USA, Guantánamo, End of “Active Hostilities” in Afghanistan?

INTRODUCTORY TEXT: *Two individuals detained by the US at Guantánamo Bay Detention Center challenged the legality of continued detention on the basis that “active hostilities” in Afghanistan had ended. The Courts in both cases ruled against them, finding that “active hostilities” in Afghanistan had not come to an end. The appeal of one of the two was later denied also by the US Supreme Court. This case is particularly conducive to a discussion on the temporal scope of armed conflict and its impact on detention.*

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See for previous developments at Guantánamo Bay Detention Center and in the armed conflict in Afghanistan:

- United States, Status and Treatment of Detainees Held in Guantánamo Naval Base

- United States, Hamdan v. Rumsfeld

- United States, Habeas Corpus for Guantánamo Detainees

- United States, The Obama Administration's Internment Standards

- US/Afghanistan, Transfer of Control over Bagram Prison

- United States, Closure of Guantánamo Detention Facilities

- US: Obama's Speech on Drone Policy

A. RAZAK V. OBAMA

[Source: United States District Court, District of Columbia, Razak v. Obama, 174 F.Supp.3d 300, 29 March 2016, available at http://www.leagle.com/decision/In%20FDCO%2020160330G35/RAZAK%20v.%20OBAMA (footnotes omitted)]

[…]

MEMORANDUM OPINION

Gladys Kessler, United States District Judge

[1] Petitioner Haji Hamdullah has been detained as a prisoner of war by the United States since his capture in 2003. Mr. Hamdullah argues that active hostilities in Afghanistan have ceased and that the United States is therefore obligated under the Third Geneva Convention to release him immediately. Respondents counter that the Authorization for the Use of Military Force [AUMF] continues to authorize Mr. Hamdullah's detention because the United States remains engaged in active hostilities in Afghanistan.

[…]

[2] This matter is before the Court on Petitioner's Motion to Grant Petition for Writ of Habeas Corpus […] [F]or the reasons set forth below, Petitioner's Motion shall be denied.

I. BACKGROUND

A. Mr. Hamdullah

[3] Mr. Hamdullah is an Afghan citizen who was captured by Afghan National Army forces in July 2003 in Afghanistan. […]. He was subsequently transferred to the custody of the United States and detained at Naval Station Guantanamo Bay. […] He has been detained at Guantanamo Bay for over 11 years. […]

[4] Mr. Hamdullah filed a petition for a writ of habeas corpus in 2005, challenging the legality of his detention. […] A Combatant Status Review Tribunal determined in 2006 that Mr. Hamdullah was properly designated as an enemy combatant because of his alleged affiliation with Hezbe-Islami Gulbuddin ("HIG"). […]

[…]

B. The War in Afghanistan

[5] In the immediate aftermath of the attacks of September 11, 2001, Congress passed the Authorization for the Use of Military Force ("AUMF"). […] In Hamdi v. Rumsfeld, a plurality of the Supreme Court ruled that "Congress's "grant of authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain (prisoners of war) [sic; this term does not appear in the Supreme Court decision quoted] for the duration of the relevant conflict." […]; see also Aamer v. Obama […] ("[T]his court has repeatedly held that under the [AUMF], individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing.").

[…]

[6] Beginning in October 2001, U.S. and coalition forces began a military campaign in Afghanistan that consisted of air, land, and sea forces. […]The military campaign drove the Taliban from control over much of Afghanistan by December 2001, "but Taliban, al-Qa'ida, and associated forces continued to operate and conduct attacks in Afghanistan." […] From 2001 until the end of 2014, the United States led a largescale combat mission in Afghanistan known as Operation Enduring Freedom. […]

[7] Secretary [of Defense] Hagel stated that the close of 2014 would bring to an end the "combat mission in Afghanistan." […] The follow-up mission, known as Operation Freedom's Sentinel, began in 2015. Operation Freedom's Sentinel has two purposes: (1) to work with allies and partners "to continue training, advising, and assisting Afghan security forces," and (2) to continue the United States' "counterterrorism mission against the remnants of Al- Qaeda to ensure that Afghanistan is never again used to stage attacks against our homeland." […]

[8] President Obama made similar remarks in a May 2014 speech regarding the end of the combat mission and the Afghan people's assumption of responsibility for securing their country. […] He stated that the United States would "bring America's longest war to a responsible end," in 2014, noting that the number of American troops in Afghanistan would be under 10,000 by the beginning of 2015, down from 180,000 when he took office. […] He continued, "this is how wars end in the 21st century—not through signing ceremonies, but through decisive blows against our adversaries, transitions to elected governments, security forces who take the lead and ultimately full responsibility." […] In his January 20, 2015 State of the Union address, President Obama reiterated his statement that the "combat mission in Afghanistan is over." […]

