United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 20, 2018 Decided August 7, 2018

No. 17-5067

MOATH HAMZA AHMED AL-ALWI,
APPELLANT

v.

DONALD J. TRUMP, PRESIDENT, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-00681)

Ramzi Kassem argued the cause for the appellant. *John J. Connolly* and *Beth D. Jacob* were with him on the briefs.

Jennifer R. Cowan was on brief for the *amicus curiae* Experts on International Law and Foreign Relations Law in support of initial hearing En Banc.

Sonia M. Carson, Attorney, United States Department of Justice, argued the cause for the appellees. *Douglas N. Letter, Matthew M. Collette* and *Sonia K. McNeil*, Attorneys, were on brief. *Sharon Swingle*, Attorney, entered an appearance.

Before: GARLAND, *Chief Judge*, and HENDERSON and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Moath Hamza Ahmed Al-Alwi, a detainee at the United States Naval Base at Guantanamo Bay, Cuba, petitioned for a writ of habeas corpus. The district court denied the petition. On appeal, Al-Alwi argues that the conflict resulting in his detention is so unprecedented that the United States' authority to detain him has unraveled. He also argues in the alternative that the conflict has ended, thereby terminating the United States' authority to detain him. Finally, he advances due process claims and a request for further fact-finding. For the following reasons, we affirm the judgment of the district court denying Al-Alwi's petition.

I. Background

Shortly after the terrorist attacks of September 11, 2001, the Congress authorized the President to

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

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (AUMF).

Ten years later, the Congress "affirm[ed] that the authority of the President to use all necessary and appropriate force pursuant to" the AUMF "includes the authority" to "detain" persons who "w[ere] a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562 (Dec. 31, 2011). The Congress granted authority to detain such persons "under the law of war without trial until the end of the hostilities authorized by the" AUMF. *Id.* § 1021(c)(1).

Al-Alwi is a Yemeni citizen who grew up in Saudi Arabia. According to the Government and uncontested in this appeal, Al-Alwi stayed in Taliban guesthouses, traveled to a Taliban-linked training camp to learn how to fire rifles and grenade launchers and joined a combat unit led by an al Qaeda official that fought alongside the Taliban. *Al Alwi v. Obama* (*Al Alwi I*), 653 F.3d 11, 13–14 (D.C. Cir. 2011); *see id.* at 20 (noting that Al-Alwi "did not deny" that "majority of the principal facts" Government asserted "were true" (internal quotation omitted)). Al-Alwi was captured in December 2001 and turned over to United States authorities, who detained him at Guantanamo Bay pursuant to the AUMF. Al-Alwi remains at Guantanamo Bay today.

In 2005, Al-Alwi petitioned for a writ of habeas corpus. The district court denied the petition after concluding that the Government's account of Al-Alwi's Taliban-related activities was supported by a preponderance of the evidence, thereby making Al-Alwi an enemy combatant who could lawfully be detained. *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 27–29 (D.D.C. 2008). This Court affirmed. *Al Alwi I*, 653 F.3d at 15–20.

In 2009, the President established an intra-branch process to "review . . . the factual and legal bases for the continued detention of all individuals" held at Guantanamo Bay. Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492 § 2(d), 74 Fed. Reg. 4,897, 4,898 (Jan. 22, 2009). As part of the ongoing process, a Periodic Review Board comprised of senior Executive Branch officials must "periodic[ally] review" detentions at Guantanamo Bay to "ensure" that continued military detentions are "justified." Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). In October 2015, the Periodic Review Board determined that continued detention of Al-Alwi "remain[ed] necessary to protect against a continuing significant threat to the security of the United States." Joint Appendix (JA) 641.

In 2015, Al-Alwi filed a second petition for a writ of habeas corpus, which is the subject of this appeal. Al-Alwi did not challenge the district court's earlier

determination that he remains an enemy combatant. Instead, Al-Alwi alleged that the conflict in Afghanistan that resulted in his detention had ended and therefore the United States "no longer [had] any lawful basis" to detain him. JA 11.

The district court denied the petition. *Al-Alwi v. Trump*, 236 F. Supp. 3d 417 (D.D.C. 2017). This appeal followed.

