No. 10-439

In the Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether intelligence reports and other "hearsay" evidence commonly used by the military to justify the detention of individuals captured abroad during armed conflict is admissible in habeas corpus proceedings challenging the detention of foreign nationals at Guantanamo Bay, Cuba, when a court determines that such evidence is reliable when considered in context.

2. Whether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings.

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OPINIONS BELOW

The unclassified version of the opinion of the court of appeals (Pet. App. a1-a20) is reported at 611 F.3d 8. The unclassified version of the opinion of the district court (Pet. App. a21-a57) is reported at 648 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2010. The petition for a writ of certiorari was filed on September 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Al Odah (petitioner) is an alien detained at the United States Naval Station at Guantanamo Bay,

Cuba, under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. a1-a20.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those conflicts, the United States and its allies have captured many persons who are part of al-Qaida or Taliban forces and detained a small fraction of them at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After *Boumediene*, the government filed a factual return to the habeas petition, and petitioner filed a traverse. Pet. App. a23-a25.

3. After conducting a three-day hearing, the district court denied the habeas petition. Pet. App. a21-a57. As an initial matter, the court explained that it would consider hearsay evidence introduced by the parties. Not-

ing this Court's statement in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), that "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government." Pet. App. a25 (quoting *Hamdi*, 542 U.S. at 533-534 (plurality opinion)), the district court determined that "allowing the use of hearsay by both parties balances the need to prevent the substantial diversion of military and intelligence resources during a time of hostilities, while at the same time providing [petitioner] with a meaningful opportunity to contest the basis of his detention," *id.* at a26. The court explained that it was "fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable," and it stated that it would "make such determinations in the context of the evidence," taking into account "any arguments the parties have made concerning the unreliability of hearsay evidence." *Ibid.* The court further stated that it would not give the government's evidence "a presumption of accuracy and authenticity," *ibid.*, but instead would "consider the accuracy or authenticity of the evidence in the context of the entire record and the arguments raised by the parties," *id.* at a28.

The district court also held that "the Government bears the burden of proving by a preponderance of the evidence that [petitioner] is lawfully detained." Pet. App. a32. The court stressed that, under that standard, petitioner "need not prove his innocence nor testify on his own behalf," and it emphasized that it had not drawn any inference from petitioner's failure to testify. *Ibid.*

The district court next examined three categories of evidence, largely based on petitioner' own statements, that supported a finding that petitioner "more likely than not became part of Taliban and al Qaeda forces in Afghanistan." Pet. App. a32. First, the court consid-

ered petitioner's August 2001 journey from Kuwait to Afghanistan. *Id.* at a33. Petitioner admitted that he sought to meet a Taliban official upon arriving in Afghanistan; he made statements concerning his travels that the court found to be "not credible"; and he used the same route as others who were traveling to Afghanistan to engage in jihad. *Id.* at a38. Based on those facts, the court determined that the "record supports a reasonable inference that [petitioner] may have also been traveling to Afghanistan to engage in jihad." *Ibid.*

Second, the court considered petitioner's activities within Afghanistan. Although petitioner claimed that he attempted to leave Afghanistan after September 11, 2001, the court found that claim not to be credible. Pet. App. a40-a43. The court observed that petitioner admitted attending a Taliban camp where he trained with an AK-47 rifle, *id.* at a39, and that his own statements further established "his meeting with individuals who appeared to be armed fighters [and] his travel into the Tora Bora mountains with armed men toward the armed conflict, where he remained through the Battle of Tora Bora and where he was ultimately captured while carrying his AK-47," *id.* at a45. The court concluded that "the only reasonable inference is that [petitioner] made a conscious decision to become a part of the Taliban's forces." *Id.* at a50.

Although the district court found the first two categories of evidence "sufficient for the Government to meet its burden," the court went on to explain that the training camp petitioner attended was more likely than not "Al Farouq, al Qaeda's primary Afghan basic training facility." Pet. App. a51. That fact, the district court concluded, "also makes it more likely than not, when combined with the other evidence in the record, that

[petitioner] became a part of the forces of the Taliban and al Qaeda." *Id.* at a57.

