[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5067

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MOATH HAMZA AHMED AL-ALWI,

Appellant,

v.

DONALD J. TRUMP, President of the United States, *et al*,

Appellees,

BRIEF OF EXPERTS ON INTERNATIONAL LAW AND FOREIGN RELATIONS LAW AS *AMICI CURIAE* IN SUPPORT OF INITIAL HEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1)(A), the undersigned certifies as follows:

(A) **Parties and Amici.** To *amici*'s knowledge, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellant in this case, No. 17-5067, other than Experts on International Law and Foreign Relations Law filing this brief as *amici* in support of Appellant.

(B) **Ruling Under Review.** To *amici*'s knowledge, references to the ruling at issue appear in the Brief for Appellant in this case, No. 17-5067.

(C) **Related Cases.** To *amici*'s knowledge, references to any related cases appear in the Brief for Appellant in this case, No. 17-5067.

STATEMENT REGARDING CONSENT TO FILE AND AUTHORSHIP

All parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the amici curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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I. Interests of *Amici Curiae* and Summary of the Argument

Amici listed in Appendix A are experts on international law and foreign relations law. *Amici* urge *en banc* review to resolve a matter of exceptional importance. Fed. R. App. P. 35(a).

The decision of the court below improperly followed dicta in *Al-Bihani v. Obama* when it deferred to the "Executive's opinion" as to whether the Executive continues to have legal detention authority under the 2001 Authorization for the Use of Military Force (AUMF). The *Al-Bihani* panel on which the court below relied rejected Al-Bihani's argument that continuing detention authority under the AUMF should not simply turn on the Executive's opinion that the conflict continues, but should instead be understood in light of international law. The *Al-Bihani* panel concluded that "the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war . . . is mistaken." 590 F.3d 866, 871 (D.C. Cir. 2010). In denying the petition for rehearing *en banc*, a seven-judge majority made clear its view that the *Al-Bihani* panel's comments on international law were dicta, explaining that the court had declined to hear the case *en banc* because the panel's discussion of "the role of international law-of-war principles in interpreting the AUMF . . . is not necessary to the disposition of the merits." *Al-Bihani* v. *Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., joined by six judges, concurring in denial of rehearing *en*

banc). Given this guidance, it is troubling that the court below adopted the *Al-Bihani* panel's approach to assessing the Executive's continuing authority to detain under the AUMF—deference to "Executive opinion"—which was expressly premised on the rejection of using international law-of-war principles in interpreting the AUMF.

In following dicta in *Al-Bihani*, the court below ignored long-standing precedent that looks to international law to identify the limits of the AUMF's detention authority. The AUMF contains no explicit detention authorization. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), six Justices held that the President's authority under the AUMF must be interpreted in light of the international law of war.[1] As the *Hamdi* plurality recognized, if the international law of war tells us what Congress authorized when it granted the President "all necessary and appropriate force," 542 U.S. at 518, it also tells us the outer limits of what Congress authorized, *id*. at 520.

[1] In 2009, consistent with *Hamdi*, the United States argued that "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war." Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442, Mar. 13, 2009, at 1. *See also* Brief for the Respondents in Opposition, *Uthman v. Obama*, No. 11-413, Dec. 2011, at 10 ("Law-of-war principles properly inform the construction of the AUMF. . . .").

As the *Hamdi* plurality noted, "It is a clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. at 520 (2004) (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364). International law, moreover, treats the continued existence of active hostilities as a factual question. That is consistent with how U.S. courts have long approached determining the existence of active hostilities. While they have weighed political branches' statements, they have also analyzed the factual records to decide if hostilities exist.

The role of the international law of war in circumscribing the Executive's detention authority under the AUMF is a question of exceptional importance. It implicates both the balance of powers within the United States and this country's long-standing commitment to the international law of war, which U.S. courts have historically implemented by reading domestic laws on wartime authority in a manner that, as far as possible, is consistent with the law of war.

