

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

ABDUL LATIF NASSER (ISN 244),)	
)	
Petitioner,)	
)	
v.)	Civil Action 05-cv-764 (CKK)
)	
DONALD TRUMP, in his official capacity)	
as President of the United States, et al.,)	
)	
Respondents.)	

**RESPONDENTS’ RESPONSE TO
PETITIONER NASSER’S SUPPLEMENTAL BRIEF MODIFYING HIS POSITION IN
THE ONGOING LITIGATION IN LIGHT OF THE DC COURT OF APPEALS’
OPINION IN ALI v. TRUMP**

Notwithstanding a determination by the Periodic Review Board (“PRB”) that Petitioner is eligible for transfer, Petitioner remains lawfully detained under the Authorization for Use of Military Force as informed by the laws of war. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (“the AUMF”). Petitioner was part of or substantially supporting al-Qaida, the Taliban, or associated forces—a status Petitioner does not challenge in these proceedings—and hostilities in the conflict for which he has been detained continue. Accordingly, Petitioner’s detention is authorized by the AUMF. See, e.g., Aamer v. Obama, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (“[T]his court has repeatedly held that under the [AUMF] individuals may be detained at Guantanamo 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.”).

Court of Appeals precedent likewise establishes that the legality of detention under the AUMF does not depend on whether a detainee would pose a threat if released. Awad v. Obama, 608 F.3 1, 11 (D.C. Cir. 2010). And of particular significance here, an Executive decision

concerning a potential discretionary transfer—such as a PRB recommendation—does not affect whether a detainee remains properly and lawfully detained. Almerfed v. Obama, 654 F.3d 1, 4 n.3 (D.C. Cir. 2011). Consequently, Petitioner’s continued detention remains lawful under the AUMF and so, contrary to Petitioner’s argument, is not arbitrary.

Because Petitioner’s detention is lawful, Petitioner’s argument that his continued detention violates due process should be rejected, even if Petitioner could invoke the Due Process Clause, which, under the law of the Circuit, he may not. Similarly, Petitioner has no legitimate argument that his detention violates the Suspension Clause. In particular, Petitioner mistakenly asserts that the writ of habeas corpus has, in his case, been suspended because he cannot pursue release based on the PRB’s determination that he is transfer eligible. To the contrary, Petitioner retains the right to pursue his underlying habeas case to challenge the factual and legal basis for his detention under the AUMF. That he may not pursue release based on the PRB’s determination concerning his eligibility for transfer effects no suspension of the writ because he has no legal entitlement to release from detention on that basis.

Accordingly, for the reasons stated in this brief and in Respondents’ Opposition to Petitioner’s Motion for Order Granting Writ of Habeas Corpus (Feb. 16, 2018) (ECF. No. 290) (“Opposition Brief”), Petitioner remains properly detainable.

BACKGROUND

I. THE PERIODIC REVIEW PROCESS

In 2011, Executive Order 13,567 instituted the Periodic Review Board process. See Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011); see also Exec. Order 13,823, 83 Fed. Reg. 4831, 4831-32 (Feb. 2, 2018) (continuing the PRB process). That process reviews the continued detention of all law-of-war detainees who have been designated for continued

detention or for prosecution, but who have not been criminally convicted or against whom criminal charges are not yet pending. Exec. Order 13,567 § 1(a).

All review-eligible detainees received an initial full review by a PRB. See id. § 3(a). Any detainee who was not recommended for transfer during his initial review is eligible for another full PRB review every three years. Id. § 3(b). In the interim, such detainees are eligible for a file review every six months. Id. § 3(c). If during a file review, a PRB determines that a significant question has arisen concerning the need for a detainee's continued detention, a new full review is to be promptly convened. Id. If the PRB process results in a detainee being determined as eligible for transfer, he does not thereafter receive additional PRB reviews as the recommendation remains extant until he is transferred.

During a review, a PRB assesses whether continued detention of the individual subject to review is necessary to protect against a continuing significant threat to the security of the United States. Exec. Order 13,567 § 2; Sec. of Defense Policy Mem, "Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Exec. Order 13567," p.6 (Feb. 15, 2019) ("PRB Policy Mem.") ("Continued law of war detention is warranted for a detainee subject to periodic review if such detention is necessary to protect against a continuing significant threat to the security of the United States.")¹ By definition, a detainee may still pose a threat and be deemed eligible for transfer from Guantanamo Bay, so long as that threat is not significant and can be mitigated through appropriate conditions. See id. §§ 1(a), 3(a)(7); PRB Policy Mem. at 22 (defining continuing significant threat as "[a] threat to the national security of

¹ The PRB Policy Memo is available at <https://www.prs.mil/Portals/60/Documents/Governance/POLICY%20MEMORANDUM%20IMPLEMENTING%20GUIDELINES%20FOR%20PERIODIC%20REVIEW%20OF%20DETAINEES%20HELD%20AT%20GUANTANAMO%20BAY%20.pdf>, (last accessed Nov. 23, 2020).

the United States that cannot be sufficiently mitigated through feasible and appropriate security measures associated with a transfer of the detainee.”).

Of note, the Executive Order expressly provides that a PRB is not intended to address the legality of any detainee’s law-of-war detention under the AUMF. *Id.* § 8. Rather, if during the PRB process material information comes to light that calls into question the legality of the reviewed detainee’s continued detention, the matter is to be referred to the Secretary of Defense and the Attorney General for appropriate action. *Id.* Thus, unless such information arises and leads to a conclusion that a detainee is not legally detained, a detainee deemed eligible for transfer still remains legally detainable under the AUMF as informed by the laws of war.