[9] On September 30, 2014, the United States and Afghanistan executed a Bilateral Security Agreement. […] The Bilateral Security Agreement's stated purpose is to foster close cooperation between the United States and Afghanistan to “strengthen security and stability in Afghanistan, counter terrorism, contribute to regional and international peace and stability, and enhance the ability of Afghanistan to deter [threats against it].” […] The Agreement denies the United States the ability to conduct combat operations in Afghanistan without Afghanistan's agreement, and lays out the United States' role in undertaking “supporting activities.” […]

II. LEGAL STANDARD

A. AUMF Detention

[10] Per the terms of the AUMF, the President

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

[11] The AUMF sets no expiration date and is in fact silent on the issue of when or how it expires. The Supreme Court and Congress however have both provided guidance on the duration of the AUMF. As discussed above, a plurality of the Supreme Court […] held that the AUMF granted the President the authority to detain "for the duration of the relevant conflict." […] In the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"), Congress reaffirmed the provisions of the AUMF and the President's authority to detain covered persons "until the end of hostilities." […] In 2014, our Court of Appeals also reaffirmed that under the AUMF, "individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."[…]

B. Geneva Convention

[12] The Third Geneva Convention was ratified as a treaty by Congress and the President in 1955. […] The first paragraph of Article 118 of the Third Geneva Convention requires that a prisoner of war be released “without delay after the cessation of active hostilities.” […] While Article 118 does not explicitly define “cessation of active hostilities,” the second paragraph does contemplate that cessation of active hostilities might not always be reached through a formal agreement or peace treaty. […] (“In the absence of stipulations [regarding release] in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing

paragraph.")

C. Judicial Review

[13] Petitioner's Petition raises two issues: whether "active hostilities" are considered to have ended, and who makes that determination. Both parties appear to agree that the Court should rely on the President's decision, but differ as to how to interpret President Obama's position. Petitioner relies on speeches made by the President declaring an end to combat operations in Afghanistan […] while Respondents rely on the assertions by individuals in the political branches that active hostilities continue. […]

[14] While entitled to some deference, the President's position is not dispositive. Our Court of Appeals has stated that, under separation of powers principles, "[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on that matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." […] But, the Hamdi plurality recognized that deference to the Executive must have limits. […] ("history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate threat to national security]").

[15] As Judge Lamberth noted in Al Warafi v. Obama, the Hamdi Court held that the AUMF's detention authorization turns partly on whether "the record establishes that United States troops are still involved in active combat in Afghanistan." […] As Judge Lamberth indicated, a "record" implies review by a court, and suggests that Hamdi stands for the proposition that a court can and must examine the issue of whether active combat continues. […]

[…]

III. ANALYSIS

A. Cessation of Active Hostilities

[16] The crux of the Parties' disagreement is whether detention is authorized for the duration of "active combat" or "active hostilities." Compare Hamdi[…] ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force' ...") with Hamdi […] ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."); see also Third Geneva Convention, Art. 118 (prisoners of war must be released "after the cessation of active hostilities").

[17] The "cessation of active hostilities" standard was first adopted in the 1949 Geneva Conventions following

the delayed repatriation of prisoners of war in earlier armed conflicts. […]

[18] The two predecessor multilateral law-of-war treaties to the 1949 Geneva Conventions required repatriation of prisoners of war only “after the conclusion of peace.” […] Repatriation delays arose after World Wars I and II due to a substantial gap in time between the cessation of active hostilities and the signing of formal peace treaties. […] The “cessation of active hostilities” requirement sought to correct this problem, thereby making repatriation no longer contingent on a formal peace accord or political agreement between the combatants. […]

[19] In light of this history, Petitioner correctly interprets the Third Geneva Convention's “cessation of active hostilities” so that final peace treaties are no longer a prerequisite to mandatory release of prisoners of war. Based on that change, Petitioner argues that the Third Geneva Convention contemplates the possibility that some degree of conflict might continue even after the core of the fighting has subsided. […]

[20] Petitioner argues that cessation of active hostilities requires only an end to active combat. […] Petitioner reaches this conclusion by comparing the language of the Third Geneva Convention with language in Articles 6 and 133 of the Fourth Geneva Convention. […]

[21] Article 133 of the Fourth Geneva Convention addresses the internment of civilians in wartime and provides that such internment “shall cease as soon as possible after the close of hostilities.” […] Relying on the Fourth Convention's Commentary, Petitioner attempts to show that “close of hostilities” could be a point in time that might occur after “cessation of active hostilities.”