Although this Court denied *en banc* review of this issue in *Al-Bihani*, where the issue was not dispositive, such review is appropriate here, where it is. The seven-judge majority statement explained that the panel's discussion of "the role of international law-of-war principles in interpreting the AUMF . . . is not necessary to the disposition of the merits." Statement Concurring in the Denial of Rehearing

En Banc, *Al-Bihani v. Obama*, No. 09-5051, Doc. No. 1263353, at 3 (Aug. 31, 2010) (Sentelle, C.J., Ginsburg, J., Henderson, J., Rogers, J., Tatel, J., Garland, J., Griffith, J.).

By contrast, the role of international law in interpreting the AUMF is essential to the resolution of this case. By neglecting to look to international law to identify the limits of the AUMF's detention authority, the court below failed to adequately address whether the United States remains engaged in the "relevant conflict," *Hamdi*, 542 U.S. at 521, and thus, whether the authority for the U.S. Government to detain Appellant under the AUMF has expired. For these reasons, the *en banc* panel should remand to the district court to engage in a fact-based assessment of whether the hostilities in which Appellant was first detained in 2001 continue today, over 15 years later.

II. Argument

A. The U.S. District Court for the District of Columbia Mistakenly Followed Dicta in *Al-Bihani v. Obama* That Contradicts the U.S. Supreme Court Decision in *Hamdi*.

Appellant Moath Hamza Ahmed Al-Alwi challenges his continued detention at the United States Naval Station at Guantanamo Bay, where he has been held for more than 15 years, on the ground that the conflict in which he was detained has ended and, with it, the legal justification for his detention. In assessing this claim, the court below explained:

> In *Al-Bihani v. Obama*, our Circuit Court rejected a Guantanamo 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-Alwi v. Trump, No. 15-0681 (RJL), Memorandum Opinion at 6 (Feb. 22, 2017). The proposition for which the court below cites *Al-Bihani* is wrong. The *Al-Bihani* panel, in deferring to the Executive, rejected Al-Bihani's argument that the Government's power to detain under the AUMF is properly read in light of international law. *Al-Bihani*, 590 F.3d at 871-72. Before arriving at the standard cited by the court below in this case, the *Al-Bihani* panel explained, "We reiterate that international law, including the customary rules of co-belligerency, do not limit the President's detention power in this instance." *Id*. at 873. It concluded, "[W]e do not rest our resolution of this issue on international law or mere common sense." *Id*. at 874. Instead, it deferred entirely to the Executive's representations in court.

In denying the petition for rehearing *en banc*, a seven-judge majority statement indicated that the *Al-Bihani* panel's comments on international law were dicta, explaining that "the role of international law-of-war principles in interpreting the AUMF . . . is not necessary to the disposition of the merits." *Al-Bihani*, 619 F.3d at 1 (Sentelle, C.J., joined by six judges, concurring in denial of rehearing *en banc*). Three additional single-judge statements debated the appropriate weight of international law in domestic jurisprudence in more detail, but the seven-judge majority's decision not to speak on the international law debate reinforced its clear, simple message that the *Al-Bihani* panel's statements on international law did not carry precedential value.

Furthermore, the majority's decision to avoid, rather than endorse, *Al-Bihani*'s comments on international law implicitly recognized a colorable argument that the *Al-Bihani* court was mistaken about international law.

District courts in this Circuit, however, including the court below, have repeatedly and mistakenly relied on the *Al-Bihani* panel opinion precisely on this question. *Al-Alwi v. Trump*, Memorandum Opinion at 3; *Al-Alwi v. Obama*, 653 F.3d 11, 18 n.7 (D.C. Cir. 2011). *See also*, *e.g.*, *Aamer v. Obama*, 58 F. Supp. 3d 16, 23 (D.D.C. 2014) (citing *Al-Bihani* for the proposition that, in the D.C. Circuit, "only domestic statutes and cases are relevant to detainee habeas claims"); *Sulayman v. Obama*, 729 F. Supp. 2d 26, 32 (D.D.C. 2010) (citing *Al-Bihani*'s

reasoning that "[t]here is no indication" from Congress that it "intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF"); *Al-Adahi v. Obama*, 692 F. Supp. 2d 85, 90 n.4 (D.D.C. 2010) ("[T]his Circuit held in *Al-Bihani* that '[t]he AUMF, DTA, and MCA of 2006 and 2009 do not hinge the Government's detention authority on . . . compliance with international law . . .'") (internal citation omitted).

