[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

REPLY 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.

The following international law experts joined an amicus brief filed in this Court in support of initial hearing *en banc* (Doc. 1697839):

Fionnuala Ni Aolain Regents Professor and Robina Chair in Law, Public Policy and Society University of Minnesota Law School	Jennifer Daskal Associate Professor of Law American University, Washington College of Law
William S. Dodge Martin Luther King, Jr. Professor of Law University of California, Davis, School of Law	Donald Francis Donovan Partner, Debevoise & Plimpton LLP

Mark A. Drumbl Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute Lewis Hall, School of Law, Washington and Lee University	Oona A. Hathaway Gerard C. and Bernice Latrobe Smith Professor of International Law Yale Law School
Jenny S. Martinez Professor of Law & Warren Christopher Professor in the Practice of International Law and Diplomacy Stanford Law School	Hope Metcalf Executive Director, Schell Center for International Human Rights and Lecturer, Yale Law School
Kal Raustiala Professor of Law UCLA School of Law	David W. Rivkin Partner, Debevoise & Plimpton LLP Immediate Past President, International Bar Association
Gabor Rona Visiting Professor of Law Cardozo Law School	Beth Van Schaack Visiting Professor & Fellow, Center for Advanced Study in the Behavioral Sciences Stanford University
David Scheffer Mayer Brown/Robert A. Helman Professor of Law Northwestern University Pritzker School of Law	Robert D. Sloane Professor of Law & R. Gordon Butler Scholar in International Law Boston University School of Law
David Sloss John A. and Elizabeth H. Sutro Professor of Law Santa Clara University School of Law	Stephen I. Vladeck Professor of Law University of Texas Law School
David Weissbrodt Regents Professor and Fredrikson & Byron Professor of Law University of Minnesota Law School	

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: *Duran* v. *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.

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TABLE OF AUTHORITIES[2]

CASES

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

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TREATISES

GLOSSARY

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

Pet'r – Opening Brief for Petitioner

Resp'ts – Brief for Respondents

STATEMENT OF THE CASE

A. Military Operations in Afghanistan

The government mischaracterizes the Bilateral Security Agreement (BSA), which doesn't state that "U.S. forces will engage in combat operations when 'mutually agreed' by the parties." Resp'ts 5. It states that "[u]nless otherwise mutually agreed, United States forces shall not conduct combat operations in Afghanistan." I.JA.81. The BSA doesn't "expressly preserve[] the ability of the United States to undertake 'military operations to defeat al-Qaida and its affiliates' in cooperation with the Afghan government," Resp'ts 5; it provides that the parties "agree to continue their close cooperation and coordination toward those ends […] *without unilateral U.S. military counter-terrorism operations*." I.JA.82 (emphasis added). The United States' ability to conduct "force protection," Resp'ts 5, is generally confined to "activities at and in the vicinity of the agreed facilities and agreed areas as are necessary." I.JA.87. United States "counter-terrorism," Resp'ts 5, is no longer unilateral; it is "intended to complement and support ANDSF's counter-terrorism operations, with the goal of maintaining ANDSF lead, and with full respect for Afghan sovereignty[.]" I.JA.82. A reasonable reading of the BSA reveals that it profoundly curtailed U.S. military operations in Afghanistan.

The government cites a letter from President Trump to Congress dated June 6, 2017, Resp'ts 5-6, for the proposition that active hostilities remain ongoing in

Afghanistan. Although the letter contains those words, overall it is consistent with Mr. al-Alwi's description of the conflict. The government also cites a June 2017 report for the same proposition. Resp'ts 6 (citing U.S. Dep't of Defense, Report to Congress: Enhancing Security and Stability in Afghanistan (June 2017)). The one page (of 95) the government cites focuses mainly on "U.S. efforts against ISIS-K," *id.* at 8, a group that didn't form until about the twelfth year of Mr. al-Alwi's incarceration. The rest of the document makes clear that the Afghan conflict, and the United States' role in it, looks nothing like it did in 2001, when Mr. al-Alwi was detained.

Finally, the government cites newspaper articles (not declarations from officials) for the proposition that "the President announced an increase of American troop levels in Afghanistan." Resp'ts 6. But the government doesn't contend that this announcement affected the binding provisions of the BSA.

