

LEGAL MEMORANDUM

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The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS

Charles D. Stimson and Hugh Danilack

Abstract

The Obama Administration's determination that ISIS is an "associated force" that falls under the AUMF has not been challenged in court in the detainee context, and it is not clear that the courts will agree. The Trump Administration should therefore not attempt to detain ISIS fighters at Guantanamo Bay until it is on a stronger legal footing. Before using Guantanamo as a detention facility for members of ISIS, it should study the case law and evaluate the litigation risk. Given the fact that al-Qaeda and the Taliban still pose a substantial national security threat to the United States and its partners and that we continue to be engaged in armed conflict with those groups and associated forces, an AUMF that includes ISIS should not disturb the existing legal authorities applicable to al-Qaeda and the Taliban. This can be accomplished legislatively in a number of ways: either a stand-alone AUMF specific to ISIS and associated forces or an AUMF that includes al-Qaeda, the Taliban, ISIS, and associated forces.

The Islamic State in Iraq and Syria (ISIS) continues to conduct hostilities against the interests of the United States and its allies. ISIS poses a significant threat and must be defeated. In the effort to achieve this goal, President Barack Obama argued that the 2001 Authorization for Use of Military Force (AUMF) gave him the legal authority to use military force against ISIS.¹ This justification has proven somewhat controversial in the legal community, with distinguished scholars both supporting and challenging the applicability of the 2001 AUMF to ISIS.² Now, President Donald Trump and his Administration are exploring the possibility of detaining ISIS terrorists at Guantanamo Bay to further the war effort to destroy ISIS.

KEY POINTS

- President Donald Trump and his Administration are exploring the possibility of detaining ISIS terrorists at Guantanamo Bay to further the war effort to destroy ISIS.
- Military detention of the enemy during wartime is a lawful, traditional means of incapacitating the enemy to deprive it of additional forces and shorten the war effort.
- Although the courts have ruled expansively on the scope of the detention authority for individuals connected to the Taliban and al-Qaeda, it is not clear that they would extend that authority to ISIS. In fact, the dissenting opinions in several habeas cases suggest that the courts are beginning to question the attenuation of detention authority jurisprudence.
- This war is like no other. It will require all lawful elements of national power to defeat the enemies of the United States.
- Considering the interests at stake, the Trump Administration should support and Congress should consider an AUMF that includes ISIS before bringing any ISIS detainees to Guantanamo.

This paper, in its entirety, can be found at <http://report.heritage.org/lm203>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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The Obama Administration argued that ISIS is an “associated force” that falls under the scope of the 2001 AUMF, but this justification has not been challenged in a court of law. If an ISIS terrorist were detained at Guantanamo, it is very likely that he would file a habeas petition in federal court to challenge the scope of the government’s detention authority. In such a case, the courts would have to analyze closely whether ISIS falls into the covered class of individuals and organizations under the 2001 AUMF as determined by the Supreme Court of the United States and the lower federal courts. As evidenced by the approach that they have taken in their AUMF-detention jurisprudence, it is not clear that the courts would agree with the Obama Administration’s justification.

If the Trump Administration rushes to bring ISIS fighters to Guantanamo without a stronger legal basis, those detainees might successfully challenge not only their own detention under the AUMF, but also the Trump Administration’s entire legal justification for the authority to use all necessary and appropriate force in the fight against ISIS. A review of the Guantanamo habeas case law shows that the Trump Administration would be on more solid legal ground if it worked with Congress to craft an ISIS-specific AUMF before bringing any ISIS detainees to Guantanamo Bay.

AUMFs and Declarations of War: A Historical Perspective

Article I, Section 8 of the U.S. Constitution gives Congress the power “to declare War.” In the history of the United States, Congress has declared war 11 times relating to five different wars.³ It also has adopted over 40 authorizations for the use of military force.⁴ Every authorization is unique in its breadth and scope, especially when a war is formally authorized.

As Curtis Bradley and Jack Goldsmith write, “The limited authorizations [for the use of military force]...stand in sharp contrast to authorizations in declared wars.” They argue that “[t]here are four crucial differences between authorizations in declared wars and authorizations in more limited conflicts.” Authorizations in declared wars:

- Do not restrict the resources available to the President,

- Do not limit the methods of force that the President can use,
- Do not place express limits on authorized targets other than by naming the enemy, and
- Do not limit the purpose of defeating the enemy and bringing the war to a successful conclusion.⁵

However, most of the AUMFs in U.S. history have been far more limited than the broad authorizations enacted in the five declared wars. These AUMFs themselves have varied considerably in breadth and scope. For example, in the late 1790s, Congress authorized the President to use “particular armed forces in a specified way for limited ends” against French naval vessels in the Quasi-War. Bradley and Goldsmith write that the authorizations in the Quasi-War did not authorize the President “to use all of the armed forces of the United States or to conduct military incursions beyond specified military targets, and they limited the geographical scope of the authorized conflict to the high seas.”⁶ In this way, the Quasi-War AUMF was very limited.

When one compares this authorization with the Gulf of Tonkin Resolution—the primary congressional authorization for the Vietnam War—one sees a much broader mandate for the use of force. The Gulf of Tonkin Resolution authorized the President to use all necessary measures without restrictions on resources, the method of force, or the authorized targets. It broadly allowed the President to repel attacks and prevent aggression in Southeast Asia without procedural or timing limitation.⁷ Bradley and Goldsmith argue that “[t]he Gulf of Tonkin Resolution is as broad as force authorization in declared wars along the crucial dimension of resources, methods, targets, and purpose, and is arguably broader (or at least more open-ended) with respect to targets and purpose.”⁸

The 2001 AUMF and the Detention Authority

The 2001 AUMF,⁹ which has been used to prosecute the war against the Taliban and al-Qaeda, falls along the broader side of the spectrum when compared with AUMFs historically. It authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001....” Using their five analytical components for evaluating AUMFs, Bradley and Goldsmith conclude that “the [2001] AUMF is as broad as authorizations in declared wars with respect to the resources and methods it authorizes the President to employ, and with respect to the purposes for which these resources can be used.”¹⁰ Thus, the 2001 AUMF follows the standard format for an AUMF that gives the President broad powers.

However, the 2001 AUMF is unique in one other important respect. In authorizing the President to use force against the nations, organizations, and persons that are connected to the September 11 attacks, the 2001 AUMF *describes* but does not specifically *name* the enemies targeted under the authorization.¹¹ While the statute nominally gives the President the authority to make the determination about which organizations or persons fall under the class of individuals covered by the AUMF, the courts have played a major role in defining its scope, most notably through the context of Guantanamo detainee habeas litigation.¹² The 2001 AUMF is self-limiting: “It is limited to al-Qaeda, the Taliban, and persons and forces associated with those ‘organizations.’ It is not a mandate to use force against any terrorist organization or other entity that may threaten U.S. national security.”¹³ It is also limited by the principle that force should be deployed only “in order to prevent any future acts of international terrorism against the United States.”¹⁴ Further, it incorporates and is limited by the law of armed conflict.