[22] The Court is not convinced. Indeed, the Commentary Petitioner cites acknowledges that the provisions are similar and “should be understood in the same sense.” […]

[23] Petitioner also looks to Article 6 of the Fourth Geneva Convention, which states that application of the Fourth Geneva Convention “shall cease on the close of military operations.” […] The phrase “close of military operations” was understood to mean “the final end of all fighting between all those concerned.” [Footnote 3 - The main purpose of this statement was to clarify that if more than two nations are involved in a conflict, the Fourth Convention only ceases to apply after the fighting stops between all parties, not just some of the parties. Fourth Convention Commentary at 62.] […] The Court agrees with Petitioner that “cessation of active hostilities” is distinct from “close of military operations,” and that active hostilities can cease prior to the close of military operations.

[24] This distinction is consistent with the differing purposes of Article 6 (defining the period of time in which the Fourth Geneva Convention, in its entirety, applies) and Article 118 (focusing on detention specifically). But, it does not necessarily follow that “cessation of active hostilities” therefore requires only an end to combat operations, as Petitioner argues. […]

[25] For the foregoing reasons, the Court concludes that the appropriate standard is cessation of active hostilities and that active hostilities can continue after combat operations have ceased. But, cessation of active hostilities is not so demanding a standard that it requires total peace, signed peace agreements, or an end to all fighting.

B. Mr. Hamdullah's Detention Under the AUMF

[26] Next, the Court looks to whether active hostilities have, in fact, ceased. Petitioner relies heavily on the Bilateral Security Agreement and the President's speeches regarding the end of the combat mission and war in Afghanistan in support of his argument that active hostilities have ceased.

[27] Petitioner relies on the Bilateral Security Agreement's requirement that the United States receive consent from the Afghan government prior to conducting combat operations in Afghanistan as evidence that combat operations have ceased.[…] Even assuming this to be true, the Court has already determined that “active hostilities” are not the same as “combat operations. […] The Bilateral Security Agreement is not evidence that active hostilities have ceased. Respondents add that although the United States has ended its combat mission in Afghanistan, this shift does not mark the end of active hostilities in Afghanistan, and indeed, fighting still continues. […]

[28] Petitioner cites to speeches by the President, including his 2015 State of the Union Address and his May 2014 Statement on Afghanistan, but notably, none of these statements discuss the end of “active hostilities.” […]The end of the combat mission is not synonymous with the end of active hostilities. […]Indeed, the President has expressly stated that active hostilities continue. […] [The Court cites President Obama] (“The United States currently remains in an armed conflict against al-Qa’ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing”).

[29] Petitioners point to greatly reduced troop numbers in Afghanistan as evidence of cessation of active hostilities. Respondents counter that the continued presence of nearly 10,000 U.S. troops in Afghanistan is actually evidence of ongoing active hostilities. […] While troop numbers alone are not sufficient to determine whether active hostilities persist[…] a United States presence of nearly 10,000 troops certainly supports the conclusion that ongoing active hostilities exist.

[30] Respondents provide numerous examples of ongoing conflict in Afghanistan and instances of hostile forces engaging U.S. personnel. […] In 2015, there were over 360 “close air support missions carried out by the United States in Afghanistan involving the release of at least one weapon.” […] Coalition forces conducted air strikes in southern Afghanistan that destroyed a large al-Qaeda training camp and U.S. armed forces continue to participate in certain ground operations. […]

[31] “The Geneva Conventions require release and repatriation only at the 'cessation of active hostilities.' ” […] As this Court has noted, “The Supreme Court and the D.C. Circuit have repeatedly held that detention under the AUMF is lawful for the duration of active hostilities.” […] While what constitutes “active hostilities” has never been clearly defined, Respondents have provided convincing examples of ongoing hostilities in Afghanistan. Given this evidence, combined with the deference accorded the Executive's determination of when hostilities have ceased, the Court concludes that active hostilities continue in Afghanistan. Mr. Hamdullah's continued detention, therefore, is both authorized under the AUMF and does not violate the Third Geneva Convention.