B. Prior Findings Regarding Mr. al-Alwi

Mr. al-Alwi didn't "admit[]," in any meaningful sense, that he "voluntarily joined the Taliban, stayed at guesthouses operated by Al Qaeda and the Taliban, and attended a Taliban-affiliated training camp." Resp'ts 7. Mr. al-Alwi argued before this Court that the chief evidence against him came from unreliable interrogation reports, and that his prior "counsel did not deny parts of the reports because they had insufficient opportunity to develop a full defense with Petitioner

and argued only inferences instead." Br. Pet'r 55, Case 09-5125, Doc. 1264231 (Sept. 4, 2010). Mr. al-Alwi further argued that he was abused, threatened, and humiliated throughout the period these statements were reported. *Id.* at 54-55. Although this Court disagreed and Mr. al-Alwi hasn't challenged the findings in this case, he never conceded their accuracy and disputes that he is an enemy of the United States. Pet. ¶ 21, I.JA.16.

SUMMARY OF ARGUMENT

The government strips *Hamdi* of its plain meaning, effectively arguing that no set of practical circumstances, however different from those of prior conflicts that informed the development of the law of war, would affect AUMF detention authority. If the conventional understanding of detention authority hasn't unraveled after fifteen years of Moath al-Alwi's indefinite detention, then it never will and the Supreme Court will have spoken for naught not only in 2004, but also in 2008 in *Boumediene*.

Barring the narrowing statutory construction urged here, the Court must find that Mr. al-Alwi's potentially lifelong imprisonment would violate the Constitution's guarantee of substantive due process. That conclusion would square with *Boumediene* and wouldn't be foreclosed by this Court's precedents.

Alternatively, U.S. active hostilities in the relevant conflict that led to Mr. al-Alwi's captivity have ended and, with them, so has the government's detention

authority. Here, the government demands total judicial deference to select pronouncements by the political branches on facts that determine whether a petitioner goes free. Acquiescing to that demand would eviscerate habeas and incapacitate the judiciary from fulfilling its duty to check the executive conduct at issue here: long-term military detention without charge that ends only when the executive says so.

Finally, should the Court not order the government to charge or release him, Mr. al-Alwi didn't forfeit his call for heightened procedural protections. More rigorous judicial review is well within the relief he requests; indeed, the government's counsel urged the district court *not* to impose such protections. Moreover, it would be a miscarriage of justice not to consider an issue that could consign Mr. al-Alwi to lifelong imprisonment when the Court has discretion to decide even issues that weren't raised below. The government argues that panel decisions foreclose specific procedural remedies, but the cumulative weight of these decisions has so constricted judicial review as to violate the Constitution, after more than fifteen years of detention with no end in sight. The Suspension and Due Process Clauses require a stronger procedural framework now.

The Court shouldn't be distracted by the government's attempt to leverage its Periodic Review Board's findings to paint an unflattering portrait of Mr. al-Alwi, or to intimate that the Board serves as a meaningful substitute for review by

an Article III court. The Board's conclusions are patently unreliable, demonstrably inaccurate, and legally irrelevant.

ARGUMENT

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

1. *Hamdi* Impels Relief

The government's reading of *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), turns part of the Supreme Court's holding into mere surplusage. The *Hamdi* plurality anticipated a conflict so unlike previous ones that conventional law of war principles governing wartime detention—including the authority to detain for the conflict's duration—would no longer apply. *Id.* at 521. It is clear today that the Afghan conflict's practical circumstances are entirely unlike those of previous conflicts that informed the development of the law of war. But, disregarding *Hamdi*, the government contends that detention is authorized for as long as any hostilities continue, regardless of their circumstances or length.

The current conflict in Afghanistan—if viewed as a single, continuous event—is wholly unlike prior U.S. conflicts in its duration. Over a decade, on three occasions, the Supreme Court or individual justices stressed that the passage of time bears on the vitality of AUMF detention authority. Pet'r 16-21. Confronted with this and with the Supreme Court's holding that "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined" and that "[i]f … terrorism continues to

pose dangerous threats to us for years to come, the Court might not have this luxury," *Boumediene* v. *Bush*, 553 U.S. 723, 797-98 (2008), the government offers no response. Nowhere does it grapple with this part of *Boumediene*.

For the thousands of law-of-war prisoners held by the United States in this century and the last, detention has always come to an end. *See* Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625 (2014) (surveying history of U.S. military detention operations since World War I). Surveys of every armed conflict in which the United States was a party over the last century have found that U.S.-held prisoners—including unlawful combatants—have been released to both state and non-state actors, no later than ten years from the start of war. *Id.*

The Afghan conflict has also evolved in other unique and significant ways, Pet'r 6-9, sprawling in geographical scope, Pet'r 19-20, and ever-shifting in the identity of combatant parties. Pet'r 8-9, 19-20. Even the bilateral legal framework governing the U.S. role in Afghanistan has changed dramatically. Pet'r 7-9, 33-36. Today, it is Afghanistan's fight, being waged with U.S. backing, not unlike our role in many other conflicts throughout the world.

