

No. 13-10450

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In the  
Supreme Court of the United States

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

*Petitioner,*

v.

Barrack Obama, Charles Hagel and John Bogdan,

*Respondents.*

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

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**REPLY TO PETITION FOR A WRIT OF CERTIORARI**

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## REPLY BY PETITIONER

Petitioner Abdul Razak Ali respectfully submits this reply brief in further support of his petition for certiorari with respect to the Decision and Order of the Circuit Court of Appeals for the District of Columbia which affirmed the denial of his petition for habeas corpus by the District Court for the District of Columbia. In his petition for certiorari, Petitioner raised arguments based solely on *issues of undisputed fact*: he was arrested in Pakistan, not in Afghanistan, he had nothing to do with the September 11<sup>th</sup> attacks or terrorism, and he was not engaged in hostilities against the United States or its allies at any time. Petitioner's "malfeasance" that apparently warrants his life imprisonment without charge was simply an eighteen day stay in the same guesthouse as a man who the government *once believed to be affiliated with al-Qaeda*, but, as the evidence showed below, is now no longer believed by the government to have been associated with al-Qaeda.

The source of the President's detention authority is the Authorization for Use of Military Force ("AUMF") passed by Congress shortly after the September 11<sup>th</sup> attacks. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (O'Connor, J.) (plurality opinion). That statute applies to persons who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF, 115 Stat. at 224. This Court in *Hamdi* construed the AUMF as permitting detention of "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" *Hamdi*, 542 U.S. at 521.

In broader terms, a plurality of this Court held in *Hamdi* that: Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" *and* "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict. *Id.* at 526 (emphasis added).

Petitioner certainly does not fall within these AUMF detention criteria as set forth in *Hamdi*. For its part, the government's response to Petitioner's Certiorari Petition highlights facts that are no longer relevant or material (even though they were previously disputed) in order for the government to simply avoid having to address the critically important questions presented by Petitioner. The questions Petitioner asks in his petition are whether he can be held, indefinitely, based simply on the fact that he was staying in the same guesthouse in Pakistan as someone else who happened to once have been accused of being connected with Al-Qaeda, rather than upon actual evidence of Petitioner's *own* overt acts hostile to the United States or its allies; and, where, as here, Petitioner was not alleged to have been engaged in an armed conflict against the United States in Afghanistan (or anywhere for that matter) prior to his capture. If the answer to those questions is yes, then Petitioner also asks whether there is any limit to the duration of his detention. It is clear that the government has avoided discussing or answering these questions, because its basis for holding Petitioner is based not on the law, but on its ever-expanding and elastic view of the law.

Indeed, the government side steps the fact that Petitioner was in a public guesthouse in Pakistan—not Afghanistan—by instead raising issues of contested fact regarding the guesthouse itself<sup>[1]</sup> and then proceeds to argue that Petitioner had once been in Afghanistan.<sup>[2]</sup> Even if some of these facts were true (which they are not) it begs the question, can someone be detained under the authority of the AUMF when they were placed into custody in Pakistan on the basis that they had *perhaps* been in Afghanistan on a previous occasion? And, is this still the case, where there is no evidence the individual ever engaged in any armed conflict? The government has chosen not to address these important questions however, irrespective of the government's silence, the fact remains that this Court has held that the AUMF applies to individuals engaged in an armed conflict against American forces and its allies *in Afghanistan* and the government cannot argue that

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<sup>[1]</sup> For example, the government claims that the house in Pakistan was a terrorist hideout where Abu Zubaydah stayed but ignores that it conceded in Abu Zubaydah's own case that Zubaydah was actually not part of either al-Qaeda or the Taliban. In addition, as Petitioner also showed below, the only evidence for even the existence of "Abu Zubaydah's force" came from a collection of papers referred to as the "al-Suri diary." The actual organizer of this "force" was not Abu Zubaydah himself but instead the unknown *author* of the "diary" an individual the government admitted below that it cannot identify and that it has no evidence actually existed. And it is also only based on this "diary" that the government claims that the English lesson Petitioner is accused of attending was part of a subversive plot. Also, as fully argued below, there was no evidence in the record of any hostile activities taking place in the house.