Subsequent to Executive Order 13,567, Congress has confirmed that the PRB process is not to determine the legality of a detainee’s law-or-war detention under the AUMF. Nat’l Defense Author. Act for Fiscal Year 2012, Pub. L. No 112-81 § 1021(b)(1), 125 Stat. 1298, 1562 (2011) (“2012 NDAA”) (“the purpose of the periodic review process is not to determine the legality of any detainee’s law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States”).

Rather, as explained in the Executive Order, the PRB process determines whether a legally detainable detainee may nevertheless be transferred solely as a matter of discretion:

This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases. It . . . does not affect the scope of detention authority under existing law. Detainees at Guantanamo have the constitutional privilege of the writ of habeas corpus, and nothing in this order is intended to affect the jurisdiction of Federal courts to determine the legality of their detention. [Exec. Order 13,567 § 1(b).]

See also 2012 NDAA 1023(b)(1) (affirming discretionary nature of PRB determinations).

Further confirming the discretionary nature of this process, the Executive Order also explicitly disclaims the creation of any rights associated with its provisions:

This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. [Exec. Order 13, 567 § 8; see also Exec. Order 13,823 §4(c) (Executive Order continuing PRB process for Guantanamo detainees).]

In sum, a PRB seeks not to determine whether a detainee is legally detainable, but whether he should be eligible for transfer from Guantanamo Bay, with the discretionary threshold being whether that detainee would pose a continuing significant threat if no longer detained by the United States. And both the Executive Order and the 2012 NDAA confirm that a PRB determination of eligibility for transfer does not affect the legality of the reviewed detainee's detention should it continue.

If a PRB review results in a determination that the detainee is eligible for transfer, that determination neither entitles nor ensures that the detainee will in fact be transferred, a possibility fully consistent with the discretionary nature of the PRB process. Rather the PRB's determination is merely the necessary first of many steps needed before the Executive may complete a transfer it deems appropriate. First, the Executive Order requires that, if a PRB decides that continued custody is not necessary to protect against a continuing significant threat from a detainee, the PRB "shall also recommend any conditions that relate to the detainee's transfer." Id. § 3(a)(7). Thereafter, the PRB recommendation is considered by a committee of relevant Executive Branch agency officials where it is either accepted and becomes final or additional review is conducted by the review committee. Id. §§ 3(d), 9(d). If the review committee finalizes the PRB determination and the detainee is deemed eligible for transfer, the

Executive Branch then considers whether to pursue a transfer. Various principals—including the Attorney General, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, the Secretary of Homeland Security, and the Secretary of State—review the potential transfer to determine whether steps may be taken to substantially mitigate the remaining threat the detainee poses and to ensure that humane treatment standards in a receiving country will be met. *Id.* §§ 4, 7, 9(d).

Based on these inputs and his own judgment, the Secretary of Defense makes the final decision on whether to transfer a detainee deemed eligible for transfer through the PRB process. 2012 NDAA § 1023(b)(2). Before conducting any transfer, the Secretary must certify to Congress that numerous factors have been satisfied, including that the transfer is in the national security interests of the United States. Nat'l Defense Author. Act for Fiscal Year 2016 § 1034(a), Pub. L. No. 114-92, 129 Stat. 726, 969 (2015) (“2016 NDAA”).²

² Other factors to be considered under the statute include:

(2) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo concerned is to be transferred—

(A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;

(B) maintains control over each detention facility in which the individual is to be detained if the individual is to be housed in a detention facility;

(C) has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests; and

(D) has agreed to share with the United States any information that is related to the individual;

(3) if the country to which the individual is to be transferred is a country to which the United States transferred an individual who was detained at United States Naval Station, Guantanamo Bay, Cuba, at any time after September 11, 2001, and such transferred individual subsequently engaged in any terrorist activity, the Secretary has—

(A) considered such circumstances; and

(B) determined that the actions to be taken as described in paragraph (2)(C) will substantially mitigate the risk of recidivism with regard to the individual to be transferred; and

Significantly, Congress has provided by law that the Secretary of Defense is not bound by the PRB's determination, expressly contemplating that a transfer may not be effectuated:

[T]he Secretary of Defense is responsible for any final decision to release or transfer an individual detained in military custody at the United States Naval Station, Guantanamo Bay, Cuba, pursuant to [Executive Order 13,567], and that in making such final decision, the Secretary shall consider the recommendation of a periodic review board or review committee established pursuant to such Executive Order, but shall not be bound by any such recommendation. [2012 NDAA § 1023(b)(2).]

II. PETITIONER'S TRANSFER RECOMMENDATION

Here, Petitioner received a hearing before a PRB, and on August 9, 2016, the PRB found by consensus that his continued law-of-war detention was "no longer necessary to protect against a continuing significant threat to the security of the United States." See Unclass. Summ. of Final Determination, available at http://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf ("PRB Determination") (last accessed on Nov. 23, 2020). In its determination, the PRB recognized the Petitioner still posed some risk to the national security of the United States:

the detainee presents some level of threat in light of his past activities, skills, and associations; however, the Board found that in light of the factors and conditions of transfer identified below, the threat the detainee presents can be adequately mitigated." Id.

The PRB recommended "transfer [of the detainee] only to Morocco, with the appropriate security assurances as negotiated by the Special Envoys [for Guantanamo Detention Closure at DoD and for Guantanamo Closure at the Department of State] and agreed to by relevant USG departments and agencies." Id.

(4) includes an intelligence assessment, in classified or unclassified form, of the capacity, willingness, and past practices (if applicable) of the foreign country or foreign entity concerned in relation to the certification of the Secretary under this subsection. [2016 NDAA § 1034.]