Since the Supreme Court’s ruling in *Boumediene v. Bush*, Guantanamo detainees have used their constitutional right to habeas corpus review to challenge their detention under the 2001 AUMF. While the courts have denied writs in cases where the government can show that the detainee was connected to al-Qaeda or the Taliban, they have not ruled on how the 2001 AUMF would apply to members of other forces such as ISIS in the detainee context.

This unique, self-limiting characteristic of the 2001 AUMF and the case law it has generated leads to the following question: If the Trump Administration brings ISIS terrorists to Guantanamo and they challenge their detention through habeas petitions, how will the courts rule? The Obama Administration argued that ISIS is an “associated force” that falls under the AUMF,¹⁵ but this determination has

not been challenged in court in the detainee context, and as evidenced by the approach the courts have taken in their AUMF jurisprudence, it is not clear that the courts will agree.¹⁶ Thus, in a habeas case involving an ISIS terrorist detained at Guantanamo, the courts must closely analyze whether ISIS could fall under the 2001 AUMF.

How the Courts Became Involved in Defining the Enemy

To begin to answer this question, we must look at how the courts have become involved in defining the enemy and how they have interpreted the 2001 AUMF through Guantanamo habeas cases.

Rarely in the history of warfare, and certainly not in U.S. history, have prisoners of war been able to challenge their wartime military detention in court. It would have been unheard of, for example, for the 400,000 German POWs held by the U.S. in World War II to be able to challenge their detention in court.

Under Article 3 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, which entered into force on August 12, 1949, prisoners of war are entitled to important protections. These protections ensure that:

[The detaining country is prohibited from committing] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.¹⁷

While Article 3 clearly states that the detaining country cannot pass sentences and carry out executions without a trial, Article 4 sets out the characteristics for an individual to be designated a POW, and Article 5 declares that such an individual may be held from the time of capture until the cessation of hostilities.¹⁸

Historically, the courts have been reluctant to get involved with how the government decides to handle the detention of enemy combatants in wartime pursuant to the authority under a declaration of war or

AUMF. The Supreme Court’s landmark World War II-era decisions in *Ex Parte Quirin* and *Johnson v. Eisentrager* illustrate this deference to the President with regard to detainee policy.

In *Ex parte Quirin*, the Supreme Court unanimously determined that the President had the authority to try eight German saboteurs by a military commission and deny them a trial in federal courts.¹⁹ The Court held that because the President has “the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war...and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war,” and because “Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction,” the President may use military commissions to try those who violate the laws of war.²⁰ The Court also determined that the President may detain unlawful enemy combatants who violate the law of war and try them by military commissions. Finally, the Court held that “section 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the courts.”²¹

In *Johnson v. Eisentrager*, the Supreme Court held that German nationals detained in China and held in a U.S. Army facility in Germany did not have a right to seek a writ of habeas corpus to challenge the legality of their detention.²² Justice Robert Jackson wrote that “the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.”²³ He continued: “In extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”²⁴

Thus, since the German prisoners were never in American territory, among other factors,²⁵ they did not fall under the jurisdiction of U.S. federal courts. Justice Jackson further argued that even presence on U.S. territory is insufficient to generate rights, since “executive power over enemy aliens, undelayed and unhampered by litigation, has been

deemed, throughout our history, essential to wartime security.”²⁶ In its decision, the Court affirmed the President’s extensive power during wartime and concluded that enemy combatants—especially those who have never been or resided in the United States—have no constitutional right to a writ of habeas corpus in federal court.

Through these two cases, the Supreme Court affirmed the President’s broad powers to detain enemy combatants for the duration of a conflict when acting pursuant to a declaration of war and denied the detainees the right to challenge their detention in federal court.

But that all changed after September 11, 2001. The courts, like it or not, have become actively involved in wartime detention decisions. Through a succession of decisions—*Hamdi v. Rumsfeld*, *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*—the Supreme Court has interpreted the 2001 AUMF and the law of war to constrain the President’s power in the detainee context and has established that detainees in Guantanamo have the constitutional right to habeas corpus review. In the wake of these rulings, the federal courts now routinely review and decide habeas petitions filed by the detainees held at Guantanamo.

Establishing the Constitutional Right to Habeas Corpus for Guantanamo Detainees. In *Hamdi v. Rumsfeld*, the Supreme Court addressed the question of whether the President has the authority to detain citizens who qualify as “enemy combatants,” understood to be any individuals who were part of or supported enemy forces in Afghanistan and who engaged the United States in armed conflict. The plurality wrote that “the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe.”²⁷ To determine this narrow class of individuals, the Court relied on the text of the AUMF and held that “there can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”²⁸

Thus, the Court concluded in *Hamdi* that the detention of individuals falling into the limited category of individuals created by its interpretation of the AUMF for the duration of the conflict is a fundamental incident to war and consistent with the

authority that Congress has granted to the President. The Court also held, however, that although the President could detain citizens and non-citizens, due process required that detainees be able to challenge their classification as enemy combatants in the narrow category of individuals that fall under the 2001 AUMF.

On the same day that *Hamdi* was decided, the Supreme Court ruled in *Rasul v. Bush* that because the United States has jurisdiction over Guantanamo, federal courts have jurisdiction to consider habeas petitions from detainees held in Guantanamo under the federal habeas statute.²⁹ The Court emphasized that the federal habeas statute is not dependent on a detainee's citizenship status and that foreign nationals at Guantanamo were therefore entitled to invoke that statute.

Although not a detention-related case, in *Hamdan v. Rumsfeld*, Salim Ahmed Hamdan challenged the statutory authority of the military commission established by Commission Order No. 1³⁰ to try him, not the President's authority to detain him for the duration of hostilities. Hamdan was captured during the invasion of Afghanistan and charged with "willfully and knowingly join[ing] an enterprise of persons who shared a common criminal purpose and conspired" with al-Qaeda.³¹ Under Commission Order No. 1, President George W. Bush established military commissions to try any non-citizen that was connected to al-Qaeda, the Taliban, or the 9/11 attacks. In his habeas petition, Hamdan argued that the military commission set up under Commission Order No. 1 did not meet the requirements of the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.³²

The Supreme Court held that Hamdan's military commission exceeded the statutory authority and wrote that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."³³ The Court also held that Hamdan was entitled to the protections set out in Common Article 3 of the Geneva Conventions and that the procedures of his military commission did not meet those standards.³⁴ In the final analysis, the Court's decision in this case limited the President's executive power over war and was another signal that the Court would no longer defer to the President in the areas of war and national security.

