RECENT CASES

LAW OF WAR — GUANTÁNAMO DETENTION AUTHORITY — D.C. CIRCUIT HOLDS THE GOVERNMENT'S AUTHORITY HAS NOT UNRAVELED. — *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018).

For the forty detainees who remain at Guantánamo Bay seventeen years after a military detention facility at the U.S. naval base opened,[1] it must feel as though the War on Terror will never end. The success of their efforts to gain release, however, seems to depend on convincing courts that it already has. Recently, in *Al-Alwi v. Trump*,[2] the D.C. Circuit upheld the continued detention of habeas petitioner Moath Hamza Ahmed Al-Alwi, who was designated an enemy combatant for fighting with the Taliban and transferred to Guantánamo in 2002.[3] Al-Alwi argued that the government's detention authority had "unraveled" due to the unprecedented duration and scope of the American war against the Taliban and al Qaeda.[4] But the panel dismissed his claim on the basis that the conflict justifying his detention had not ended.[5] In making that determination, the panel assessed whether hostilities on the ground were ongoing[6] — a traditional standard under the law of war for measuring the lawful duration of detention.[7] The court's analysis, however, highlights the need for a new standard: as applied to the War on Terror, a conflict lacking some conventional boundaries, the end-of-hostilities test provides no serious check on indefinite detention.

In the week after September 11, 2001, Congress passed an Authorization for the Use of Military Force[8] (AUMF) empowering the President to "use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks."[9] That November, President George W. Bush invoked the AUMF and his Article II authority as grounds for the detention of al Qaeda members and others supportive of terrorism against the United States.[10]

---

[1] *The Guantánamo Docket*, N.Y. TIMES (May 2, 2018), https://nyti.ms/2HKdiKY [https://perma.cc/9L2H-FW5E].

[2] 901 F.3d 294 (D.C. Cir. 2018).

[3] *Id.* at 295–96.

[4] *Id.* at 297.

[5] *Id.* at 297–98.

[6] *Id.* at 297; *see also id.* at 299–300.

[7] *Id.* at 298.

[8] Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

[9] *Id.* § 2(a).

[10] Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), *reprinted as amended in* 10 U.S.C. § 801 (2012).

Pursuant to that authority, the U.S. military brought the first set of detainees from the war in Afghanistan to Guantánamo in January 2002.[11]

Two years later, in *Hamdi v. Rumsfeld*,[12] the Supreme Court affirmed the government's asserted authority over the detainees.[13] Justice O'Connor held for a plurality that detention of enemy combatants is a "fundamental incident of waging war" and thus encompassed in Congress's authorization for the use of "necessary and appropriate force."[14] Under "longstanding law-of-war principles," she noted, detention authority lasts for the duration of a conflict, so as to prevent combatants from returning to the battlefield.[15] But Justice O'Connor allowed for the possibility that this "understanding may unravel" — "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[16] Though she argued that no such unraveling in "this unconventional war" had occurred "as of [that] date,"[17] the statement nonetheless seemed to suggest that the unique facts of a conflict could require courts to reevaluate traditional assumptions about war, like the end-of-detention yardstick.

Al-Alwi, a Yemeni citizen raised in Saudi Arabia,[18] is one of the roughly 780 detainees who have been brought to Guantánamo since 2002.[19] Prior to his capture in late 2001, Al-Alwi trained with the Taliban and fought in an al Qaeda–led combat unit in Afghanistan.[20] In 2005, after three years of detention, Al-Alwi filed a habeas petition in the D.C. District Court challenging his designation as an enemy combatant; he claimed that he had no connection with al Qaeda and that the "minimal" support he provided the Taliban was not targeted at U.S. or coalition forces.[21] No action was taken on Al-Alwi's petition until 2008, however, when the Supreme Court held in a separate case that noncitizen Guantánamo detainees have a constitutional right to habeas corpus.[22] After a hearing to assess Al-Alwi's claim, the D.C. District Court denied his petition.[23] Though no evidence was adduced that he had used arms

---

[11] *Shackled Detainees Arrive in Guantanamo*, CNN (Jan. 11, 2002, 11:28 PM), https://cnn.it/2TIchJG [https://perma.cc/TLD3-SZPF].

