No. _____

In the
Supreme Court of the United States

ABDUL RAZAK ALI
Detainee, Guantánamo Bay Naval Station
Guantánamo Bay, Cuba;

Petitioner,

v.

Barrack Obama, Charles Hagel and John Bogdan,

Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

LAW OFFICE OF H. CANDACE GORMAN
H. Candace Gorman
Counsel of Record
220 S. Halsted St., Suite 200
Chicago, IL 60661
(312) 427-2313

Counsel for Petitioner

QUESTIONS PRESENTED

1.) Whether the Authorization for Use of Military Force (Pub. L. 107-40, 115 Stat. 224 § 2(a) (2001)) ["AUMF"] and the Constitution permit detention of an individual based on a "personal associations" standard rather than upon evidence of actual overt acts hostile to the United States or its allies?

2.) Whether the Authorization for Use of Military Force (Pub. L. 107-40, 115 Stat. 224 § 2(a) (2001)) ["AUMF"] and the Constitution permit detention of an individual arrested in Pakistan on the basis that an individual was part of an "associated force" of al Qaeda or the Taliban where he was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture.

3.) Whether the Authorization for Use of Military Force (Pub. L. 107-40, 115 Stat. 224 § 2(a) (2001)) ["AUMF"] and the Constitution limit the duration of detention under circumstances such as this, where the individual was found to be a part of an "associated force" and where he was not engaged in an armed conflict against the United States in Afghanistan prior to his capture?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Abdul Razak Ali (ISN 685) a/k/a Saeed Bakhouche ("Razak Ali" or "Petitioner") is the petitioner in the civil action entitled *Abdul Razak Ali v. Barack Obama*, No. 10-1020 (RJL), originally filed on December 21, 2005. Razak Ali has been detained at Guantánamo Bay, Cuba since 2002 and is the real party in interest and the Petitioner in this Court.

Respondent[s]

Barack Obama, President of the United States
Charles Hagel, Secretary of Defense and
John Bogdan, Commanding Officer, JTF-Guantánamo.

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STATUTES

OTHER AUTHORITIES

Petitioner respectfully petitions for a Writ of Certiorari to review the decision of the Circuit Court of the District of Columbia in this case.

OPINIONS BELOW

The December 3, 2013 opinion of the Court of Appeals is reported at 736 F.3d 542 (D.C. Cir. 2013) and is reproduced at page 2 of the appendix to this petition ("App."). The January 11, 2011 opinion of the District Court is reported at 741 F. Supp. 2d 19 (D.D.C. 2011) and is reproduced at App. 25.

JURISDICTION

A timely petition for panel rehearing and a timely petition for rehearing *en banc* were denied by the Court of Appeals for the District of Columbia on February 28, 2014 (App. 1). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 § 2(a) (2001) provides:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations of persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

A. Factual Background

Petitioner is an Algerian national who traveled from his native Algeria in the fall of 2001 to Lahore, Pakistan in order to attend religious school. Because of unrest in Pakistan in late 2001, his classes were halted and Petitioner was placed in a guesthouse by his sponsoring religious organization, until classes could resume or he could return home. In March, 2002 Petitioner was moved to a second guesthouse where, unlike the first guesthouse, he could be with people who spoke his native tongue, Arabic. Petitioner has affirmed that he knew no one at the second guesthouse prior to his arrival. Unfortunately for Petitioner, after about two weeks into his stay there, a man known in press accounts as "Abu Zubaydah" ("Zubaydah") arrived at the same guesthouse. Zubaydah was wanted by American forces because he was thought, erroneously as it turned out, to be a senior leader of al Qaeda. The guesthouse was raided just over two weeks after Petitioner arrived and a few days after Zubaydah arrived. Petitioner has been detained at Guantánamo for more than twelve years because of the unfortunate coincidence of his being in the same guesthouse as an individual that the military wrongly thought to be a leader in al Qaeda, Abu Zubaydah. Petitioner has not been cleared for release and his habeas petition was denied because he has been accused of being a part of an "associated force" (the Abu Zubaydah "force") and taking English lessons while at the guesthouse.

B. District Court Proceedings

On December 21, 2005, the undersigned counsel filed a Petition for Writ of Habeas Corpus on behalf of Razak Ali. District Court Judge Richard Leon conducted a four-day merits hearing commencing on December 2010. The District Court issued its decision denying the petition on January 11, 2011. (App. 25.) The Court found that it was charged with determining whether, by a preponderance of the evidence, that "Bakhouche is the type of individual that is detainable under the AUMF because he was "part of an "associated force" (*i.e.*, Abu Zubaydah's force) engaged in hostilities against the United States or its Allied forces." (App. 29.) Specifically, the District Court found that Petitioner was properly detainable based on his apprehension at a suspicious guesthouse in Pakistan (where Abu Zubaydah and supposed "senior leadership" of Abu Zubaydah's "force" were found) and based on the accusation that Petitioner participated in English lessons at the guesthouse - an activity considered to be indicative of hostile action. (App. 30.) On March 8, 2011, Razak Ali appealed Judge Leon's denial of his habeas petition to the Court of Appeals for the District of Columbia Circuit.

C. Appellate Proceedings

On December 3, 2013, the finding that Petitioner was connected to terrorist activities was tacitly adopted by the Panel in its December 3, 2013 Opinion (*Ali v. Obama*, 736 F.3d 542, (D.C. Cir. 2013)) when it relied on the following suspicious circumstances and factors which were found by the Circuit Court to be sufficient to

detain Petitioner under the AUMF: that Petitioner was in the same guesthouse as Zubaydah; that a "diary" was found in the house written by an unknown individual that listed nicknames of people the government claims are part of "Zubaydah's associated force" (although none of the nicknames belonged to Petitioner); that Petitioner was alleged to have participated in English lessons (coupled with a presumption that English lessons being taught at the guesthouse were connected with the activities of the "force"); and that another individual arrested the same night at a different guesthouse, who admitted having traveled in Afghanistan, was actually Petitioner. (App. 9-15.)

As further described below, Judge Harry T. Edwards filed a separate opinion concurring in the judgment. (App. 22.)

Razak Ali filed a motion for rehearing or, in the alternative, rehearing *en banc*, which the Court denied on February 28, 2014. (App. 1.)

REASONS FOR GRANTING THE PETITION

I. WHETHER THE AUTHORIZATION FOR USE OF MILITARY FORCE (PUB. L. 107-40, 115 STAT. 224 § 2(A) (2001)) ["AUMF"] AND THE CONSTITUTION PERMIT DETENTION OF AN INDIVIDUAL BASED ON A "PERSONAL ASSOCIATIONS" STANDARD RATHER THAN UPON EVIDENCE OF ACTUAL OVERT ACTS HOSTILE TO THE UNITED STATES OR ITS ALLIES?

The Court of Appeals determined that because Petitioner was staying at a suspicious public guesthouse where Arabic was spoken, and Petitioner was found to be taking "English lessons" at that guesthouse. Those facts, coupled with statements by an

individual alleged to be Petitioner who was arrested that same night at a different guesthouse and who admitted being in Afghanistan and *intending* to fight in a war, were found to be a sufficient basis to warrant potential lifetime detention. The Court of Appeals reached this result making no findings that Razak Ali carried or used a weapon, engaged in battle against American forces and/or allied forces in Afghanistan or elsewhere, or otherwise supported the activities of al Qaeda or the Taliban:

As Judge Edwards noted in his concurrence,

> the majority attempts to overcome this disjunction between Ali's alleged actions and the conduct prohibited by the AUMF and the NDAA by pointing to Ali's "*personal associations*" with Abu Zubaydah during Ali's very brief stay in the guest house. The majority's reliance on a "personal associations" test to justify its conclusion that Ali is detainable as an "enemy combatant" rests on the case law from this circuit cited in the majority opinion, which I am bound to follow. However, what is notable here is that there is a clear disjunction between the law of the circuit and the statutes that the case law purports to uphold. In other words, the "personal associations" test is well beyond what the AUMF and the NDAA prescribe.
>
> (App. 23.)

In fact, much of the "evidence" relied upon by the Court of Appeals came from what has been called "the Al-Suri diary." This supposed diary is a compilation of papers of unknown authorship which the government claims was found at the Pakistani guesthouse where Petitioner stayed and which names, only by pseudonym, various members of the so called "Abu Zubaydah force." The government admits it has no evidence as to the identity of the author of this so-called "diary" but asserts nonetheless that it was written by the "organizer" of the "Abu Zubaydah force." The so called "dairy" purportedly discusses a group of "thinkers" whom the (still unknown) author

imagines were preparing to engage in illicit activities (and therefore, if that force ever actually existed, it was organized by the *unknown* "diary" author and not by its namesake Abu Zubaydah). Based on the supposed contents of this "diary," the Panel found that Petitioner and the Arabs found at the guesthouse were members of this "associated force" which *the government named* the "Abu Zubaydah force."

Although Petitioner raised substantial questions dispelling any indicia of reliability associated with the "al-Suri diary," in his briefs below, the Panel decision refused to revisit the reliability of the "diary" that the Court of Appeals first recognized in *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010). The Panel concluded that Petitioner's arrest during the raid where Zubaydah was also captured was sufficiently "damning" evidence of a personal association to mark Petitioner as a member of the phantom "Abu Zubaydah force," and therefore, all by itself, supported his possible detention for life. Concluding that such evidence tends to prove that Razak Ali more likely than not was "part of" either the Taliban or al Qaeda or an "associated force" under these circumstances is entirely inconsistent with a proper application of the AUMF. As Judge Edwards observed in his concurrence this is "well beyond what the AUMF and NDAA prescribe." (App. 23.) There is simply no basis for a finding that Petitioner was "part of" an "associated force," (even if there was actual evidence that the force even existed, let alone engaged in hostile action) although the Court of Appeals found so solely on the basis of "personal association." (*See* App. 8, 23.)