In all these ways, it is clear that the current conflict's circumstances couldn't be more different from those of the conflicts that informed the development of the law of war or, indeed, from the circumstances of the same conflict at the time

Hamdi was decided (assuming, *arguendo*, that it is a single, continuing conflict). Yet, in the government's estimation none of that matters. As long as any fighting involving the United States and the Taliban continues in Afghanistan in any way, detention authority endures.

Accepting the government's interpretation of *Hamdi* would be tantamount to holding that no set of practical circumstances differentiating the Afghan conflict from its predecessors would impact the government's authority to continue to imprison Mr. al-Alwi. Looking for a formal declaration of surrender as the sole marker for the end of detention authority in these unprecedented circumstances would misapply the conventional understanding of detention authority to a situation that is anything but conventional. For *Hamdi* to have any meaning, the plurality must have envisioned changes in the conflict's practical circumstances other than a formal declaration of surrender that can affect the Court's understanding of detention authority. And if the differences in practical circumstances setting apart this conflict from its predecessors aren't sufficient to realize the scenario *Hamdi* anticipated, it is hard to imagine what differences would be sufficient. The language in *Hamdi* would be rendered meaningless.[3]

[3] The government's reliance on *Ali* v. *Obama*, 736 F.3d 542 (D.C. Cir. 2013), is misplaced. That case challenged the legality of initial capture and detention, not ongoing detention authority. Moreover, the Court's statement that "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention," *id.* at 552, is plainly *dicta*.

2. The Law of War Supports Relief

The government doesn't dispute that there is no precedent under the traditional law of war for potentially lifelong imprisonment. Instead, it declares that "detention is authorized for conflicts with non-state armed groups." Resp'ts 29. Mr. al-Alwi maintains that he was captured during an international armed conflict (IAC) and that he retains all of the protections afforded prisoners of his condition by customary international law and by the provisions of domestic law implementing it. Pet'r 36-39. Nonetheless, even the law governing non-international armed conflict (NIAC) with non-state groups favors Mr. al-Alwi.

Although fewer rules govern NIAC detention, certain customary international law rules and principles apply that bind the United States. Common Article 3 of the Geneva Conventions provides a baseline of protections, *see Hamdan* v. *Rumsfeld*, 548 U.S. 557, 628-32 (2006), as does Additional Protocol II to the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, June 8, 1977, 16 I.L.M. 1442. In a NIAC, "the need for a valid reason for the deprivation of liberty concerns both the initial reason for such deprivation and the continuation of such deprivation." Jean-Marie Henckaerts & Louise Doswald- Beck, 1 *Customary International Humanitarian Law*, Rule 99, at 348 (lnt'l Comm. of the Red Cross, Cambridge Univ. Press reprtg. 2009). Also,

Customary International Humanitarian Law Rule 128(C) applies in a NIAC and limits the duration of non-criminal detention. *Id.*, Rule 128(C), at 451 ("Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.").

The government ignores these principles, preferring instead to cherry-pick certain IAC rules and to apply them by analogy to the situation at hand, which it deems a NIAC. Unfortunately, this patchwork approach has been endorsed to an extent by various panels of this Court, but it hasn't been addressed *en banc* or by the Supreme Court. For example, the government claims it can hold Mr. al-Alwi until the end of hostilities, which is a concept derived from Article 118 of the Third Geneva Convention that applies only to prisoners of war in an IAC.[4]

Moreover, even in an IAC, the end of active hostilities defines an outer limit for detention. Nothing about that far-end-point suggests that detention cannot end earlier, whether by the government's own discretion or because release is otherwise legally required. *See, e.g., Al-Warafi* v. *Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) (recognizing circumstances where detainee determined to be Taliban member may nonetheless be entitled to habeas grant because release is required by laws of war, including Geneva Conventions and U.S. laws incorporating them).

[4] This is consistent with *Hamdi*, 542 U.S. at 520, where the petitioner was captured fighting U.S. forces on a battlefield in what was then international armed conflict. Pet'r 37-38.