Thus, while the D.C. Circuit may have felt it was clear that *Al-Bihani*'s pronouncements on international law were mere dicta, lower courts have treated those statements as circuit precedent. This case presents an opportunity for this Court to correct that confusion. While in *Al-Bihani*, the *en banc* court declined to wade into complicated issues of international law that it determined was not dispositive, this case presents facts that require the court to address these issues. Here, the district court must determine whether active hostilities are, as a matter of fact, ongoing.[2] This case therefore provides an opportunity to clarify that,

[2] The court below noted 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 evidence affirmatively suggests that hostilities are over," Op. at 7 n.2, in which case, the court would have to struggle with how to weigh the facts against the Executive's representations. It concluded that this was not that case because "the government has provided overwhelming evidence that active hostilities *are in fact ongoing*." *Id.* In treating the facts not as the starting point but only as relevant insofar as they plainly rebut the Executive's representations, the court erred. The court also

consistent with long-standing principles of domestic law, the appropriate, fact-based standard for assessing when a conflict has ended may be informed by international law.

B. To Decide Whether There Is Legal Authority to Continue to Detain Appellant, the Proper Standard Is Whether Active Hostilities In the Relevant Conflict Are, As a Matter of Fact, Ongoing.

1. Hamdi *Established That the President's Detention Authority Is an Implied Power under the AUMF, Based on Long-Standing Law-of-War Principles.*

The AUMF contains no explicit detention authorization.[3] Instead, in 2004, a plurality of the Supreme Court held that the AUMF incorporates an implied authority to detain enemy combatants. *Hamdi*, 542 U.S. at 519 (plurality). The plurality established 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 long-standing law-of-war principles." *Id*. at 521. In confirming this authority, the plurality cited

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did not specifically determine that the hostilities in which Appellant was involved are, in fact, ongoing—which is necessary to his continued lawful detention.

[3] In fact, following the September 11 attacks, Congress rejected proposed legislation that would have explicitly afforded the Government "indefinite preventive detention [authority]." Brief for the Constitution Project as Amicus Curiae supporting Respondent at 9-16, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (citing Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001)), http://www.aclu.org/sites/default/files/field_document /ashcroftvkidd_20110201_constitutionprojectamicus.pdf.

a number of treaties regulating the conduct of hostilities to show that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id*. at 520.

Finding an implied power rooted in an understanding of the law of war, the plurality acknowledged essential restrictions on the Executive's power to detain under the AUMF. In determining that *Hamdi*'s challenge was justiciable, the plurality rejected the proposition that determinations of detention should be left solely to the Executive. *Compare id.* at 535 (plurality) ("In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."), *with id*. at 579 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."). Moreover, the plurality repeatedly referred to the factual record in determining whether Hamdi's detention remained authorized as part of the exercise of "necessary and appropriate force" under the AUMF, including whether "United States troops are still involved in active combat in Afghanistan." *Id*. at 521. This suggests that courts should look to the factual record, rather than merely defer to the Executive.

2. Because the Law of War Is the Source of Implied Authority to Detain under the AUMF, It Informs Not Only the Reach of That Authority but Also Its Appropriate Limits.

The international law of war is the source of implied detention authority under the AUMF. In *Hamdi*, six Justices looked to international law to understand the extent of authority granted to the Executive in Congress' war authorization, 542 U.S. at 521 (plurality), 548-49 (Souter, J., joined by Ginsburg, J.), adhering to the Court's long-standing view that, absent other indicia of statutory meaning, Congress reasonably intended to authorize only those actions consistent with the international law of war. *See*, *e.g.*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2094 (2005) ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers."). As the *Hamdi* plurality recognized, if the international law of war tells us what Congress authorized when it granted the President "all necessary and appropriate force," 542 U.S. at 518 (plurality), it also tells us the outer limits of what Congress authorized. *Id.* at 520 (citing international legal sources for the "clearly established principle of the law of war that detention may last no longer than active hostilities"); *see* Jack Goldsmith,

Reflections on Al-Bihani - Part I, Lawfare (Sept. 3, 2010), https://www.lawfareblog.com/reflections-al-bihani-part-i.

a. The Supreme Court Has Long Recognized That International Law Constrains Powers Implied under Congressional War Authorizations.