As Judge Edwards observed in his concurring opinion, the Court of Appeals made no finding that Petitioner had any role in planning, authorizing, committing or

aiding the September 11th attacks or harbored persons who did, nor indeed, that he was part of al Qaeda or the Taliban. Further, as Judge Edwards observed in his concurrence, "personal association" is simply not a lawful basis for detention. This effective application of a lower standard as a basis for lawful detention denied Petitioner the "meaningful review" of his detention mandated by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008) at 783, and rendered his habeas proceeding "functionally useless." (App. 24.)

II. WHETHER THE AUTHORIZATION FOR USE OF MILITARY FORCE (PUB. L. 107-40, 115 STAT. 224 § 2(A) (2001)) ["AUMF"] AND THE CONSTITUTION PERMIT DETENTION OF AN INDIVIDUAL ARRESTED IN PAKISTAN ON THE BASIS THAT AN INDIVIDUAL WAS PART OF AN "ASSOCIATED FORCE" OF AL QAEDA OR THE TALIBAN WHERE HE WAS NOT "ENGAGED IN AN ARMED CONFLICT AGAINST THE UNITED STATES" IN AFGHANISTAN PRIOR TO HIS CAPTURE?

The Authorization for Use of Military Force (the "AUMF") permits the President to detain those individuals who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such ... persons." Pub. L. No. 107-40, Sec. 2(a), 115 Stat. 224 (2001). In *Hamdi v. Rumsfeld* 542 U.S. 507, 516 (2004) a plurality of this Court understood enemy combatants to include "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*" *(emphasis added).*

Here, the Petitioner was detained after staying in a public guesthouse in Pakistan for approximately eighteen days. It is contested whether Petitioner had ever even set

foot in Afghanistan prior to his being brought there by U.S. forces. Petitioner had no weapon and has never been accused of engaging in an armed conflict against the United States or its allies in Afghanistan. The chief allegations against Petitioner are that he was in that particular guesthouse in Pakistan and that he took English lessons while staying there. Petitioner is being held pursuant to the AUMF despite the fact that there is not one scintilla of evidence that Petitioner "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations of persons." As Judge Edwards observed in his concurrence:

> Nothing in the record indicates that Ali "planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001, or that he "harbored [terrorist] organizations or persons," or that he was "part of or substantially supported al-Qaeda, the Taliban, or associated forces," or that he "committed a belligerent act" against the United States. Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF or the NDAA. Ali's principal sin is that he lived in a "guest house" for "about 18 days."
>
> (App. 23.)

In *Hussain v. Obama, No. 13--*638, 2014 U.S. LEXIS 2548, 82 U.S.L.W. 3610 (Apr. 21, 2014), in a statement respecting the denial of a petition for writ of certiorari, Justice Breyer made the following observations.

> The Authorization for Use of Military Force (AUMF), passed in September 2001, empowers the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." §2(a), 115 Stat. 224. In Hamdi v. Rumsfeld, 542 U. S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), five Members of the Court agreed that the AUMF authorizes the President to detain enemy combatants. Id., at 517-518, 124

> S. Ct. 2633, 159 L. Ed. 2d 578 (plurality opinion); Id., at 587, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (Thomas ~, J., dissenting). In her opinion for a plurality of the Court, Justice O'Connor understood enemy combatants to include "an individual who . . . was part of or supporting forces hostile to the United [*2] States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Id., at 516, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (internal quotation marks omitted). She concluded that the "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured," is "an exercise of the 'necessary and appropriate force'" that Congress authorized under the AUMF. Id., at 518, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (emphasis added). She explained, however, that the President's power to detain under the AUMF may be different when the "practical circumstances" of the relevant conflict are "entirely unlike those of the conflicts that informed the development of the law of war." Id., at 521, 124 S. Ct. 2633, 159 L. Ed. 2d 578.

As Justice Breyer observed, this Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention for an individual like Petitioner who was found to be part of an "associated force" but who was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture. In the present case, Petitioner contends not only that he never set foot in Afghanistan, let alone participated in armed conflict there, but that he has never been found to have "engaged in an armed conflict against the United States" *in Afghanistan* (or anywhere) at the time of his capture. In fact, the government took the position below that evidence of active participation in hostilities is unnecessary to establish that an individual was part of an enemy force and thus properly detained. The government takes this position notwithstanding that the test, as recognized in *Hamdi* is whether Petitioner is "an individual who (1) was part of or supporting forces (2) hostile to the United States or

coalition partners (3) in Afghanistan and (4) who engaed in an armed conflict against the United States (5) there."

The finding by the Court of Appeals that Razak Ali was part of an "associated force" under the facts of this case demonstrates the effective expansion of the AUMF detention standards envisioned by *Hamdi* to a point beyond recognition, allowing the indefinite detention of Petitioner, who was in a neighboring country, staying in a public accommodation, without even a contention, let alone a preponderance of evidence, that Petitioner was part of hostile forces in Afghanistan engaged in armed conflict against American forces there. The fact that Petitioner was in the vicinity of others suspected of being part of a hostile "associated" force in a neighboring country (without actual proof that the associated force *even existed*) should not be used to expand the reach of the AUMF as interpreted by *Hamdi*. Accordingly, a grant of certiorari is appropriate and necessary here, because Petitioner faces the very real prospect of life in prison as a result of the denial of his habeas relief, based on an improper expansion of what constitutes the kind of hostile act warranting detention under the AUMF.

III. WHETHER THE AUTHORIZATION FOR USE OF MILITARY FORCE (PUB. L. 107-40, 115 STAT. 224 § 2(A) (2001)) ["AUMF"] AND THE CONSTITUTION LIMIT THE DURATION OF DETENTION UNDER CIRCUMSTANCES SUCH AS THIS WHERE THE INDIVIDUAL WAS FOUND TO BE A PART OF AN "ASSOCIATED FORCE" AND WHERE HE WAS NOT ENGAGED IN AN ARMED CONFLICT AGAINST THE UNITED STATES IN AFGHANISTAN PRIOR TO HIS CAPTURE?

Petitioner is on the list of individuals whom the President has determined to be too dangerous to be released, but for whom there is insufficient evidence to try, either in an Article III court of law or a military tribunal. This is based solely on his presence in the suspicious guesthouse and the conclusion that he was taking English lessons. It is not surprising, given the allegations against Petitioner, that he cannot be tried in any legal proceedings, as the allegations against him are a specious basis for detention and should not amount to a basis for lifelong detention under the the law of war, or for any other reason. Despite these facts, the administration has continued to assert that Petitioner can be detained *forever,* without charge, based solely on these benign circumstances. For their part, the lower courts have agreed. Petitioner has already been detained for over twelve years. Construing the AUMF to authorize indefinite detention in these circumstances leaves no meaningful bounds on the Executive's detention authority.

Boumediene emphasized that detainees at Guantánamo "are entitled to the privilege of habeas corpus to challenge the legality of their detention." 553 U.S. at 771. Writing for the Court, Justice Kennedy explained that "the writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers." *Id.* at 765. "Within the Constitution's separation-of-powers structure," he stated, "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Id.* at 797. Judicial enforcement of the Suspension Clause is therefore necessary to vindicate its purposes: "This Court may not impose a *de facto* suspension [of the writ] by abstaining from these

controversies." *Id.* at 771. Unfortunately that is exactly what has happened in the aftermath of *Boumediene,* as the Court of Appeals has altered the standards for detention and the applicable burden of proof so far from previously established law that virtually no Guantánamo detainee can successfully challenge his detention if the government does not wish him released.

Petitioner respectfully submits that absolutely nothing in our constitution or in the AUMF allows for the indefinite detention of an individual apprehended in Pakistan under circumstances such as these - where Petitioner is accused of being part of an "associated force" based solely on his presence in a public guesthouse and who has not engaged in an armed conflict against the United States in Afghanistan (or anywhere). Here, even determining the scope of the relevant armed conflict pursuant to which Respondents purports to derive their authority to detain Petitioner is complicated by the fact that the conflict itself is so highly undefined—characterized as a "global war on terror" by Respondents as opposed to a war between nations. Thus, indefinite detention to keep Petitioner from reentering the "battlefield" is a misleading term because if Petitioner is released from Guantánamo he will not be repatriated to the *enemy*— whether that be al Qaeda, the Taliban or an "associated force"— nor to an enemy nation, let alone to a battlefield. Petitioner will be repatriated to his home country of Algeria. The practical reality of the relevant conflict, then, simply does not lend itself to a reflexive assertion of power to detain Petitioner until the end of hostilities. *Hamdi* cannot be read to automatically sanction such a detention until the end of hostilities when Respondents have not met their burden of proving there is any nexus between

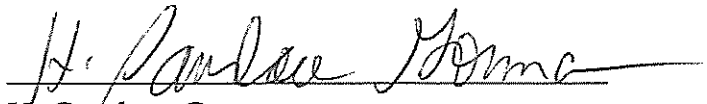
Petitioner's continuing detention and preventing his return to the battlefield, the original and actual intention of the AUMF.

Accordingly, this Court should grant certiorari on this basis as well.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a writ of certiorari should be granted.

