

No. 11-7020

In The
Supreme Court of the United States

MUSA'AB OMAR AL-MADHWANI

Petitioner,

v.

BARACK H. OBAMA, ET AL.

Respondents.

Reply Brief in Support of Petition for Writ of Certiorari

Patricia Bronte
Bronte Law, LLC
622 Sheridan Square #3
Evanston, IL 60202
(312) 388-7890

Darold W. Killmer*
Mari Newman
Killmer, Lane & Newman, LLP
1543 Champa Street, Suite 400
Denver, CO 80220
(303) 571-1000
dkillmer@kln-law.com

* Counsel of Record

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ARGUMENT

I. The Court of Appeals' Expansive Detention Standard is Inconsistent with This Court's Rulings on the Permissible Scope of Executive Detention under the Authorization for Use of Military Force.

The detention standard developed by the court of appeals improperly permits the indefinite detention of detainees, including Petitioner, whose detention is not authorized by the Authorization for Use of Military Force ("AUMF"). Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001). In this case, the district court explicitly found that Petitioner posed no threat to the United States, yet still held that Petitioner was lawfully detained under the AUMF. Further, the standards developed by the court of appeals have resulted in denial of relief to *every* Guantánamo detainee who has sought it. Now that Congress, through the National Defense Authorization Act, has codified the state of law as the court of appeals has created it, this Court must

state the law to provide guidance to the lower courts, to Congress, and to the President regarding the permissible scope of detention under the AUMF. Finally, the district court's conclusion that Petitioner's alleged associations with al Qaeda were intentional was clearly erroneous.

A. Because the District Court Found that Petitioner Poses No Threat to the United States, His Detention is not Authorized by the AUMF.

Conceding that Petitioner's release would pose no threat to the United States, Respondent argues this is irrelevant to whether the AUMF authorizes it to detain Petitioner until the War on Terror ends. Indeed, according to the government, this Court has no business considering whether Petitioner's detention serves any purpose at all. Resp't Br. 15-16. Nothing could be further from the truth.

In the AUMF, Congress expressly limited the purpose for which the executive may detain persons: such detention must be "necessary and appropriate . . . in order to prevent any future acts of international terrorism against the United States" by the persons or organizations responsible for the September 11, 2001 attacks. Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF – which the government acknowledges throughout its opposition brief as the sole authority for Petitioner's detention – does not permit detention unless it serves that purpose. *Id.* "[T]he AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained." *Basardh v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009).

The government's interpretation of the AUMF to permit continued detention of an individual held to pose no threat ignores the express purpose for which Congress authorized the use of force and directly contradicts the intent articulated by the last 20 words of the AUMF. As justification for its position, the government relies on the court of appeals' bare conclusion that the AUMF does not require a *habeas* court to inquire into the threat a petitioner may pose to national security. Resp't Br. 15-16. The court of appeals initially arrived at that conclusion without any legal analysis, without examining the text of the AUMF (which is contrary to its holding), and in a case (unlike this one) in which the district court made no finding regarding the petitioner's dangerousness. *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010).¹ Notably, the very scholars on whom the government relies, Resp't Br. 8, flatly reject the notion that the AUMF authorizes the indefinite detention of persons – like Petitioner – who pose no threat to national security:

[T]he question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities. . . . This interpretation of how the laws of war should apply to the length of detention of terrorist enemy combatants is supported by the fact that many of the traditional rules [of the laws of war] contemplate release of an enemy combatant based on an individualized determination that the combatant does not preset a future threat.

¹ And, as noted in Section II, *infra*, the court of appeals reached this conclusion under the assumption that detainees have no constitutional rights of due process, an erroneous assumption that likely portended the result.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2125 (2005).

In this case, detaining Petitioner cannot serve to “prevent any future acts of international terrorism against the United States.” Pub. L. 107-40, 115 Stat. 224. The district court specifically found that Petitioner is *not* a threat to United States interests or national security. App. 25-27, 68-69, 92, 115. Apparently expressing its own frustration with the state of the law, the district court held:

I do not accept the rationale then that [to] find the government had shown a basis for his detention that means that he should not be released. I see nothing in the record that the petitioner poses any greater threat than the dozens of detainees similarly situated who have been transferred or cleared for transfer. In fact his record is a lot less threatening, including the government's own records that they know of, that do not give any basis for his continued detention, although I have found that he was originally, and he has been detained legally by the government. . . . We don't have any credible evidence of operations undertaken by this individual, of planning to do any attacks by this individual, of actively fighting on behalf of Al Qaeda or the Taliban.

