remains engaged in active hostilities against Al Qaeda, the Taliban, and their associated forces.

2. Whether the district court correctly rejected Al-Alwi's claim that, because of the duration and "practical circumstances" of the conflict in Afghanistan, he must be released even if active hostilities continue.

3. Whether Al-Alwi forfeited his claim that the district court should evaluate his habeas petition under a heightened evidentiary standard by failing to raise it below, and whether that claim is in any event foreclosed by Circuit precedent.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. United States Military Operations in Afghanistan Against Al Qaeda, the Taliban, and Associated Forces

In response to the attacks of September 11, 2001, Congress enacted the Authorization for Use of Military Force, which authorizes "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." AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). The President ordered the U.S. military to subdue Al Qaeda and the Taliban regime that harbored it in Afghanistan.

In October 2001, U.S. and coalition forces began a military campaign, known as Operation Enduring Freedom, to destroy Al Qaeda and remove the Taliban from power. Thousands of U.S. service members participated in this major combat mission in furtherance of the armed conflict against Al Qaeda, the Taliban, and their associated forces. The International Security Assistance Force, a United Nations Security Council-authorized international coalition operating under the command of the North Atlantic Treaty Organization, also conducted combat and other military operations in Afghanistan. JA65. The coalition included thousands of military personnel from more than fifty nations, including the United States. JA68-69.

Over time, the United States and its coalition partners succeeded in reducing the number of military personnel in Afghanistan as the Afghan government took on

greater responsibility for its own security and reconstruction. In May 2014, President Obama announced that the United States would end combat operations and focus on counterterrorism operations, among other missions. JA74-75; *see also* JA108. In September 2014, the United States and the Afghan government reached a bilateral security agreement that provides that U.S. forces will engage in combat operations when "mutually agreed" by the parties. Agreement art. 2, § 1 (JA81). It also expressly preserves the ability of the United States to undertake "military operations to defeat al-Qaida and its affiliates" in cooperation with the Afghan government, *id.* art. 2, § 4 (JA82); and reflects an expectation that the United States will continue to engage in "force protection," *id.* art. 7, § 3 (JA87); "counter-terrorism," *id.* art. 2, § 4 (JA82); and "self-defense, consistent with international law." *Id.* art. 3, § 2 (JA83).

In 2015, the United States ended Operation Enduring Freedom and began Operation Freedom's Sentinel. JA63. Operation Freedom's Sentinel is focused on defeating Al Qaeda, the Taliban, and their associated forces, "protecting U.S. forces, and preventing Afghanistan from becoming a safe haven for terrorists to plan attacks against the U.S. homeland and U.S. targets and interests in the region." JA 752-54, ¶¶ 8-11; JA112, ¶ 10 (explaining the operation's goals). Participants also train, advise, and assist the Afghan National Defense and Security Forces. JA111-13, ¶¶ 7-12.

Active hostilities continue under Operation Freedom's Sentinel. Two Presidents have reported to Congress that active hostilities "remain ongoing" against Al Qaeda, the Taliban, and their associated forces. *See, e.g.*, Letter from President

Donald J. Trump (June 6, 2017) ("2017 Letter from the President");[1] Letter from President Barack H. Obama (June 13, 2016) (JA885) (same); Letter from President Barack H. Obama (June 11, 2015) (JA51) (same); *see also* U.S. Dep't of Defense, Report to Congress: Enhancing Security and Stability in Afghanistan 8 (June 2017) ("2017 DoD Report").[2] Senior military leaders have declared that "Al Qaeda leaders and operatives continue to maintain a significant presence in Afghanistan" and that the Taliban "remains a resilient, lethal force." Declaration of Rear Admiral Sinclair M. Harris ¶¶ 10, 11 (Apr. 14, 2015) (JA112); Declaration of Rear Admiral Andrew L. Lewis ¶¶ 10-11 (Feb. 1, 2016) (JA753-54).

To date, forty-three U.S. service members have died during Operation Freedom's Sentinel and 239 have been wounded in action.[3] Thousands of U.S. military personnel continue to be deployed to Afghanistan. Harris Decl. ¶ 6 (JA110-11); Lewis Decl. ¶ 6 (JA751). In August 2017, the President announced an increase of American troop levels in Afghanistan. *See, e.g.*, *Trump Outlines New Afghanistan War Strategy with Few Details,* N.Y. Times (Aug. 21, 2017); *U.S. Troop Increase in Afghanistan Underway, General Says*, N.Y. Times (Aug. 24, 2017).

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[1] https://www.whitehouse.gov/the-press-office/2017/06/06/text-letter-president-speaker-house-representatives-and-president-pro.
[2] https://www.defense.gov/Portals/1/Documents/pubs/June_2017_1225_Report_to_Congress.pdf.
[3] U.S. Military Casualties: Operation Freedom's Sentinel (OFS) Casualty Summary, https://dcas.dmdc.osd.mil/dcas/pages/report_ofs_month.xhtml (last visited Nov. 3, 2017).

B. This Court Held that the 2001 AUMF Authorizes Al-Alwi's Detention Because He Was Part of Al Qaeda or the Taliban

Al-Alwi is a Yemeni national who was captured near the Afghanistan-Pakistan border in December 2001 and subsequently detained by the United States at Naval Station Guantanamo Bay, Cuba. Al-Alwi has admitted that he voluntarily joined the Taliban, stayed at guesthouses operated by Al Qaeda and the Taliban, and attended a Taliban-affiliated training camp, where he learned to fire a rocket-propelled grenade launcher and received "a Kalashnikov rifle, ammunition magazines, and grenades." *Al-Alwi v. Obama*, 653 F.3d 11, 13-14 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 907 (2012); *see also Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 28-29 (D.D.C. 2008). He also admitted that he served between eight and eleven months on multiple Afghan fronts in a Taliban combat unit commanded by a high-level Al Qaeda leader, and remained with his unit well beyond September 11, 2001, even after his unit was bombed repeatedly by U.S. warplanes. *Al-Alwi*, 653 F.3d at 14; *see also Al-Alwi*, 593 F. Supp. 2d at 28-29.

