
CASE NO. 10-5087

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOHAMMEDOU SALAHI,
PETITIONER-APPELLEE,
v.

BARACK OBAMA, ET AL.,
RESPONDENT-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR NON-GOVERNMENTAL ORGANIZATIONS BRENNAN
CENTER FOR JUSTICE AND REPRIEVE AS AMICI CURIAE IN
SUPPORT OF PETITIONER-APPELLEE**

ELIZABETH GOITEIN
EMILY BERMAN
FAIZA PATEL
BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Dated: June 16, 2010

Attorneys for Amici Curiae

RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae make the following disclosures:

The Brennan Center for Justice at NYU School of Law certifies that it has not issued shares to the public, and has no parent company, subsidiary, or affiliate that has issued shares to the public.

Reprieve certifies that it has not issued shares to the public, and has no parent company, subsidiary, or affiliate that has issued shares to the public.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned counsel 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 Appellants, other than the Non-Governmental Organizations filing this brief as amici curiae in support of Petitioner-Appellee and the National Association of Criminal Defense Lawyers, which amici believe intends to file a brief as amicus curiae in this case.

(B) **Ruling Under Review.** References to the ruling at issue appear in the Brief for Appellants.

(C) **Related Cases.** References to any related cases appear in the Brief for Appellants.

CERTIFICATE OF COMPLIANCE WITH RULE 29(d)

In accordance with D.C. Circuit Rule 29(d), the undersigned certifies that the accompanying brief is necessary. Amici are non-governmental organizations that have advocated in this Court and others for habeas rights for detainees held at Guantanamo Bay. Amici are not aware of any other brief in this case that discusses the scope of the President's detention authority under the AUMF.

Dated: June 16, 2010

/s/ Emily Berman

Brennan Center for Justice
161 Sixth Avenue, 12th floor
New York, NY 10013

TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	8
I. THE DETENTION AUTHORITY RECOGNIZED IN <i>HAMDI</i> AND SUBSEQUENT CASE LAW IS INSUFFICIENT AS A MATTER OF LAW TO AUTHORIZE SALAHI’S DETENTION BASED ON THE FACTS ALLEGED BY THE GOVERNMENT.....	8
A. <i>Hamdi</i> Construed the AUMF to Authorize Detention in a Limited Set of Circumstances.....	8
B. This Court Has Construed the AUMF to Authorize the Detention of Individuals as “Part of” Al Qaeda Only Where There Is Sufficient Evidence of Actions Analogous to Those of a Soldier in an Enemy Army	11
C. Even As Depicted By the Government, the Evidence Is Insufficient as a Matter of Law to Authorize the Detention of Salahi as “Part Of” Al Qaeda Under <i>Hamdi</i> and the Jurisprudence of this Court .	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abdah v. Obama</i> , No. 04-1254, 2010 WL 1626073 (D.D.C. Apr. 21, 2010)	18, 19
<i>Ahmed v. Obama</i> , 613 F. Supp. 2d 51 (D.D.C. 2009)	18
<i>al Bihani v. Obama</i> , 590 F.3d 866 (D.C. Cir. 2010)	1, 4, 5, 11, 13, 15, 20, 22
<i>al Bihani v. Obama</i> , 594 F. Supp. 2d 35 (D.D.C. 2009)	15
<i>al Gingo v. Obama</i> , 626 F. Supp. 2d 123 (D.D.C. 2009)	18
<i>al Maqaleh v. Gates</i> , No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010)	1, 20
<i>Awad v. Obama</i> , No. 09-5351, 2010 WL 2292400 (D.C. Cir. June 2, 2010).....	3, 16, 19, 22
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	1, 19
<i>Gherebi v. Obama</i> , 609 F. Supp. 2d 43 (D.D.C. 2009)	4, 11, 13, 17, 18
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	1
<i>*Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	3, 4, 5, 8, 9, 10, 14, 23
<i>Hamlily v. Obama</i> , 616 F. Supp. 2d 63 (D.D.C. 2009)	4, 13, 17
<i>Salahi v. Obama</i> , Civ. No. 05-cv-0569 (D.D.C. Apr. 9, 2010)	18, 21, 22

*Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

(continued)

Page(s)

Statutes and Treaties

*Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224.....	2, 8, 11
Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4(1) & (2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135	12, 14, 15
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3	6, 12

