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**ORAL ARGUMENT NOT YET SCHEDULED**

# No. 10-5087

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

**MOHAMMEDOU OULD SALAHI,**

**Appellee/Petitioner,**

**vs.**

**BARACK H. OBAMA, et al.,**

**Appellants/Respondents.**

**On Appeal from the United States**
**District Court for the District of Columbia**

## BRIEF FOR APPELLEE

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**June 9, 2010**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certify as follows:

### A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

Amici for Appellee include The Brennan Center for Justice, National Association of Criminal Defense Lawyers, and People for the American Way Foundation.

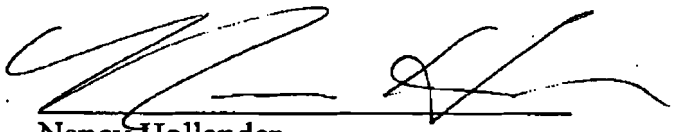
### B. Rulings Under Review

References to the ruling at issue appear in the Brief for Appellants.

### C. Related Cases

In June 2007, Appellee Mohamedou Ould Salahi filed an appeal from the decision of the Combatant Status Review Tribunal pursuant to the Detainee Treatment Act. *See Slahi v. Gates*, No. 07-1185. That case was closed on July 30, 2009.

Other than the foregoing and the cases appearing in the Brief for Appellants, counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(c).



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# GLOSSARY

AUMF.....Authorization for Use of Military Force

BSCT.....Behavioral Science Consultation Team

CITF.....Criminal Investigative Task Force

CSRT.....Combatant Status Review Tribunal

DIA.....Defense Intelligence Agency

DOD.....Department of Defense

FBI.....Federal Bureau of Intelligence

GTMO.....Guantanamo Bay Naval Base

ICRC.....International Committee of the Red Cross

JA.....Joint Appendix

NCIS.....Naval Criminal Investigative Service

OMC.....Office of Military Counsel

SASC.....Senate Armed Services Committee



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# BRIEF FOR APPELLEE

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## STATEMENT OF ISSUES

In 1991, when al-Qaeda was one of several groups fighting the communists in Afghanistan with the support of the U.S., Mohamedou Ould Salahi joined al-Qaeda. In 1992, he fought with al-Qaeda until the communists were defeated, then left Afghanistan and never returned. From 1992 until his arrest in 2001, Salahi performed no other tasks for al-Qaeda. Although he maintained contact with alleged al-Qaeda members he knew from the early 1990s, the district court correctly found that these contacts were insufficient to make him "part of" the al-Qaeda that attacked the U.S. on 9/11.

After reading the government's brief, one would assume the district court accepted all its evidence, that Salahi presented no contrary evidence, that the court's findings favored the government, and that historical events never happened. Because the court found that the government failed to prove Salahi was "part of" al-Qaeda within the meaning of the AUMF, it found it unnecessary to decide whether Salahi disassociated from that organization. Although the government attempts to recast the court's factual findings as legal conclusions to avoid the deferential standard of review accorded such findings, its challenge to the ruling below is essentially a factual one. When viewed through the appropriate standards of review, the questions presented on appeal are:

1. Whether finding that the al-Qaeda Salahi joined in 1991 was different from the al-Qaeda that attacked the U.S. in 2001 was clearly erroneous.

2. Whether other factual findings underlying the court's conclusion that the government failed to prove Salahi was "part of" the al-Qaeda that attacked the U.S. in 2001 were clearly erroneous.

3. Whether the court properly refused to create a presumption that Salahi was "part of" al-Qaeda and could be detained indefinitely based on a 1991 oath to al-Qaeda.

4. Whether the court abused its discretion in finding that the reliability of Salahi's statements to interrogators was "open to question" due to the influence of extremely coercive interrogation methods and in making a related decision to credit only those statements that were corroborated by other evidence.

5. Whether the AUMF and U.S. Constitution permit the indefinite military detention of a person arrested far from any battlefield, who has no connection to the armed conflict between the U.S. and al-Qaeda, and who never took part in hostilities against the U.S.

## STATUTORY PROVISIONS

All applicable statutes are contained in the Brief for Appellants.

## STATEMENT OF FACTS

### I. THE COURT FOUND THAT THE AL-QAEDA TO WHICH SALAHI SWORE *BAYAT* IN 1991 WAS NOT THE AL-QAEDA THAT ATTACKED THE U.S. ON 9/11.

The government rests its case on the fact that Salahi swore an oath, or *bayat*, to al-Qaeda in March 1991, ignoring the finding that "the al-Qaida that Salahi joined in 1991 was very different from the al-Qaida that turned against the United States in the latter part of the 1990s." [JA-258-59] It is undisputed that when Salahi swore *bayat*, al-Qaeda was one of several groups supporting the Afghan resistance against a Soviet-backed communist government—a resistance the U.S. supported. When placed in this historical context, Salahi's membership in al-Qaeda from 1991-1992 cannot bear the weight the government places on it.

In 1978, a *coup d'etat* put a communist government into power in Afghanistan. Neamatollah Nojumi, THE RISE OF THE TALIBAN IN AFGHANISTAN (Nojumi), 41 (Palgrave 2002). Revolts began throughout the country as the predominately Muslim population "saw the new government as a threat to their religion and way of life." *Id.* at 53. In December 1979, Soviet troops invaded Afghanistan in support of the communists. "The invasion of the Soviet army in Afghanistan increased the scope of the massive revolt and severely rattled Afghan society." *Id.* at 57.

As the government stipulated in another case, "[i]n response to the Soviet invasion of Afghanistan, groups of Muslims formed an armed force that became known as the Afghan mujahideen. The Afghan mujahideen fought the invading Soviet force and the Soviet supported Afghan government." [JA-1844-45] In the 1980s, thousands of Muslims came from around the world to assist in the fight against the Soviet forces.

After the Soviets retreated in 1989, many foreign mujahideen stayed to fight the Soviet-backed communist government, including members of al-Qaeda. "From the time of the departure of Soviet troops from Afghanistan in February 1989, through the dissolution of the Soviet Union in 1991, the Soviet Union provided economic and military support to the [communist] government in Afghanistan." *Id.* Therefore, the U.S. continued to fund the mujahideen. "By mid-1989 . . . the United States and Saudi Arabia had agreed to supply $600 million each to the mujahidin by the end of the year; an additional $100 million from the United States brought the total to $1.3 billion." Barnett R. Rubin, THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM (Rubin), 182 (2d. ed., Yale University Press, 2002). "In June 1991, the Bush administration approved the off-budget transfer of $30 million worth of captured Iraqi weapons to the mujahidin." *Id.* at 183. The U.S. also gave the mujahideen Stinger missiles. [JA-1845]

The communist government fell in 1992. Rubin at 269. At that time, a spokeswoman for the U.S. State Department declared that the "Afghan Resistance has fought a long and bitter struggle for self-determination which won admiration and support from around the world." U.S. Department of State Daily Briefing #57 (April 15, 1992) (Dept. of State Brief # 57).

After the communist government collapsed, the Afghan mujahideen rulers began fighting among themselves. The Taliban took power in 1996. Richard Wright, THE LOOMING TOWER, 230 (Knopf 2006).

Salahi traveled to Afghanistan in 1990 to "perform Jihad, assist the Afghanis in their struggle against the aggressions of Communists." [JA-2585-86] He trained at the al-Farouq training camp. [JA-2587] Although the government claims[1] [redacted] [Brief at 3], the government's expert acknowledges that[1] [redacted] [1] [redacted] [JA-323] Salahi trained at al-Farouq in the early 1990's, when the U.S. considered the Afghan resistance—of which al-Qaeda was a part—to be "freedom fighters." Dept. of State Brief # 57. Salahi left Afghanistan in 1992 and never returned. [JA-2588]

The government asserts that Salahi assumed the "al-Qaida pseudonym" or *kunya*, Abu Musab while at al-Farouq. [Brief at 3] While it is true Salahi assumed the *kunya*, it was not an "al-Qaida pseudonym" as he assumed it *before* joining al-

Qaeda.[1] [JA-2619] Salahi explained that the practice of assuming a *kunya* in Afghanistan began because the mujahideen "were afraid of people from Communist countries finding out" about their participation. [JA-340]

Before returning home, Salahi swore *bayat* to Iz Eldin al-Bahraini, an al-Qaeda member.[2] [JA-2587] Salahi acknowledges that by making this oath he joined al-Qaeda, but did so for the limited purpose of fighting against communism. [JA-2369] The government places undue significance on the swearing of *bayat*.[3] For example, the government claims that Salahi's "loyalty was to bin Laden," misrepresenting Salahi's testimony as support for this assertion. [Brief at 4] In fact, Salahi repeatedly testified that his loyalty, if any, was to the organization, *not* bin Laden.[4] [JA-2587;2619] The court resolved this factual dispute in Salahi's favor, finding that he swore *bayat* to the organization. [JA-261]

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[1] Salahi testified that he assumed a *kunya* while training at al-Farouq and only later joined al-Qaeda. [JA-2619]

[2] Although the government describes al-Bahraini as a "top lieutenant of bin Laden," [Brief at 4] the record reflects only that Salahi described him as a senior al-Qaeda member. [JA-500;2619]

[3] To make its case, the government's brief cites a statement Salahi allegedly made in December 2003, which is only months after the U.S. government stopped its worst mistreatment.

[4] Q: But your oath of bayat was to Osama bin Laden. Correct?
A: No, to the organization.

