

Nos. 09-5265, 09-5266, 09-5277

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FADI AL MAQALEH, et al.,  
Petitioners-Appellees,

v.

ROBERT GATES, et al.,  
Respondents-Appellants.

\_\_\_\_\_  
AMIN AL BAKRI, et al.,  
Petitioners-Appellees,

v.

BARACK OBAMA, et al.,  
Respondents-Appellants.

\_\_\_\_\_  
REDHA AL-NAJAR, et al.,  
Petitioners-Appellees,

v.

ROBERT GATES, et al.,  
Respondents-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**BRIEF OF AMICI CURIAE SPECIAL FORCES ASSOCIATION, U.S. ARMY  
RANGER ASSOCIATION, SEN. LINDSEY O. GRAHAM, ABRAHAM  
GERMAN, WADE ISHIMOTO, ANDREW NICHOLS PRATT, DENNIS  
WALTERS, GEORGE R. WORTHINGTON, MICHAEL YON AND SEN.  
RYAN ZINKE IN SUPPORT OF APPELLANTS.**

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## INTEREST OF AMICI

Amici are veterans organizations, a member of the United States Senate Committee on Armed Services, and individual veterans of United States Special Operations Forces (“SOF”). Amici are deeply concerned with the development of the law governing SOF operations in the continuing war against terrorism, and ideally placed to advise the Court about the dangerous implications of the District Court’s decision. Amici have vast experience in Special Operations. Amici believe that, if affirmed, the District Court’s decision will make SOF activity less effective and significantly more dangerous.

The views expressed in this brief are those of the organizational and individual Amici and do not necessarily reflect the views of any other entity or organization with which Amici are associated. Amici file this brief with the consent of the parties.

The qualifications of organizational Amici are as follows:

The Special Forces Association (“SFA”) is a nonprofit organization that represents and promotes the welfare and tradition of the U.S. Army Special Forces (“Green Berets”)

community. The SFA's more than 9,600 members include highly-decorated veterans of U.S. combat operations worldwide.

The U.S. Army Ranger Association ("USARA") is a not-for-profit organization that promotes and preserves the tradition and service of the United States Army Rangers. The USARA's over 1,000 combat veteran members have served in World War II, Korea, Vietnam, Panama, Afghanistan, Iraq, and elsewhere.

The qualifications of individual Amici are as follows:

Lindsey O. Graham is the senior United States Senator from South Carolina. He is the only U.S. Senator currently serving in the National Guard or Reserves, as a Colonel assigned as a Senior Instructor at the Air Force JAG School. Senator Graham is a member of the Senate Armed Services Committee. He played a key role in passing the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739, and the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

Abraham "Linc" German is President of the U.S. Army Ranger Association. He retired with the rank of Colonel after twenty-six years of active duty, including service as a combat

commander of Special Forces teams in the Dominican Republic and Vietnam. Col. German also served as Chief of Unconventional Warfare, Special Operations Division, Office of the Joint Chiefs of Staff (“OJCS”), and as a Special Forces General Staff Training Officer at the John F. Kennedy Center for Special Warfare, Ft. Bragg, NC. His decorations include the Defense Superior Service Medal, the Legion of Merit, and the Bronze Star.

Wade Ishimoto is one of the original members of First Special Forces Operational Detachment Delta (“Delta Force”), an elite antiterrorist team within the U.S. Army’s Special Operations Command. He was the Intelligence Officer of the ground force assigned to the 1980 mission to rescue 53 American hostages in Tehran and has more than twenty years of active duty and combat experience. His decorations include the Legion of Merit, the Bronze Star, and the Defense Meritorious Service Medal.

Andrew Nichols Pratt is Professor of Strategy and International Politics at the George C. Marshall European Center for Security Studies. Prior to his retirement from the Marine Corps with the rank of Colonel, he commanded a Central

Intelligence Agency (“CIA”) Special Operations Group (“SOG”) team conducting covert operations in support of U.S. national security objectives overseas. Col. Pratt participated in active operations in the Near East, Africa, and Southeast Asia.

Dr. Dennis Walters is a retired U.S. Army Special Forces officer with over 25 years of service. In 2000, he commanded a Special Forces team deployed to Kosovo where he spent three months in daily combat operations. In October 2001, Dr. Walters deployed to Tajikistan to support the U.S. invasion of Afghanistan. In 2003, Dr. Walters led a Special Forces team which trained and led Kurdish forces into action against the Iraqi Army.

