

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FAWZI KHALID ABDULLAH FAHAD AL ODAH,** )  
    **Detainee, Camp Delta** )  
    **Guantánamo Bay Naval Base** )  
    **Guantánamo Bay, Cuba,** )

**Plaintiff,** )

**v.** )

**Case No.** \_\_\_\_\_

**UNITED STATES OF AMERICA,** )

**BARACK OBAMA,** )  
    **President of the United States** )  
    **The White House** )  
    **1600 Pennsylvania Avenue** )  
    **Washington, DC 20500** )

**CHUCK HAGEL,** )  
    **Secretary of Defense** )  
    **Department of Defense** )  
    **1000 Defense Pentagon** )  
    **Washington, DC 20301-1000** )

**REAR ADMIRAL RICHARD W. BUTLER** )  
    **Commander, Joint Task Force Guantánamo** )  
    **U.S. Southern Command** )  
    **Guantánamo Bay Naval Base** )  
    **Guantánamo Bay, Cuba,** )

**Defendants.** )

\_\_\_\_\_ )

**PETITION FOR WRIT OF HABEAS CORPUS  
AND DECLARATORY JUDGMENT**

1. Petitioner Fawzi Khalid Abdullah Fahad al Odah (“al Odah”) petitions this Court for Writ of Habeas Corpus and, in addition or in the alternative, for declaratory judgment and associated injunctive relief and mandamus.

2. Petitioner is a Kuwaiti citizen taken into custody by U.S. military forces in Afghanistan and subsequently transferred to the U.S. Naval Station at Guantánamo Bay, Cuba (“Guantánamo”), where he has remained in detention since 2002, a period of more than 11 ½ years as of the date of the filing of this petition.

3. Respondents are the United States of America, President Barack Obama, in his capacity as Commander-in-Chief, U.S. Secretary of Defense Chuck Hagel and Rear Adm. Richard W. Butler, Commander of the Joint Task Force at Guantánamo. Respondents are responsible for Petitioner’s detention.

4. Petitioner hereby seeks his release from detention pursuant to the Great Writ as preserved by the United States Constitution, Art. I, § 9 and the federal habeas corpus statute, which is codified at 28 U.S.C § 2241 *et seq.* In addition, or in the alternative, he seeks injunctive relief and mandamus, setting forth the conditions upon which his release will be ordered and the procedures that Respondents must implement in contemplation of those conditions, all in accordance with fundamental requirements of due process under the United States Constitution, Fifth Amendment, the laws of nations, the treaty obligations of the United States, and Army Regulation 190-8, § 3-13.

5. Because this proceeding arises under federal law, treaty obligations of the United States, and the United States Constitution, this Court has jurisdiction over this dispute pursuant to 28 U.S.C. §1331.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e) because, *inter alia*, the initial decision to detain Petitioner at Guantánamo and the decision to continue his detention there to date were made and approved by Respondents in this judicial district.

### **BACKGROUND FACTS**

7. Petitioner Fawzi al Odah was born in Kuwait City, Kuwait in 1977. He attended Kuwait University, where he received his degree in 1998. Following graduation, he worked as a teacher. In August 2001, he traveled to Spin Buldak, Afghanistan, and later to Kandahar, to Logar Province, to Jalalabad, and finally to Tora Bora before he was taken captive by Pakistani border guards in December 2001, and turned over to U.S. military forces in the region.

8. In early 2002, Respondents transferred Petitioner to the detention facility at Guantánamo. He has not been charged with any crime. He has remained in custody there for more than eleven and a half years.

9. During this period, the legality of the detention of Petitioner and others at Guantánamo has been continually called into question. Four Supreme Court cases, *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008), have addressed Respondents' detention policy and the indefinite detentions of al Odah and others at Guantánamo. In each case, the Supreme Court has recognized certain rights of detainees.

10. In *Hamdi*, a plurality of the Supreme Court stated that, pursuant to the Authorization for Use Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) ("AUMF") and the international law of armed conflict, the detention of prisoners in Guantánamo could "last no longer than active hostilities." 542 U.S. at 520. In reaching its decision, the *Hamdi* plurality relied expressly (and exclusively) on "[a]ctive combat operations against Taliban fighters. . . . in Afghanistan" as the justification for detentions in Guantánamo. 542 U.S. at 521.