IV. CONCLUSION

[32] For the foregoing reasons, Petitioner's Motion to Grant Petition for Writ of Habeas Corpus shall be denied. […]

B. US DISTRICT COURT OF THE DISTRICT OF COLUMBIA, AL-ALWI V. TRUMP

[**Source:** United States District Court for the District of Columbia,Al-Alwi v. Trump, Civil Action No. 15-0681 (RJL), 21 February 2017, available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv0681-34]

[…]

MEMORANDUM OPINION

[…] [1] Petitioner Moath Hamza Ahmed Al-Alwi (“Al-Alwi” or “petitioner”) challenges his continued detention at the United States Naval Station at Guantanamo Bay, Cuba, where he has been held since January 2002. Although this Court, […] and our Court of Appeals, […] previously determined that Al-Alwi could lawfully be detained as an enemy combatant under the Authorization for the Use of Military Force (“AUMF”), […] Al-Alwi now argues that the relevant conflict in Afghanistan that justified his detention has now ended, thereby extinguishing the United States’ authority to detain him any longer.

[2] Currently before the Court is Al-Alwi’s Petition for Writ of Habeas Corpus […]. Upon consideration of the pleadings, the law, and the record, and for the reasons stated below, I find that Al-Alwi’s detention remains lawful […]

[…]

BACKGROUND

[3] Moath Hamza Ahmed Al–Alwi is a Yemeni citizen who was captured in Pakistan in late 2001 and ultimately delivered to United States custody. He has been detained at Guantanámo Bay since January 2002. […] In 2005, Al–Alwi filed a petition for writ of habeas corpus, challenging the legality of his detention. […] In December 2008, I denied his petition, finding that the government had established by a preponderance of the evidence that (1) he stayed at guesthouses in Afghanistan and Pakistan that were associated with the Taliban (and, in at least one instance, al Qaeda); (2) he voluntarily surrendered his passport at a guesthouse closely associated with al Qaeda; (3) he received military training at a Taliban-related camp and travelled to two separate fronts to support Taliban fighting forces; and (4) he remained with his Taliban unit after September 11, 2001 and several United States bombing runs in Afghanistan. […] Based on those findings, I determined that it was "more probable than not that he was 'part of or supporting Taliban or al Qaeda forces' both prior to and after the initiation of U.S. hostilities" and thus could be lawfully detained under the AUMF. […] In 2011, our Circuit Court held that Al-Alwi was "part of" al Qaeda or Taliban forces and affirmed his detention. […]

[4] Al–Alwi filed his second and current petition for a writ of habeas corpus in May 2015. […] In his petition, Al–Alwi does not challenge the Court's prior determination that he is an enemy combatant. […] Instead, he alleges that the relevant conflict in Afghanistan that originally justified his detention has concluded and his detention is no longer authorized by the AUMF (and violates the Geneva Convention and the Convention Against Torture). […] In the alternative, Al–Alwi argues that his detention has gone on for so long that it can no longer be reconciled with traditional law of war principles, and he must therefore be released whether or not the conflict is still ongoing. […] For the following reasons, I disagree as to both positions.

[…]

ANALYSIS

[5] Shortly after the September 11, 2001 attacks, Congress passed the Authorization of [sic] the Use of Military Force ("AUMF"), which states

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

[…] The AUMF gives the President authority to detain enemy combatants—i.e., individuals who were "part of" or provided support to al Qaeda and Taliban forces in Afghanistan. […] This Court has already determined that Al–Alwi is an enemy combatant who can be lawfully detained under the AUMF. […] As a result, the issue presented by this petition is not whether the government had the initial authority to detain him, but whether that authority has lapsed in the fifteen years since.

[6] In 2004, a plurality of the Supreme Court observed in *Hamdi v. Rumsfeld* that it was a “clearly established principle of the law of war that detention may last no longer than active hostilities.” […] Informed by the principles of the law of war, the Court held that the AUMF's grant of authority to use “necessary and appropriate force” included within it the “authority to detain (combatants) [sic; this term does not appear in the Supreme Court decision quoted] for the duration of the relevant conflict.” […] In the National Defense Authorization Act of 2012 (“NDAA”), Congress explicitly clarified that the AUMF gives the President authority to detain combatants “under the law of war without trial until the end of hostilities ....” […] Thus, the Court must determine whether “active hostilities” have ceased, such that Al–Alwi's detention is no longer permitted.