These rulings set the stage for the Court's ruling in *Boumediene v. Bush*. In a narrow 5–4 majority,

Justice Anthony Kennedy wrote that every detainee is guaranteed "a meaningful opportunity to demonstrate that he is being [unlawfully] held" and that the reviewing authority "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."³⁵ Kennedy concluded that the Military Commissions Act³⁶ and the Detainee Treatment Act³⁷ served as inadequate substitute review procedures for the right to file for habeas corpus review. To support this conclusion, he argued that the United States held *de facto* sovereignty over Guantanamo and that *de facto*, not *de jure*, sovereignty is critical when determining the extraterritoriality of the Constitution. Consequently, the Court, following the decisions in *Hamdi*, *Rasul*, and *Hamdan*, found that detainees held at Guantanamo Bay as enemy combatants had a constitutional right to habeas corpus review.³⁸

These four cases established that the President had the authority to detain enemy combatants who were part of or assisted the Taliban, al-Qaeda, or associated forces during hostilities under the 2001 AUMF; that trial by military commission must comply with the UCMJ and Geneva Conventions; and that detainees in Guantanamo had the constitutional and statutory rights to challenge their detentions through habeas petitions.

Cases Defining the Scope of Military Detention Authority Under the 2001 AUMF

In the wake of *Boumediene*, numerous detainees held at Guantanamo have filed habeas petitions alleging that the circumstances of their particular cases place them outside the explicit or implied class of individuals to which the President's detention power under the AUMF applies. These individuals have advanced a range of arguments in habeas petitions that include not having involvement with the 9/11 attacks, not having connections to the Taliban or al-Qaeda, not participating in hostilities against the United States or its coalition partners, and not committing direct hostile action with a weapon in armed conflict against the United States.

Defining the Approach. The district courts and the D.C. Circuit Court of Appeals have rejected many of these habeas petitions by extending the reasoning in *Hamdi* that the President has the authority to detain individuals who were part of or associated with the Taliban or al-Qaeda. In these cases, the

courts require that the government show that the detainee in question has a connection to the Taliban or al-Qaeda, but their interpretation of what it means to be “part of” and “associated with” the Taliban, al-Qaeda, or associated forces is broad.

In *Ali v. Obama*, the D.C. Circuit Court of Appeals explained its approach to deciding whether an individual is part of or associated with an enemy force under the 2001 AUMF: “Determining whether an individual is part of al-Qaeda, the Taliban, or an associated force almost always requires drawing inferences from circumstantial evidence, such as that individual’s personal associations.... So we must look to other indicia to determine membership in an enemy force.”³⁹ In *Bensayah v. Obama*, the court added that “it is impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al-Qaida” and that, consequently, such a “determination must be made on a case-by-case basis” focused on the actions of the individual.⁴⁰

Thus, in each case, while the government must show by a preponderance of the evidence that a detainee has a connection to the Taliban, al-Qaeda, or an associated force, the courts have extended the range of characteristics and activities sufficient to prove a connection to one of those groups.

Through the cases, the courts have identified at least a dozen different criteria that they have determined are relevant to prove a connection between an individual and al-Qaeda or the Taliban.⁴¹ The following sections review a representative sample of these habeas cases, organized by some of the major criteria they have created.⁴²

Intention to Fight Against the United States or Its Coalition Partners. In a significant early habeas case, *Awad v. Obama*, the D.C. Circuit Court upheld the district court’s finding that Adham Mohammed Ali Awad was “part of” al-Qaeda in December 2001. In mid-September 2001, Awad, a Yemeni national, traveled to Afghanistan with the intent to receive weapons training, become a fighter, and engage in hostilities against U.S. forces. In December 2001, Awad joined a group of al-Qaeda fighters who attacked and barricaded themselves inside Mirwais Hospital. Awad, whose right leg had been amputated, was eventually surrendered to U.S. and allied forces by al-Qaeda forces at the hospital.⁴³

Awad, among several legal and evidentiary challenges, argued that the district court was wrong to determine that he was “part of” al-Qaeda. However,

the circuit court, on reviewing all the evidence, wrote that:

Awad’s statements of intent are undisputed. Awad repeatedly told U.S. interrogators that the reason he traveled to Afghanistan in mid-September 2001 was to join the fight against U.S. and allied forces. The district court found that the reason Awad traveled to Afghanistan was to fight, and Awad does not challenge that finding on appeal. The government acknowledges that intention to fight is inadequate by itself to make someone “part of” al-Qaeda, but it is nonetheless compelling evidence when, as here, it accompanies additional evidence of conduct consistent with an effectuation of that intent.⁴⁴

The court concluded that, taken together, Awad’s statements of intent, his joining al-Qaeda forces at the hospital, his identification as a member by other al-Qaeda members, and other pieces of evidence were sufficient to establish that he was “part of” al-Qaeda. Further, the court affirmed the preponderance of the evidence standard and rejected Awad’s claims that the government must show that a detainee would be a threat if released in order to continue detention.⁴⁵

Thus, while intention to join the fight against the United States is not by itself sufficient to establish that an individual is “part of” al-Qaeda, it is one of many elements the courts have employed in determining whether an individual is “part of” or “associated with” al-Qaeda or the Taliban.

For other cases dealing with the intention-to-fight criterion, see *Al-Adahi v. Obama* and *Ali v. Obama*.⁴⁶

Close Association with Members of Enemy Forces. In *Al-Bihani v. Obama*, the D.C. Circuit Court held that the government did not have to prove that the detainee had engaged in combat against the United States and its allies in order to detain individuals who were part of the Taliban or al-Qaeda forces. Ghaleb Nassar Al-Bihani traveled through Pakistan to Afghanistan to defend the Taliban and stayed at a series of Taliban and al-Qaeda-affiliated guesthouses. He also may have trained at two separate al-Qaeda terrorist training camps before joining a paramilitary group called the 55th Arab Brigade, a force that was allied with the Taliban and that included members of al-Qaeda. Al-Bihani was a cook and carried a weapon, but he never fired it in combat.⁴⁷

Al-Bihani, among other arguments, claimed that he should be detained only if he had committed “a direct hostile act, such as firing a weapon in combat.” As the court writes:

Al-Bihani interprets international law to mean anyone not belonging to an official state military is a civilian, and civilians, he says, must commit a direct hostile act, such as firing a weapon in combat, before they can be lawfully detained. Because Al-Bihani did not commit such an act, he reasons his detention is unlawful.⁴⁸

The court rejected that argument and ruled that Al-Bihani’s role as part of associated forces was sufficient to justify detention. First, the court stated that accompanying the 55th Arab Brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and following brigade orders establish that Al-Bihani “was part of and supported a group—prior to and after September 11—that was affiliated with Al Qaeda and Taliban forces and engaged in hostilities against a U.S. Coalition partner.”⁴⁹ Consequently, Al-Bihani was detainable under both versions of the Military Commissions Act for purposefully and materially supporting al-Qaeda and the Taliban.

