

out in the 2015 Joint Comprehensive Plan of Action, justifying this action by pointing to the earlier decision of the United States to withdraw from this commitment and reimpose sanctions.<sup>29</sup> Iran has also warned that it could stop all energy exports through the Strait of Hormuz if sanctions relief is not forthcoming.<sup>30</sup> In September of 2019, a drone attack inflicted major damage on Saudi oil production facilities. Iran denied carrying out the strike, but Pompeo, among others, deemed Iran responsible and warned of consequences.<sup>31</sup>

#### INTERNATIONAL LAW AND NONSTATE ACTORS

##### *U.S. Supreme Court Denies Certiorari in Habeas Case Brought by Guantánamo Bay Detainee Challenging His Continuing Detention*

doi:10.1017/ajil.2019.64

On June 10, 2019, the Supreme Court denied certiorari in a case in which the D.C. Circuit held that the United States could continue to detain an individual at Guantánamo Bay until the cessation of the hostilities that justified his initial detention, notwithstanding the extraordinary length of the hostilities to date.<sup>1</sup> The case, *Al-Alwi v. Trump*, arises from petitioner Moath Hamza Ahmed Al-Alwi's petition for a writ of habeas corpus challenging the legality of his continued detention at the United States Naval Base at Guantánamo Bay.<sup>2</sup> The Supreme Court's denial of certiorari was accompanied by a statement by Justice Breyer observing that "it is past time to confront the difficult question" of how long a detention grounded in the U.S. response to the September 11 attacks can be justified.<sup>3</sup>

<sup>29</sup> *Iran to Restore Arak Reactor to Original Design from July 7*, MEHR NEWS AGENCY (July 3, 2019), at <https://en.mehrnews.com/news/147161/Iran-to-restore-Arak-reactor-to-original-design-from-July-7>. In response, the United States called for a special session of the International Atomic Energy Agency. U.S. Mission to Int'l Orgs. in Vienna Media Note, United States Requests Special Meeting of IAEA Board of Governors (July 5, 2019), at <https://vienna.usmission.gov/media-note-united-states-requests-special-meeting-of-iaea-board-of-governors> [<https://perma.cc/5CR4-UM8R>]; see also U.S. Mission to Int'l Orgs. in Vienna Media Note, Statement by the U.S. Mission Spokesperson on the Special IAEA Board of Governors Meeting Agenda Item 1 (July 10, 2019), at <https://vienna.usmission.gov/media-note-statement-by-the-u-s-mission-spokesperson-on-special-iaea-board-of-governors-meeting-on-iran> [<https://perma.cc/67AX-GP73>] (stating that during this special session "Board Members expressed their concern that Iran is expanding its proliferation-sensitive nuclear activities").

<sup>30</sup> Babak Dehghanpisheh, *Iran Says It Will Further Breach Nuclear Deal in One Month Unless Europeans Act*, REUTERS (Aug. 5, 2019), at <https://www.reuters.com/article/us-mideast-iran/iran-says-it-will-further-breach-nuclear-deal-in-one-month-unless-europeans-act-idUSKCN1UV1TV>.

<sup>31</sup> Zack Budryk, *Pompeo Doubles Down on Blaming Iran for Oil Attacks: "This Was a State-on-State Act of War,"* THE HILL (Sept. 22, 2019), at <https://thehill.com/homenews/sunday-talk-shows/462488-pompeo-doubles-down-on-blaming-iran-for-oil-attack-this-was-a> (noting additional sanctions and deployments ordered by the Trump administration in the wake of this incident and describing Pompeo as saying that "he and President Trump are 'looking for a diplomatic resolution' but 'we're prepared to do the things we need to do'").

<sup>1</sup> *Al-Alwi v. Trump*, 139 S. Ct. 1893 (2019).

<sup>2</sup> *Al-Alwi v. Trump*, 236 F. Supp. 3d 417, 418 (D.D.C. 2017), *aff'd*, 901 F.3d 294, 295 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1893 (2019).

<sup>3</sup> 139 S. Ct., *supra* note 2, at 1894 (Breyer, J., statement respecting denial of certiorari).