In 2005, Al-Alwi filed a habeas petition, principally arguing that the United States should not be permitted to detain him on the basis of his own statements. The district court denied the petition, and this Court affirmed. The Court observed that Al-Alwi did not contest "the truth of the majority of his admissions," and that Al-Alwi's counsel "expressly conceded or did not disavow several" key facts on which the government relied, like his membership in a Taliban combat unit commanded by a high-level Al Qaeda leader. *Al-Alwi*, 653 F.3d at 17-20 (quotation marks omitted).

This Court accordingly held that the record before the district court was "enough to establish" that Al-Alwi "was 'part of the Taliban or al Qaeda,'" justifying his detention. *Id.* at 20. The Supreme Court denied Al-Alwi's petition for certiorari. *Al-Alwi v. Obama*, 567 U.S. 907 (2012).

C. The District Court Denied Al-Alwi's Second Habeas Petition

In 2015, Al-Alwi filed a second habeas petition, which is the subject of this appeal. JA8-24. The new petition did not contest the factual basis for the district court's previous decision (affirmed by this Court) that he was part of Taliban or Al Qaeda forces; to the contrary, the petition expressly stated that Al-Alwi did "not seek to re-litigate" this determination. JA16, ¶ 21. As relevant here, Al-Alwi instead asserted that President Obama cut off the government's authority to detain him by ending Operation Enduring Freedom and transitioning to Operation Freedom's Sentinel. JA19-20, ¶¶ 35-37. Al-Alwi also claimed that the district court should intervene to end his detention, whether or not the United States remains engaged in active hostilities, because his continued detention is inconsistent with the law of war, citing the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). JA1347-48.

The district court denied the petition. JA1338-48. As for Al-Alwi's first argument, this Court has held that the "determination of when hostilities have ceased is a political decision" and accordingly deferred "to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), *cert.*

denied, 563 U.S. 929 (2011). The President and national security officials have "clearly stated that active hostilities remain ongoing in Afghanistan," JA1344, the district court explained, and remarks about the transition from combat to counterterrorism operations "cannot reasonably be construed as a presidential declaration that active hostilities have ended." JA1345. Nor has Congress purported to end the war; rather, Congress enacted the 2001 AUMF and subsequently affirmed that the AUMF authorizes detention for the duration of hostilities conducted pursuant to it. *See* JA1346-47. And Al-Alwi's petition would fail even if the President's assessment received no deference, the district court reasoned, because the government "provided overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2.

The district court also rejected Al-Alwi's alternative argument. Because the United States remains engaged in active hostilities, the court explained, Al-Alwi's detention is consistent with the law of war, which authorizes detention while hostilities endure. *See* JA1347-48. *Hamdi* does not suggest that the duration of a conflict should "somehow excuse it from longstanding law of war principles." JA1348. Indeed, the district court observed, the current active hostilities against Al Qaeda and the Taliban resemble the circumstances at the time the Supreme Court decided *Hamdi*: thousands of U.S. military personnel remain deployed to Afghanistan and engaged in ongoing operations against enemy fighters. *Ibid.* As the Supreme Court explained in *Hamdi*, "[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be [enemy] combatants who engaged

in an armed conflict against the United States." 542 U.S. at 521 (plurality opinion) (quotation marks omitted); *accord id.* at 579, 587 (Thomas, J., dissenting).

SUMMARY OF ARGUMENT

1. The district court properly refused to override the assessment of two Presidents and find that hostilities stopped when the United States ended Operation Enduring Freedom and began Operation Freedom's Sentinel. This Court has twice ruled 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." *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); *see also Maqaleh v. Hagel*, 738 F.3d 312, 341 (D.C. Cir. 2013), *vacated as moot by Al-Najar v. Carter*, 135 S. Ct. 1581 (2015). These decisions rest on Supreme Court precedents stretching back almost two centuries. *See, e.g.*, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); *United States v. Anderson,* 76 U.S. (9 Wall.) 56, 70-71 (1870); *The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1872); *The Three Friends,* 166 U.S. 1, 63 (1897); *Ludecke v. Watkins*, 335 U.S. 160 (1948). The decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not to the contrary: *Hamdi* contains no holding by a majority of the Court explaining how to analyze whether the United States remains engaged in hostilities, and the plurality opinion that Al-Alwi cites does not address whether the President's assessment is entitled to deference.

This Court should affirm Al-Alwi's detention even if it looks beyond the Executive Branch's statements. A detainee's release "is only required when the

fighting stops." *See Al-Bihani*, 590 F.3d at 874. As the district court explained, "[i]n addition to showing that the political branches are in agreement about the presence of ongoing hostilities, the government has provided overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. Detailed declarations by senior military leaders describe ongoing U.S. military activities and attacks by Al Qaeda, the Taliban, and their associated forces. Nothing in the plurality opinion in *Hamdi* demands more.