In January 1992, Salahi returned to Afghanistan to fight against the communists. [JA-2588] He soon left Afghanistan when he became disillusioned by infighting amongst the rival mujahideen factions. [JA-2588] As history demonstrates and as the district court found, the al-Qaeda Salahi joined and fought with from 1991 to 1992 was vastly different from the organization that attacked the U.S. on 9/11. [JA-258-59]

## II. THE EVIDENCE DID NOT ESTABLISH CONDUCT ON BEHALF OF AL-QAEDA AFTER 1992.

In an effort to morph Salahi's membership in the al-Qaeda of 1991-1992 into the al-Qaeda that attacked the U.S. in 2001, the government points to isolated events during that nearly ten year period, none of which establishes conduct on behalf of the latter organization. The government also points to no evidence that Salahi ever engaged in hostilities against the U.S. or its allies.

1. The government offers as evidence of ongoing membership in al-Qaeda Salahi's attempt to travel to Bosnia in 1992, asserting that Bosnia was "a known jihad front for al-Qaida." [Brief at 5] The government merely speculates that Salahi wanted to act on behalf of al-Qaeda, which Salahi denies. [JA-2589] The district court did not credit the government's spin on this evidence. [JA-263] Aside from the fact the government's argument ignores the tragic history of that

[JA-2619; *see also* JA-2587 (explaining that he did not understand his oath to be to bin Laden personally)]

war, in which the international community—not just al-Qaeda—came to the aid of the Bosnians after thousands of Muslim civilians were killed, it is undisputed that Salahi did not ever reach Bosnia or fight there.

2. The government also relies on evidence of Salahi's contact with two individuals it claims are members of al-Qaeda, Karim Mehdi and Christian Ganczarski. [Brief at 5] Notably, the government produced no evidence that Salahi was involved in their crimes. Further, it exaggerates what Salahi may have known about their activities, suggesting, for example, Salahi "consulted with Ganczarski on al-Qaida projects," ignoring the finding below that it had failed to prove Salahi's involvement in those projects.[5] [JA-271-73] The government also asserts Ganczarski "directed" Salahi to stop work on a jihadi discussion group, when the record indicates Ganczarski merely discouraged him from doing so. [JA-274;2639]

The government also attempts to cast a malevolent hue over ordinary discourse between Salahi and Mehdi. For example, the government describes as incriminating evidence that Mehdi sent Salahi "materials from Germany" and bank information "purportedly in furtherance of a claim for German pension funds." [Brief at 49-50] It is uncontroverted that the "materials" Mehdi sent were Salahi's

[5] Salahi testified he knew Ganczarski had purchased radio equipment, but had no knowledge whether he had done so at the behest of al-Qaeda. [JA-2633-34]

and his then-wife's personal belongings, which they had left in Germany when they returned to Mauritania in 2000. [JA-2616] Further, nothing controverts Salahi's statement that he asked for Mehdi's German bank information for purposes of obtaining a pension refund, because money could not be wired from Germany to Mauritania. [JA-261;2323-35]

The government also ignores the finding—and the evidence supporting it—that the sporadic emails between Salahi, Mehdi and Ganczarski in 2001 "suggest the men were not in continuous contact." [JA-279 (emphasis in original); JA-1278 (Ganczarski wrote, "What is wrong with you? You don't contact anybody.")] The district court found that these emails "tend to support Salahi's submission that he was attempting to find the appropriate balance—avoiding close relationships with al-Qaida members, but also trying to avoid making himself an enemy." [JA-279]

3. The government asserts—without citation—that the court found that Salahi worked for his cousin, Abu Hafs, on matters related to al-Qaeda. [Brief at 40] This is false. Although the court found that Salahi maintained contact with his cousin and helped his cousin send money to his family in Mauritania, the court found that the government failed to prove these contacts and the transfer were on behalf of al-Qaeda. [JA-270-73;275;278]

The government also asserts the court found that "Salahi 'hosted' the al-Qaida telecommunications chief, al-Iraqi, in Germany in 1995 and 1996 and

'spoke to him about the telecommunications equipment' he was buying for al-Qaida.'" [Brief at 41] However, the court did not find that al-Iraqi was the "al-Qaida telecommunications chief" or that al-Iraqi told Salahi he was buying telecommunications equipment *for* al-Qaeda. The court found only that Salahi hosted Abu Hijar and may have discussed the purchase of equipment for Sudan. [JA-271]

The government also alleges the court found that Salahi "helped Abu Hafs secrete money into Mauritania."[6] [Brief at 19] The court found only that Salahi made "[t]wo money transfers of modest amounts a year apart," noting Salahi's testimony that he did so to help Abu Hafs provide for his family in Mauritania.[7] [JA-275] Salahi testified he helped his cousin because his cousin could not wire money directly from Sudan to Mauritania. [JA-2608-09] The government ignores the finding below that "the government relies on nothing but Salahi's

[6] The government also asserts—without citation—that the transfers were "undetectable." [Brief at 7] Contrary to this assertion, Salahi testified that his cousin wired the money into Salahi's bank account [JA-2608], which would have created a record.

[7] The government indirectly challenges the court's characterization of the amounts transferred as "modest," offering for the first time on appeal that the money transferred was "quadruple the per capita gross domestic product" for Mauritania. [Brief at 43] The government's calculation ignores that the transfers occurred a year apart and provides no information about the size of Abu Hafs' family.

uncorroborated, coerced statements to conclude that the money transfers were done on behalf of al-Qaida." [JA-275]

The government also misrepresents the court's findings regarding two passports Abu Hafs sent to Salahi in the hope Salahi and his wife would travel to Afghanistan in 2001. Salahi testified, and the court found, that the passports were issued to Salahi's sister-in-law (Abu Hafs' wife) and a man named Ahmed Mazid. [JA-272;2612][8] It is uncontroverted that Salahi never used the passports [JA-272], and there is no evidence that the documents were not issued to their rightful owners. Nonetheless, the government falsely claims the court found the passports were "fraudulent," repeating this accusation throughout its brief. [Brief at 7;13;19-20;32;42] The court did not find the passports were fraudulent. [JA-272-73] The government also obscures the fact that Salahi returned the passports to their rightful owners, claiming, for example, that he gave "one of them to a man he did not know, named Mazid," without acknowledging that it was Mazid's passport. [*Compare* Brief at 43 *with* JA-272]

While the court did find Salahi was in contact with his cousin until 2001, that contact was sporadic and there is no evidence it was on behalf of al-Qaeda. According to the 9/11 Commission, in 2001 Abu Hafs was at odds with the al-

[8] The court mistakenly states that Abu Hafs sent Salahi money for the trip. [JA-272 (citing JA-2633)]. There is no evidence that Abu Hafs sent Salahi money for this purpose.

Qaeda leadership—including bin Laden—because he opposed any attacks on the U.S., "basing [his] opposition to the attacks on the Qu'ran." Nat'l Comm'n on Terrorist Attacks Upon the U.S., THE 9/11 COMMISSION REPORT (9/11 REPORT), at 252 (2004). [JA-2505;2542]

4. As it did below, the government takes statements from the record out of context to support its contention that Salahi never left al-Qaeda. It asserts that in his CSRT Salahi admitted that he continued working for al-Qaeda to avoid making himself an enemy of that organization. [Brief at 6;34] When taken in context, however, it is clear that Salahi was not saying he wanted to continue to work for al-Qaeda; rather, to avoid making himself an enemy of al-Qaeda, Salahi gave his cousin excuses why he could not rejoin al-Qaeda instead of explicitly rejecting the organization. [JA-2608] The district court refused to credit the negative inferences the government sought to draw from this statement. [JA-264]

In addition to twisting what Salahi said, the government mischaracterizes what the court found, asserting that the court concluded Salahi provided "begrudging service" to al-Qaeda to avoid making himself an enemy of the organization. [Brief at 29] The court made no such finding. To the contrary, the court found the evidence tended to show Salahi had distanced himself from alleged al-Qaeda members and was consistent with Salahi's claim that he "was attempting

to find the appropriate balance—avoiding close relationships with al-Qaida members, but also trying to avoid making himself an enemy." [JA-279]

5. The government claims "the court found that Salahi engaged in specific recruiting for al-Qaida." [Brief at 39] However, the district court found the *opposite*—that "the government has not credibly shown Salahi to have been a 'recruiter.'" [JA-269-70] At most, according to the court, the government established that Salahi had contact with people he knew were al-Qaeda members until November 1999 and made a referral to a known al-Qaeda member in 1997, four years before Congress passed the AUMF. [JA-269] The court supported this factual finding by explaining the evidence in detail. [JA-264-70]

Although the government admits that the court "rejected the government's claim that Salahi was a recruiter" at one point [Brief at 13], it ignores that finding throughout the rest of its brief. For example, the government claims that "Salahi engaged in al-Qaida recruiting and travel facilitation throughout the 1990s." [Brief at 8] In support, the government relies, not on Salahi's testimony under oath but on uncorroborated interrogations and then mischaracterizes what he supposedly said to the interrogators. The government claims that Salahi "admitted to being an al-Qaida recruiter" yet the interrogation report cited never mentions al-Qaeda. The interrogator writes that Salahi said, "I helped making propaganda for jihad and recruiting people for the cause." [JA-500] The government also cites to a

summary stating that Salahi is "suspected of being a recruiter" [JA-510], and another which claims that he was a "jihad recruiter." [JA-526] As the court noted below [JA-2526], the government regularly—and improperly—conflates *jihad* with al-Qaeda.[9] [redacted]

The government claims that "Salahi recruited Ramzi Bin al-Shibh." [Brief at 9] Even the transcript references the government cites [JA-2611;2629] do not support the assertion. Salahi specifically says he did *not* recruit al-Shibh [JA-2611] and makes clear that statements he made to the contrary were attempts to corroborate what interrogators told him, but were not truthful.[10] The government also omits its previous admission that Salahi had no reason to know about 9/11 [JA-253],[1,2] [redacted] where he

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[9] Court: Jihad, I gather in your lexicon, equals Al-Qaeda?