**PRIOR PROCEEDINGS**

11. In May 2002, al Odah petitioned this Court for writ of habeas corpus on grounds that he was not, in fact, an enemy combatant as the U.S. military had determined and that his detention was therefore unlawful. In his petition, he denied any part in hostilities against the United States or its allies, asserting that he never became part of Taliban or Al Qaeda forces and never engaged in combat against the U.S. military or its allies in Afghanistan.

12. That petition, *Al Odah v. Bush*, was consolidated with other cases and decided by the Supreme Court *sub nom Rasul v. Bush*, 542 U.S. 466 (2004). In *Rasul*, the Supreme Court held that prisoners at Guantánamo were entitled to invoke remedies under the habeas corpus statute, 28 U.S.C § 2241 *et seq.* Al Odah was also a party to the case that was ultimately decided by the Supreme Court *sub nom Boumediene v. Bush*, 553 U.S. 723 (2008), which determined that prisoners in Guantánamo were entitled to invoke remedies under habeas corpus as protected by the U.S. Constitution.

13. On August 11-13, 2009, more than seven years after al Odah filed his petition, this Court held an evidentiary hearing in his case. This Court found under a preponderance of evidence standard as follows:

- a. That when he arrived in Spin Buldak, he met, at his request, with a Taliban official who escorted him to a Taliban-operated camp near Kandahar, where he remained for a short time and received some training with an AK-47 rifle;
- b. That he subsequently traveled to Kandahar, where he was located at the time of the September 11, 2001, attacks in the United States;
- c. That he then traveled to Logar Province, where he remained for about one month, leaving his passport and other personal possessions with a Taliban associate when he departed;

- d. That he next traveled to Jalalabad, where he stayed in a house with a number of men, some of whom carried weapons, and where he obtained an AK-47 rifle.
- e. That he departed Jalalabad on foot with his rifle and headed through the White Mountains in the Tora Bora region, traveling with a group of about 150 men, some of whom were also armed and appeared to be fighters.
- f. That the group with which he traveled was attacked by U.S. and allied air forces but al Odah was not injured.
- g. That when he reached the Pakistan border, while still armed, he was detained by Pakistani guards and turned over to U.S. military forces.

14. Based on these findings, this Court concluded that more likely than not Petitioner became part of Taliban and Al Qaeda forces operating in Afghanistan, and therefore that he was properly classified and detained as an enemy combatant pursuant to the AUMF, and on that basis his petition was denied. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009).

15. This Court's decision was affirmed on appeal. *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011).

16. Even accepting this Court's findings, Petitioner has spent more than eleven and one half years incarcerated under punitive conditions on the basis that he was, at most, a low-level foot soldier in Northern Afghanistan. There is no finding that al Odah ever fired a weapon at United States or allied forces or ever took any specific hostile action. There is no finding that he participated in or planned the 9/11 operation or any other operation of Al Qaeda or any other terrorist group.

17. While Petitioner continues to deny that he became part of Taliban and/or Al Qaeda forces or that he is properly classified as an enemy combatant, he accepts for purposes of the instant action that this Court's prior factual findings are conclusive and does not seek to

litigate them in the instant petition. He asserts, however, that he is presently entitled to relief based on the new facts set forth below.

**STATUS OF THE WAR IN AFGHANISTAN**

18. The AUMF was enacted in September 2001 and provided the legal justification for the war in Afghanistan. On October 7, 2001, on the basis of the AUMF, the U.S. began active military operations in Afghanistan. At the time, then-President Bush explained that the military action against Afghanistan was undertaken for the purpose of destroying Al Qaeda, which was entwined with and supported by the Taliban government of Afghanistan. In his televised address to the nation, President Bush justified the war in Afghanistan on the basis that the Taliban government of Afghanistan was harboring and assisting Al Qaeda. He stated:

On my orders, the United States military has begun strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.

These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime.

19. The invasion was premised on the Taliban having a certain measure of control over Al Qaeda and its leaders. President Bush cited, as a principal justification for the invasion of Afghanistan, the fact that the Taliban government of Afghanistan had, among other inactions, failed to deliver to U.S. custody the Al Qaeda leaders responsible for the 9/11 attacks:

More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps. Hand over leaders of the Al Qaeda network, and return all foreign nationals, including American citizens unjustly detained in our country.

None of these demands were met. And now, the Taliban will pay a price.