And while the government selectively applies IAC principles to what it deems to be a NIAC, claiming authority to hold Mr. al-Alwi until the end of hostilities, like a prisoner of war in an IAC, it simultaneously denies Mr. al-Alwi protections applicable to IAC detainees, such as Article 75(3) of Additional Protocol I to the Geneva Conventions, because it says it is holding him in a NIAC.

That the government now chooses to label Mr. al-Alwi an "enemy belligerent" doesn't clarify matters. Like the term "enemy combatant" before it, this improvised label has no basis in international humanitarian law and cannot deprive Mr. al-Alwi of due protections. Anyway, combatant status exists only in an IAC. There are no combatants in a NIAC, only government forces and civilians. *See* Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War* 191 (2010) ("The traditional view is that … there are no 'combatants,' lawful or otherwise, in common Article 3 conflicts."). Even in an IAC, combatants who aren't afforded prisoner of war status under the Third Geneva Convention are deemed civilians subject to the protections of the Fourth Geneva Convention, who nonetheless may be criminally prosecuted for participation in hostilities because they lack combat immunity. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 50, June 8, 1977, 16 I.L.M. 1391, 1410 (Additional Protocol I) ("A civilian is any person who does not belong to one of the categories of persons

referred to in Article 4 … of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."). In sum, there is no internationally recognized status other than combatant and civilian.

The government picks which rules or principles of international or non-international armed conflict it wishes to apply to Mr. al-Alwi, and it does so always to his detriment, making his continued imprisonment all the more arbitrary and contrary to U.S. and international law. Given the unprecedented practical circumstances of the conflict from which Mr. al-Alwi's capture arose, the Court should no longer analogize to or borrow from the Third Geneva Convention, but turn rather to the Fourth Geneva Convention, authorizing detention only for so long as a civilian presents an imperative security need, which no one contends that Mr. al-Alwi does.[5]

3. Continued Imprisonment Violates Due Process

The alternative to a narrowing judicial construction of AUMF detention authority consistent with *Hamdi* is potentially lifelong imprisonment, which would violate constitutional safeguards. If the Court wishes to decide that constitutional

[5] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), art. 78, 6 U.S.T. 3516 at *51 (allowing internment of protected persons "for imperative reasons of security").

question, following *Boumediene*'s test for the Constitution's extraterritorial reach to non-U.S.-citizens, it should conclude that the Due Process Clause applies at Guantánamo to limit the duration of Mr. al-Alwi's detention.

The government contends that due process doesn't apply at Guantánamo. Yet, the main case it cites, *Kiyemba* v. *Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (*Kiyemba I*), addressed only the narrow question whether due process authorizes entry into the United States of non-citizens without property or presence in the country. *Id.* at 1026-27. There is no other way to reconcile *Kiyemba I* with *Boumediene* or subsequent panel decisions by this Court. *See Kiyemba* v. *Obama*, 561 F.3d 509, 514 n.* (D.C. Cir. 2009) *(Kiyemba II)* (assuming arguendo that "alien detainees have the same constitutional rights … as … U.S. citizens" detained by U.S. military in Iraq); *id.* at 518 n.4 (Kavanaugh, J., concurring) ("Even assuming that the Guantanamo detainees … possess constitutionally based due process rights" they wouldn't prevail); *Kiyemba* v. *Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) *(Kiyemba III)* ("[P]etitioners never had a constitutional right to be brought to this country and released."); *id.* at 1051 (Rogers, J., concurring) ("Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States."); *cf. Kiyemba* v. *Obama*, 131 S. Ct. 1631, 1631-32 (2011) (Breyer, Kennedy, Ginsburg,

Sotomayor, JJ., statement respecting the denial of certiorari) (third country's offer to resettle detainees transformed their due process claim seeking entry into the United States, which, should circumstances change in the future, may be raised again before the Court). *See also Aamer* v. *Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014) ("As the government does not press the issue, we shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo.").

The other case the government cites, *Al-Madhwani* v. *Obama*, 642 F.3d 1071 (D.C. Cir. 2011), fares no better. There, the Court expressly avoided a due process challenge by a Guantánamo captive to an evidentiary issue that arose during his habeas corpus hearing. *See id.* at 1077 ("We need not address the underlying legal basis for Madhwani's objection[.]"). Whatever else the Court said in that opinion about due process is therefore *dicta*.