Rear Admiral George R. Worthington (U.S. Navy, ret.) graduated from the U.S. Naval Academy in 1961. He served with Underwater Demolition Team 11, a forerunner to the U.S. Navy’s Sea, Air and Land (“SEAL”) units, making combat deployments into Vietnam throughout 1966 and 1967. Following a one-year tour with Naval Special Warfare Group (Vietnam), Adm. Worthington served as U.S. Naval Attaché to the Khmer Republic

in Phnom Penh in 1974 and was present when that country fell to the Khmer Rouge in 1975. He served with U.S. Navy SEAL teams and has more than twenty-five years of operational experience with SOF.

Michael Yon is a former Green Beret who has been reporting from Iraq and Afghanistan as an independent journalist since December 2004. His work has been featured on “Good Morning America,” *The Wall Street Journal*, *The New York Times*, CNN, ABC, FOX, and hundreds of other major media outlets around the world.

Ryan Zinke is a Montana State Senator (R-SD 2) and a retired U.S. Navy SEAL. Senator Zinke led counter-insurgency and contingency operations in the Persian Gulf and the Pacific and served as Ground Force Commander in support of Stabilization Force, Bosnia-Herzegovina (“SFOR”). In 2004, he led over 3,500 SOF personnel in Iraq in the conduct of 360 combat patrols, 48 Direct Action missions, and hundreds of other sensitive operations. He earned two Bronze Stars for combat action.

## BACKGROUND

The United States fields the best SOF in the world. U.S. Special Operations Command (“USSOCOM”) unites elite units from across the armed services. These include the Green Berets, U.S. Navy SEALs, U.S. Army Rangers, and other highly specialized units. *See generally* Thomas K. Adams, *U.S. Special Operations Forces in Action* 8-9 (1998). In addition, the Joint Special Operations Command (“JSOC”) oversees the Army’s Delta Force, the Navy’s SEAL Team Six, and other elements. *Id.* at 9.

SOF are uniquely trained and experienced warriors who undertake missions beyond the capabilities of conventional forces. *See id.* at 1-26. They are trained to operate in small units behind enemy lines, frequently operating among local populations. *See id.* Core USSOCOM missions include:

1. Direct Action: Short-duration strikes and other small-scale offensive actions to seize, destroy, capture or recover targets in enemy controlled areas;
2. Special Reconnaissance: Acquiring information concerning the capabilities, intentions and activities of enemy forces;

3. Unconventional Warfare: Operations conducted through local surrogate forces organized, trained, equipped, supported and directed by external forces;
4. Foreign Internal Defense: Providing training and other assistance to foreign governments and their militaries;
5. Civil Affairs Operations: Activities to cultivate relations between U.S. forces and foreign civil authorities and civilian populations to facilitate U.S. military operations;
6. Counterterrorism: Measures taken to prevent, deter and respond to terrorism;
7. Counterinsurgency Operations: Military, paramilitary, political, economic, psychological and civic actions taken to defeat insurgencies.

*See generally*, USSOCOM Fact Book (2009) at 7. These capabilities are essential to victory against al-Qaeda, the Taliban, and affiliated groups which fight using unconventional means. As a result, SOF are the “tip of the spear” in the war on terror.

This case raises the question of whether courts thousands of miles away should constrain U.S. and allied forces in ways that

will impair the effectiveness of and increase the considerable dangers to SOF personnel who regularly confront al-Qaeda, the Taliban and other terrorist groups in combat.

In extending habeas corpus rights to detainees held at the Bagram Theater Internment Facility in Afghanistan (“Bagram”), but captured outside that country, the District Court took a far too narrow view of the factors to be considered in determining whether the Suspension Clause applies here under *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The District Court articulated a six-factor test for determining whether habeas proceedings should be made available to detainees held by the U.S. government at Bagram. These were:

- (1) the citizenship of the detainee;
- (2) the status of the detainee;
- (3) the adequacy of the process through which the status determination was made;
- (4) the nature of the site of apprehension;
- (5) the nature of the site of detention;
- [and] (6) the practical obstacles inherent in resolving the prisoner’s entitlement to [habeas relief].

*Maqaleh v. Gates*, 604 F. Supp. 2d 205, 215 (D.D.C. 2009).

The District Court concluded that these factors weighed in favor of making habeas proceedings available to non-Afghan Bagram detainees who had been captured outside of Afghanistan.

*Id.* at 235. The Court declined to make habeas proceedings available to detainees captured in Afghanistan, but made clear that it did so out of respect for U.S. relations with Afghan authorities and that the weighing of the *Boumediene* factors in this regard could change. *See id.*<sup>1</sup>

Amici believe that the District Court erred seriously in its consideration of the “nature of the site of apprehension” and “practical difficulties” resulting from making habeas proceedings available to Bagram detainees. *Id.* at 215.