Pursuant to that recommendation, the Department of State transmitted a diplomatic note to the Government of Morocco regarding the security assurances required by the U.S. Government for this transfer. The Government of Morocco finally responded affirmatively to the U.S. Government regarding those assurances through a diplomatic note transmitted on December 28, 2016. Because of the timing of this response, which was less than 30 days before the Secretary of Defense would leave office, the Secretary of Defense did not make a final decision regarding the transfer, including whether the requirements of § 1034 of the 2016 NDAA were satisfied and the transfer was in the national security and policy interests of the United States. That Secretary's successors have not made a final decision to approve Petitioner's transfer.

To date, Petitioner remains eligible for a transfer.

III. PROCEDURAL POSTURE OF PETITIONER'S INDIVIDUAL HABEAS CASE

Petitioner filed his original petition challenging the legality of his detention in 2005. See Pet. for Writ of Habeas Corpus (Apr. 1, 2005) (ECF No. 1). Respondents filed an Amended Factual Return in 2012 justifying Petitioner's continued detention, explaining that Petitioner, as part of al-Qaida, Taliban, or associated forces, is legally detained under the AUMF, as informed by the laws of war. See Not. of Filing (Sept. 19, 2012) (ECF No. 226). Petitioner has yet to respond to those justifications by filing a Traverse. In late 2015, the Court granted a joint motion to stay proceedings based on the Periodic Review Board recommendation regarding Petitioner, see Minute Order (Dec. 7, 2015), and subsequently continued that stay based on the same reason or on subsequent developments in Guantanamo-related litigation, see Minute Order (Sep. 13, 2016).

In January 2017, Petitioner filed an emergency motion (ECF No. 257) seeking, inter alia, a writ of habeas corpus requiring his release based on the PRB's recommendation for his transfer. Petitioner argued that in light of the transfer recommendation, his continued detention was arbitrary and violated the AUMF and the Due Process Clause. Judge Kollar-Kotelly denied Petitioner's motion. Nasser v. Obama, 234 F. Supp. 3d 121 (D.D.C. 2017).

In its decision, the Court explained that "under well-established law" of the Supreme Court and Court of Appeals, detainees who were "part of" al-Qaida were legally detainable under the AUMF for the duration of active hostilities. See id. at 124. Because Petitioner did not challenge in his motion the allegations in the Amended Factual Return and because hostilities remained ongoing, Petitioner had no basis to claim his detention was unlawful. See id. The Court went on to explain,

Furthermore, Petitioner's status is unaffected by the PRB's recommendation that he be transferred to Morocco. The Executive authority enacting the PRB review process unequivocally states that the PRB's findings "[do] not address the legality of any detainee's law of war detention." Exec. Order No. 13,567 § 8 (2011). The Court is therefore bound to hold that Petitioner is not entitled to a writ of habeas corpus on the basis of his current Motion. [Id.]

The Court additionally rejected Petitioner's request that the Court issue an order dispensing with, in Petitioner's case, the NDAA's certification requirements for transfers of Guantanamo detainees, as well as a provision in the statute requiring advance notice of transfer to Congress, so that Petitioner's transfer out of U.S. custody could, according to Petitioner, proceed expeditiously. Id. at 124-25. In denying Petitioner's request, the Court explained that Petitioner had no standing to pursue such relief. According to the Court:

Petitioner cannot show an "injury in fact" because there has been no "invasion of a legally protected interest." Under settled Supreme Court and D.C. Circuit precedent, Petitioner does not have a right to be released or transferred from his detainment, and no additional right has been conferred by either the PRB determination or by § 1034 of the 2016 NDAA. The decision to transfer Petitioner

pursuant to a recommendation of the PRB rests exclusively within the discretion of the Secretary of Defense. Petitioner has no “right” to such a transfer. See Exec. Order No. 13,567 § 10(c) (2011) (Executive Order establishing the PRB “does not[] create any right or benefit”); 2012 NDAA § 1023(b)(2) (Secretary of Defense is “not ... bound by any such [PRB] recommendation”). [Nasser, 234 F. Supp. 3d at 125.]

The Court concluded that the PRB determination did not “confer additional rights upon Petitioner” because “irrespective of any discretionary right granted to the Secretary of Defense to effect a transfer,” Petitioner’s detention was “lawful under the established law of the Supreme Court and the D.C. Circuit.” Id.

In January 2018 a motion seeking an order granting a writ of habeas corpus was filed by eleven detainees in nine cases, including Petitioner in this case. See Petrs.’ Mot. for Order Granting Writ of Habeas Corpus (Jan. 11, 2018) (ECF No. 274). Petitioner refers to the filing as “the Mass Petition.” That motion asserted identical claims collectively on behalf of the eleven detainees, including claims that their ongoing law-of-war detention (1) exceeded the authority granted by the AUMF, (2) violated substantive due process; or (3) violated procedural due process. Respondents have opposed the motion. See Opp’n Br. at 10-45. Petitioner’s filing, and that of seven others, was consolidated before Judge Hogan for resolution and remains pending. See Minute Order (Jan. 18, 2018).