App. 26-27. These findings echo the government's own conclusion, made shortly after the government tortured petitioner in the Dark Prison and then brought him to the Guantánamo prison a decade ago: petitioner is a naïve young man, “at best . . . the lowest level Al Qaeda member,” who should be released. App. 68-69, 90-92, 115. Even if the government were correct that it has no general duty in each Guantánamo case to make “an individualized showing” of the petitioner's future dangerousness, Resp't Br. 15, the district court's specific factual findings in this case – which the government does not dispute – demonstrate that continuing to

detain Petitioner does not and cannot serve the purpose Congress specified in the AUMF.

This Court should grant the Petition and reverse the court of appeals' decision that Petitioner, whom the district court found poses no threat to the United States, can nonetheless be indefinitely detained pursuant to the AUMF.

B. The “Procedural and Substantive Standards” Established by the Court of Appeals Result in Approval of Indefinite Detention of Guantánamo Detainees in Every Case.

In *Boumediene v. Bush*, 553 U.S. 723, 796 (2008), this Court imparted on the lower courts the responsibility to develop “procedural and substantive standards” for evaluating *habeas* petitions by Guantánamo Bay detainees. Instead of developing standards designed to achieve the fair and just adjudication of Guantánamo *habeas* petitions, the “standards” developed by the court of appeals have resulted in a judicial finding against *every* petitioner, affirming every decision by the D.C. District Court denying *habeas* relief, and reversing or vacating every decision granting *habeas* relief. *See* Pet. Cert. 12.

In *Boumediene*, this Court instructed the lower courts to develop “procedural and substantive standards” with respect to Guantánamo detainees’ *habeas* procedures “in the first instance.” *Boumediene*, 553 U.S. at 796-97. The D.C. District Court and the D.C. Court of Appeals have now done so, developing “standards” that have resulted in eventual denial of relief to every Guantánamo detainee who has sought it since *Boumediene* was decided. *See* Pet. Cert. 12. The

results-oriented “standards” have rendered meaningless the *habeas* rights granted by this Court in *Boumediene*.

As the government notes, this Court has declined to review multiple (indeed, all) Guantánamo cases since *Boumediene*. Those denials do not, however, mean that this Court has approved of the “standards” established by the lower courts. See *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”). Rather, the fact that numerous Guantánamo detainees have asked this Court to clarify the law in variety of areas demonstrates that the lower courts require guidance from this Court regarding the standards to be applied to Guantánamo detainees. The need for this Court’s guidance is particularly acute in this case, where even the district court that found against Petitioner expressed its frustration with the “standards” it believed it was required to follow: “As I have said, I believe that the defendant does not presently pose a threat to the United States, but I believe the way the law is presently written that I have no choice but to follow the law as written.” App. 29.

The government contends that, by now and again mentioning some types of activity that are not sufficient to require a conclusion that a detainee was “part of” al Qaeda, the court of appeals has adequately developed “standards” for review of Guantánamo detainees’ cases. Resp’t Br. 9. But these asserted limitations on the government’s authority to detain have been hypothetical only, never actuated. As representative examples, the government points to *Salahi v. Obama*, 625 F.3d 745

(D.C. Cir. 2010), and *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010). In *Salahi*, the court of appeals noted that “the purely independent conduct of a freelancer is not enough to establish that an individual is part of al Qaeda,” but went on to reverse the district court’s granting of the petition and remand for additional factual findings to compel a different result. *Salahi*, 625 F.3d at 752-53 (internal quotation marks omitted). Similarly, in *Awad*, the court of appeals noted that “intention to fight is inadequate by itself to make someone ‘part of al Qaeda,’” but nonetheless went on to affirm the district court’s denial of the writ, determining that Mr. Awad was “part of” al Qaeda. *Awad*, 608 F.3d at 9.² Both of these “limitations,” if actually applied to the facts of the case, would have resulted in Petitioner falling outside the scope of detention.

