HOW THE BIDEN ADMINISTRATION'S INITIAL LITIGATION POSITIONS ON GUANTANAMO COULD UNDERCUT BIDEN POLICY TO CLOSE THE PRISON†

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During his first 100 days, President Biden had an opportunity to demonstrate his resolve to finally close the U.S. military prison at Guantanamo Bay, Cuba, and end indefinite detention. Now in its twentieth year of operation, the prison remains a symbol of abuse and lawlessness around the world.

In February, the Biden administration launched a formal review of the Guantanamo prison "to make progress toward closing" it, resurrecting an important Obama-era goal. The Biden administration's approach has been quickly put to the test, as the administration has responded to detainees' pending legal challenges on several fronts. Unfortunately, at least thus far, the administration has failed to seize the opportunity litigation presents to end policies that defined post-9/11-era extralegal abuses. Instead, in perhaps the most consequential of these cases, the administration's first filing adopts a rights-rejecting approach that will make achieving President Biden's ultimate aim harder.

Earlier this month, the Biden administration could have distanced itself from the Trump administration's categorical rejection of due process rights for detainees held at Guantanamo. That opportunity arose in *Ali v. Biden*, in which a detainee is petitioning the Supreme Court to reverse a lower court opinion accepting the Trump administration's position. Doing so would not only have been legally correct, but also would have helped the administration further President Biden's and Secretary of Defense Austin's stated goal of ending the purgatory that is Guantanamo—by providing an additional judicially managed route for resolution of long-pending cases.

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Unfortunately, the administration headed in the wrong direction, raising questions about whether it will more broadly decline to use straightforward tools to close Guantanamo and end indefinite detention.

As each of us wrote previously, the Biden administration could have flatly rejected the Trump administration's flawed and unnecessary litigation strategy. It could have demonstrated that this administration will act consistent with the President's view that Guantanamo "undermines American national security" and "is at odds with our values as a country;" with his commitment to closing it; and with his vision of a U.S. foreign policy that "uphold[s] universal rights" and "respect[s] the rule of law." And last week, twenty-four Democratic Senators – led by Judiciary Committee Chairman Dick Durbin and Appropriations Committee Chairman Patrick Leahy – wrote to Biden urging him to do just that:

> [I]n service of both closing the Guantanamo detention facility and upholding the United States' human rights obligations, we urge you to reverse erroneous and troubling legal positions taken by the Trump Administration regarding the application of relevant international and domestic legal protections to Guantanamo, including in particular the position that the Constitution's Due Process Clause does not apply to the men detained there.

Instead, the Biden administration's legal position in *Ali* returns the U.S. government to a stance of longstanding resistance to fundamental rights.

In urging the Supreme Court to deny review of the petition filed in *Ali*, the government suggests the due process issue was not squarely raised before the appeals court and that, even if it had been, it would not make a difference because the petitioner, Ali, got the minimal process that is owed to temporary battlefield detainees during wartime under the Court's 2004 decision in *Hamdi v. Rumsfeld*. That process, the government said, allows for the liberal use of hearsay, does not allow a petitioner to confront witnesses, does not consider whether a petitioner poses a future danger, and enables the government to justify indefinite imprisonment by a mere preponderance of the evidence.

The *Hamdi* standard, which is highly deferential to the government, might have made sense 17 years ago when the case was decided, closer in time to the circumstances of capture and detention. It no longer makes sense in 2021. To put it another way, even as President Biden says "it's time to end America's longest war," his administration is arguing that it can indefinitely detain men at Guantanamo based on a standard that is no more rigorous than the low "negligence" standard used in garden variety civil cases. Applying this standard to Mr. Ali shows what it means: the government could continue subjecting Mr. Ali to lifetime detention based on a finding that it is more likely than not that he spent about 18 days at a guesthouse 20 years ago, and without any consideration by a judge of whether he actually poses a future threat to the United States. In its *Ali* filing, the Biden administration suggests that administrative and discretionary Periodic Review Boards (PRBs) conduct a "future threat" assessment that satisfies the Due Process Clause, but PRBs are no substitute for judicial review with constitutional safeguards and they do not adequately take into account the experiences of torture and trauma survivors in particular.

Picking up where the Trump administration left off in *Ali* is even more problematic because, for the Biden administration, fighting the case makes no sense. If the President believes Guantanamo is profoundly harmful and intends to close it, what is his Justice Department hoping to achieve? Why, with the 20th anniversary of 9/11 fast approaching, would his administration invest in maintaining sweeping detention authority at a notorious off-shore prison that represents the worst of the "forever war" Biden wants to end?

Not only is the government's opposition in *Ali* antithetical to the President's views and promises, it will also make closing Guantanamo harder, for several reasons. For example, as Senators Durbin, Leahy and their colleagues explained, "if the Justice Department were not to oppose habeas petitions in appropriate cases, those detainees could be transferred more easily pursuant to court orders." That is because current law requiring the Defense Secretary to make a series of mostly security-related certifications prior to a foreign transfer does not apply to court-ordered releases.

Indeed, given current congressional restrictions on transferring detainees, it is hard to see why the Biden administration would continue to resist giving the judiciary—which is not bound by those restrictions—the ability to rigorously test the evidence against the detainees and, where appropriate, to order their release or facilitate their transfer.

Perhaps more damaging to closure efforts is the message that the government risks sending in *Ali* to potential transfer countries. Surely those countries' officials will wonder why they should consider resettling men against whom the U.S. government is advancing extreme legal arguments in order to prevent any prospect of their release.