Other Authorities

Br. of Respondent, <i>Hamdi v. Rumsfeld</i>	14
Bradley, Curtis A. & Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047 (2005)	13, 17
Coll, Steve, <i>Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001</i> (2004)	22
Resp.'s Mem. Regarding Gov't Detention Authority Relative to Detainees at Guantanamo Bay, <i>In re Guantanamo Bay Detainee Litig.</i> , Misc. Nos. 08-442, 05-0763, 05-1646, 05-2378 (D.D.C. Mar. 13, 2009)	3

*Authorities upon which we chiefly rely are marked with asterisks.

INTERESTS OF AMICI CURIAE

Amici are non-governmental organizations dedicated to ensuring that in its response to terrorism, this nation preserves its commitment to the Constitution and the rule of law. They have filed amicus curiae briefs in previous cases defining the scope of the President's authority, including, in the Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008), and, in this Court, *al-Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010), and *al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010). Amici recognize that the instant case raises a critical question about the scope of the President's detention authority under the 2001 Authorization for the Use of Military Force, and submit this brief to explain that whatever the full scope of such authority, it does not include the authority to detain an individual who cannot be analogized to a soldier in an enemy army in a traditional armed conflict.

The Brennan Center for Justice at the New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. It advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. It has served as counsel in several cases involving Executive detention.

Reprieve is a London-based legal services charity founded in 1999 by its current director, Clive Stafford Smith, who practiced capital defense litigation in

the United States for 20 years. The chairman is Thomas Bingham, Baron Bingham of Cornhill, the recently retired senior law lord in the United Kingdom. Reprieve provides pro bono legal assistance to prisoners facing the death penalty (in the U.S. and around the world) and also litigates to reunite prisoners held beyond the rule of law with their legal rights. Lawyers from Reprieve have been involved in Guantanamo Bay litigation from the very start, filing the initial case that led to the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), and have to date worked on the cases of at least 80 detainees held at Guantanamo. Reprieve has also been at the forefront of efforts to bring the rule of law to secret U.S. detention facilities.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner-Appellee Mohamedou Salahi and urge affirmance of the district court judgment granting the petition for habeas corpus. We presume that Salahi will argue that the district court's factual findings were not clearly erroneous.¹ In this brief, we show that the district court would have erred as a matter of law had it held, on the facts offered by the Government, that Salahi is detainable under the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as someone who is "part of" al Qaeda. Such a holding would expand the AUMF's detention authority far beyond

¹ Because Salahi's brief was not publicly available at the time we prepared this amicus curiae brief, amici have not had an opportunity to read his brief.

what is contemplated in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and the jurisprudence of this Circuit.

The Government relies for detention authority in this case on the AUMF.² Although the AUMF itself does not mention detention authority, in *Hamdi*, the Supreme Court held that the AUMF confers authority on the President to detain “enemy combatants.” 542 U.S. at 516. The Court defined “enemy combatant” as an individual who is “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* (quotation marks omitted). The Court read such detention authority into the AUMF by concluding that Congress must have intended to incorporate the principles of the law of war, under which detention is a “fundamental and accepted [] incident” of the use of force. *Id.* at 518.

Hamdi analyzed detention authority in the context of a traditional armed conflict between states where the fighting took place on discrete and identifiable battlefields. Hamdi himself was allegedly captured on a battlefield in Afghanistan carrying a weapon and supporting the forces of the Taliban, then the government of Afghanistan, in hostile combat against U.S. and coalition forces. *Hamdi*, 542 U.S. at 512-13. The Court in *Hamdi* found that these factual circumstances, if

² See Resp.’s Mem. Regarding Gov’t Detention Authority Relative to Detainees at Guantanamo Bay 1, *In re: Guantanamo Bay Detainee Litig.*, Misc. Nos. 08-442, 05-0763, 05-1646, 05-2378 (D.D.C. Mar. 13, 2009).

proven, would be sufficient to justify Hamdi's detention under the AUMF, as interpreted in accord with the principles of the law of war. *Id.*

While the *Hamdi* plurality indicated that lower courts might apply the AUMF beyond these limited factual circumstances, *id.* at 522 n.1, it warned that if the circumstances of the conflict in question substantially differed from those that informed the development of the law of war, the Court's willingness to recognize the authority to detain that the AUMF conferred could "unravel," *id.* at 521.