A citizen of Yemen, Al-Alwi was around twenty-five years old when he was captured in Pakistan in late 2001.<sup>4</sup> Among other things, he was accused of participating in Taliban military training, supporting Taliban forces on the battlefield, and continuing to support the Taliban after the September 11, 2001 terrorist attacks.<sup>5</sup> He was detained pursuant to the Authorization for Use of Military Force passed by Congress shortly after the attacks (the 2001 AUMF), and he was transferred to Guantánamo Bay in 2002.<sup>6</sup> The 2001 AUMF authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>7</sup>

In 2005, Al-Alwi filed his first petition for a writ of habeas corpus, challenging his classification as an enemy combatant and his detention. The federal district court did not decide Al-Alwi’s case until 2008, after the Supreme Court had held in *Boumediene v. Bush* that individuals detained at Guantánamo Bay were entitled to challenge their detention through habeas corpus petitions.<sup>8</sup> The district court denied his petition and in 2011, the D.C. Circuit affirmed.<sup>9</sup> In October 2015, an administrative tribunal, which was established to ensure that each prisoner’s continued detention was justified, determined that Al-Alwi’s continued detention was necessary.<sup>10</sup> There appear to be no plans to either try Al-Alwi before a military commission or to transfer him to a third country; rather, his continued detention is justified by the United States on the basis of the laws of war.<sup>11</sup>

In May 2015, Al-Alwi filed his habeas corpus petition in the case at hand.<sup>12</sup> He did not challenge the prior determination that his initial detention was lawful, but he claimed that his continued detention was not authorized.<sup>13</sup> More particularly, Al-Alwi argued that the government’s authority to detain him based on the traditional laws of war had “unraveled” because of the unconventional nature of the conflict, or in the alternative, that the government’s authority to detain him had expired because the original conflict in Afghanistan had ended.<sup>14</sup>

Al-Alwi’s arguments drew upon language from the opinion of a plurality of Supreme Court justices in the 2004 decision of *Hamdi v. Rumsfeld*. In that case, the plurality interpreted the 2001 AUMF to authorize the detention of combatants, but it expressed some concern about

<sup>4</sup> The Guantánamo Docket, *Moath Hamza Ahmed al Alwi*, N.Y. TIMES (May 2, 2018), at <https://www.nytimes.com/interactive/projects/guantanamo/detainees/28-moath-hamza-ahmed-al-alwi>.

<sup>5</sup> *Al-Alwi v. Trump*, 236 F. Supp. 3d, *supra* note 2, at 419 (also noting that the finding that at one point Al-Alwi had “voluntarily surrendered his passport at a guesthouse closely associated with al Qaeda”).

<sup>6</sup> *See id.* at 418.

<sup>7</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (further stating that such uses of force are “in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons”).

<sup>8</sup> *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 26 (D.D.C. 2008) (discussing how the case was held until after the Supreme Court’s decision).

<sup>9</sup> *See generally id.*; *Al Alwi v. Obama*, 653 F.3d 11, 13 (D.C. Cir. 2011).

<sup>10</sup> *Al-Alwi v. Trump*, 901 F.3d 294, 296 (D.C. Cir. 2018).

<sup>11</sup> *See* The Guantánamo Docket, *supra* note 4.

<sup>12</sup> *See Al-Alwi v. Trump*, 236 F. Supp. 3d, *supra* note 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

the potential duration of the conflict.<sup>15</sup> It recognized the possibility that if “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 through the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.”<sup>16</sup> The plurality then observed that “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.”<sup>17</sup> Notably, the plurality added that “[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, that understanding may unravel.”<sup>18</sup>

On February 22, 2017, the federal district court denied Al-Alwi’s petition, finding by a preponderance of the evidence that he was lawfully detained as an enemy combatant.<sup>19</sup> The court found that “the record establishes clearly that both Congress and the President agree that the military is engaged in active hostilities in Afghanistan”<sup>20</sup> and that “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.”<sup>21</sup>

On August 7, 2018, the D.C. Circuit affirmed the district court’s decision, upholding Al-Alwi’s continued detention.<sup>22</sup> Like the district court, the circuit court rejected Al-Alwi’s argument that changes in the circumstances of the conflict warranted his release.<sup>23</sup> The court was not persuaded by Al-Alwi’s argument that the conflict’s unprecedented “duration, geographic scope, and variety of parties involved” rendered inapplicable the principle that detention may last until the end of hostilities.<sup>24</sup> The court observed that neither the 2001 AUMF nor a related subsequent statute “places limits on the length of detention in an ongoing conflict.”<sup>25</sup> The court observed:

Our baseline, then, is that the AUMF remains in force if hostilities between the United States and the Taliban and al Qaeda continue. . . .