<sup>[2]</sup> As shown below, this supposed fact relates to an individual arrested at another guesthouse as shown by key portions of an FBI agent's affidavit which the Circuit Court disregarded. The FBI agent's Report was actually submitted to Petitioner by the government as exculpatory evidence a few days prior to Petitioner's hearing. Similarly the accusation that Petitioner took an English lesson required the rejection of yet another government document that corroborated Petitioner's denial of taking the English lesson in the guesthouse.

Petitioner was first detained in Afghanistan or that he was engaged in an armed conflict against American forces and/or its allies.

The government has also side stepped the observation made by Judge Harry Edwards in his concurrence below—by once again focusing its arguments not on Petitioner himself, but on its contested view of the house where Petitioner was first detained. However, as Judge Edwards observed the AUMF only provides the President with authority to use all necessary and appropriate force against persons and entities that he determines “planned, authorized, committed, or aided” the September 11, 2001 attacks – or “harbored such organizations or persons.” (App. 22.) As Judge Edwards also observed, the National Defense Authorization Act (“NDAA”) reaffirmed the provisions of the AUMF and added language regarding persons who were a part of “or substantially supported” al-Qaeda, the Taliban and associated forces engaged in hostilities with the United States, including any person who has committed a “belligerent act” against the United States or directly supported enemy forces. (App. 22.)

Judge Edwards correctly concluded that there was nothing in the record indicating that the Petitioner played any role in the September 11 attacks, nor was there any evidence or indication that he harbored terrorist organizations or persons, nor that he committed belligerent acts against the United States, observing: “[Ali] 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) The traditional notion of detaining “the enemy”—those captured bearing arms or

otherwise materially aiding those bearing arms – is now being applied to detain those in proximity of someone reasonably or even unreasonably believed to be the enemy. This is precisely how these laws have been applied to Petitioner and the absurdity of this result in this case is something else the government has not addressed.

And finally the government has completely side stepped the question posed by Justice Stephen Breyer of this Court in *Hussain v. Obama*, 572 U.S. ---, 134 S.Ct. 1621 (Apr. 21, 2014), to wit:

The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not “engaged in an armed conflict against the United States” in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.

These are precisely the questions that the Petitioner has raised herein. For its part, the government instead asks this Court to look at contested facts which are not relevant to the matters raised herein because the government seeks diversion from the issue at hand: the expansion of the AUMF beyond recognition by the government, an improper expansion nonetheless approved by the decisions of the Circuit Court.

Despite the clear language setting forth the limitations of the applicable statutes (the AUMF and NDAA) the Circuit Court improperly extended the reach of the lawful basis for detention from engagement in hostilities (or even actual membership in Al Qaeda or the Taliban) all the way to a mere “personal

associations” standard in affirming the denial of Petitioner’s habeas corpus petition. Like the government, the Circuit Court focused its attention not on Petitioner or his actions, but on the government’s claims regarding the guesthouse in which he stayed. Hence, the Circuit Court simply assumed, without basis or supporting evidence in the record, that only individuals connected to Abu Zubaydah would be allowed in that house. So holding, the Circuit Court concluded that Petitioner’s arrest during the raid where Zubaydah was also captured was itself sufficiently “damning” evidence of a personal association to mark Petitioner as a member of the phantom “Abu Zubaydah force,” and therefore supported his possible detention for life. For its part the government latched on to this holding for arguing a basis for open-ended, potentially life-long incarceration of Petitioner because of the unfortunate happenstance of a fellow guest staying at the same public lodging. However, as Judge Edwards observed in his concurrence, this is “well beyond what the AUMF and NDAA prescribe.” (App. 23)

The questions posed by Judge Edwards in his concurrence and by Justice Breyer in the *Hussain* case should once and for all be answered by this Court: to wit, whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual is alleged to be part of an associated force of al Qaeda or the Taliban, but was not engaged in an armed conflict against the United States (or its allies) in Afghanistan prior to his capture and whether, "assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention." *Hussain v. Obama*, 572 U.S. ---, 134 S.Ct. 1621 (Apr. 21, 2014) Or,

whether, as Judge Edwards observed in his concurrence below, “the law of the Circuit 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.” (App. 24)

## CONCLUSION

For the foregoing reasons, and the reasons stated in his Petition, Petitioner respectfully submits that his writ of Certiorari be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2014, I filed and served the foregoing Reply to Petition for Certiorari to those listed below by causing it to be delivered to the solicitor via U.S. Mail.

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