Subsequent cases in this Circuit have interpreted the AUMF to permit detention only in limited factual circumstances that go beyond those alleged in *Hamdi*. They have held that, under that statute, the President may detain not only those who fight on behalf of an enemy state's armed forces, but also anyone who is "part of" al Qaeda, the Taliban, or associated groups. *See, e.g., al Bihani*, 590 F.3d at 872-73; *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69-70 (D.D.C. 2009).³ They have reached this conclusion by analogizing these organizations to a conventional enemy military force in an international armed conflict.⁴ *See Gherebi v. Obama*, 609 F. Supp. 2d 43, 68-70 (D.D.C. 2009).

³ In addition, this Court has held that an individual may be detained if he "supported" a group against whom the AUMF authorizes the use of force. *Al Bihani*, 590 F.3d at 872-73. The Government in this case argues only that Salahi is "part of" al Qaeda.

⁴ As noted above, the Supreme Court in *Hamdi* addressed a detention that took place in the context of a war between nation states. Whether the law of war and the ruling in *Hamdi* properly permit detention in circumstances merely analogous

But the analogy is imperfect. Determining whether someone is “part of” al Qaeda is a more difficult task than determining membership in a nation state’s army. Those who fight on behalf of al Qaeda do not wear uniforms or recognizable insignia. Courts have thus relied on the presence of other concrete factual circumstances to give some confidence that innocent civilians, or those with only fleeting or tangential ties to al Qaeda, are not mistakenly found to be “part of” al Qaeda and subjected to potentially lifelong detention.

In each of this Court’s decisions delineating the government’s authority to detain someone as “part of” al Qaeda, the government has pointed to objective factors allowing it to analogize the detainee to a member of the military in a traditional armed conflict. *See, e.g., al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Awad v. Obama*, No. 09-5351, 2010 WL 2292400 (D.C. Cir. June 2, 2010). The government has identified, and this Court has considered, such factors as whether the detainee fought alongside al Qaeda in Afghanistan; trained in al Qaeda training camps at the time of the conflict; carried weapons in hostile combat with U.S. and coalition forces; or provided substantive support to al Qaeda’s combat operations in Afghanistan during the conflict—all actions that resemble closely the actions of a soldier in a traditional war between nations. The courts in this Circuit

to traditional wars between nations, as this Court has held, is beyond the scope of this brief. What is clear, however, is that the AUMF may not provide for detention if the relevant circumstances are entirely *unlike* those of traditional wars, as is the case here. *Hamdi*, 542 U.S. at 521.

also have borrowed the “command structure” test from the law of war, reasoning that a person who is within al Qaeda’s military command structure may be considered a member of al Qaeda just as a person who is within the command structure of a military unit is considered a member of the armed forces in traditional conflicts. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43, 1125 U.N.T.S. 3 (“Additional Protocol I”).

Such factors are entirely missing from this case. Salahi was first detained in Mauritania, far from any battlefield; he is not alleged to have engaged in any hostilities against the U.S. or its allies; to have carried any weapon on any battlefield to fight U.S. forces or allies, at any time; to have had any connection to hostilities in Afghanistan; or to have been involved in any way in the 9/11 attacks. The Government does suggest that he engaged in some activities—none of which were connected to 9/11 or the hostilities in Afghanistan—on behalf of members of al Qaeda during the late 1990s and 2000, but as we discuss below, these allegations are insufficient to establish that Salahi was part of the al Qaeda command structure. Extending detention authority to apply in these circumstances would exceed not only the authority contemplated in *Hamdi* and the precedents of this Court, but also the authority Congress granted in the AUMF.

To be sure, Salahi admits to having been a member of al Qaeda when it was fighting the communist government in Afghanistan in the early 1990s. But that was a different conflict altogether from the one that gave rise to the AUMF. In the early 1990s, the U.S. and groups like al-Qaeda had a common goal: to prevent communist rule in Afghanistan. None of the allegations regarding the period thereafter involved any actions hostile to the U.S. There are simply no facts analogous to those in *Hamdi* or cases decided in this Circuit to indicate that Salahi is within the category of persons whose relationship to al Qaeda can be analogized to membership in an enemy army, and who can therefore be subject to indefinite detention under this Court's precedents.