For centuries, the Supreme Court has recognized that where Congress has not explicitly provided otherwise, international law supplies the default authorities and obligations governing the conduct of hostilities. *See, e.g.*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations . . . ."). In *Talbot*, 5 U.S. (1 Cranch) at 28, the Court stated that "[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." In *Charming Betsy*, 6 U.S. (2 Cranch) at 118, the Court similarly observed in a law of war context that "an act of Congress ought never to be construed to violate the law of nations . . . ." In *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) at 198, the Court went further, noting that "[t]he law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights . . . ."

The Supreme Court has continued to apply the international law of war as default rules during 20th and 21st-century conflicts. During World War I, the Court relied on the international law of war to determine the United States' rights

and responsibilities in *Berg v. British & African Steam Navigation Co.*, 243 U.S. 124, 149, 153 (1917). The Court in *Ex parte Quirin*, 317 U.S. 1 (1942), observed during World War II that "[f]rom the very beginning of its history, this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Id*. at 27-28.

In the context of the War on Terror, the Supreme Court and lower courts have routinely interpreted the Uniform Code of Military Justice, the AUMF, and the Detainee Treatment Act through reference to the international law of war. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 594-95 (2006) ("Together, the UCMJ, the AUMF and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war."); *Hamdi*, 542 U.S. at 521 (plurality).[4]

[4] In *Hamdi*, the plurality recognized that certain forms of implied detention authority cannot be understood as authorized under the AUMF, given that they violate the international law of war. 542 U.S. at 521 (citing Geneva Convention (III), art. 118).

b. Congress and the Executive Have Also Recognized That the International Law of War Constrains the Executive's Implied Authority at Issue in This Case.

All branches of government agree that the international law of war limits the Executive's implied detention authority under the AUMF. The Department of Justice specifically agreed in 2009 that "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war." Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, 1, Misc.-No. 08-442 (D.C. 2009) (citing *Hamdi*, 542 U.S. at 521 (plurality)). Congress has also affirmed that the law of war constrains the President's detention authority. As it stated in the National Defense Authorization Act for Fiscal Year 2012, "the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war." Pub. L. No. 112-81 § 1021(a) (impliedly asserting that ongoing detentions must be consistent with what the law of war permits) (internal citation omitted).

This Court should thus consider the limits imposed by the law of war on detention in armed conflict, particularly where, as here, all three branches have

already looked to the law of war as the source of the Executive's implied detention authority.

3. Under the Law of War, the Authority to Detain Is Contingent on the Presence of "Active Hostilities" In the Relevant Conflict, Which Is a Factual Determination.

a. Under International Law, the Authority to Detain Continues Only as Long As There Are Active Hostilities.

Under the law of war, the authority to detain continues only as long as "active hostilities" are *ongoing*. As the *Hamdi* plurality noted, "It is a clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. at 520 (2004) (plurality) (citing Geneva Convention (III), art. 118). Consequently, "[p]risoners of war *shall be released and repatriated* without delay upon the cessation of active hostilities." *Id*. (emphasis added) (citing Geneva Convention (III), art. 118); *see also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 510-11 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Geneva Convention (III), arts. 118, 85, 99, 119, 129,).

b. Under the International Law of War, Whether Active Hostilities Are Ongoing Is a Factual Question.

Under the international law of war, whether active hostilities are ongoing is a fact-based determination. Pursuant to the "clearly established principle of the law of war that detention may last no longer than active hostilities," the Government must establish ongoing active hostilities based on facts on the ground to demonstrate that it possesses detention authority under international law. *Hamdi*, 542 U.S. at 520.

The International Committee of the Red Cross (ICRC), for example, interprets both the "close of hostilities" in Article 133 of the Fourth Geneva Convention and the "cessation of active hostilities" in Article 118 of the Third Geneva Convention to mean "a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities." 4 Int'l Comm. of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 514-15 (Jean Pictet et al. eds., 1958). The ICRC similarly notes that the conclusion of an armistice or peace agreement is neither necessary nor sufficient to conclude that active hostilities have ended. 1 Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* 456 (2005).