[Government Counsel]: Yes, Your Honor. ...

Court: ... I understand Jihad to be a non-al-Qaeda specific term.

[10] Government counsel repeatedly read a statement from an interrogation, asking Salahi if he had read the statement correctly. That Salahi agreed the government read something correctly does not mean the statement read was true, as the district court acknowledged. [JA-2632]

was shown pictures of the 9/11 hijackers and asked whether they had accompanied al-Shibh to Salahi's home, to which Salahi said "no." [JA-584]

The government takes inconsistent views of the evidence in its effort to portray Salahi as an al-Qaeda recruiter—contrary to the court's finding that it failed to prove this—and to connect him to 9/11—again contrary to the court's finding that no evidence supported such an inference. [JA-253;270] The government asserts on the one hand that Salahi recruited al-Shibh and on the other that—at the time of this supposed recruitment—Salahi already knew al-Shibh to be an al-Qaeda member. [*Compare* Brief at 32 *with id.* at 39] The government cannot have it both ways. Regardless, the district court rejected the inferences the government asked it to draw from the evidence, concluding the evidence that Salahi was a recruiter was not credible. [JA-269] This finding is entitled to substantial deference.

In another effort to connect Salahi to the 9/11 attacks, the government asserts Al-Qaeda "relied on [Salahi's] recruits to carry out 9/11." [Brief at 32] This assertion ignores the court's finding of fact that Salahi was *not* a recruiter, the government's concession Salahi knew nothing of the 9/11 attacks, and [redacted][1,2] he said he had never met the 9/11 pilots.

The government does the same thing with the evidence regarding the fax to Chris Paul. The government claims that the court found "as a fact that Salahi sent a facsimile to Paul … *to recruit for al-Qaida*." [Brief at 38 (emphasis added)] The court found, however, only that "Salahi continued to be in touch with people he knew to be al-Qaida members, and that he was willing to refer would-be jihadists to them when the opportunity arose." [JA-269] This is not a finding that Salahi sent the fax to recruit for al-Qaeda.

The court did not dismiss the particular incidents of al-Qaeda recruiting on the ground that they were too sporadic as the government claims. [Brief at 39] It dismissed the government's allegation that Salahi recruited for al-Qaeda because the government failed to present credible evidence that the allegation was true. [JA-269] The court rejected much of the government's evidence supporting its allegation that Salahi recruited al-Shibh [JA-265-67], finding only that the evidence showed Salahi provided lodging for al-Shibh and two others for one night, and the men discussed jihad and Afghanistan [JA-268]. The court rejected the inference the government sought to draw from the fax to Paul, finding only that, on one occasion in 1997, Salahi was willing to refer a person interested in jihad to someone he believed to belong to al-Qaeda. [JA-270]

6. The district court carefully reviewed all of the government's evidence regarding the two months Salahi was in Canada. [JA-276-78] The evidence was

basically that Salahi knew individuals, some of whom may have been al-Qaeda members. Much of this evidence was from uncorroborated statements that Salahi later retracted. [JA-276] The court found that the only corroborating evidence from the period in Canada was [redacted][1] found when Mohsen was arrested, which included Salahi's name on a piece of paper that also included the name of Ahmed Ressam. [*Id.* (citing JA-481)] The court concluded that it could draw no inference from that snippet of paper other than that there might be some link between the three people. The court also noted that Ressam had provided evidence against other Guantanamo detainees, but provided nothing against Salahi. [JA-277]

The Canadian evidence did not support any finding that Salahi engaged in hostilities against the U.S. or performed any tasks on behalf of al-Qaeda. To the contrary, [redacted][2] Salahi was [redacted][1,2] asked whether, while in Canada, he had planned to harm the United States or Canada. [JA-1861-63] He answered, "no," [redacted][1,2] [*Id.*] The court below found that the evidence related to Canada did not "add anything of significance" to the government's claim that Salahi was "part of" al-Qaeda. [JA-277-78]

7. Finally, the government relies on allegations that Salahi *considered* creating a discussion group regarding the Islamic concept of *jihad* and was a

member of various internet forums that discussed such topics, again conflating jihad with al-Qaeda. [Brief at 11] Salahi denied that the group was connected to al-Qaeda and the court did not find otherwise.

With respect to the discussion groups of which Salahi was a member, the court did not find that Salahi was involved in planning denial of service attacks related to al-Qaeda. [Brief at 20] The record contains no evidence that the denial of service attacks were related to al-Qaeda. To the contrary, the record shows that they were directed at the Israeli government as part of an international protest against that country's aggression towards the Palestinians. [JA-2617] Further, the court found the government had produced no evidence that Salahi engaged in such attacks, only that he had access to information regarding them. [JA-274]

## III. THE RECORD CONTAINS UNCONTROVERTED EVIDENCE OF "EXTENSIVE AND SEVERE MISTREATMENT" OF SALAHI AT GUANTANAMO.

The government asserts that the district court failed to make findings regarding the reliability of Salahi's statements to interrogators. [Brief at 52-55] This is not true. As discussed, *infra*, the court found that the "extensive and severe mistreatment" of Salahi at Guantanamo brought into question the reliability of all statements Salahi made to his interrogators. [JA-252;259] Thus, the court credited only those statements that were corroborated either by Salahi himself or other

evidence. Because evidence of Salahi's mistreatment at Guantanamo is relevant to this Court's review of the findings below, Salahi describes it here.

**A. Arrest and Rendition.**

In November 2001, Salahi received a telephone call from Mauritania[2] [1] asking him to meet [2] [11] [JA-2374-75;2593-94] Salahi did as he was asked and was seized upon his arrival.[12] November 20, 2001, is the last time Salahi saw his family. [*Id.*] He disappeared, leaving his mother to guess at what had happened to her son.

Salahi was detained for a week before being illegally rendered to [1] at the direction of the U.S. [JA-2375;2594] During his eight months in [1] Salahi was isolated, abused and threatened by interrogators, and was prohibited from meeting with the ICRC, who regularly visited the prison. [JA-2375-76]

In July 2002, Salahi's clothing was returned, leading him to believe he was being released. [JA-2376-77;2594] His hopes for freedom were soon dimmed. He was [1,2] shackled before being driven to an airport where guards stripped off his clothing and forced him to wear a diaper. [JA-2594-95] He [1,2] a bench in an airplane and flown to the

[11] The record contains more detailed accounts of Salahi's arrest, renditions and mistreatment. [JA-162-79;226-231;233;2371-90;2593-607]

[12] The government claims Salahi was "captured" [Brief at 6], rather than accurately reporting that he turned himself in to Mauritanian officials.

American military base in Bagram, Afghanistan. [JA-2595] At Bagram, he was interrogated, mistreated and threatened. [JA-2377-78;2595] For example, while being transported to an interrogation [1,2 redacted] a guard dragged Salahi over concrete steps, causing him severe pain. [*Id.*] In the interrogation room, interrogators covered his head, forced him to his knees, [1,2 redacted] [1,2 redacted] Salahi suffers from [6 redacted]—which the interrogator knew—making this position extremely painful to him. [*Id.*]

On August [2 redacted] 2002, the U.S. flew Salahi to Guantanamo. [1,2 redacted] [1,2 redacted] [1,2 redacted] [JA-2378;2596]

**B. Guantanamo.**[13]

At Guantanamo, FBI agents interrogated Salahi for several months. [JA-2379;2596] In September 2002 and again in January 2003, FBI interrogators suggested to Salahi that he would be tortured if he did not cooperate. [*Id.*] In January 2003, Salahi was told that the American military planned to kidnap him and put him in "a very bad place," which he understood to mean he would be tortured. [*Id.*] The same month, DOD issued an interrogation plan for Salahi, which included interrogations lasting up to twenty hours, use of military dogs to

[13] Salahi's account of the sustained and serious mistreatment he suffered at Guantanamo has been corroborated in numerous official government reports. [JA-356-92;1072-89;1398-1424;1425-67]

intimidate and agitate him, humiliation, denial of opportunities to pray or perform other religious obligations, and sensory overload, among other extreme techniques. [JA-1459-60;1920;2221-29] Many of these techniques—and others—were later used against Salahi.

Two months later, the FBI told Salahi that it was turning him over to DOD interrogators and that he was not going to enjoy the time to come. [JA-1402;2379;2597] Salahi feared he would be abused or tortured [JA-2379]; his fears were justified.

