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No. 10-5292

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

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**ABDULRAHMAN ABDOU ABOU  
AL GHAITH SULEIMAN,**  
*Petitioner-Appellant,*

v.

**BARACK H. OBAMA, ET AL.**  
*Respondents-Appellees.*

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On Appeal from the United States District Court  
for the District of Columbia, Civil Action No. 05-2386,  
Hon. Reggie B. Walton

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**Reply Brief of Petitioner-Appellant Abdulrahman  
Abdou Abou Al Ghaith Suleiman**

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### Glossary

App.	Joint Appendix
AUMF	Authorization for Use of Military Force
CSRT	Combatant Status Review Tribunal
MCA	Military Commissions Act
Pet. Br.	Petitioner's Opening Brief
Resp. Br.	Respondents' Response Brief
Supp.App.	Supplemental Appendix

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### Summary of the Argument

I. Under the AUMF the government was required to prove both that Suleiman was a member of the Taliban and that he engaged in, or purposefully and materially supported, hostilities against the United States or its coalition partners; the government did not meet this burden.

II. Assuming *arguendo* that the Court decides that the AUMF authorizes the government to imprison Suleiman based solely on proof that he was a part of the Taliban, the AUMF violates the Due Process Clause of the Fifth Amendment because: (1) that test is void for vagueness; and (2) Suleiman may not be imprisoned solely on the basis of Taliban membership.

III. The *Ex Post Facto* Clause prohibits reliance on evidence as to events preceding the effective date of the AUMF.

IV. Assuming *arguendo* that the AUMF authorizes the government to imprison Suleiman on the basis that he was part of the Taliban, the government did not meet its burden of proof.

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### Argument

- I. The writ of habeas corpus should have been granted because the government did not prove, as required by the AUMF, that Suleiman was both a member of the Taliban and that he participated in armed hostilities against the United States.**
- A. Suleiman has not forfeited his right to present his statutory construction analysis of the AUMF.**

The government argues that this Court should not rule on our statutory construction analysis of the AUMF because we failed to present this issue to Judge Walton. (Resp. Br. 52.)<sup>1</sup> The government has not cited a single case in which a reviewing court determined that a purely legal statutory construction argument was forfeited by failure to raise the issue in the court below.

We are presenting a legal issue, unrelated to the introduction of evidence at the trial court level. No prejudice will result to the government in initially dealing with this issue in this Court. Many cases, including several decided by this Court, have permitted statutory construction arguments to be presented for the first time on appeal, provided the failure to present the argument to the trial court does not deprive the opposing litigant of the opportunity to present relevant evidence.<sup>2</sup>

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<sup>1</sup> In the District Court, we contended that the applicable test was that announced by Judge Walton in *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70 (D.D.C. 2009), that the government's detention authority did not extend to persons "outside the military command structure of an enemy organization." (App.3287-88.)

<sup>2</sup> See, e.g., *White v. United States Dept. of Army*, 720 F.2d 209, 211 (D.C. Cir. 1983); *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir. 1982); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

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Indeed, in one of the cases cited by the government, *Hormel v. Helvering*, 312 U.S. 552, 554 (1941), the Court held it was proper to consider a newly raised argument on appeal.

We meet the applicable test. We contend that under the AUMF, the government was required to prove both that Suleiman engaged in, or purposefully and materially supported, hostilities against the United States or its coalition partners. This requires no factual development; it is a pure matter of statutory interpretation.

- B. In *Al-Bihani* and later cases, this Court was dealing with persons alleged to be members of al Qaeda, or both al Qaeda and the Taliban, whereas this case presents a question of first impression relating to a person that the District Court found only to be a Taliban member.**

We have submitted a question of first impression to this Court: whether the AUMF authorizes imprisonment of an alleged Taliban member on the basis that he was shown to be part of the Taliban, without it also being established that he engaged in hostilities against the United States or its allies.

This is the first time this question has been presented here. One other case has come before this Court relating to a detainee whose continued imprisonment was based solely on being part of the Taliban, *Warafi v. Obama*, No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011), but this issue was not raised.

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In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), this Court forged the test for holding persons in custody under the AUMF. That case involved a man alleged to be a member of both al Qaeda and the Taliban, and the standard this Court applied did not distinguish between the two. The Court held – we respectfully submit mistakenly – that persons were subject to being charged before military commissions on the basis of Taliban membership, without proof that they engaged in hostilities against the United States or its allies. 590 F.3d at 872. We agree with the Court that the 2006 and 2009 versions of the MCA are relevant in construing the AUMF, and for that reason we submit the following chronology:

The 2006 MCA used the term “unlawful enemy combatant” to describe those who were subject to military commission trials, and divided this term into three separate categories: “a person who is part of the Taliban or al Qaeda, or associated forces,” persons who “engaged in hostilities against the United States or its [allies],” and persons who “purposefully and materially supported hostilities against the United States or its [allies].” 2006 MCA, sec. 3, § 948a(1).