Second, the court argued that the language of the AUMF gives the government the authority to detain Al-Bihani on the grounds that al-Qaeda is responsible for 9/11, the Taliban harbored al-Qaeda, and the 55th Arab Brigade defended the Taliban:

Drawing from these facts, it cannot be disputed that the actual and foreseeable result of the 55th’s defense of the Taliban was the maintenance of Al Qaeda’s safe haven in Afghanistan. This result places the 55th within the AUMF’s wide ambit as an organization that harbored Al Qaeda, making it subject to U.S. military force and its members and supporters—including Al-Bihani—eligible for detention.⁵⁰

Thus, the court established that close association with a force that is covered by the AUMF, even if in a non-combat role, is grounds for detention under the AUMF.

For other cases dealing with the close-association criterion, see *Awad v. Obama*, *Uthman v. Obama*, *Al Alwi v. Obama*, *Hussain v. Obama*, and *Odah v. United States*.⁵¹

Identification as a Member by Other Members of the Enemy Forces or Documents Created by Enemy Forces. In *Barhoumi v. Obama*, the D.C. Circuit Court held that Sufyian Barhoumi was “part of” an al-Qaeda-associated force engaged in hostilities against the United States and lawfully detained under the 2001 AUMF. Born in Algeria, Barhoumi left after high school and travelled through North Africa and Europe before settling in London, where he lived for two years. While living in London, Barhoumi attended a mosque where he saw a film showing Russian atrocities against Muslims. This experience prompted him to travel to Afghanistan, where he trained in several military camps, including one associated with Abu Zubaydah.⁵² Barhoumi fled Afghanistan when the U.S. and coalition forces invaded and was captured in a guesthouse in Pakistan in February 2002.⁵³

Barhoumi claimed that the district court erred in admitting into evidence the al-Suri diary, which is hearsay. The al-Suri diary is a diary written by Abu Kamil al-Suri, who claimed to be a member of Abu Zubaydah’s militia. The diary repeatedly mentions “Ubaydah Al-Jaza’iri,” an alias that Barhoumi has admitted to using.⁵⁴ It describes Barhoumi as “one of the trainers at Khaldun⁵⁵,” mentions his travel with Abu Zubaydah, and mentions his involvement with the fighting at Tora Bora. Barhoumi “argue[d] that even if the diaries are admissible hearsay, the district court should have disregarded them on the ground that they are inherently unreliable. He further assert[ed] that the government failed to establish that he was ‘part of’ an associated force...”⁵⁶

The court rejected that argument and ruled that all of the evidence against Barhoumi, including the diary, was sufficient to connect him to an enemy force covered by the AUMF:

[The] record evidence shows (1) that Barhoumi trained at the Khaldan camp, which was associated with Zubaydah; (2) that he was later captured along with Zubaydah in the same Pakistan guesthouse; and (3) that he functioned as a “Permanent” member of Zubaydah’s group who provided explosives training to other militia members “for operations against the Americans inside of Afghanistan.” This evidence shows more than “mere sympathy” toward Zubaydah’s organization: al-Suri’s diary singles him out as a member of that organization, actively engaged in training other members.⁵⁷

Taken together, the court established that Barhoumi's activities and identification as a member by another member of an organization covered by the AUMF constituted grounds for his detention.

For another case dealing with the identification-as-a-member criterion, see *Awad v. Obama*.⁵⁸

Trained in a Camp Associated with Enemy Forces. In *Al-Adahi v. Obama*, the D.C. Circuit Court held that Mohammed Al-Adahi was "part of" al-Qaeda and lawfully detained under the 2001 AUMF. Al-Adahi, a Yemeni national, moved to Afghanistan in the summer of 2001. He stayed in Kandahar with his brother-in-law, who was a close associate of Osama bin Laden. Al-Adahi met with bin Laden twice and then attended al-Qaeda's Al Farouq training camp. In late 2001, Al-Adahi was injured and crossed the Pakistani border on a bus carrying wounded fighters. He was captured by Pakistani authorities soon thereafter.⁵⁹

Al-Adahi claimed that he was not part of al-Qaeda and could not be detained under the AUMF. The district court considered an extensive record of evidence but found "no reliable evidence in the record that Petitioner was a member of al-Qaida" and ruled that he should be released.⁶⁰

The D.C. Circuit rejected the district court's conclusion because, in its approach, it wrongly required that each piece of evidence presented in the case had to be sufficient to prove that Al-Adahi was a member of al-Qaeda without consideration of any of the other evidence in the case. "When the evidence is properly considered," the D.C. Circuit Court wrote, "it becomes clear that Al-Adahi was—at the very least—more likely than not a part of al-Qaida."⁶¹

The court concluded that all of the evidence against Al-Adahi, including his training at Al Farouq, was sufficient to connect him to an enemy force covered by the AUMF. The court even went so far as to suggest that Al-Adahi's training at Al Farouq was sufficient on its own to establish that he was part of al-Qaeda: "Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States...and that Al-Adahi voluntarily affiliated himself with al-Qaida."⁶² The court continued:

The [district] court appeared to rule that an individual must embrace every tenet of al-Qaida before United States forces may detain him.⁶³ There is no such requirement.... When the government shows that an individual received and

executed orders from al-Qaida members in a training camp, that evidence is sufficient (but not necessary) to prove that the individual as affiliated himself with al-Qaida.... Al-Adahi's statements confirm that he received and followed orders while he was at Al Farouq. His attendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that he was part of al-Qaida.⁶⁴

Relying on *Al-Bihani*, the D.C. Circuit stated that if a person "attends an al-Qaida training camp, this constitutes 'overwhelming' evidence that the United States had authority to detain that person."⁶⁵

Thus, the court concluded that even if training in a camp is insufficient on its own to establish a connection to al-Qaeda, it is clearly a criterion upon which detention can be justified under the AUMF. In this case, the court found that Al-Adahi's training at Al Farouq was sufficient to show that he was "part of" or "associated with" al-Qaeda.