[…]

[7] Unfortunately for the petitioner, the record establishes clearly that both Congress and the President agree that the military is engaged in active hostilities in Afghanistan against al Qaeda, the Taliban, and their associated forces. With respect to the executive branch, the record establishes that the President and his national security officials believe and have clearly stated that active hostilities remain ongoing in Afghanistan. An exhaustive review of those statements is not necessary here, but a few representative examples are illustrative. For example, the White House has repeatedly informed Congress about the military's involvement in active hostilities in Afghanistan. In December 2016, President Obama sent a supplemental War Powers letter to Congress to inform them about the status of U.S. armed forces around the world. In the letter, the President stated that U.S. forces remain in Afghanistan to, among other things, “conduct[ ] and support[ ] counterterrorism operations against the remnants of core al-Qa'ida and against ISIL, and tak[e] appropriate measures against those who directly threaten U.S. and coalition forces.” […] The letter also included the President's explicit statement that “the United States remains in an armed conflict, including against the Taliban, and active hostilities remain ongoing.” […] President Obama also made clear in his statements to the public that active hostilities remain ongoing in Afghanistan. For example, the President issued a statement in July 2016 stating that approximately 8,400 troops would remain in Afghanistan through 2017, and that U.S. forces would “remain focused on supporting Afghan forces and going after terrorists.” […]

[8] In his petition, Al-Alwi points to several statements by President Obama in late 2014 and early 2015 indicating that the “combat mission” in Afghanistan was over to support his arguments that active hostilities have ceased. […]

[9] However, when viewed in their proper context, these statements cannot reasonably be construed as a presidential declaration that active hostilities have ended in Afghanistan. Instead, President Obama's statements reflect a transition from Operation Enduring Freedom, which was the military's active combat mission, to Operation Freedom's Sentinel, a support and counterterrorism operation that nonetheless entails active hostilities in Afghanistan. […] Although the President announced a change in the military's focus going forward, he made clear that the United States would continue to engage in active counterterrorism operations in Afghanistan. In fact, in the December 28, 2014 remarks referred to in Al–Alwi's petition, President Obama

explicitly clarified that the United States would maintain a military presence in Afghanistan to “train, advise, and assist Afghan forces and to conduct counterterrorism operations against the remnants of al Qaeda.” […] As such, his comments cannot be construed as a definitive declaration that active hostilities have concluded, particularly when juxtaposed with the other numerous statements from the executive branch expressly stating that active hostilities persist in Afghanistan.

[10] With respect to the legislative branch, Congress passed the AUMF in 2001, which gave the President the authority to use “necessary and appropriate force” in Afghanistan, which remains in effect today. […] Furthermore, as discussed earlier, Congress passed the NDAA in 2012, which affirmed the President's authority “to use all necessary and appropriate force pursuant to the [AUMF].” […] Both indicate that Congress believes that active hostilities are ongoing and has certainly not passed an “authoritative congressional declaration purporting to terminate the war.” […] As a result, his detention under the AUMF remains lawful. [Footnote 3 reads: Al–Alwi also argues that his continued detention is prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 13 […] Protocol Additional I to the Geneva Conventions […] art. 75 (3) […]. Specifically, he argues that the conflict in Afghanistan has ended, requiring his release under the Geneva Convention, and asserts that his continued and indefinite detention has gone on for so long that it constitutes torture, violating the Convention Against Torture. […] As an initial matter, these arguments seem exceedingly likely to fail on the merits—active hostilities remain ongoing in Afghanistan, and the mere length of his detention cannot be characterized as torture. More importantly, Al–Alwi has no judicially enforceable rights under the Geneva Conventions or the Convention Against Torture, whether he invokes them directly or indirectly, and his claims under them must therefore be rejected. […]].

[11] Finally, Al–Alwi argues in the alternative that his fifteen-year detention has gone on for so long that it cannot be reconciled with longstanding principles of war and cannot be justified under the AUMF. […] To support his argument, Al–Alwi points to the following language in the Supreme Court's plurality opinion in *Hamdi*:

[W]e agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.

[…] Al–Alwi argues that the “scenario Justice O'Connor describes has come to pass” and that the unusual nature and length of the conflict in Afghanistan have caused conventional understandings of the law of war to unravel completely. […] Therefore, the Court should order his release whether or not the conflict in Afghanistan continues. I disagree.

[12] Simply put, this case does not present a situation in which petitioner's detention would be inconsistent with the “clearly established principle of the law of war that detention may last no longer than active hostilities” or the rationale underlying that principle. […] After all, 8,400 United States service members are currently stationed in Afghanistan and engage in the use of force, against al Qaeda, Taliban, and associated forces, consistent with the laws of war and in a context similar to that presented to the Supreme Court in *Hamdi*. To say the least, the duration of a conflict does not somehow excuse it from longstanding law of war principles.

CONCLUSION

[13] Thus, for all the foregoing reasons, the Court DENIES petitioner’s Petition for Writ of Habeas Corpus […].