II. Analysis

On appeal from denial of a habeas petition, we review the "district court's findings of fact for clear error, its habeas determination *de novo*, and any challenged evidentiary rulings for abuse of discretion." *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). As stated earlier, the Government's initial authority to detain Al-Alwi as an enemy combatant after his capture has been asked and answered in the affirmative, *Al Alwi I*, 653 F.3d 11, and remains unaffected by this petition and appeal. Instead, Al-Alwi's petition advances two arguments to support his claim that the Government's established detention authority has expired. First, Al-Alwi argues that the United States' authority to detain him has "unraveled" because the conflict in which he participated is a new species of conflict uninformed by the previous law of war. Second, and alternatively, Al-Alwi argues that the conflict has ended. On a separate and final note, Al-Alwi asserts on appeal due process violations and a need for further discovery in district court. We reject all of Al-Alwi's arguments.

A. Authority to detain has not unraveled

The Congress's "grant of authority" in the AUMF "for the use of 'necessary and appropriate force,'" the United States Supreme Court has held, authorizes detention of enemy combatants "for the duration of the particular conflict in which they were captured." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (plurality opinion) (quoting AUMF); *accord id.* at 579 (Thomas, J., dissenting) ("The Executive Branch . . . has determined that [petitioner] is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail. . . ."); *see Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) ("The AUMF . . . authorizes the Executive Branch to detain" enemy combatants "for the duration of hostilities."). And the 2012 National Defense Authorization Act permits "[d]etention under the law of war . . . until the end of the hostilities authorized by the" AUMF. Pub. L. No. 112-81, § 1021(c)(1). Neither of these enactments places limits on the length of detention in an ongoing conflict. Our baseline, then, is that the AUMF remains in force if hostilities between the United States and the Taliban and al Qaeda continue. *See Ali v. Obama*, 736 F.3d 542, 552 (D.C. Cir. 2013) ("[T]he 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities."). Such hostilities continue, as discussed in more detail *infra*. *See*, *e.g.*, Redacted Declaration of Rear Admiral Andrew L.

Lewis ¶¶ 11–12 (Feb. 1, 2016), JA 754–55 ("Fighting [between the Taliban and U.S. forces] has been nearly continuous since February 2015. . . . From January 2015 to [February 2016], there have been numerous, specific instances of hostile forces, including the Taliban and al-Qaeda, attacking or planning to attack U.S. personnel and facilities in Afghanistan."); United States Air Forces Central Command, 2010–2015 Airpower Statistics (Oct. 31, 2015), JA 579 (indicating United States released 847 weapons during 2015).

Nevertheless, Al-Alwi maintains that traditional law-of-war principles, which the *Hamdi* plurality said grounded its "understanding" of the AUMF's detention authority, 542 U.S. at 521, do not apply to the conflict here because of the conflict's duration, geographic scope and variety of parties involved. The "unprecedented" circumstances of the Afghanistan-based conflict, Al-Alwi argues, "ha[ve] eroded the United States' detention authority under the AUMF." Appellant's Br. 17. But Al-Alwi's cited authorities, *see* Appellant's Br. 16, merely suggest the possibility that the duration of a conflict may affect the Government's detention authority and, in any event, are not controlling. *See Hamdi*, 542 U.S. at 521 (plurality opinion) ("understanding" of detention authority "*may* unravel" if circumstances of conflict "are entirely unlike those" of previous conflicts (emphasis added)); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that Constitution applies at Guantanamo Bay and noting, in context of rejecting Government argument that such holding

would be unprecedented, conflict resulting in Guantanamo Bay detention "is already among the longest wars in American history"); *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (statement of Breyer, J., respecting denial of certiorari) (Court has not "considered whether, assuming detention . . . is permissible, either the AUMF or the Constitution limits the duration of detention"). These statements, then, do not provide a "foundation" for Al-Alwi's theory to prevail or persuade. *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010) (rejecting petitioner's "clean hands" theory he argued undermined Government's authority to detain him in part because "the citation [petitioner] gives to support his theory is not controlling").