For other cases dealing with the trained-in-a-camp criterion, see *Barhoumi v. Obama*, *Al Alwi v. Obama*, and *Al-Bihani v. Obama*.⁶⁶

Stayed at a Guesthouse Associated with an Enemy Force. In *Ali v. Obama*, the D.C. Circuit Court held that Abdul Razak Ali, an Algerian, was "part of" al-Qaeda and lawfully detained under the 2001 AUMF. Ali traveled to Afghanistan after September 11, 2001, to fight against the United States. He was captured in March 2002 by U.S. and Pakistani forces in a guesthouse in Faisalabad, Pakistan, along with al-Qaeda-associated terrorist leader Abu Zubaydah and four other terrorist trainers from a training camp in Afghanistan. The guesthouse contained official al-Qaeda documents, electrical components, and bomb-making parts. Ali had stayed at the guesthouse for about 18 days before being captured.⁶⁷

Ali claimed that he was not part of Abu Zubaydah's force and could not be detained under the AUMF. He "insist[ed], however, that he mistook the Abu Zubaydah facility for a public guesthouse, and that he had nothing to do with the terrorist activity being planned there."⁶⁸ Ali argued that relying on his capture in the guesthouse presumed his guilt by association—or "guilt by guesthouse."

In dismissing Ali's arguments, Judge Brett Kavanaugh of the D.C. Circuit wrote that "[t]he standard of proof for military detention is not the same as the

standard of proof for criminal prosecution, in part because of the different purposes of the proceedings and in part because military detention ends with the end of war.”⁶⁹ The purpose of detention is to detain enemy combatants for the duration of hostilities to keep them off the battlefield. Thus, the government did not need to establish “guilt,” only that it is more likely than not that Ali was “part of” or “associated with” al-Qaeda.

Judge Kavanaugh then proceeded to the central question and dismissed Ali’s argument:

The central fact in this case is that Ali was captured in 2002 at a terrorist guesthouse in Pakistan. This Court has explained [see *Uthman v. Obama*] that a detainee’s presence at an al-Qaeda or associated terrorist guesthouse constitutes “overwhelming” evidence that the detainee was part of the enemy force.⁷⁰

Continuing: “It strains credulity to suggest that Ali spent time in early 2002 in a four-bedroom house in Faisalabad, Pakistan, with Abu Zubaydah and the leaders of Zubaydah’s force while having no idea what the people around him were doing.”⁷¹

Even if Ali’s presence at the guesthouse were not sufficient evidence, however, Judge Kavanaugh pointed to many other factors to show that Ali was “part of” al-Qaeda: Ali stayed at the guesthouse for an extended time; he traveled to Afghanistan after 9/11 and intended to fight the U.S.; the guesthouse contained documents and equipment relating to terrorism; and the others present in the guesthouse were Abu Zubaydah and his senior leaders. The court also cited one of the other inhabitants of the house as saying that “all the people in the house were Al-Qaeda people or ‘jihadis’.”⁷²

Taken together, the court established that Ali’s activities and lengthy stay at a guesthouse inhabited by Abu Zubaydah and other senior al-Qaeda-affiliated leaders were sufficient to meet the preponderance-of-the-evidence standard. Consequently, Ali could be detained under the AUMF as “part of” al-Qaeda.

For other cases dealing with the guesthouse criterion, see *Barhoumi v. Obama*, *Al-Adahi v. Obama*, *Uthman v. Obama*, *Al Alwi v. Obama*, and *Odah v. United States*.⁷³

Possessed a Weapon Supplied by an Enemy Force. In *Hussain v. Obama*, the D.C. Circuit Court held that Abdul al Qader Ahmed Hussain, a Yemeni,

was “part of” al-Qaeda and the Taliban and lawfully detained under the 2001 AUMF. Hussain traveled between Afghanistan and Pakistan in the years leading up to September 11, 2001. In November 2000, he moved to just north of Kabul, Afghanistan, close to the front lines of conflict between the Taliban and the Northern Alliance. Hussain lived with three Taliban guards, who gave him an AK-47 rifle and trained him in its use. After September 11, 2001, Hussain fled from Afghanistan to Pakistan. He was captured in Faisalabad in March 2002.⁷⁴

Hussain, among other arguments, claimed that his possession of a weapon provided by members of the Taliban was not grounds for his detention. He argued that the government had to show he used that weapon to engage in hostilities against the United States. The D.C. Circuit, citing *Awad* and *Al-Bihani*, concluded that this argument demanded more than the AUMF requires.⁷⁵ Further, “We have adopted no categorical rules to determine whether a detainee is ‘part of’ an enemy group. Instead, we look at the facts and circumstances in each case.... We look at each piece of evidence ‘in connection with all the other evidence’ in the record, and not in isolation.”⁷⁶

When considered in light of all the evidence presented in the case, the court argued that, “Evidence that Hussain bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites—and may well compel—the conclusion that he was loyal to those forces. We have repeatedly affirmed the propriety of this common-sense inference.”⁷⁷

The court went on to clarify how the possession-of-a-weapon criterion factored into its decision to dismiss Hussain’s motion:

Mere possession of the weapon—or carrying it around—was not the critical point. The district court’s conclusion that Hussain was loyal to enemy forces turned on the fact that Taliban soldiers gave him an AK-47 while he lived among them near the battle lines. Under our precedent, that alone demonstrates loyalty to a shared cause, even if Hussain never brandished the weapon in combat.⁷⁸

Taken together, the court established that Hussain’s activities and possession of a weapon provided to him by an enemy force constituted grounds for his detention.

For another case dealing with the guesthouse criterion, see *Odah v. United States*.⁷⁹

Other Criteria. Many other habeas cases have continued to expand the scope of the government’s detention authority under the AUMF. These cases have created a body of jurisprudence for detention under the AUMF in which the “relevant indicia and circumstances” can include whether an individual hosted leaders of an enemy force, followed practices associated with enemy forces, recruited or referred aspiring members to the enemy force, traveled on routes traditionally used by the enemy force, swore an oath of allegiance to an enemy force, or lied to interrogators about his identity or activities, among other factors.⁸⁰

As the cases demonstrate, the detention authority in each one depends heavily on the facts and circumstances in evidence when considered in their entirety. This approach has raised some concern that in certain cases, the government may not be willing or able to provide a court with certain sensitive or classified information to meet the evidentiary standard to show that a detainee is “part of” or “associated with” al-Qaeda or the Taliban. By ruling on an expansive range of characteristics that can be used to justify detention, the courts’ approach has alleviated some of these concerns.

However, while the courts have ruled on the scope of characteristics that may be used to show that an individual detainee is “part of” or “associated with” the Taliban, al-Qaeda, or associated forces, all of their rulings have very clearly depended on showing a connection between the detainee and these specific, named groups.

Attenuation of AUMF Jurisprudence in the Detainee Context and Its Application to ISIS

It is vitally important to note that in the detainee context, the courts have not addressed whether the President’s authority under the AUMF extends to detainees who were “part of” or “associated with” ISIS. Nowhere in all of the habeas case law reviewed in this paper do the courts specifically list any associated forces other than those related to the 9/11 attacks, which have been determined to be the Taliban and al-Qaeda. As noted, the case law denying habeas petitions relies heavily on connecting individual detainees to the Taliban or al-Qaeda. Thus, it is unclear whether the President’s authority under

the AUMF to detain an enemy combatant in Guantanamo would be extended to an ISIS fighter.