[…]

C. AL-ALWI v. TRUMP, THE US SUPREME COURT REFUSES TO HEAR MR ALWI’S APPEAL

[Source: S.M., The Supreme Court refuses to hear a Guantánamo detainee’s appeal, The Economist, 12 June 2019, available at : https://www.economist.com/democracy-in-america/2019/06/12/the-supreme-court-refuses-to-hear-a-guantanamo-detainees-appeal]

The Supreme Court refuses to hear a Guantánamo detainee’s appeal

[…]

[1] IN JANUARY 2002, Moath al-Alwi, a Yemeni, was one of the first 20 men dispatched to the Guantánamo Bay Naval Base in Cuba and detained as an enemy combatant. Some 780 men have passed through Guantánamo over the past 17 years, and Mr al-Alwi is one of only 40 prisoners remaining. On June 10th, the Supreme Court refused to entertain Mr al-Alwi’s latest legal challenge to his detainment. […]

[…]

[2] […] In March, the District of Columbia Circuit Court of Appeals noted that the National Defence Authorisation Act of 2012 permitted the government to detain enemy combatants until the end of hostilities in the Afghan theatre. With “active combat” still underway—the Air Force has already conducted over 1000 sorties there this year, about a third of those involving weapon fire—there is no doubt that hostilities continue. In any case, it would take a “political act” to bring the war to a close, the court noted, not a judicial

declaration.

[3] So Mr al-Alwi and some three dozen fellow detainees languish at Guantánamo with little hope of release, barring an unlikely vote in Congress to rescind the aging AUMF. Relief from the judiciary remains elusive. Two other pending cases at the DC Circuit Court involve “forever prisoners” Khalid Ahmed Qassim, another Yemeni citizen, and Abdul Razak Ali, an Algerian. Both requested an initial hearing "en banc" (as a full court) at the appeals court […] and were turned down. […] There is little reason to believe either detainee will fare better than Mr al-Alwi did.

[4] But there are at least two Breyeresque [see Document D] judges on the DC Circuit who would like their colleagues to resolve the mess. In an opinion concurring with the decision not to hear Mr Ali’s challenge en banc from the outset, Judge David Tatel (joined by Judge Cornelia Pillard) wrote that the court has never clarified the “Due Process Clause’s reach into Guantánamo Bay”. […]

[5] […] Mr Ali’s claim that “the Due Process Clause has something to say about the length of his confinement”, Judge Tatel wrote, “is serious—and deserves to be taken seriously”. Guantánamo’s prisoners have not been charged with a crime, much less tried for one, yet their detainments are “lengthening into decades, with no end in sight”. The conundrum “requires this court’s careful consideration”.

[…]

D. SUPREME COURT OF THE UNITED STATES, AL-ALWI v. TRUMP, STATEMENT OF JUDGE BREYER

[Source: Supreme Court of the United States, Moath Hamza Ahmed Al-Alwi v. Donald J. Trump, President of the United States, et al., On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, 10 June 2019, available at : https://www.supremecourt.gov/opinions/18pdf/18-740_2c8f.pdf]

[1] The petition for a writ of certiorari is denied. […]

[2] Statement of Justice Breyer respecting the denial of certiorari.

[3] […] In Hamdi v. Rumsfeld, […] a majority of this Court understood the AUMF to permit the President to detain certain enemy combatants for the duration of the relevant conflict. […]

[4] Justice O’Connor’s plurality opinion cautioned that “[i]f the practical circumstances” of that conflict became “entirely unlike those of the conflicts that informed the development of the law of war,” the Court’s “understanding” of what the AUMF authorized “may unravel.” […] Indeed, in light of the “unconventional

nature" of the "war on terror," there was a "substantial prospect" that detention for the "duration of the relevant conflict" could amount to "perpetual detention." […] But as this was "not the situation we face[d] as of th[at] date," the plurality reserved the question whether the AUMF or the Constitution would permit such a result.

[5] In my judgment, it is past time to confront the difficult question left open by Hamdi. […] "Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury" […].

[6] Some 17 years have elapsed since petitioner Moath Hamza Ahmed al-Alwi, a Yemeni national, was first held at the United States Naval Base at Guantanamo Bay, Cuba. In the decision below, the District of Columbia Circuit agreed with the Government that it may continue to detain him so long as "armed hostilities between United States forces and [the Taliban and al-Qaeda] persist." […] The Government represents that such hostilities are ongoing, but does not state that any end is in sight. […] As a consequence, al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today's conflict may differ substantially from the one Congress anticipated when it passed the AUMF, as well as those "conflicts that informed the development of the law of war." […]

[7] "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case." […] I would, in an appropriate case, grant certiorari to address whether, in light of the duration and other aspects of the relevant conflict, Congress has authorized and the Constitution permits continued detention.