## ARGUMENT

### I. The District Court Erred In Its Consideration Of The “Site Of Apprehension” Factor.

#### A. The “Battlefield” Extends Beyond Afghanistan.

The District Court seriously misunderstood the nature of the U.S. military’s ongoing operations against al-Qaeda and related terrorist groups around the world. In analyzing the “site of apprehension” factor, the District Court found Bagram detainees

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<sup>1</sup> The District Court also held that the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600, was unconstitutional as

captured in Afghanistan “qualitatively different than Bagram detainees who, like petitioners, were captured elsewhere.” *Maqaleh*, 604 F. Supp. 2d at 221. Conceding that habeas rights might not extend to “*the battlefield* of Afghanistan,” the District Court insisted that “a meaningful distinction” existed because “[t]he only reason these petitioners are in an active theater of war is because [the U.S. Government] brought them there.” *Id.* at 230-31 (emphasis added). On this basis, the District Court ruled that “[t]he site of apprehension factor . . . for these petitioners cuts in their favor because . . . all were apprehended outside of Afghanistan.” *Id.* at 221. In the District Court’s view, capture outside of the political boundaries of Afghanistan favored granting access to habeas proceedings.

The District Court’s limitation of the battlespace to the formal and porous borders of Afghanistan is irreconcilable with both the scope of hostilities and the far-flung activities of SOF in the war on terror.<sup>2</sup> This conflict has been waged in a variety of

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applied to non-Afghan enemy combatant detainees seized outside of Afghanistan but held at Bagram. *See Maqaleh*, 604 F. Supp. 2d at 231.

<sup>2</sup> *See, e.g.*, Stephen J. Hedges, *Special Forces Get Bigger Role*, Chicago Tribune, Dec. 21, 2003, at C14 (reporting that “[c]urrently, Special

countries. Afghanistan is a pivotal front in the war, but it has never been the totality of the battlespace.<sup>3</sup>

The District Court's conflation of the battlefield with Afghanistan's political boundaries is an error of particular concern to the SOF community. *See, e.g.*, Andrew Feickert, *U.S. Special*

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Operations teams are operating in a number of foreign locales, including Djibouti, Kenya, and along the Afghan border with Pakistan"); Dana Priest, *Surveillance Operation In Pakistan Located And Killed Al Qaeda Official*, Washington Post, May 15, 2005, at A25 (noting that "U.S. military Special Operations Forces have been operating inside Pakistan . . . with the knowledge of Pakistani authorities"); Robert D. Kaplan, *Unheralded Military Successes: Low-cost, Low-risk Operations Such As Those In Colombia And The Philippines Show What The U.S. Can Achieve*, Los Angeles Times, Nov. 25, 2007, at M4 (describing success of U.S. Special Forces operations against Islamist terrorist groups in the Philippines); Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda In Many Countries*, New York Times, Nov. 10, 2008, at A1 (describing reported Special Operations missions in Pakistan, Syria, and Iran); Joshua Hammer, *Desert Storm*, New Republic, Mar. 6, 2009, at 11 (describing operations of the U.S. Special Forces in Mali as part of the U.S. government's Trans-Sahara Counter Terrorism Initiative, pursuant to which they "train Malian troops in counterterrorism and . . . conduct their own operations"); Karen DeYoung, *U.S. Says Raid In Somalia Killed Terrorist With Links To Al Qaeda*, Washington Post, Sept. 15, 2009, at A09 (describing Special Forces assault which killed a known al-Qaeda leader in Somalia).

<sup>3</sup> For example, the U.S. Government is keenly aware that developments in Pakistan are crucial to the success of U.S. objectives and operations in Afghanistan. *See* Statement of the Hon. Michèle A. Flournoy, Under Secretary of Defense for Policy, to the Senate Armed Services Committee Regarding United States Policy Toward Afghanistan and Pakistan (Apr. 1, 2009) at 1 ("The futures of [Afghanistan and Pakistan] . . . are inextricably linked. Al-Qaeda and its extremist allies have moved across the border to Pakistan where they plan terrorist attacks and support operations that undermine the stability of both countries."). The Office of the Director of National Intelligence ("ODNI") recently noted that al-Qaeda "central" is located in northern Pakistan. *See* Dennis C. Blair, Written Response to

*Operations Forces (SOF): Background and Issues for Congress* at 6, Congressional Research Service (May 16, 2008) (noting the likelihood of an increased SOF role in Pakistan). Since 2001, SOF have operated in strategic tribal areas where village, clan and valley are far more significant than lines on a map. According to recent testimony by Admiral Eric T. Olson, USSOCOM Commander, on any given day SOF are present in approximately sixty-five countries. Statement to the Senate Armed Services Committee Regarding United States Policy Toward Afghanistan and Pakistan (April 1, 2009) at 4.