ARGUMENT

Petitioner in his Supplemental Brief once again attempts to rely upon the PRB’s determination that he is eligible for transfer to argue that, in light of that determination, his detention violates the Suspension Clause, the Due Process Clause, “or some combination of the two.” Petr. Nasser’s Suppl. Br. Modifying His Position in this Ongoing Lit. in light of the DC Court of Appeals’ Op. in Ali v. Trump at 2 (Oct. 23, 2020) (ECF No. 328) (Petitioner’s Supplemental Brief). Petitioner asserts that in light of his PRB determination, Petitioner’s

detention has become “arbitrary,” and his continued detention, thus, violates the Suspension Clause, as well as substantive due process. Id. 8-10, 19-20. Petitioner also asserts, apparently based on a perceived lack of process for him to either obtain additional PRB or other action to effect his release or process to judicially enforce the PRB determination and obtain release, that his situation has resulted in an unlawful suspension of the habeas-corpus writ and a violation of procedural-due-process principles. Id. 11-12, 20-21.

Petitioner claims that these arguments raised in his Supplemental Brief to the Mass Petition have been occasioned by the recent decision of the Court of Appeals in Ali v. Trump, 959 F.3d 364 (D.C. Cir. 2020). In Ali the Court of Appeals considered the appeal by another Guantanamo Bay law-of-war detainee from the denial, by Judge Leon, of that detainee’s claims raised in the Mass Petition. Unlike Petitioner’s filing, Ali’s was not consolidated for decision before Judge Hogan and so proceeded to a hearing before Judge Leon, who denied each of Ali’s claims. Ali v. Trump, 317 F.Supp. 3d 480, 488 (D.D.C. 2018).

The Court of Appeals affirmed Judge Leon’s rejection of Ali’s claims in the Mass Petition. As pertinent here, the Court denied each of Ali’s claims that his continued detention violated due process. In particular, when affirming the denial of the Mass Petition’s substantive-due-process claims as to Ali, the majority³ noted that Ali’s detention—although long—remained permissible because the conflict for which he was detained was ongoing. 959 F.3d at 370. Given the ongoing nature of the hostilities, the Court explained that “Ali’s detention still serves the established law-of-war purpose of ‘prevent[ing] captured individuals from returning to the field of battle and taking up arms once again,’” and “[w]hatever subjective motivations Ali might

³ Judge Randolph concurred in the judgment only. He would have held that the due-process arguments presented by the Mass Petition were foreclosed by Circuit precedent. 959 F.3d at 374-380 (Randolph, J., concurring in judgment).

impute to the government, its original and legitimate purpose for detaining him—recognized by the law of war and Supreme Court precedent—persists.” *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality op.)). And although the Court did not ground its decision on the threat Ali would pose if released, it did note that “[on] top of” the legal basis for detention, Ali continued to pose a significant threat to national security as evidenced by repeated decisions of the PRB concluding that Ali’s continued detention was warranted because of the threat he posed. *Id.* at 370-371. In a footnote, the panel stated that given these decisions, “this case does not present the question of what protections might apply to a detainee whom the [Periodic Review] Board has determined to be suitable for release, yet who continues to be detained.” *Id.* 371 n.4.

Petitioner suggests that this footnote from Ali has basically invited the arguments Petitioner now raises in his Supplemental Brief. The footnote, however, should have no effect on the adjudication of the Mass Petition as to Petitioner. Indeed, the footnote does not purport to revise binding precedent of the Supreme Court and this Circuit concerning the Executive’s authority with respect to the detention of enemy combatants in the ongoing conflict against al-Qaida, the Taliban, and associated forces. Indeed, Ali relied on that precedent. On its face, the footnote does nothing more than note that Ali did not present an issue of a detainee who has been recommended for transfer. And under controlling precedent, Petitioner remains lawfully detained.

I. Petitioner Remains Lawfully Detained Under the AUMF

As previously decided on Petitioner’s January 2017 motion for a habeas writ and as explained in Respondents’ opposition to the Mass Petition, Petitioner remains lawfully detained pursuant to the AUMF. The legal authority for Petitioner’s detention is settled, and under Circuit precedent, whether a detainee is eligible for transfer does not undermine or affect the legality of

his detention. Indeed, under applicable law and precedent, Petitioner, as “part of” al-Qaida, Taliban, or associated forces—a conclusion unchallenged in the Mass Petition—may be lawfully detained “for the duration of the relevant conflict.” Hamdi, 542 U.S. at 521; see also Boumediene v. Bush, 553 U.S. 723, 733 (2008) (noting that Hamdi recognized that the government has the authority to detain “individuals who fought against the United States in Afghanistan ‘for the duration of the particular conflict in which they were captured’”); Aamer v. Obama, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (“ [T]his court has repeatedly held that under the [AUMF] individuals may be detained at Guantanamo 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.”); Al-Bihani v. Obama, 590 F.3d 866, 875 (D.C. Cir. 2010)(a detainee’s release “is only required when the fighting stops”).

Congress also has “affirm[ed]” in the 2012 NDAA that the authority the AUMF granted the President includes detention of persons who were “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.” 2012 NDAA §§ 1021(a), (b)(2). Further, Congress affirmed that such detention may continue “until the end of the hostilities authorized by the Authorization for Use of Military Force.” Id. § 1021(c). This Court has noted that this detention determination “falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.” Al Alwi v. Trump, 901 F.3d 294, 297 (D.C. Cir. 2018).

The Court of Appeals has repeatedly recognized that these considerations remain unchanged despite the length of the current duration of hostilities:

We are of course aware that this is a long war with no end in sight. . . . But the **2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities.** [Ali v. Obama, 736 F.3d 542, 552 (D.C. Cir. 2013) (emphasis added).]

See, e.g., Ali v. Trump, 959 F.3d at 370 (length of detention does not violate substantive due process because the conflict has been (1) long and (2) continues); al Alwi v. Trump, 901 F.3d at 297 (the relevant “baseline . . . is that the AUMF remains in force if hostilities between the United States and the Taliban and al Qaeda continue).