[12] 542 U.S. 507 (2004).

[13] *Id.* at 518 (plurality opinion).

[14] *Id.* at 519.

[15] *Id.* at 518, 521.

[16] *Id.* at 521.

[17] *Id.* at 520–21.

[18] *Al-Alwi*, 901 F.3d at 296.

[19] *Id.*; *see also The Guantánamo Docket*, *supra* note 1.

[20] *Al-Alwi*, 901 F.3d at 296.

[21] Al Alwi v. Bush, 593 F. Supp. 2d 24, 26–28 (D.D.C. 2008).

[22] *Id.* at 26; *see also* Boumediene v. Bush, 553 U.S. 723 (2008).

[23] *Al Alwi*, 593 F. Supp. 2d at 27.

against U.S. forces, the court held that his "close ties" to the Taliban and al Qaeda before and after the start of the U.S. war in Afghanistan made it more likely than not that he was "part of or supporting Taliban or al Qaeda forces."[24] The D.C. Circuit affirmed.[25]

In 2015, Al-Alwi filed a second habeas petition.[26] This time, he did not contest his enemy-combatant designation.[27] Instead, he claimed that the government's detention authority had expired.[28] Al-Alwi first argued that the "unprecedented" circumstances of the conflict in which he had participated — its duration, its geographic scope, and the variety of parties involved — had caused detention authority to "unravel," as the *Hamdi* plurality had contemplated a decade prior.[29] In the alternative, he argued that the conflict had ended, pointing to certain U.S. actions and statements as evidence.[30] In particular, in a 2014 security agreement with Afghanistan, the United States declared that its forces would no longer conduct combat operations;[31] and later that same year, President Barack Obama announced an end to the U.S. combat mission.[32] In effect, then, Al-Alwi argued the United States had terminated its own detention authority.

The D.C. District Court denied Al-Alwi's habeas petition again.[33] Responding to his first argument, the court held that the government's authority to detain had not unraveled.[34] "To say the least," the court noted, "the duration of a conflict does not somehow excuse it from longstanding law of war principles."[35] As for whether the conflict itself had ended, the court deferred to both the Executive's and Congress's determinations that hostilities in Afghanistan were ongoing, and thus concluded that Al-Alwi's continued detention was (still) authorized under the AUMF.[36]

---

[24] *Id.* at 27–29 (quoting the definition of "enemy combatant," *see id.* at 27, adopted by the district court on remand in *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008)). The D.C. Circuit has held that a preponderance of the evidence standard is constitutional in Guantánamo cases. Odah v. United States, 611 F.3d 8, 13 (D.C. Cir. 2010).

[25] Al Alwi v. Obama, 653 F.3d 11, 13 (D.C. Cir. 2011).

[26] *Al-Alwi*, 901 F.3d at 296.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 297.

[30] *Id.* at 298–300.

[31] *Id.* at 300.

[32] *Id.* at 299–300; *see also* President Barack Obama, Statement on the End of United States Combat Operations in Afghanistan, 2014 DAILY COMP. PRES. DOC. 1 (Dec. 28, 2014) [hereinafter Obama Statement].

[33] Al-Alwi v. Trump, 236 F. Supp. 3d 417, 418 (D.D.C. 2017).

[34] *Id.* at 423.

[35] *Id.*

[36] *Id.* at 421–22.

The D.C. Circuit affirmed.[37] Writing for the panel, Judge Henderson[38] rejected Al-Alwi's argument that the government's authority to detain enemy combatants had unraveled.[39] She first noted that neither the AUMF nor the 2012 National Defense Authorization Act[40]— in which Congress affirmed that the AUMF authorizes detention through the end of hostilities[41] — "places limits on the length of detention in an ongoing conflict."[42] She then characterized the notion of unraveling introduced by Justice O'Connor in *Hamdi* as "merely suggest[ing] the possibility that the duration of a conflict may affect" detention authority.[43] Al-Alwi failed, Judge Henderson held, to identify any principle of international law that undermined the long-accepted rule that authority to detain persists through the end of active hostilities.[44]