Respectfully submitted,



H. Candace Gorman
Counsel of Record
Law Office of H. Candace Gorman
220 S. Halsted
Suite 220
Chicago, IL 60661
312.427.2313

Counsel for Petitioner

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H. Candace Gorman
Counsel of Record
220 S. Halsted St., Suite 200
Chicago, IL 60661
(312) 427-2313

Counsel for Petitioner

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5102 **September Term, 2013**

1:10-cv-01020-RJL

Filed On: February 28, 2014

Abdul Razak Ali, Detainee,

Appellant

v.

Barack Obama, President, et al.,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*, Circuit Judges; Edwards* and Williams, Senior Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark
Deputy Clerk

*Circuit Judge Wilkins and Senior Circuit Judge Edwards did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 27, 2013 Decided December 3, 2013

No. 11-5102

ABDUL RAZAK ALI, DETAINEE,
APPELLANT

v.

BARACK OBAMA, PRESIDENT, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01020)

H. Candace Gorman argued the cause and filed the briefs for appellant.

Sydney Foster, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Ian Heath Gershengorn*, Deputy Assistant Attorney General, and *Robert M. Loeb*, Attorney, U.S. Department of Justice. *Matthew M. Collette* and *Douglas N. Letter*, Attorneys, U.S. Department of Justice, entered appearances.

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

Opinion concurring in the judgment filed by *Senior Circuit Judge* EDWARDS.

KAVANAUGH, *Circuit Judge*: The United States is engaged in an ongoing war against al Qaeda, the Taliban, and associated forces. In March 2002, as part of that war, Abdul Razak Ali was captured by U.S. and Pakistani forces at a four-bedroom house in Faisalabad, Pakistan. After Ali's capture, the U.S. military detained him as an enemy combatant. Since June 2002, Ali has been held at the U.S. Naval Base in Guantanamo Bay, Cuba.

When captured at the house in Pakistan, Ali was with an al Qaeda-associated terrorist leader named Abu Zubaydah. Also present were four former trainers from a terrorist training camp in Afghanistan, multiple experts in explosives, and an individual who had fought alongside the Taliban. Their living quarters contained documents bearing the designation "al Qaeda," electrical components, and a device typically used to assemble remote bombing devices. At the time of his capture, Ali had been at the terrorist guesthouse for about 18 days. Soon after the capture, an FBI interrogator asked Ali for his name and nationality. Ali falsely identified himself as Abdul Razzaq of Libya. Ali maintained that lie for the next two years.

That much is undisputed. In addition, the record strongly suggests, and the District Court found, two other significant facts: Ali, a native Algerian, traveled to Afghanistan after September 11, 2001, in order to fight in the war against U.S. and Coalition forces. And while at the Pakistan guesthouse,

Ali participated in Abu Zubaydah's terrorist training program by taking English lessons.

Under our precedents, we conclude that those facts justify the President's decision to detain Ali as an enemy combatant pursuant to the 2001 Authorization for Use of Military Force. *See* Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). We therefore affirm the judgment of the District Court denying Ali's petition for a writ of habeas corpus.

I

Shortly after the attacks against the United States on September 11, 2001, Congress passed and President George W. Bush signed the Authorization for Use of Military Force. The AUMF provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *see* U.S. Const. art. I, § 8.

This Court has stated that the AUMF authorizes the President to detain enemy combatants, which includes (among others) individuals who are part of al Qaeda, the Taliban, or associated forces. *See Hussain v. Obama*, 718 F.3d 964, 967

(D.C. Cir. 2013).[1] Detention under the AUMF may last for the duration of hostilities. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011). This Court has assumed without deciding that, to justify detention of a member of al Qaeda, the Taliban, or an associated force, the Government must prove the detainee's status by a preponderance of the evidence. *See Hussain*, 718 F.3d at 967 n.3; *Uthman*, 637 F.3d at 403 n.3; *Al-Bihani v. Obama*, 590 F.3d 866, 878 & n.4 (D.C. Cir. 2010). In a prior case involving a Guantanamo detainee captured in the same Faisalabad guesthouse as Ali, we recognized that the force commanded by Abu Zubaydah constitutes an "associated force" for purposes of the AUMF. *See Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). Ali does not dispute that conclusion here.

The only question, then, is whether Ali more likely than not was part of Abu Zubaydah's force. Ali says that he was not. He admits that he was captured with Abu Zubaydah in the Faisalabad, Pakistan, guesthouse. Ali also admits that he

[1] As this Court has explained in prior cases, the President may also detain individuals who substantially support al Qaeda, the Taliban, or associated forces in the war. The National Defense Authorization Act for Fiscal Year 2012 expressly permits military detention of a "person who was a 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." Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011). And our earlier cases, citing the Military Commissions Act of 2009, permit military detention of a person who was part of or "purposefully and materially" supported al Qaeda, the Taliban, or associated forces in the war. *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (quoting 10 U.S.C. § 948a(7)); *see Almerfedi v. Obama*, 654 F.3d 1, 3 n.2 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400, 402 n.2 (D.C. Cir. 2011).

lied about his identity from the time of his capture in March 2002 until late 2004, when he admitted that he is really Saeed Bakhouche of Algeria, not Abdul Razzaq of Libya.[2] Ali insists, however, that he mistook the Abu Zubaydah facility for a public guesthouse, and that he had nothing to do with the terrorist activity being planned there.

In 2005, Ali filed a habeas petition contesting his detention. After the Supreme Court ruled in *Boumediene v. Bush*, 553 U.S. 723 (2008), that the habeas corpus right extends to Guantanamo, the District Court took up Ali's case and held a three-day hearing. Based on Ali's presence at the guesthouse with Abu Zubaydah, his participation in Abu Zubaydah's training program, his admission to traveling to Afghanistan to fight in the war against U.S. and Coalition forces, and other evidence connecting Ali to Abu Zubaydah fighters, the District Court concluded that "it is more probable than not that" Ali "was in fact a member of Abu Zubaydah's force." *Ali v. Obama*, 741 F. Supp. 2d 19, 27 (D.D.C. 2011).

On appeal, Ali argues that the Government failed to justify his detention by a preponderance of the evidence. He also contests several procedural aspects of the habeas proceeding, including the Government's alleged failure to disclose evidence that could have undermined the credibility of two detainees who linked Ali to Abu Zubaydah's force.

This Court reviews the District Court's ultimate habeas determination de novo, its underlying factual findings for clear error, and its procedural rulings for abuse of discretion. *See Barhoumi*, 609 F.3d at 423.

[2] The District Court spelled Ali's name as Bakhouche. Ali's brief spells it as Bakhouch.

II

The central fact in this case is that Ali was captured in 2002 at a terrorist guesthouse in Pakistan. This Court has explained that a detainee's presence at an al Qaeda or associated terrorist guesthouse constitutes "overwhelming" evidence that the detainee was part of the enemy force. *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010)); *see Alsabri v. Obama*, 684 F.3d 1298, 1302 (D.C. Cir. 2012); *Suleiman v. Obama*, 670 F.3d 1311, 1314 (D.C. Cir. 2012); *Almerfedi v. Obama*, 654 F.3d 1, 6 n.7 (D.C. Cir. 2011); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (D.C. Cir. 2011); *Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010). We have previously affirmed the detention of an individual captured in the same terrorist guesthouse as Ali. *See Barhoumi v. Obama*, 609 F.3d 416, 425, 427 (D.C. Cir. 2010).

Ali contends that he simply mistook the Abu Zubaydah guesthouse for a public guesthouse. He argues that reliance on his capture in the Abu Zubaydah guesthouse unfairly presumes guilt by association – or, as he styles it, "guilt by guesthouse." Ali Br. 42. That argument has two flaws.

To begin with, we are not talking about "guilt." This is not a criminal proceeding in which the Government asks a court to find Ali guilty and punish him for past behavior by sentencing him to a defined term of imprisonment. In other words, this is not a federal criminal trial or a military commission proceeding for war crimes. Rather, this case involves military detention. The purpose of military detention is to detain enemy combatants for the duration of hostilities so

as to keep them off the battlefield and help win the war. Military detention of enemy combatants is a traditional, lawful, and essential aspect of successfully waging war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) (military detention during wartime "is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character") (internal quotation marks and citation omitted). The standard of proof for military detention is not the same as the standard of proof for criminal prosecution, in part because of the different purposes of the proceedings and in part because military detention ends with the end of the war.

Moreover, determining whether an individual is part of al Qaeda, the Taliban, or an associated force almost always requires drawing inferences from circumstantial evidence, such as that individual's personal associations. Unlike enemy soldiers in traditional wars, terrorists do not wear uniforms. Nor do terrorist organizations issue membership cards, publish their rosters on the Internet, or otherwise publicly identify the individuals within their ranks. So we must look to other indicia to determine membership in an enemy force. As this Court has stated before, a person's decision to stay with the members of a terrorist force at a terrorist guesthouse can be highly probative evidence that he is part of that force and thus a detainable enemy combatant. One does not generally end up at al Qaeda or other terrorist guesthouses in Afghanistan or Pakistan by mistake – either by the guest or by the host. *See Uthman*, 637 F.3d at 406.

In any event, we need not address the hypothetical in which a detainee's presence at a terrorist guesthouse constitutes the *only* evidence against him. In this case, at least

six additional facts support the conclusion that Ali more likely than not was part of Abu Zubaydah's force:

- Ali's housemates at the terrorist guesthouse were not just foot soldiers, but included the terrorist leader Abu Zubaydah himself, as well as the senior leaders of Zubaydah's force.
- Ali had been staying at the guesthouse for about 18 days.
- The guesthouse in which Ali was captured contained documents and equipment associated with terrorist operations.
- Ali participated in Abu Zubaydah's terrorist training program by taking English lessons at the guesthouse.
- Ali had traveled to Afghanistan after September 11, 2001, with the intent to fight in the war against U.S. and Coalition forces.
- After his capture, Ali lied about his identity, and he maintained his false cover story for more than two years.