As explained in Respondents’ opposition to the Mass Petition, the authority to detain enemy belligerents appropriately persists for the duration of active hostilities because the very purpose of law of war detention, as acknowledged by the Supreme Court in Hamdi, is “to prevent captured individuals from returning to the field of battle and taking up arms once again.” Opp’n Brief at 24-25; Hamdi, 542 U.S. at 518-19. Established Court of Appeals precedent makes clear, however, that “the United States’s authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities.” Awad, 608 F.3d at 11. “Whether a detainee would pose a threat to U.S. interests if released is not an issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.” Id. Relatedly, that a detainee is formally eligible for transfer does not undermine the legality of detention or warrant an order of release. The Court of Appeals has plainly stated that “whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully.” Almerfedi, 654 F.3d at 4 n.3 (involving detainee approved for transfer by pre-PRB process).

As explained in Respondents’ opposition brief, hostilities remain ongoing. Opp’n Brief at 16-32; see also Ex. 1, Ltr. From the President to the Speaker of House of Reps. & Pres. pro

tempore of the Senate, June 9, 2020 (War Powers Resolution Letter).⁴ Petitioner, therefore, remains lawfully detained under the AUMF as informed by the laws of war.

II. The PRB Recommendation Did Not Render Petitioner's Continuing Detention Arbitrary

Petitioner nevertheless argues that the PRB determination making him eligible for potential transfer has rendered his continued detention arbitrary. This is simply not the case. As an initial matter, as explained supra, the lawfulness of a detainee's continued detention is not dependent on whether the detainee would pose a threat if transferred, or on any eligibility for transfer. Petitioner remains lawfully detained despite the PRB's long-standing determination that he is eligible for transfer.

Indeed, both the Executive Order creating the PRB process and the statute affirming it note that the legality of a detainee's detention is not an issue for a PRB to determine. Exec. Order 13,567 § 8; 2012 NDAA § 1023(b)(1). In addition, both the Executive Order and the statute emphasize that the process involves discretionary decisions regarding the need for continued detention. See Exec. Order 13,567 § 1(b); 2012 NDAA § 1023 (b)(1). Further, Congress has made clear that the Secretary of Defense, the official ultimately responsible for executing a transfer, is not bound by a PRB determination regarding eligibility for transfer. 2012

⁴ This latest War Powers Resolution Letter provides

United States Armed Forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, and supporting the Afghan government and the Afghan military as they confront the Taliban in the field. . . . Meanwhile, United States forces remain committed to our longstanding security relationship with the Government of Afghanistan and are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al Qa'ida [or] threaten United States and coalition forces in Afghanistan The United States remains in armed conflict in Afghanistan and against the Taliban, and active hostilities remain ongoing. [Id.]

NDAA § 1023(b)(2). And lastly, Executive Order 13,567 expressly negates that it bestows any rights on a detainee to either the process itself or to an ultimate outcome. Exec. Order 13,567 § 10(c). Consequently, Petitioner can point to nothing within the PRB process that confers Petitioner with a right to a transfer or that otherwise undermines the legality of his detention. See Nasser, 234 F. Supp. 3d at 125 (PRB determination did not “confer additional rights upon Petitioner” because “irrespective of any discretionary right granted to the Secretary of Defense to effect a transfer,” Petitioner’s detention was “lawful under the established law of the Supreme Court and the D.C. Circuit”).⁵ And as the Court of Appeals has determined, it is not appropriate for Petitioner or the courts to devise an alternative detention standard to the long-standing standards reflected in the statutes and case law. See Ali, 736 F.3d at 552 (“[I]t is not the Judiciary’s proper role to devise a novel detention standard that varies with length of detention.”).

Furthermore, aside from ignoring controlling precedent, as a practical matter Petitioner’s argument that his detention has become arbitrary rests on two faulty, if related, premises: first, that the PRB’s determination establishes Petitioner would pose no “sufficiently grave threat” if transferred; and second, that his continued detention no longer serves the purpose underlying law-of-war detention. As to the first, instead of concluding Petitioner would pose no threat if transferred, the PRB determination is explicit that Petitioner would continue to pose a threat—one that might be possible to mitigate, but a threat nonetheless. And as to the second, given that Petitioner was part of or substantially supporting al-Qaida, Taliban, or associated forces and that

⁵ Respondents do not concede Petitioner’s assertions that no means now exist within the Executive Branch to facilitate transfers.

hostilities continue, his ongoing detention, by definition, continues to fulfill the purpose underlying law-of-war detention by preventing him from returning the battlefield.

Simply put, Petitioner's designation by the PRB may make him eligible for a transfer at the discretion of the Secretary of Defense consistent with NDAA requirements, but the PRB's determination does not entitle Petitioner to transfer or somehow render his detention arbitrary. See also Nasser, 234 F.Supp.3d at 125 (PRB recommendation does not confer Petitioner with "right" to transfer); cf. al Wirghi v. Obama, 54 F.Supp.3d 44 (D.D.C. 2014) (Lamberth, J.) (designation for transfer under pre-PRB process does not reflect a decision that the detainee poses no threat or render continued detention unconstitutionally arbitrary).

III. PETITIONER'S CONTINUED DETENTION DOES NOT VIOLATE THE CONSTITUTION

As explained supra, Petitioner argues that in light of his transfer eligibility, Petitioner's detention has become "arbitrary," and his continued detention, thus, violates the Suspension Clause, as well as due process. Petitioner also argues, apparently based on a perceived lack of process for him to either obtain additional PRB review or other action to effect his release or process to enforce the PRB's determination judicially and obtain release that his situation has resulted in an unlawful suspension of the habeas corpus writ and a violation of procedural-due-process principles.