International law has consistently looked to facts, particularly when assessing whether detention authority expired with the cessation of hostilities. The

Conference of Government Experts, which prepared the first draft of the revised Prisoners of War Convention, concluded that "captivity…[should] cease as soon as the military situation no longer induce[s] [prisoners of war] to seek to harm the detaining country, *i.e.*, on the cessation of hostilities." Int'l Comm. of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* 243 (Geneva, Apr. 14-26, 1947). The Commentary to Article 2(2) of Additional Protocol II stipulates that the end of "active hostilities" is determined by examining the state of military operations. Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ¶4493 (Yves Sandoz et al. eds., 1987).

Foreign state military manuals employ a factual assessment to determine if hostilities remain active, consistent with international law. The United Kingdom specifies that "'[c]essation of active hostilities' is a question of fact and does not depend on the existence of an armistice agreement." U.K. Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict 205*, § 8.169 (2011). Germany's interpretation of the "end of active hostilities" in Article 118 of the Third Geneva Convention similarly "requires neither a formal armistice agreement nor the conclusion of a peace treaty. What really matters is the actual cessation of hostilities . . . ." Fed. Ministry of Defence of the Fed. Republic of Ger.,

Humanitarian Law in Armed Conflicts Manual ¶ 732 (1992). Germany's Soldiers' Manual similarly requires release and repatriation "[a]fter the cessation of combat operations." Bundesministerium der Verteidigung, *Völkerrecht in bewaffneten knofliklen*, Druckschrift Einsatz Nr. 03, Humanitäres 7 (2006). Canada emphasizes the expiration of detention authority "as soon as the reasons which necessitated internment cease to exist," Office of the Judge Advocate Gen., *The Law of Armed Conflict at the Operational and Tactical Level 11-7* § 58 (1999) and "as soon as the circumstances justifying the arrest, detention or internment have ceased to exist," Office of the Judge Advocate Gen., *The Law of Armed Conflict at the Operational and Tactical Level* § 1135.3 (Aug. 2001). Mexico distinguishes between "the time hostilities cease…[at which time] repatriation must take place. . . ," and "the time peace is concluded." Ministry of Nat'l Def., *Manual de Derecho Internacional Humanitario para el Ejercito y la Fuerza Aerea Mexicanos* § 194 (2009). Moreover, a number of military manuals mandate the release and repatriation of detainees "without delay after the cessation of hostilities," seen to be triggered "as soon as the reasons which necessitated internment no longer exist." Estado Mayor del Ejercito, *El Derecho de los Conflictos Armados [Law of Armed Conflict Manual]* §§ 6.5, 6.9 (1996); *see also* N.Z. Def. Force, *Interim Law of Armed Conflict Manual* § 1133 (1992).

Even the cessation of armed conflict (generally understood to capture a broader set of circumstances than active hostilities) is determined by looking to facts on the ground. Under international law, neither the subjective views of the parties nor formal legal declarations are dispositive in identifying the end of armed conflict. Int'l Comm. of the Red Cross, Working Paper (June 29, 1999), http://www.iccnow.org/ documents/ICRCWorkPaperArticle8Para2e.pdf.[5]

Establishing the existence of non-international armed conflict (NIAC), like the conflict at issue in this case, is fundamentally based on facts. This is driven in part by necessity: parties to NIACs rarely issue formal statements of war; they speak through their actions. Courts therefore look to facts both to establish whether a NIAC has begun and whether it has concluded. The International Tribunal for the Former Yugoslavia (ICTY) developed a test to distinguish NIACs from lesser internal conflicts and disturbances, defining a NIAC as a "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor* v. *Tadić*, Case No. IT-94-1-I,

[5] Under international law, the subjective judgments of parties are inconsequential in this determination. *See, e.g.*, Human Rights Council, Report of Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, ¶ 51 (Nov. 23, 2006) (declining to give effect to positions staked by the Government of Israel in determining whether hostilities between Israeli and Hezbollah fighters rose to the threshold of an "armed conflict" because it was "well established in international humanitarian law that for the existence of an armed conflict the decisive element is the factual existence of the use of armed force").

Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. for the Former Yugoslavia, Oct. 5, 1995). Whether a NIAC exists is a fact-based determination "focus[ing] on . . . the intensity of the conflict and the organization of the parties." *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. for the Former Yugoslavia, May 7, 1997). The *Tadić* formulation "is regularly cited as authoritative in state military manuals, international legal instruments, international jurisprudence, and expert and academic commentary." Oona A. Hathaway, et al., *Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. Pa. L. Rev. 1, 11-16 (2016). Both the intensity and organization prongs of the *Tadić* test must be resolved through a particularized, fact-based adjudication. *See, e.g.*, *Prosecutor v. Fatmir Limaj*, IT-03-66-T, Judgment, ¶ 90 (Int'l Crim. for the Former Yugoslavia, Nov. 30, 2005) ("[T]he determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.").[6]

[6] Decisions at the ICTY have consistently followed *Tadić* in "assess[ing] the existence of armed conflict by reference to objective indicative factors . . . depending on the facts of each case." *Prosecutor v Boškoski*, IT-04-82-T, Judgment, ¶ 176 (Int'l Crim. for the Former Yugoslavia, July 10, 2008); *see, e.g.*, *Prosecutor v. Haradinaj et al.*, Judgment, ¶ 373 (Int'l Crim. for the Former Yugoslavia, Apr. 3, 2008); *Prosecutor v. Đorñević*, IT-05-87/1-T, Judgment, ¶¶ 1522-26 (Int'l Crim. for the Former Yugoslavia, Feb. 23, 2011).

Just as the courts look to facts on the ground to determine whether a NIAC has been triggered, they look to facts to determine whether a NIAC has ended. The settled consensus in international law is that the continued existence of a NIAC "does not depend on the subjective judgment of the parties to the conflict" and "must be determined on the basis of objective criteria." Int'l Comm. of the Red Cross, Working Paper 8 (Jun. 29, 1999).[7] Although international tribunals have not identified a precise set of facts that would indicate that a NIAC has ended, the ICTY held that the end of a NIAC is determined by looking to facts on the ground, not formal agreements. *Tadić*, Decision on Defence Motion, ¶ 70. The ICRC has explained that whether there has been a "peaceful settlement" "should, first and foremost, be driven by facts on the ground . . . [and that] the notion 'peaceful settlement' should be interpreted as a situation where a factual and lasting pacification of the NIAC has been achieved." Int'l Comm. of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (Geneva, Dec. 8-10, 2015). Similarly, in Sri Lanka, the continued existence of a NIAC was determined by examining the facts on the ground.

[7] The ICRC's authoritative commentaries on armed conflict emphasize "what actually happens on the ground," "factual conditions," and "material criteri[a]." Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 at 1319; *see also* Int'l Comm. of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* (ICRC Opinion Paper, Mar. 2008).

Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* 253 (2012); *see also Prosecutor v. LTTE* (finding a NIAC in existence between October 2003 and April 2010 based on the state of combat operations, stating, "[t]he exact moment in time at which the law of non-international armed conflict would cease to operate in such a situation would have to be judged on a case-by-case basis as against the facts . . ."") (Court of Appeal of The Hague, Apr. 30, 2015); Rogier Bartels, *From* Jus in Bello *to* Jus Post Bellum: *When Do Non-International Conflicts End?*, *in* Carsten Stahn, et al., Jus Post Bellum*: Mapping the Normative Foundations* 302-03 (2014) (citing three reports on Sri Lanka by the International Crisis Group).

4. Determining Whether Active Hostilities, As a Matter of Fact, Continue Is Not Beyond the Capacity Of the U.S. Courts; Throughout History, U.S. Courts Have Examined Facts to Decide Whether Conflict Exists.

Historically, while U.S. courts have weighed political branches' statements in evaluating whether active hostilities are ongoing, they have also analyzed the factual records to decide whether or not conflict exists. *See* Deborah Pearlstein, *Law at the End of War*, 99 Minn. L. Rev. 143, 151-69 (2014) (reviewing case law).