Whatever “standards” the court of appeals has established with respect to Guantánamo detainees’ *habeas* petitions, the cases decided since *Boumediene* have fallen far short of providing the “*meaningful* review” that the *Boumediene* decision requires. *Boumediene*, 553 U.S. at 783 (emphasis added). Indeed, “the writ [of *habeas corpus*] must be effective.” *Id.* Under the standards created by the court of appeals, the writ itself has become impermissibly ineffective. This Court should therefore grant the Petition for Writ of Certiorari to correct the lower courts’ errors in establishing standards for the *habeas* petitions of Guantánamo detainees.

² Here, the district court held that Petitioner himself had no intention to fight, and that there is no evidence that he fired a weapon in battle or was on the front lines, or that he planned, participated in, or knew of any terrorist plots. App. 26-27, 69, 114.

C. Congress's Adoption of the Court of Appeals' Standards in the National Defense Authorization Act Requires this Court to Intervene and Clarify the Law.

The government now points to the National Defense Authorization Act, § 1021, 125 Stat. 1561 (“NDAA”), to support its contention that this Court need not review Petitioner’s case. Resp’t Br. 7, 14. But the opposite is true. Congress’s action in passing the NDAA provides further evidence that this Court *must* review another Guantánamo detainee’s case, as Congress has now codified the court of appeals’ current view of the law on indefinite detention of detainees at Guantánamo, which contravenes this Court’s prior holdings. At least some of the judges who have participated in creating the current state of the law within the D.C. Circuit Court of Appeals have explicitly expressed hostility toward *Boumediene*. In fact, the court of appeals has become outright defiant to this Court in its handling of Guantánamo detainee cases, noting that this Court “is unlikely to” grant *certiorari* in another detainee case because “taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene*.” *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2010) (Silberman, J., concurring). Abdicating from this Court’s responsibility to review what the lower courts have done to eviscerate *Boumediene*’s command “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’” *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)).

The time has come for this Court to once again review a Guantánamo detainee’s *habeas* petition, in order to “say what the law is” to guide the lower

courts and Congress as to the constitutionally required process that must be afforded to detainees facing indefinite detention, possibly for the rest of their lives, without in many cases – including Petitioner’s – ever having been charged with a crime. This Court has repeatedly done so in the past, and it must do so again. *See Boumediene*, 553 U.S. at 783, 794-95 (reversing the court of appeals’ conclusion that Guantánamo detainees had no right to invoke the constitutional protection of the Suspension Clause); *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (reversing the court of appeals’ conclusion that courts should defer to the Executive’s view that a Guantánamo prisoner has no enforceable rights under the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (reversing the court of appeals’ conclusion that detainees could not challenge their detention because Guantánamo Bay is outside the territorial sovereignty of the United States). That Congress has now “affirm[ed]” the court of appeals’ view of the law, NDAA, § 1021, 125 Stat. 1561, and indicated that even American citizens may be subject to indefinite detention by the military, adds to the “[f]undamental questions of national importance pertaining to limits on executive power and application of notions of due process to the detainees at Guantánamo” raised by this case. Pet. Cert. 6.

D. Evidence in the Record Does Not Support the District Court’s Conclusion that Petitioner Intended to be Part of al Qaeda.

The district court improperly concluded that Petitioner intended to be a part of al Qaeda. App. 114. This conclusion was based solely on Petitioner’s associations, with no consideration of whether those associations were made knowingly or voluntarily. *See* Pet. Cert. 8-10. The district court’s description of

Petitioner demonstrates that Petitioner took no action to support those with whom he “associated”:

As a young, unemployed, undereducated Yemeni, Petitioner was particularly vulnerable to the demagoguery of religious fanatics. The record reflects that Petitioner was, at best, a low-level al Qaeda figure. It does not appear he even finished his weapons training. There is no evidence that he fired a weapon in battle or was on the front lines. There is also no evidence that he planned, participated in, or knew of any terrorist plots.

App. 116.