First, it is undisputed that Ali's housemates at the terrorist guesthouse were not just foot soldiers, but included Abu Zubaydah himself, as well as the senior leaders of Zubaydah's force. *See Ali v. Obama*, 741 F. Supp. 2d 19, 26 (D.D.C. 2011). Abu Zubaydah, an "associate" and "longtime ally" of Osama bin Laden, operated terrorist training camps in Afghanistan and led a force that engaged in hostilities against U.S. and Coalition forces. J.A. 1620; THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 150, 174 (2004); *see Barhoumi*, 609 F.3d at 425; J.A. 1548; 9/11 COMMISSION REPORT at 59. Zubaydah-trained fighters coordinated with or joined al Qaeda, and at least one Zubaydah associate attempted to attack the United States

homeland. *See United States v. Ressam*, 679 F.3d 1069, 1072-74 (9th Cir. 2012) (en banc); J.A. 1548-49, 1620; 9/11 COMMISSION REPORT at 261.[3]

After U.S. and Coalition forces eviscerated al Qaeda and other terrorist training camps in Afghanistan in late 2001, Abu Zubaydah retreated to a house in Faisalabad, Pakistan. He used the Faisalabad house to prepare for attacks on U.S. and Coalition forces using remote-detonated explosives. *See Ali*, 741 F. Supp. 2d at 26; J.A. 1600, 1651, 1736, 1741. Ali admits that he knew Abu Zubaydah and that they lived together at the Faisalabad guesthouse. And they were not alone. Based on statements by guesthouse occupants and a diary kept by an Abu Zubaydah associate, the District Court concluded that approximately 10 senior leaders of Zubaydah's force resided at the guesthouse when Ali was captured there. *Ali*, 741 F. Supp. 2d at 26. In an earlier case, we credited the diary as "probative record evidence" providing a "veritable membership list" for Zubaydah's force. *Barhoumi*, 609 F.3d at 425-26. The members of Zubaydah's force named on that list were not strangers to Ali. He identified them by name and photo, and they identified him.

It strains credulity to suggest that Ali spent time in early 2002 in a four-bedroom house in Faisalabad, Pakistan, with Abu Zubaydah and the leaders of Zubaydah's force while having no idea what the people around him were doing. But

[3] Courts in this circuit and others have likewise recognized Abu Zubaydah's association with al Qaeda. *See United States v. Moussaoui*, 591 F.3d 263, 306 (4th Cir. 2010); *Shafiiq v. Obama*, No. 05-1506, 2013 WL 3242201, at *1 (D.D.C. June 5, 2013); *Kandari v. United States*, 744 F. Supp. 2d 11, 48 (D.D.C. 2010); *Mohammed v. Obama*, 689 F. Supp. 2d 38, 58 (D.D.C. 2009); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 561 (S.D.N.Y. 2005).

even granting Ali the benefit of the doubt, it is nearly unfathomable that avowed terrorist leaders like Abu Zubaydah would tolerate an unknown couch-surfer crashing down the hall in the same house for several weeks. Of course, there remains a slender possibility that Ali innocently blundered into his extended stay at a heavily fortified terrorist den. But one of his housemates offered a far more plausible explanation: "all the people in the house were Al-Qaeda people or 'jihadis.'" J.A. 1650-51.

In sum, the fact that Ali resided with Abu Zubaydah and Zubaydah's top lieutenants during their preparation for active conflict with U.S. and Coalition forces strongly buttresses the conclusion that Ali was part of Zubaydah's force. *Cf. Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012) (affirming detention based on detainee's "close ties" to Mullah Omar); *Alsabri*, 684 F.3d at 1301 (affirming detention based on detainee's residence with *U.S.S. Cole* bomber and continuing relationships with Taliban or al Qaeda members); *Al-Adahi*, 613 F.3d at 1107 (affirming detention based on detainee's multiple "personal audience[s]" with Osama bin Laden); *Barhoumi*, 609 F.3d at 425 (affirming detention based on detainee's capture in same guesthouse as Abu Zubaydah); *see generally Uthman*, 637 F.3d at 404 ("company" that detainee "was keeping" can suggest membership in terrorist force); *Hussain v. Obama*, 718 F.3d 964, 969 (D.C. Cir. 2013) (same); *Latif v. Obama*, 677 F.3d 1175, 1197 (D.C. Cir. 2012) (same); *Suleiman*, 670 F.3d at 1314 (same); *Al-Madhwani*, 642 F.3d at 1076 (same); *Esmail v. Obama*, 639 F.3d 1075, 1077 (D.C. Cir. 2011) (same); *Awad v. Obama*, 608 F.3d 1, 9-10 (D.C. Cir. 2010) (same).

Second, it is undisputed that Ali had been staying at the guesthouse for about 18 days. J.A. 1666. His stay there was no brief layover on a tourist jaunt through Pakistan. On the

contrary, if Ali were there for innocent purposes, he had more than ample time to recognize the dangerous company he was keeping and leave. Likewise, Abu Zubaydah and the other terrorists at the house had more than ample time to eject someone who was an errant passer-by. The length of Ali's stay makes it all the more implausible that he was an innocent bystander to the terrorist activity at Abu Zubaydah's guesthouse. *Cf. Hussain*, 718 F.3d at 970 ("extended stays" at terrorist-linked mosques suggest affiliation with terrorist force); *Suleiman*, 670 F.3d at 1314 (seven-month stay at Taliban guesthouse shows detainee was "hardly stopping by"); *Almerfedi*, 654 F.3d at 6-7 (extended stay at mosque linked to terrorism suggests terrorist affiliation); *Esmail*, 639 F.3d at 1076 ("length of" detainee's stay at training camp constitutes "particularly strong evidence").

Third, it is undisputed that the guesthouse in which Ali was captured contained documents and equipment associated with terrorist operations. The District Court found that the terrorist guesthouse where Ali resided contained "pro-al Qaeda literature, electrical components, and at least one device typically used to assemble remote bombing devices." *Ali*, 741 F. Supp. 2d at 21. Ali does not dispute that those objects were in the guesthouse. Rather, he suggests that the objects have alternative, benign uses. That's true. But electrical components, for example, have a much different connotation when found next to an al Qaeda manual in a terrorist guesthouse than when found in an electrical engineering laboratory. Tellingly, the record included evidence that Abu Zubaydah planned to conduct terrorist attacks using remote-detonated explosives. J.A. 1549, 1600, 1736. Considered in context, the presence of pro-al Qaeda literature, electrical components, and a device typically used to assemble remote bombing devices in the guesthouse where Ali spent about 18 days corroborates other evidence

connecting him to Abu Zubaydah's force. *Cf. Obaydullah v. Obama*, 688 F.3d 784, 792-93 (D.C. Cir. 2012) (explosives found outside detainee's residence suggest membership in terrorist force); *Khan v. Obama*, 655 F.3d 20, 30 (D.C. Cir. 2011) (incriminating items discovered at detainee's properties suggest membership in terrorist force); *Al-Adahi*, 613 F.3d at 1109 (presence of Casio watch identified with terrorist attacks suggests membership in terrorist force).

Fourth, the District Court found, and the evidence supports the conclusion, that Ali participated in Abu Zubaydah's terrorist training program by taking English lessons at the guesthouse. At least one of Ali's housemates provided multiple, specific accounts of having witnessed Ali and other housemates taking English lessons from a member of Abu Zubaydah's force. Ali offers no persuasive rebuttal to those detailed eyewitness reports. The District Court did not clearly err by relying on that evidence. *Ali*, 741 F. Supp. 2d at 26.

Ali argues that there is nothing sinister about learning English. That's true in isolation, but again, the context here is important. Otherwise-innocent activity can impart a different meaning depending on the circumstances. Here, the record included evidence that leaders of Abu Zubaydah's force provided English language training to help prepare their members to better infiltrate English-speaking areas and launch successful terrorist attacks. Ali's willingness to participate in such a training program undercuts his claim of ignorance about terrorist activity in the guesthouse and further connects him to Abu Zubaydah's force. *Cf. Alsabri*, 684 F.3d at 1304-06 (training at terrorist facility is compelling evidence that detainee was part of terrorist force); *Al Alwi v. Obama*, 653 F.3d 11, 17-18 (D.C. Cir. 2011) (same); *Al-Madhwani*,

642 F.3d at 1075 (same); *Esmail*, 639 F.3d at 1076 (same); *Al-Adahi*, 613 F.3d at 1108-09 (same).

Fifth, the District Court found, and the evidence supports the conclusion, that Ali had traveled to Afghanistan after September 11, 2001, with the intent to fight in the war against U.S. and Coalition forces. Ali admitted as much when, shortly after his capture, he told an FBI interviewer that he had departed Libya in October 2001 for Karachi, Pakistan, and that "he met some Afghans in Karachi who took him to Afghanistan to fight in the war." J.A. 74. Ali does not dispute the "damning" significance of traveling to the battlefield to engage in combat against U.S. and Coalition forces. *Hussain*, 718 F.3d at 968. Instead, he denies making the admission.