Given the ways in which the facts of this case depart from those that have come before, this Court should hold as a matter of law that being "part of" al Qaeda requires a more substantial connection to that organization than the fragmentary scraps offered by the Government here. For this Court to hold otherwise would extend the AUMF to cover detentions too far removed from the type of detention that the Supreme Court deemed "fundamental" to waging war and would risk the potentially indefinite detention of innocent civilians.

ARGUMENT

I. THE DETENTION AUTHORITY RECOGNIZED IN *HAMDI* AND SUBSEQUENT CASE LAW IS INSUFFICIENT AS A MATTER OF LAW TO AUTHORIZE SALAHI'S DETENTION BASED ON THE FACTS ALLEGED BY THE GOVERNMENT

A. *Hamdi* Construed the AUMF to Authorize Detention in a Limited Set of Circumstances

The AUMF delegates to the President authority to use “all necessary and appropriate force” against “those nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” AUMF § 2(a), 115 Stat. at 224. While this statute does not explicitly refer to detention authority, the Supreme Court held that detention of battlefield combatants is a form of military force authorized by the AUMF’s “necessary and appropriate” provision. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (holding that the AUMF authorized detention of an individual who was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States there”) (quotation marks omitted).

Although the facts presented in *Hamdi* do not necessarily constitute the limits of detention authority under the AUMF, that case is the foundation of all that has followed. A plurality of the Court in *Hamdi* concluded that the AUMF must be understood to authorize detention of individuals who were “part of or

supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 509, 516 (plurality) (emphasis added). In a battlefield-based armed conflict like the one between the U.S. and its allies and the Taliban forces in Afghanistan, the Court concluded that detention of individuals falling into this “*limited category*”—individuals such as Hamdi, who was captured alongside Taliban forces while engaged in hostilities against the U.S. on an active battlefield—was “so fundamental and accepted as an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 518 (plurality) (emphasis added); *see also id.* at 519 (plurality) (“Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here.”) (emphasis added).

The alleged circumstances of Hamdi’s detention, if proven, yielded unequivocal evidence of the necessary nexus between Hamdi and the Taliban. The government alleged that Hamdi “affiliated with a Taliban military unit and received weapons training.” *Hamdi*, 542 U.S. at 512-13 (plurality). It further alleged that he “took up arms with the Taliban,” a party “engaged in armed conflict against the United States” in Afghanistan. *Id.* at 510, 513 (plurality). Moreover, when Hamdi was allegedly captured on the battlefield during a time when U.S. allied forces were “engaged in battle with the Taliban,” Hamdi was in possession

of a “Kalishnikov assault rifle.” *Id.* at 513 (plurality). Proof of those facts would provide convincing and objective grounds to believe that Hamdi was a member of a Taliban “military unit,” *i.e.*, part of the armed forces of a party to a recognized armed conflict. This conduct would bring him squarely within the scope of the AUMF.⁵

In endorsing the lawfulness of Hamdi’s detention under the allegations lodged by the government, the plurality repeatedly noted the limited scope of its holding, *id.* at 516 (plurality) (determining to “answer only the narrow question” before the Court); *id.* at 518 (plurality) (noting the “limited category” of individuals under consideration), and carefully restricted that holding to the circumstances before it, *id.* at 518, 522 (plurality) (permitting detention, “for the duration of . . . hostilities,” of “individuals who fought against the United States in Afghanistan as part of the Taliban”). While the Court envisaged that lower courts would fill out the “permissible bounds” of detention authority in subsequent cases, it cautioned that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [the understanding behind its authorizing detention] may unravel,” *id.* at 521 (plurality).

⁵ Of course, the *Hamdi* plurality also held that even persons captured on the battlefield are entitled to a hearing to determine whether they are not instead an innocent civilian, such as an aid worker or journalist seized in error.