The 2009 MCA was a part of the 2009 National Defense Authorization Act. The term “unlawful enemy combatant” was replaced by the term “unprivileged enemy belligerent,” and the specific references to both al Qaeda and the Taliban were originally removed. 2009 MCA, sec. 1802, § 948a (7). Senator Jeff Sessions introduced an amendment to add a reference to al Qaeda into the Act as Subsection

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(7)(C), defining a separate category of persons who could be charged, as it had been in the 2006 MCA. 155 Cong. Rec. S8029 (daily ed. Jul. 23, 2009). His amendment did not include membership in the Taliban. Speaking on the Senate floor, Senator Sessions explained why membership in al Qaeda should be retained as a separate and distinct basis for being charged:

“I ask my colleagues, in the middle of a war against al-Qaida, is it wise to remove al-Qaida from the definition of...the new form ‘unprivileged enemy belligerent’?...Congress should be crystal clear that membership in al-Qaida qualifies a detainee for unprivileged enemy belligerent status....I urge my colleagues to...retain this language that was initially omitted, keeping al-Qaida by name as a group which we are at war against.” 155 Cong Rec. S8085-86 (daily ed. Jul. 24, 2009).

The 2009 MCA as enacted included Senator Sessions’s amended reference to al Qaeda. Thus, under the 2009 MCA, those who could be charged by military commissions who were not part of al Qaeda – including those who were alleged to be members of the Taliban – had to be shown to have either “engaged in hostilities against the United States or its coalition partners” or to have “purposefully and materially supported hostilities against the United States or its coalition partners.” 2009 MCA, sec. 1802, §§ 948a (7)(A) - (B).

We pointed out in our opening brief (pp. 36-37 n.21) that the effect of the change in the definitions in the 2009 MCA repealed those in the 2006 MCA, and

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that members of this Court in the *Al-Bihani* opinions recognized this repealing effect. (Judge Brown, 590 F.3d at 875, and Judge Kavanaugh, 619 F.3d at 63.)<sup>3</sup>

The reasons for Congress's distinguishing between al Qaeda and the Taliban were not explained, but they may be inferred from the historical record applicable to the two organizations. Al Qaeda is a purely terrorist organization, with no lawful purpose. The same may not be said of the Taliban. From 1996 to 2001, the Taliban ruled the government of Afghanistan, and was officially recognized by several countries. Although the United States did not formally recognize the Taliban government, our government maintained relations with the Taliban government.<sup>4</sup>

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<sup>3</sup> In addition to the cases cited in our opening brief regarding repeal by implication, see also *United States v. Lovely*, 319 F.2d 673, 679-80 (4th Cir. 1963); *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822-23 (6th Cir. 1953).

<sup>4</sup> Dr. Kenneth Katzman, a specialist in Middle East affairs for the Congressional Research Service, authored a report for Congress in which he reported: during the Clinton Administration, an Assistant Secretary of State and other officials "met periodically with Taliban officials"; in April 1998 our United Nations Ambassador "met with Taliban officials and the opposition during his visit to Afghanistan"; "the Bush Administration continued the previous Administration's policy of maintaining a dialogue with the Taliban"; "In March 2001, Bush Administration officials received a Taliban envoy ...to discuss bilateral issues." See Kenneth Katzman, U.S. Congressional Research Service, RL30588, *Afghanistan: Current Issues and U.S. Policy Concerns* (June 23, 2002), at 18. Katzman also notes that three countries – including staunch U.S. ally Saudi Arabia – officially recognized the Taliban. *Id.* at 17. Journalist Steve Coll describes the many meetings and communications that took place between our United Nations Ambassador and members of our State Department, and members of the Taliban regime. Steve Coll, *Ghost Wars*, 343, 383-86, 429-30 (Harper & Row 2004).

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Therefore, applying the test for indefinite detention to members of the Taliban, without requiring that they engaged in hostilities toward our government or its allies, would have the unintended effect of sweeping in the many hundreds if not thousands of Afghani citizens who were officials or employees of the Taliban government or organization, but innocent of any act or hostility toward our government or its allies. And those who supported the Taliban would include members of our government who had relations with Taliban officials. These results,<sup>5</sup> which Congress undoubtedly did not contemplate or intend in passing the AUMF, may be avoided by requiring the government to establish that those like Suleiman, branded as members of the Taliban, must be shown to have engaged in hostilities against the United States or its allies, as required by Sections (7)(A) and (B) of the 2009 MCA.

**C. There was no proof or finding, as required by the AUMF, that Suleiman, as an alleged Taliban member, engaged in or supported hostilities against the United States or its coalition partners.**

If, as we contend, the authority of the government to hold Suleiman must be supported by proof of actual engagement in hostilities against the United States coalition forces, then his petition should be granted. The government did not

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<sup>5</sup> These are not fanciful speculations. Compare the discussion of the application of the Florida statute in *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961): "The very absurdities of these possibilities brings into focus the extraordinary ambiguity of the statutory language."

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prove, and Judge Walton did not find, that Suleiman engaged in or supported hostilities against the United States or its coalition partners.