Moreover, Al-Alwi has not identified any international law principle affirmatively stating that detention of enemy combatants may *not* continue until the end of active hostilities, even in a long war. Instead, law-of-war principles are open-ended and unqualified on the subject. *See Hamdi*, 542 U.S. at 520 (plurality opinion) (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War and Article 20 of the Hague Convention (II) on Laws and Customs of War on Land as support for "clearly established principle of the law of war" that detention may continue during "active hostilities"); *accord id.* at 588 (Thomas, J., dissenting) (noting that "the power to detain does not end with the cessation of formal hostilities"). Nor has Al-Alwi advanced an alternative detention rule that should apply at this point. Although he urges that we "must impose a limit" on the

Government's statutory authority to continue detaining him, Appellant's Br. 21, he provides no description of a limit and points to no controlling authority setting a possible limit. *Cf. Ali*, 736 F.3d at 552 ("[A]bsent 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.").

Accordingly, we continue to follow *Hamdi*'s interpretation of the AUMF and the National Defense Authorization Act's plain language. Both of those sources authorize detention until the end of hostilities. Although hostilities have been ongoing for a considerable amount of time, they have not ended. As in *Hamdi*, then, "the situation we face" does not support Al-Alwi's theory of unraveling authority because "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan." 542 U.S. at 521 (plurality opinion). Therefore, we reject Al-Alwi's argument that the United States' authority to detain him has "unraveled."

B. Authority to detain has not expired

In the alternative, Al-Alwi argues that the United States' detention authority has expired because the "relevant conflict," *Hamdi*, 542 U.S. at 521 (plurality opinion), in which he was captured and detained has ended. We disagree.

The "termination" of hostilities is "a political act." *Ludecke v. Watkins*, 335 U.S. 160, 168–69 (1948). If the "life of a statute" conferring war powers on the Executive "is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government." *Id.* at 169 n.13; *see also Al-Bihani*, 590 F.3d at 874 (in absence of Congressional definition of end of war, "we defer to the Executive's opinion on the matter"). "Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." *Ludecke*, 335 U.S. at 169.

The question alluded to in *Ludecke* is not compelled here. The AUMF authorizes detention for the duration of the conflict between the United States and the Taliban and al Qaeda. National Defense Authorization Act, Pub. L. No. 112-81, § 1021(a), (b)(2), (c)(1); *Uthman*, 637 F.3d at 402. We affirmed the district court's earlier determination that Al-Alwi was part of either the Taliban or al Qaeda. *Al Alwi I*, 653 F.3d at 15–20. The Executive Branch represents that armed hostilities between United States forces and those entities persist. *See* Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 13, 2016) ("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."), JA 885; Letter from the President to the

Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 6, 2017) ("The United States remains in an armed conflict [in Afghanistan], including against the Taliban, and active hostilities remain ongoing."), perma.cc/Q769-DKQY. The record confirms the Executive Branch's representations. *See*, *e.g.*, Redacted Declaration of Rear Admiral Andrew L. Lewis ¶¶ 11–12 (Feb. 1, 2016), JA 754–55 ("Fighting [between the Taliban and U.S. forces] has been nearly continuous since February 2015. . . . From January 2015 to [February 2016], there have been numerous, specific instances of hostile forces, including the Taliban and al-Qaeda, attacking or planning to attack U.S. personnel and facilities in Afghanistan."); United States Air Forces Central Command, 2010–2015 Airpower Statistics (Oct. 31, 2015), JA 579 (indicating United States released 847 weapons during 2015); Statement of Gen. John F. Campbell (Mar. 4, 2015), JA 124 ("[W]e continue to attack the remnants of al-Qaeda" in Afghanistan). Al-Alwi does not contest the accuracy of this record and his counsel conceded at oral argument that "there is a shooting war in Afghanistan [that] involves U.S. elements." Oral Arg. Tr. 39:19–20.

Al-Alwi argues that the nature of the hostilities has changed such that the "particular conflict in which [he was] captured," *Hamdi*, 542 U.S. at 518 (plurality opinion), is not the same conflict that remains ongoing today. Al-Alwi was captured during Operation Enduring Freedom, the U.S. military campaign launched in 2001 to "defeat[] al Qaeda" and remove the Taliban

from power in Afghanistan. JA 64. President Obama announced the "end" of Operation Enduring Freedom at the end of 2014. JA 63. President Obama contemporaneously announced the "begin[ning]" of Operation Freedom's Sentinel. JA 63. The new Operation "pursue[d] two missions": to "continue [supporting] Afghan security forces" and to "continue our counterterrorism mission against the remnants of Al-Qaeda." JA 63. The transition from Operation Enduring Freedom to Operation Freedom's Sentinel, Al-Alwi contends, terminated the Government's power under the AUMF to detain him.

