

GOVERNMENT CONTINUES ITS FIGHT FOR INDEFINITE DETENTION

The government appealed its loss in the habeas petition of Mohamedou Ould Salahi Friday.

It's worth reviewing what this appeal is about. At the District level, Judge James Robertson ruled that while Salahi had clearly been an al Qaeda sympathizer and, before al Qaeda declared war on the US had been a sworn member of al Qaeda, the government had presented no **admissible** evidence (the most damning evidence submitted was gotten by torturing Salahi) that he was working under the orders of al Qaeda when they detained him in 2001.

His ruling is important—and damaging for the government's hopes to indefinitely detain those who it can't charge—for two reasons. First, because he hewed very closely to the terms of the AUMF.

If the government has any authority to detain Salahi without charging him with a crime, its source is the Authorization for Use of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

"The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Authorization for Use of Military

Force, Pub. L. 107-04, 115 Stat. 224 (2001).

That purpose, the “prevent [ion of] any future acts of international terrorism,” has the Supreme Court’s seal of approval, see *Boumediene*, 128 S.Ct. at 2277 (“The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.”) those who, as the government argued in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), were “part of or supporting forces hostile to the United States or coalition partners . . . and who engaged in an armed conflict against the United States.” (internal quotations omitted) .

And based on the AUMF’s reference to those who attacked us on 9/11, Robertson ruled that a suspicion that Salahi might one day return to al Qaeda—even if he had not been part of al Qaeda in 2001 when it attacked the US and had not taken up hostilities against the US—was not enough to detain him indefinitely.

The government’s problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qaida and become a terrorist upon his release. That concern may indeed be well-founded. Salahi fought with al-Qaida in Afghanistan (twenty years ago) , associated with at least a half-dozen known al-Qaida members and terrorists, and somehow found and lived among or with al-Qaida cell members in Montreal. But a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government’s

prediction that he may do unlawful acts in the future -any more than a habeas court may rely upon its prediction that a man will not be dangerous in the future and order his release if he was lawfully detained in the first place. The question, upon which the government had the burden of proof, was whether, at the time of his capture, Salahi was a "part of" al-Qaida. On the record before me, I cannot find that he was. [emphasis original]

And of course, given that both sides admit much of the evidence is inadmissible because it was coerced, this raises questions of what happens to those we're holding because they incriminated themselves under coercion.