In June 2003, Salahi was put into total isolation. [JA-2379-80;2597] Although he was told he was being punished for his "lies," the true purpose of the isolation was to make him dependent on his interrogators.[14] [JA-1869] He was deprived of all comfort items, except for a thin mattress and worn-out blanket. [JA-1930;2380] His cell was deliberately "made as cold as a freezer." More egregiously, the government deprived Salahi—an observant Muslim—of his Qu'ran and soon forbade him from praying out loud, even though Islam requires that three of the five daily prayers be spoken aloud. [JA-1460;1886;2380;2599]

From mid-June through August 2003, Salahi was interrogated daily and was badly abused by his interrogators. [JA-2380-83] "[T]he single most important

[14] Salahi was isolated from everyone but his interrogators and guards for over one year. Although the ICRC twice asked to see him during this period, General Miller refused their requests, claiming "military necessity." [JA-1490;1496]

aspect of [the interrogation plan for Salahi] is the initial shock of the treatment … [the] detainee will have the perception that his situation has changed drastically and that life can still become worse than what he is experiencing." [JA-1461] As the SASC found, interrogators also used non-approved techniques. [JA-1463]

Salahi was interrogated in three shifts, often with only a short or no break between interrogations. [JA-1873;1886;2381;2598] His interrogators—[2] [redacted]—[2] [redacted]—verbally and physically abused him. The interrogators had access to his medical records so they knew he had degenerative disk disease and sciatica, both of which can cause excruciating pain from being forced to stand or sit in certain positions. [JA-1965;2192;2221] Yet they forced Salahi to stand bent over all day with his hands shackled to the floor during interrogations, or to stand upright for long periods of time. [JA-1462-63;2380] The medical records document increased low back pain "for the past 5 days while in isolation and under more intense interrogation," and note that the pain medication prescribed for him could not be administered throughout July 2003 because he was at the "reservation." [JA-1473-74;2054;2057] During this time, two [3] [redacted] interrogators sexually abused him. [JA-2380]

Salahi was deprived of sleep for approximately seventy straight days during which time his interrogators manipulated his environment to increase the physical symptoms of sleep deprivation. [JA-1463;1873;2381] His tormentors deprived

him of control over his own hygiene. [JA-1930;2383;2599] He was also forced to endure strobe lights and heavy-metal music playing on repeat, until he could no longer stand from exhaustion. [JA-1463;1753;1877-79;2380-82] Interrogators also exposed Salahi to extremely cold temperatures, once even dousing him with ice water and leaving him in a cold room for hours. [*Id.*] He was deprived of sufficient food and lost weight during this period. [JA-2382;2598]

The SASC reported that an interrogator known as "Mr. X," who wore a mask at all times, also began making death threats against Salahi:

> [T]he interrogator told Salahi to "use his imagination to think up the worst possible scenario he could end up in." The interrogator told Salahi that "beatings and physical pain are not the worst thing in the world. After all, being beaten for a while, humans tend to disconnect the mind from the body and make it through. However, there are worse things than physical pain." The interrogator told Salahi that he would "very soon disappear down a very dark hole. His very existence will become erased ... no one will know what happened to him and, eventually, no one will care."

[JA-1463-64 (footnotes omitted); *see also* JA-1878-79;1921]

**C. Threats against Family.**

Beginning in July and continuing through September 2003, interrogators threatened Salahi's family to coerce him into telling them what they wanted to hear. [JA-1881;1886-87;1890] In mid-August 2003, Richard Zuley, the interrogation team leader, visited Salahi [redacted][1,2] and showed him a letter purportedly from the DOD, which authorized the arrest of Salahi's

mother. [JA-1468;2383-84;2599-600] Although Salahi did not know it until years later, the letter was a forgery. The letter stated that Salahi's mother was being arrested because of his refusal to cooperate. [*Id.*] Zuley told Salahi that his mother would be brought to Guantanamo and noted that she would be the only woman in the prison, suggesting that she would be sexually assaulted by other detainees. [*Id.*]

The following month, interrogators told Salahi that his mother and brother had been taken into U.S. custody, and described how they suffered during their flight. [JA-1892;1894] When Salahi was told of his family's "fate," he began to cry. [JA-1892] Later that month, an interrogator told Salahi that "if interrogators and other important people did not feel he was being truthful, he would be ensuring that his family's situation would worsen." [JA-1748-49; *see also* JA-1503;1894] Threatening harm to a detainee's family was prohibited. [JA-1414;1909]

**D.** [1] [redacted]

[1,2] [redacted]

[1,2] [redacted] [JA-1921] Salahi was being interrogated when he heard men shouting and running and a dog barking. [JA-1921;2384;2600-01] The door to the interrogation room opened violently and three men burst into the room. [JA-2384;2600] Two were wearing masks and one was holding a military working dog. [*Id.*] The men used the dog to intimidate

Salahi, "to help create an atmosphere that something major was occurring," and "to add to the tension level of the detainee." [JA-1461;1921]

The men began hitting Salahi [redacted] [JA-2384;2600-01] They dragged him into a truck while continuing to hit him. Salahi began to pray, but one of his attackers punched him in the mouth and told him, "no praying." [JA-2384;2601] [redacted] [*Id.*;JA-2050]

When the truck stopped, Salahi was dragged out and placed in a boat. The beatings continued. When Salahi passed out from the pain, he was resuscitated with ammonia. [JA-2384] The first leg of the boat trip lasted approximately three-and-one-half hours. When it stopped, Salahi was taken out and thrown on the ground. [*Id.*]

Laying on the ground, Salahi could hear Zuley talking loudly to two Arab men, [redacted] [JA-2385;2601] The Arab men made threatening statements to Salahi, which, according to a DOD report, the military intentionally permitted him to overhear. [JA-1921] After about thirty minutes of arguing over who would get to interrogate Salahi, Zuley ordered the Arab men to take Salahi back to the boat. [JA-1404;2385;2601]

Again inside the boat, Salahi's tormenters put ice down his shirt and pants and, when the ice melted, added more. [JA-2385] For the next three-and-one-half

hours, he was randomly beaten[1] so he could not anticipate blows or protect himself from them, which added to the terror he experienced. [*Id.*,JA-1921]

Eventually, Salahi was taken to a new cell and seen by a corpsman, who treated his injuries while cursing him. [JA-2385;2601-02; *see also* JA-1475;2050 (medical records confirming the trauma to Salahi's chest and face, as: "1) Fracture ?? 7-8 ribs, 2) Edema of the lower lip")] Salahi received medication that caused him to drift in and out of consciousness. [JA-2385;2602] Salahi was not interrogated for several days, "presumably to allow tension to build and set the stage for subsequent interrogations." [JA-1921;2602]

Salahi was the only prisoner in the new building in which he was kept. Consistent with the "special interrogation plan," his cell was "modified in such a way as to reduce as much outside stimuli as possible. The doors will be sealed to a point that allows no light to enter the room." [JA-1461-62;1464;1930] The guards assigned to him wore face masks. [JA-2386-87;2605] It was not until a year later—in July 2004—that Salahi was allowed outside during sunlight hours. [JA-1937]

**E. Interrogations Resume.**

After Salahi had been in isolation for a few days, Zuley told him he had to "stop denying" the government's accusations. [JA-2386-87;2605] While Zuley

was talking, the[1] man was behind the tarp, cursing and shouting for Zuley to let him in. [*Id.*]

The SASC found that interrogating Salahi "at Camp Echo was intended to emotionally and psychologically weaken him through 'drastic changes in his environment'" and the special interrogation plan devised for him "included efforts 'to replicate and exploit the Stockholm Syndrome between detainee and his interrogators.'" [JA-1461] Several months before the government implemented its interrogation plan for Salahi, the NCIS psychologist assigned to the CITF at Guantanamo submitted a written memorandum reporting that "the idea of inducing the Stockholm syndrome implied that 'the subject feels that he is to be killed *and the information provided may in fact be distorted.*'" [*Id.* (emphasis added)] Despite this warning, the military implemented its special interrogation plan against Salahi in an effort to extract incriminating statements from him. [JA-1462]

The day after Zuley met with Salahi, interrogations resumed. [JA-2386] In addition to the threats to him and his family, Salahi was abused by the masked guards assigned to his cell. They would force him to drink a liter of water every hour or two so he was unable to sleep through the night. [JA-2387;2602] They allowed him only one minute to eat his food and would throw out whatever he could not eat in that time. [*Id.*;JA-2605] They continued the prohibition on prayer

and refused to allow him to observe religious holidays, enforcing their rules by threatening harsh punishments for violations. [*Id.*]

Under these circumstances, Salahi [1,6] [redacted] [JA-2387;2604-05] [1,6] [redacted] [1,6] [redacted] [JA-1464-65;2029;2387;2604-05] [1,6] [redacted] [1,6] [redacted] [1,6] [redacted] [1,6] [redacted] [JA-1464-65] [1,6] [redacted] [1,6] [redacted] [1,6] [redacted] [1,6] [redacted] [JA-1465]

After suffering nearly two years of imprisonment away from his family and months of torture and other mistreatment, Salahi decided that the only way to end the abuse was to admit anything the interrogators asked of him, regardless of its truthfulness. [JA-2387-88;2605-06] Months earlier, Mr. X had told Salahi that his interrogators would falsify evidence to detain him indefinitely if Salahi did not tell them what they wanted to hear. [JA-1877-78;1881-84] Another interrogator had told Salahi if he did not cooperate, "his time for helping himself will have passed. He will remain at GTMO forever and not go to trial because only those who cooperated are allowed to go to [trial] and learn what their fates will be. He will

forever be in a state of limbo." [JA-1951; 1953-54] Thus, Salahi believed that capitulating to the demands of his interrogators—even if it meant falsely incriminating himself and others—was the only way to protect himself and his family and secure his release.

Salahi then met with an interrogator and said he would admit to everything, which he subsequently did. [JA-2387-89;2605] Despite Salahi's "cooperation," the worst abuse continued for several more weeks, and the fear of its return continues to this day. [JA-1464;2607]

**F. Later Statements.**

As Judge Robertson recognized, the majority of the statements on which the government relied in this habeas proceeding were taken during "the mistreatment or during the 2 years following it." [JA-259] Faced with the overwhelming evidence of Salahi's mistreatment during that period, the government disavowed its reliance on interrogations taken from June through September 2003. [JA-2497-98] But the cruel, inhuman and degrading treatment continued well into 2004. Soldiers continued to force him to drink water to keep him awake until February 2004. [JA-2602] It was not until June or July 2004 that the guards assigned to Salahi's cell removed their masks. [JA-2389;2605] In addition, on July 30, 2004, Salahi was finally told that he had not been "disappeared" to a new country but

was still in Guantanamo, and would finally be allowed outdoors during sunlight hours. [JA-1937]

Although Salahi's conditions of confinement gradually improved, he continued to make false inculpatory statements to protect himself from further torture. [JA-2605] He added "salt and pepper" to make statements inculpatory, using information learned from his interrogators. [JA-2635] His fear of further torture was fed by interrogators who threatened to return him to the "program" in mid-2005 if he did not cooperate. [JA-2606-07] Salahi testified that this fear continued even after he was first visited by his attorneys later that year. [JA-2607]

## SUMMARY OF ARGUMENT

The government's central claim is that the court erred by failing to find a presumption that Salahi could be detained under the AUMF based on the 1991 oath to al-Qaeda. This claim fails for several reasons, but above all because, as the court found, that organization was engaged in a goal—the overthrow of the communist regime—the U.S. supported and thus was different than the al-Qaeda that attacked the U.S. on 9/11.