B. This Court Has Construed the AUMF to Authorize the Detention of Individuals as “Part Of” Al Qaeda Only Where There Is Sufficient Evidence of Actions Analogous to Those of a Soldier in an Enemy Army

In the wake of the *Hamdi* decision, lower courts have undertaken to apply the principles set out in the *Hamdi* plurality. Though the Taliban government is no longer in power in Afghanistan, the AUMF authorized force not only against “nations,” but also against “organizations.” Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224. Thus the nature of the courts’ inquiry has changed. Instead of seeking to determine whether a detainee is a member of an enemy nation’s army, they must decide if he is “part of” an organization responsible for the September 11 attacks. *Al Bihani v. Obama*, 590 F.3d 866, 871-72 (D.C. Cir. 2010).

Hamdi did not speak to the question of what constitutes being “part of” an enemy organization so as to authorize detention. To apply *Hamdi*’s principles in the context of detainees alleged to be members of al Qaeda, lower courts have drawn on the plurality’s use of the law of war and analogized al Qaeda to a conventional army. They have asked whether a detainee “is a member of the ‘armed forces’” of al Qaeda, much as it could be asked whether a soldier is a member of a nation state’s armed forces. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 67 (D.D.C. 2009); *see also id.* at 66 (noting the importance of the distinction between “members of ‘armed forces’ who necessarily always actively participate

in hostilities . . . and individuals who are not a part of the enemy's armed forces and therefore do not actively participate in hostilities").

Determining whether an individual is "part of" al Qaeda (or another relevant group) for AUMF purposes, however, is a more difficult task than determining membership in a conventional army. Longstanding law-of-war principles speak to determinations of membership in the armed forces of enemy nations in battlefield and related circumstances. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2)(a)-(d), Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("Third Geneva Convention" or "GC III") (membership entails being part of the command structure; wearing a fixed distinctive sign indicating membership in the armed forces; carrying arms openly; and conducting operations in accordance with the laws and customs of war); Additional Protocol I, art. 43 (all organized armed forces, groups, and units which are under a command that is responsible for the conduct of its subordinates are part of the armed forces). Thus making membership determinations in the context of a traditional war with traditional armies is a relatively simple exercise.

By contrast, discovering who is "part of" an organization like al Qaeda is a much more complicated task. Al Qaeda is an unconventional, amorphous, transnational organization; it is not made up of soldiers wearing uniforms, it is unaffiliated with any particular nation, and it uses "asymmetric tactics that exploit

the rules of open societies” by blending into the civilian population. *Al Bihani*, 590 F.3d at 882 (Brown, J. concurring). As a consequence, it is not always clear whether a particular individual is associated with al Qaeda, and if so, what the nature of that association may be. *See Gherebi*, 609 F. Supp. 2d at 68 (“Obviously, the organizations that the President is authorized to target under the AUMF do not . . . issue membership cards or uniforms.”) (quotation marks omitted); *see* Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113 (2005) (“Members of terrorist organizations do not wear uniforms or other indicia of affiliation, and the organizations purposefully obscure their structure and members’ roles, identity, and status”). Accordingly, to distinguish between “members of a terrorist organization involved in combat operations and civilians who may have some tangential connection to such organizations,” courts must look to other objective, verifiable indications that the detainee is “part of” the organization. *Gherebi*, 609 F. Supp. 2d at 68; *see also Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (noting that courts must use an approach to determining who is “part of” al Qaeda that is “more functional than formal”).

Ensuring accurate determinations regarding the nature of a detainee’s alleged association with one of these organizations is especially important in the conflict with al Qaeda because error in these cases comes at a higher price than in

traditional warfare. Because law-of-war detention is meant “to prevent captured individuals from returning to the field of battle and taking up arms once again,” detainees can be held only “for the duration of the relevant conflict.” *Hamdi*, 542 U.S. at 518, 521 (plurality). In a traditional war, this duration is presumed to be finite. But the current conflict with al Qaeda is open-ended and “unlikely to end with a formal cease-fire agreement.” *Id.* at 520 (plurality) (quotation omitted). Detention here therefore raises a “substantial prospect of perpetual detention.” *Id.* (plurality). It was this prospect of such an unending deprivation of liberty that induced the *Hamdi* plurality to warn of the potential for detention authority under the law of war to “unravel” under the weight of new circumstances. *Id.* at 521 (plurality).