As explained above, however, Petitioner's continuing detention is not arbitrary and, moreover, is consistent with governing law concerning the authority to detain under the AUMF. Thus, Petitioner cannot base a claimed constitutional violation of either the Suspension Clause or the Due Process Clause on the asserted "arbitrariness" of his detention. And, as explained below,

Petitioner also cannot otherwise make out violations of either the Suspension Clause or the Due Process Clause.⁶

A. Petitioner Has No Argument That His Detention Violates Due Process

Petitioner in his Supplemental Brief argues at length that he should have rights under the Due Process Clause and that his allegedly “arbitrary” detention violates due process, either substantively or procedurally. Petr.’s Suppl. Br. at 13-19. As explained above, however, Petitioner’s detention is not arbitrary. Furthermore, the Supreme Court’s decision in Hamdi dispenses with any question that the detention of Petitioner for the duration of hostilities, if that occurs, is inconsistent with due process. As explained supra, the Supreme Court held that detention authority under the AUMF continued for the duration of hostilities, and the Court resolved that issue in the context of a case involving a U.S. citizen with due process rights. See Hamdi, 542 U.S. at 510, 520-522.

In any event, Petitioner has no argument that his detention violates the Due Process Clause because under the current law of the Circuit, Petitioner may not avail himself of the protections of the Due Process Clause. As Petitioner acknowledges, in Al Hela v. Trump, the Court of Appeals held that, “[u]nder longstanding precedents of this court and the Supreme Court, the Due Process Clause cannot be invoked by Guantanamo detainees, whether those due process rights are labeled ‘substantive’ or ‘procedural.’” 972 F.3d 120, 150 (D.C. Cir. 2020)

⁶ Petitioner also asserts that an alleged interplay between the Suspension Clause and Due Process Clause results in a “penumbra” that imbues Petitioner with rights that neither Clause affords. Petr.’s Suppl. Br. at 22-23. Petitioner offers no logical arguments supporting why this must be so, and he can cite to no case law even remotely supporting his argument in the context of law-of-war detention. At bottom, Petitioner’s “penumbra” argument devolves into one that his detention must be arbitrary and unlawful because Petitioner believes his detention to be just that. For the reasons explained in the text, however, under controlling precedent, Petitioner’s detention is neither arbitrary nor unlawful.

(citing cases rejecting extraterritorial application of the Due Process Clause, including, *inter alia*, Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Zadvydas v. Davis, 533 U.S. 678 (2001)); *see also* Al Hela, 972 F.3d at 140 & n.5 (Guantanamo detainees are held outside the sovereign territory of the United States and, therefore, may not invoke the protections of the Due Process Clause); Ali, 959 F.3d at 380 (Randolph, J., concurring) (observing the “litany of circuit cases since Eisentrager confirming that the Fifth Amendment does not apply to aliens without property or presence in the United States”); Uthman v. Trump, 04-CV-1254 (RCL), 2020 WL 5095472, at *6 (D.D.C. Aug. 28, 2020) (noting “longstanding view that the Due Process Clause does not apply to foreign nationals without property or presence inside the United States’s sovereign territory”). Accordingly, Petitioner cannot successfully invoke the Due Process Clause in service of his arguments.

Petitioner argues that Al-Hela was wrongly decided, Petr.’s Suppl. Br. at 13-19, but although a petition for rehearing *en banc* was filed in Al-Hela on October 26, 2020,⁷ the decision in the case remains the law of the Circuit unless and until further acted upon by the Court of Appeals. *See Ayuda, Inc. v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring) (“[o]nce [an] opinion [is] released it [becomes] the law of this circuit”); *see also LaShawn A. v. Berry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (panel decision is by statute “the decision of the court” unless otherwise acted upon by the full *en banc* court); *cf. United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district courts are obligated to apply controlling

⁷ *See* Pet. of Petr.-Appellant for Re-Hearing En Banc, No. 19-5079 (D.C. Cir. filed Oct. 26, 2020). The Court of Appeals has requested that the Government file a response to the petition; the Government’s response is currently due December 8, 2020.

Circuit precedent unless that precedent has been overruled by the Court of Appeals en banc or by the Supreme Court).

Accordingly, Petitioner has no claim that his continued detention violates due process.

B. Petitioner's Detention Does Not Violate the Suspension Clause And No Suspension of the Writ Has Been Effected.

Petitioner also argues that his continued detention while eligible for transfer based on the PRB's determination violates the Suspension Clause (1) because his detention has become arbitrary, and (2) because, in the absence of any administrative or judicial avenue for him to enforce the PRB's determination and compel his transfer out of U.S. custody, a suspension of the writ of habeas corpus has been effected. As explained supra, however, under the Court of Appeals' Suspension Clause jurisprudence, Petitioner's detention is not as a legal or factual matter arbitrary, and the detention remains lawful.

Moreover, no suspension of the writ exists. Petitioner remains free to litigate the merits of his initial habeas petition: that is, to challenge the factual and legal basis for his detention under the AUMF, consistent with the Supreme Court's pronouncements in Boumediene, 553 U.S. at 573. So long as he may do so, the writ cannot be said to have been suspended. In the words of Boumediene, because Petitioner may invoke this Court's habeas jurisdiction and challenge his detention on the merits, he retains a "meaningful opportunity" to prove his detention is unlawful. 553 U.S. at 779. Thus the Suspension Clause guarantee remains fulfilled as to Petitioner.

