No. 11-413

IN THE
SUPREME COURT OF THE UNITED STATES

UTHMAN ABDUL RAHIM MOHAMMED UTHMAN,

Petitioner,

v.

BARACK OBAMA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The petition in this case presents in stark terms the D.C. Circuit's failure to articulate and apply a standard for detention of the Guantánamo prisoners that places any meaningful limits on the Executive Branch's detention authority. The court says that it is applying a "functional" test to determine if a prisoner may be detained under the AUMF, but the court's test has nothing to do with any functions actually performed by a detainee. The "test" as applied is essentially a "guilt by association" approach that would permit indefinite detention of virtually any Arab seized by Pakistan or Afghanistan at the time of the U.S. invasion of Afghanistan, because any of them could easily have come into contact with Taliban or al Qaeda members or have been at locations where such members may also have been present. The effect of the court's approach is to destroy any hope of the "meaningful" habeas remedy for Guantánamo detainees promised by this Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

1. Respondent's brief fails to rebut the fundamental propositions on which this petition is based.

First, the district court expressly found that the government had failed to prove that petitioner Uthman had engaged in fighting against the United States or any of its allies. App. 38a, 44a. The government made no effort to show that this finding was clearly erroneous, and it was not disturbed by the court of appeals. App. 8a n.5. The government's only attempt to avoid this fact is their statement,

citing the court of appeals' decision, that Uthman "was captured . . . 'in the vicinity of Tora Bora,' 'an isolated, mountainous area' that was 'widely known' to be a battleground." Opp. 12, citing App. 7a-8a. In fact, as even the government conceded, Uthman was captured in or near Parachinar, Pakistan, located in a valley area, not mountains, and twelve miles from the Tora Bora mountains in Afghanistan. Pet. at 3 n.3, 5, citing Classified Mem. 16.

Second, the district court found that Uthman was not shown by the government to be a person who "received and executed orders" from an enemy force, *i.e.*, from the Taliban or al Qaeda. App. 21a, 44a. The court of appeals likewise did not disturb this finding, so it too is the law of the case. App. 5a. The government does not challenge the finding but attempts to minimize it, suggesting that the district court was only saying that the government had failed to prove that "particular orders" or "a formal order" were given to Uthman. Opp. 9, 10. The finding, however, was not so limited. Rather, it is clear that the district court was looking to see if Uthman was a member of an enemy force. Just as one can determine that a private in the U.S. Army is one who receives and executes orders as part of an armed force without requiring proof of any particular or formal orders, so here the district court was able to determine whether Uthman was shown to be a member of an enemy force, *i.e.*, someone who received and executed orders, without demanding proof of particular or formal orders.

Third, as the court of appeals stated, there was not even a claim that Uthman "purposefully and

materially support[ed]" al Qaeda or Taliban forces. App. 4a n.2.

The fact that Uthman was not shown to have engaged in combat against the United States by itself arguably requires his release. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521, 526 (2004) (plurality opinion).[1] Even if, however, the AUMF's detention authority is construed as including non-combatant members of an enemy force, this would include only those, like personnel in the U.S. Army, who receive and execute orders from that force's command structure. It would not extend to persons like Uthman, who are not shown to have received and executed such orders. And where, as here, there is also no showing that the detainee "purposefully and materially support[ed]" an enemy force, it is impossible to see any legitimate basis for detention under the AUMF.

The court of appeals provided no justification for its refusal to affirm the district court on the basis of the above facts, other than to explain that it was applying a "functional" test. App. 5a-6a. The

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[1] The Government incorrectly asserts that Uthman "failed to preserve [this] argument in the court of appeals." Opp. 10. Uthman was the appellee, and he defended the favorable decision of the district court on its own terms when arguing before the appellate panel. It would have been futile to make this argument to the panel, because the panel was bound by a previous decision of the court rejecting this argument. *See Al-Bihani v. Obama*, 590 F.3d 866, 871-73 (D.C. Cir. 2010). When the panel in this case reversed the district court, Uthman filed a petition for rehearing en banc which preserved this argument.

contours of the test were not defined by the court, as the court neither specified what "functions" would justify detention nor identified any detainable functions that it thought were performed by Uthman. As a result, the court permitted detention of Uthman under the AUMF on the ground that he was "part of al Qaeda" even though the court did not find that Uthman ever actually did anything for or on behalf of al Qaeda or that he performed any function within or for that organization. The "functional" test turned out to be little more than a wide-ranging exercise in guilt-by-association, with the court justifying detention because, *inter alia*, Uthman went to a high school in Yemen attended by some alleged future al Qaeda members, travelled a road that was also used by alleged al Qaeda members (and used by non-al-Qaeda members as well), and was captured in a group of thirty men of whom three were said by the district court to be "admitted, or at least alleged, al Qaeda members." Pet. 5-8, quoting Classified Mem. 16-17. The result is a rubbery test that might allow indefinite detention of any Arab who was in Afghanistan in 2000-2001, when the country was run by the Taliban and when al Qaeda had a presence in the country, and when it was virtually impossible never to have been in a place where al Qaeda or Taliban members may also have been.[2]