The government writes as if the court made no findings against it nor received any evidence contrary to its position. Indeed, ample evidence supports the court's finding that the government failed to prove that Salahi was "part of" the al-Qaeda that attacked the U.S. in 2001.

Most of the support for the government's case comes from statements Salahi made in response to coercive interrogations or to prevent further mistreatment. To make its case, the government was forced to minimize what the several government reports and the court below found—that U.S. agents so severely mistreated Salahi to extract his statements that one must question the reliability of most, if not all, of them. The court did not abuse its discretion in refusing to credit uncorroborated admissions by Salahi.

Alternatively, the AUMF and the U.S. Constitution do not permit the indefinite detention of one who was arrested far from the battlefield, had no connection to the war being waged between the U.S. and al-Qaeda in Afghanistan and who never took part in any hostilities against the U.S.

## STANDARD OF REVIEW

The district court's factual findings are reviewed for clear error. *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010). Those findings, whether based on oral or other evidence, accordingly "must not be set aside unless clearly erroneous." *Overby v. Nat'l Assoc. of Letter Carriers*, 595 F.3d 1290, 1294 (D.C. Cir. 2010). Equal deference is owed "to the inferences drawn from findings of fact as . . . to the findings themselves." *Id.* (internal quotation marks omitted). As the Supreme Court has explained, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not

reverse it even [if] convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Thus, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Here, "even greater deference to the trial court's findings" is required because the district court's opinion was "based on determination regarding the credibility of witnesses," including Salahi himself. *Id.* at 575. Similarly, this Court reviews the district court's evidentiary rulings for abuse of discretion. *Al-Bihani*, 590 F.3d at 870. The Court reviews its habeas determination *de novo*. *Id.*

## ARGUMENT

### I. THE COURT'S FINDING THAT THE AL-QAEDA SALAHI JOINED IN 1991 WAS DIFFERENT FROM THE AL-QAEDA THAT ATTACKED THE U.S. IN 2001 WAS NOT CLEARLY ERRONEOUS.

The government rests its case on the fact that Salahi swore *bayat* to al-Qaeda in 1991, at a time when that organization's sole purpose was to fight communism. [Brief at 4] The government ignores the deference due the court's finding that the organization to which Salahi swore *bayat* "was very different from the al-Qaida that turned against the United States in the latter part of the 1990's." [JA-259]

During the time Salahi swore the oath to al-Qaeda and fought in Afghanistan, the U.S. did not regard the mujahideen forces in Afghanistan as its enemy. To the contrary, the U.S. supported their efforts. [JA-1844-45] It is

therefore not only incorrect, but ironic, that the government now argues that Salahi's participation in fighting alongside mujahideen forces between 1990 and 1992 could render him presumptively detainable as an enemy of the U.S.

The government selectively reads secondary sources to claim that, as early as 1992, "[bin Laden] was ready to strike at the US." Abdel Bari Atwan, THE SECRET HISTORY OF AL QAEDA (Atwan), at 22 (2006). The same source states that it was not until 1994 that "bin Laden's focus shifted from political activism" and "[h]e began to concentrate on building a considerable military organization to carry out operations against US . . . targets, initially on the Arabian Peninsula." *Id.* at 48.

According to the 9/11 Commission, "[n]ot until 1998 did al-Qaeda undertake a major terrorist operation of its own," by undertaking the bombings of the U.S. embassies in Nairobi and Dar Es Salaam. 9/11 REPORT, at 62. Earlier attacks against U.S. interests – such as the Khobar Towers bombing in Saudi Arabia and the "Blackhawk down" incident in Somalia – are incorrectly (but frequently) attributed to al-Qaeda. *Id.* 59-60.

In light of this history, Salahi's 1991 oath is benign. Salahi joined an organization committed to overthrowing the communist government in Afghanistan. There is no evidence that he took part in, took orders from, or belonged to the violent anti-American organization that al-Qaeda became. His

1991 oath alone cannot establish that he was part of al-Qaeda when he was captured ten years later.

Nonetheless, the government spends much of its brief arguing that the swearing of *bayat* was a "significant undertaking that shows enduring ties to al-Qaida" that transcend the well-documented and considerable changes in the organization and its purpose during the 1990s. Most of the government's factual assertions are not supported by the record. [Brief at 25-28] Others are supported only by references to books that describe the swearing of *bayat* under different circumstances than are presented here. For example, in THE MARTYR'S OATH, the author discusses the practice of personally swearing *bayat* to bin Laden in 2001, not to al-Qaeda in 1991. Stewart Bell, THE MARTYR'S OATH, 107-10 (Wiley 2005). And in THE SECRET HISTORY OF AL-QAEDA, the author discusses an inner circle of al-Qaeda that swore *bayat* to bin Laden. Atwan, at 77. Regardless of what *bayat* may mean to others and ten years later, the evidence in the record is that Mr. Salahi swore *bayat* to al-Qaeda to fight against the communists and for no other purpose. The district court did not commit clear error in declining to draw the inferences from this fact that the government advocated.

The government interjects alarmist and unsupported assertions about al-Qaeda "operatives in the West" laying "in wait to act when missions become available." [Brief at 26] No evidence exists that Salahi "lay in wait" for

assignments at the time of his arrest in 2001. To the contrary, the court found that the government's evidence of Salahi's activities in 2001—correspondence with alleged al-Qaeda members—showed "if anything" that Salahi had distanced himself from those members. [JA-279]

## II. THE COURT'S FACTUAL FINDINGS UNDERLYING ITS CONCLUSION THAT SALAHI WAS NOT "PART OF" AL-QAEDA WITHIN THE MEANING OF THE AUMF WERE NOT CLEARLY ERRONEOUS.

In an effort to avoid the deferential standard of review applicable to the district court's factual findings, the government recasts those findings as if they favored the government's position. In doing so, the government ignores the record evidence that supports the court's findings and its ultimate conclusion that the government failed to meet its burden of proving that Salahi was a "part of" al-Qaeda at the time of his arrest. For example, the government states that the "district court concluded as a factual matter … [that] once in the West, [Salahi] proceeded to 'provide some support to al-Qaida, or to people he knew to be a-Qaida'[.]" [Brief at 18] But the court did not find that Salahi provided support to al-Qaeda "once in the West." What the court wrote was, "Salahi may very well have been an al-Qaida sympathizer, and the evidence does show that he provided some support to al-Qaida, or to people he knew to be al-Qaida. Such support was sporadic, however, and, at the time of his capture, non-existent." [JA-254] The

court's statement is consistent with the evidence that Salahi fought with al-Qaeda against the communists and thereafter remained in contact with alleged al-Qaeda members he knew during that earlier time period.

The government relied upon six allegations in making its case that Salahi was "part of" al-Qaeda:[15]

- He swore bayat in 1991.
- He recruited for al-Qaeda from 1991 to 1999.
- He assisted with al-Qaeda telecommunications projects.
- He transferred money for his cousin.
- He had connections with Canadian al-Qaeda members
- He had relationships with other al-Qaeda members.

The court made factual findings against the government on most of these allegations. As noted above, the court found that the al-Qaeda of 1991 was not the same as the al-Qaeda of 2001. [JA-258-59] The court also rejected the government's claim that Salahi was a recruiter, finding he did not recruit al-Shibh, and that, although Salahi may have been willing to send someone interested in jihad to Paul, who he believed belonged to al-Qaeda in 1997, this did not qualify as "recruiting" for al-Qaeda. [JA-268-70] The court likewise rejected the government's assertion that Salahi helped al-Qaeda with telecommunications projects, finding those allegations to be uncorroborated. [JA-271-73] Similarly,

[15] The government has not challenged the district court's finding that Salahi is not detainable under the substantial support prong of the AUMF. [JA-254]

although the court found that Salahi had access to information regarding proposed cyber-attacks, it also found the government had failed to prove that Salahi engaged in any such attacks. [JA-274] With respect to the money transfers, the court concluded that the evidence showed nothing more than a relationship between Salahi and his cousin, not that Salahi was part of al-Qaeda. [JA-275] And, finally, the court rejected the notion that Salahi was detainable as "part of" al-Qaeda because of connections with others accused of al-Qaeda affiliations. [JA-276-78]

The district court did not, as the government wrongly suggests, consider the evidence piecemeal or in isolation, nor did it impose upon the government the burden of proving "new and separate orders" from the al-Qaeda leadership. [Brief at 32;34] Rather, the court carefully considered all the evidence and found that the government had failed to prove that Salahi was part of the al-Qaeda that attacked the U.S. on 9/11.

## III. THE COURT PROPERLY REFUSED TO CREATE A PRESUMPTION THAT SALAHI WAS "PART OF" AL-QAEDA AND COULD BE DETAINED INDEFINITELY BASED ON THE 1991 OATH.