2. The district court likewise correctly rejected Al-Alwi's request to end his detention whether or not hostilities continue. Contrary to his assertion, the conflict in Afghanistan is not so "entirely unlike * * * previous conflicts" that the law of war (and the corresponding authority to detain enemy belligerents) does not apply. In *Hamdi*, a plurality of the Court expressly declined to address such an argument because "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan." 542 U.S. at 521. This remains true today: the United States is still actively fighting the same organizations that Al-Alwi joined, in the same country where he served them, because these groups continue to attack U.S. forces and plot to inflict harm on this country and its people. Both the Supreme Court and this Court have affirmed that the law of war permits the detention of enemy belligerents for the duration of hostilities. *See, e.g.*, *id.* at 521 (plurality opinion); *accord id.* at 579, 587 (Thomas, J., dissenting); *Al-Bihani*, 590 F.3d at 874. It is not open to this panel to replace that longstanding law-of-war principle with a catch-and-release system in which belligerents could return to the battlefield.

The panel also should not adopt a narrowing construction of the AUMF or rule that Al-Alwi's continued detention violates the Due Process Clause. The law of this Circuit provides that "the due process clause does not apply to aliens" detained at Guantanamo who have no "property or presence in the sovereign territory of the United States." *See Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (per curiam), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010); *see also Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011). And Al-Alwi offers no basis for a court to determine that he should be released. Al-Alwi points to the duration of his detention, but he does not explain what standard a court should adopt in setting time limits on detention that go beyond the well-established rule that detention may last for the duration of hostilities. Al-Alwi also provides no support for the proposition that the Due Process Clause requires a court to inquire into the discretionary choice to release other detainees when evaluating his detention.

Of course, the United States has no interest in holding any detainee longer than necessary; as Al-Alwi points out, most of the individuals detained at Guantanamo Bay have been released. The government thus periodically reviews whether his detention remains "necessary to protect against a significant threat to the security of the United States" under a process that provides a hearing and other significant procedural protections. *See generally* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). In December 2016, that review found that Al-Alwi should remain detained because he would be "susceptib[le] to recruitment" by enemy forces if released. *Infra* pp. 31-32.

3. For the first time on appeal, Al-Alwi suggests that the Constitution requires the district court to consider whether the government has presented clear and convincing evidence supporting his detention. Al-Alwi forfeited this argument by failing to raise it before the district court; regardless, it is foreclosed by Circuit precedent. *See, e.g.*, *Al-Bihani*, 590 F.3d at 878; *Al Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010). And Al-Alwi does not explain how a different burden of proof would affect the outcome in his case; indeed, he does not challenge any of the factual findings that impelled the district court to deny his first habeas petition.

STANDARD OF REVIEW

This Court reviews "the district court's findings of fact for clear error, its habeas determination de novo, and any challenged evidentiary rulings for abuse of discretion." *Al-Alwi v. Obama*, 653 F.3d 11, 15 (D.C. Cir. 2011) (quotation marks omitted), *cert. denied*, 567 U.S. 907 (2012).

ARGUMENT

I. THE 2001 AUMF AUTHORIZES AL-ALWI'S DETENTION BECAUSE THE UNITED STATES IS ENGAGED IN ACTIVE HOSTILITIES IN AFGHANISTAN AGAINST AL QAEDA, THE TALIBAN, AND THEIR ASSOCIATED FORCES

A. "Congress' grant of authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain for the duration of the relevant conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion); *accord id.* at 587 (Thomas, J., dissenting). The Geneva Conventions similarly require

that prisoners of war be released "only at the 'cessation of active hostilities.'" *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T 3316, 3406. This Court has explained that the term "active hostilities" "is significant," because it "serves to distinguish the physical violence of war from the official beginning and end of a conflict." *Al-Bihani*, 590 F.3d at 874. The reality is that "fighting does not necessarily track formal timelines." *Ibid.* The law accordingly reflects "what common sense tells us must be true: release is only required when the fighting stops." *Ibid.*

Congress has ratified this understanding of the President's detention authority. The National Defense Authorization Act for Fiscal Year 2012 "affirm[ed]" that the President's authority under the 2001 AUMF includes the power to detain individuals who were "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562 (2011). Congress also affirmed that the President's authority includes "[d]etention under the law of war without trial until the end of the hostilities authorized by" the AUMF. *Id.* § 1021(c)(1), 125 Stat. at 1562.

Two Presidents have reported to Congress that active hostilities against Al Qaeda, the Taliban, and their associated forces "remain ongoing." *Supra* pp. 5-6. As President Trump recently explained, "an effective military effort" is necessary to

address the "immense" threats to U.S. national security that "we face in Afghanistan." *See* Remarks by President Trump on the Strategy in Afghanistan and South Asia (Aug. 21, 2017).[4] Given the current state of the conflict, President Trump has lifted prior policy restrictions on military forces to ensure that the military is capable of "fully and swiftly waging battle against the enemy." *See ibid.*

A President's assessments of the status of a conflict are entitled to considerable deference. This Court has twice held 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." *Al-Bihani*, 590 F.3d at 874; *Maqaleh v. Hagel*, 738 F.3d 312, 341 (D.C. Cir. 2013) (holding that "whether an armed conflict has ended is a question left exclusively to the political branches" and accepting the government's representation that "the United States remains at war in Afghanistan"), *vacated as moot by Al-Najar v. Carter*, 135 S. Ct. 1581 (2015). This follows from "the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security." *Al-Bihani*, 590 F.3d at 875. Absent a determination by the political branches that hostilities have ended, detention "is justified." *Ibid.*

This Court's decisions align with Supreme Court precedents stretching back almost two centuries. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court explained that

[4] https://www.whitehouse.gov/the-press-office/2017/08/21/remarks-president-trump-strategy-afghanistan-and-south-asia.