We disagree. As indicated above, the AUMF authorizes detention during active hostilities between the United States and the Taliban and al Qaeda. Nothing in the text of the AUMF or the National Defense Authorization Act suggests that a change in the form of hostilities, if hostilities between the relevant entities are ongoing, cuts off AUMF authorization. *Cf. Al-Bihani*, 590 F.3d at 874 (rejecting petitioner's argument that "current hostilities are a different conflict" based on Taliban shift from government to non-government form and noting common sense and laws of war "do not draw such fine distinctions"); *Ali*, 736 F.3d at 552 (acknowledging that "this is a long war with no end in sight" but stating that "war against al Qaeda, the Taliban, and associated forces obviously continues" and detention authority under AUMF has no statutory "time limit"). However characterized, the Executive Branch represents, with ample support from record evidence, that the hostilities described in the AUMF

continue. In the absence of a contrary Congressional command, that controls. *See Ludecke*, 335 U.S. at 168–70 (deferring to political branch determination that "war with Germany" persisted despite fact that Germany had "surrender[ed]" and "Nazi Reich" had "disintegrat[ed]").

Al-Alwi also argues that the United States' entry into a bilateral security agreement (Agreement) with Afghanistan "mark[ed] the end of the original armed conflict" resulting in Al-Alwi's detention "and the commencement of a new one." Appellant's Br. 33. In the Agreement, the United States declared that its "forces shall not conduct combat operations in Afghanistan." Security and Defense Cooperation Agreement, Afg.-U.S., Art. 2 ¶ 1, Sept. 30, 2014. Instead, the United States agreed to "undertake supporting activities" to assist Afghan security. *Id.* at Art. 2 ¶ 2. Al-Alwi contends that the United States' new role as a result of the Agreement changed the "relevant conflict" and therefore the United States Government has been divested of authority to detain him.

But the Agreement does not declare an end to the conflict on which Al-Alwi's detention is based and the beginning of a new one. Although the Agreement indicates that the United States' military operations in Afghanistan have changed, at the same time it "acknowledge[s] that U.S. military operations to defeat al-Qaida and its affiliates may be appropriate in the common fight against terrorism." *Id.* at Art. 2 ¶ 4. The Agreement also contemplates "U.S. military counter-terrorism operations." *Id.* It does not declare an end to

the conflict resulting in Al-Alwi's detention and the beginning of a different one.

"If the record establishes that United States troops are still involved in active combat in Afghanistan," detention of "Taliban combatants" is "part of the exercise of 'necessary and appropriate force,' and therefore [is] authorized by the AUMF." *Hamdi*, 542 U.S. at 521 (plurality opinion) (quoting AUMF). The record so manifests here. Although United States troops are involved in combat with a different operation name, they nonetheless remain in active combat with the Taliban and al Qaeda. Accordingly, the "relevant conflict" has not ended. *Id.* The Government's authority to detain Al-Alwi pursuant to the AUMF has not terminated.

C. Due process challenges and discovery request

Al-Alwi raises three additional arguments on appeal. First, he asserts that his continued detention, even if authorized by the AUMF, violates substantive due process protections. Second, he asserts that procedural due process requires more procedural protections in future proceedings, including a greater evidentiary burden of proof, than he has received so far. Third, he asserts that the district court should have allowed limited discovery on the differences between Operation Enduring Freedom and Operation Freedom's Sentinel.

We do not reach the merits of these arguments, however, because Al-Alwi forfeited them. Neither

Al-Alwi's habeas petition nor his opposition to the Government's motion to dismiss mentioned any of these arguments. And Al-Alwi made none of the claims at oral argument in district court. By not asserting these arguments in the district court, Al-Alwi forfeited them and we do not reach them. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1053 (D.C. Cir. 2017) ("issues and legal theories not asserted" in district court "ordinarily will not be heard on appeal" (internal quotation omitted)).