As a last resort, the government claims that Suleiman is detainable apart from the AUMF (Resp. Br. 58-59), without specifying the authority to which they refer. This argument is irrelevant, because this Court is called upon only to determine whether Suleiman's imprisonment is justified under the AUMF.

**II. The District Court's interpretation and application of the AUMF violated Suleiman's rights under the Fifth Amendment Due Process Clause.**

**A. Suleiman has not forfeited his right to have this Court rule on the Due Process Clause issues.**

The government's initial argument is that our Due Process claims have been forfeited because they were not made in the District Court. (Resp. Br. 52.) In *United States v. LaGuardia*, 902 F.2d 1010, 1013 (1st Cir. 1990), the First Circuit Court of Appeals said:

“[I]f the defendants' constitutional claim has merit, it would be a rank miscarriage of justice to allow their sentences to stand. Furthermore, the point can be resolved with certitude on the existing record. . . .”

The same situation is presented here. Our two due process challenges to the government's interpretation of the AUMF are grounded on legal principles. No further factual development is needed; the issues are ripe for decision by this Court. This Court and many other courts of appeal have ruled on newly raised constitutional challenges to statutes when the record has been fully developed in

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the District Court.<sup>6</sup> The cases relied upon by the government (Resp. Br. 52) are not on point.<sup>7</sup>

**B. Suleiman has standing to invoke rights under the Due Process Clause.**

The government challenges Suleiman's standing to raise due process issues before this Court based upon *dicta* from Judge Randolph's opinion in *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the

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<sup>6</sup> See, e.g., *United States v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991) (statute unconstitutionally vague); *United States v. Gilbert*, 813 F.2d 1523, 1528-29 (9th Cir. 1987), *cert. denied*, 484 U.S. 860 (1987) (First Amendment, vagueness, and overbread as applied); *United States v. Easter*, 981 F.2d 1549, 1557 (10th Cir. 1992), *cert. denied* 508 U.S. 953 (1993) (void for vagueness); *United States v. Kashiwabara*, No. 92-10358, 1993 U.S. App. LEXIS 11461, at \*2 (9th Cir. 1993) (same); *United States v. Jones*, 527 F.2d 817, 819 (D.C. Cir. 1975) (Equal Protection clause); *In re Howell*, 731 F.2d 624, 626-27 (9th Cir. 1984) (government permitted to raise new constitutional argument on appeal because "the new issue is purely legal, and the record pertinent to resolution of this issue can be developed no further.")

<sup>7</sup> In *Trout v. Secretary of the Navy*, a class action, the appellant argued it was entitled to a reduction of a refund ordered to be paid to the Navy. 540 F.3d 442, 448 (D.C. Cir. 2008). The Court of Appeals declined to consider the argument because it had not been raised in the District Court. *Id.* *United States v. Johnson* involved hearsay admitted during the government's rebuttal case. 802 F.2d 1459, 1456 (D.C. Cir. 1986). The Court of Appeals held the objection was waived because no objection was made at trial, and it "was an error harmless to appellant." *Id.* In *Gonzales-Vera v. Townley*, this Court declined to consider two technical, procedural arguments – that the Court's interpretation of a statute involving the Witness Security Program presented "two avoidable constitutional concerns" – because "no 'plain miscarriage of justice' will result from our declining to consider these arguments." 595 F.3d 379, 384 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 337 (2010).

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United States.” (Resp. Br. 53.) In a concurring opinion, Judge Rogers took issue with that statement:

“However, in *Boumediene* [*v. Bush*, 553 U.S. 723], the Supreme Court rejected this territorial rationale as to Guantanamo, holding that detainees who were brought involuntarily were entitled under the Constitution to seek habeas relief because ‘[in] every practical sense Guantanamo is not abroad; it is within the constant jurisdiction [and ‘plenary control’] of the United States,’ [citing 553 U.S. at 769].” 555 F.3d at 1038.

In response, Judge Randolph asserted that the Supreme Court in *Boumediene* “specifically limited its holding to the Suspension Clause.” 555 F.3d at 1032.

We agree with Judge Rogers that Judge Randolph misread *Boumediene*, which is not limited to the Suspension Clause. The opinion specifically states:

“Nothing in *Eisentrager* [339 U.S. 763] says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus . . . . A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting [the various cases]: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” 553 U.S. 723, 764 (emphasis added).

**C. Judge Walton’s ruling that Suleiman was subject to imprisonment solely on the basis that he was “part of” the Taliban violated Suleiman’s rights under the Due Process Clause.**

The government does not attempt to challenge or distinguish the cases or legal principles of due process cited in our opening brief. (Pet. Br. 34-35.)