3. The court of appeals affirmed. Pet. App. a1-a20. The court stated that it was "now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF." *Id.* at a11 (citing *Al-Bihani* v. *Obama*, 590 F.3d 866 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); *Awad* v. *Obama*, 608 F.3d 1 (D.C. Cir. 2010), petition for cert. pending, No. 10-736 (filed Nov. 30, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (D.C. Cir. 2010)). The court next rejected petitioner's argument "that the Federal Rules of Evidence and the habeas corpus statute, 28 U.S.C. § 2241 et seq., restrict the situations in which a district court may admit hearsay evidence in considering a petition from a person detained pursuant to the AUMF." Pet App. a12. The court explained that "[t]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay." *Ibid.* (citation and internal quotation marks omitted). In this case, the court of appeals explained, "[t]he government offered reasons why its hearsay evidence had indicia of reliability, and the [district] court considered the reliability of the evidence in deciding the weight to give the hearsay evidence." *Id.* at a13. After rejecting petitioner's procedural challenges, the court of appeals held that there was sufficient evidence supporting the district court's finding that petitioner was "part of" al Qaeda and Taliban forces. *Id.* at a13-a19.

ARGUMENT

Petitioner argues (Pet. 11-16) that district courts should not consider hearsay evidence in evaluating habeas corpus petitions brought by individuals detained at Guantanamo Bay under the AUMF, and (Pet. 16-19) that, in responding to such petitions, the government should be required to prove by more than a preponderance of the evidence that detention is proper. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals.

To date, the district courts have issued decisions in habeas cases involving 58 detainees, granting writs of habeas corpus for 38 detainees and denying writs for 20 detainees. The D.C. Circuit has now issued published decisions in seven cases, affirming the denial of writs of habeas corpus in four cases including this one, see *Al-Bihani* v. *Obama*, 590 F.3d 866 (2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); *Awad* v. *Obama*, 608 F.3d 1 (2010), petition for cert. pending, No. 10-736 (filed Nov. 30, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (2010), reversing the grant of a writ in one case, see *Al-Adahi* v. *Obama*, 613 F.3d 1102 (2010), petition for cert. pending, No. 10-487 (filed Oct. 8, 2010), vacating the grant of a writ and remanding for further proceedings in one case, see *Salahi* v. *Obama*, 625 F.3d 745 (2010), and reversing the denial of a writ and remanding for further proceedings in one case, see *Bensayah* v. *Obama*, 610 F.3d 718 (2010). No D.C. Circuit panel has held that the admission of hearsay evidence, subject to the district court's assessment of its reliability and probative value, is improper in this unique context. And no D.C. Circuit judge or district court judge has concluded that a standard of proof more

rigorous than preponderance of the evidence should apply.

In short, the lower courts have properly performed the task that this Court assigned them in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)—they have developed "procedural and substantive standards," *id.* at 796, for habeas proceedings for military detainees. Nothing in the Constitution or any other source of law requires the application of different standards or procedures. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in relying upon intelligence reports and other "hearsay" evidence in assessing the lawfulness of his detention. Specifically, he argues (Pet. 11) that a unanimous series of D.C. Circuit decisions holding that hearsay evidence is admissible and instructing the district court judges to assess the reliability and probative value of such evidence, see Pet. App. a12-a13; *Awad*, 608 F.3d at 7; *Al-Bihani*, 590 F.3d at 879, have "undermined" the habeas right recognized in *Boumediene* and are contrary to the Federal Rules of Evidence. Those arguments lack merit.

a. This Court has recognized that habeas proceedings for detainees held by the military are unique, and that the standards and evidentiary rules that would apply in a domestic criminal case are not necessarily applicable in this context. See *Boumediene*, 553 U.S. at 783 ("Habeas corpus proceedings need not resemble a criminal trial."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that the "full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate" in habeas proceedings for military detainees). In proceedings challenging the military's detention of individuals

captured abroad during an armed conflict, information generated by the military—and by other agencies operating abroad—will generally be not only the most relevant and probative evidence, but often the only evidence bearing on the legality of the detention. It is appropriate for courts to consider the same types of evidence that the military necessarily uses when it makes detention decisions. See *id.* at 531 (plurality opinion) (noting that the "law of war and the realities of combat may render [military] detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Indeed, *Hamdi* strongly suggests that intelligence reports should, as a general rule, be admissible in habeas proceedings for detainees held by the military. The plurality in *Hamdi* explicitly recognized that the government could support the detention of a United States citizen with "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs," 542 U.S. at 534, such as the intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases, see *id.* at 538 (approving of hearsay evidence contained in declaration of government official). Likewise, this Court recognized in *Boumediene* that habeas proceedings are flexible and may be adapted to circumstances as necessary, including the unique military setting at issue here. 553 U.S. at 779 (stressing that "common-law habeas corpus was, above all, an adaptable remedy"). The Court therefore noted that "accommodations can be made" in this exceptional context "to reduce the burden habeas corpus proceedings will place on the military without impermissibly

diluting the protections of the writ." *Id.* at 795. And the Court cautioned that, in developing "procedural and substantive standards," the lower courts should accord "proper deference * * * to the political branches." *Id.* at 796.