Al-Alwi’s cited authorities merely suggest the possibility that the duration of a conflict may affect the Government’s detention authority and, in any event, are not

<sup>15</sup> 542 U.S. 507, 520–21 (2004) (plurality opinion) (considering the extent to which the 2001 AUMF authorized the detention of a U.S. citizen considered by the government to be an unlawful combatant).

<sup>16</sup> *Id.* at 520.

<sup>17</sup> *Id.* at 521.

<sup>18</sup> *Id.*

<sup>19</sup> See *Al-Alwi v. Trump*, 236 F. Supp. 3d, *supra* note 2.

<sup>20</sup> *Id.* at 421.

<sup>21</sup> *Id.* at 423 (quoting *Hamdi*, 542 U.S., *supra* note 15, at 520–21).

<sup>22</sup> See *Al-Alwi v. Trump*, 901 F.3d, *supra* note 10, at 295.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 297.

<sup>25</sup> *Id.* The court was referring not only to the 2001 AUMF, but also to the National Defense Authorization Act for Fiscal Year 2012. *Id.* That act “affirms” the president’s power to detain covered combatants “under the law of war without trial until the end of hostilities authorized by the Authorization for Use of Military Force.” National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298 (2011).

controlling. . . . These statements, then, do not provide a “foundation” for Al-Alwi’s theory to prevail or persuade. . . .

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. . . . Nor has Al-Alwi advanced an alternative detention rule that should apply at this point. . . .

Therefore, we reject Al-Alwi’s argument that the United States’ authority to detain him has “unraveled.”<sup>26</sup>

The D.C. Circuit also rejected Al-Alwi’s argument that, although the U.S. military is still operating in Afghanistan, the current conflict is not the same as the one in which he was captured.<sup>27</sup> Al-Alwi pointed to the transition from Operation Enduring Freedom to Operation Freedom Sentinel in 2014, as well as the reduction of the U.S. role in Afghanistan.<sup>28</sup> To the court, however, “[n]othing in the text of the [2001] AUMF . . . suggests that a change in the form of hostilities, if hostilities between the relevant entities are ongoing, cuts off [2001] AUMF authorization.”<sup>29</sup> Moreover, the court noted that the “Executive Branch represents that armed hostilities between the United States forces and these entities persist,” and it concluded that the political branches have the primary authority to determine when hostilities have ended.<sup>30</sup>

Al-Alwi then sought review from the Supreme Court, arguing that the D.C. Circuit did not sufficiently consider whether the unprecedented nature of the conflict had altered the government’s detention authority.<sup>31</sup> His petition observed that, if the hostilities are viewed as a single conflict, it has lasted for seventeen years, making it the longest declared conflict in American history and longer than many conflicts under which the law of war developed.<sup>32</sup>

<sup>26</sup> Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 297–98. The court did not discuss international human rights law. *But see, e.g.*, Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, at para. 22, 36th Sess. May 1–19, 2006, UN Doc. CAT/C/USA/ CO/2 (2006) (“[D]etaining persons indefinitely without charge constitutes per se a violation of the Convention [against Torture.]”); *UN Rights Chief Speaks Out Against US Failure to Close Guantánamo Detention Facility*, UN NEWS (Jan. 23, 2012), at <https://news.un.org/en/story/2012/01/400992-un-rights-chief-speaks-out-against-us-failure-close-guantanamo-detention#.VQ2WoN75j8E> [<https://perma.cc/N8SR-UQFN>] (condemning indefinite detention at Guantánamo Bay as a violation of international law).

<sup>27</sup> *See* Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 299. Whether or not it should be characterized as the same conflict for purposes of the 2001 AUMF, the U.S. conflict in Afghanistan has changed its character considerably since 2001. *See, e.g.*, KENNETH KATZMAN & CLAYTON THOMAS, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY, at 17–22 (2017) (stating that “the enemy” in Afghanistan includes the Islamic State-Khorasan Province, which has only been active in Afghanistan since 2014 and noting that the various enemy groups are not always allied with each other); 159 CONG. REC. H5002-01 (daily ed. July 24, 2013) (statement of Rep. Schiff) (stating that the AUMF is being “used to go after groups like al Shabaab, which may not even have been in existence at the time of 9/11”); U.S. Dep’t of Defense, Enhancing Security and Stability in Afghanistan, at 17 (2019) (listing nine enemy groups that the U.S. is currently fighting in Afghanistan).