Many of the “snatch-and-grab” operations by which detainees held by the U.S. government – at Bagram and elsewhere – have been captured involve elite forces operating outside of Afghanistan. *See, e.g.*, USSOCOM History, 1987-2007 (2008) at 130-132 (describing SOF efforts to capture al-Qaeda-linked terrorists in the Philippines). These operations have degraded the enemy’s command and control networks, prevented major terrorist

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Questions for the Record, Senate Select Committee on Intelligence (Feb. 12, 2009) at Question 1.

attacks, and provided intelligence vital to counterinsurgency efforts in Afghanistan. *See id.* at 87-112.

That SOF are trained to operate at a remove from the “main” locus of combat does not mean that the Green Berets or Navy SEALs are not fighting in an “active theater of war.” *Cf. Maqaleh*, 604 F. Supp. 2d at 230-31. Yet this is the logical implication of the District Court’s decision.

**B. The District Court’s Decision Creates Legal Sanctuaries For Enemy Forces.**

The District Court’s reasoning applies to *all* non-Afghan enemy combatants seized outside of Afghanistan and held at Bagram or elsewhere in that country. The District Court drew no distinctions on the basis of *where* such captures occurred. *See Maqaleh*, 604 F. Supp. 2d at 209. As a result, because of the habeas-related obstacles to military operations described below, the District Court’s decision creates legal sanctuaries for enemy forces. Enemy combatants accommodating enough to remain within the formal borders of Afghanistan may be seized quickly

and as safely as is possible under combat conditions. If they flee into Pakistan, however, they suddenly acquire habeas rights.<sup>4</sup>

Al-Qaeda and the Taliban have already sought refuge across Afghanistan's porous border with Pakistan. *See, e.g.*, Seth G. Jones, *Counterinsurgency in Afghanistan*, RAND Counterinsurgency Study Vol. 4 (2008) at 53-55. The District Court's decision gives them one more reason to do so and, as have the United States' asymmetrical foes in the past, we can expect them to take advantage of any such sanctuaries. *Cf.* Guenter Lewy, *America in Vietnam* 129 & 174-75 (1978) (describing how North Vietnamese and Viet Cong forces exploited self-imposed U.S. limits on the use of force to create sanctuaries in Laos and Cambodia during the Vietnam War, marshalling their forces in areas deemed off-limits to air attack).<sup>5</sup>

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<sup>4</sup> Osama bin Laden himself is thought to be hiding in northern Pakistan. Under the District Court's decision, he too could bring habeas proceedings if captured and detained at Bagram. *See* "CIA Chief Says Bin Laden In Pakistan," *Reuters* (Jun. 11, 2009).

<sup>5</sup> Analogous concerns have led courts to deny habeas protection to alien enemies detained abroad. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (Jackson, J.) (warning that to extend habeas rights to aliens detained outside of the United States during times of armed conflict would lead to the judicial "fettering" of U.S. forces in the field and that "the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States").

For these reasons, Amici urge the Court to overturn the District Court's conclusions regarding the "site of apprehension."

**C. It Is Not The Role Of The Judiciary To Define The "Battlefield."**

Determining the length and breadth of the "battlefield" is not within the province of the Judiciary.<sup>6</sup> This is precisely the kind of issue constitutionally confided to the Executive and Legislative Branches and not to the Judiciary, a political question that the Courts should avoid on both constitutional and prudential grounds. *See generally, Baker v. Carr*, 369 U.S. 186 (1962).

The Executive and Legislative Branches have already rejected the District Court's conception of the relevant battlespace.<sup>7</sup> In enacting the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001),

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<sup>6</sup> When enemy forces have taken advantage of self-imposed U.S. limits on the use of force, these limits have always been a matter for the Executive and Legislative branches, not the Judiciary. *See, e.g., Lewy, supra* p. 14, at 382-83. *See generally*, Mark Bowden, *Black Hawk Down* (Penguin Books 1999) at 335.

<sup>7</sup> The Supreme Court has recognized that when "the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . [such action is] supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."