The government's appeal centers on its claim that Judge Robertson erred by declining to create a presumption that Salahi could be detained based on the March 1991 oath he swore to al-Qaeda. [Brief at 18-51] In the government's view, the only question is whether Salahi proved he had "dissociated" or, alternatively,

whether the government had proven "non-dissociation." The fundamental problem with the government's argument is not simply that the oath pre-dated the 9/11 attacks by more than a decade. It is that the al-Qaeda to which Salahi swore an oath in 1991 was, as Judge Robertson found, "very different from the al-Qaida that turned against the U.S. in the latter part of the 1990s." [JA-258] Not only was the 1991 al-Qaeda not hostile to the U.S., but the U.S. shared and actively supported al-Qaeda in its effort to overthrow the communist government in Afghanistan. The government's real complaint is that Judge Robertson rejected the inference from the oath that the government urged: that it made Salahi "part of" al-Qaeda within the meaning of the AUMF. Judge Robertson properly refused to presume Salahi could be detained based on this oath and instead evaluated the oath along with the other evidence, according it the weight he believed it was due. His determination that Salahi was not "part of" al-Qaeda under the AUMF was not error, clear or otherwise, and the government's arguments to the contrary are without merit.[16]

The government [Brief at 23] points to the "burden-shifting" approach endorsed by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).[17] *Hamdi*, however, did not suggest that the burden could shift to the detainee to

[16] A detainee who swore an oath to al Qaeda or bin Laden in 2001 or at some point *after* al Qaeda declared its purpose to engage in hostilities against the U.S. would present a different case.

[17] All citations to *Hamdi* are to the plurality opinion unless otherwise noted.

prove his innocence *before* the government established that he met the criteria for detention under the AUMF. To the contrary, Justice O'Connor explained that "the onus could shift to the petitioner" only "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria." *Id.* Thus, the government must first establish that Salahi was part of al-Qaeda at the time of capture before the burden can shift to him "to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* Based on its careful examination of the evidence, the district court properly found that the government had failed to make that showing. [JA-280-81]

The district court also properly rejected the government's effort [Brief at 24-25] to circumvent its evidentiary burden by importing conspiracy law. [JA-258 ("The criminal law of withdrawal from a conspiracy has no place in this proceeding.")] A plurality of the Supreme Court has rejected the government's argument that criminal conspiracy is a war crime triable by military commission. *Hamdan v. Rumsfeld*, 548 U.S. 557, 601-03 (2006) (opinion of Stevens, J.). If conspiracy cannot be prosecuted as a war crime, it necessarily cannot furnish the basis for military detention, a context in which conspiracy principles are unknown. *See Hamlily v. Gates*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009).

The sole legitimate purpose of military detention "is to prevent captured individuals from returning to the field of battle and taking up arms once again."

*Hamdi*, 542 U.S. at 518-19. Military detention is thus necessarily "devoid of all penal character." *Id.* at 518 (internal quotation mark and citation omitted).

By contrast, conspiracy law imposes punishment or liability. The rules for joining a conspiracy, and those governing withdrawal, are tailored to this punitive purpose. Thus, conspiracy law presumes that once a person joins a conspiracy, he remains part of the conspiracy forever. This presumption is not displaced by abandoning, ceasing contact, or completely severing ties with the conspiracy. Rather, a person must take affirmative steps "to disavow or to defeat the objectives of the conspiracy." *United States v. Dabbs*, 134 F.3d 1071, 1083 (11th Cir. 1998); *accord United States v. Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983). Even then, a person who successfully proves withdrawal only limits his liability from the date of withdrawal forward: he remains vicariously liable for all crimes or torts committed by his co-conspirators before his formal withdrawal.

These principles—intended to punish by making it difficult to escape or mitigate liability—are inapplicable to military detention under the AUMF, which can have no punitive aspect. *Hamdi*, 542 U.S. at 518-19. Here, the question is simply whether Salahi was "part of" al-Qaeda *when captured*. If he was not—or was no longer—part of al-Qaeda's forces at that time, he cannot be detained under the AUMF.

Further, if this Court were to accept the government's invitation to borrow from conspiracy law, it must also consider the law of multiple conspiracies. Between the time that Salahi swore *bayat* in March 1991 and the 9/11 attacks, al-Qaeda changed so drastically that it cannot be regarded as a single continuous conspiracy. *See United States v. Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988) ("In determining whether the conspiracy was single or multiple, . . . most important [factor] is whether the conspirators share a common goal"); *United States v. Graham*, 83 F.3d 1466, 1471 (D.C. Cir. 1996). That Salahi swore an oath in 1991 shows, at most, that he was a member of a separate, earlier conspiracy whose goal was to defeat the communists in Afghanistan. None of the government's evidence shows that he was ever part of the later al-Qaeda conspiracy whose objective was to attack the U.S. The district court, in short, did not commit clear error by refusing to require Salahi to show that he withdrew from a conspiracy of which he was never a part.

That the 1991 oath cannot establish that Mr. Salahi was part of al Qaeda when captured is underscored by the text of the AUMF itself. The AUMF authorizes force only against those "nations, organizations or persons" who "authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Pub. L. No. 107-40, 115 Stat. 224 (enacted Sept. 18, 2001). Yet the government seeks to create a legal presumption in favor of detainability based on

evidence – the 1991 oath – that long predates the 9/11 attacks, is entirely unrelated to those attacks, and dates to a time when al Qaeda was not even contemplating violent attacks upon the U.S., let alone the 9/11 attacks themselves.

The government cannot benefit from a presumption in its favor on the basis of such stale and irrelevant evidence lest the AUMF be given an impermissibly retrospective interpretation, presumptively sweeping up those who are not part of forces hostile to the U.S. in the post-9/11 conflict against al Qaeda, but who were instead simply fighting with the al Qaeda that was on the same side as the U.S. in a battle against communism.

## IV. THE COURT DID NOT APPLY A HEIGHTENED STANDARD OF PROOF TO THE GOVERNMENT.

The government makes much of the district court's statement that "[i]t is only fair to the petitioner . . . and . . . not unfair to the government to view the government's showing with something like skepticism, drawing only such inferences as are compelled by the quality of the evidence." [JA-258] Judge Robertson, however, did not impose a "higher standard" on the government than preponderance of the evidence. [Brief at 12;51-52] He merely clarified that he would not necessarily draw all possible inferences in the government's favor, as the government had urged, but would assess the "quality of the evidence" in determining whether the government had met its burden. *Id.*; *accord Boumediene*

*v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2270 (2008) (a habeas court must "assess the sufficiency of the Government's evidence against the detainee"); *Parhat v. Gates*, 532 F.3d 834, 842-50 (D.C. Cir. 2008) (identifying deficiencies in the government's evidence in determining whether the government met its burden of showing that a detainee was an "enemy combatant"). Judge Robertson did what the Supreme Court instructed: "conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene*, 128 S. Ct. at 2269.

## V. THE COURT DID NOT ABUSE ITS DISCRETION IN QUESTIONING THE RELIABILITY OF ALL SALAHI'S STATEMENTS GIVEN HIS "EXTENSIVE AND SEVERE" MISTREATMENT AND THE LACK OF ANY "CLEAN BREAK."

Judge Robertson correctly found that the "government's case relies heavily on statements made by Salahi himself, but the reliability of those statements – most of them now retracted by Salahi – is open to question." [JA-252] This is consistent with his previous concerns about Salahi's statements. *See* Transcript of Classified Hearing, *Salahi v. Obama*, 05-cv-569 (April 7, 2009) at 2 (noting that Salahi's "mistreatment is acknowledged and probably wipes out most of the weight, if not all of the weight, of the petitioner's own statements"). At the merits hearing, Judge Robertson reiterated that he was "[b]asically inclined to reject anything [Salahi] said except that which is corroborated." [JA-2655] After hearing the testimony and reviewing the exhibits, Judge Robertson's opinion

remained the same—Salahi's uncorroborated statements, and the uncorroborated statements of other prisoners, are not reliable. [JA-267-68]

The government claims that the only statements Judge Robertson analyzed for reliability are those in the CSRT and then argues that the CSRT forms a line between previous coerced and unreliable statements and post reliable statements. The CSRT proceeding was of an entirely different quality from an interrogation. The proceeding was recorded, the questioners were officers, not interrogators, and the statements were under oath. Second, although Salahi retracted earlier coerced statements during his CSRT, he felt safe to do so not because he was no longer under the influence of the interrogators who tortured him, but because he had already retracted those statements [1,2] [redacted] [JA-344-45] [1] [redacted] Salahi was [1,2] [redacted] [1,2] [redacted] to test the truthfulness of his statements about al-Qaeda activities in Canada and his alleged interactions with al-Shibh, respectively. [JA-584;1861-63] He had to retract earlier inculpatory statements [2] [redacted] [2] [redacted] [JA-2612;2590] Third, the record shows that even during the CSRT Salahi was still afraid to tell the panel about his torture. [JA-2606] And after the CSRT, when a new interrogator asked Salahi about his earlier torture and abuse, Salahi was unwilling to talk about it until the interrogator promised that his statement would "be classified, nobody is going to know about it." *Id.* Fourth,

approximately five months after the CSRT proceeding, in May 2005, Salahi's new interrogators threatened to return him to the "program" if he did not cooperate with them. [JA-2606-07]

Judge Robertson draws no bright line, and the government's presumption that Salahi's uncorroborated statements to interrogators after the CSRT "share the reliability characteristics of the Salahi's CSRT statements. . ." [Brief at 54] is not supported by the record and is contrary to the law.

As Judge Robertson correctly held, for the "taint of abuse and coercion [to] be attenuated enough for a witness's statements to be considered reliable [,] there must certainly be a 'clean break' between the mistreatment and any such statements." [JA-260] Further, where statements are alleged to have been obtained under torture or other coercion, the burden rests on the government to prove by "at least a preponderance of the evidence" that each statement was the product of the speaker's own free and uncoerced will. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). Moreover, once the accused has shown that one confession was the product of coercion, all subsequent confessions are presumptively tainted and the government bears the burden of showing that there was a "break in the stream of events … sufficient to insulate a statement from the [coercive] effect of all that went before." *Clewis v. Texas*, 386 U.S. 707, 710 (1967). *See also United States v. Karake*, 443 F. Supp. 2d 8, 89 (D.D.C. 2006) (upon showing of coercion, the

government must demonstrate that sufficient time has elapsed "between the removal of the coercive circumstances and the present confession").