Instead, the government offers a pair of bald assertions:

The government argues that the void for vagueness principle does not apply because the AUMF “is not a penal statute, and it does not define criminal

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conduct”; it is not punitive because its purpose is not to shape behavior, but “to prevent [captured individuals] from returning to the field of battle.” (Resp. Br. 54.) We submit three responses: First, Suleiman was never on the battlefield, hence he could not return. Second, the AUMF is obviously punitive, as discussed in Part IB of our opening brief, and Part IIIC below. It belies reality to say Suleiman has not been punished; for the past nine-plus years he has been held in a small cell, under “lockdown” prison conditions. Third, courts have consistently held that void-for-vagueness challenges may be made to non-criminal statutes.<sup>8</sup>

In *Scales v. United States*, 367 U.S. 203 (1961), the Court, in order to avoid a void-for-vagueness violation, *id.* at 223-24, construed the federal Smith Act to apply to “only ‘active’ members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, *unaccompanied by any significant action in its support or any commitment to undertake such action,*” *id.* at 228 (emphasis added). In *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966), the Court expanded upon *Scales*: “A law which applies to membership without the ‘specific intent’ to further the illegal aims of the

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<sup>8</sup> *Small v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925) (act regulating prices); *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 287 (1961) (state employment qualification); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (payment of costs after acquittal).

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organization infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association’ which has no place here . . . . Such a law cannot stand.”

The government’s second point is that the AUMF is not void for vagueness because it applies to someone who, like Suleiman, was part of the Taliban. (Resp. Br. 55.) We have shown in Part IB above that the Taliban in 2001 controlled the government of Afghanistan; hence Taliban membership encompasses every official and perhaps lower level governmental employees, and others who were “part of” or supported the government, but who had nothing to do with the conflict either before or after the United States entered the fray in November 2001.

Because of these violations of the Due Process Clause, Judge Walton’s denial of the writ on the basis that Suleiman was a part of the Taliban should be reversed.

**III. The *Ex Post Facto* Clause prohibits the Court from relying on evidence as to events preceding the effective date of the AUMF – September 18, 2001.**

**A. Suleiman has not forfeited his right to have this Court rule on the *ex post facto* issue.**

The government’s initial argument is that the constitutional *ex post facto* claim has been forfeited because it was not made in the District Court. (Resp. Br. 52.) Our response is the same as that made in Parts IA and IIA above - this is an argument that did not call for introduction of evidence and is ripe for ruling by this

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Court. In *Milhouse v. Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976), this Court adopted the sound policy considerations discussed in the cases cited above:

“This [*Ex Post Facto* Clause] claim was not presented to the District Court. The issue is one of law, however, which does not require further factual development. Hence, despite the failure of appellants to raise the issue before the District Court, we will address it on its merits.”

The *Milhouse* Court cited *Hormel v. Helvering* in which the Supreme Court said:

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy.” 312 U.S. 552, 557 (1941).

**B. Suleiman is entitled to invoke rights under the *Ex Post Facto* Clause.**

The government has not argued that Suleiman lacks standing to invoke rights under the *Ex Post Facto* Clause, but should the Court consider the standing issue *sua sponte*, our response is contained in Part IA of our opening brief, and in Part IIB above, relating to the Due Process Clause.

**C. Judge Walton violated Suleiman’s rights under the *Ex Post Facto* Clause by relying on events that preceded September 18, 2001.**

The government’s first argument is that the *Ex Post Facto* Clause does not apply because it relates solely to punitive laws, and the AUMF is not punitive. (Resp. Br. 55-56.) In addition to the discussion on this same subject in Part IIC above, we call the Court’s attention to Chief Justice John Marshall’s definition of

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an *ex post facto* law - one “which renders an act punishable in a manner in which it was not punishable when it was committed.” *Fletcher v. Peck*, 10 U.S. 87, 138 (1810). In order to qualify as a retroactive punishment of the kind proscribed by the *Ex Post Facto* Clause, a criminal penalty need not be involved. Thus, in *Ex Parte Garland*, 71 U.S. 333 (1866), the Court held unconstitutional a statute that prohibited a person from being admitted to the practice of law based upon conduct engaged in prior to the law’s enactment. Suleiman has been held in a United States prison for over nine years, and the government claims he may continue to be held for the rest of his life. Using any rational definition of the word, it is difficult to understand how this is not “punishment.”<sup>9</sup>

The government cites the dicta in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), regarding the right of nations to hold prisoners of war, not as a punishment, but to prevent them from returning to battle. (Resp. Br. 54.) This is irrelevant here. Prior to September 2001, the United States was not involved in the fighting in Afghanistan (the Taliban’s opponent was the Northern Alliance), and the AUMF was not yet part of our laws. Suleiman is being held under the authority of the AUMF, solely on the basis of his being part of the Taliban, based in large measure

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<sup>9</sup> In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-70 (1963), the Court held that a law that divested citizenship rights was punitive. In so doing the Court articulated a seven-factor test – based on Supreme Court precedent – for determining whether a statute is punitive. Suleiman’s detention clearly meets a majority of these factors.

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on evidence preceding the enactment of the AUMF, without any showing that he engaged in hostilities against the United States or its allies. Other laws of war are not involved.