Of course, Mr. al-Alwi doesn't wish to enter the United States nor does his case centrally challenge an evidentiary ruling, so neither *Kiyemba* nor *Al-Madhwani* forecloses his claim. Indeed, this Court hasn't addressed a constitutional due process challenge to the duration of captivity at Guantánamo. The government, for its part, doesn't argue that it would be impractical or anomalous to grant Mr. al-Alwi due process rights, or that there are any practical

barriers to the application of due process rights at Guantánamo, at least to the extent necessary to limit the duration of Mr. al-Alwi's captivity. The Court should deem those issues conceded.

4. The Government Must Charge or Release Mr. al-Alwi

The government protests that Mr. al-Alwi "does not explain what standard a court should adopt in setting time limits on detention." Resp'ts' 30-31. To be absolutely clear, whether because detention authority has unraveled under *Hamdi*, or because continued imprisonment shocks the conscience, Pet'r 22-26, this Court should require the government to charge or release Mr. al-Alwi after more than fifteen years in U.S. custody.

While this Court doesn't have to specify in this case exactly when the threshold was crossed, it should rule that today, over fifteen years in, continued and potentially lifelong imprisonment has become unlawful. A court may read a time limit into a statute to avoid a constitutional question, *see, e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (implying "presumptive detention period" and declining to "sanction indefinite detention"), or curb asserted government authority when it violates the Constitution. *See, e.g.*, *Addington* v. *Texas*, 441 U.S. 418, 432-33 (1979) (due process bars civil commitment without showing of danger to others by "clear and convincing evidence").

Nor would requiring the government to charge or release Mr. al-Alwi create "a catch-and-release system." Because wartime detention authority no longer holds, in keeping with both domestic and international law, the government should revert to the familiar processes of the domestic legal regime.

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

The government contends that fighting in Afghanistan continues, Resp'ts 13-15, and Mr. al-Alwi has acknowledged that some fighting in Afghanistan does. The question is whether hostilities remain ongoing in the conflict that led to his capture,[6] and whether the judiciary has any role in answering that question when adjudicating a habeas petition.

In habeas cases, the *judiciary* must decide facts relevant to the legality of detention. Pet'r 29-32. The government contends that *Hamdi* "contains no holding addressing *how* to determine whether the United States remains engaged in hostilities," that the court's role is only "to confirm that the Executive Branch's views … are not implausible," and that *Al-Bihani* v. *Obama*, 590 F.3d 866 (D.C. Cir. 2010) requires deference to the political branches. Resp'ts 21-22. That position aligns neatly with Justice Thomas, who would have deferred to the political branches' determination, but his opinion was in dissent—as the

[6] Pointedly, the question isn't if "Afghanistan has achieved peace," Resp'ts 18, which it hasn't known for generations.

government itself observes. Resp'ts 20. The controlling *Hamdi* plurality asked whether "the record establishes that United States troops are still involved in active combat in Afghanistan." 542 U.S. at 521. Whether a record establishes facts necessary to support detention isn't an absence of guidance. It is a reference to what courts have done for centuries—determine whether custody is lawful based on evidence of record, not simply on the jailer's fiat. *Hamdi*, for instance, didn't defer to the government's declaration that hostilities were continuing; it cited a news article and a Department of Defense briefing for that proposition.[7]

The government nevertheless insists that this Court's decision in *Al-Bihani*, requires "considerable deference" to the president on whether active hostilities endure. Resp'ts 15. *Al-Bihani*, however, rested partly on the view that international law-of-war principles were inapplicable, which seven judges of this Court later dismissed as *dicta*. *Al-Bihani* v. *Obama*, 619 F.3d 1 (D.C. Cir. 2010). Moreover, *Al-Bihani* is now nearly eight years old and so much has changed in that period

[7] Also, in *Hamdi*, the parties weren't arguing that hostilities had ended; they were arguing whether indefinite detention was permissible. The Supreme Court concluded it needn't answer that question at that time. Indeed, in 2004, it didn't need an extensive record to determine whether hostilities were ongoing, and that wasn't a significant issue in the briefing. Thirteen years later the situation is different.

that its assessment of wartime conditions can have little pertinence to the situation today.[8]

Other authority cited by the government doesn't require a habeas court to completely defer to the political branches when deciding whether detention authority has lapsed. *Ludecke* v. *Watkins*, 335 U.S. 160 (1948), interpreted the Alien Enemy Act, which gives the president plenary authority to remove and detain certain resident aliens "[w]henever there is a declared war" or a threat of invasion and the president makes a public proclamation "of the event." Even in the face of that statute, the Supreme Court didn't cede all authority to the political branches to determine when a war ends; rather, it decided the question was "too fraught with gravity even to be adequately formulated when not compelled." *Id.* at 169. It cited *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948), a contemporary case that made clear "the question whether the war power has been properly employed in cases such as this is open to judicial inquiry." *Id.* at 144; *see also Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919)