The Supreme Court has repeatedly recognized that coercive treatment continues to influence and affect the person coerced after the unlawful treatment has ended, and has held that a court evaluating the admissibility of a particular statement must look at the totality of the circumstances surrounding the making of the statement, including the person's previous treatment by law enforcement. *See Clewis*, 386 U.S. at 710; *cf. Oregon v. Elstad*, 470 U.S 298, 310 (1985) ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.").

With a few exceptions, the government primarily relied on statements taken within two years of the worst mistreatment. Given the severity of the abuse, the fact that Salahi remained detained in the same building where he had suffered that abuse under the control of the government that had authorized it, no point in time exists in which he has been held in a manner that would permit this Court to conclude that there had been a "clean break" and that his statements were "made freely, voluntarily, and without compulsion or inducement of any sort." *Haynes v. Washington*, 373 U.S. 503, 513 (1963). Thus, the court consistently credited only those statements for which there was some corroboration, either by Salahi's

testimony or independent evidence.

Moreover, substantial research shows that not only do torture and other abusive interrogation techniques render the statements taken under those conditions unreliable, the abuse may also have long term consequences that render later statements equally unreliable. "Social scientists know that … 'the longer people are detained, the harsher the conditions, the worse the lack of support system, the greater the risk that what they say will be unreliable.'" Darius Rejali, TORTURE AND DEMOCRACY at 510 (Princeton University Press 2007).

In a written statement provided to the SASC in August 2007, [3] [3] a GTMO [2] psychiatrist, told the Committee that "psychological investigations have proven that harsh interrogations do not work. At best it will get you information that a prisoner thinks you want to hear to make the interrogation stop, but that information is strongly likely to be false." SASC REPORT, at 47. And in the specific context of Salahi's case, the government has produced a FBI Memorandum [JA-1745-50] stating that, during the time he was subjected to the interrogation techniques described above, agents from the OMC and CITF

> … continue[d] to raise objections about the techniques being employed by DIA personnel when interrogating SALAHI and other detainees. In regards to SALAHI, there is no evidence that these techniques have produced any threat-neutralization information.

[JA-1750]

The government's challenge to Judge Robertson's evidentiary rulings focuses on statements Salahi made to the FBI in 2005. [Brief at 55-59] As the court noted in its order, Salahi retracted those statements [JA-273], testifying they were untrue. [JA-2638] The court also found that documents referenced in those interrogations—which the government had alleged linked Salahi to Ganczarski's efforts to purchase radios—did not connect Salahi to those efforts. [JA-273;2465-94] Given Salahi's serious and pervasive mistreatment at Guantanamo and the lack of a "clean break" in the years following the worst of that mistreatment, the court did not abuse its discretion in refusing to credit statements Salahi made that were not corroborated by other evidence.

## VI. THE LAW DOES NOT PERMIT THE INDEFINITE MILITARY DETENTION OF A PERSON ARRESTED FAR FROM ANY BATTLEFIELD, WHO HAS NO CONNECTION TO THE ARMED CONFLICT BETWEEN THE U.S. AND AL-QAEDA IN AFGHANISTAN, AND WHO NEVER TOOK PART IN HOSTILITIES AGAINST THE U.S.

There are three additional and alternative grounds for affirming the district court's judgment. First, the AUMF does not authorize Salahi's detention because the government fails to demonstrate any nexus to armed conflict within the meaning of the laws of war. Second, construing the AUMF to authorize Salahi's detention would not only contradict established law-of-war principles but raise

serious constitutional problems this Court should avoid because it would permit imprisonment without criminal process. Third, if this Court were nevertheless to conclude that the AUMF authorizes Salahi's indefinite military detention, it must hold the AUMF unconstitutional as applied to Salahi.

1. The AUMF must be construed in light of law-of-war principles. *See Hamdi*, 542 U.S. at 518-21; *id.* at 548 (Souter, J., concurring in part); *Hamdan*, 548 U.S. at 593-95; *see also Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). On this point, the parties agree. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay 1, *Salahi v. Obama*, No. 05-569 (D.D.C. Mar. 13, 2009) (Dkt. 189) ("The detention authority conferred by the AUMF is necessarily informed by the principles of the laws of war.").

In *Hamdi*, the Supreme Court applied these longstanding law-of-war principles to hold that the AUMF authorized the military detention of an armed soldier captured on a battlefield in Afghanistan fighting alongside Taliban forces against U.S. and allied troops. 542 U.S. at 512-13, 516-17. Although the plurality recognized that the AUMF did not specifically mention detention, it found that the military detention of an armed soldier captured in a war zone to prevent his return to the battlefield was so "fundamental [an] incident of waging war" that "in

permitting the use of 'necessary and appropriate force,'" Congress could be said to have authorized detention in these "narrow circumstances." *Id.* at 519. The plurality thus held that Hamdi could be detained for the duration of active hostilities in Afghanistan. *Id.* at 520-21. The plurality, however, also warned that inferring a detention power from the AUMF's silence beyond the clear law-of-war circumstances presented in *Hamdi* might cause the understanding that the AUMF authorizes detention to "unravel." *Id.* at 521

In *al-Bihani*, this Court upheld the military detention of an individual who accompanied and served in a Taliban-affiliated paramilitary group fighting on the front lines in Afghanistan against a U.S. coalition partner. 590 F.3d at 869, 872-73; *id.* at 884 (Williams, J., concurring). In that case, the AUMF authorized the petitioner's military detention because, as in *Hamdi*, it was supported by clearly-established and longstanding law-of-war principles.

Salahi's military detention deviates significantly from these principles. The government's assertion that the AUMF authorizes his continued detention presents the "unraveling" *Hamdi* warned against.

The laws of war—and thus any military detention power inferred under the AUMF—apply only in connection with an armed conflict, of which there are two types: international and non-international. *Hamdan*, 548 U.S. at 630-31. International armed conflict exists only between nation states and is irrelevant

here. *See* Third Geneva Convention Relative to the Treatment of Prisoners of War, arts. 2-3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Hamdan*, 548 U.S. at 628-31.

Non-international armed conflicts, by contrast, typically occur within the territory of a nation state but do not have a nation state on both sides. Non-international armed conflicts encompass civil wars or other armed conflicts between a government and an insurgent group that take place within its territory. *See, e.g.*, 3 Int'l Comm. of the Red Cross, Commentary: The Geneva Conventions of 12 Aug. 1949, art. 3, at 28-29, 31-33 (Jean Pictet gen. ed., 1960); *see also Hamdan*, 548 U.S. at 629 (describing non-international armed conflict as a conflict "'occurring in the territory of one of the High Contracting parties [to the Geneva Conventions]'" (quoting Common Article 3)).

The U.S. is engaged in a non-international armed conflict against al-Qaeda and associated forces *in Afghanistan*. *Hamdan*, 548 U.S. at 628-29; *id.* at 641-42 (Kennedy, J., concurring); *al-Bihani*, 590 F.3d at 869, 872-73; *id.* at 883-84 (Williams, J., concurring); *see also al-Maqaleh v. Gates*, __ F.3d __, No. 09-5265, 2010 WL 2010783, at *2 (D.C. Cir. May 21, 2010) (U.S. and coalition forces are conducting "an ongoing military campaign against al-Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan." (internal quotation marks omitted)). Under present law, the U.S. may, consistent with law of war principles,

detain militarily under the AUMF those who are part of or who provide the requisite support to al-Qaeda, the Taliban, or associated forces in connection with that armed conflict, as a fundamental incident of waging the war there. *See Hamdi*, 542 U.S. at 518-19; *al-Bihani*, 590 F.3d at 873. But the AUMF, as informed by law-of-war principles, does not authorize the detention of a person who was arrested in Mauritania, far from any battlefield, who has no connection to the armed conflict the U.S. is waging in Afghanistan, and who never participated in hostilities against the U.S. anywhere in the world.

The existence of a non-international armed conflict is determined by facts on the ground in the territory in which the purported fighter (or, the purported war criminal, as the case may be) is alleged to have operated. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (observing that, in the state where the petitioner resided (Indiana), the facts on the ground were not such as to justify resort to military procedures); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 858 (2009) ("In addition to exchange, intensity, and duration [of fighting], armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet."); *see also Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals

Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (ICTY App. Chamber Oct. 2, 1995).

Here, the government does not allege—let alone prove—that Salahi had any connection to, or any participation in, an armed conflict within the meaning of the laws of war that would trigger the President's detention powers under the AUMF. The government does not allege that Salahi took part in or had any connection to the armed conflict in Afghanistan that began after 9/11. It also does not allege that there was any armed conflict in Mauritania when Salahi was arrested there in November 2001. And the government has abandoned its allegation that Salahi was involved in the September 11, 2001 attacks. [JA-253] In short, the government does not allege that Salahi directed any of his purported actions toward any theater of armed conflict, participated in any armed hostilities against the U.S., or participated in any aspect of the global "war on terror" that international law would view as rising to the level of armed conflict.