During the *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), in holding that a state of civil war existed, the Court discussed factors such as the amount of territory held by rebels and the organization of armies. To justify examining facts,

the Court cited scholars on the law of nations to argue that "war may exist without a declaration on either side." In *Ex parte Milligan*, 71 U.S. 2, 126 (1866), the Court similarly considered the fact that armies were not fighting in Indiana in assessing the Government's assertion that war existed there. The Court distinguished the Executive's power to proclaim martial law during wartime from the question of whether the stated war is "actual and present." In *The Protector*, 79 U.S. 700, 701-02 (1871), the Court considered the Executive's statements only after determining that "[a]cts of hostility . . . occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other . . . that it would be difficult, if not impossible, to say on what precise day [war] began or terminated."

In upholding the War-Time Prohibitions Act's ongoing application, the Court took account of "facts of public knowledge . . . that the treaty of peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing," and relied on those facts rather than presidential statements "that were doubtless used in a popular sense." *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 163, 167 (1919). *Ludecke v. Watkins*, 335 U.S. 160, 169 (1948), cited in *Al-Alwi* for the contention that war's existence is a political

question, 236 F. Supp. 3d at 420-21, references *Hamilton* when evaluating the status of World War II (employing facts such as that U.S. armies were still active on the ground in Europe).

More recently, courts have similarly analyzed facts to determine whether hostilities continue, rather than relying exclusively on Executive representations. The plurality in *Hamdi* looked to "the record" to determine whether the AUMF authorized detentions and whether United States troops were still involved in active combat in Afghanistan. 542 U.S. at 521. Following *Hamdi*, the court in *Al-Warafi v. Obama* confirmed that, rather than show unlimited deference to the Executive, courts must analyze the facts when determining the status of conflict:[8] "By [the Government's] logic, so long as he maintained that active hostilities were ongoing in Afghanistan, the President could preserve his AUMF detention power even if he withdrew all U.S. military presence from Afghanistan, stopped any military aid to the Afghan government, and brokered a lasting peace treaty between the U.S., the Taliban, al Qaeda, and the Afghan government. But . . . the President's position, while relevant, is not the only evidence that matters." 2015 U.S. Dist. LEXIS 99781 at *14 (D.D.C. 2015), *order vacated, appeal dismissed* (Mar. 4, 2016).

[8] Though mooted out due to the petitioner's transfer from Guantanamo, this case's reasoning has not been overruled and remains persuasive authority.

U.S. courts have thus repeatedly demonstrated willingness and capacity to examine factual records to determine the existence of conflicts.

C. The *En Banc* Panel Should Remand to the Court Below with Guidance to Determine Whether Active Hostilities Are Ongoing, Based on a Review of the Factual Circumstances.

In *Hamdi*, the plurality concluded "that detention of individuals falling into the limited category we are considering, for the duration of the *particular* conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. at 518 (emphasis added). As described *supra*, Parts II.A, B, that inquiry requires a fact-based assessment.

In the case of Appellant, there is cause to believe that the hostilities in the particular conflict in which he was detained may no longer be active. In December 2014, President Obama declared that the combat mission in Afghanistan would be ending. Office of the Press Sec'y, *Statement by the President on the End of the Combat Mission in Afghanistan* (Dec. 28, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan ("[O]ur combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion."); *see also* Office of the Press Sec'y, *Statement by the President on Afghanistan* (May 27, 2014), https://obama whitehouse.archives.gov/the-press-office/2014/05/27/statement-

president-afghanistan ("Together with our allies and the Afghan government, we have agreed that this is the year we will conclude our combat mission in Afghanistan."); Office of the Press Sec'y, *The Record: President Obama on Foreign Policy*, https://obamawhitehouse.archives.gov/sites /obamawhitehouse.archives.gov/files/achievements/theRecord_foreignpolicy.pdf ("[We r]esponsibly ended the U.S. combat missions in Iraq and Afghanistan, bringing home over 90 percent of the nearly 180,000 American troops deployed . . . .").