[8] The government's citation to *Maqaleh* v. *Hagel*, 738 F.3d 317 (D.C. Cir. 2013), is also unavailing. The issue there was whether the court could adjudicate habeas petitions brought by prisoners held by the United States at Bagram Air Base in Afghanistan. The petitioners there didn't contest the ongoing nature of the relevant conflict in Afghanistan at the time. *See* Jt. Br. for Pet'rs-Appellants 13, *Al Maqaleh v. Obama*, Nos. 12-5404, 125399, 12-5401 (D.C. Cir. Apr. 27, 2013) (conceding "Bagram's location within a theatre of war"). As a result, whether the existence of a conflict is a political question was never presented to the Court.

("The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations[.]"). In *Hamilton*, a statute prohibited the sale of distilled spirits "until the conclusion of the present war and thereafter until the termination of demobilization." *Id.* at 160. A distiller argued that the act had become void as World War I wound down. In his opinion, Justice Brandeis didn't simply defer to the political branches, but instead reviewed a wealth of external facts before holding that "we are unable to conclude that the act has ceased to be valid." *Id.* at 163.

Likewise, *Baker* v. *Carr*, 369 U.S. 186 (1962), illustrates that courts don't abdicate to the political branches when rights turn on the existence of war. Noting that "deference rests on reason, not habit," the opinion explains that, where "clearly definable criteria for decision may be available[,] the political question barrier falls away" and a court "is not at liberty to shut its eyes" and can "inquire whether the exigency still existed upon which the continued operation of the law depended." *Id.* at 213-14. The *Baker* Court cited *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 426 (1934), which explained that "even the war power does not remove constitutional limitations safeguarding essential liberties."

A long line of Supreme Court authority makes clear that "the mere existence of a state of war could not suspend or change the operation upon the power of

Congress of the guaranties and limitations of the Fifth and Sixth Amendments[.]" *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) (collecting cases). So it is with the constitutional provision the founders deemed possibly the most important civil liberty of all: the privilege of habeas corpus. *See* The Federalist No. 84 (Hamilton) (arguing that "establishment of the writ of *habeas corpus*," along with prohibition on *ex post facto* laws and titles of nobility, were greater securities to liberty than a bill of rights).

Although the government claims the judiciary must accord "considerable deference" to the executive in determining whether hostilities are ongoing, in reality the government seeks complete deference to presidential or congressional statements it selected. The government would have the Court ignore the evidence marshalled by Petitioner, including President Obama's statements in his State of the Union Address as well as other public fora, that the U.S. combat mission in Afghanistan was "over." Pet'r 7.

Tellingly, the government offers only a footnote to defend its assertion of continued detention authority over Mr. al-Alwi emanating from a conflict in a theater where the United States no longer has detention authority. The government's only comment on the clear provision in the BSA prohibiting it from maintaining or operating detention facilities in Afghanistan is the *ipse dixit* that "a

voluntary agreement about facilities in Afghan sovereign territory does not deprive the United States of authority to detain Al-Alwi." Resp'ts 27 n.8.

Detention here turns on whether active hostilities are ongoing in the relevant conflict, and the district court didn't fairly consider (or even allow development of) the record on that point. A court cannot answer that question solely by deferring to the government's selection of statements made by the president or Congress. *See* Pet'r 4-10. The Suspension Clause and the separation of powers impose on the judiciary the high responsibility of reviewing executive detention, including military detention, and that responsibility cannot be discharged by deferring to the executive on factual issues material to detention.

The government argues that detention authority cannot lapse with "'each successful campaign of a long war'" because that would force the United States "'to constantly refresh the ranks' of the enemy." Resp'ts 25-26 (quoting *Al-Bihani*). This misses the point. If the *relevant* conflict has ended, the presumption that detention prevents an "enemy" from returning to the fight no longer holds. Mr. al-Alwi has no interest in joining a fight led by the government of Afghanistan against ISIS-K and other forces.[9]

[9] The government's reliance on a truncated version of President Trump's remarks merits no discussion, Resp'ts 15 & n.4, other than to point out that he actually stated that "we face [immense security threats] in Afghanistan *and the broader region*," referring not only to Afghanistan, but to Pakistan and India ("two nuclear-armed states"), "South Asia and the broader Indo-Pacific region," and