20. In Respondent Obama's December 1, 2009 speech, he reiterated this reasoning, stating:

To address these important issues, it's important to recall why America and our allies were compelled to fight a war in Afghanistan in the first place . . . . Al Qaeda's base of operations was in Afghanistan, where they were harbored by the Taliban -- a ruthless, repressive and radical movement that seized control of that country after it was ravaged by years of Soviet occupation and civil war, and after the attention of America and our friends had turned elsewhere.

21. Since the beginning of the war in Afghanistan, the U.S. has made substantial progress in destroying Al Qaeda's ability to continue its terrorist activities. In particular, as Respondent Obama has made clear, the U.S. has destroyed the operations of the "core" Al Qaeda command structure in Afghanistan and Pakistan, leaving regional groups to operate largely autonomously, without central leadership.

22. Most significantly, on May 2, 2011, United States special forces personnel killed the leader of Al Qaeda, Osama Bin Laden. In addition, dozens of other Al Qaeda and allied Taliban leaders have been killed in the last 11 years during the war in Afghanistan, resulting in what Respondents have acknowledged is the "decimation" of Al Qaeda. As a result of the U.S.'s military operations, in May 2013, Respondent Obama stated, "Today, the core of Al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghazi or Boston. They have not carried out a successful attack on our homeland since 9/11."

23. Although groups of terrorists continue to invoke the name of Al Qaeda – for example AQI (Al Qaeda in Iraq), AQAP (Al Qaeda in the Arabian Peninsula), and AQIM (Al Qaeda in the Islamic Maghreb) – their operations are decentralized, and leadership and

membership are overwhelmingly local. Each group has a distinctive local history and a mostly local membership.

24. This ad-hoc and loosely affiliated group of organizations, operating under a common brand but not a common command structure, does not constitute a fighting force against which “war” as defined under customary international law and treaty can be waged. As the International Commission of the Red Cross has noted, under the International Law of Armed Conflict, maintenance of “active hostilities” requires combat operations at a certain level of intensity against a force with “a certain command structure” that has “the capacity to sustain military operations.” Even as the U.S. continues to take actions to eliminate any threat posed by these offshoots of Al Qaeda, these sporadic operations against attenuated and geographically distinct entities do not meet this definition.

25. In his May 21, 2013 speech to the National Defense University, Respondent Obama acknowledged this, stating “Core Al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves Al Qaeda will pose a credible threat to the United States.”

26. With the acknowledged “decimation” of Al Qaeda, Respondents have also announced plans to end active combat operations in Afghanistan. In his 2013 State of the Union Address, Respondent Obama stated that U.S. military forces will be withdrawn from Afghanistan at the latest by the end of 2014, stating that “[b]y the end of [2014] *our war in Afghanistan will be over*” (emphasis added). Respondent Obama has since reiterated that statement on multiple occasions, including in his Address from Bagram Air Force Base on May 1, 2013, in his Counterterrorism Speech on May 23, 2013, and at a Joint Press Conference in South Africa on June 28, 2013.



27. These declarations of official policy are not merely projections. Respondents have taken concrete steps to implement the withdrawal of U.S. troops on this timetable, including transferring control over U.S. detention facilities housing Afghan detainees at Bagram to the Afghan government on March 22, 2013, and turning over the last 95 Afghan districts to Afghan security control on June 18, 2013.

28. It is therefore reasonable to conclude that, by the end of 2014, active hostilities between the United States and opposing forces will have ceased. It is further reasonable to expect that the end of such hostilities will be acknowledged and declared by Respondents. Once the United States discontinues active combat operations in Afghanistan, any other anti-terror missions will not be active combat operations under the International Law of Armed Conflict.

**REQUIREMENT FOR PETITIONER'S REPATRIATION**

29. Article 118 of The Third Geneva Convention of 1949 requires that Respondents procure Petitioner's "release[] and repatriat[ion] without delay after the cessation of active hostilities." This obligation is an unambiguously unilateral responsibility of the United States as a Detaining Power. This obligation has been incorporated into U.S. domestic law as well, pursuant to A.R. 190-8, §3-13, which requires that all prisoners be "repatriated or released at the cessation of hostilities. . . ."

30. Respondents are further required by the Geneva Conventions to "establish and execute without delay a plan of repatriation" to comply with their obligation to repatriate their prisoners. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

31. Such a plan of repatriation must be established well in advance of the actual end of active combat operations so that the United States can comply with its obligation to repatriate Petitioner “without delay.”