As for whether those hostilities were actually ongoing, Judge Henderson noted that their termination is "a political act."[45] The Executive claimed that the AUMF-authorized conflict continued, and the record confirmed its claim.[46] Absent any contrary word from Congress, Judge Henderson reasoned, the Executive's representations controlled.[47] She explained that neither the U.S.-Afghanistan security agreement nor a proclaimed end to the combat mission impacted the inquiry.[48] Though the United States had transitioned to a new operation, a change in the conflict's "form" did not "cut[] off AUMF authorization."[49] All that mattered was whether hostilities on the ground persisted.[50] Because the United States remained in "active combat" with the Taliban and al Qaeda, its authority to detain Al-Alwi had not expired.[51]

Judge Henderson's application of the end-of-hostilities inquiry is consistent with the understanding that detention is justified militarily only as long as fighting is ongoing. But as applied to the conflict in Afghanistan, this traditional understanding would permit seemingly open-ended detention authority. And even if active combat in

---

[37] *Al-Alwi*, 901 F.3d at 295.

[38] Judge Henderson was joined by Chief Judge Garland and Judge Griffith.

[39] *Id.* at 298.

[40] Pub. L. No. 112-81, 125 Stat. 1298 (2011) (codified as amended in scattered sections of the U.S. Code).

[41] *Id.* § 1021(a), (c)(1).

[42] *Al-Alwi*, 901 F.3d at 297.

[43] *Id.* at 298.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 300.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* The panel dismissed three due process arguments Al-Alwi raised on appeal, holding he had forfeited the claims by failing to raise them before the district court. *Id.* at 301.

Afghanistan ended, the authority could likely be sustained on the basis of the broader War on Terror. As applied to a purportedly global battlefield, the end-of-hostilities test provides no serious check on indefinite detention. *Al-Alwi* highlights the need for a standard that better balances the military purpose behind detention with humanitarian considerations underlying the law of war.

A factual end-of-conflict inquiry under the law of war was designed to balance the military purpose of detention with humanitarian interests requiring detainees "not be interned indefinitely."[52] The specific Geneva Convention provision cited by Justice O'Connor in *Hamdi*[53] mandates that prisoners of war be released "without delay after the cessation of active hostilities"[54] — in other words, "once the fighting is over," such that the military justification underlying detention "no longer exists."[55] It was adopted after the Second World War as a response to governments that had held prisoners of war past the end of combat on the ground that the conflict had not been formally ended by treaty or armistice.[56]

In Afghanistan, however, where "fighting does not necessarily track formal timelines,"[57] a purely factual inquiry helps sustain U.S. detention authority through varied stages of an open-ended conflict. The U.S. actions and statements highlighted by Al-Alwi, for instance, represented an effort to bring official combat operations to an end while still ensuring support sufficient for Afghanistan's security.[58] Given that fighting continued even at this reduced level of engagement, the "hostilities" requirement was easily met. Barring U.S. efforts to disengage from

---

[52] CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 208 (1977).

[53] Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (plurality opinion); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2093 n.198 (2005) (concluding the *Hamdi* plurality "was probably relying on Article 118 as evidence of a customary rule of international law").

[54] Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

[55] INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 547 (Jean S. Pictet ed., A.P. de Heney trans., 1960). The Red Cross commentary "is widely viewed as the informal legislative history of the Conventions." Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 182 n.167 (2014).

[56] INT'L COMM. OF THE RED CROSS, *supra* note 55, at 541, 546. The drafters of Art. 118 recognized that detention is "a painful situation which must be ended as soon as possible." *Id.* at 546. The rule amended the original provision under the 1929 Geneva Convention, which required repatriation only "as soon as possible after the conclusion of peace." Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[57] Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) (noting that Art. 118 "serves to distinguish the physical violence of war from the official beginning and end of a conflict").

[58] *See, e.g.*, Obama Statement, *supra* note 32.

Afghanistan entirely, this state of affairs could persist indefinitely.[59] Even a substantial lapse in fighting might not end the conflict under the law-of-war standard: "cessation of active hostilities" is a high bar, arguably requiring "clearly no probability of resumption of hostilities in a near future."[60] Afghanistan's enduring instability, as evidenced by President Donald Trump's stop-and-start efforts to withdraw U.S. troops from the country,[61] suggests that this high bar is unlikely to be met anytime soon.