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

1. Mr. al-Alwi Has Not Forfeited the Issue

The government's terse argument on forfeiture, Resp'ts 33, is misguided. Mr. al-Alwi adequately raised the unconstitutionality of his continued detention in his Petition. *See* I.JA.11 ¶ 2 (alleging that "continued indefinite imprisonment is unlawful pursuant to U.S. Constitution and laws"); *id.* ¶ 4 (Petitioner "currently being held in violation of the U.S. Constitution and laws"); I.JA.12 ¶ 5 ("Respondents are currently imprisoning Petitioner … 'in violation of the Constitution … of the United States.'"). He asked the court to "grant such other relief as it may deem appropriate in order to protect [his] rights under common law, the U.S. Constitution, federal statutes, and international law." I.JA.23.

Although the record below is abbreviated because the government moved to dismiss—a questionable practice in habeas litigation—it makes clear that a core question considered was whether military detention authority lapses or diminishes after fifteen years and with no end in sight. If Mr. al-Alwi prevailed on that question, the *remedy* might have been an order of release, or it might have been "other relief … to protect Mr. al-Alwi's rights under … the U.S. Constitution, federal statutes, and international law," such as another hearing before an Article

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"Mosul in Iraq." While it is perhaps the president's prerogative to prescribe far-ranging war, it is incumbent upon the judiciary, through habeas corpus, to set boundaries on detention.

III judge to determine if continued detention is warranted under more stringent standards.

The government plainly understood Mr. al-Alwi to be requesting relief in the alternative to release. At oral argument, Petitioner's counsel pointed out that "at this point, the Supreme Court says the judiciary is going to have to step back in. And the judiciary is going to have to ask [if there should] be a limit to detention under the AUMF or a constitutional limit to detention when you have this kind of forever war." III.JA.1327-28. In response, government counsel quoted *Ali* v. *Obama*, 736 F.3d 542, 552 (D.C. Cir. 2013), for the proposition that "absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more stringent over time, it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." JA.1329. This is exactly the issue the government now claims was never raised or argued below.

It is settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Mr. al-Alwi argued below that the war's duration (among other circumstances) undermined the government's authority to continue to detain him and violated constitutional safeguards. He is entitled to expand that argument on appeal by explaining that if this Court declines to order him charged or released, it should

direct application of heightened procedural protections on remand to justify continued indefinite detention that exceeds fifteen years.

Finally, this Court may address an argument even if it wasn't preserved below. *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."); *United States* v. *Booze*, 293 F.3d 516, 519 (D.C. Cir. 2002), (considering argument not raised below to avoid unwarranted reduction of sentence in criminal case); *United States* v. *TDC Mgmt. Corp.*, 288 F.3d 421, 425 (D.C. Cir. 2002) (forfeiture doctrine shouldn't apply where obvious result would be plain miscarriage of justice); *Mulligan* v. *Andrews*, 211 F.2d 28 (D.C. Cir. 1954) (court wouldn't apply forfeiture doctrine where plaintiff might lose livelihood for unlawful removal from government employment). Here, it would be a "plain miscarriage of justice" not to consider an issue that could determine Mr. al-Alwi's lifetime detention.

Habeas is "an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779. It "cuts through all forms and goes to the very tissue of the structure." *Frank* v. *Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). The *Boumediene*

Court itself departed from the practice of remanding questions not decided below, partly because the petitioners had been denied meaningful review of their detention for years. 553 U.S. at 772-73. Given the nature of the issues here, "a remand simply would delay ultimate resolution … by this Court." *Id.* The Court should address them now, as the "costs of delay can no longer be borne by those who are held in custody." *Id.* at 795.

2. The Current Procedural Framework Cannot Support Potential Lifetime Detention

The government's assertions that length of detention is irrelevant and that Mr. al-Alwi isn't entitled to due process should be rejected. The Supreme Court, held that "[t]he intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry." *Boumediene*, 553 U.S. at 783; *see* Pet'r 45-46, 48-50. *Boumediene* was equally clear that meaningful review requires procedural protections, citing the seminal due process decision of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). 553 U.S. at 781.

Still, the government chiefly argues that robust procedural protections aren't required because decisions—some almost a decade old—cannot be revisited. It doesn't address whether these decisions, taken together, so constrict judicial review as to violate the Constitution. Nor has this Court decided whether the cumulative effect of its decisions results in a violation of the meaningful review *Boumediene* found was mandated by the Constitution. *See Rasul* v. *Myers*, 563

F.3d 527, 529 (D.C. Cir. 2009) ("[W]e must adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court."). Simply put, Mr. al-Alwi asks this Court to recognize that judicial review of an executive decision to detain should become more robust when detention reaches fifteen years with no end in sight, and to apply that principle to the cumulative effect on the potency of judicial review of a series of rulings issued over a decade.

