

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FAWZI KHALID ABDULLAH)	
FAHAD AL ODAH, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. CV 02-0828 (CKK)
)	
BARACK OBAMA, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS’ REPLY REGARDING
THE GOVERNMENT’S DETENTION AUTHORITY**

Respondents respectfully submit this reply relating to the Government’s March 13, 2009, memorandum regarding detention authority (“Gov’t Mem.”). Petitioners purport to accept the framework in the Government’s memorandum, which Judge Walton endorsed in large part in *Gherebi v. Obama*, ___ F. Supp. 2d ___, 2009 WL 106895 (D.D.C. Apr. 22, 2009). *See* Pet’s Mem. at 2. However, Petitioners then seek to narrow the framework. Petitioners’ efforts to narrow the standard adopted by Judge Walton are irrelevant to the facts of these cases, and should be rejected.

DISCUSSION

Petitioners argue that an individual must have been subject to a “unified command structure” of the military arm of an enemy force to be detainable. Pet’s Mem. at 5-8. In light of the looser, informal, and secretive structure of the enemy armed groups the nation faces in this ongoing conflict, and the fact-specific nature of the test Judge Walton accepted in *Gherebi*, the Court should reject Petitioners’ narrow “unified command structure” limitation. Petitioners also suggest that certain types of non-combat support,

such as financial support, can never suffice to make one effectively part of an armed group targeted in the AUMF. *Id.* at 8-10. However, their interpretation is at odds with Judge Walton's decision in *Gherebi*.

First, a formalistic or narrow view of what constitutes being part of an enemy armed force is inconsistent with Judge Walton's recognition that determining whether an individual is part of an enemy organization will be fact specific. *Id.* at *23 (citing Gov't Mem. at 2). Such a view also ignores the looser structure of the enemy armed groups addressed in the AUMF. In *Gherebi*, the Court determined that, in defining the scope of detention authority, it is important to separate "mere sympathy for or association with an enemy organization" from "some sort of 'structured' role in the 'hierarchy' of the enemy force." *Id.* at *21. But the Court acknowledged that the test is not rigid, and that the relevant "command structures" or "hierarchy" of the group may be "diffuse." *Id.* at *22 (citing Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2114-15 (May 2005)).

Because the Court looked to Article 4 of the Third Geneva Convention to "inform" its analysis of who is properly detainable, at the Government's suggestion, the Court's analysis confirms that the "command structure" requirement is not rigid or formalistic. *Id.* at *21. Article 4(A)(2) provides that members of irregular militias and volunteer corps belonging to a Party to the conflict should be detained as prisoners of war if they meet certain conditions. *Id.* Such irregular militias or forces may, as in these cases, include individuals who voluntarily become part of an armed group organized in some fashion under a command responsible for subordinates. *Id.* As Judge Walton noted, however, "[t]he term 'organized' is obviously rather flexible," even for the types

of groups that may claim Article 4's prisoner-of-war protections. *Id.* (quoting Int'l Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949*, at 512 (Sandoz et al. eds. 1987)). And as to the purely non-state armed groups we face in the ongoing conflict, Judge Walton made clear that the provisions of Article 4 "obviously cannot be applied literally to the enemy organizations contemplated in the AUMF." *Id.* at *21.

Any more rigid requirement, such as proving a "unified command structure," is at odds with the functional nature of the inquiry under the Government's framework adopted in *Gherebi* and with the nature of the armed groups at issue here. And as Judge Walton recognized, individuals may fall within the command structure at different levels and in different capacities. *Id.* at *21 & n.19 (noting examples of providing housing, providing transportation, cooks, and guards). Indeed, contrary to Petitioners' argument, "there is no shortage of scenarios arising out of the conflict at hand from which to identify the[] contours" of detention authority in these cases. *Id.* at *23.

Second, Petitioners' effort (at 8-10) to qualify the kind of "substantial support" that would establish that an individual is detainable should also be rejected. As just noted, members of armed groups may carry out a range of functions. As Judge Walton recognized in *Gherebi*, "many members of the armed forces who, under different circumstances, would be 'fighters' may be assigned to non-combat roles at the time of their apprehension. These individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure." *Id.* at *21 n.19. Judge Walton, to be sure, stated that "[s]ympathizers, propagandists, and financiers who have no involvement with the

‘command structure’” are not detainable. *Id.* at *22. But, conversely, individuals who *do* provide such support in connection with “involvement with the ‘command structure,’” however “diffuse,” may be detainable. *Id.* Terrorist groups like al-Qaida have no other “command structure” than a “military” one, because they are solely devoted to terrorism and combat.¹ Procuring the financing of such military and terrorist activities, and engaging in propaganda used in connection with terrorist aims and recruitment, are critical functions of groups such as al-Qaida.² Moreover, Article 4 explicitly contemplates detention of certain classes of individuals accompanying the armed forces, some of whom carry out “civilian” functions in support of military operations, even though such individuals might not be subject to targeting. Third Geneva Convention, art. 4(A)(4).

In any event, irrespective of Petitioners’ arguments, if the Government’s evidence is credited, these cases do not implicate the outer bounds of detention authority. Contrary to Petitioners’ suggestions, none of the individuals at issue here is being detained for providing mere abstract support. And there should be no question that, under the Government’s framework, individuals who trained as part of al-Qaida and Taliban forces, took positions with those forces, retreated as part of those forces, or engaged in conduct

¹ In the oral argument in *Gherebi*, portions of which Petitioners selectively cite, counsel for the Government stated that cases involving financiers and facilitators would be fact-specific. Tr. at 54. The Government also took the position that significant financial support, combined with other evidence that a detainee is part of al-Qaida, could constitute the kind of substantial support that would support detention under the AUMF. *Id.*; see also *id.* at 56-57. As the Government stated at that hearing (at 56-57), such issues cannot be resolved in the abstract, as Petitioners seek to do here.

² Petitioners argue that supporting a charitable organization with links to terrorism is not sufficient to render an individual detainable. The Government acknowledges that some terrorist-related organizations may carry out other legitimate charitable functions. The Government is not seeking to detain anyone for working for a charity or carrying out purely civilian activities. Nonetheless, if such activities involve links to terrorism, they may be relevant evidence supporting the reliability of other evidence establishing that an individual was part of enemy forces. Moreover, with respect to alleged charitable organizations that also carry out military functions, the inquiry must focus on the individual’s role within the organization, as well as the individual’s and the organization’s link to al-Qaida or the Taliban.

that otherwise shows that they were part of those forces, are detainable. *Gherebi*, 2009 WL 106895, at *22-23. Such individuals are not “civilians who may have some tangential connections” to an enemy organization, and thus outside the class of detainable individuals. *Id.* at *22. Rather, they are detainable because they have placed themselves under the loose command structure of an organized armed enemy force. *Id.* at *23-24. Al-Qaida and Taliban forces recruited throughout the Middle East and other parts of the world, operated a network of militant safehouses, controlled access to training camps, regulated conduct within the camps, arranged for the deployment and arming of fighters after they attended the camps, conducted combat operations in the field, and arranged for fighters to retreat and try to blend back into the civilian population in places like Pakistan.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court adopt the detention authority framework explained in the Government’s March 13, 2009, memorandum, and reject the limitations suggested by Petitioner to the extent that they are inconsistent with that framework.

Dated: May 8, 2009

Respectfully submitted,

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