In addition, Petitioner can demonstrate no legally protected interest in the Executive's discretionary authority to transfer detainees to a foreign country. As noted above, as the Court previously concluded in this case,

Petitioner cannot show an “injury in fact” because there has been no “invasion of a legally protected interest.” Under settled Supreme Court and D.C. Circuit precedent, Petitioner does not have a right to be released or transferred from his detainment, and no additional right has been conferred by . . . the PRB determination The decision to transfer Petitioner pursuant to a recommendation of the PRB rests exclusively within the discretion of the Secretary of Defense. Petitioner has no “right” to such a transfer. [Nasser, 234 F. Supp. 3d at 125.]

Indeed, Petitioner can point to nothing within the PRB process that confers Petitioner with a right to a transfer or that otherwise undermines the legality of his detention based on the PRB determination; in fact, the opposite is true. See, e.g., Exec. Order 13,567 § 10(c) (“This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”).⁸

In sum, Petitioner’s claim that his PRB determination undermines the legality of his detention is legally and factually incorrect. That determination affords Petitioner no legal entitlement to transfer or to a habeas writ. Thus, no suspension of the writ has been effected with respect to Petitioner’s continued detention, and he remains free to challenge whether he was part of or substantially supporting al-Qaida, the Taliban, or associated forces.

⁸ Courts of this Circuit have interpreted similar language in executive orders as not creating any judicially enforceable rights. See Meyer v. Bush, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993) (holding that executive order establishing President Reagan’s Task Force on Regulatory Relief did not create any private rights of action subject to judicial review); Alliance for Natural Health U.S. v. Sebelius, 775 F. Supp. 2d 114 (D.D.C. 2011) (holding that plaintiffs may not sue for alleged violations of executive order containing express language that order does not create enforceable rights); Shekoyan v. Sibley Int’l Corp., 217 F. Supp. 2d 59, 68 (D.D.C. 2002) (individual could not enforce employment discrimination provision of executive order absent “a provision that provides for a private cause of action”).

CONCLUSION

For the reasons stated herein, and in Respondents Opposition Brief, Petitioner remains lawfully detained, and his Motion for Order Granting Writ of Habeas Corpus should be denied.

23 November 2020

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

ABDUL LATIF NASSER (ISN 244),)	
)	
)	
Petitioner,)	
)	
v.)	Civil Action 05-cv-764 (CKK)
)	
DONALD TRUMP, in his official capacity)	
as President of the United States, et al.,)	
)	
Respondents.)	

**RESPONDENTS' RESPONSE TO
PETITIONER NASSER'S SUPPLEMENTAL BRIEF MODIFYING HIS POSITION IN
THE ONGOING LITIGATION IN LIGHT OF THE DC COURT OF APPEALS'
OPINION IN ALI v. TRUMP**

EXHIBIT 1



Menu

STATEMENTS & RELEASES

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Text of a Letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate

NATIONAL SECURITY & DEFENSE | Issued on: June 9, 2020



ALL NEWS

Dear Madam Speaker: (Dear Mr. President:)

I am providing this supplemental consolidated report, prepared by my Administration and consistent with the War Powers Resolution (Public Law 93-148), as part of my efforts to keep the Congress informed about deployments of United States Armed Forces equipped for combat.

MILITARY OPERATIONS IN SUPPORT OF UNITED STATES COUNTERTERRORISM EFFORTS

In furtherance of counterterrorism efforts, the United States continues to work with partners around the globe, with a particular focus on the United States Central and Africa Commands' areas of responsibility. In this context, the United States has deployed forces to conduct counterterrorism operations and to advise, assist, and accompany security forces of select foreign partners on counterterrorism operations. In the majority of these locations, the mission of United States military personnel is to facilitate counterterrorism operations of foreign partner forces and does not include routine engagement in combat. In many of these locations, the security environment is such that United States military personnel may be required to defend themselves against sporadic terrorist threats or attacks, and deploy United States military personnel with weapons and other appropriate equipment for their force protection. Specific information about counterterrorism deployments to select countries is provided below, and a classified annex to this report provides further information.

Military Operations against al-Qa'ida, the Taliban, and Associated Forces and in Support of
Related United States Counterterrorism Objectives

Since October 7, 2001, United States Armed Forces, including Special Operations Forces, have conducted counterterrorism combat operations against al-Qa'ida, the Taliban, and associated forces. Since August 2014, these operations have targeted the Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL), which was formerly known as al-Qa'ida in Iraq. In support of these and other overseas operations, the United States has deployed combat-equipped forces to several locations in the United States Central, European, Africa, Southern, and Indo-Pacific Commands' areas of responsibility. Such operations and deployments have been reported previously, consistent with Public Law 107-40, Public Law 107-243, the War Powers Resolution, and other statutes. These ongoing operations, which the United States has carried out with the assistance of numerous international partners, have been successful in seriously degrading ISIS capabilities in Syria and Iraq. If necessary, in response to terrorist threats, I will direct additional measures to protect the people and interests of the United States. It is not possible to know at this time the precise scope or the duration of the deployments of United States Armed Forces that are or will be necessary to counter terrorist threats to the United States.

Afghanistan. United States Armed Forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, and supporting the Afghan government and the Afghan military as they confront the Taliban in the field. In February, the United States took significant steps towards achieving peace in Afghanistan by reaching an agreement with the Taliban that was coordinated with Afghanistan's National Unity Government, and by releasing a joint declaration with the Government of Afghanistan. These commitments represent an important step to a lasting peace in a new Afghanistan and create a path forward to end the war in Afghanistan. Meanwhile, United States forces remain committed to our longstanding security relationship with the Government of Afghanistan and are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten United States and coalition forces in Afghanistan, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict in Afghanistan and against the Taliban, and active hostilities remain ongoing.