The government's claim that more robust procedural protections would make no difference to Mr. al-Alwi also is wrong. The district court didn't review the full record to discern the status of military operations in Afghanistan; it deferred to the political branches' assertions, incorrectly holding that it had to accept the government's litigation position. It didn't, for instance, balance President Obama's clear statement to Congress that the war had ended, with the government's argument that the current fighting is the same war.

Surprisingly, the government offers for this Court's consideration the Periodic Review Board's conclusion that continued detention is necessary. Yet, in other Guantánamo cases, the government insisted courts disregard PRB findings that continued detention is unnecessary. *See, e.g.*, *Nasser* v. *Obama*, 234 F. Supp. 3d 121, 124 (D.D.C. 2017); *Barhoumi* v. *Obama*, 234 F. Supp. 3d 84, 87 (D.D.C. 2017). If the government now argues that habeas courts should defer to PRB conclusions, that position should be stated clearly. There is certainly no basis for

habeas courts to consider PRB conclusions only when they coincide with the government's position.

Anyway, PRBs display almost all of the deficiencies which led the *Boumediene* Court to find the CSRTs weren't an adequate substitute for habeas. The determination is not by an independent judiciary nor is it reviewable by one. The detainee cannot know the allegations against him, except in the most cursory fashion, because they're classified. Counsel similarly doesn't see the government's submission to the PRB in full, and cannot discuss with the client whatever she's allowed to see. A prisoner can't meet counsel to discuss the PRB outside the presence of a military representative (who isn't a lawyer). The introduction of witnesses or evidence is at the Board's discretion and the detainee cannot rely on any information discovered in habeas litigation, although the government can. Only a government-provided interpreter is allowed, leading to uneven interpretation at best.

These shortcomings materialized in Mr. al-Alwi's Board hearings. In the first, interpretation was so poor it interfered with the Board's understanding of Mr. al-Alwi's statements.[10] In addition he was brought to the wrong location, causing

[10] The errors were known only because Mr. al-Alwi's counsel is fluent in Arabic. *See* Tr. PRB Hr'g (Sept. 22, 2015) pp. 1, 5-10, 12, 15-16, 18-19, 21, 25-27, 29, 31, 33-36, 39, 42, 47, 50, 54-56, 68-70, 79, *available at* http://www.prs.mil/Portals/60/Documents/ISN028/150922_U_ISN_28_HEARING_TRANSCRIPT_DETAINEE_SESSION.pdf.

him distress and the Board to lose patience.[11] In the second hearing, he was deprived of counsel. The hearing was calendared then rescheduled twice and ultimately occurred when neither counsel could be present, although both were standing by at Guantánamo ahead of the first two dates. Other flaws are clear on the record, which counsel aren't permitted to draw upon as they work on the habeas side.

Even so, the Board's decision doesn't withstand scrutiny. Among its concerns are that Mr. al-Alwi didn't have firm plans for his release—ignoring an expert opinion describing several ways his artistic talent would enable him to support himself.[12] The Board criticizes his intent to rely on family support, which is inconsistent with many other decisions where the Board points to family support as an important factor in allowing transfer because it provides the released detainee with stability and a place in society. The government's reliance on flawed PRB

[11] *See* Personal Rep. Statement (Feb. 8, 2016), *available at* http://www.prs.mil/Portals/60/Documents/ISN028/filereview1/20160208_U_ISN028_DETAINEE_WRITTEN_SUBMISSION_PUBLIC.pdf.

[12] Prof. Erin Thompson Letter (Sept. 15, 2016), *available at* https://www.artfromguantanamo.com/moath-alalwi/.

procedures only further highlights the need for heightened procedural protections in any renewed judicial review of Mr. al-Alwi's lengthy detention.[13]

CONCLUSION

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.

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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

[13] Since President Trump's inauguration, every Board decision has been against the detainee, except for one hearing which is still undecided over nine months after the hearing.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Appellate Rule 32(a)(7)(B) because it contains 6,425 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 20th day of November, 2017, I caused copies of the foregoing Reply 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 first-class U.S. mail, postage-prepaid, two hard copies of the brief to the person listed below.

Sonia M. Carson, 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