NO. 18-740

In the Supreme Court of the United States

MOATH HAMZA AHMED AL-ALWI,
Petitioner,
v.
DONALD J. TRUMP, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The government's misdirection should not distract the Court from the fundamental issues Moath al-Alwi presents in his petition and the extraordinary state of affairs that the executive and the lower courts have created. Mr. al-Alwi has been detained by the United States without charge or trial for nearly seventeen years. Surveys of every armed conflict in which the United States was a party over the last century have found that U.S.-held prisoners—including unlawful combatants—have been released to both state and non-state actors, no later than ten years from the start of war. *See* Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625 (2014) (surveying history of U.S. military detention operations since World War I). For the thousands of law-of-war prisoners held by the United States in this century and the last, detention has always come to an end. *Id.* The lower courts' failure to properly weigh how the conflict in Afghanistan differs from past conflicts that informed the development of the law of war has turned "the substantial prospect of perpetual detention" this Court foresaw into a grim reality for Mr. al-Alwi. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). His continued imprisonment raises serious constitutional questions, which the Court should avoid by limiting statutory detention authority.

ARGUMENT

I. *Hamdi* Anticipated that Detention Authority May Unravel During the Conflict

The government reads *Hamdi* as a mere restatement of the conventional rule that detention authority endures for the duration of a conflict. It contends that "the 'practical circumstances' sufficient to justify an enemy belligerent's continued detention" are the continuation of combat operations in Afghanistan. Opp'n 13. But the Court, in cautioning that detention authority may unravel, was specifically wrestling with the claim that the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) (2001) ("AUMF"), "does not authorize indefinite or perpetual detention." *Hamdi*, 542 U.S. at 521. Justice O'Connor found that "the substantial prospect of perpetual detention" Hamdi raised was "not farfetched" because "[i]f the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life." *Id.* at 520.

To address that prospect, the Court looked to the conflict's practical circumstances, including the passage of time. *Id.* at 521. This part of *Hamdi* can only be read as discussing the conditions for an eventual departure from the traditional rule, not as reaffirming that rule. And *Hamdi* was not the only

instance that warning was sounded. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 771, 797-98 (2008); *Hussain v. Obama*, 572 U.S. 1079 (2014) (statement of Breyer, J., respecting denial of certiorari). Fifteen years ago, the "substantial prospect of perpetual detention" was but an omen. *Hamdi*, 542 U.S. at 520. Today, that prospect has become a reality for Mr. al-Alwi. The Court should decide whether the government's statutory authority to detain Mr. al-Alwi has unraveled.

II. The NDAA Did Not Displace *Hamdi*

The government claims that the National Defense Authorization Act ("NDAA") of 2012, Pub. L. No. 112-81, § 1021, "codified" or "clarif[ied]" its preferred understanding of the AUMF. Opp'n 11, 14. It did neither and, while the government declares it "controlling" today, *id.*, the President at the time disclaimed that § 1021 "breaks no new ground and is unnecessary." Presidential Statement on Signing H.R. 1540, reprinted in 2011 U.S.C.C.A.N. S13. But to the extent the NDAA reflects AUMF detention authority as construed by the courts, then it necessarily incorporates the possibility of unraveling explicitly reserved in *Hamdi*. *Cf. Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (quoting *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)) ("[W]here ... Congress adopts a new law incorporating sections of a prior law,

Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). If the NDAA, as a budget authorization act, codified the scope of detention authority, then surely that codification could not have been selective or partial, leaving out those parts of *Hamdi* that the government would wish away, and incorporating only those parts that support its position.

Generally, while subsequent legislation may inform the construction of an earlier statute, it "is not, of course, conclusive in determining what the previous Congress meant." *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *See also United States v. Wise*, 370 U.S. 405, 411 (1962) ("Unless subsequent statutes have repealed or amended this aspect of the Sherman Act, our inquiry is at an end."). The rule of *in pari materia* that the government invokes, relying on mid-eighteenth century authority, "certainly makes the most sense when the statutes were enacted by the same legislative body at the same time." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). That is not the case here, with the AUMF dating to 2001, and the NDAA issuing in 2012 to authorize funding. Moreover, the rule cannot be used to import an extension or limitation to the coverage of a statute "where none is now apparent" on the face of that statute. *Id.* at 245. For this additional reason, the NDAA does not foreclose the Court's application of the limit on AUMF detention authority it envisioned in *Hamdi* and *Boumediene*.

And even if Congress meant to codify detention authority bounded by nothing except executive

discretion during a potentially never-ending conflict, disregarding the limit envisioned in *Hamdi* and *Boumediene*, then Congress was simply wrong, and it remains the Court's mandate to correct it. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

III. The Canon of Constitutional Avoidance Applies Here

The government misperceives the locus of statutory ambiguity. Ambiguity resides not in the existence, scope, or original articulation of AUMF detention authority, but in the "outer boundaries" of that power, heretofore left "undefined." *Boumediene*, 553 U.S. at 797-98. The plain text of the AUMF authorizing the use of "all necessary and appropriate force" can be interpreted in two ways: either it permits Mr. al-Alwi's lifelong imprisonment, or it doesn't. The Court's pronouncement fifteen years ago that its understanding of statutory detention authority "may unravel" if the conflict's practical circumstances prove to be sufficiently different, *Hamdi*, 542 U.S. at 521, and the repeated warnings since, *see, e.g., Boumediene*, 553 U.S. at 797-98; *Hussain*, 572 U.S. at 1079 (statement of Breyer, J., respecting denial of certiorari), should impel the Court today to resolve that ambiguity.