Iraq and Syria. As part of a comprehensive strategy to defeat ISIS, United States Armed Forces are conducting a systematic campaign of airstrikes and other necessary operations against ISIS forces in Iraq and Syria and against al-Qa'ida in Syria. A small presence of United States Armed Forces remains in strategically significant locations in Syria to conduct operations and secure critical petroleum infrastructure, in partnership with indigenous ground forces, against continuing terrorist threats emanating from Syria. United States Armed Forces in Iraq continue to advise, coordinate with, and provide support to select elements of the Iraqi security forces, including Iraqi Kurdish security forces. Support to Iraqi security forces includes training, equipment, communications support, and intelligence support. United States Armed Forces also provide limited support to the North Atlantic Treaty Organization mission in Iraq. Actions in Iraq are being undertaken in coordination with the Government of Iraq, the Kurdistan Regional Government, and in conjunction with coalition partners.

As reported in January, I directed a strike in Iraq targeting Qassem Soleimani, commander of the Iranian Islamic Revolutionary Guard Corps-Qods Force, in response to an escalating series of attacks by Iran and Iranian-backed militias on United States forces and interests in the Middle East region. I directed this action to protect United States personnel, to deter Iran from conducting or supporting further attacks against United States forces and interests, to degrade Iran's and Qods Force-backed militias' ability to conduct attacks, and to end Iran's strategic escalation of attacks on and threats to United States interests.

Arabian Peninsula Region. A small number of United States military personnel are deployed to Yemen to conduct operations against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS. The United States military continues to work closely with the Republic of Yemen Government (ROYG) and regional partner forces to degrade the terrorist threat posed by those groups.

United States Armed Forces, in a non-combat role, have also continued to provide military advice and limited information, logistics, and other support to regional forces combatting the Houthis in Yemen. Such support does not involve United States Armed Forces in hostilities with the Houthis for the purposes of the War Powers Resolution.

United States Armed Forces are deployed to the Kingdom of Saudi Arabia to protect United States forces and interests in the region against hostile action by Iran or supporting groups.

These forces, operating in coordination with the Government of the Kingdom of Saudi Arabia, provide air and missile defense capabilities and support the operation of United States fighter aircraft. The total number of United States forces in the Kingdom of Saudi Arabia is approximately 3,600.

Jordan. At the request of the Government of Jordan, approximately 3,145 United States military personnel are deployed to Jordan to support Defeat-ISIS operations, to enhance Jordan's security, and to promote regional stability.

Lebanon. At the request of the Government of Lebanon, approximately 40 United States military personnel are deployed to Lebanon to enhance the government's counterterrorism capabilities and to support the counterterrorism operations of Lebanese security forces.

Turkey. United States Armed Forces remain deployed to Turkey, at the Turkish government's request, to support Defeat-ISIS operations and to enhance Turkey's security.

East Africa Region. In Somalia, United States Armed Forces continue to counter the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. Since the last periodic report, United States forces have conducted a number of airstrikes against al-Shabaab, and remain prepared to conduct airstrikes against ISIS terrorists. United States military personnel also advise, assist, and accompany regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism operations. United States Armed Forces are deployed to Kenya to support counterterrorism operations in East Africa. Following the January 2020 attack on United States Armed Forces and interests in Manda Bay, Kenya, additional United States Armed Forces personnel and equipment were deployed to Kenya to increase force protection measures. United States military personnel continue to partner with the Government of Djibouti, which has permitted use of Djiboutian territory for basing of United States Armed Forces. United States military personnel remain deployed to Djibouti, including for purposes of staging for counterterrorism and counter-piracy operations in the vicinity of the Horn of Africa and the Arabian Peninsula, and to provide contingency support for embassy security augmentation in East Africa, as required.

Lake Chad Basin and Sahel Region. United States military personnel in the Lake Chad Basin and Sahel Region continue to conduct airborne intelligence, surveillance, and reconnaissance

operations and to provide support to African and European partners conducting counterterrorism operations in the region, including by advising, assisting, and accompanying these partner forces. Approximately 760 United States military personnel remain deployed to Niger.

Cuba. United States Armed Forces continue to conduct humane and secure detention operations for detainees held at Guantánamo Bay, Cuba, under the authority provided by the 2001 Authorization for the Use of Military Force (Public Law 107-40), as informed by the law of war. There are 40 such detainees as of the date of this report.

Philippines. United States Armed Forces deployed to the Philippines are providing support to the counterterrorism operations of the armed forces of the Philippines.

MILITARY OPERATIONS IN EGYPT

Approximately 460 United States military personnel are assigned to or supporting the United States contingent of the Multinational Force and Observers, which have been present in Egypt since 1981.

UNITED STATES AND NORTH ATLANTIC TREATY ORGANIZATION OPERATIONS IN KOSOVO

The United States continues to contribute forces to the Kosovo Force (KFOR), led by the North Atlantic Treaty Organization in cooperation with local authorities, bilateral partners, and international institutions, to deter renewed hostilities in Kosovo. Approximately 640 United States military personnel are among KFOR's approximately 4,000 personnel.

I have directed the participation of United States Armed Forces in all of the above-described operations pursuant to my constitutional and statutory authority as Commander in Chief and as Chief Executive (including the authority to carry out Public Law 107-40, Public Law 107-243, and other statutes), as well as my constitutional and statutory authority to conduct the foreign relations of the United States. Officials of my Administration and I communicate regularly with congressional leadership and other Members of Congress with regard to these deployments, and we will continue to do so.

Sincerely,

DONALD J. TRUMP

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The White House



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