The government next compares the statute involved in *Kansas v. Hendricks*, 521 U.S. 346 (1977) (Resp. Br. 56 n.30), to show that the AUMF is not punitive, but Hendricks' situation is not comparable to Suleiman's. In *Hendricks*, the statute authorized civil commitment of persons judicially found beyond a reasonable doubt to be dangerously mentally ill and a continuing danger to the public. Hendricks was entitled to appear with a lawyer and cross-examine witnesses and to a new judicial hearing every year; at any other time he could file a petition for release; and he was entitled to immediate release if adjudged safe to be at large. 521 U.S. at 353-54, 363-64. The Supreme Court held the statute did not have retroactive effect and did not impose a punishment of the kind contemplated by the *Ex Post Facto* Clause. 521 U.S. at 370-71.

The government's second argument (Resp. Br. 56-57) is that the *Ex Post Facto* Clause was not violated because the evidence supports a finding that Suleiman was a part of the Taliban based on his conduct *after* the AUMF took effect. This is the approach taken in the cases cited in their brief.<sup>10</sup> Accordingly,

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<sup>10</sup> *United States v. Monaco*, 194 F.3d 381, 386-87 (2d Cir. 1999), *United States v. Moore*, 27 F.3d 969, 975-76 (4th Cir. 1994); *United States v. Smith*, 464 F.2d 1129, 1132-36 (2d Cir. 1972).

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in Part IVC below we show that the evidence of Suleiman's post-September 18, 2001 conduct is insufficient to warrant holding him, regardless of this Court's ruling as to whether being a "part of" the Taliban alone warrants detention under the AUMF.

**IV. Assuming *arguendo* that the "part of the Taliban" test governs, the government did not meet its burden of proof.**

**A. Introduction.**

The factual record consists almost entirely of two statements Suleiman made to government investigators, his statements before the CSRT, and his testimony at the hearing in the District Court. The factual differences between the parties relate to the interpretations to be placed upon what Suleiman is reported to have said, and as to whether Judge Walton was permitted to make factual assumptions based on his disbelief of certain parts of Suleiman's statements and testimony, without evidence to support those assumptions.

We were at a severe disadvantage in the habeas hearing, because Judge Walton denied our prehearing motion to require the government to authenticate its documentary hearsay evidence.<sup>11</sup> We could not question the government's

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<sup>11</sup> Prior to trial, Judge Walton denied our motions (i) to require the government to authenticate the identity and reliability of their documents, as required by Fed. R. Evid. 901 and *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) and (ii) to call a government lawyer as a witness to testify regarding the government's efforts to locate Suleiman's Yemen passport and airline records to substantiate travel in March 2001 and other significant matters. (App.556).

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witnesses because there were none. The government was not required to justify its failure to call the authors of the two reports which Judge Walton held were sufficiently authenticated by other hearsay. As a result, we were confronted with papers and arguments based on papers. And unlike the CSRT hearing – which was recorded, thus enabling us to prepare a corrected transcript<sup>12</sup> – no recordings were made of the interviews. We therefore had no way of testing the accuracy and completeness of the translators' interpretations of Suleiman's responses, or of the interviewers' recording of statements attributed to Suleiman, or whether in several instances discussed below the interviewers injected their own observations as though Suleiman made the statements, similar to several words interjected parenthetically into the CSRT transcript.

**B. Comments on the government's statement of facts.**

Before turning to our discussion of the sufficiency of the evidence, we wish to illustrate the limitations we labored under in the hearing below, and call attention to a number of instances in which the government has taken liberties with the record and otherwise distorted the facts presented in the District Court.

*1. The date Suleiman traveled to Pakistan and Afghanistan.* At page 5 of the government's brief, it is stated that "the date is disputed" as to when Suleiman

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<sup>12</sup> The Supplemental Appendix, the admissibility of which this Court has not yet ruled on, illustrates the lack of accuracy on several significant matters in the government's transcript of the CSRT proceedings, involving unwarranted attributions, misinterpretations, and complete omissions of questions and answers.

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met with Khulud; this is wrong. While the exact calendar dates were not proven, the only evidence in the record establishes that Suleiman met with Khulud – and traveled to Pakistan – in early 2001. Thus, during the 2004 CSRT hearing, the second charge read to Suleiman was, “3(a)1 The Detainee traveled from Yemen to Afghanistan in March, 2001,” to which Suleiman responded, “Correct.” (App.2153.) Our opening brief gives other examples of our proof – and the government’s allegations – that Suleiman left Yemen in March 2001. (*See* Pet. Br. 9, 55.)

2. *Suleiman’s motive for going to Afghanistan.* Judge Walton made a “factual” finding that Suleiman’s “motive for traveling to Afghanistan was due, at least in part, to his desire to be a ‘part of’ the Taliban.” (App.397.) We discussed this in our opening brief at pages 41 to 44. Suleiman’s statements and testimony are consistent: he was not aware that Khulud was affiliated with or recruiting fighters for the Taliban, and nothing was said by Khulud about joining or fighting with the Taliban.