Hamdi supplies the starting point for making accurate determinations regarding a detainee’s eligibility for detention. It endorsed the detention of a person proved to be “part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and* . . . engaged in an armed conflict against the United States.” *Hamdi*, 542 U.S. at 516 (plurality) (emphasis added) (quotation marks omitted); *see also* Br. of Respondent at 3, *Hamdi v. Rumsfeld*. By using the conjunctive “and,” *Hamdi* extended detention to individuals who were *both* “part of” the Taliban *and* participated in the armed conflict. *Id.* The plurality made the finding of soldier-like actions (e.g., carrying a weapon on the battlefield in that

group's hostilities against the U.S. and coalition forces) a necessary factual predicate of Hamdi's detention.

Hamdi dealt with a traditional conflict between nation states: the U.S. and its allies, and the then-government of Afghanistan. Subsequent cases in this Court, in extending *Hamdi*'s reach to justify detention in the non-traditional conflict that is currently underway, have reasoned by analogy from *Hamdi* and from the requirements of international humanitarian law for conventional armed forces and militias. *See* GC III art. 4(2). Put simply, the courts have looked for factors that render the detainees comparable, in the courts' view, to soldiers in conventional armies. While we take no position here regarding whether these cases were rightly decided, we emphasize—and demonstrate below—that the kind of facts relied on in those cases are entirely absent in Salahi's case.

Take the case of *al Bihani*, in which this Court found that petitioner's detention was authorized based on the fact that he was "part of" the 55th Arab Brigade, an al Qaeda-affiliated unit that fought alongside the Taliban. 590 F.3d at 872-73. In reaching this conclusion, this Court relied on factual findings that al Bihani "accompan[ied] the brigade on the battlefield, carr[ied] a brigade-issued weapon, cook[ed] for the unit, and retreat[ed] and surrender[ed] under brigade orders." *Id.*; *see also al Bihani v. Obama*, 594 F. Supp. 2d 35, 40 (D.D.C. 2009) (describing al Bihani's actions as "faithfully serving in an al-Qaeda-affiliated

fighting unit that is directly supporting the Taliban by helping prepare the meals of its entire fighting force”). The court thus found that al Bihani was not only affiliated with the 55th brigade, but also supported that group in its operations on the battlefield while engaged in hostilities against the United States.

This Court’s decision in *Awad* was based on similar types of allegations. The petitioner in that case admits that he traveled to Afghanistan for the purpose of fighting the U.S. and coalition forces there. *Awad v. Obama*, No. 09-5351, 2010 WL 2292400, at *8 (D.C. Cir. June 2, 2010). He allegedly succeeded in that goal when he joined a group of al Qaeda fighters who had barricaded themselves inside a hospital, “holding their position through the display of weapons and the threat of killing everyone in the building.” *Id.* at 1. Awad allegedly remained with these fighters for almost two months while local Afghan and allied forces laid siege to the hospital. *Id.* The insurgents then surrendered Awad to their adversaries, and he was detained by Afghan forces. *Id.* at *1-2. The government also introduced evidence—in the form of a list of names from an al Qaeda training camp—that Awad had engaged in weapons training there. *Id.* Awad thus allegedly not only traveled to Afghanistan to receive weapons training and to fight against the U.S. and allied forces, but also allegedly participated in ongoing hostilities with other al Qaeda members.

Other decisions have relied on participation in al Qaeda’s command structure—even in the absence of any direct participation in hostilities—to supply a basis for detention. This “command structure” test, too, stems from an analogy to membership in a conventional army. Specifically, the court in *Gherebi* looked to the Third Geneva Convention and Additional Protocol I—sources that elucidate who may be considered part of a military force—to “inform the Court’s assessment as to whether an individual qualifies as a member of the ‘armed forces’ of an enemy organization like al-Qaeda.” 609 F. Supp. 2d at 68. Just as those under a national army’s command are considered part of that nation’s armed forces, the court concluded that a finding that someone is “part of” al Qaeda could follow from proof that an individual received and executed orders from al Qaeda’s command structure, such as “housing, feeding, or transporting al-Qaeda fighters.” *Id.* at 68; accord *Hamlily*, 616 F. Supp. 2d at 75 (reaching same conclusion); see also Bradley & Goldsmith, *supra*, at 2114-15 (describing “participation within the command structure of a party to the conflict” as an important criterion for determining membership in traditional wars, and noting that “terrorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants and can naturally be deemed ‘members’ of the organization”).