Congress recognized that al-Qaeda, along with the United States' other terrorist enemies, is a global network. The AUMF anticipates that combat will not always be confined within the geographic boundaries of nation-states. *See* AUMF § 2(a) (authorizing 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”) (emphasis added). As such, it is plain that the Executive and Legislative Branches do not consider this conflict to be confined to Afghanistan. This is confirmed by both the AUMF’s specific reference to “organizations, or persons” *as separate and apart from* “nations,” *see id.* at § 2(a) (emphasis added), and, not least, by the far-flung operations of SOF. *See supra* note 2.

Thus, legally and practically, the “battlefield” in the war against terrorism is wherever SOF operate pursuant to the AUMF. At the very least, any place where SOF are engaged in combat operations pursuant to the AUMF should be part of “the

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*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

battlefield” for purposes of *Boumediene’s* “site of apprehension” analysis.

**II. The District Court Underestimated The “Practical Difficulties” Of Making Habeas Corpus Proceedings Available To Bagram Detainees.**

The District Court’s consideration of the “practical obstacles involved” in extending habeas corpus proceedings to enemy combatants held at Bagram was deeply flawed. *See Maqaleh*, 604 F. Supp. 2d at 227. The District Court failed to consider one of the most important “practical difficulties”: the need for someone – likely SOF – to collect evidence of a quality and volume sufficient to vindicate the detention of enemy combatants by a “preponderance of the evidence.” *See In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (TFH), 2008 U.S. Dist. LEXIS 97095, at \*104 (D.D.C. Nov. 6, 2008).<sup>8</sup>

**A. Preponderance Of The Evidence Is A High Standard In The Context Of Ongoing Combat Operations.**

The ability to litigate habeas proceedings under *Boumediene* is anything but a foregone conclusion. Civilian courts apply

standards and methodologies very different from those applied by the military and intelligence communities. As the District Court recently explained in *Ahmed v. Obama*, 613 F. Supp. 2d 51, 55-56 (D.D.C. 2009), the “mosaic theory,” by which the military and intelligence agencies are trained to produce a composite picture from many individual nuggets of information, may not produce evidence sufficient to prevail at a habeas hearing. *See Ahmed*, 613 at 55:

The Court understands that use of the mosaic approach is a common and well-established mode of analysis in the intelligence community. This may well be true. Nonetheless, at this point in this long, drawn-out litigation the Court’s obligation is to make findings of fact and conclusions of law which satisfy appropriate and relevant legal standards as to whether the Government has proven by a preponderance of the evidence that the Petitioner is justifiably detained. *The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different, and certainly cannot govern the Court’s ruling*<sup>9</sup> (emphasis added).

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<sup>8</sup> Amici cite the Guantanamo Detainee Litigation merely to illustrate the evidentiary standard that would be applied to detainees at Bagram and do not here challenge the Court’s holding in those cases.

<sup>9</sup> *Ahmed*’s discussion of the insufficiency of intelligence information for habeas purposes suggests that courts will drift towards the evidentiary standards which they are used to applying: those of criminal prosecutions under the Federal Rules of Evidence. For the U.S. military and intelligence

The *Ahmed* court ordered the release of a detainee believed by the U.S. government to have been actively fighting with the Taliban against U.S. forces. *See id.*

Similar difficulties arise from the use of hearsay evidence. What a court may term “hearsay” will often be reliable and actionable for intelligence purposes. Nevertheless, hearsay is generally disfavored in the courts and here it can be admitted only where its reliability is established and the introduction of nonhearsay evidence would be unduly burdensome or otherwise interfere with the government’s efforts to protect national security. *See In re Guantanamo Bay Detainee*, 2008 U.S. Dist. LEXIS at \*105-06. *See also Bostan*, 2009 U.S. Dist. LEXIS at \*22 (“[I]ndividual items of hearsay proffered by the government will be assessed to determine whether they have sufficient indicia of reliability to justify their admission. If they do, they will be

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community to have to collect traditionally admissible evidence to support the detention of every enemy combatant would be an insurmountable burden. *Cf. Bostan v. Obama*, No. 05-883 (RBW), 2009 U.S. Dist. LEXIS 73583, at \*20-19 (D.D.C. Aug. 19, 2009), (“This member of the Court will therefore observe the Federal Rules of Evidence except where national security or undue burden to the government requires otherwise, and the onus will be placed on the government to justify deviance from these rules.”).

admitted into evidence; if they do not, they will be excluded.”). As a result, “hearsay” that has proven sound for intelligence and military purposes and perhaps directly led to the relevant detainee’s capture may still be inadmissible if its reliability cannot be established for habeas purposes, or if an “undue burden” test cannot be met.<sup>10</sup>

The result will be that U.S. and allied forces must collect sufficient evidence to prevail at a habeas proceeding in all captures made outside of Afghanistan where the detainees are held in that country. As discussed in detail below, the systematic and successful collection of such evidence will severely disrupt military operations and often prove impossible.