The government's assertion that Salahi may be detained under the AUMF instead rests on an oath he swore to al-Qaeda in 1991 and his association with alleged al-Qaeda members during the 1990s. These allegations do not show that Salahi had any connection to, let alone supported or participated in, any armed conflict between the U.S. and al-Qaeda. Indeed, the fact on which the government relies most heavily—the oath to al Qaeda—took place not only a decade before

any armed conflict between the U.S. and al Qaeda, but at a time when the U.S. was *supporting* al Qaeda and other groups in their attempt to overthrow the communist government in Afghanistan. Whether or not some of Salahi's alleged activities later in the 1990s might provide grounds for a criminal prosecution, they do not support his military detention under the AUMF because they have no nexus to an armed conflict with the U.S. within the meaning of the law of war.[18]

The government's suggestion that the existence of a non-international armed conflict somewhere in the world (e.g., Afghanistan) necessarily triggers application of the laws of war anywhere a suspected al Qaeda terrorist might be found is an unprecedented assertion. It is at odds with the law-of-war principles that necessarily inform the AUMF's application and meaning and raises serious constitutional problems by sanctioning indefinite, and potentially lifetime detention, without trial.

2. Courts must, where possible, construe statutes to avoid raising constitutional problems. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg.*

[18] The government's reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), is misplaced. In *Quirin*, there was no dispute that the petitioners were subject to military detention based on their uncontested affiliation with the military arm of the enemy German government—a clear and irrefutable basis for military jurisdiction under universally accepted law-of-war principles. *Id.* at 30-31 & n. 7, 37-38. Further, while the petitioners in *Quirin* were not seized on a battlefield, they crossed military lines—in uniform and heavily armed—with the intent to carry out hostilities against the United States. *Id.* at 21-22 & n.1, 31.

*& Constr. Trades Council*, 485 U.S. 568, 575 (1988). This rule of construction applies with particular force where individual liberties are at stake. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (statutes should be construed to infringe fundamental liberties only to the extent they clearly and unequivocally authorize curtailment of such liberties). This rule protects core freedoms, and safeguards Congress's prerogative of democratic deliberation on matters cutting to the heart of the Nation's values and traditions. *See* Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 Sup. Ct. Rev. 1, 4, 6 (2006) (recognizing that departure by the executive "from standard adjudicative forms . . . must be authorized by an explicit and focused decision from the national legislature," especially where that departure "intrude[s] on constitutionally sensitive interests").

Under the Constitution, the right not to be detained without criminal trial is the norm and "detention without trial 'is the carefully limited exception.'" *See Hamdi*, 542 U.S. at 529 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). This right is grounded in the Due Process Clause of the Fifth Amendment as well as in the numerous safeguards of the criminal process contained in that amendment and in the Sixth Amendment. This right is at the core of the Constitution's protection of individual liberty against arbitrary and unlawful government imprisonment. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992);

*Milligan*, 71 U.S. (4 Wall.) at 119-20. It also helps "keep the military strictly within its proper sphere," as the Framers of the Constitution intended. *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality opinion); *see also Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting) (noting the Framers' "general mistrust of military power permanently at the Executive's disposal"). Detention without trial raises especially grave concerns—and thus heightens the imperative of a clear legislative statement—when that detention is indefinite and potentially permanent. *See Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001) (refusing to construe a statute explicitly authorizing some detention of allegedly dangerous aliens to authorize indefinite, possibly permanent, detention).

Although the detention of enemy soldiers is a recognized exception to constitutional requirement of criminal charge and trial, that detention must be consistent with clearly established law-of-war principles. *Hamdi*, 542 U.S. at 518-19, 522; *Quirin*, 317 U.S. at 21-22, 37-38. Those principles support the detention of members of the enemy armed forces in an international armed conflict against another nation, *Quirin*, 317 U.S. at 21-22, 31, and those who have the requisite nexus to the armed conflict in Afghanistan, *Hamdi*, 542 U.S. at 516-19; *Al-Bihani*, 590 F.3d at 872-73. They may also justify individuals who take part in other hostilities against the U.S., a question this Court need not reach here. But they do not support the military detention of individuals, like Salahi, seized in a civilian

setting, far from any armed conflict, and who has never taken part in any hostilities against the U.S., whether as a member of the enemy's armed forces or by supporting those forces in an armed conflict against the U.S. and its allies.

Stretching the AUMF's law-of-war bound detention authority to circumstances such as these, so far afield from any recognized law-of-war principle, would alone raise serious constitutional problems. Those constitutional problems are magnified because Salahi's detention—unlike detentions cabined by the participation of U.S. forces in the armed conflict in Afghanistan, as in *Hamdi* or *Al-Bihani*—is not simply indefinite but potentially a life sentence. *See Boumediene*, 128 S. Ct. at 2270 (cautioning that detention in a 'war on terror' "may last a generation or more").

If, as the executive insists, the constitutional right to a criminal trial must be curtailed beyond the battlefield or other clearly established law-of-war circumstances, "it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of [a] Court." *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting). But in the absence of an express legislative statement—indeed, based on a statute that is silent on detention—this Court should not assume Congress took the momentous step of authorizing the type of permanent imprisonment without trial at issue here.

3. If this Court were to find that the AUMF authorized Salahi's detention, then the AUMF, as applied to Salahi, would violate the Constitution.

In *Boumediene*, the Supreme Court did more than hold that the Constitution's Suspension Clause "has full effect at Guantánamo Bay." 128 S. Ct. at 2262. It emphatically rejected the government's assertion that constitutional rights cannot extend to foreign nationals seized and detained outside the U.S. *Id.* at 2253 (rejecting that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends"). The Court affirmed that the test was whether it was "impracticable" or "anomalous" under the circumstances to apply a particular constitutional provision extraterritorially. *Id.* at 2255; *see also id.* at 2253-55 (discussing Insular Cases); *id.* at 2255-56 (discussing *Reid v. Covert*, 354 U.S. 1 (1957)); *al-Maqaleh*, 2010 WL 2010783, at *7 (confirming that, post-*Boumediene*, the "impractical" and "anomalous" test determines whether particular provisions of the Constitution apply outside the U.S.). Applying the Constitution's criminal trial guarantee to Salahi is neither "impractical" or "anomalous."[19]

The Supreme Court has consistently held that the constitutional right to a criminal trial applies to noncitizens as well as to citizens. *See Sanchez-Llamas v.*

[19] The panel in *Kiyemba v. Obama*, 555 F.3d 1022, 1027 (D.C. Cir. 2009), *reinstating judgment as amended* __ F.3d __ 2010 WL 2134279 (D.C. Cir. May 28, 2010), addressed the distinct question of whether Guantánamo detainees had a constitutional right to be released into the United States.

*Oregon*, 548 U.S. 331, 350 (2006); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The U.S. has also long provided this right to noncitizens seized outside the country, *see, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring), including to those accused of terrorism, *see, e.g.*, *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177 (2d Cir. 2008); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991). Congress, moreover, has criminalized precisely the type of terrorist activities alleged here, and thus has anticipated that those activities be charged and tried in federal court. *See, e.g.*, 18 U.S.C. § 2339A (material support for terrorism); *id.* § 2339B (material support for designated foreign terrorist organization).

Salahi was not seized on, near or in connection with a battlefield, but was arrested in a civilian setting in Mauritania, and is being detained in "a territory . . . that is under the complete and total control of our government," thousands of miles from any theater of war. *See Boumediene*, 128 S. Ct. at 2262; *see also id.* at 2258-59 (focusing on site of apprehension and detention); *al-Maqaleh*, 2010 WL 2010783, at *11-*12 (contrasting Bagram Air Base in Afghanistan with Guantánamo Bay). Nor is Salahi being detained based on alleged involvement in any hostilities against the U.S. Thus, unlike in cases of battlefield-connected detention, there is no "evidence buried under the rubble of war." *Hamdi*, 542 U.S. at 532. Furthermore, because this was not a battlefield—or even military—

capture, criminal prosecution would not "compromise[ ]" military operations "as the government strove to satisfy evidentiary standards." *Al-Bihani*, 590 F.3d at 877. There are, in short, no "practical obstacles inherent" in recognizing the right of Guantánamo detainees like Salahi not to be detained indefinitely without trial. *Boumediene*, 128 S. Ct. at 2259 (focusing on "practical obstacles inherent" in adjudicating the constitutional right).

As described above, Salahi's detention does not fall within any permissible law-of-war based exception to the constitutional requirement of criminal process: Salahi is not a member of or affiliated with the military arm of an enemy government; he has no connection to the armed conflict in which the U.S. is presently engaged in Afghanistan; and he has not taken part in any hostilities against the U.S. That the government can point to no precedent or historical example of military detention under these circumstances itself provides strong evidence that the detention power it claims is neither authorized nor constitutional. *Cf. Printz v. United States*, 521 U.S. 898, 917-18 (1997). Military detention under these circumstances is not "a fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. It not only exceeds the detention power Congress provided under the AUMF, but it violates the Constitution by denying Salahi the protections of the criminal process.

## CONCLUSION

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

Dated: June 9, 2010

Respectfully submitted,

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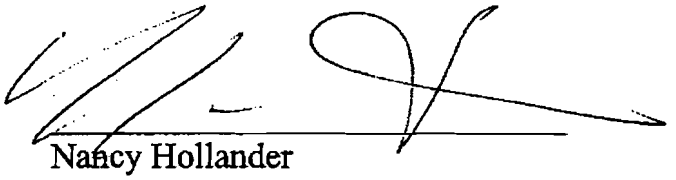
**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)7(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 13, 951 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).



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## CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2010, I filed and served the foregoing Brief for Appellee by delivering an original and seven copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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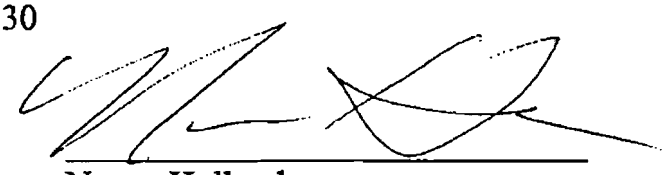

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