<sup>28</sup> *See* Al-Alwi v. Trump, 901 F.3d, *supra* note 10, at 300.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 299 (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948)). For further discussion of this issue, see Recent Case, *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), 132 HARV. L. REV. 1542, 1546–47 (2019).

<sup>31</sup> Petition for Writ of Certiorari at 11, Al-Alwi v. Trump, 139 S. Ct. 1893, *supra* note 1.

<sup>32</sup> *Id.* at 14.

Aside from the unprecedented length of the conflict, the fighting has expanded beyond Afghanistan and beyond the Taliban and Al Qaeda, as enemies have “regrouped and dissolved” since the conflict began and the 2001 AUMF was passed, making the conflict more indeterminate than previous wars.<sup>33</sup> Al-Alwi argued that the Supreme Court’s guidance in *Hamdi* called upon the Court to evaluate whether these circumstances warrant judicially enforceable limits on the duration of military detention:

If the D.C. Circuit’s interpretation of *Hamdi* stands, no set of practical circumstances differentiating the Afghan conflict from its predecessors could impact the government’s authority to imprison Mr. al-Alwi. For *Hamdi* to have any meaning, the plurality must have envisioned that changes in the conflict’s practical circumstances other than a formal declaration of surrender could affect the judicial understanding of detention authority. And if the differences in duration and other circumstances setting apart this conflict from its predecessors are not sufficient, it is hard to imagine what differences would be.<sup>34</sup>

Al-Alwi also argued that the Supreme Court should determine whether the judiciary has the authority to make an independent determination that a particular conflict has ended since “[i]f the judiciary yields to executive declarations in the face of contrary facts, then habeas is no check at all.”<sup>35</sup>

On June 10, 2019, the Supreme Court denied Al-Alwi’s petition for a writ of certiorari.<sup>36</sup> Justice Breyer issued a statement respecting the denial of certiorari, arguing that the time to reevaluate the government’s detention authority has arrived:

In my judgment, it is past time to confront the difficult question left open by *Hamdi*. See *Boumediene v. Bush*, 553 U.S. 723, 797–798, 128 S. Ct. 2229, 171 L.Ed.2d 41 (2008) (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”).

Some 17 years have elapsed since petitioner Moath Hamza Ahmed al-Alwi, a Yemeni national, was first held at the United States Naval Base at Guantánamo Bay, Cuba. In the decision below, the District of Columbia Circuit agreed with the Government that it may continue to detain him so long as “armed hostilities between United States forces and [the Taliban and Al Qaeda] persist.” The Government represents that such hostilities are ongoing, but does not state that any end is in sight. As a consequence, al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today’s conflict may differ substantially from the one Congress anticipated when it passed the AUMF, as well as those “conflicts that informed the development of the law of war.”<sup>37</sup>

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 11–12.

<sup>35</sup> *Id.* at 32.

<sup>36</sup> Al-Alwi v. Trump, 139 S. Ct. 1893, *supra* note 1.

<sup>37</sup> *Id.* at 1894 (Breyer, J., statement respecting denial of certiorari) (citations omitted). Justice Breyer had previously signaled concern about the length of detention justified under the 2001 AUMF. See, e.g., Hussain v. Obama, 572 U.S. 1079 (2014) (Breyer, J., statement respecting denial of certiorari) (agreeing with the

Of the forty current detainees at Guantánamo Bay, twenty-three, like Al-Alwi, are currently held in law-of-war detention and not recommended for transfer.<sup>38</sup> All have been there for at least ten years.<sup>39</sup> Many of the other detainees have also challenged their detention.<sup>40</sup> In 2018, the Center for Constitutional Rights filed a petition for a writ of habeas corpus on behalf of eleven detainees.<sup>41</sup> The petitioners in that case argued that their due process rights have been violated in many ways, including by the effective cessation by President Trump of case-by-case determinations with respect to the potential release, and they also made arguments similar to Al-Alwi's with respect to the duration of detention justified under the 2001 AUMF.<sup>42</sup> Sharqawi Al Hajj, one of the detainees who joined the lawsuit, observed that "[t]he government says my detention is legal because of the indefinite war against terrorism. When terrorism ends, the war will end. So, never."<sup>43</sup> News reporting indicates that the Department of Defense is preparing plans for having the detention center at Guantánamo operational for an additional twenty-five years.<sup>44</sup>