Discussion

I. Classification of the Situation and Applicable Law

1.(Document A, paras [1], [3], [5] and [6]; Document B, paras [1], [3] and [5], Document C. paras [1] and [2])

a.How would you describe the situation in Afghanistan at the time Haji Hamdullah fell into the power of the United States? Was there an armed conflict? If so, was it international or non-international in character? Who were the parties to the conflict? What was the applicable law? (GC I-IV, Common Arts 2 and 3)

b.Does the fact that the Court applies GC III and refers to him as a prisoner of war imply that an IAC existed? (GC I-IV, Common Arts 2 and 3)

c.How would you qualify the fighting between the United States and Afghanistan, on the one hand, and the Taliban, on the other hand, in 2016? (GC I-IV, Common Arts 2 and 3)

d.If the conflict is today not of an international character, can the petitioners still invoke GC III? (CIHL, Rule 128)

2.How would you describe the situation in Pakistan at the time Al-Alwi was captured and detained? In your

opinion, was there an armed conflict in Pakistan at the time? What law was applicable to the detention of Al-Alwi? (GC I-IV, Common Arts 2 and 3)
3.Is the “war on terror” a new type of conflict or may it be classified under one of the existing types in IHL? May the US struggle against any group labelled as terrorist fall withing the scope of this armed conflict? What law governs this situation?

II.Temporal scope of application of IHL

4.(Document A, paras [3]-[6], [13]-[29]; Document B, paras [5]-[8], Document D, para. [6])

a.Do the Courts discuss whether the applicability of IHL has ended or only whether under IHL the petitioners should be repatriated because active hostilities have ended? (GC III, Arts 5 and 118)
b.Under international law, when does an IAC end? When does a NIAC end? Are there any differences between these types of conflicts on this question? (GC I-IV, Common Arts 2 and 3; GC III, Art. 12; GC IV, Art. 49)
c.Under international law, how does one determine a conflict has ended in IAC/NIAC? Are the courts correct in requiring a “political act” to establish whether a conflict has ended? Can a party simply declare a conflict is over? Can refusal of a party to recognize the cessation of hostilities impact the temporal scope of a conflict? Are there any factors or elements one must find to establish the end of a conflict? (GC I-IV, Common Arts 2 and 3; GC III, Art. 5; GC IV, Art. 6)
d.What evidence did the courts consider when determining whether the conflict had ended? What evidence did the courts find most persuasive? How does this analysis compare with your analysis in (c)?
e.In your opinion, had the conflict ended in either case? Why or why not? Which evidence did you find most persuasive?

III.Classification of Persons

5.(Document A, paras [1]-[6]; Document B, paras [1]-[5])

a.What was the status, under IHL, of Haji Hamdullah, in your opinion? Is there any additional information you would need to determine his status? What was the U.S. Government’s determination of his status? What rules of IHL governed whether or not he could be detained, on what grounds, and according to what procedures? (GC I-IV, Common Art. 3; GC III, Arts 4, 5; GC IV, Art. 4; CIHL, Rule 99.
b.What was the status, under IHL, of Al-Alwi, in your opinion? If not a prisoner of war, was he a protected person under GC IV? Is there any additional information you would need to determine his status? What was the U.S. determination of his status? What rules of IHL, if any, governed whether or not he could be detained, on what grounds, and according to what procedures? (GC I-IV, Common Art. 3; GC III, Arts 4, 5, 118 and 119; GC IV, Arts 4 and 78; CIHL, Rule 99)
c.When did the petitioners start to be protected by IHL of IACs? Why are they still protected by IHL of IACs today? (GC III, Arts 4, 5; GC IV, Arts 2, 4, 6)
d.Was the transfer of Haji Hamdullah from the custody of Afghan National Army forces into the custody of the United States lawful under IHL? Was his transfer from Afghanistan to Guantanamo Bay lawful under IHL? On what does your determination depend? (GC I-IV, Common Art. 3; GC III, Arts 12, 46, 47 and 48; GC IV, Arts 49, 127-128)
e.Was the transfer of Al-Alwi from (presumably) Pakistani custody into the custody of the United States lawful under IHL? Was his transfer from Pakistan to Guantanamo Bay lawful under IHL? On what does your determination depend? (GC I-IV, Common Art. 3; GC III, Arts 12, 46, 47 and 48; GC IV, Arts 49, 127-128)

f.Could the U.S. have been considered an Occupying Power in Afghanistan? If so, in what way would that affect your answers to (b) - (e) above? (GC I-IV, Common Art. 2; GC IV, Art. 49)

IV.Detention

6.*(Document A, para. [5], [10]-[11]; Document B, para. [5])* In your opinion, is the AUMF consistent with IHL? Why/Why not?