Adhering to *Hamdi* and *Boumediene*, the district courts and the court of appeals have developed a set of procedural rules to govern the habeas proceedings for the detainees held by the military at Guantanamo. As this case illustrates, within the context of these unique proceedings, district court judges generally admit and consider intelligence reports and other "hearsay" evidence, and assess its reliability and probative value. Pet. App. a26. In making those case-specific and highly contextual assessments, the district courts have not blindly accepted the government's proffers. See *e.g.*, *Al Rabiah* v. *United States*, 658 F. Supp. 2d 11, 28-40 (D.D.C. 2009). Unlike juries, district court judges understand the limitations of certain types of hearsay evidence and have experience in evaluating the reliability of such evidence. Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 180 (1987) (holding that district courts may consider hearsay in assessing the admissibility of evidence). And in performing that gatekeeping function, the district court judges have had the benefit of detailed declarations from the government concerning intelligence-gathering methods and techniques used to create different types of reports. See, *e.g.*, C.A. App. 467-506.

Significantly, in many cases, much of the "hearsay" evidence supporting detention consists simply of military or other reports recording what the detainee has said. Leaving aside the threshold point that records of a party's own statements do not constitute "hearsay,"

see Fed. R. Evid. 801(d)(2)(A), there are fewer legitimate bases for questioning the reliability of such routine records than for questioning more attenuated intelligence reports where the sources of the information are not clear, see *Parhat* v. *Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (stressing that hearsay evidence "must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability"). In such circumstances, a detainee can challenge the reliability of reports purporting to summarize what he has previously admitted simply by testifying at the habeas hearing—a right open to all detainees in these proceedings. Where, as here, the petitioner elects not to challenge the reliability of any specific evidence on which the district court relied in finding that his detention was lawful—evidence that was largely based on his own prior statements—a global challenge to the admission of all hearsay evidence has considerably less force. Thus, as this case illustrates, the approach to hearsay endorsed by the court of appeals and applied by the district courts is correct and is fully consistent with both *Hamdi* and *Boumediene*.

b. Despite the flexibility that this Court contemplated in *Hamdi* and *Boumediene*, petitioner argues that Federal Rule of Evidence 1101(e) compels strict application of the rules generally applicable to hearsay evidence, even in habeas proceedings involving detainees held by the military. Petitioner's argument is flawed in several respects.

As an initial matter, the Federal Rules of Evidence do not apply because this is a constitutional habeas case, not a statutory one. Rule 1101(e) enumerates various categories of cases in which the rules of evidence "apply to the extent that matters of evidence are not provided

for in the statutes which govern procedure therein," including "habeas corpus under sections 2241-2254 of title 28, United States Code." But this is not a statutory habeas case; to the contrary, 28 U.S.C. 2241(e) makes clear that courts have no statutory jurisdiction to consider habeas petitions from Guantanamo detainees. As Justice Souter observed in his concurring opinion in *Boumediene*, what remains "must be constitutionally based jurisdiction or none at all." 553 U.S. at 799; see *Al-Bihani*, 590 F.3d at 877 (these habeas proceedings are not "bound by the procedural limits created for other detention contexts"). Because this is not a proceeding "under sections 2241-2254," it is not addressed in Rule 1101(e). The court of appeals was therefore correct to conclude that the relevant question is not whether hearsay is admissible under the Federal Rules of Evidence but rather whether such evidence is sufficiently reliable to provide support for the specific detention at issue. See *Al-Bihani*, 590 F.3d at 879 (explaining that "the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits").