The Government contends that Ali admitted his trip to Afghanistan in an FBI interview conducted within 48 hours of his capture. The FBI agent's notes indicate that the interview subject was "Abdul Razzaq," an alias that Ali has admitted using and that multiple housemates associated with him. The interview notes show that Razzaq was born in La Gilat, Libya, in July 1970. The notes also give the names of Razzaq's parents and brother. All of that biographical data matches information later provided by Ali at Guantanamo. As Ali emphasizes, however, the FBI agent's notes also indicate that the interview subject was captured at a different Faisalabad guesthouse where Ali never resided. The Government contends that this notation was inaccurate and points to a later intelligence report correcting the mistake. Ali insists that the initial version – with the inaccurate guesthouse location – proves that he is not the Abdul Razzaq who made the incriminating admission.

Given that multiple Faisalabad guesthouses were raided on the same day, it seems most likely that the agent interviewing Ali simply recorded the wrong site of capture in his initial report. It strikes us as dramatically less plausible that the agent interviewed a *different* Abdul Razzaq who happened to have been born in the same place during the same month of the same year to a family whose members had the same names. Ali's argument amounts to a claim of innocence-by-typo. After hearing all the evidence, the District Court concluded that Ali had made the admission, and that the typo was just a typo. *Ali*, 741 F. Supp. 2d at 26-27. We cannot say that this factual finding amounts to clear error.

Sixth, it is undisputed that, after his capture, Ali lied about his identity and maintained his false cover story for more than two years. From the time of his capture in March 2002 until late 2004, Ali told U.S. interrogators that he was Abdul Razzaq of Libya. Then he admitted that he had been giving a false identity all that time, and that he is actually Saeed Bakhouche of Algeria.

Ali's willingness to lie in this fashion is telling. If he were truly an innocent traveler caught in the wrong place at the wrong time, he presumably would have given his real name. After all, Ali claims that he had nothing else in his past to hide. Ali Br. 67. Our prior cases have discussed the more likely explanation for behavior like Ali's: Terrorists are trained "to make up a story and lie." *Al-Adahi*, 613 F.3d at 1111. Here, Ali's sketchy tale bears several of the hallmarks of counter-interrogation techniques that this Court has observed in past cases: "developing a cover story . . . recanting or changing answers . . . [and] giving as vague an answer as possible." *Id.* Whatever his motive, Ali's consistent lying about his name and nationality renders him "wholly incredible." *Ali*, 741 F. Supp. 2d at 27. Moreover,

his willingness to adopt and repeat a false cover story constitutes strong evidence of guilt. *See Al-Adahi*, 613 F.3d at 1107 ("false exculpatory statements are evidence – often strong evidence – of guilt"); *see Hussain*, 718 F.3d at 969 (same); *Latif*, 677 F.3d at 1195 (same); *Almerfedi*, 654 F.3d at 7 (same); *Al-Madhwani*, 642 F.3d at 1076 (same); *Esmail*, 639 F.3d at 1076-77 (same); *Uthman*, 637 F.3d at 407 (same).

To sum up, as the District Court correctly concluded, the record here establishes the following: Ali was captured in a terrorist guesthouse in Pakistan where he resided with Abu Zubaydah and the senior leaders of Zubaydah's terrorist force. Ali had been there for about 18 days. The guesthouse where Ali lived contained materials associated with al Qaeda and terrorism, and Ali participated in at least one component of Abu Zubaydah's training program. Moreover, Ali had traveled to Afghanistan to fight in the war against U.S. and Coalition forces. And after his capture, Ali lied about his identity for more than two years.

Ali maintains that many of those facts, considered individually, could have innocent explanations. Maybe yes, maybe no. But individual pieces of evidence are not considered in complete isolation from one another. *Cf. Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987) ("individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it"). As our precedents have explained, this commonsense principle carries no less weight in habeas proceedings for Guantanamo detainees. *See Hussain*, 718 F.3d at 968; *Uthman*, 637 F.3d at 407; *Al-Adahi*, 613 F.3d at 1105-06.

Considering the facts collectively and in light of our precedents, and exercising de novo review of the District Court's ultimate conclusion, we conclude that the

Government has satisfied its burden to prove that Ali more likely than not was part of Abu Zubaydah's force.[4] Any alternative account would mean that Ali ended up in the guesthouse by accident and failed to realize his error for more than two weeks; *and* that Abu Zubaydah and his senior leaders tolerated an outsider living within their ranks; *and* that a different Abdul Razzaq who happened to have the same biographical information traveled to Afghanistan after September 11, 2001, to fight in the war against U.S. and Coalition forces; *and* that, despite knowing that he was an innocent man, Ali lied about his true name and nationality for two years. Ali's story "piles coincidence upon coincidence upon coincidence." *Uthman*, 637 F.3d at 407. We conclude that the President has authority under the AUMF to detain Ali.[5]

III

In addition to contesting the sufficiency of the evidence supporting his detention, Ali advances several procedural challenges.

First, Ali argues that he was entitled to a second habeas hearing because, at his first hearing, the Government

[4] We do not imply that all of the evidence discussed here is *necessary* to determine that Ali was part of Abu Zubaydah's force. We hold only that the evidence here is *sufficient* to demonstrate that Ali was part of Abu Zubaydah's force and therefore sufficient to justify his detention. *Cf. Uthman v. Obama*, 637 F.3d 400, 407 n.8 (D.C. Cir. 2011).

[5] We reach this conclusion based solely on the evidence we have discussed above. As noted further below, we need not and do not rely on evidence from two detainees whose credibility Ali has contested, Muhammed Noor Uthman and Musa'ab al-Madhwani.

allegedly failed to disclose evidence that could have undermined the credibility of two detainees who linked him to Abu Zubaydah's force: Muhammed Noor Uthman and Musa'ab al-Madhwani.

The Constitution entitles a Guantanamo detainee to "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (internal quotation marks and citation omitted); *see* U.S. Const. art. I, § 9. The court reviewing a habeas petition has authority to "admit and consider relevant exculpatory evidence." *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010) (quoting *Boumediene*, 553 U.S. at 786). In its case management order, the District Court required the Government to disclose any evidence "that tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention." Case Management Order at 2, *Ali v. Obama*, No. 10-1020 (D.D.C. Aug. 25, 2010).

At Ali's habeas hearing, the Government relied on evidence from Uthman and al-Madhwani without disclosing to Ali's counsel certain information that could have undermined the credibility of those detainees. But then the Government formally withdrew reliance on the evidence from al-Madhwani, and the District Court therefore did not consider evidence from him in deciding whether to grant the petition. *Ali v. Obama*, 741 F. Supp. 2d 19, 24 (D.D.C. 2011); *cf. Al-Bihani*, 590 F.3d at 881 (district court "assiduously avoided" relying on facts related to possible error). To be sure, the District Court did initially rely on information from Uthman. But the District Court later made an express finding that Ali would be detainable even without considering any evidence from Uthman. *See Ali v. Obama*,

No. 10-1020, 2011 WL 1897393, at *1 (D.D.C. May 17, 2011).

Like the District Court, we do not rely on evidence from al-Madhwani or Uthman in determining that Ali more likely than not was part of Abu Zubaydah's force. Therefore, any asserted error resulting from the Government's alleged failure to disclose evidence undermining the credibility of those two detainees had no bearing on the outcome of the case in the district court, nor any bearing on the outcome of this appeal. *Cf. Al-Bihani*, 590 F.3d at 881 (asserted error would not require reversal because it "would not have changed the outcome of the case").

Second, Ali asserts a variety of challenges related to the Government's presentation of the case, including its decision to amend its factual allegations and renumber its exhibits before the habeas hearing, which allegedly deprived Ali's counsel of time to prepare. None of those claims constitutes an error that justifies reversal on appeal. Far from depriving Ali of a fair hearing, the District Court prudently accommodated Ali's counsel's requests for additional preparation time by rescheduling the habeas hearing from October 2010 to December 2010 and by delaying closing arguments by an extra day. *See* Tr. of Hearing at 81, *Ali v. Obama*, No. 10-1020 (D.D.C. Dec. 15, 2010); Minute Order, *Ali v. Obama*, No. 10-1020 (D.D.C. Oct. 4, 2010); Motion to Reschedule Habeas Hearing, *Ali v. Obama*, No. 10-1020 (D.D.C. Sept. 15, 2010). At the same time, the District Court appropriately moved the case along promptly, consistent with the Supreme Court's directive in *Boumediene*. *See Boumediene*, 553 U.S. at 795.

Third, Ali cursorily alleges judicial bias by the District Judge. That claim lacks merit. Ali does not identify any

actions that demonstrate improper judicial bias. Consistent with Supreme Court precedent, Ali received "a meaningful opportunity" to contest his detention. *Id.* at 779.

* * *

Based on the evidence that we have outlined, Ali more likely than not was part of Abu Zubaydah's force. To be sure, as in any criminal or civil case, there remains a *possibility* that the contrary conclusion is true – in other words, that Ali was not part of Abu Zubaydah's force. But the preponderance standard entails decisions based on the more likely conclusion. In our judgment, the evidence here demonstrates that Ali more likely than not was part of Zubaydah's force. The President therefore has authority to detain Ali under the 2001 Authorization for Use of Military Force.

In reaching our conclusion, we emphasize that this is not a federal criminal or military commission proceeding. Ali is not being criminally punished for his past behavior. Rather, the United States is detaining Ali because of his status as an enemy combatant in an ongoing war. Such military detention is a traditional, lawful, and essential part of successfully waging war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). Importantly, the standard of proof for such military detention is not the same as the standard of proof for criminal punishment, in part because the purpose of detention is not punishment and in part because military detention – unlike a criminal or military commission sentence – comes to an end with the end of hostilities.