Corresponding shifts on the ground in Afghanistan support President Obama's statements. Preceding President Obama's declaration of the cessation of combat, the U.S. and Afghan governments entered into a bilateral security agreement, under which, "[u]nless otherwise mutually agreed, United States forces shall not conduct combat operations in Afghanistan." Dep't of State, *Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan*, art. 2(1), (Sept. 30, 2014), https://www.state.gov/documents/organization/2444 87.pdf. On January 1, 2015, following President Obama's announcement, the U.S. Government formally replaced Operation Enduring Freedom, in which Al-Alwi was detained, with Operation Freedom's Sentinel, in which U.S. forces strictly support Afghan forces in counterterrorism missions. Dep't of Def. Inspector Gen., *Operation Freedom's*

Sentinel: Report to the United States Congress, 15 (Oct. 1–Dec. 31, 2016), http://www.dodig.mil/IGInformation/archives /FY2017_LIG_OCO_OFS_Q1_Dec20162.pdf ("[Operation Freedom's Sentinel] began on January 1, 2015 when the United States ended 13 years of combat operations in Afghanistan under Operation Enduring Freedom. . . . At that point, the Afghan Government assumed full responsibility for the security of Afghanistan with limited U.S. or coalition support on the battlefield."). President Trump's decision in August to increase the number of American troops in Afghanistan did not change the nature of the U.S. mission in Afghanistan. *See, e.g.*, Julie Hirschfeld Davis & Mark Landler, *Trump Outlines New Afghanistan War Strategy with Few Details*, N.Y. Times (Aug. 21, 2017), https://www.nytimes.com/2017/ 08/21/world/asia/afghanistan-troops-trump.html ("One administration official conceded that there was to be no major change in the mix of American forces operating in Afghanistan and that the priorities would remain training Afghan forces and conducting counterterrorism operations."). Regardless, these operational changes suggest that President Obama did not declare that combat had ended only in a "popular sense," *Hamilton*, 251 U.S. at 167 (1919), but rather that a combat mission had concluded and a training mission began in its stead. Moreover, the presence of significant numbers of troops on the ground in Afghanistan is not evidence in itself of ongoing hostilities. As of March 2017,

more U.S. troops were deployed in Japan, Germany, South Korea, and Italy than in Afghanistan—none of them countries in which the United States is engaged in active hostilities. *See* Jeff Desjardins, *U.S. Military Personnel Deployments by Country*, Visual Capitalist (Mar. 18, 2017), http://www.visualcapitalist.com/u-s-military-personnel-deployments-country/.

These facts suggest that the hostilities in the conflict in which Al-Alwi was detained may no longer remain active. In relying on *Al-Bihani*, the court below made a decision inconsistent with the Supreme Court's guidance in *Hamdi*. The Executive is entitled to some deference in determining whether hostilities are ongoing, but that authority is far from unchecked.[9] Rather than deferring exclusively to the Executive's statements, the court should have conducted its own factual analysis. For these reasons, this Court should remand to the court below to

[9] Other district court decisions in this Circuit recognize limits to the deference to which the Executive is entitled. *See, e.g.*, *Razak v. Obama*, 174 F. Supp. 3d 300 (D.D.C. 2016) ("While entitled to some deference, the President's position is not dispositive. . . . [T]he *Hamdi* plurality recognized that deference to the Executive must have limits."); *Al-Kandari v. U.S.*, No. 15-329 at 9 (D.D.C. 2016) (rejecting respondents' argument that the court "no longer serves in the role of decisionmaker because the Government has the authority to detain Petitioner until the Government determines that active hostilities have ceased"); *Al-Warafi v. Obama*, 2015 U.S. Dist. LEXIS 99781, at *6 (D.D.C. 2015) ("The notion that courts can hear habeas petitions only insofar as they rule for the Government on a potentially dispositive issue is, if anything, even more insidious than the notion that courts cannot decide the issue at all.").

engage in a fact-based assessment of whether the hostilities in which Appellant was first detained in 2001 continue today, over 15 years later.

III. Conclusion

For the foregoing reasons, this Court should hear this matter in an initial hearing *en banc*.

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Respectfully submitted,

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[10] The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 29(a)(5) and 32(a)(7), the undersigned certifies that this brief has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font. According to the word processing system used to prepare the brief, Microsoft Word 2010, it contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that, on October 10, 2017, a true and correct copy of the foregoing Brief of Experts on International Law and Foreign Relations Law as Amici Curiae in Support of Initial Hearing *En Banc* was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

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