cases dating from 1827 require courts to "refus[e] to review the political departments' determination of when or whether a war has ended." *Id.* at 213 (citing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827)); *see, e.g.*, *United States v. Anderson,* 76 U.S. (9 Wall.) 56, 70-71 (1870) (noting the "inherent difficulty of determining" when the war had ended and rejecting claims that a court could identify the end of a war based on events); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872) (ruling that a court must "refer to some public act of the political departments of the government to fix the dates" of war); *The Three Friends,* 166 U.S. 1, 63 (1897) (ruling that "it belongs to the political department to determine when belligerency shall be recognized"); *Commercial Trust Co. of N.J. v. Miller,* 262 U.S. 51, 57 (1923) (ruling that a court "cannot estimate the effects of a great war and pronounce their termination at a particular moment of time"). Similarly in *Ludecke v. Watkins*, 335 U.S. 160 (1948), the Supreme Court held that the President retained the power to deport enemy aliens, notwithstanding an enemy's surrender, because the President had determined that a state of war persisted. *Id.* at 168-70. Emphasizing that the law does not "lag behind common sense," the Court held that whether the war had ended was a "matter[] of political judgment for which judges have neither technical competence nor official responsibility." *Id.* at 167, 170.

Here, Congress and the President agree that the United States is engaged in active hostilities against Al Qaeda, the Taliban, and their associated forces. The 2001 AUMF and its corresponding detention authority "do[] not have a time limit." *See Ali v. Obama*, 736 F.3d 542, 552 (D.C. Cir. 2013). As noted above, Congress has

reaffirmed the President's continuing authority under the AUMF. Two Presidents have recognized that active hostilities against Al Qaeda, the Taliban, and their associated forces "remain ongoing." *Supra* pp. 5-6. Following appropriate Executive Branch coordination, the government reiterates that view again here. Under the decisions of the Supreme Court and this Court discussed above, these statements are sufficient for this Court to conclude that the United States continues to engage in active hostilities against the Taliban, Al Qaeda and their associated forces, and that the 2001 AUMF therefore continues to authorize Al-Alwi's detention.

B. This Court should affirm Al-Alwi's detention even if it looks beyond the President's statements and Congress's actions. As the district court explained, "[i]n addition to showing that the political branches are in agreement about the presence of ongoing hostilities, the government has provided overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. Indeed, Al-Alwi himself acknowledges that "fighting continues in Afghanistan." Br. 32.

Detailed declarations by senior military leaders describe military activities under Operation Freedom's Sentinel and the ongoing efforts by Al Qaeda, the Taliban, and associated forces to harm the United States. Harris Decl. ¶¶ 6, 10-12 (Apr. 14, 2015) (JA110-13); Lewis Decl. ¶¶ 6, 10-13 (Feb. 1, 2016) (JA751-55). In 2015 alone, U.S. forces released 947 airborne weapons during 4,676 air sorties and conducted 20,600 intelligence, surveillance, and reconnaissance missions. Lewis Decl. ¶ 13 (JA755). In the months before Al-Alwi filed his second habeas petition, there were "numerous,

specific instances of hostile forces, including the Taliban and Al Qaeda, attacking or planning to attack U.S. personnel and facilities in Afghanistan," Harris Decl. ¶ 12 (JA113), and between February 2015 and February 2016, fighting with the Taliban was "nearly continuous." Lewis Decl. ¶ 11 (JA754). Taliban fighters have killed U.S. service members and contractors, coalition members, and civilians in convoys, at military bases, and on city streets. *See, e.g.*, JA399-402 (describing an attack on a military base in Kabul); JA403 (describing a suicide car bombing in Kabul); JA404-05 (describing a suicide car bombing in the Nangahar province); JA406-07 (describing a suicide car bombing on a military convoy); JA408-10, 411-12 (describing a series of coordinated attacks at a coalition base, a police academy, and a main roadway). The Taliban has declared that it "will fight until there is not one foreign soldier on Afghan soil" and it has "established an Islamic state." JA395-96; *see also* JA160, JA178.

Events after the district court denied Al-Alwi's most recent habeas petition continue to belie any claim that Afghanistan has achieved peace. *Accord* Pet. Br. 32 (admitting that "fighting continues in Afghanistan"). The Department of Defense has reported to Congress that Afghanistan is "at a critical point in the fight against the insurgency." 2017 DoD Report 5.[5] The country now bears "the largest concentration of terrorist and extremist organizations in the word." *Id.* at 22. Fighters from as many as twenty terrorist groups launched more than 800 attacks in Afghanistan in

[5] This Court should take judicial notice of the 2017 DoD Report, *see* Fed. R. Evid. 201(b)(2), on which Al-Alwi also relies, *see* Pet. Br. 9.

March 2017 alone. *Id.* at 24. In April 2017, the Taliban launched Operation Mansouri, a new effort to perpetrate "violent attacks * * * on foreign forces, the Afghan Government, and its military forces and intelligence infrastructure." *Id.* at 20. Thousands of U.S. forces continue to work to defeat the threats posed by Al Qaeda, the Taliban, and their associated forces. *See id.* at 6-8. To date, forty-three U.S. service members have died during Operation Freedom's Sentinel and 239 have been wounded in action. *See supra* p. 6. There can be no serious doubt under these circumstances that the fighting has not stopped. The United States thus remains authorized to detain Al-Alwi. *See Al-Bihani*, 590 F.3d at 874 (holding that a detainee's "release is only required when the fighting stops").[6]

C. Al-Alwi argues (Br. 28-43) that the district court should not have deferred to the political branches in concluding that hostilities continue. But as discussed above, this Court has already ruled that the status of hostilities is a question for the political branches. *Al-Bihani*, 590 F.3d at 874; *Maqaleh*, 738 F.3d at 341. *Al-Bihani* is dispositive here, for a panel of this Court is "without authority to overturn a decision by a prior panel of this Court." *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (quotation marks omitted). Al-Alwi's amici underscore that his argument is foreclosed by asking this Court to grant initial en banc review of his claims.