The government erroneously contends that Petitioner has not disputed any of the district court’s findings of fact. Resp’t Br. 10. That is simply not true. Part and parcel to Petitioner’s argument that the record contained insufficient evidence to establish that he was “part of” al Qaeda is Petitioner’s contention that many of the district court’s factual findings regarding his conduct were clearly erroneous. For example, in the district court and the court of appeals, Petitioner contended that “he was unaware of any affiliation between al-Qaida and the guesthouse or training camp,” App. 7; and that “[t]he ostensible purpose of each leg of [his] journey back and forth across Afghanistan . . . was to search out the people who held his passport,” App. 8. Further, in the court of appeals, Petitioner contended that, “[t]he trial court erred in finding that Al-Madhwani *voluntarily* received weapons training at Al-Farouq camp in Afghanistan.” Supp. App. 158.³ The court of appeals

³ Petitioner is submitting a Supplemental Appendix with his Reply Brief in order to include the opening and reply briefs he filed in the court of appeals. This supplementation is necessary due to the government’s contentions that Petitioner has not disputed any of the district court’s findings of

recognized that Petitioner “claim[ed] that there was insufficient evidence to find that he was ‘part of al-Qaida.” App. 2. Petitioner has certainly preserved the argument that the district court’s factual findings regarding his intent and conduct were clearly erroneous. *See Arthur Anderson LLP v. United States*, 544 U.S. 696, 707 n.10 (2005).

Because the district court’s conclusion that Petitioner intended to be a “part of” al Qaeda was erroneous, the government’s contention that Petitioner’s actions were sufficient to justify his detention, Resp’t Br. 9-10, is invalid. And, accounting for all of the evidence in the record, Petitioner’s conduct was not sufficient to justify his indefinite detention without charge under a proper interpretation of the AUMF.

II. The Court of Appeals’ Denial of Due Process Protections to Guantánamo Bay Detainees is Inconsistent with the Law and this Court’s Decision in *Boumediene v. Bush*.

Do detainees imprisoned at Guantánamo Bay, Cuba have any due process rights in their efforts to challenge their detentions at the prison? The District of Columbia Circuit Court of Appeals determined, in this case as in every other previous case in which the issue has been presented, that they do not. App. 10-11 (“[t]his Court has . . . stated that the detainees [at Guantánamo Bay] possess no constitutional due process rights.” *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 518 n.4 (D.C. Cir. 2009) (citing *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009)), cert. denied, 130 S. Ct. 1880 (2010)).

fact, Resp’t Br. 10, and that Petitioner has not properly preserved arguments regarding the violation of his due process rights. Resp’t Br. 16-17.

By and large, the judges in the D.C. District Court presiding over the habeas petitions of scores of detainees complain that they are bound by this determination, or completely unclear as to whether due process rights exist or not. *See, e.g., Al-Qurashi v. Obama*, 733 F. Supp. 2d 69, 78 n.14 (D.D.C. 2010) (“[I]t remains uncertain to what extent the Due Process Clause applies to the [non-citizen] detainees at Guantánamo Bay.”); *Basardh v. Obama*, 612 F. Supp. 2d 30, 33 (D.D.C. 2009) (“[T]he Court is spared from having to wade into the debate over whether the due process principles recognized by the Supreme Court in *Hamdi v. Rumsfeld* also apply to a non-U.S. citizen held at Guantánamo.”). There thus appears no doubt that, absent review by this Court, *habeas* petitions will continue to be resolved against detainees – always – under the erroneous apprehension that the detainees have no constitutional rights of due process.

This prospect does not bother Respondent. Indeed, Respondent argues that this case is “an inappropriate vehicle for considering the issue.” Resp’t Br. 16. The argument is premised upon a wrong assumption. Respondent erroneously asserts that “Petitioner’s only due process claim on appeal concerned the district court’s alleged reliance on a newspaper article that was outside the record.” Resp’t Br. 17. This is not so. Concepts of the denial of due process, specifically, permeated Petitioner’s appeal (and the litigation in the district court), but were repeatedly brushed aside by the lower courts on the assumption that Guantánamo detainees are not entitled to any due process rights. For example, in support of his argument that the AUMF cannot be applied so broadly as to justify detention upon mere association with alleged terrorists (an argument contained in the petition in this

Court, and also forcefully argued at the district court level and at the court of appeals), Petitioner argued to the court of appeals as follows:

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), made clear that mere association does not make one an “enemy combatant.” *Id.* at 534-35 (habeas inquiry “limited to the alleged combatant's acts,” and “the errant tourist, embedded journalist, or local aid worker” should not be detained). To “indefinitely hold[] the detainee – possibly for life – solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself . . . **would be a violation of due process.**” *In re Guantánamo Detainee Cases*, 355 F.Supp.2d 443, 476 (D.D.C. 2005), *vacated sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C.Cir. 2007), *rev'd*, 128 S.Ct. 2229 (2008).