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOATH HAMZA AHMED AL-ALWI,	)	
Petitioner	)	**Civil Action No. 15-0681 (RJL)**
v.	)	
DONALD J. TRUMP, *et al.*,	)	
Respondents.	)	

[/s/ [Illegible]

ORDER

February 21, 2017 [Dts. ## 1, 15]

For the reasons set forth in the accompanying Unclassified Memorandum Opinion, it is hereby

ORDERED that petitioner's Petition for Writ of Habeas Corpus [Dkt. #1] is DENIED; and it is further

ORDERED that respondents' Response to Petition for Writ of Habeas Corpus and Motion to Dismiss or for Judgment Mkt. # 15] is GRANTED; and it is further

ORDERED that this action is hereby DISMISSED in its entirety,

SO ORDERED.

This is a final, appealable Order.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

236 F.Supp.3d 417
United States District Court, District of Columbia.

Moath Hamza Ahmed AL–ALWI, Petitioner
v.
Donald J. TRUMP,[1] et. al., Respondents.

Civil Action No. 15–0681 (RJL)
|
Signed February 21, 2017
|
Filed February 22, 2017

Attorneys and Law Firms

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MEMORANDUM OPINION

[Dkts. ## 1, 15]

RICHARD J. LEON, United States District Judge

Petitioner Moath Hamza Ahmed Al–Alwi ("Al–Alwi" or "petitioner") challenges his continued detention at

[1] Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes President Donald J. Trump for former President Barack H. Obama.

the United States Naval Station at Guantanámo Bay, Cuba, where he has been held since January 2002. Although this Court, *Al–Alwi v. Bush*, 593 F.Supp.2d 24, 28 (D.D.C. 2008), and our Court of Appeals, *Al–Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011), previously determined that Al–Alwi could lawfully be detained as an enemy combatant under the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107–40 § 2(a), 115 Stat. 224 (2002), 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.

Currently before the Court is Al–Alwi's Petition for Writ of Habeas Corpus [Dkt. # 1] and respondents' Response to Petition for Writ of Habeas Corpus and Motion to Dismiss or for Judgment [Dkt. # 15]. 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, DENY his petition for writ of habeas corpus, and GRANT respondents' Motion to Dismiss.

BACKGROUND

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. Pet. for Writ of Habeas Corpus, ¶¶ 14–16 [Dkt. # 1]; Government's Resp. to Pet. at 4 [Dkt. # 15]. In 2005, Al–Alwi filed a petition for writ of habeas corpus,

challenging the legality of his detention. Pet. for Writ of Habeas Corpus, *Al–Alwi v. Bush*, No. 05–cv–2223 [Dkt. # 1]. After the Supreme Court held in *Boumediene v. Bush*, 553 U.S. 723, 732, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), that Guantanámo detainees are entitled to challenge the legality of their detention through habeas corpus, I held an evidentiary hearing to assess his habeas claim. 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. *Al–Alwi v. Bush*, 593 F.Supp.2d 24, 28 (D.D.C. 2008). 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. *Id.* at 29. In 2011, our Circuit Court held that Al–Alwi was "part of" al Qaeda or Taliban forces and affirmed his detention. *Al–Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011).

Al–Alwi filed his second and current petition for a writ of habeas corpus in May 2015. Pet. for Writ of Habeas Corpus, [Dkt. #1]. In his petition, Al–Alwi does not

challenge the Court's prior determination that he is an enemy combatant. *Id.* ¶ 21. 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). *Id.* ¶¶ 35–47. 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. Pet'r's Opp'n to Resp'ts' Mot. to Dismiss at 28 [Dkt. # 16]. For the following reasons, I disagree as to both positions.