[6] The classified supplement to the joint appendix describes in greater detail military activities under Operation Freedom's Sentinel and the ongoing efforts by Al Qaeda, the Taliban, and their associated forces to harm the United States.

Al-Alwi and amici nonetheless argue (Pet. Br. 29-32; Amici Br. 9, 23-24) that the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), contradicts this Court's decision in *Al-Bihani*. This claim is both mistaken and irrelevant: as explained above, the district court considered extensive proof of the ongoing operations against Al Qaeda, the Taliban, and their associated forces and concluded that the government had offered "overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. Nothing in *Hamdi* requires more.

In *Hamdi*, the Supreme Court considered a habeas petition filed by a U.S. citizen detained in the United States as an enemy belligerent. 542 U.S. at 510-11. First, applying "longstanding law-of-war principles," the Court ruled that the 2001 AUMF "include[s] the authority to detain" even U.S. citizens "for the duration of the relevant conflict." *Id.* at 521 (plurality opinion); *accord id.* at 579, 587 (Thomas, J., dissenting). A plurality of the Court stated that "[i]f the record establishes that United States troops are still involved in active combat in Afghanistan," detention during "these hostilities" is "part of the exercise of 'necessary and appropriate force'" authorized by the AUMF. *Id.* at 521; *compare id.* at 588 (Thomas, J., dissenting) (explaining that a court is "bound by the political branches' determination that the United States is at war"). The plurality then noted that between 13,500 and 20,000 U.S. military personnel remained engaged in "ongoing operations." *Id.* at 521.

Second, a majority of the Court held that the Due Process Clause "demands some system for a citizen-detainee to refute his classification" as an enemy belligerent.

Hamdi, 542 U.S. at 524-39 (plurality opinion); *accord id.* at 543, 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (disagreeing that the AUMF provides "clear congressional authorization" to detain U.S. citizens but agreeing that the detainee should be able to challenge his classification). The Court remanded to allow "prudent and incremental" fact-finding on the detainee's belligerent status. *See id.* at 538-39 (plurality opinion); *id.* at 553 (opinion of Souter, J.).

Thus, while *Hamdi* stands for the proposition that detention is permitted while hostilities are ongoing, that decision contains no holding addressing *how* to determine whether the United States remains engaged in hostilities, let alone whether the President's assessment of a conflict is entitled to deference. In the absence of any binding contrary precedent, *Al-Bihani* controls here, and it is consistent with the long-established principle that the existence of hostilities is a political determination for the political branches. Indeed, if Al-Alwi and his amici were correct, *Hamdi* "would have marked not only a change in, but a complete" and unacknowledged "repudiation" of nearly two centuries of case law, creating "considerable tension" within the Supreme Court's precedents. *Cf. Boumediene v. Bush*, 553 U.S. 723, 764 (2008). *Hamdi* "need not be read to conflict in this manner." *Cf. ibid.*

Regardless, not even the *Hamdi* plurality intended that a court would conduct the intensive factual inquiry that Al-Alwi seeks. The plurality treated a newspaper article quoting military officers and a media briefing where a senior military official described ongoing "counterterrorist operations" as conclusive proof that the United

States remained engaged in active hostilities. *Hamdi*, 542 U.S. at 521 (citing Pamela Constable, *U.S. Launches New Operation in Afghanistan*, Wash. Post, Mar. 14, 2004; General John Abizaid, Central Command Operations Update Briefing (Apr. 30, 2004)).[7] Nothing in the plurality opinion suggests that a court should do more to confirm that the Executive Branch's views on the status of hostilities are not implausible, much less that a court should allow captured enemy fighters to conduct discovery into the nature of ongoing military operations against the groups to which they belong. *See, e.g.*, Pet. Br. 42-43 (arguing that the district court abused its discretion by failing to order such discovery). This is underscored by the scope of the remand in *Hamdi*, which the Court contemplated would be limited to fact-finding about the detainee's belligerent status. *See* 542 U.S. at 538-39 (plurality opinion) (discussing the government's evidence against the detainee); *id.* at 553 (opinion of Souter, J.) (explaining that he "join[ed] with the plurality in ordering remand * * * to allow [the detainee] to offer evidence that he is not an enemy combatant"). Here, the government "provided overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. Any factual inquiry that the *Hamdi* plurality envisioned is satisfied.

The other cases that Al-Alwi and his amici cite also fail to advance his argument. Both *The Prize Cases* and *The Protector* hold that the courts should defer to the Executive when determining the status of a conflict—the opposite of what Al-

[7] http://archives.cnn.com/TRANSCRIPTS/0404/30/ltm.04.html.

Alwi and amici claim. *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (ruling that the President's decision to establish a blockade is "official and conclusive evidence to the Court that a state of war existed"); *The Protector*, 79 U.S. (12 Wall.) at 702 (ruling that it is "necessary * * * to refer to some public act of the political departments of the government to fix the dates" of war).

In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), the Supreme Court considered a statute that by its own terms expired when the President proclaimed that war and demobilization had ended, *id.* at 165-66; by contrast, the 2001 AUMF and its corresponding detention authority "do[] not have a time limit." *Ali*, 736 F.3d at 552; *see also Ludecke*, 335 U.S. at 169 n.13 (discussing *Hamilton* and explaining that where "the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government"). *Hamilton* also did not involve second-guessing the President's assessment that hostilities continue, as Al-Alwi seeks to do here.