At the same time, courts have recognized that some forms of association with al Qaeda do not suffice to satisfy the “part of” standard for the purposes of the AUMF. For example, “an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained.” *Gherebi*, 609 F. Supp. 2d at 69; *see also Abdah v. Obama*, No. 04-1254, 2010 WL 1626073, at *10 (D.D.C. Apr. 21, 2010) (“Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections are not alone enough to demonstrate that, more likely than not, [petitioner] was a part of Al Qaeda.”); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 63-64 (D.D.C. 2009) (granting habeas petition where evidence amounted to “guilt by association”); *Al Gincio v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009) (“[T]he more ephemeral, or undefined, the relationship, the less likely it will satisfy the “part of” requirement.”). Nor, as the district court stated in this case, may “a habeas court . . . permit a man to be held indefinitely upon suspicion, or because of the government’s prediction that he may do unlawful acts in the future...” *Salahi v. Obama*, No. 05-0569, 2010 WL 1443543, at *10 (D.D.C. Apr. 9, 2010). In these hypotheticals, the facts—even if proved—simply do not provide a basis for analogizing the detainee to a soldier in a conventional army, and therefore do not provide a basis for detention under the AUMF as interpreted by the Supreme Court in *Hamdi* and by this Court’s jurisprudence.

Accordingly, the court granted the habeas petition of a detainee who had allegedly engaged in activities not involving “direct evidence of fighting or otherwise receiving orders.” *Abdah*, No. 04-1254, 2010 WL 1626073, at *10 (D.D.C. Apr. 21, 2010) (quotation marks omitted). In that case, the court noted that petitioner’s connections with al Qaeda—which included studying at a school at which other men were recruited to fight for al Qaeda; receiving money for his trip to Afghanistan from an individual who supported jihad; traveling to Afghanistan along a route also taken by al Qaeda recruits; being seen at two al Qaeda guesthouses in Afghanistan; and being with al Qaeda members in the vicinity of Tora Bora after the battle that occurred there—were consistent with membership in al Qaeda, but not proof of it. *Id.* Even the kind of evidence held insufficient to justify detention in *Abdah* is completely absent in Salahi’s case.

As the foregoing discussion illustrates, in order to distinguish those with tenuous links to al Qaeda from those who are “part of” that organization for the purposes of the AUMF, courts have consistently looked at how closely the circumstances of an individual’s participation in hostilities resembled those of a soldier in a traditional war. Restricting detention authority to these types of circumstances is particularly important given the limited procedural recourse this Court has extended to detainees to challenge their detention. Even for detainees who have the right to challenge their detention in court, *see Boumediene v. Bush*,

553 U.S. 723 (2008), habeas hearings have far fewer procedural protections than criminal trials. *See, e.g., id.* at 2269; *Awad*, 2010 WL 2292400, at *9 (clarifying that the government must show only by a preponderance of the evidence that an individual is detainable under the AUMF); *al Bihani*, 590 F.3d at 876-81. In addition, this Court’s construction of the AUMF presumably will apply to detainees in U.S. custody around the world—including those at Bagram Air Base in Afghanistan—who currently have no recourse to judicial review at all. *See al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783 (D.C. Cir. May 21, 2010). In cases where the analogy to a soldier in a traditional war is as attenuated as it is here, the risk of mistakenly detaining those who are not, in fact, combatants is simply too high, and the consequences of such error—potentially indefinite detention—too great.

C. Even As Depicted By the Government, the Evidence Is Insufficient as a Matter of Law to Authorize the Detention of Salahi as “Part Of” Al Qaeda Under *Hamdi* and the Jurisprudence of this Court

Salahi’s conduct has none of the hallmarks of conventional combatancy upon which courts have relied to date. It is undisputed that he has not set foot in Afghanistan at any time during the post-9/11 hostilities there. It is undisputed that he was not captured on a battlefield of any kind. It is undisputed that he was carrying no weapon at the time he was detained, and he is not alleged ever to have taken up arms against the U.S. He never supported combat operations against the

U.S. of any military units fighting on behalf of, or alongside, the Taliban or al Qaeda. The Government adduced no evidence that he ever took steps to contribute to al Qaeda's efforts against the U.S. or coalition forces. *Salahi*, 2010 WL 1443543, at *10.