ISIS was founded in 2004, three years after 9/11, by Abu Musab al-Zarqawi, who pledged his allegiance to Osama bin Laden. Originally, the group was known as al-Qaeda in Iraq and carried out attacks against U.S. forces, civilians, and coalition partners with the goal of pressuring the U.S. and other countries to leave Iraq. ISIS broke away from al-Qaeda leadership in 2013 after a dispute over leadership of the jihad in Syria. It now rejects the leadership of Ayman al-Zawahiri, Osama bin Laden’s successor, who criticized the brutality of ISIS.⁸¹

Thus, in a habeas case involving an ISIS terrorist detained at Guantanamo, the courts must closely analyze whether ISIS could fall under the 2001 AUMF. That is, given the historical connection between ISIS and al-Qaeda, does ISIS fit into the narrow class of targets that fall under the 2001 AUMF?

The Obama Administration argued that the 2001 AUMF authorizes the President to use all necessary and appropriate force in the fight against ISIS. In 2015, Stephen Preston, General Counsel for the Department of Defense, in a speech entitled “The Legal Framework for the United States’ Use of Military Force Since 9/11,” asserted that:

The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. The recent split between ISIL and current al-Qa’ida leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States....⁸²

Preston may be correct, but the courts may nevertheless disagree with him.

While this justification has raised eyebrows in the legal community, especially with respect to how it would hold up in the detainee context, no one with standing to challenge it has done so. If President Trump begins to bring detainees to Guantanamo who were “part of” or “associated with” ISIS, those detainees will use their constitutional right to habeas review established under *Boumediene* to challenge their detention on the grounds that the 2001 AUMF does not extend to ISIS—at least not in the detainee context.

Although the courts have not addressed this question explicitly and have ruled expansively on the scope of the detention authority for individuals connected to the Taliban and al-Qaeda, it is not clear that they would extend that authority to ISIS. In fact, the dissenting opinions in several habeas cases suggest that the courts are beginning to question the attenuation of detention authority jurisprudence.

- In *Ali v. Obama*, the “guest house case,” D.C. Circuit Judge Harry T. Edwards wrote that “Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF or the NDAA. Ali’s principal sin is that he lived in a ‘guest house’ for ‘about 18 days.’”⁸³ Judge Edwards suggests that all of Ali’s connections to Abu Zubaydah are “personal associations” and that such a test extends the prescriptions of the AUMF and 2012 NDAA too far. Further, Judge Edwards raises a question about whether the attenuation of the court’s jurisprudence has gone too far and created a situation in which Guantanamo habeas proceedings are “functionally useless” if detention is authorized for as long as the “war on terror” continues.⁸⁴
- In *Hussain v. Obama*, Judge Edwards wrote a scathing dissent that calls for a rethinking of the Guantanamo detainee cases. “What is a judge to make of this, especially here,” he asks, “where there is not one iota of evidence that Hussain ‘planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such...persons?’”⁸⁵ For Judge Edwards, “the salient point is quite simple: the burden of proof was on the Government to make the case against Hussain by a preponderance of the evidence. In my view, it failed to carry this burden.”⁸⁶ Further, he concludes:

[W]hen I review a record like the one presented in this case, I am disquieted by our jurisprudence. I think we have strained to make sense of the applicable law, apply the applicable standards of review, and adhere to the commands of the Supreme Court. The time has come for the President and Congress to give serious consideration to a different approach for the handling of the Guantanamo detainee cases.⁸⁷

Taken together, the lack of an explicit mention of ISIS as a group covered under the AUMF and the subsequent questions surrounding the applicability of the AUMF to ISIS fighters in the detainee context suggest that the Trump Administration would be on more solid legal ground if it worked with Congress on an ISIS-specific AUMF. If the Trump Administration rushes to bring ISIS fighters to Guantanamo without a stronger legal basis, those detainees might successfully challenge not only their own detention under the AUMF, but also the Obama Administration’s entire legal justification for the authority to use all necessary and appropriate force in the fight against ISIS.

Conclusion

The Obama Administration argued that ISIS is an “associated force” that falls under the AUMF, but this determination has not been challenged in court in the detainee context. Moreover, as evidenced by the approach the courts have taken in their AUMF jurisprudence, it is not clear that the courts will agree. Consequently, the Trump Administration should not attempt to detain ISIS fighters in Guantanamo until it is on stronger legal footing.

The Bush Administration learned the hard way that using Guantanamo Bay as a military detention facility and setting up military commissions without congressional legislation had negative unintended consequences. If President Bush had asked the Congress in October 2001 to authorize the use of the U.S. Naval Station at Guantanamo Bay for the detention of enemy combatants, Congress would certainly have approved such legislation by an overwhelming margin. Much, but perhaps not all, of the controversy surrounding Guantanamo Bay would have been alleviated.

Similarly, had the Bush Administration worked with Congress in 2001 to pass legislation authorizing the use of military commissions against those enemy combatants who committed war crimes, Congress would likely have done so. That would not have guaranteed the absence of litigation stemming from military commissions’ defendants, but it might have avoided a decision like *Hamdan*, which set back military commissions by years.

As Secretary of Defense Robert Gates said years ago, we cannot kill or capture our way out of this war. But military detention of the enemy during wartime is a lawful, traditional means of incapacitating the

enemy to deprive it of additional forces and shorten the war effort.

This war is like no other. It will require all lawful elements of national power to defeat the enemies of the United States. If the Trump Administration makes good on its promise to use Guantanamo Bay as a detention facility for terrorist detainees, including ISIS members, it should study the case law and evaluate the litigation risk of bringing ISIS members to the island detention facility. If Administration officials study the issue, they may well conclude that the litigation risk of an ISIS member's winning his habeas case is not insubstantial.

Given the fact that al-Qaeda and the Taliban also still pose a substantial national security threat to the United States and its partners and that we continue to be engaged in armed conflict with those groups and associated forces, an AUMF that includes ISIS should not disturb the existing legal authorities applicable to al-Qaeda and the Taliban. This can be accomplished legislatively in a number of ways: either a stand-alone AUMF specific to ISIS and associated forces or an AUMF that includes al-Qaeda, the Taliban, ISIS, and associated forces.

Considering the interests at stake, the Trump Administration should support and Congress should consider an AUMF that includes ISIS before bringing any detainees to Guantanamo.