7.*(Document A, para. [12]; Document B, para. [6])* Assuming Haji Hamdullah and Al-Alwi were detained under IHL, when does that body of law foresee that they be released? Does this depend on their pre-capture status as combatants/civilians? (GC I-IV, Common Art. 3; GC III, Art. 118; GC IV, Arts 133-134; CIHL, Rule 128)

8.Under IHL, may the U.S. detain these persons indefinitely? Until the end of the "war on terror"? Why or why not? Under domestic law? Is there a difference? In your opinion, is fifteen years of detention too long? Why or why not? (GC I-IV, Common Art. 3; GC III, Art. 118; GC IV, Arts 133-134; CIHL, Rule 128)

a.*(Document C, paras [4]-[5])* According to Judge Tatel there must be an assessment of the "Due Process Clause" as to the rights of Guantánamo's prisoners. The Due Process Clause requires, under the US Constitution, that detention comply with the principle of legality and that there be judicial oversight in order to safeguard against arbitrary detention. Is the question of Al-Alwi and Haji Hamdullah one of "Due Process"? Does it matter that they have not been convicted of any crime? Does IHL contain anything that might be similar to a "Due Process Clause"? (GC I-IV, Common Art. 3; GC III, Art. 84; P II, Art. 5 and 6; CIHL, Rule 100)

b.*(Document D)* Justice Breyer criticizes the fact that a detention instituted during the "war on terror" might amount to perpetual detention. Does IHL prohibit such detention? What about human rights law? Could more protective provisions of the US constitution prevail over IHL in this regard? (GC I-IV, Common Art. 3; GC III, Art. 118; GC IV, Arts 132-134; CIHL, Rule 128)

9.*(Document A, paras [16]-[25]; Document B, paras [7]-[9])* When must a prisoner of war be repatriated? Is the end of active hostilities a moment in time prior to the end of the applicability of IHL? To the general close of military operations? (GC III, Art. 118; GC IV, Art. 6; CIHL, Rule 128)

a.Must a State repatriate POWs when its participation in an IAC ends even if the conflict goes on?

b.Did the participation of the United States in hostilities in Afghanistan ended at the end of 2014?

c.May a State continue to hold prisoners of war if it terminates its participation in hostilities, but continues to support a party to the conflict?

10.*(Document A, paras [6]-[9])* Did the transition from Operation Enduring Freedom to Operation Freedom's Sentinel mark the end of active hostilities in Afghanistan? Despite President Obama's statement in his January 20, 2015 State of the Union address that the "combat mission in Afghanistan is over"? Why/Why not? (GC I-IV, Common Arts 2 and 3; GC IV, Art. 6)

11.*(Document A, paras [1], [7]-[29], in particular para. [16])* What is the essence of Haji Hamdullah's argument concerning the legality of his detention? Please enumerate the specific elements of his argument. Does the Court agree with his assessment? Why/Why not? What does the Court conclude?

12.*(Document B, paras [1], [6]-[10])* What is the essence of Al-Alwi's argument concerning the legality of his detention? Please enumerate the specific elements of his argument. Does the Court agree with his assessment? Why/Why not? What does the Court conclude?

13.*(Document B, paras [10]-[12])* Al-Alwi makes two alternative arguments concerning the legality of his prolonged detention.

a.Why does Al-Alwi allege a violation of the Convention against Torture and Additional Protocol I? Do you agree with the Court that “the mere length of his detention cannot be characterized as torture”? Why/Why not? Are there any circumstances in which prolonged detention and refusal to release amount to torture? Do you agree that Al-Alwi has no judicially enforceable rights under the Geneva Conventions? If active hostilities had ended, would he not have had a judicially enforceable right to be released? If so, on what basis? (GC III, Arts 13, 118; GC IV, Arts 6, 27, 133-134; P I, Art. 75; CIHL, Rule 128)
b.What are the elements of his second alternative argument concerning the nature of the conflict? Does the Judge agree? Why/Why not? Does your personal opinion align with Al-Alwi’s claim or the Court’s decision? Do you think that IHL rules, as they presently stand, permit the US to indefinitely detain individuals like Al-Alwi and Hamdullah? If he is a prisoner of war? If his detention is only justified by analogy to that of prisoners of war? Would you suggest a change to the rules? (GC III, Arts 13, 118; GC IV, Arts 6, 27, 133-134; P I, Art. 75; CIHL, Rule 128)