We are of course aware that this is a long war with no end in sight. We understand Ali's concern that his membership in Zubaydah's force, even if it justified detention as an enemy combatant for some period of time, does not

justify a "lifetime detention." Reply Br. 28 (capitalization altered). But the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities. *See Hamdi*, 542 U.S. at 521; *compare* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (numerous provisions set to expire on December 31, 2005). The war against al Qaeda, the Taliban, and associated forces obviously continues. Congress and the President may choose to make long-term military detention subject to different, higher standards. Indeed, for many years now, under the direction of two Presidents, the Executive Branch has unilaterally conducted periodic reviews and released or transferred to foreign countries a large number – in fact, the vast majority – of Guantanamo detainees. Many releases or transfers have likewise occurred with detainees who have been held on U.S. bases in foreign countries (and outside of the courts' habeas jurisdiction, *see Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010)). But absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more stringent over time, it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention. The only question before us is whether the President has authority under the AUMF to detain Ali. In conducting that analysis, we must apply the same standard in 2013 that we would have applied in the aftermath of Ali's capture in 2002.

We affirm the judgment of the District Court denying Ali's petition for a writ of habeas corpus.

So ordered.

EDWARDS, *Senior Circuit Judge*, concurring in the judgment. The Authorization for Use of Military Force ("AUMF") provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines *planned, authorized, committed, or aided the terrorist attacks* that occurred on September 11, 2001, or *harbored such organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added). In the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"), Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011), Congress reaffirmed the provisions of the AUMF. The NDAA added a provision saying that "covered persons" include a "person who was a *part of or substantially supported* al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States . . . , including any person who has *committed a belligerent act* or has directly supported such hostilities in aid of such enemy forces." *Id.* § 1021(b)(2) (emphasis added).

Abdul Razak Ali's habeas petition has been denied in this case because, as the majority says,

> Ali was captured in a terrorist guesthouse in Pakistan where he resided with Abu Zubaydah and the senior leaders of Zubaydah's terrorist force. Ali had been there for about 18 days. The guesthouse where Ali lived contained materials associated with al Qaeda and terrorism, and Ali participated in at least one component of Abu Zubaydah's training program [by taking English lessons]. Moreover, Ali had traveled to Afghanistan to fight in the war . . . .

Nothing in the record indicates that Ali "planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001, or that he "harbored [terrorist] organizations or persons," or that he was "part of or substantially supported al-Qaeda, the Taliban, or associated forces," or that he "committed a belligerent act" against the United States. Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF or the NDAA. Ali's principal sin is that he lived in a "guest house" for "about 18 days."

The majority attempts to overcome this disjunction between Ali's alleged actions and the conduct prohibited by the AUMF and the NDAA by pointing to Ali's "*personal associations*" with Abu Zubaydah during Ali's very brief stay in the guest house. The majority's reliance on a "personal associations" test to justify its conclusion that Ali is detainable as an "enemy combatant" rests on the case law from this circuit cited in the majority opinion, which I am bound to follow. However, what is notable here is that there is a clear disjunction between the law of the circuit and the statutes that the case law purports to uphold. In other words, the "personal associations" test is well beyond what the AUMF and the NDAA prescribe.

The majority explains that "[t]he purpose of military detention is to detain enemy combatants for the duration of hostilities so as to keep them off the battlefield and help win the war." This is indisputable, but it is no consolation for Ali because the result of our judgment today is that Ali may now be detained for life.

The majority acknowledges, as it must, that the "war against al Qaeda, the Taliban, and associated forces obviously

continues," and there is no end in sight. Our Nation's "war on terror" started twelve years ago, and it is likely to continue throughout Ali's natural life. Thus, Ali may well remain in prison for the rest of his life. It seems bizarre, to say the least, that someone like Ali, who has never been charged with or found guilty of a criminal act and who has never "planned, authorized, committed, or aided [any] terrorist attacks," is now marked for a life sentence.

The majority says that "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." Respectfully, in my view, that is not the issue. The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.

741 F.Supp.2d 19
United States District Court,
District of Columbia.

Abdul Razak ALI, Petitioner,

v.

Barack H. OBAMA,[1] et al., Respondents.

Civil Case No. 10–1020 (RJL). | Jan. 11, 2011.

Synopsis

Background: Detainee, an Algerian national taken into custody in Pakistan and held at the U.S. Naval Base at Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force (AUMF), petitioned for writ of habeas corpus.

[Holding:] The District Court, Richard J. Leon, J., held that evidence was more than adequate to establish that it was more likely than not that petitioner was a member of a force associated with the al Qaeda terrorist organization.

Petition denied.

West Headnotes (2)

[1] **Habeas Corpus** ⇐ Aliens

Under case management order (CMO) governing habeas petitions of Guantanamo detainees, Government bears burden of proving the lawfulness of the petitioner's detention by a preponderance of the evidence.

Cases that cite this headnote

[2] **Habeas Corpus** ⇐ Enemy combatants and similar detainees

Evidence in habeas proceeding was more than adequate to establish it was more likely than not petitioner was a member of a force associated with the al Qaeda terrorist organization, and thus was detainable under the Authorization for Use of Military Force (AUMF); petitioner was captured in the same Pakistani guesthouse in which the leader and numerous members of the associated force were staying, and there was credible evidence petitioner had lived with them during a two-week period in which they were preparing for future operations, had previously traveled with them from Afghanistan to Pakistan, and had taken an English course from the force's trainers.

Cases that cite this headnote

Attorneys and Law Firms

*20 H. Candace Gorman, Law Office of H. Candace Gorman, Chicago, IL, Shayana Devendra Kadidal, Center for Constitutional Rights, New York, NY, for Petitioner.

Andrew I. Warden, Federal Programs Branch, Carolyn Gail Mark, Charlotte A. Abel, James J. Gilligan, John P. Lohrer, John Edward Wallace, Preeya M. Noronha, Rachelle C. Williams, Sarah Maloney, Sean W. O'Donnell, Jr., Stephen McCoy Elliott, Terry Marcus Henry, Alexander Kenneth Haas, Ann E. Nash, Dalin Riley Holyoak, David Hugh White, James J. Schwartz, Joseph Charles Folio, III, Julia A. Berman, Kathryn Celia Mason, Keith Simmons, Kristina Ann Wolfe, Mary Elizabeth Carney, Norman Christopher Hardee, Patrick D. Davis, Paul A. Dean, Robert J. Prince, Scott Douglas Levin, Thomas A. Gillice, Timothy Allen Bass, U.S. Department of Justice, Civil Division, Blanche L. Bruce, U.S. Attorney's Office, Washington, DC, for Respondents.

Opinion

MEMORANDUM ORDER

RICHARD J. LEON, District Judge.

Petitioner Abdul Razak Ali, who now claims his name to be Saeed Bakhouche (hereafter "petitioner," "Bakhouche," or "Razak"), is an Algerian detainee being held at the U.S. Naval Base at Guantanamo Bay, Cuba. He alleges that he is being unlawfully detained by President Barack H. Obama, Secretary of Defense Robert M. Gates, and various others in the relevant chain of command (collectively, "Respondents" or the "Government"). On December 14, 2010, this Court commenced a habeas corpus hearing for Bakhouche. That morning, counsel for both parties made unclassified opening statements in a public hearing. Petitioner listened to a live translation of the opening statements via a telephone transmission to Guantanamo Bay, Cuba.

Thereafter, the Court went into a closed-door session to hear each side present an opening statement that included relevant classified information. Upon completion of their statements, each side presented its evidence, most of which included classified material, and arguments regarding various material issues of fact in ***21** dispute between the parties. Because these presentations were not completed by the end of the day on December 14, 2010, the Court reconvened the following day. Once again, presentations and arguments relating to various classified materials consumed most of this day and the Court, as a result, scheduled closing arguments two days later, on December 17, 2010. After hearing each side's closing arguments, the Court informed the parties that it would hold a public hearing in the near future to announce its decision. A classified version of this opinion setting forth in greater particularity the factual basis of the Court's ruling will be distributed in the upcoming weeks and issued through the Court Security Office, together with the final judgment.

Before stating the Court's ruling, a brief statement of the relevant factual and procedural background of the case is appropriate.

BACKGROUND

Petitioner is a forty-year old Algerian citizen who was captured on March 28, 2002, by Pakistani forces in a raid at a guesthouse in Faisalabad, Pakistan. He was caught together with a well known Al Qaeda facilitator: Abu Zubaydah. Indeed, Abu Zubaydah was at that very time assembling a force to attack U.S. and Allied forces. Captured along with the petitioner and Abu Zubaydah were a bevy of Abu Zubaydah's senior leadership, including instructors in engineering, small arms, English language (with an American accent), and various electrical circuitry specialists. Also found at the guesthouse were pro-al Qaeda literature, electrical components, and at least one device typically used to assemble remote bombing devices (*i.e.*, improvised explosive devices or "IED" s). Petitioner was transported to Bagram Air Force Base for questioning, where he was held before being transferred to the U.S. Naval Base in Guantanamo Bay, Cuba, in June 2002.

In the aftermath of the Supreme Court's decision in *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686, 2691–92, 159 L.Ed.2d 548 (2004) (holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo), petitioner filed this habeas corpus petition in this Court on December 21, 2005. (Pet. For Writ of Habeas Corpus [Dkt. # 1].) The case was originally assigned to my colleague, Judge Reggie B. Walton. As with hundreds of other petitions filed around that time, no action was

taken until the Supreme Court ruled on June 12, 2008, in *Boumediene v. Bush,* 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), that Guantanamo detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention." (*Id.* at 2262.)