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), is inapposite because the Court did not consider whether a war existed. The issue was instead whether the President was justified in declaring martial law in Indiana, which turned on whether "the courts [we]re open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 80. Finally, *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), does not require the inquiry Al-Alwi seeks; the Court simply noted in dicta that "the war power does not remove constitutional limitations safeguarding essential liberties." *Id.* at 426.

D. In the alternative, Al-Alwi and his amici insist (Pet. Br. 36-42; Amici Br. 14-21) that international law requires U.S. courts to decide the operational status of military efforts. But neither actually argues that the district court should have engaged in the factual inquiry that they claim international law requires. Despite maintaining that "the subjective judgments of parties" engaged in conflict is "inconsequential" under international law in determining the existence of active hostilities (Amici Br. 18 n.5; *see also id.* at 20), Al-Alwi and his amici both agree that the President's statements are entitled to at least some deference. Pet. Br. 29 (arguing that the district court "erred by deferring completely to the executive's determination"); *id.* at 31 (protesting "excessive deference by the judiciary"); *id.* at 32 (emphasizing that "[t]o be clear, Petitioner isn't arguing that courts have the authority to declare war, or its end"); Amici Br. 27 (conceding that "[t]he Executive is entitled to some deference in determining whether hostilities are ongoing"); *ibid.* (arguing that the district court erred by "deferring exclusively to the Executive's statements").

In any event, the only international sources Al-Alwi and his amici cite that specifically embrace the judicial role they seek are opinions by two *ad hoc* tribunals that do not bind U.S. courts, do not address detention authority, and do not offer the "clearly definable criteria for decision" that are necessary in this sensitive context. *Baker*, 369 U.S. at 213-14 (explaining that the need for deference is most acute when a case "directly implicates" the separation of powers and no "clearly definable criteria for decision" are available); *see* Amici Br. 20 (conceding that "international tribunals

have not identified a precise set of facts that would indicate" that hostilities have ended). This ambiguity is all the more reason that a court should defer to the political branches to determine the status of hostilities in Afghanistan. The rest of the sources that Al-Alwi and his amici identify either merely describe the existence of hostilities as fact-dependent, which elides the question whether a court should defer to the political branches' assessment, or otherwise reiterate the principle that an enemy belligerent may be detained for the duration of active hostilities, which is not disputed here.

E. Al-Alwi also contends (Br. 28-29, 32-36) that President Obama cut off the government's ability to detain him by ending Operation Enduring Freedom, during which Al-Alwi was captured. But detention authority does not turn on the name or circumstances of a particular operation. So long as the United States remains involved in active hostilities, it makes no difference whether an operation's name changes. The AUMF and the law of war do not "draw such fine distinctions." *See Al-Bihani*, 590 F.3d at 874. *Hamdi* does not say otherwise: as discussed above, the plurality in *Hamdi* suggested that the United States remains involved in "hostilities" that permit a belligerent's detention as long as U.S. forces are carrying out "ongoing operations" against the enemy. *See* 542 U.S. at 521. These are the circumstances of Operation Freedom's Sentinel today. *Supra* pp. 5-6, 17-19. A contrary rule would "make each successful campaign of a long war but a Pyrrhic prelude to defeat": each "initial success * * * would trigger an obligation to release" belligerents "captured in

earlier clashes," forcing the United States "to constantly refresh the ranks" of the enemy. *Al-Bihani*, 590 F.3d at 874. The law of war is not so self-defeating.

For the same reasons, it makes no difference whether the conflict in Afghanistan should be defined as an international armed conflict, as Al-Alwi asserts (Br. 36-39), or as a non-international armed conflict, as his amici maintain (Br. 18-21). The authority to detain Al-Alwi does not rest upon how one defines the nature of the conflict at any given point; detention authority continues for the duration of hostilities. *See, e.g.*, *Hamdi*, 542 U.S. at 521 (plurality opinion); *accord id.* at 579, 587 (Thomas, J., dissenting); *Al-Bihani*, 590 F.3d at 874.

F. Al-Alwi is also wrong to claim (Br. 34) that the fact that the United States entered into a bilateral security agreement providing for coordination with Afghan forces shows that the United States is no longer engaged in "*active* hostilities." The agreement authorizes U.S. forces to engage in combat operations when "mutually agreed" by the parties, Agreement art. 2, § 1 (JA81); contemplates that the United States will use "military operations to defeat al-Qaida and its affiliates" in cooperation with the Afghan government, *id.* art. 2, § 4 (JA82); and reflects an expectation that the United States will continue to engage in "force protection," *id.* art. 7, § 3 (JA87); "counter-terrorism," *id.* art. 2, § 4 (JA82); and "self-defense, consistent with international law." *Id.* art. 3, § 2 (JA83). Far from barring hostilities, the agreement is

premised on the reality that active hostilities continue.[8] And as discussed above, there is "overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2.

II. AL-ALWI'S ASSERTION THAT THE GOVERNMENT'S DETENTION AUTHORITY HAS "UNRAVELED" LACKS MERIT

As demonstrated above, the Supreme Court and this Court have uniformly held that the United States may detain an enemy belligerent while fighting continues. Citing *Hamdi*, Al-Alwi nonetheless argues (Br. 15-28) that the district court should have intervened to end his detention even if the United States remains engaged in hostilities, on the theory that the conflict in Afghanistan is "entirely unlike * * * previous conflicts that informed the development of the law of war." He urges (Br. 21-26) that this Court must reach this conclusion to avoid the question whether his continued detention violates the Due Process Clause. Both claims are mistaken.