Trump and Congress have also taken action that could affect the future of the Guantánamo Bay detention facility. In January 2018, Trump signed an executive order signaling his support for the detention facility at Guantánamo Bay, both in terms of its continued operation and as a place to which the United States could potentially bring new detainees.<sup>45</sup> Additionally, recent versions of the annual National Defense Authorization Act (NDAA) have contained provisions limiting the president's authority to curtail operations at Guantánamo Bay or to transfer detainees to the United States.<sup>46</sup> With the House of Representatives passing to Democratic control in 2019, it is unclear whether different provisions will be included in the NDAA for 2020, which is likely to pass Congress in the fall of 2019. The version passed by the House in July of 2019 differed from previous NDAA's with respect to Guantánamo in several ways, among them: omitting a provision prohibiting the use of funds for the transfer of Guantánamo detainees to the United States; including a provision

Court's denial of certiorari on the ground that the petition at hand did not seek review of "unanswered questions" like "whether . . . either the [2001] AUMF or the Constitution limits the duration of detention").

<sup>38</sup> The Guantánamo Docket, *supra* note 4.

<sup>39</sup> Human Rights First, *Guantánamo by the Numbers* (Oct. 10, 2018), available at <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

<sup>40</sup> See Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus at 7–9, *Al-Bihani v. Trump*, (D.D.C. filed Feb. 16, 2018) (No. 1:–4-cv-01194-UNA) (including a table with the status of eleven current detainees' petitions for habeas corpus).

<sup>41</sup> Center for Constitutional Rights Press Release, *Gitmo Attorneys to Court: Find Perpetual Detention Unlawful and Order Release* (July 11, 2018), at <https://ccrjustice.org/home/press-center/press-releases/gitmo-attorneys-court-find-perpetual-detention-unlawful-and-order>.

<sup>42</sup> Motion for Order Granting Writ of Habeas Corpus at 1–4, *Al-Bihani v. Trump* (D.D.C. filed Jan. 11, 2018) (No. 1:09-cv-00745-RCL).

<sup>43</sup> See Center for Constitutional Rights Press Release, *supra* note 41.

<sup>44</sup> Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), at <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html> (quoting the detention center's commander as remarking that "[u]nless America's policy changes, at some point we'll be doing some sort of end of life care here").

<sup>45</sup> Protecting America Through Lawful Detention of Terrorists, Exec. Order No. 13823, 83 Fed. Reg. 4831 (Jan. 30, 2018); see also Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 326 (2018) (discussing this executive order in more depth).

<sup>46</sup> See, e.g., John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1032–35, 132 Stat. 1636 (2018) (prohibiting, among other things, the use of funds for transferring detainees to the United States).

prohibiting the use of funds for the transfer of new detainees to Guantánamo; and adding a provision expressing Congress's sense that "the United States has an ongoing obligation to provide medical care to individuals detained" at Guantánamo, "meeting appropriate standards of care."<sup>47</sup> The version passed by the Senate over the summer of 2019 did not include these provisions,<sup>48</sup> and as of mid-September 2019, the two chambers of Congress had not agreed on a final version. The future of these provisions—as well as of more ambitious efforts to repeal the 2001 AUMF<sup>49</sup>—remains to be seen.

<sup>47</sup> National Defense Authorization Act for Fiscal Year 2020, §§ 1032–34, H.R. 2500, 116th Cong. (2019).

<sup>48</sup> See National Defense Authorization Act for Fiscal Year 2020, §§ 1021–25, S. 1790, 116th Cong. (2019) (largely reiterating provisions that had been included in earlier NDAAAs).

<sup>49</sup> In the summer of 2019, for example, the House of Representatives included such a provision in another appropriation bill—a bill that, as of late September, was pending in the Senate. Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, H.R. 2740, 116th Cong. § 9025 (2019) (text as engrossed in the House on June 19, 2019); U.S. Congress, *All Actions H.R.2740 — 116th Congress (2019–2020)*, at <https://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?q=%7B%22search%22%3A%5B%22H.R.+2740%22%5D%7D&ts=7&tr=1> [<https://perma.cc/RG6W-6WLP>].