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<sup>10</sup> Even where Courts have denied habeas relief post-*Boumediene*, they have only done so after the Executive Branch has made detailed arguments supported by extensive disclosures of intelligence information to the Court. See *Alwi v. Bush*, 593 F. Supp. 2d 24, 29 (D.D.C. 2008) (denying habeas relief after the government presented evidence that petitioner had: (1) stayed at guesthouses in Afghanistan and Pakistan that were closely associated with the Taliban and al-Qaeda; (2) voluntarily surrendered his passport at a guesthouse closely associated with al-Qaeda; (3) received training at a Taliban-related camp; (4) traveled to two different fronts to fight with Taliban forces; and (5) stayed with his Taliban unit well after September 11, 2001 and fought U.S. forces). The District Court’s decision in *Maqaleh* will require the Executive Branch to justify the detention of every non-Afghan detainee captured outside of Afghanistan and held at Bagram in precisely this way.

These risks are compounded by the fact that al-Qaeda is actively engaged in what scholars term “lawfare.”<sup>11</sup> See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, Joint Force Quarterly vol. 54 at 36 (2009) (noting that al-Qaeda and the Taliban use human shields to exploit U.S. and NATO rules of engagement).

Al-Qaeda’s deliberate adoption of a lawfare strategy is confirmed by a training manual for its operatives recovered in 2004 which devotes an entire section to exploiting Western legal systems. It instructs that, if arrested, “[a]t the beginning of the trial, once more the brothers must insist on proving that torture was inflicted on them by State Security [investigators] before the judge.” See U.S. Department of Justice, *Translation of Al Qaeda Training Manual - Lesson Eighteen: Prisons and Detention Centers* (n.d.), at 94.<sup>12</sup> It also instructs terrorists to “[c]omplain [to the court] of mistreatment while in prison,” regardless of whether that mistreatment actually occurred, and to “[t]ake advantage of

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<sup>11</sup> “Lawfare” has been defined as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.” Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, Joint Force Quarterly vol. 54 at 35 (2009).

visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison [i.e. their terrorist activities].” *Id.* See also Donna Miles, *Al Qaeda Manual Drives Detainee Behavior At Guantanamo Bay*, American Forces Press Service, June 29, 2005. Al-Qaeda pays keen attention to Western legal developments and will exploit any legal protection that U.S. courts bestow.

**B. Special Operations Missions Are Not Suited To The Collection Of This Kind Of Evidence.**

One of the most important methods used to capture enemy combatants is the “snatch-and-grab” operation, in which an SOF team stealthily approaches a target, captures him, and returns to safety as quickly as possible. USSOCOM Fact Book, *supra* p. 7, at 7 (describing “capture” missions as a core mission of SOF); *cf.* Bowden, *supra* note 6. Such missions are incompatible with the collection of evidence for use in a court of law. This is true whether the evidence in question consists of tangible forensic material or statements obtained by questioning witnesses,

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<sup>12</sup> Available at: [http://www.usdoj.gov/ag/manualpart1\\_4.pdf](http://www.usdoj.gov/ag/manualpart1_4.pdf).

informants, or the prisoners themselves.

**1. SOF Do Not Have The Time To Safely Gather Evidence.**

SOF rely on skill, speed and mobility when operating in enemy controlled areas. SOF can spend very little “time on target,” as they quickly lose the advantages of stealth and surprise when they engage the enemy. William H. McRaven, *SpecOps: Case Studies in Special Operations Warfare: Theory and Practice* at 6 (1995) (“The key to a special operations mission is to gain relative superiority early in the engagement. The longer an engagement continues, the more likely the outcome will be affected by the will of the enemy, chance, and uncertainty, the factors that comprise the frictions of war.”). Enemy fighters will converge to attack during the “extraction” phase of the SOF operation.

As a result, SOF missions are timed to the minute because any delay at a target site greatly increases the risks of mission failure and the likelihood of SOF personnel being killed or

wounded.<sup>13</sup> SOF personnel simply do not have the same leisure to properly collect evidence as do civilian crime scene investigators.

Regrettably, the District Court did not consider these issues in its “practical obstacles” analysis.