Supp. App. 193 (emphasis added); *see also* Pet. Cert. 66-67. This Court has long held that allowing a finding of “guilt by association” is anathema to the notions of due process upon which our Constitution rests. *See, e.g., Aptheker v. Sec. of State*, 378 U.S. 500, 510-11 (1964). There can be no doubt that this argument has been consistently preserved by Petitioner herein. Likewise, as acknowledged by Respondent, Petitioner preserved the argument that he ought to be protected by the Due Process Clause in arguing that the district court improperly reached beyond the record of legitimate evidence in reaching its decision to deny Petitioner’s habeas corpus petition. Resp’t. Br. 17. The government (and the court of appeals) merely asserts that the district court did not cite to this finding in its *written* opinion, but ignores the fact that its *oral* opinion (which contained additional detail of the facts upon which the decision was based) explicitly cited to extra-record “evidence” finding such evidence “telling” (i.e., material and important). App. 68.

Indeed, most of the arguments forwarded by Petitioner in his Petition, and nearly all of them litigated on appeal, would be either considerably strengthened on the one hand, or denied of much forceful effect at all on the other, depending upon whether the reviewing court assumes that due process protections apply to detainees. It is analytically improper to evaluate the D.C. Circuit's decision in this case in a vacuum; its decision was wholly premised on the proposition that Petitioner, like all detainees, has no constitutional due process rights, and the court supported its determination by citation to its own cases that had so held, all of which are contrary to *Boumediene*, and the result of which denied Petitioner a "meaningful review" of the legality of his detention. This Court assumed as much in deciding *Boumediene* – assumed the application of due process standards that the D.C. Circuit has subsequently wholly rejected. The *Boumediene* Court noted that "[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context." *Boumediene*, 553 U.S. at 781.

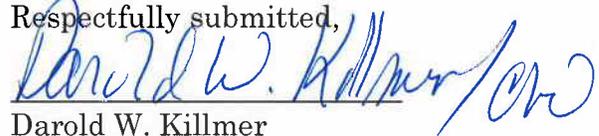
This Court deferred delineating the contours of the rights of detainees in *Boumediene*, instead noting that it would be up to the lower courts in the first instance to do so. Nearly four years later, however, it is clear that the lower courts have erected insurmountable barriers to relief, and further delay only inflicts more extraordinary denial of justice in a historically unprecedented way. As noted in Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari, even judges on the D.C. Circuit Court are beginning to believe that the appeals court has

slammed the door on detainees' cases: "the court's assault on *Boumediene* does not end with its presumption of regularity. Not content with moving the goal posts, the court calls the game in the government's favor." *Latif v. Obama*, __ F.3d __ (D.C.Cir. Oct. 14, 2011) (Tatel, J., dissenting). The *Boumediene* Court observed that, "[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional." *Boumediene*, 553 U.S. at 772. Petitioner has been imprisoned without charges for nearly ten years, and counting. It is impossible, under these circumstances, to fairly conclude that his cause is an "inappropriate vehicle" for this Court to review the question as to whether due process principles have any application to the government's conduct.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,



Darold W. Killmer

Mari Newman

KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000

Patricia A. Bronte
BRONTE LAW, LLC
622 Sheridan Square #3
Evanston, IL 60202
(312) 388-7890

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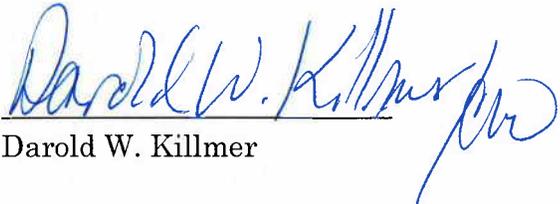
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CERTIFICATE OF SERVICE

I, Darold W. Killmer, hereby Certify that I am a member of the bar of this Court, and that I have this 8th day of February 2012 caused the Reply Brief in Support of Petition for Writ of Certiorari and Supplemental Appendix to be filed with the Court and delivered to:

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



Darold W. Killmer