The government has distorted the evidence to support Judge Walton’s assertion. Referring to Suleiman’s meetings with ██████ in a mosque in Taiz, Yemen, they state: “Sulaiman, believing that ██████ was associated with the Taliban, accepted the offer.” (Resp. Br. 6.) Similarly, at page 37 they state, “Sulaiman admitted to government interrogators that he believed that ██████ was

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associated with the Taliban. JA 835.” These are both misstatements of what Suleiman told the investigators, and contradict his testimony at the CSRT hearing. In the 2002 interview to which the government lawyers refer (App.835), the investigator wrote: “Sulayman *believes* [REDACTED] was associated with the Taliban based solely on the offer [he] made” (emphasis added). Thus, Suleiman used the present tense, not the past tense (“believed”) the government attributes to him. The same is true with regard to Suleiman’s 2004 statement (App.848), in which he stated that when they spoke in Taiz prior to his departure for Pakistan, he did not believe Khulud was affiliated with the Taliban, but that in hindsight – in August 2004 – he “*has* his suspicions” about Khulud’s relation to the Taliban (emphasis added). At the hearing, Suleiman testified that he was aware the Taliban controlled the Afghani government and that Khulud said Suleiman would be able to obtain a house from the Taliban government. There was no talk between the two about an armed conflict, or about Suleiman being expected to join the Taliban, take military training, or engage in fighting. (App.3084-87,3143.) No evidence was introduced to the contrary.

3. *The description of the “waiting point.”* Citing the August 2004 interview (App.849), the government argues that Suleiman described the so-called “waiting point” he visited north of Kabul “as a staging area for fighters to make final preparations before going into battle.” (Resp. Br. 9.) We believe the sentence

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describing the purpose of the “waiting points” was inserted by the interviewer; the language (“staging area”) is that of military personnel, not a youth from Yemen. But even if said by Suleiman, it is not evidence that he joined, fought for, or became a part of the Taliban.

4. *Suleiman as part of the Taliban.* The government asserts, “Ample record evidence supports the determination that [Suleiman] was part of the Taliban forces when he was captured.” (Resp. Br. 30.) This too is incorrect. We demonstrate in parts C and D below that the record is devoid of evidence that Suleiman joined the Taliban, was ever part of a Taliban “force,” or otherwise became associated with the Taliban. When Suleiman was taken into custody in Pakistan, he and various strangers were fleeing for their lives from a dangerous, war-torn country.

5. *References to matters irrelevant to Judge Walton’s opinion.* The government discusses matters that were not relied upon by Judge Walton in deciding this case. (Resp. Br. 10 n.9, 12-19.) In order to avoid remand, we referred to some of these items in the addenda to our opening brief. Notably, the government’s references contain no refutation of the merits of our addenda discussion.

6. *Omission of uncontradicted evidence.* A flaw in both Judge Walton’s opinion and the government’s presentation to this Court is the omission of significant, undisputed evidence introduced by Suleiman. For example, when

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Khulud and Suleiman met in Kabul, Afghanistan, Khulud first disclosed to Suleiman that he was expected to fight with the Taliban; Suleiman immediately and vigorously objected, they argued, then they parted and had no further contact. (Pet. Br. 10-11, 41-44.) There is nothing in Judge Walton's opinion concerning this undisputed evidence, and the government did not call Khulud or explain his unavailability. Other examples of omitted evidence, and lack of evidence to support findings and conclusions, are contained in our opening brief. (See Pet. Br. 15-28, 39-51.)

7. *"Findings of fact" based upon disbelief.* The government repeats the errors Judge Walton committed by relying on disbelief in Suleiman's testimony as a basis for inferring the existence of contrary facts. Disbelieved testimony may be disregarded, but disbelief may not be bootstrapped into "proof" that the contrary is established, as the cases cited in our opening brief hold. (Pet. Br. 40 n.24.) Examples of Judge Walton's violations of this principle relate to his findings regarding: (1) Suleiman's motives for traveling to Afghanistan (App.396-97); (2) Suleiman earning the trust of Taliban personnel and providing "some form or assistance" to them in exchange for room and board (App.401-02); and (3) the persons who gave Suleiman weapons likely being Taliban members (App.407 n.20).

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We recognize that circumstantial evidence may be used as a basis for drawing conclusions, and that false exculpatory statements may give rise to adverse inferences of fact. But these are shorthand descriptions of concepts that must be applied in light of the evidence in each case. These concepts do not justify speculative “findings” or the extreme stacking of inferences upon inferences. Inferences may not be speculative, or based upon guesswork or assumptions.<sup>13</sup> “Circumstantial” findings must be logical, rational and reasonable, and here – in light of the government’s burden of proof – more likely than not to be correct. Similarly, the false exculpatory rule is limited in use.<sup>14</sup>

Here, there was absolutely no reliable evidence that any of Suleiman’s testimony was false, or evidence to warrant the assumptions of “fact” in which Judge Walton engaged. It was pure speculation, wrapped in claims of “common

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<sup>13</sup> *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982) (“an inference is not reasonable if it is ‘only a guess or a possibility,’ for such an inference is not based on the evidence but is pure conjecture and speculation”); *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005) (“the chance of error or speculation increases in proportion to the width of the gap between underlying fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based upon the preceding one.”); *Fenner v. GMC*, 657 F.2d 647, 650-51 (5th Cir. 1981) (“[a]n inference may be unreasonable if it is ‘at war with uncontradicted or unimpeached facts’”).