## **2. Gathering Evidence To Satisfy Habeas Courts Will Impair SOF Operations.**

SOF cannot easily or safely gather evidence suitable for use in a civilian habeas proceeding. Analogies to military intelligence collection are of extremely limited utility in this regard. *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (explaining that while information in a classified intelligence report, relating to the credibility and reliability of a source, “was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is not sufficient for the purposes for which a habeas court must now evaluate it”); *Ahmed*, 613 F. Supp. 2d at 55. Green Berets and Navy SEALs typically operate in platoon or

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<sup>13</sup> Combat operations are utterly unlike the situation facing police officers who have, for example, raided an apartment and apprehended a violent suspect or confiscated a large cache of narcotics. Upon securing a crime scene, police need not worry that all criminals within a fifty mile radius will converge on their location to attack. Yet this is *exactly* the primary concern of every Special Operations team leader immediately after capturing a high-level al-Qaeda target.

team-sized units of approximately a dozen soldiers or even fewer. Adams, *supra* p. 6, at 3-5. Each member of an always very small SOF team has an absolutely critical job to do and is already cross-trained in several of his teammates' unique capabilities, such as communications, heavy weapons, intelligence, or combat medicine.

Nor is it at all feasible to "embed" FBI or other law enforcement agents to collect evidence during SOF missions. Such a policy would fatally compromise the purpose and effectiveness of SOF teams, which are superbly conditioned to operate in the most arduous conditions and can do so in such small numbers only because of team members' ability to defend themselves while advancing the objectives of the mission.

By contrast, every non-SOF-qualified person who accompanies a team places the entire mission at greater risk. Team members will have to be tasked to protect the evidence-gathering specialist, further degrading the team's capability. Moreover, the vehicles used by SOF – when they use vehicles at

all<sup>14</sup> – are not suited to carrying extra passengers. SOF operating in Afghanistan are frequently inserted aboard specially modified helicopters that can carry only a limited number of personnel.<sup>15</sup> For instance, the relatively large MH-60 Black Hawk helicopter carries a maximum of eleven SOF personnel. Ewen Southby-Tailyour, *Jane's Special Forces Recognition Guide* at 212 (2005). Due to the small size of SOF teams and transport, each forensic specialist would displace an integral SOF member from the mission, thereby diminishing combat effectiveness and unit cohesion.

All other things being equal, the District Court's decision makes it more difficult to capture and hold enemy combatants and puts the teams who may participate in their capture outside of Afghanistan at considerably greater risk. The District Court did not consider these issues at all in its "practical obstacles" analysis.

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<sup>14</sup> SOF are frequently inserted behind enemy lines via stealthy, highly-dangerous methods such as High Altitude-Low Opening ("HALO") parachute jumps and SCUBA diving which require extensive training.

<sup>15</sup> If a team were inserted aboard Navy SEAL Delivery Vehicle ("SDV") submersibles, there would be no way to take non-SOF-trained specialists on the mission. The SDV is a "wet" submersible sled which SEALs ride while wearing underwater breathing apparatus.

**3. It Is All-But-Impossible To Collect Useful Or Admissible Evidence In The Midst Of Combat.**

The District Court also failed to consider any of the “practical difficulties” of collecting evidence in a combat situation: gunfire, darkness, dust kicked up by rotor wash, and the “fog of battle” all make it extremely difficult to collect and catalog evidence, maintain a chain of custody, or even to produce an account of what happened precise and consistent enough for civilian judicial purposes. Evidence can easily be lost or misplaced during a rapid extraction, particularly if SOF personnel have had to linger in one place to collect it and must then withdraw under fire. Even the difficulties of identifying a particular enemy fighter may prove insurmountable where the “witnesses” last saw him crouched behind cover in the dark or with his face covered. A substantial proportion of Special Operations “snatch-and-grab” missions are deliberately undertaken at night to maximize surprise and better disorient the enemy.

**4. The District Court's Decision Will Have A Chilling Effect On Intelligence Gathering.**

A last and vital question is whether a court would consider confessions extracted from detainees irremediably tainted because of the “inherently coercive” nature of point of capture interrogations. Any type of questioning under combat conditions may appear coercive. Such situations invariably involve the open display and application of armed force unlike anything seen in civilian police work. The very objective of such missions is to overawe and terrify an armed enemy into submission.