32. It is overwhelmingly likely that active combat operations will end on or before December 31, 2014. Whether those operations end sometime shortly before or shortly after that date is irrelevant to Petitioner’s claim to relief here. Combat operations in Afghanistan will end at a time certain in the foreseeable future, and at that point there will no longer be any legal justification for Petitioner’s continued detention. In these circumstances, Petitioner has a present claim to relief that is not dependent on determining with certainty the precise date that combat operations end.

33. As the Supreme Court has articulated in a series of cases, the detention of prisoners at Guantánamo can be justified under the AUMF only so long as there are active hostilities in Afghanistan. A plurality of the Supreme Court stated in *Hamdi v. Rumsfeld*:

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. Pursuant to the Geneva Conventions “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities...unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences”. . . . Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, *for the duration of these hostilities*, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States.

542 U.S. at 520-21 (emphasis added) (citations omitted).

34. This principle was reaffirmed in the majority opinion in *Boumediene v. Bush*, which stated:

In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as

to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.*, at 518 (plurality opinion of O’Connor, J.), *id.*, at 588–589 (Thomas, J., dissenting).

553 U.S. at 733.

35. The *Hamdi* plurality also recognized that there is an important liberty interest with respect to the scope and limit of detention that courts have a responsibility to protect, stating, “History and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse of others who do not represent that sort of threat.” 542 U.S. at 530. Justice O’Connor further explained: “In our society liberty is the normal and detention without trial is the carefully limited exception. We have always been careful not to minimize the importance of and fundamental nature of the individual right to liberty.” *Id.*

#### **LENGTH AND CONDITION OF PETITIONER’S DETENTION**

36. Petitioner never engaged in actual combat with U.S. military or allied forces in Afghanistan. He never fired his AK-47 at such forces, much less caused injury or death to any member of those forces or to others. Although this Court found that he was generally “part of” the Taliban and/or Al Qaeda operating in Afghanistan, none of the Court’s findings suggests that he provided any significant aid or support to the Taliban or Al Qaeda in Afghanistan or elsewhere.

37. The justification for detention for the duration of a conflict is to prevent the detainee from returning to the battlefield to resume hostilities against the detaining power. There is no basis in the factual findings of this Court or otherwise to reasonably believe that Petitioner would attempt to return to the battlefield in Afghanistan to engage in combat with U.S. military or allied forces in that country if he were released from custody at Guantánamo and repatriated to his native Kuwait. Indeed, there will be no battlefield in Afghanistan in which the United States

is sustaining active combat operations after December 31, 2014, or earlier, and there is no other battlefield as that term is construed in customary international law to which Petitioner could or would return.

38. The length of Petitioner's detention, which currently stands at more than eleven and one half years, with no end in sight, is already far longer than the detentions of many Guantánamo detainees who admitted having engaged in actual combat against U.S. forces, including detainees who have been charged, tried, and convicted of war crimes, and who were sentenced to terms in prison of far shorter duration than Petitioner's current confinement. For example:

- a. Ahmed Hamdan, a driver for Osama Bin Laden, was convicted of providing material support for terrorism. In August 2008, he was sentenced to 5 ½ years and was given credit for the 61 months and eight days he spent in detention at Guantánamo. He was accordingly released. His sentence was, however, later vacated on the ground that he had been impermissibly charged retroactively with crimes under the Military Commission Act.
- b. David Hicks pleaded guilty to one count of providing material support for terrorism, was sentenced to 7 years, and all but 9 months were suspended. He was released after 7 months.
- c. Ibrahim Ahmed Mahmoud Al Qosi confessed to providing and conspiring to provide material support for terrorism. He was a driver and cook for Osama Bin Laden. He was sentenced to 14 years of incarceration with all

but two years suspended. He has been repatriated to his home country of Sudan.

- d. Omar Ahmed Khadr pleaded guilty to murder and attempted murder in violation of the laws of war, conspiracy to commit terrorism, providing material support for terrorism and spying. He was sentenced to 8 years in prison.

39. It is entirely anomalous and unjust for a detainee who has never been accused of any crime, and who has been adjudicated as at worst a low level operative with far less culpability than enemy combatants who have been convicted of far more serious acts, to languish in detention when, had he been charged with more serious wrongdoing, it is overwhelmingly likely he would have already been released.