<sup>14</sup> “[F]alsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant’s innocence as it is to the Government’s theory of guilt.” *United States v. Lorenzo*, 534 F.3d 153, 161 (2d Cir. 2008), citing *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975).

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sense,” concerning matters that occurred halfway around the world, in another culture, eight years ago. Judge Walton concluded that portions of Suleiman’s statements and testimony were untrue, and from that conclusion he inferred, without evidentiary support, that the facts were the very opposite of Suleiman’s versions – versions that the government had not shown by its own evidence to be false.

**C. The evidence relating to post-September 18, 2001 events is insufficient to establish that Suleiman was a part of the Taliban.**

While we believe there is not sufficient evidence in the record that Suleiman became a part of the Taliban without regard to the date the AUMF went into effect, there surely is not sufficient evidence based upon his activities following that date.

Regarding his conduct after the AUMF took effect, Suleiman explained at the CSRT, to his interviewers at Guantanamo Bay, and to Judge Walton, that he made the second trip to the waiting place to escape both (i) the followers of Massoud who were slaying Arabs in the streets of Kabul after Massoud’s September 9, 2001 assassination and (ii) the United States’ bombings near Kabul, which began on October 7, 2001.<sup>15</sup> With many others, Suleiman fled from Kabul to save his life. He obtained a weapon for personal safety from a man he knew only as [REDACTED], which he returned when they were no longer in danger from wild

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<sup>15</sup> App.836,849,2154-55,3107-09; Supp.App.12-13.

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animals in the mountains.<sup>16</sup> Upon arriving in Pakistan, he asked to be taken to the Yemen embassy. Instead, he was placed in jail; then transferred to United States military personnel; taken to and tortured at the U.S. prison in Kandahar; then flown to Guantanamo Bay, where he has been incarcerated for more than nine years.<sup>17</sup>

Thus, the evidence of Suleiman's post-September 18, 2001 conduct concerns: (1) his residence without incident for about five weeks at al-Qa'eity's home; (2) shortly before November 2, 2001, his joining many others in a hurried exodus from Kabul in a effort to save his life from the onslaughts of Massoud's enraged followers, the bombs dropping from U.S. warplanes, and the ongoing battles between the Northern Alliance and the Taliban; (3) his stay for 12 days with others (none identified) at or near the "waiting point" north of Kabul; (4) when the Taliban forces were defeated at the "front line" and the waiting area was no longer safe,<sup>18</sup> his joining a group (none identified except [REDACTED]) who went on foot through the mountains to Pakistan in order to escape the chaotic conditions in Afghanistan; (5) his receipt of a weapon from [REDACTED] for his personal protection, which he returned when danger ceased; and (6) his arrival in Pakistan and transfer to U.S. custody.

<sup>16</sup> App.836,3113-14.

<sup>17</sup> App.2158,3111-18.

<sup>18</sup> The Northern Alliance – which Massoud had led - occupied Kabul on November 12, 2001. See Katzman, Cong. Research Service, RL 30588, Afghanistan: Current Issues and U.S. Policy (Jun. 23, 2002).

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The ultimate determination as to whether the writ of habeas corpus should have been granted is reviewed *de novo* by this Court. We respectfully ask this Court to rule that the proof of Suleiman's conduct during the time the AUMF was in effect does not establish by a preponderance of the evidence that he was a part of the Taliban.

**D. The evidence, including events preceding September 18, 2001, is insufficient to establish that Suleiman was a part of the Taliban.**

Here is a summary of the uncontradicted evidence relating to events both before and after September 18, 2001:

- In March 2001, Suleiman was a young man living with his family in Taiz, Yemen, who had repeated two years of school. He was unemployed. His attempt to cross into Saudi Arabia to seek employment was blocked at the border. Thereafter, he met Abu Khulud in a Taiz mosque. (App.3079, 3082-84,3236-37.)
- [REDACTED] and Suleiman spoke on several occasions. [REDACTED] said that if Suleiman went to Afghanistan, he would perhaps be able to find a wife and obtain housing from the Taliban government, and that [REDACTED] would pay the airfare. Suleiman accepted the offer. He was not aware that [REDACTED] was affiliated with the Taliban or was recruiting fighters; there was no discussion of an armed conflict in Afghanistan, or that he would be expected to join the Taliban, take military training, or fight. (App.835,848,3084-87,3143.)

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- Suleiman followed [REDACTED] travel directions. He met [REDACTED], his wife, and children, as they had arranged in Kabul. On the way, he stayed in housing suggested by [REDACTED] and had little contact with other residents.

(App.835,3088-89,3091-92,3145.)

- In Kabul, [REDACTED] announced that Suleiman was expected to fight with the Taliban in order to qualify for the promised benefits. Suleiman vehemently objected, saying [REDACTED] had not told him this before; they argued; he flatly refused [REDACTED] suggestion that he stay at a house in Kabul with Taliban fighters; instead, he agreed to stay at the house of a generous Yemeni, [REDACTED], where he remained for the next seven months.<sup>19</sup>

(App.835-36,848,3092-94,3147-48.) Suleiman told the CSRT that he was not aware al-Qa'eity was affiliated with either the Taliban or al Qaeda.