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[2] The government asserts that it "has no interest in holding any detainee longer than necessary." Opp. 11. If the government is unlawfully detaining Uthman, it must release him now, not when the Executive Branch decides that it is no longer (...continued)

2. The government attempts to defend the record of the D.C. Circuit as fair and balanced, noting that two judges who have been publicly hostile to *Boumediene* (Judges Silberman and Randolph) were not on the panel in this case. Opp. 13. The reality, however, is that the D.C. Circuit has decided seventeen Guantánamo habeas appeals on the merits, and in not one of those cases has the court affirmed or required the grant of habeas. Pet. 14-15.[3]

Moreover, since the filing of the petition, the D.C. Circuit, in vacating and remanding the grant of a Guantánamo habeas writ, has referred to "*Boumediene*'s airy suppositions" as "caus[ing] great difficulty for the Executive and the courts." *Latif v. Obama*, --- F.3d ---, 2011 WL 5431524, at *15, slip op. at 52 (D.C. Cir. Oct. 14, 2011) (Brown, J.). The decision accused this Court of "fundamentally alter[ing] the calculus of war, guaranteeing that the benefit of intelligence that might be gained -- even from high-value detainees -- is outweighed by the systemic cost of defending detention decisions." *Id.*

"necessary" to hold him. The Executive Branch has detained Uthman for ten years, and he is now serving what is turning into a life sentence.

[3] In addition to the cases noted in the petition, the court of appeals has subsequently vacated and remanded a habeas grant, *Latif v. Obama*, --- F.3d ---, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011), and affirmed two habeas denials, *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011), and *Kandari v. United States*, No. 10-5373 (D.C. Cir. Dec. 9, 2011) (per curiam) (unpublished).

The decision then as much as said that *Boumediene* was forcing the Executive Branch to wage war on a give-no-quarter basis: "*Boumediene*'s logic is compelling: take no prisoners. Point taken." *Id.* at *15, slip op. at 53. The dissenting opinion by Judge Tatel correctly observed that the court's decision constituted an "assault on *Boumediene*," and that the court, "[n]ot content with moving the goal posts," had "call[ed] the game in the government's favor." *Id.* at *30, slip op. at 19 (Tatel, J., dissenting). He added that the court's approach in that case made it "hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'" *Id.*

Outside commentators have likewise recognized that the D.C. Circuit has essentially deprived *Boumediene* of any real meaning. The *New York Times* in an editorial observed that *Boumediene* "has been eviscerated by the Court of Appeals for the District of Columbia Circuit," and it urged this Court to "reject this willful disregard of its decision in *Boumediene v. Bush*." Editorial, *Reneging on Justice at Guantánamo*, N.Y. Times, Nov. 20, 2011, at SR10, http://www.nytimes.com/2011/11/20/opinion/sunday/reneging-on-justice-at-guantanamo.html. Jonathan Hafetz, an associate professor at Seton Hall Law School, has stated that "disdain [for *Boumediene*] among a number of D.C. Circuit judges has helped lead to decisions that collectively eviscerate *Boumediene* and foster . . . a result-oriented jurisprudence in which the circuit's main purpose is to affirm habeas denials and reverse grants." Jonathan Hafetz, *The D.C. Circuit and Guantánamo: The Defiance Reaches New Heights*, Balkinization,

Nov. 16, 2011, http://balkin.blogspot.com/2011/11/dc-circuit-and-guantanamo-defiance.html (also describing *Latif* as the "culmination of a series of D.C. Circuit decisions that have effectively gutted *Boumediene* by construing habeas in the narrowest of terms, reversing district judges who've sought to scrutinize the government's evidence, and denying judges any power to remedy unlawful detention").[4]

CONCLUSION

There are now, counting this petition, five petitions for certiorari arising from Guantánamo habeas merits decisions. *Al Alwi v. Obama*, No. 11-7700; *Almerfedi v. Obama*, No. 11-683; *Al-Madhwani*

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[4] The petition in footnote 10 quoted an unpublished article that has now been published. Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 42 SETON HALL L. REV. 1451 (2011). The published article contained changes to the quoted language, so that it reads as follows:

> In contrast, on the "merits" of the detainee cases, the analysis and the holdings reflect a profound tension with both *Boumediene* and *Hamdi*, and a fundamental unwillingness by the D.C. Circuit . . . to take seriously the implications of the Supreme Court's analysis in either case. Between them, *Hamdi* and *Boumediene* do not just require *some* judicial review of the government's evidence; rather, they compel a "meaningful" opportunity on the detainee's part to challenge the factual and legal basis for his detention. If every inference is being drawn against the detainee, or if the use of the "mosaic" theory is having the effect of watering down the burden of proof, it is difficult to conclude how such review satisfies that command.

Id. at 1488-89.

v. Obama, No. 11-7020; *Al-Bihani v. Obama*, No. 10-1383. (A sixth will be filed next month in *Latif*.) All, as here, raise questions as to whether Guantánamo detainees are being denied a meaningful habeas remedy. The need for supervisory intervention by the Court is obvious and urgent.

The Court should grant the petition.

Respectfully submitted,

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