—*Charles D. Stimson is Manager of the National Security Law Program and Senior Legal Fellow in the Center for National Defense, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation. He served as Deputy Assistant Secretary of Defense for Detainee Affairs from 2006–2007. Hugh Danilack is a graduate of Dartmouth College where he was editor of the Dartmouth Law Journal. He will be attending law school in the fall.*

Endnotes

1. It is critically important to note that an AUMF is not a substitute for a comprehensive strategy to confront and defeat an enemy, whether the enemy is a state actor or a non-state actor such as a terrorist organization. It is merely the legislative vehicle by which to authorize the use of U.S. military force. See Charles D. Stimson, *A Framework for an Authorization for Use of Military Force Against ISIS*, HERITAGE FOUNDATION BACKGROUNDER No. 2957 (September 24, 2014), available at <http://www.heritage.org/terrorism/report/framework-authorization-use-military-force-against-isis>.
2. See Marty Lederman, “The Legal Theory Behind the President’s New Military Initiative Against ISIL,” *Just Security*, September 10, 2014, <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>; Jack Goldsmith, “President Obama’s Astonishing War Powers Legacy,” *Lawfare*, September 11, 2014, <http://www.lawfareblog.com/2014/09/president-obamas-astonishing-war-powers-legacy/>; and Steve Vladeck, “ISIL as al Qaeda: Three Reactions,” *Lawfare*, September 13, 2014, <http://www.lawfareblog.com/2014/09/2001-aumf-isil/>.
3. Jennifer K. Elsea & Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CONGRESSIONAL RESEARCH SERVICE, April 18, 2014, available at <https://fas.org/sgp/crs/natsec/RL31133.pdf>. The five wars are the War of 1812 with Great Britain, the War with Mexico in 1846, the War with Spain in 1898, the First World War, and the Second World War. The 11 declarations are as follows: Great Britain, June 18, 1812; Mexico, May 13, 1846; Spain, April 25, 1898; World War I (Germany), April 6, 1917; World War I (Austria-Hungary), December 7, 1917; World War II (Japan), December 8, 1941; World War II (Germany), December 11, 1941; World War II (Italy), December 11, 1941; World War II (Bulgaria), June 5, 1942; World War II (Hungary), June 5, 1942; and World War II (Rumania), June 5, 1942.
4. *Id.*
5. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2074–2075 (May 2005).
6. *Id.* at 2072–2073.
7. *Id.* at 2075.
8. *Id.* at 2076.
9. On September 18, 2001, Congress authorized the President to “Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”
10. Bradley & Goldsmith, *supra* note 5, at 2083.
11. *Id.* at 2082.
12. *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Armed Services Committee*, 113th Cong. (May 16, 2013) (statement of Charles D. Stimson, Manager, National Security Law Program, The Heritage Foundation), available at http://www.armed-services.senate.gov/imo/media/doc/lawofarmedconflict_useofmilitaryforce_2001aumf_hearing_051613.pdf. Despite the fact that the express language of the AUMF does not include the word “detention,” each of the three branches of the federal government, including the executive branch across two Administrations, has recognized that the AUMF necessarily includes the power to detain those subject to the boundaries of the AUMF. As is well known by now, the Supreme Court held in *Hamdi* that “Congress has in fact authorized Hamdi’s detention, through the AUMF.” As the Court explained, citing longstanding, consistent executive practice and the law of war, “detention of individuals [who fought against the United States as part of the Taliban], 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.” Both the Bush and Obama Administrations subsequently relied on the AUMF for the authority to detain members of al-Qaeda, the Taliban, and associated forces. *Id.* at 117–118. “Since 9/11, the United States has detained over 100,000 detainees, a fact not known to most Americans. The vast majority of those—about 75,000—were security internees captured and held in Iraq during that internal non-international armed conflict. Today, we have no detainees—security internees—in Iraq. ¶ Some 25,000 enemy combatants were held in Afghanistan. Today, the United States has no detainees in Afghanistan. ¶ A total of 779 detainees were held by the Joint Task Force at the U.S. Naval Station at Guantanamo Bay, Cuba. Today, there are only 122 detainees from 18 countries held at Guantanamo. There are no American enemy combatants held at Guantanamo, and there never have been.” *Statutory, Policy, and Constitutional Defects of HB15-1114: Hearing Before the State, Veterans, and Military Affairs Committee of the Colorado State Senate* (March 23, 2015) (statement of Charles D. Stimson, Senior Legal Fellow & Manager of the National Security Law Program, The Heritage Foundation), available at <http://www.heritage.org/article/testimony-statutory-policy-and-constitutional-defects-hb15-1114>. As of this writing, following releases and transfers by the Obama Administration, only 41 detainees are held at Guantanamo. *Guantanamo by the Numbers*, MIAMI HERALD, Oct. 25, 2016, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html>.
13. Stimson, *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force*, at 116.
14. *Id.*
15. See Stimson, *supra* note 1. The Obama Administration has argued that, “[b]ased on ISIL’s longstanding relationship with al-Qa’ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with AQ in 2004; and ISIL’s position—supported by some individual members and factions of AQ-aligned groups—that it is the true inheritor of Usama bin Laden’s legacy, the President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between AQ’s senior leadership and ISIL.” *Id.* at 4.

