

Biden's Plan to End Afghanistan War Gives Some Detainees Hope for Release

The legal basis for indefinite detention at Guantánamo is to prevent combatants from returning to the battlefield. But what if their old battlefield is no more?



By Charlie Savage and Carol Rosenberg

Published April 21, 2021 Updated Sept. 26, 2021

WASHINGTON — President Biden has declared that he intends to end the war in Afghanistan by the 20th anniversary of the Sept. 11 attacks this year. But it is less clear whether anything will change for detainees at the prison at Guantánamo Bay that was opened for that war.

Traditionally, when conflicts end, wartime detainees are sent home. But the government, under the administrations of both parties, has taken the position that the war Congress authorized after Sept. 11 is bigger than the conflict in Afghanistan. Moreover, Mr. Biden is not declaring defunct the broader war against Al Qaeda and its progeny, wherever they are.

Still, lawyers for at least two of the 40 remaining prisoners at Guantánamo told federal judges this week that whatever wartime legal authority the government had to detain their clients was evaporating. The motions were the first legal fallout from Mr. Biden's announcement.

One of the detainees, Khalid Qassim, 44, is a Yemeni man who has been held without trial at Guantánamo for nearly 19 years; he was captured in late 2001 or early 2002 and is being held as a Qaeda trainee who “may have fought for the Taliban in or near Kabul and Bagram, Afghanistan, before fleeing to the Tora Bora mountains in late 2001.”

On Monday, his lawyers sought a judge's permission to expand his existing habeas corpus lawsuit to include the new argument that with Mr. Biden's “announced end to the involvement of United States troops in active combat in Afghanistan, there can no longer be any legal basis” to keep detaining him.

The other, an Afghan named Asadullah Haroon Gul, who is about 40, was captured in 2007 by Afghan forces and turned over to the United States military. A basis for holding him is his past affiliation with a militia known by the acronym HIG, a movement that — like its sometime allies the Taliban and Al Qaeda — resisted the American and allied invasion of Afghanistan.

The militia, however, made peace with the Afghan government in 2017, essentially breaking with the Taliban. Even before Mr. Biden's decision to withdraw from Afghanistan, lawyers for Mr. Haroon had already sued seeking his release because the militia was no longer engaged in an armed conflict in Afghanistan.

In a motion filed in his habeas case on Tuesday, his lawyers also argued that while they believed Mr. Haroon should have been released years ago anyway, now the United States had even less of a basis for holding him and he should be “immediately” sent home.

“The law is clear: Asadullah gets to go home now, regardless of whether, as the government incorrectly contends, he was part of or substantially supported Al Qaeda,” they wrote.

The Justice Department has not yet responded to the filings.

John F. Kirby, a Pentagon spokesman, said in an interview that Mr. Biden intended to close the wartime prison, but argued that there was no direct link between its future and the coming end to what he called the “mission” in Afghanistan.

“We are still going to maintain counterterrorism capabilities in the region,” he said. “And we will still be able to strike at terrorist threats in Afghanistan even if we don't have boots on the ground.”

After the Pentagon opened the wartime prison in January 2002 and detained hundreds of men there, more were from Afghanistan than from any other nation. Today, 40 detainees remain, more than half of whom were captured outside Afghanistan and only two of whom are Afghans.

on the Taliban takeover in Afghanistan. [Get it sent to your inbox.](#)

The Biden administration's intention to pull American troops out of Afghanistan (save for an embassy guard force) is a new chapter in a saga over how the war that grew out of the Sept. 11 attacks has challenged the traditional moral basis for law-of-war detention.

Indefinite wartime detention — without trial and until the end of hostilities — developed as a humanitarian alternative to killing captives to prevent them returning to the battlefield and posing a later danger. But traditional wars end after a few months or years. The open-ended nature of the post-Sept. 11 “forever war” transformed the practice into a recipe for possible life imprisonment without trial.

The Bush administration first claimed a legal right to hold detainees captured in Afghanistan indefinitely and without trial at Guantánamo in 2002, and the Supreme Court approved that authority in 2004, so long as detainees received a fair hearing.

In the ruling, Justice Sandra Day O'Connor suggested that the legal basis for holding Guantánamo detainees might “unravel” over time if the war never ended. But, she wrote, the court did not need to worry about perpetual detention at that point since the United States was still “involved in active combat in Afghanistan.”

That, however, left unanswered the question of what it would mean if Afghanistan was no longer an active zone of armed conflict, even as fighting raged elsewhere thousands of miles away.

Understand the Taliban Takeover in Afghanistan

Who are the Taliban? The Taliban arose in 1994 amid the turmoil that came after the withdrawal of Soviet forces from Afghanistan in 1989. They used brutal public punishments, including floggings, amputations and mass executions, to enforce their rules. Here's more on their origin story and their record as rulers.

Mr. Haroon's case may be stronger since he is an Afghan citizen, as opposed to other detainees who the government says traveled to Afghanistan to join Osama bin Laden's Islamist movement. There is only one other Afghan still at Guantánamo, Muhammad Rahim, 55, but he presents a more complex case.

He was initially held in C.I.A. custody as a “high-value detainee,” and his 2016 intelligence profile describes him as a courier and facilitator for Al Qaeda — including for Bin Laden — who had advance knowledge of the Sept. 11 attacks. He has never been charged with war crimes.

If the evidence is strong that Mr. Rahim worked directly for Al Qaeda, the government can argue that wartime authority continues to exist to hold him to prevent him from returning to the fight, even if the warfare involving the United States in Afghanistan is over. But his lawyer, Cathi Shusky, a federal defender in Ohio, argued that the evidence was weak.

“There's a reasonable explanation he wasn't part of either” Al Qaeda or the Taliban, said Ms. Shusky, who said many of the details of his case were classified, preventing her from elaborating. “There is some twisting of the narrative. I think when the facts are fully revealed, it will show his continued detention is not lawful.”

A U.S. military representative for Mr. Rahim, told an administrative review board in March 2016 that Mr. Rahim regretted his past and wanted to return to his two wives and seven children in Afghanistan. His motivations were not ideological, the representative said; rather “he only did what he did for money, so he could feed his family.”

His federal court petition for release has been on hold for years while he sought release through the board, which has repeatedly declared his detention a national security necessity. But Ms. Shusky said she and another lawyer were planning to revive his habeas corpus case in light of the decision to pull out of Afghanistan.

A ruling in an earlier case is reason for caution. In President Barack Obama's second term, he declared an end to the “combat mission” in Afghanistan and more broadly described the war as “over.” Citing that language, a Yemeni detainee at Guantánamo, who was held as a Taliban militia member, asked a judge to order his release since the American commander in chief had said the war had ended.

But the reality on the ground was that the American military continued to battle militias deemed to pose a threat, including the Taliban and those who swore allegiance to the new Islamic State. In July 2015, Judge Royce C. Lamberth ruled that the government still had authority to detain the man because fighting continued in Afghanistan.

“A court cannot look to political speeches alone to determine factual and legal realities merely because doing so would be easier than looking at all of the relevant evidence,” Judge Lamberth wrote. “The government may not always say what it means or mean what it says.”

In the end, the Obama administration sent the detainee to Oman for resettlement. But, as of their most recent reviews by the six-agency, parolelike board, both Afghan men who remain there are still designated as ineligible for trial and deemed too dangerous to release.