(Supp.App.19.)

- Suleiman wanted to return home, but he had no money for airfare. Al-Qa'eity made vague promises that he would provide the funds, but did not do so. For the next seven or so months, Suleiman spent most of his time walking to the market and mosque in Kabul, eating, sleeping, and reading the Qu'ran. He learned of the fighting that Taliban supporters were engaged

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<sup>19</sup> We introduced evidence that it was common for Muslims like al-Qa'eity to offer room and board free of charge to travelers. (App.2596.) It is undisputed that noncombatants, including al-Qa'eity's wife and children, resided in the home in Kabul during the time Suleiman stayed there. (App.3094.)

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in, and that al-Qa'eity<sup>20</sup> and other men who were living in the house supported the Taliban government. Suleiman did not participate in the fighting, which he regarded as a tribal conflict that was not his concern. (App.836,848,3094,3097-98.)

- On one occasion, for relief from boredom, Suleiman accepted al-Qa'eity's suggestion that he visit a nearby "waiting area,"<sup>21</sup> where he spent about a week. While there, he accepted an offer from an unidentified person to fire several rounds into a wall, using a type of gun that was commonly used in Yemen during celebrations. He also kicked a rusty mortar that was lying on the ground. (App.3100-06,3149-51.)
- Shortly after Massoud was assassinated on September 9, 2001, his followers began to attack Arabs on the streets of Kabul. A few weeks later, the U.S. began bombing the area. Together with many others, Suleiman fled for safety, first to the waiting area, and then through the mountains leading from Afghanistan into Pakistan. On the way, a stranger named [REDACTED] loaned him

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<sup>20</sup> In the government transcript of the CSRT (Supp.App. 9), the translator omitted the penultimate exchange: "Q. . . . The individual whose house you stated at, Hamza Al Qaety, do you know if he was associated with the Taliban or Al Qaeda? A. No." (Supp.App.19.)

<sup>21</sup> According to our expert, in the government's transcript of the CSRT, the English/Arabic translator mistakenly used the words "second line" when Suleiman actually said "waiting area." (Supp.App.12,15,17.) We have since verified with Mr. Bezri that the same error was made in an attribution to Suleiman at Supp.App.4.

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a rifle for protection against wild animals in the mountains. He did not use the rifle and returned it when danger ceased. Upon arrival in Pakistan, he was taken into custody by Pakistani authorities and then turned over to U.S. personnel. (App.836,849,3107-14,3152-55.)

We respectfully submit that this evidence does not establish Suleiman to be a part of the Taliban. There is no evidence to establish:

- That Suleiman formally or informally joined the Taliban or other forces opposed to the United States or its coalition partners.
- That he was associated with or supported the Taliban organization.
- That he spoke with, took orders from, or gave orders to, Taliban personnel.
- That he was issued a weapon by the Taliban.
- That he received weapons training at a training camp.
- That he was engaged in a battle or fight.
- That he fired a weapon at another person, or another person fired a weapon at him.
- That he uttered a single word, or engaged in a single act, in support of the Taliban.

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### Conclusion

Abdulrahman Suleiman has been held in custody for over nine years, without being charged with committing a crime, without contact with his family except through occasional outdated letters, with little access to reading materials or news or to fellow prisoners, and with poor food and poor medical attention – circumstances that, if imposed upon our citizens by Yemen, would result in an uproar of protest, and perhaps military action.<sup>22</sup>

He has been treated as though he was and is a dangerous criminal, whereas the evidence establishes that he did not fire a weapon at any person and was not fired at, was never on the battle lines, never fought in a battle, and never joined or assisted the Taliban forces in any way. He dearly wishes to go home to his family in Taiz and resume his life there.

Accordingly, we request that this Court reverse the District Court's decision, and grant Suleiman's petition for writ of habeas corpus.

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<sup>22</sup> In his declaration of the War on Terror, President Bush demanded that the Taliban "[r]elease all foreign nationals, including American citizens you have unjustly imprisoned." *Bush: 'This Will Not Be an Age of Terror,'* Chi. Trib., Sep. 21, 2001, at N11. Bush was referring to "eight foreign aid workers, among them two Americans," who had been held by the Taliban since August 2001 "on charges of attempting to convert Muslims to Christianity." Elisabeth Bumiller, *A Nation Challenged*, N.Y. Times, Oct. 15, 2001, at A5. Suleiman has been held much longer and has never been charged.

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Respectfully submitted,

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May 12, 2011

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### Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), as modified by the Court's order of April 27, 2011:

1. As provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a)(1), the brief contains 7,477 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman font, with footnotes in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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**Certificate of Service**

I hereby certify that on this 12th day of May, 2011, I caused the foregoing Reply Brief to be served via the Court Security Officer on counsel for the government at the following address:

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