16. The 2001 Authorization for Use of Military Force (AUMF) was used by the Bush and Obama Administrations to justify the wars against al-Qaeda and the Taliban and other groups that have been determined to be sufficiently related to these groups or the 9/11 attacks. As Curtis Bradley and Jack Goldsmith have written, “The President’s authority is at its highest ‘[w]hen the President acts pursuant to an express or implied authorization of Congress.’ The difficult issue is determining what Congress has implicitly authorized.” Bradley & Goldsmith, *supra* note 5, at 2052. The courts have taken up this question with regard to the President’s authority to detain enemy combatants in the war on terrorism and their right to habeas petitions. Through the central cases, the Supreme Court, the Court of Appeals for the D.C. Circuit, and the district courts have determined that detainees in Guantanamo Bay have the constitutional right to a writ of habeas corpus but that a habeas petition may be denied for a narrow class of detainees under the President’s authority to use “all necessary and appropriate force” pursuant to the 2001 AUMF. The courts, however, have not addressed this question with respect to ISIS.
17. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, *available at* <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590006?OpenDocument>.
18. *Id.* and art. 5, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590008?OpenDocument>.
19. *Ex parte Quirin*, 317 U.S. 1, 21–23 (1942). On or about June 13, 1942, eight German soldiers, including Richard Quirin, arrived in New York and Florida in German submarines. They came ashore wearing part or full German uniforms (to ensure that they would be afforded POW status if captured) and carrying a supply of explosives, fuses, and incendiary and timing devices. All eight soldiers had been trained at the same sabotage school, had been given American money, and had received orders from an officer of the German High Command to destroy war industries and war facilities in the United States.
20. *Id.* at 30–33.
21. *Id.* at 40–41.
22. *Johnson v. Eisentrager*, 339 U.S. 763, 766–767 (1950). The German soldiers were acting in the service of German armed forces in China. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a military commission constituted by our commanding general at Nanking. They were charged with engaging in military activity in Asia after the unconditional surrender of the German High Command on May 8, 1945. After conviction, they were repatriated to Germany to serve their sentences in United States Army custody.
23. *Id.* at 777–778.
24. *Id.* at 771–772.
25. As Justice Jackson wrote, these other factors include whether the individual in question is an enemy alien, has never been or resided in the United States, was captured outside of our territory and there held in military custody as a prisoner of war, was tried and convicted by a military commission sitting outside the United States, committed offenses against the laws of war outside the United States, and was imprisoned at all times outside the United States. *Id.* at 778.
26. *Id.* at 775.
27. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).
28. *Id.* at 518.
29. *Rasul v. Bush*, 542 U.S. 446 (2004).
30. 66 F. Reg. 57833.
31. *Hamdan v. Rumsfeld*, 548 U.S. 557, 569–570 (2006). Hamdan allegedly served as Osama bin Laden’s bodyguard and personal driver.
32. *Id.*
33. *Id.*
34. *Id.* at 563.
35. *Boumediene v. Bush*, 553 U.S. 723, 729 (2008).
36. 10 U.S.C. § 948a (2006).
37. 42 U.S.C. § 2000dd (2005).
38. It is worth noting that the courts have considered whether *Boumediene’s* reasoning granting the constitutional right to habeas petitions extends beyond Guantanamo Bay. In *Al-Maqaleh v. Gates*, the D.C. Circuit Court applied *Boumediene’s* three-factor test to the habeas petitions of three detainees at Bagram Air Force base. Detainee Fadi Al-Maqaleh, a Yemeni citizen captured in Afghanistan, was detained at Bagram. He filed a habeas petition, but the D.C. Circuit held that the district court did not have jurisdiction to hear the case because the federal courts’ habeas authority does not extend to Bagram Air Force Base. In *Boumediene*, the Supreme Court established a three-factor test to determine whether detainees at Guantanamo had a right to habeas petitions: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Boumediene*, 553 U.S. at 766. The Court held in *Al-Maqaleh* that the second and third parts of this test worked against granting a habeas petition and thus that “under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.” It seems from its decisions in *Boumediene* and *Al-*

- Maqaleh* that the Court has taken a highly functional rather than formal approach to determining how far the federal courts' habeas authority reaches as applied extraterritorially to non-citizens. *Al-Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).
39. *Ali v. Obama*, 736 F.3d 542, 546-7 (D.C. Cir. 2013).
 40. *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010).
 41. The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (December 2016), 29-30.
 42. Obviously, the courts heard statutory habeas cases prior to *Boumediene* and developed jurisprudence for the detainee context. However, after the 2008 ruling in *Boumediene*, all of the habeas cases have been constitutional habeas cases. Since *Boumediene* now governs habeas petitions from detainees at Guantanamo, the cases reviewed in this section include only district and circuit court cases decided under that ruling.
 43. *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010).
 44. *Id.* at 9.
 45. *Id.* at 11.
 46. *Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010); *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013).
 47. *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010).
 48. *Id.* at 871.
 49. *Id.* at 873.
 50. *Id.* at 873.
 51. *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010).
 52. Abu Zubaydah is a high-level al-Qaeda lieutenant. The 9/11 Commission Report states: "On November 30, 1999, Jordanian intelligence intercepted a telephone call between Abu Zubaydah, a longtime ally of Bin Laden, and Khadr Abu Hoshar, a Palestinian extremist. Abu Zubaydah said, 'The time for training is over.'" Abu Zubaydah ran a terrorism and guerilla warfare training camp called Khaldan in Afghanistan. He facilitated the travel and training of jihadists, both at Khaldan and elsewhere. Abu Zubaydah was also responsible for planning and approving attacks in Jordan and Israel. In spring 2001, the reports on terrorist threats and planned attacks increased to their highest levels since the millennium alerts in 1999. In late March, National Security Adviser Condoleezza Rice was briefed on Abu Zubaydah and the CIA efforts to locate him. Abu Zubaydah was a major part of the millennium plots, and there were repeated warnings that he was planning an operation in Israel, Saudi Arabia, or India. The reports about Zubaydah over the succeeding months suggested that Abu Zubaydah was planning a series of large-scale terrorist attacks on Israeli and American targets. He was arrested in Pakistan in March 2002. The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 174-175, 255-256 (1st ed. 2004).
 53. *Barhoumi v. Obama*, 609 F.3d 416, 416-419 (D.C. Cir. 2010).
 54. *Id.* at 420.
 55. Khaldan was one of Afghanistan's oldest military training camps. While there is some debate over how Khaldan was affiliated with al-Qaeda, it is clear that many of those connected with al-Qaeda trained at Khaldan or directed those seeking to engage in terrorism to train there. The 9/11 Commission Report states: "Khaldan and Derunta were terrorist training camps in Afghanistan controlled by Abu Zubaydah. While the camps were not al Qaeda facilities, Abu Zubaydah had an agreement with Bin Laden to conduct reciprocal recruiting efforts whereby promising trainees at the camps could be invited to join al Qaeda." The National Commission on Terrorist Attacks Upon the United States, *supra* note 52, at 175 and 500 (footnote 5).
 56. *Barhoumi*, 609 F.3d at 423.
 57. *Id.* at 427.
 58. *Awad*, 608 F.3d at 1.
 59. *Al-Adahi*, 613 F.3d at 1102-1103.
 60. *Id.* at 1103.
 61. *Id.* at 1106.
 62. *Id.* at 1108.
 63. The district court concluded that Al-Adahi's attendance at Al Farouq was "not affirmative evidence that Al-Adahi embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities." *Id.* at 1108.
 64. *Id.* at 1109.
 65. *Id.* at 1109.
 66. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).
 67. *Ali*, 736 F.3d at 542-543.
 68. *Id.* at 544.

69. *Id.* at 545.
70. *Id.* at 545.
71. *Id.* at 547.
72. *Id.* at 546-547.
73. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010).
74. *Hussain*, 718 F.3d at 966-967.
75. *Id.* at 967-968.
76. *Id.* at 968.
77. *Id.* at 968-969.
78. *Id.* at 969 (footnote 5).
79. *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010).
80. The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (December 2016) at 29-30.
81. See Stimson, *supra* note 1, at 2-3.
82. Stephen W. Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11: As Delivered by the General Counsel of the Department of Defense at the Annual Meeting of the American Society of International Law*, April 10, 2015, available at <https://www.defense.gov/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=2575&Article=606662>.
83. *Ali*, 736 F.3d at 553 (Edwards, J., concurring).
84. *Id.* at 553-554 (Edwards, J., concurring).
85. *Hussain*, 718 F.3d at 973 (Edwards, J., concurring).
86. *Id.* (Edwards, J., concurring).
87. *Id.*