Questioning in such circumstances is critical to obtaining battlefield intelligence and saves lives, but all of these factors may well be seen as “coercive” by a court accustomed to the techniques of police operating far from a battlefield. *See Al-Ghizzawi v. Bush*, No. 05-2378 (JDB), 2008 U.S. Dist. LEXIS 103189 (D.D.C. Dec. 22, 2008) (adopting a case management order under which “[i]f requested by the petitioner, the government shall disclose to the petitioner . . . information about the circumstances in which any statements of the petitioner were made or adopted, including but not limited to any evidence of coercive techniques used during any

interrogation or any inducements or promises made”); *Bacha v. Obama*, No. 05-2385 (ESH), 2009 U.S. Dist. LEXIS 61310 (D.D.C. July 17, 2009) (a post-*Boumediene* habeas proceeding in which petitioner’s statements deemed “coerced” were suppressed by the court).

If SOF teams need to worry about “tainting” the intelligence they gather, operations will be severely impacted. It will be much more difficult to conduct offensive sweeps where small teams seize and quickly interrogate a progression of targets in short succession, often over the course of a single day, so as to deny enemy forces the opportunity to escape and round up a network of terrorist targets. The District Court also did not consider these issues in its “practical obstacles” analysis.

**C. The District Court’s Decision Will Make It All But Impossible To Hold Enemy Combatants Seized By Allied Forces.**

One of the core missions of SOF is working with and training local elements sympathetic to American interests. USSOCOM Fact Book, *supra* p. 7, at 7. It is already difficult to train foreign personnel to operate in a manner consistent with U.S. standards

and to undertake inherently dangerous missions. It will be even more difficult to persuade our allies not only to risk their lives on the battlefield but also to take into account unfamiliar and foreign U.S. legal procedures which will increase the risk to their safety.<sup>16</sup>

The District Court simply did not consider that many of the enemy combatants held by the United States at Bagram were captured by other than U.S. forces.<sup>17</sup> A natural result of the District Court's decision will therefore be to force U.S. commanders to either: (1) use U.S. forces directly for all captures outside of Afghanistan, a course whose serious political implications the courts have no business precipitating; (2) run the risk of having to release a significant number of terrorists because allies may have captured them in a manner deemed

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<sup>16</sup> This is particularly true for individuals who assist U.S. forces at the risk of persecution in their own country. It is impossible to ask such individuals to testify where they believe that doing so would expose them and their families to retaliation by enemy forces.

<sup>17</sup> For example, the Special Forces have been tasked with training the Pakistani Frontier Corps, a paramilitary force based in Pakistan's strategic Northwest Frontier Province to interdict and disrupt Taliban operations. *See, e.g.,* Yochi J. Dreazen & Siobhan Gorman, *U.S. Special Forces Sent To Train Pakistanis*, *The Wall Street Journal* (May 16, 2009) at A6 (noting that "[t]he Special Forces personnel will focus on training Pakistan's Frontier Corps, a paramilitary force responsible for battling the Taliban and al-Qaeda fighters, who cross freely between Afghanistan and Pakistan." These are

unsatisfactory by a far away court, or (3) deemphasize snatch-and-grab missions in favor of airstrikes targeted at terrorist leaders.

Faced with historically unprecedented judicial oversight over the detention of enemy combatants, the Executive Branch might reasonably decide that the intelligence benefits of capturing enemy leaders no longer justify the risks of such operations when a court is likely to order the release of the individuals captured on a technicality.<sup>18</sup> None of these alternatives is consistent with U.S. national security or foreign policy objectives, and all would make combined operations with allies increasingly difficult. While such outcomes are not the intended goal of judicial action, Amici fear that they will result from the District Court's decision.

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crucial allies in strategic terrain where it is difficult for U.S. forces to act on their own.

<sup>18</sup> Airstrikes in those portions of the Afghan theater that lie outside of the political boundaries of Afghanistan (i.e., in Pakistan) pose serious difficulties of their own. These strikes are deeply unpopular with Pakistanis and have been criticized for causing civilian casualties. *See U.S. Drone Strikes Target Militants In Pakistan*, Reuters (Aug. 7, 2009). The use of SOF or local allies, who operate on the ground, is less likely to cause civilian casualties and is therefore a valuable option. Depending on the context, however, the presence of foreign troops on the ground or in combat in Pakistan may also be politically delicate. The Executive Branch is best suited to balancing these political and operational concerns. Yet, by adding legal failure to the risks of a ground operation, the District Court's decision interposes the Judiciary into thoroughly Executive decisions.

### III. CONCLUSION

The District Court failed in its analysis of the “site of apprehension” and “practical obstacles” factors as articulated in *Boumediene*. Its decision should be reversed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF  
THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6,229 words (which does not exceed the applicable 7,000 word limit).

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## CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009 I filed and served the foregoing brief with the Court and the following counsel via electronic mail, by operation of the Court's ECF system, and by sending copies by first-class U.S. mail:

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