A. *Hamdi* does not support Al-Alwi's claim that "practical circumstances" have made law-of-war principles inapplicable to the conflict in Afghanistan. In *Hamdi*, the detainee argued that the AUMF did not authorize "indefinite or perpetual detention"; the plurality replied that the AUMF grants "authority to detain for the duration of the relevant conflict," under "longstanding law-of-war principles," and remarked that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts

[8] Al-Alwi also asserts that the agreement would prohibit the United States from detaining him "inside Afghanistan today," Br. 36, citing a provision stating that the United States will not "maintain or operate detention facilities in Afghanistan." Agreement art. 3, § 3 (JA83). But a voluntary agreement about facilities in Afghan sovereign territory does not deprive the United States of authority to detain Al-Alwi.

that informed the development of the law of war, that understanding may unravel." 542 U.S. at 521. But the plurality stressed that this was "not the situation we face as of this date," because "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Ibid.* This remains true today. *Supra* pp. 5-6, 17-19.

The Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and the statement by Justice Breyer about the denial of certiorari in *Hussain v. Obama*, 134 S. Ct. 1621 (2014), also do not advance Al-Alwi's argument. The Court observed in *Boumediene* that the conflict in Afghanistan "is already among the longest wars in American history," but never suggested that the duration of a conflict might vitiate the government's authority to detain enemy belligerents. 553 U.S. at 771. Justice Breyer's statement, which cannot bind this Court, reaffirms the plurality that he joined in *Hamdi*, in the course of addressing a different issue. *Hussain*, 134 S. Ct. at 1622.

More fundamentally, Al-Alwi's proposal would transform law-of-war detention. Al-Alwi asks this Court (Br. 28 n.8) to require "that the government charge or release thirty-one" detainees, nearly the entire population of Guantanamo Bay, effectively rewarding the enemy for stretching the ongoing conflict to historic lengths by persistently continuing its attacks. But both the Supreme Court and this Court have affirmed that the law of war permits the detention of enemy belligerents while hostilities continue. *See, e.g.*, *Hamdi*, 542 U.S. at 521 (plurality opinion); *accord id.* at 579, 587 (Thomas, J., dissenting); *Al-Bihani*, 590 F.3d at 874; *see also Ali*, 736 F.3d at 552 (ruling that "it is not the Judiciary's proper role to devise a novel detention

standard that varies with the length of detention" under the 2001 AUMF). Any holding in favor of fixed-term detention would undermine this longstanding law-of-war principle and set up an arbitrary catch-and-release system in which enemy fighters could return to the battlefield. It is not open to this Court to do so.

Al-Alwi also contends (Br. 26-28) that the law of war no longer applies to the conflict in Afghanistan because international law assumes "traditional wars between states" that end in peace agreements. But detention is authorized for conflicts with non-state armed groups, as the Supreme Court, this Court, and Al-Alwi's amici recognize. *See, e.g.*, *Hamdi*, 542 U.S. at 521 (plurality opinion); *accord id.* at 579, 587 (Thomas, J., dissenting); *Al-Bihani*, 590 F.3d at 874; Amici Br. 15-18. As Al-Alwi's amici note (Br. 15), "the conclusion of an armistice or peace agreement is neither necessary nor sufficient to conclude that active hostilities have ended." If Al-Alwi's point is that this conflict is different because the enemy will never agree to lay down arms, that is more reason the United States needs to detain enemy forces, not less.

B. Al-Alwi also errs in contending that his continued detention violates the Due Process Clause, or that principles of constitutional avoidance required the district court to interpret the AUMF to preclude his continued detention. Al-Alwi begins with the remarkable statement that "[n]othing * * * forecloses application of the Due Process Clause" to his detention. Br. 22-23. But the law of this Circuit provides the opposite, stating that "the due process clause does not apply to aliens" detained at Guantanamo who have no "property or presence in the sovereign territory of the

United States." *See Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("*Kiyemba I*"), *vacated and remanded*, 559 U.S. 131 (per curiam), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010); *see also Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011). *Kiyemba* and *Al-Madhwani* (neither of which Al-Alwi cites) foreclose his due process argument.

Contrary to Al-Alwi's assertions (Br. 18-22), neither *Hamdi* nor *Boumediene* advances his claim. The Court in *Boumediene* emphasized that it "d[id] not address the content of the law that governs * * * detention." 553 U.S. at 798. While the *Hamdi* plurality "agree[d] that indefinite detention for the purpose of interrogation is not authorized," 542 U.S. at 521, Al-Alwi does not (and cannot) claim that interrogation is the purpose of his detention. Al-Alwi remains detained to prevent his return to the battlefield. *See id.* at 518 (explaining that detention is intended "to prevent captured individuals from returning to the field of battle"). As noted above, and discussed below, the government has not chosen to release Al-Alwi as a discretionary matter because he continues to pose a significant threat to the security of the United States.

Regardless, Al-Alwi does not identify any way for a court to assess whether his continued detention "shocks the conscience" (Br. 22-23) or "smacks of arbitrariness" (Br. 24-25). Al-Alwi points to the duration of his detention, as well as the fact that other detainees (who he asserts faced "more troubling allegations," Br. 24) have been released. It is unclear whether Al-Alwi believes that either one of these factors alone or some combination of the two converts detention into a constitutional violation. He does not explain what standard a court should adopt in setting time limits on

detention that would go beyond the well-established rule that detention may last for the duration of active hostilities. He offers no support for the proposition that the Due Process Clause requires a court to inquire into the evidence about other former detainees, as well as the evidence about him, to justify his continued detention. And the discretionary decision whether to release a detainee rests on a complex constellation of factors that are not within the sphere of judicial competence, including commitments by foreign nations to monitor former detainees and take other appropriate security measures that are negotiated through diplomatic processes.