40. The length of Petitioner's detention is entirely disproportionate to the conduct for which he has been detained under any reasonable construction.

#### **FIRST CLAIM FOR RELIEF**

41. Petitioner's detention pursuant to the AUMF will be without legal justification upon the cessation of active military hostilities between U.S. and allied forces against the remnants of the Taliban and Al Qaeda in Afghanistan.

42. Since Respondent Obama has declared that remaining U.S. combat troops will be withdrawn from Afghanistan by the end of 2014 at the latest, active hostilities involving U.S. forces will have ceased by that date, and, at that time, Petitioner will be entitled to immediate release and repatriation to Kuwait. Whether that date moves up or back, active combat operations will inevitably end at a date certain in the foreseeable future, and Petitioner is entitled

to immediate release as of that date. Petitioner has a present enforceable right to an order mandating his immediate release upon the cessation of active combat operations.

43. In order for such release to take place at that time and for the Respondents to comply with their obligations under the Geneva Conventions and Army Reg. 190-8, Respondents must adopt and implement the military and administrative procedures necessary to effectuate Petitioner's release well in advance of the end of 2014. In the absence of such steps, Petitioner will be irreparably harmed by having his release delayed, potentially for months beyond that declared date, awaiting these steps belatedly to be taken.

44. As a consequence, this Court should order Petitioner to be released immediately upon cessation of active hostilities in Afghanistan, and, by writ of mandamus, it should order Respondents to immediately design, put in place, and implement the military and administrative procedures that will assure such timely release.

45. In these circumstances, the Court should retain jurisdiction over the instant action to assure Respondents' compliance with this directive, including requiring Respondents to provide periodic reports to the Court as to their compliance.

### **SECOND CLAIM FOR RELIEF**

46. To the extent that Petitioner's continued detention can be said to serve any preventive purpose under the AUMF, the remote theoretical risk that he will return to the Afghanistan battlefield (which, with the conclusion of the war in Iraq, is the only active battlefield pursuant to the Law of Armed Conflict) is heavily outweighed by the clearly punitive effect of his continued detention and by Petitioner's important liberty interest in being free from detention as articulated by the Supreme Court in *Rasul*, *Hamdi*, *Boumediene* and other precedents.

47. Respondents have failed to adhere to the solely prophylactic nature of detention as authorized by the AUMF. Petitioner is inarguably detained in a prison environment. U.S. officials characterize and treat Guantánamo detainees, including Petitioner, as terrorists and criminals, not prisoners of war.

48. In light of the predominantly punitive purpose and effect of Petitioner's detention, his continued detention for preventive purposes cannot be justified under the AUMF, and he must be ordered released forthwith and repatriated to Kuwait.

WHEREFORE, Petitioner al Odah prays for relief as follows:

1. That the Court issue a Writ of Habeas Corpus to Respondents requiring Respondents to justify Petitioner's continued detention;

2. That, upon a finding that his detention can no longer be justified, the Court order Petitioner's release from custody forthwith and direct Respondents to arrange for his immediate repatriation to Kuwait;

3. That, in the event the Court determines that Petitioner's continued detention remains justified until the cessation of active hostilities involving U.S. combat forces in Afghanistan, the Court (a) order that Petitioner will be entitled to release immediately upon the withdrawal of U.S. combat forces from Afghanistan at or before the end of 2014, as declared by Respondent Obama; or at such other time when such withdrawal of U.S. combat forces takes place and (b) order Respondents to design, put in place, and promptly begin to implement procedures necessary to effectuate Petitioner's immediate release and repatriation at such time; and

4. That the Court grant such other and further relief as may be necessary and appropriate to achieve the foregoing.

Respectfully submitted,

/s/ Eric L. Lewis

Eric L. Lewis (D.C. Bar #394643)  
Anne Katherine Toomey (D.C. Bar #426658)  
LEWIS BAACH PLLC  
1899 Pennsylvania Avenue, NW, Suite 600  
Washington, DC 20006  
Tel: (202) 833-8900  
Fax: (202) 466-5738  
[eric.lewis@lewisbaach.com](mailto:eric.lewis@lewisbaach.com)  
[katherine.toomey@lewisbaach.com](mailto:katherine.toomey@lewisbaach.com)

*Attorneys for Plaintiff Fawzi Khalid  
Abdullah Fahad Al Odah*

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