Further raising the stakes, the U.S Court of Appeals for the D.C. Circuit recently granted rehearing en banc in *Al-Hela v. Trump*, which also presents the question whether the Due Process Clause applies at Guantanamo. Last August, a D.C. Circuit panel ruled that, pursuant to Circuit precedent, it did not. That panel included two Judges—Raymond Randolph and Neomi Rao—who have long resisted the idea that detainees have any basic constitutional rights. Vacating that panel decision opens the door for the Biden administration to rethink the position it took in *Ali* and to use its brief to the full D.C. Circuit in *Al-Hela* (and the oral argument currently scheduled for September), to reverse that position.

The developments in *Ali* and *Al-Hela* now place even greater weight on the remaining avenues for the Biden administration to reverse rights-denying positions and to close Guantanamo. For example, the administration faces another fast-approaching decision point in a separate Guantanamo habeas case: *Al-Qahtani v. Biden*.

Mohammed Al-Qahtani is a detainee who has been diagnosed as schizophrenic and has at times been suicidal. He has asked the Defense Department to grant him an independent medical evaluation—as provided for in Army regulations that implement the Geneva Conventions (AR 190-8)—to determine whether he is entitled to medical repatriation. Under the Trump administration, the Defense Department refused to provide even this basic safeguard. When Mr.

Al-Qahtani obtained a federal court order requiring the government to comply with his request, the then Army Secretary took the extraordinary step of stripping *all* Guantanamo detainees of their longstanding rights under AR 190-8. On the basis of that action, and just five days before Biden's inauguration, the Trump administration moved for reconsideration of the federal court's order. (For additional details about Mr. Al-Qahtani's case see this article from January).

On March 25, the eve of the Biden administration's first filing deadline in *Al-Qahtani*, the government asked for an extension "to allow new officials to appropriately consider and assess the issues and arguments raised in and related to Petitioner's opposition to the Motion for Reconsideration." That seemed like a potentially promising sign, at least until the government's brief in *Ali*. On April 23, it again asked for, and received, additional time to respond.

How to proceed in *Al-Qahtani* should be an easy call. The Biden administration should do the right thing, stand down, and transfer Al-Qahtani. The government does not contest the severity of Mr. Al-Qahtani's mental illness, and Saudi Arabia would accept his repatriation. If it refuses to do so, the administration must provide the easy and humane medical evaluation to which he is entitled, and then transfer Mr. Al-Qahtani if the independent medical experts who would conduct that evaluation determine that repatriation is warranted.

Whichever course the Biden administration chooses, it must include Acting Army Secretary John Whitley rescinding the memo his predecessor issued in an 11th hour attempt to circumvent a federal court order by denying all Guantanamo detainees the protections provided by AR 190-8. If he refuses, Senators should demand that Biden's nominee to replace him—Christine Warmouth—commit to doing so as a condition of her confirmation.

Finally, the President has announced that he will withdraw U.S. troops from Afghanistan by this September's 20th anniversary of the 9/11 attacks. "We went to war with clear goals," Biden asserted in his speech announcing the withdrawal. "We achieved those objectives." He added that "al Qaeda is degraded in Iraq—in Afghanistan. And it's time to end the forever war."

President Biden's withdrawal announcement and its reasoning has significant legal implications and presents a unique new opportunity for the administration to generate momentum in favor of Guantanamo closure—specifically, by connecting the end of the conflict to the release and repatriation of detainees who have been held for nearly two decades based on their alleged participation in it.

The early signs on that score are not encouraging. Following Biden's announcement, a Pentagon spokesman responded that there was no direct link between the future of indefinite detention at Guantanamo and what he described as the "mission" in Afghanistan, adding that the U.S. wanted to "maintain counterterrorism capabilities in the region" and to "still be able to strike at terrorist threats in Afghanistan." In other words, it appears that, at least preliminarily, the U.S. may take the position that indefinite law-of-war-based detention may continue in Guantanamo despite Biden's declaration that the conflict that gave rise to it is at end with troop withdrawal.

The Pentagon statement makes little sense practically or legally as a matter of international law. Instead, it portends a stark departure from the position that prior administrations have asserted and that the Supreme Court adopted in *Hamdi* when it allowed for wartime detention under the 2001 Authorization for Use of Military Force (AUMF)—*i.e.*, that detainees captured on a battlefield could be held as combatants under traditional law-of-war principles to prevent their return to the conflict, and that they would be released once the war ends, just like prisoners of war in the past. In *Hamdi*, the Court also specifically tied the duration of the conflict to the presence of U.S. troops and active combat operations in Afghanistan. Just as importantly, it cautioned that if "the practical circumstances" of the conflict no longer resembled those that have informed the development of the law of war, the understanding that the AUMF authorized detention may "unravel."

Meanwhile, several detainees have already filed motions in their habeas cases, arguing that once the U.S. military withdraws from Afghanistan, whatever wartime legal authority the government might have invoked to detain them without charge no longer exists. The Biden administration has yet to respond to those motions. If the administration adopts the Pentagon's view in detainees' cases, it would not only undermine its stated desire to close the prison, but would also be pressing a new, and unprecedented, indefinite military detention power in the "forever war" Biden has pledged to end.

No one thinks closing Guantanamo and putting an end to indefinite military detention will be easy. But it is not an intractable problem. It can be done following this road map. First, though, the Biden administration needs to stop standing in its own way.