While he maintained ties with some members of al Qaeda, some of whom were also his relatives, there is no evidence that any of the events or incidents relied upon by the Government supported hostilities against the U.S. *Id.* Nor do they establish that he was part of al Qaeda's command structure. The Government does allege that Salahi undertook certain acts at the behest of one alleged member of al Qaeda, who was also Salahi's cousin and brother-in-law—e.g., work on a telecommunications system, wire transfers, and returning a passport to its owner. But providing such intermittent assistance—a handful of isolated incidents over the course of nearly a decade—to a family member cannot suffice to place Salahi within al Qaeda's command structure. To the contrary, such evidence shows how far removed from al Qaeda's operations Salahi actually was. Such sporadic involvement with a close relation hardly resembles the acts of a soldier executing orders in an army.

And although Salahi had sworn a *bayat* to al Qaeda in the early 1990s, as the district court noted, “the al-Qaida that Salahi joined in 1990 was very different from the al-Qaida that turned against the United States in the latter part of the

1990s.” *Id.* at *1, *11 n.7. Indeed, at the time Salahi swore the bayat, the U.S. and groups like al-Qaeda had a common goal: to prevent communist rule in Afghanistan. Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* 189-95, 201, 225-27 (2004). Even the Government’s view of the facts reveals that any contact with suspected members of al Qaeda was sporadic and pre-dated the 9/11 attacks, in which the Government concedes Salahi had no part. *Salahi*, 2010 WL 1443543, at 4 n.2.

In short, the government has pointed to no objective, credible indication of the kind and strength that all previous decisions of this Court and the Supreme Court have relied upon to show that a given detainee was “part of” al Qaeda. Hamdi and al Bihani allegedly carried weapons in the midst of a war against the U.S. and its allies. *Hamdi*, 542 U.S. at 513 (plurality); *al Bihani*, 590 F.3d at 872-73. Awad is charged with joining al Qaeda forces behind a barricade in the midst of a siege by U.S. allies. *Awad*, 2010 WL 2292400, at *1-2. Al Bihani allegedly surrendered with a brigade fighting alongside the Taliban shortly after the U.S. invasion of Afghanistan. In stark contrast, Salahi was arrested at his home in Mauritania, thousands of miles from any battlefield, on suspicion of activities he had allegedly engaged in prior to the start of the conflict in Afghanistan and bearing no relation to the 9/11 attacks.

This case represents the first Guantánamo habeas petition to come before this Court in which the detention has no connection to either the September 11th attacks or the hostilities in Afghanistan. This Court should not extend the President’s detention authority under the AUMF to circumstances so far removed from those in which *Hamdi* considered detention so “fundamental . . . an incident to war.” *Hamdi*, 542 U.S. at 518. Doing so would create too great a possibility of erroneous decisions leading to indefinite detention and extend the President’s detention authority beyond the bounds approved by Congress.

CONCLUSION

For the foregoing reasons this Court should affirm the decision of the district court.

Dated: June 16, 2010

Respectfully submitted,

EMILY BERMAN
FAIZA PATEL
BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(5)(A) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), the undersigned certifies that the accompanying brief has been prepared using 14-point typeface, proportionally spaced, with serifs. According to the word processing system used to prepare the brief, Microsoft Office Word 2003, the brief contains 5,374 words, exclusive of the table of contents, table of authorities, attorney identification and certificates of service and compliance.

Dated: June 16, 2010

/s/ Emily Berman

Emily Berman
Brennan Center for Justice
161 Sixth Avenue, 12th floor
New York, NY 10013

CERTIFICATE OF SERVICE

I hereby certify that, on June 16, 2010, the foregoing was electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Additionally, I caused copies of the foregoing to be sent by U.S. Mail to the following counsel:

Nancy Hollander
Theresa M. Duncan
Freedman B. Hollander
Goldberg & Ives
20 First Plaza, Suite 700
Albuquerque, NM 87102-0000

Counsel for Petitioner-Appellees

Arthur B. Spitzer
American Civil Liberties Union
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920

Counsel for Petitioner-Appellees

Melissa A. Goodman
Jonathan L. Hafetz
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400

Counsel for Petitioner-Appellees

August E. Flentje
Douglas N. Letter
Robert M. Loeb
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent-Appellants

/s/ Emily Berman

Emily Berman