Of course, the United States has no interest in holding any detainee longer than necessary. Accordingly, a Periodic Review Board of senior officials from six departments and offices periodically reviews the continued detention of Guantanamo detainees to determine, as a discretionary matter, whether "[c]ontinued law of war detention * * * is necessary to protect against a significant threat to the security of the United States." Exec. Order No. 13,567, § 2, 76 Fed. Reg. at 13,277. A detainee receives advance notice and "an unclassified summary of the factors and information" that the Board will consider; a hearing at which the detainee may present statements, answer questions, and call reasonably available witnesses; the assistance of a personal representative with appropriate security clearances; and the assistance of any private counsel the detainee chooses to engage. *Id.* §§ 3(a)(1)-(5), 76 Fed. Reg. at 13,277-78. The Board has consistently and unanimously found that Al-Alwi's detention remains necessary to protect against a continuing significant threat to U.S. national security.

In 2015, the Board concluded that Al-Alwi's continued detention remains necessary based on his "prior close ties with the Taliban and his praise for the Taliban as expressed during the [Board] hearing," his "evasive and hostile" responses to questions, and the "minimal evidence of a change in [his] mindset." JA641. In 2016, again following a full review, the Board again determined that Al-Alwi's continued detention remains necessary.[9] The Board explained that "it was unable to determine whether the detainee has had a change in his extremist mindset due to his terse and vague responses to questions from Board members, his lack of candor regarding his activities and affiliation with al-Qa'ida, his continued and recent extremist statements, and a lack of delineation from his past extremist views and his present views." The Board also noted Al-Alwi's history of "significant noncompliance while in detention," including "serious offenses against the guard force, and his refusal to acknowledge those offenses." The Board thus concluded that Al-Alwi would be "susceptib[le] to recruitment" by enemy forces if released from detention.[10]

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[9] http://www.prs.mil/Portals/60/Documents/ISN028/FullReview/170109_ISN28_FINAL_DETERMINATION%20FORM_PUBLIC_V1.pdf (Dec. 21, 2016).

[10] The Board also periodically conducts a "file" review of Al-Alwi's detention, during which the Board considers "any relevant new information" and any statement that Al-Alwi chooses to offer. *See* Exec. Order No. 13,567, § 3(c), 76 Fed. Reg. at 13,279. If a file review raises "a significant question" about whether "continued detention is warranted," the Board would "promptly" conduct a full review, like the full reviews described above. *Ibid.* On June 7, 2017, following the most recent file review, the Board determined that there is "no significant question" that Al-Alwi's "continued detention is warranted." http://www.prs.mil/Portals/60/Documents/ISN028/FileReview2/20170607_U_ISN_28_FINAL_DETERMINATION_MFR_PUBLIC.pdf.

III. AL-ALWI'S REQUEST FOR HEIGHTENED PROCEDURAL PROTECTIONS IS FORFEITED AND FORECLOSED BY CIRCUIT PRECEDENT

Al-Alwi contends (Br. 43-54), for the first time on appeal, that the Constitution required the district court to consider whether the government presented clear and convincing evidence supporting his detention. Al-Alwi does not dispute that the court properly analyzed his first habeas petition under a preponderance-of-evidence standard. He does not challenge the factual findings in his prior case or assert here that he is not part of the Taliban or Al Qaeda. Apparently anticipating some future challenge to his status as an enemy belligerent, he asks this Court to abandon decisions governing the adjudication of Guantanamo habeas petitions, including *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); and *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011).

Al-Alwi's contention should be rejected on multiple grounds. First, he forfeited this argument by failing to raise it before the district court. *Huron v. Colbert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (reiterating that "it is not the province of an appellate court to hypothesize or speculate about the existence of an injury" that a party "did not assert to the district court") (quotation marks omitted).

Second, this argument is foreclosed by clear Circuit precedent, which a panel of this Court may not overrule. *Awad*, 608 F.3d at 11. Like Al-Alwi, the detainee in *Al-Bihani* argued that "the prospect of indefinite detention in this unconventional war

augurs for * * * at least a clear and convincing" standard of evidence. 590 F.3d at 878. This Court found "no indication" that the Constitution requires that showing, pointing out that *Hamdi* deemed "constitutionally adequate—even for the detention of U.S. citizens"—a burden-shifting scheme that "mirrors a preponderance standard." *Ibid.*; *see also Al-Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010) (explaining that "[i]t is now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition" by an individual detained under the AUMF). Al-Alwi's analogy to civil commitments (Br. 49-50) is likewise unpersuasive; as *Al-Bihani* explains, "courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified." 590 F.3d at 877; *see also Ali*, 736 F.3d at 552.

Al-Alwi also does not explain how a different standard would affect the outcome in his case. He does not challenge his status as an enemy belligerent, which is based principally on his own admissions. There is "overwhelming evidence that active hostilities *are in fact ongoing*." JA1343-44 n.2. The authority to detain Al-Alwi under the AUMF does not turn on whether he continues to pose a threat to national security. *See, e.g.*, *Al-Bihani*, 590 F.3d at 874; *Awad*, 608 F.3d at 11 (explaining that the "authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities"). And the question of Al-Alwi's future dangerousness also is not justiciable, for it involves assessments of national security risks and military

conditions that the judiciary is ill-suited to address. *Ludecke*, 335 U.S. at 170 (ruling that a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *People's Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that the government's finding that "the terrorist activity of [an] organization threatens * * * the national security of the United States" is "nonjusticiable").

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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November 2017

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I hereby certify that on November 3, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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