Pursuant to an agreement between most of the judges of this Court, Judge Walton agreed to have Judge Thomas F. Hogan formulate the initial Case Management Order ("CMO") which would define the procedural process (*i.e.*, including the burden of proof, standard of proof, and definition of enemy combatant) that would guide the litigation of these detainee cases.[2] On November ***22** 6, 2008, Judge Hogan issued a consolidated Case Management Order for all of the judges who had transferred their cases to him for this procedural purpose. (Case Mgm't Order, Nov. 6, 2008 [Dkt. # 689].) That CMO was amended several times thereafter by both Judge Walton (*i.e.*, on November 12, 2008 (Order, Nov. 12, 2008 [Dkt. # 695]) and December 19, 2008 (Order, Dec. 19, 2008 [Dkt. # 797])) and by Judge Hogan on December 16, 2008 (Order, Dec. 16, 2008 [Dkt. # 784]). Ultimately, petitioner filed a Motion for an Expedited Judgment in his case on January 16, 2009. (Notice of Filing Mot. for Expedited J., Jan. 16, 2009 [Dkt. # 902].) Judge Walton issued a further supplemental Case Management Order thereafter on February 19, 2009 (Supp. Case Mgm't Order, Feb. 19, 2009 [Dkt. # 1011]), which he amended on March 27, 2009 (Order, Mar. 27, 2009 [Dkt. # 1101]).

On April 21, 2009, Judge Walton transferred this case to Chief Judge Lamberth for reasons of judicial economy. (Order, Apr. 21, 2009 [Dkt. # 1153].) On May 28, 2009, petitioner filed a Renewed Motion for Expedited Judgment. (Order Memorializing Oral Rulings, May 28, 2009 [Dkt. # 1190].) The Government filed its Factual Return on July 29, 2009. (Notice of Pub. Filing of Factual Return, July 29, 2009 [Dkt. # 1282].) Again on August 28, 2009, petitioner filed a Renewed Motion for Expedited Judgment. (*See* Memo. and Op., Nov. 19, 2009, at n. 1 [Dkt. # 1337].) On September 24, 2009, Chief Judge Lamberth denied petitioner's motion. (*Id.*)

On October 5, 2009, petitioner filed his Traverse in this case and filed motions seeking certain discovery. (Notice of Filing Traverse, Oct. 5, 2009 [Dkt. # 1317].) While this discovery process was still pending, however, petitioner moved to recuse Chief Judge Lamberth on January 29, 2010, based on public comments he had made regarding the role of the legislature in deciding issues related to detention cases. (Mot. for Recusal, Jan. 29, 2010 [Dkt. # 1361].) On June 6, 2010, Judge Lamberth issued an order recusing himself from the case. (Order, June 6, 2010 [Dkt. # 1418].) On June 16, 2010, the case was randomly reassigned to this Court. (Reassgm't of Civil Case, June 16, 2010 [Dkt. # 1419].) On August 4, 2010, I scheduled an initial status conference in this case for August 19, 2010. (Minute Entry, Aug. 4, 2010.)

On August 19, this Court met with the parties and inquired into the state of the record and remaining discovery issues, and to set a date for the merits hearing. (Minute Entry, Aug. 19, 2010.) Six days later, on August 25, 2010, I issued a CMO in this case. (Case Mgm't Order, Aug. 25, 2010 [Dkt. # 1423].) That order was virtually identical to the CMO I had issued on August 27, 2008, in *Boumediene v. Bush,* No. 04–cv–1166, and that I had used in the six other habeas merits hearings I held in the eight months that followed the *Boumediene* hearing. (No. 04–cv–1166, Case Mgm't Order, Aug. 27, 2008 [Dkt. # 142].) It was also virtually identical to the CMO I had issued just a few weeks earlier, on August 4, 2010, in *Obaydullah v. Obama.* (No. 08–cv–1173, Case Mgm't Order, Aug. 4, 2010 [Dkt. # 77].)

On August 26, 2010, I held a discovery hearing to address certain pending discovery requests by the petitioner. (Minute Entry, Aug. 26, 2010.) On September 10, 2010, I held a follow-up status conference to address those discovery issues further and to schedule the merits hearing in this case for October 4 and 5, 2010. (Minute Entry, Sept. 10, 2010.) On September 15, 2010, however, petitioner's counsel requested a continuance of the merits hearing to enable her to meet once again with ***23** her client in Cuba. (Mot. to Reschedule Habeas Hr'g, Sept. 15, 2010 [Dkt. # 1428].) On September 21, 2010, I granted her request and converted the October 4, 2010 hearing into a status hearing. (Minute Entry, Sept. 21, 2010.) On October 4, 2010, I rescheduled the merits hearing for December 14 and 15, 2010, and gave petitioner until November 5, 2010, to amend his Traverse. (Minute Entry, Oct. 4, 2010.) On November 18, 2010, the Government filed its response to the Amended Traverse. (Notice of Filing Resp. to Pet.'s Amended Traverse, Nov. 18, 2010 [Dkt. # 1443].)

On December 7, 2010, I held a pre-hearing conference with counsel in an effort to narrow the factual issues to be covered at the merits hearing. (*See* Minute Entry, Oct. 4, 2010.) At that hearing I informed detainee's counsel that I had received a notice of an *ex parte* filing from the Government the previous day that was classified at the top secret level. (*See* Notice of Classified *Ex Parte* Filing, Dec. 6, 2010 [Dkt. # 1444].) In addition, I informed the parties that it had been my practice in all of my previous habeas cases to refrain from reviewing such filings until such time as I had a need to do so. Indeed, I informed counsel for both parties that because detainee counsel, in my judgment, has a "need to know" any evidence being relied upon by the Government to sustain petitioner's ongoing detention, the Government would only be permitted to keep this evidence from detainee counsel if doing otherwise would endanger our national security. Accordingly, unless and until the Government needed to rely on the information contained in the *ex parte* filing in either its case-in-chief or rebuttal case, the Court would *not* review it or conduct the type of hearing that using it would necessitate. Neither side noted any concern regarding this approach. Moreover, at no time during the merits hearing held on December 14, 15, and 17, did the Government either inform the Court that its *ex parte* filing related to its pretrial discovery obligations or express any need or intent to rely upon the evidence contained in the *ex parte* filing.

On December 22, 2010, the Court informed the parties that it would announce its unclassified opinion in open court on December 30, 2010. On December 23, 2010, however, counsel for the Department of Justice informed the Court's staff *for the first time* that it had just received permission from its client to inform the Court via telephone that the *ex parte* pleading it had previously filed concerned potentially exculpatory information that the Government had not turned over to detainee counsel because it was classified at a higher classification level than detainee counsel was authorized to view. As a result, I immediately held an *ex parte* hearing that afternoon with Government counsel to inquire into the circumstances surrounding the Government's failure to previously inform me of this fact and to obtain some sense as to the nature of this "exculpatory" material. I specifically cautioned counsel, however, not to reveal at this point the substance of the material contained in its *ex parte* filing. At that hearing, Department of Justice counsel apologized for failing to inform the Court directly of the exculpatory nature of its *ex parte* filing. In addition, he informed the Court that the nature of the exculpatory evidence was such that it related *only* to the credibility and reliability of one particular identification witness that the Government was relying upon in its case-in-chief. In response, the Court informed the Government counsel that in its judgment, detainee counsel has a need to know and a right to review exculpatory material that relates to the credibility and reliability of any witness whose statements are being relied upon by the Government. Accordingly, in order to legally justify *not* providing ***24** such information to detainee counsel, the Government would have to satisfy the Court that providing such information to detainee counsel for use in a closed proceeding would somehow endanger the national security of the United States. As such, the Government, in essence, had to decide whether it wished to continue relying on the statements of this witness. If so, the Court would hold an *ex parte* hearing on December 28, 2010, to address the national security implications of revealing this exculpatory information to detainee counsel. If not, the Court would hold a conference call that same day to inform detainee counsel of these developments, and of the Government's withdrawal of reliance on this particular witness.

On December 24, 2010, Government counsel notified the Court via facsimile that it had decided to withdraw all reliance on the witness in question, thereby obviating the necessity of an *ex parte* hearing on December 28, 2010. As a consequence, the Court had no need to open and review the materials in the *ex parte* application. Three days later, the Government filed a public pleading in advance of the scheduled telephone call in which it notified detainee counsel of its intention to withdraw its reliance on the statements of this particular witness. (*See* Resp.'s Notice of Withdrawal of Reliance on Statements by Third–Party Detainee, Dec. 27, 2010 [Dkt. # 1445].) Unfortunately, the Government's filing did *not* give a complete and accurate description of the events preceding that decision. Nevertheless, the Court held the conference call with counsel for both sides on December 28, 2010, to correct the record for the benefit of detainee's counsel and to address those events. On that occasion, detainee counsel requested an opportunity to reformulate and re-present her closing argument in light of the removal of the evidence from the Government's case. (*See also* Pet.'s Mot. to Withhold Ruling, Dec. 28, 2010 [Dkt. # 1446].) The Court granted her request and set a hearing for January 4, 2011. (Minute Entry, Jan. 4, 2011.) On that day, counsel for both sides presented hour-long supplemental closing arguments to the Court based on the amended record.

After a careful review of the Factual Return and Traverse, in all of their amended forms, and after three days of hearings on the factual issues in dispute and the arguments of counsel, the following is the Court's ruling on Bakhouche's petition.