And even if hostilities in Afghanistan were to cease completely, the U.S. government might be able to maintain its current detention authority on the basis that the broader War on Terror was ongoing. The *Hamdi* plurality's holding was tied to Afghanistan;[62] accordingly, decisions on Guantánamo habeas petitions so far have "depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in *Afghanistan*."[63] But the AUMF includes no geographic limits.[64] Indeed, the U.S. government has used the Act to justify action in at least fourteen countries so far.[65] It has authorized force against groups clearly associated with al Qaeda — the AUMF's main target, but a group that has decentralized since 2001, giving birth to offshoots in the Middle East and Africa.[66] And it has also relied on the AUMF in the fight against ISIS, on the ground that it is a "splinter group."[67] So long as hostilities continue in any of these geographic theaters, even if "against a succession of groups increasingly far removed from" al Qaeda,[68] there will arguably always be a battlefield to which current Guantánamo detainees can return. Thus, under the traditional standard, their detention

---

[59] *See* Pearlstein, *supra* note 55, at 198 ("So long as the U.S. armed forces . . . keep shooting, the government has at least a colorable argument that hostilities continue.").

[60] DELESSERT, *supra* note 52, at 72; *see also id.* at 71–72; DUSTIN A. LEWIS ET AL., INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT 38–39 (2017) (noting the Department of Defense's adoption of this interpretation).

[61] *See, e.g.*, Thomas Gibbons-Neff & Mujib Mashal, *U.S. to Withdraw About 7,000 Troops from Afghanistan, Officials Say*, N.Y. TIMES (Dec. 20, 2018), https://nyti.ms/2RhbKRD [https://perma.cc/ZMT8-3ZWW].

[62] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

[63] Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 213 (2013) (emphasis added).

[64] *See* 50 U.S.C. § 1541 note (2012). Justice O'Connor's "reliance on the status of hostilities in Afghanistan as a barometer for assessing the AUMF's continuing force seems to do more violence than justice to the Act's plain language." Stephen I. Vladeck, Ludecke*'s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SEC. L. & POL'Y 53, 90 (2006).

[65] MATTHEW WEED, CONG. RESEARCH SERV., MEMORANDUM: PRESIDENTIAL REFERENCES TO THE 2001 AUTHORITY FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS (2016).

[66] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013: EXECUTIVE SUMMARY 5 (2014).

[67] HAROLD KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 118 (2018).

[68] *Id.*

will remain perpetually justified. That standard "is premised on the possibility of an identifiable end of the conflict,"[69] but the unconventional nature of today's enemy means there simply may not be any such end to the War on Terror.[70]

Regardless of whether she envisioned this particular conflict as now qualifying for her "unraveling," Justice O'Connor's insight that the unique circumstances of a conflict could require revisiting traditional assumptions about war invites rethinking grounds for long-term detention today. Given that the current standard provides a weak check on indefinite detention, alternatives that better balance the military purpose of detention with humanitarian interests that also underlie the law of war should be considered. One would be to introduce some sort of specific time limit to guard against excessive detention.[71] While released detainees could return to the battlefield, as have more than one hundred former Guantánamo inmates,[72] the fact of detention might have reduced their fighting capacity.[73] The rule could be a blunt one if applied strictly, but time limits distinguishing between categories of detainees — for instance, the able-bodied versus the infirm — might go some way toward alleviating that bluntness.[74]

In a similar vein, a second option, proposed by Professors Jack Goldsmith and Curtis Bradley, would turn on individualized determinations of whether an adversary fighter's continued detention is justified.[75] President Obama institutionalized a version of this approach in 2011 through the Periodic Review Board (PRB), a body of executive

---

[69] Bradley & Goldsmith, *supra* note 53, at 2124; *see also id.* at 2049 ("It is unclear how to conceptualize the defeat of terrorist organizations, and thus . . . the end of the conflict.").

[70] *But see* Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., The Conflict Against al Qaeda and Its Affiliates: How Will It End?, Speech at the Oxford Union (Nov. 30, 2012) (manuscript at 6) (on file with the Harvard Law School Library) (arguing there would be "a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured . . . such that al Qaeda as we know it . . . has been effectively destroyed," *id.* at 8–9).