STANDARD OF REVIEW

The government bears the burden of proving by a preponderance of the evidence that Al–Alwi is lawfully detained. If the government fails to meet that burden, the Court must grant the petition and order Al–Alwi's release. This is the standard that governed the Court's review of Al–Alwi's original habeas petition. *See* Case Management Order, *Al–Alwi v. Bush*, 05–cv–2223, at 3 (Oct. 31, 2008) [Dkt. # 76] ("The government must establish, by a preponderance of the evidence, the lawfulness of the petitioner's detention. The government bears the ultimate burden of persuasion."). Our Circuit has repeatedly affirmed that a preponderance standard is constitutionally appropriate when reviewing Guantanamo detainee habeas petitions. *See Al Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010) ("It is now well-settled law that a preponderance of the evidence

standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF."); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) ("[A] preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanámo Bay, Cuba.").

ANALYSIS

Shortly after the September 11, 2001 terrorist attacks, Congress passed the Authorization of 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 or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. 107–40, § 2(a), 115 Stat. 224 (Sept. 18, 2001). 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. *Al–Bihani v. Obama*, 590 F. 3d 866, 872 (D.C. Cir. 2010) ("[An individual] is lawfully detained [under the AUMF if he] is . . . 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against

the United States or its coalition partners'"). This Court has already determined that Al–Alwi is an enemy combatant who can be lawfully detained under the AUMF. *Al–Alwi v. Bush*, 593 F.Supp.2d 24, 29 (D.D.C. 2008), *aff'd, Al–Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011). 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.

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." 542 U.S. 507, 520–21, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion) (citing Geneva Convention (III) Relative to the Treatment of Prisoners art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364). 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] for the duration of the relevant conflict." *Id.* at 521, 124 S.Ct. 2633. 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. . . ." NDAA, Pub. L. No. 112–81, §§ 1021(c), (b)(2), 125 Stat. 1298, 1562 (2012). *See also Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) ("[U]nder the [AUMF] . . . individuals may be detained at Guantanámo 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." (citation omitted)). Thus, the Court must determine whether "active hostilities" have ceased, such that Al–Alwi's detention is no longer permitted.

Al–Alwi argues that the Court must undertake its own wide-ranging evidentiary review of the facts on the ground in Afghanistan and determine for itself whether and when active hostilities ended. Pet'r's Opp'n to Resp'ts' Mot. to Dismiss at 12–15 [Dkt. #16]. But controlling authority in this Circuit requires a much more circumscribed inquiry than that. In *Al–Bihani v. Obama*, our Circuit Court rejected a Guantanámo detainee's argument that the United States' war against the Taliban had ended and that he must therefore be released. 590 F.3d 866, 874 (D.C. Cir. 2010). The Court noted that release was required upon the cessation of active hostilities, but held that the "determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Id.* at 874.

Al–Bihani was rooted in a long line of Supreme Court authority recognizing that the courts lack the institutional ability to decide when active hostilities conclude and should afford the political branches substantial deference in the national security arena. *See, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 170, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) (holding that determining when active hostilities conclude is a "matter[] of political judgment for which judges have neither technical

competence nor official responsibility."); *Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51, 57, 43 S.Ct. 486, 67 L.Ed. 858 (1923) ("A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time.") As such, this Court must therefore ascertain whether Congress and the President have determined that active hostilities in Afghanistan have ceased.[2]

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[2] Al–Alwi argues that looking to the political branches gives them "the power to switch the Constitution on or off at will" and ignores the Court's appropriate role in habeas review. Pet'r's Opp'n to Mot. to Dismiss [Dkt. # 16] at 14 (quoting *Boumediene v. Bush*, 553 U.S. 723, 765, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008)). I disagree. It is conceivable that a situation could arise where the political branches represent to a court that hostilities remain ongoing, without any factual support for their representation, or where the evidence affirmatively suggests that hostilities are over. In that case, a court would be forced to wrestle with whether and how to scrutinize the political branches' determination. However, the Supreme Court has warned that whether a court has the authority to determine that "a war though merely formally kept alive ha[s] in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." *Ludecke v. Watkins*, 335 U.S. 160, 169, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948). Fortunately, the question is not compelled here. In addition to showing that the political branches are in agreement about the presence of ongoing hostilities, the government has provided overwhelming evidence that active hostilities *are in fact ongoing*, with thousands of U.S. service members engaged in a combination of support and active counterterrorism operations against the Taliban, al Qaeda, and associated forces. *See, e.g.*, Decl. of Rear Admiral Andrew Lewis (redacted, unclassified version) [Dkt. # 21–1] (describing ongoing conflict with Taliban and al Qaeda fighters); United States Air Force Central Command Combined Air and Space Operations Center, Combined Forces Air Component Commander 2011–2016 Airpower Statistics [Dkt. # 30–5]

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." Letter from the President—Supplemental 6–Month War Powers Resolution (Dec. 5, 2016), at 3 [Dkt. # 30–1]. 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." *Id.* President Obama also made clear in his statements to the public that active hostilities remain ongoing in

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(listing number of air sorties and weapons releases in Afghanistan from 2011 to 2016).