Nielsen v. Preap offers the government no aid. There, the Court found the plain text of 8 U.S.C. § 1226(c) to allow only one possible interpretation, "making constitutional avoidance irrelevant." 139 S. Ct. 954, 972 (2019). The AUMF, however, has no plain text that provides for detention authority, let alone the limits of such authority.

The government's other assertion, that "Congress removed that ambiguity in the 2012 NDAA," Opp'n 17, flies in the face of Justice Breyer's statement, two years *after* the NDAA, that this Court has not "considered whether … either the AUMF or the Constitution limits the duration of detention," *Hussain*, 572 U.S. at 1079, making clear that the ambiguity remains intact. The government cannot contend that Justice Breyer was unaware of the NDAA, or that he was confused about the Court's precedents.

To be clear, Mr. al-Alwi's invocation of constitutional avoidance is in service of a statutory argument, not a constitutional claim. As the Court observed in *Clark v. Martinez*, "when a litigant invokes the canon of avoidance, … he seeks to vindicate his own *statutory* rights." 543 U.S. 371, 382 (2005). At argument before the court of appeals, Chief Judge Garland acknowledged as much. Tr. Oral Arg. at 19, *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018) (No. 17-5067) ("JUDGE GARLAND: I understand the avoidance argument, and I'm not suggesting that's been forfeited, but that's still only a statutory interpretation question."). Mr. al-Alwi has advanced his argument on the interpretation of the AUMF from this litigation's inception.

The government makes the unprecedented and remarkable claim that even the indefinite detention of a U.S. citizen for seventeen years would not raise constitutional doubt. Opp'n 16. Because constitutional problems should be avoided "whether or not [they] pertain to the particular litigant before the Court," *Clark*, 543 U.S. at 380-81, that claim alone cries for the Court to reject an interpretation of

the AUMF permitting perpetual detention here in favor of one imposing a durational limit on detention authority.

IV. It Is the Judiciary's Role to Determine the End of the Relevant Conflict for Purposes of Detention Authority

The government does not squarely confront Mr. al-Alwi's argument that the judiciary must have some role in defining the relevant conflict through the office of habeas corpus, the Constitution's principal check on executive detention. *See Boumediene*, 553 U.S. at 797 ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."). Otherwise, the government could detain alleged combatants as long as it could point to some conflict simmering somewhere in the world, no matter how unrelated it might be to the conflict that supported detention originally. The argument is narrow and individualized: it does not plausibly arise until a conflict continues long enough to lose its original character. The point is that when a wartime detainee petitions for a writ of habeas corpus, the judiciary must determine whether the conflict relevant to that detainee has terminated.

The government responds that only the political branches can say when a war ends and, in any event, this one has not because shooting in Afghanistan continues. Opp'n 18-20. This allows the government to avoid addressing almost all the ways the Afghan conflict has changed between 2001 and 2019. *See* Pet. at 3-7.

The one change addressed by the government is the Bilateral Security Agreement ("BSA"), and the government's argument here is misleading. Where the government claims the BSA "contemplates that U.S. forces will engage in combat operations when 'mutually agreed' by the parties," Opp'n 21, the BSA actually states that "[u]nless otherwise mutually agreed, United States forces shall not conduct combat operations in Afghanistan." C.A. App. 81 (BSA art. 2, ¶ 1). The BSA does not say that "the United States will use 'military operations to defeat al-Qaida and its affiliates' in cooperation with the Afghan government," Opp'n 21; it provides that "U.S. military operations to defeat al-Qaida and its affiliates may be appropriate in the common fight against terrorism," but the parties "agree to continue their close cooperation and coordination toward those ends … *without unilateral U.S. military counter-terrorism operations*." C.A. App. 82 (BSA art. 2, ¶ 4) (emphasis added). The United States' ability to conduct "force protection," Opp'n 21, is generally confined to "activities at and in the vicinity of the agreed facilities and agreed areas as are necessary." C.A. App. 87 (BSA art. 7, ¶ 3). U.S. "counter-terrorism" is no longer unilateral; it is "intended to complement and support ANDSF's counter-terrorism operations, with the goal of maintaining ANDSF lead, and with full respect for Afghan sovereignty[.]" C.A. App. 82 (BSA art. 2, ¶ 4).

Finally, the government effectively concedes that the U.S. no longer has authority to detain individuals in Afghanistan. Opp'n 22. But it claims that it can still detain persons it captured in Afghanistan in places outside of Afghanistan. *Id.* How an individual captured in Afghanistan makes it out of the country

without detention in the country is left unexplained. Mr. al-Alwi's point, however, was that the elimination of U.S. detention authority in Afghanistan is a profound change from the Afghan conflict as it existed in 2002, and as to that point the government says nothing. In sum, the BSA profoundly curtailed U.S. military operations in Afghanistan, and the conflict it frames there today is nothing like the one in 2002, when Mr. al-Alwi was first detained.