[71] *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 230 (2011). Bellinger and Padmanabhan identify three alternatives that, for the most part, align with the three discussed here. *See id.* at 230–31.

[72] DIR. OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA 1 (2018), https://www.dni.gov/files/documents/Newsroom/cleanFINAL-for-public-release-GTMO-Reengagement-Sum-for-Unclass-CDA_18-00514.pdf [https://perma.cc/D2JC-8W4P] (finding 123 of the 729 detainees who have been transferred from Guantánamo have reengaged in terrorism as of July 15, 2018).

[73] *See* DELESSERT, *supra* note 52, at 135 (suggesting "[t]here are serious humanitarian grounds to believe that the physical and moral fitness of a prisoner is seriously impaired" by detention).

[74] *Id.* at 110. The Third Geneva Convention already requires release of the seriously sick and wounded prior to the end of hostilities. *See* Third Geneva Convention, *supra* note 54, art. 109; *see also* Bradley & Goldsmith, *supra* note 53, at 2125–26.

[75] *See* Bradley & Goldsmith, *supra* note 53, at 2125; *see also* Bellinger & Padmanabhan, *supra* note 71, at 231.

officials that reviews Guantánamo detentions.[76] In 2015, the PRB determined that the detention of Al-Alwi "remain[ed] necessary to protect against a continuing significant threat to the security of the United States."[77] A drawback of this approach, however, especially to the extent that it lacks a check external to the Executive, is its potential for abuse and political interference.[78]

A third alternative would best grapple with the unprecedented nature of the conflict at hand, tying detention not to the duration of the War on Terror as a whole but rather to specific components of that broader armed conflict.[79] In other words, it would tie detention authority to the precise conflict justifying its exercise. For instance, if fighting between the United States and the Taliban ended through a peace agreement — an increasingly likely, though far from certain, prospect[80] — the U.S. government would forfeit authority to detain a former fighter like Al-Alwi.[81] Given that the particular conflict best understood to justify his detention had ended, his detention would have to cease as well, regardless of any continued threat of terrorism by al Qaeda and its affiliates in other theaters.

In rejecting the unraveling claim, Judge Henderson noted Al-Alwi's failure to advance "an alternative detention rule."[82] Given the absence of any such alternative under existing law, this failure is unsurprising. While the *Al-Alwi* court was correct to note that the duration of an armed conflict alone does not take the conflict out of the traditional detention framework, the practical realities of the War on Terror — in particular its global reach and the nature of the adversary — should require revisiting that framework. A factual inquiry as to whether hostilities continue provides an insufficient check on indefinite detention — a state of affairs obvious to enemy combatants who, like Al-Alwi, are seventeen years into their detention with no end in sight.

---

[76] *See* Exec. Order No. 13,567 § 3, 3 C.F.R. 227, 227–29 (2012). President Trump has adopted the same process. *See* Exec. Order. No. 13,823 § 2(e), 83 Fed. Reg. 4831, 4831 (Feb. 2, 2018).

[77] *Al-Alwi*, 901 F.3d at 296 (alteration in original) (quoting Joint Appendix).

[78] *See* Benjamin R. Farley, *Who Broke Periodic Review at Guantanamo Bay?*, LAWFARE (Oct. 15, 2018, 10:00 AM), https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay [https://perma.cc/9U8V-RD43] (arguing the PRB under President Donald Trump has become "little more than a fig leaf for unreviewable detention"). The PRB approved thirty-eight detainees for release under the Obama Administration, but has approved none under the Trump Administration so far. *Id.*

[79] *See* Bellinger & Padmanabhan, *supra* note 71, at 230; *cf.* DELESSERT, *supra* note 52, at 108 ("[A] reasonable interpretation of Article 118 cannot lead to consider as a whole a situation in which a series of incidents occur in the broader context of a protracted war.").

[80] *See, e.g.*, Rob Nordland & Mujib Mashal, *U.S. and Taliban Edge Toward Deal to End America's Longest War*, N.Y. TIMES (Jan. 26, 2019), https://nyti.ms/2HwQG5C [https://perma.cc/WQW3-8CG5].

[81] *Cf.* Bellinger & Padmanabhan, *supra* note 71, at 230.

[82] *Al-Alwi*, 901 F.3d at 298.