LEGAL STANDARD

[1] Under this Court's CMO, the Government bears the burden of proving the lawfulness of the petitioner's detention by a preponderance of the evidence. In the *Boumediene* cases, and in six subsequent habeas merits hearings, the Court adopted the following definition of "enemy combatant" to delineate those who could be detained lawfully:

> An "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Boumediene v. Bush, 583 F.Supp.2d 133, 135 (D.D.C.2008). In the aftermath of the change in administrations in January 2009, however, the Government for reasons unknown to this Court, now eschews the use of the phrase "enemy combatant" and simply argues instead that petitioner Bakhouche is the type of individual that is detainable under the AUMF because he was "part of" an "associated force" (*i.e.,* Abu Zubaydah's force) engaged in hostilities against the United States or its Allied forces. Either way, the petitioner's status ***25** ultimately depends on his relationship, if any, with Abu Zubaydah's force. Fortunately, there is no real discrepancy between these two standards in that regard, and therefore choosing between them is *not* necessary to a ruling on the petition in this case.

ANALYSIS

The Government contends that the petitioner was a member of Abu Zubaydah's force that was reorganizing at a guesthouse in Faisalabad, Pakistan, and preparing for future operations against U.S. and Allied forces. In particular, the Government contends that the petitioner: (1) lived with Abu Zubaydah and a cadre of his lieutenants during a two week period; (2) previously traveled with Abu Zubaydah's force through Afghanistan and ultimately fled with them through Afghanistan to Pakistan; and (3) took an English course (with an American accent) when he was staying at Abu Zubaydah's guesthouse.

[2] Petitioner, not surprisingly, disagrees. Although he acknowledges being captured in the same guesthouse as Abu Zubaydah, he denies: (1) ever being in Afghanistan, let alone being with Abu Zubaydah's force there; (2) ever taking an English course from Abu Zubaydah's trainers at the guesthouse; and (3) ever being a member, permanent or otherwise, of Abu Zubaydah's force. In essence, he claims that the Government has mistakenly identified him as a member of Abu Zubaydah's force, who traveled with Abu Zubaydah in Afghanistan and fled with him to Pakistan before gathering at this particular guesthouse to start preparing for their next offensive against U.S. and Allied forces. Upon reviewing the Return, the Traverse, and the oral argument during the merits hearing, I disagree with the petitioner's contention and conclude for the following reasons that the Government has more than adequately established that it is more likely than not that petitioner Bakhouche was, in fact, a member of Abu Zubaydah's force and is therefore detainable under the AUMF.

At the outset it is worth noting that our Circuit Court has *unequivocally* recognized that Abu Zubaydah and his band of followers have well established ties to al Qaeda and the Taliban and thus constitute an "associated force" under the AUMF. *See Barhoumi v. Obama,* 609 F.3d 416, 420 (D.C.Cir.2010) (affirming the district court's conclusion that Barhoumi was part of "Abu Zubaydah's militia—an 'associated force that was engaged in hostilities against the United States or its coalition partners' " and affirming denial of petitioner Barhoumi's writ); *Al Harbi v. Obama,* No. 05–02479, 2010 WL 2398883, at *14 (D.D.C. May 13, 2010) ("There appears to be no dispute that Abu Zubaydah was an al Qaeda operative and that Al Qaeda-related activities took place in his [Faisalabad] house."). Thus, a member of Abu Zubaydah's force is, by definition, detainable under the AUMF. Indeed, petitioner does not dispute this, focusing instead on whether he was actually a member of Abu Zubaydah's force.

The Government, of course, does not rely exclusively on petitioner's capture in the same guesthouse as Abu Zubaydah—although the Government contends, and the Court acknowledges, that that *alone* is enough to warrant petitioner's detention under the AUMF. *See Khalifh v. Obama,* No. 05–1189, at 12, 2010 WL 2382925 (D.D.C. May 29, 2010) ("Whatever interaction [petitioner] might have had with the top terrorists he met, whether it was limited or extended, his presence with them at [a] guesthouse is quite powerful support to the inference that he was considered a member of al Qaeda (and/or associated forces) at the time. Without such an understanding, he would not have been permitted ***26** to be around so many terrorists for any amount of time."). Instead, the Government directs this Court to what petitioner was doing *while* he was at the guesthouse with Abu Zubaydah and his senior leadership, and what he was doing *before* he arrived at that guesthouse.

As to the former, the Government sets forth credible accounts by fellow guesthouse dwellers who not only positively identified the petitioner by one of the various names he was using at that time—*i.e.,* Abdul Razak—but who also credibly account for petitioner participating in one of Abu Zubaydah's various training programs while he was staying in the guesthouse (*i.e.,* taking a class in English). Combining this evidence with the obvious and common-sense inference that a terrorist leader like Abu Zubaydah would not tolerate an unknown and untrusted stranger to dwell in a modest, two-story guesthouse for two weeks with himself and ten or so of his senior leadership, while they are preparing for their next operation against U.S. and Allied forces, the Court cannot help but conclude that petitioner's presence at this guesthouse is enough, *alone,* to find that he was more likely than not a member of Abu Zubaydah's force. But, there is more!

The Government also introduced credible evidence placing petitioner with Abu Zubaydah's force in various places in Afghanistan prior to his stay at the Faisalabad guesthouse. For example, one of his fellow detainees—who was also captured in the guesthouse—positively identified petitioner's photo by both of the names he was using at that time (*i.e.,* Abdul Razak and Usama al Jaza'iri) and recalled petitioner being in a particular location in Afghanistan prior to their arrival in Pakistan. His statements were corroborated by a contemporaneous diary propounded by one of Abu Zubaydah's close friends (the "al Suri diary") which not only listed petitioner—under the same name Usama al Jaza'iri—as a *permanent* member of Abu Zubaydah's group, but also placed him in at least one of the same locations in which this eyewitness identified him. Indeed, our Court of Appeals, in a recent case involving another detainee who was captured the same day in the same guesthouse as petitioner, found this very diary to be a credible source as to that other detainee's membership in Abu Zubaydah's force. *Barhoumi,* 609 F.3d at 432. In addition, petitioner was cited by that same name in a separate report listing the survivors of a fire in a different location in Afghanistan. In sum, the Government proffered more than enough credible evidence for this Court to conclude that it is more likely than not that petitioner was, indeed, a member of Abu Zubaydah's force. That conclusion, I might add, is corroborated further by petitioner's own admission—when he was first interrogated—that he had gone to Afghanistan to fight in the jihad against the U.S. and its Allied forces.

Bakhouche, of course, vigorously denies the accuracy of the numerous photo identifications of him as Abdul Razak, and especially the one photo identification of him as Usama al Jaza'iri. In particular, he denies being the "Usama al Jaza'iri" referred to in the al Suri diary and the fire incident report and denies being a member, much less a permanent member, of Abu Zubaydah's force who traveled with them for a protracted period in Afghanistan. To the extent I can be specific in discussing the shortcomings of his position in this unclassified opinion, suffice it to say that while his challenge to the reliability of certain photo identifications might be more compelling if these witnesses had only seen him on one particular occasion in either Pakistan or Afghanistan, it is particularly undercut by petitioner's own admission that he had stayed at the Abu Zubaydah ***27** guesthouse with not only the witness who identified him as Usama al Jaza'iri, but also with a number of the other witnesses who identified him as Abdul Razak. Simply put, Bakhouche's effort to undermine the reliability of the Government's evidence linking him to the Abu Zubaydah group *prior* to his capture at the guesthouse is inherently flawed and undermined by his own lack of credibility on certain critical points. In particular, Bakhouche's stubborn insistence that he had never been to Afghanistan, and did not know or interact in any way with Abu Zubaydah and his lieutenants in that relatively small guesthouse, was wholly incredible.

As such, the Court has no difficultly concluding that the Government more than adequately established that it is more probable than not that the petitioner was in fact a member of Abu Zubaydah's force that had gathered in that Faisalabad guesthouse to

prepare for future attacks against U.S. and Allied forces. Accordingly, petitioner Bakhouche is being lawfully detained under the AUMF and this Court must, and will therefore, DENY his petition for a writ of habeas corpus.

CONCLUSION

For all of the foregoing reasons, and for the reasons that will be set forth in greater particularity in the forthcoming classified version of this opinion, it is hereby

ORDERED that petitioner Abdul Razak Ali's, a.k.a. Saeed Bakhouche's, petition for a writ of habeas corpus is **DENIED.**

SO ORDERED.

Footnotes

1 Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes Barack H. Obama for George W. Bush.

2 I chose not to reassign the habeas cases originally on my docket to Judge Hogan for this purpose. Instead, I issued my own CMO on August 27, 2008, that I used in the various habeas proceedings assigned to me. That CMO, among other things, placed the burden of proof on the Government, set the standard of proof as a preponderance of the evidence, provided discovery rights for detainees (including a right to "exculpatory" materials), and formulated the procedural processes that would guide the hearings in my Court. In addition, it set forth the definition of "enemy combatant" that the Government's evidence would have to satisfy. (*See Boumediene v. Bush*, No. 04–1166, Case Mgm't Order, Aug. 27, 2008 [Dkt. # 142].) This procedural framework was ultimately blessed by our Circuit Court this past June in *Al–Bihani v. Obama*, 590 F.3d 866, 869–70 (D.C.Cir.2010).

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2014, I filed and served the foregoing Petition for Certiorari to those listed below by causing it to be delivered to the solicitor via U.S. Mail.

Donald B. Verrilli, Jr.
Solicitor General of the United States
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

H. Candace Gorman
Attorney for Petitioner

LAW OFFICE OF H. CANDACE GORMAN
H. Candace Gorman
Counsel of Record
220 S. Halsted St., Suite 200
Chicago, IL 60661
(312) 427-2313