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." Statement by the President on Afghanistan (July 6, 2016), at 5 [Dkt. # 26–2].

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 argument that active hostilities have ceased. *See, e.g.*, President Barack Obama, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014) ("[O]ur combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion."); President Barack Obama, Remarks by the President in the State of the Union Address at the U.S. Capitol (Jan. 20, 2015) ("[O]ur combat mission in Afghanistan is over."); Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015) ("[O]ur combat mission in Afghanistan is over, and America's longest war has come to a responsible and honorable end.").

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. Redacted, Unclassified Decl. of Rear Admiral Sinclair M. Lewis, ¶¶ 6, 17 [Dkt. #15–2 at 98]. 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*." President Barack Obama, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014) (emphasis added). 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.

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. Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (Sept. 18, 2001). 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]." NDAA, Pub. L. No 112–8 1, §§ 1021(a) and (b)(2), 125 Stat. 1298, 1562. Both indicate that Congress

believes that active hostilities are ongoing and has certainly not passed an "authoritative congressional declaration purporting to terminate the war." *Al–Bihani*, 590 F.3d at 874. As a result, his detention under the AUMF remains lawful.[3]

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[3] Al–Alwi also argues that his continued detention is prohibited by the Convention Against Torture and Additional Protocol I of the Geneva Conventions. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 13, Dec. 10, 1984, 1465 U.N.T.S. 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(3), June 8, 1977, 1125 U.N.T.S. 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. Pet. for Writ of Habeas Corpus, ¶¶ 35–47 [Dkt. # 1]; Pet' r s Opp'n to Resp'ts' Mot. to Dismiss at 28–32 [Dkt. #16]. 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. Military Commissions Act of 2006, Pub. L. No 109–366, 120 Stat. 2600, 2631 (codified in note following 28 U.S.C. § 2241) ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus . . . proceeding to which the United States, or a current or former officer . . . of the United States is a party as source of rights. . . ."); *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013) ("[A] detainee may not invoke the Geneva Conventions in a habeas proceeding."). *See also Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011) (holding that the Convention Against Torture is not self-executing and does not create judicially enforceable rights).

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. Pet'r's Opp'n to Resp'ts' Mot. to Dismiss at 28 [Dkt. #16]. 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.

Hamdi v. Rumsfeld, 542 U.S. 507, 521, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion). 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. Pet'r's Opp'n to Resp'ts' Mot. to Dismiss at 28 [Dkt. #16]. Therefore, the Court should order his

release whether or not the conflict in Afghanistan continues. I disagree.

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. *Hamdi*, 542 U.S. at 520–21, 124 S.Ct. 2633. 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

Thus, for all the foregoing reasons, the Court DENIES petitioner's Petition for Writ of Habeas Corpus [Dkt. # 1] and GRANTS respondents' Response to Petition for Writ of Habeas Corpus and Motion to Dismiss or for Judgment [Dkt. # 15]. An Order consistent with this decision accompanies this Memorandum Opinion.

Public Law 107-40
107th Congress

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

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

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

LEGISLATIVE HISTORY—S.J. Res. 23 (H.J. Res. 64):
CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 14, considered and passed Senate and House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):
Sept. 18, Presidential statement.

SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in sub-section (b)) pending disposition under the law of war.

(b) COVERED PERSONS.—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

(2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111–84)).

(3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.

(4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.

(d) CONSTRUCTION.—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

(e) AUTHORITIES.—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other

persons who are captured or arrested in the United States.

(f) REQUIREMENT FOR BRIEFINGS OF CONGRESS.—The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals considered to be "covered persons" for purposes of subsection (b)(2).