The government does not address most of Mr. al-Alwi's authorities showing that the judiciary can consider in habeas whether wartime detention authority has lapsed because the relevant conflict has ended. *See* Pet. at 27-29. The exception is the decision in *Ludecke* v. *Watkins*, 335 U.S. 160, 169 (1948), which leaves the door open, as the government acknowledges. Opp'n 20. The other authorities it cites are inapposite. For example, in *United States* v. *Anderson*, 76 U.S. (9 Wall.) 56 (1870), this Court deferred to a Presidential proclamation that the Civil War had ended for purposes of reviewing cases under the Abandoned or Captured Property Act, which allowed any person to reclaim property within two years of the war's end. *Id*. at 70. The Court found that "Congress did not intend to impose on this class of persons the necessity of deciding [the date] for themselves." *Id*. In *The Protector*, 79 U.S. (12 Wall.) 700 (1871), which involved a statute of limitations similar to the one in *Anderson,* the Court relied on executive proclamations declaring the end of war only "in the absence of more certain criteria." *Id.* at 702. *The Three Friends*, 166 U.S. 1 (1897), did not consider whether an armed conflict had ended, but rather whether the political branches recognized

belligerency or political revolt in Cuba—in other words, "the existence of war in a material sense [or] of war in a legal sense." *Id.* at 62–64. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51 (1923), addressed whether possession of property held in trust for an alien enemy is equivalent to physical seizure. *Id.* at 57. And although the Supreme Court in *Baker* v. *Carr* decided that political branches determine the "dates of duration of hostilities," 369 U.S. 186 (1962), the Court also recognized that "deference rests on reason, not habit." *Id.* at 213. When "clearly definable criteria for decision may be available … the political question barrier falls away." *Id* at 214.

Perhaps the judiciary must defer to an executive determination that the "relevant conflict" continues, no matter how fantastic that determination appears in light of a record proffered by a habeas petitioner who has been indefinitely imprisoned without trial for more than seventeen years. But this Court has not decided that important issue, and this case is a clear opportunity to do so.

V. This Court Should Correct the Lower Courts' Definition of an "Enemy Combatant"

The government incorrectly suggests that the circumstances of Mr. al-Alwi's apprehension do not implicate the question that Justice Breyer identified about who is detainable as an "enemy combatant." Justice Breyer stated that the Court "ha[d] not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed conflict

against the United States' in Afghanistan." *Hussain,* 572 U.S. 1079 (2014) (statement of Breyer, J., respecting denial of certiorari). Although "the circumstances of Hussain's detention may involve these unanswered questions, … his petition does not ask [the Court] to answer them" and was therefore denied. *Id.* In key aspects, the circumstances of Mr. al-Alwi's detention are indistinguishable from Hussain's. If Hussain could have presented these questions in Justice Breyer's view, then so can Mr. al-Alwi.

The court of appeals affirmed "that Hussain was a part of al Qaeda or the Taliban when he was captured." *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013). The same court also found "[Mr.] Al Alwi was 'part of al Qaeda or Taliban forces.'" *Al Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011). In both cases, lower courts justified detention on this basis alone, without any finding that either person had engaged in armed conflict against or fired a single shot at U.S. forces.

The underlying factual findings also align in both cases. "After living for ten months at the battlefront in Afghanistan with Taliban guards who armed him, Hussain fled to Pakistan, where he remained until his capture shortly thereafter." *Hussain*, 718 F.3d at 970. "Al Alwi stayed in several guesthouses associated with the Taliban, … was issued a Kalashnikov rifle, ammunition magazines, and grenades, fled to Pakistan, where he was captured and subsequently turned over to U.S. authorities." *Al Alwi*, 653 F.3d at 13–14. Both men fled Afghanistan after September 11, 2001. *Hussain*, 718 F.3d at 970; *Al Alwi*, 653 F.3d at 14.

Nonetheless, the government claims that Mr. al-Alwi *was* "engaged in an armed conflict against the United States," despite there being no evidence of him actually using arms against U.S. or coalition forces. Opp'n 17. It asserts that "[a] member of a combat unit may still be engaged in armed conflict even if he has not yet had occasion to fire a shot against opposing forces." Opp'n 18. This Court took a starkly different view when it last examined the matter. Unlike Mr. al-Alwi, Hamdi was captured in a foreign theatre of war, Afghanistan, and allegedly "surrendered and gave his firearm to [coalition] forces." *Hamdi*, 542 U.S. at 513 (citations omitted). The Court still remanded for further proceedings because it could not conclude, on the basis of the above without more, that both prongs of the Court's definition of a detainable "enemy combatant" were met. 542 U.S. 507, 527, 539 (2004). In that light, the government's claim here that Mr. al-Alwi meets the definition is patently conclusory.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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