Moreover, even if Section 2241 were to provide the jurisdiction over this proceeding, the Federal Rules of Evidence are applicable only to the extent that "matters of evidence are not provided for in the statutes which govern procedure therein or in other rules." Fed. R. Evid. 1101(e). Here, application of the Federal Rules of Evidence (and their prohibition on hearsay) cannot be reconciled with the relevant Congressional enactments. See Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, § 1005(e), 119 Stat. 2742; Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7,

120 Stat. 2635-2636. In both the DTA and the MCA, Congress expressly precluded statutory habeas review and sought to replace it with a direct-review regime in the court of appeals. In doing so, Congress recognized that the ordinary statutory habeas rules and procedures were a poor fit for the process of assessing evidence drawn from military and intelligence information. While this Court held in *Boumediene* that constitutional habeas review must remain available, it remains clear that Congress did not intend for all of the statutory habeas procedures and rules of evidence, which were not designed to address the unique military detention context, to apply in hearings regarding the lawfulness of the detention of the Guantanamo detainees under the AUMF.

In light of Congress's manifest purpose for these specific proceedings, rigid application of more general evidentiary rules governing hearsay would be inappropriate. See *Morales* v. *TWA*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). And given this Court's repeated recognition in *Boumediene* that "[c]ertain accommodations can be made" in developing the procedures for these habeas proceedings, 553 U.S. at 795, it would make little sense to say that the Court's ruling compelled strict adherence to the Federal Rules of Evidence. For that reason, petitioner's argument (Pet. 13) that "[t]here is no indication that the *Hamdi* plurality intended to modify or repeal Fed. R. Evid. 1101(e)," is beside the point. What matters is that *Congress* plainly intended to preclude any habeas review for Guantanamo detainees, and *Boumediene* restored only what is constitutionally required of habeas review while expressly recognizing the need for both procedural and

substantive accommodations to be made in this unique context. 553 U.S. at 795.

Petitioner contends that strict application of the Federal Rules of Evidence would not be unduly burdensome because some forms of hearsay evidence could still be admitted under various exceptions to the hearsay rules. But while petitioner correctly observes (Pet. 14-15) that "capture reports and other records made contemporaneously with the prisoner's capture would typically be admissible either as records of regularly conducted activity under Fed. R. Evid. 803(6) or as public records under Fed. R. Evid. 803(8)," that observation does not demonstrate that the court of appeals erred in concluding that hearsay is admissible in Guantanamo habeas proceedings without regard to the Federal Rules of Evidence. On the contrary, petitioner's assertion underscores that the type of "hearsay" typically admitted in such proceedings (capture reports and other documents recording statements made by detainees) is generally reliable and does not unfairly prejudice detainees given the ample opportunities they have to challenge such evidence in district court.

c. As explained above, the district courts have fashioned habeas procedures for Guantanamo detainees that safeguard against the improper use of hearsay evidence by allowing the detainees' counsel access to the evidence and an opportunity to contest the reliability of particular pieces of evidence. See *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168 (1988) (upholding the admission of evidence "subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish [its] weight"). The district courts have generally allowed intelligence reports and expert declarations to be admitted, while the detainee and his counsel have

had substantial opportunities to challenge the government's assertions and to question the evidence. See Pet. App. a64-a73 (Case Management Order). In this case, for example, the government filed a factual return and complied with its obligations to disclose "exculpatory evidence"—that is, evidence that would tend to show that the detention standard is not met. *Id.* at a24-a25. Petitioner's attorneys were granted security clearances and given access to the classified evidence, and petitioner responded to the government's factual return with a traverse. Petitioner also had an opportunity to provide testimony during a three-day merits hearing in order to challenge the accuracy and reliability of any documents summarizing any of his prior statements—which constituted the bulk of the evidence supporting detention in this case. *Id.* at a50 (summarizing admissions by petitioner supporting detention). Although petitioner elected not to testify, that does not demonstrate that the court of appeals erred in holding that hearsay is generally admissible. Instead, petitioner's failure to challenge any specific hearsay evidence as unreliable or inaccurate strongly suggests that there was no prejudice or error in the admission of any such evidence. It also makes this case an unsuitable vehicle for addressing specific questions regarding the reliability of certain categories of hearsay evidence.

2. Petitioner also argues (Pet. 16-17) that application of a preponderance standard is inappropriate, and that "there must be some heightened standard for the quantum of evidence to justify indefinite imprisonment." That argument fails for many of the same reasons that undermine petitioner's challenge to the admissibility of hearsay evidence. Indeed, petitioner cites (Pet. 16) what he characterizes as the admission of "stale and almost

entirely flimsy and untestable hearsay" in this case as one of the reasons why a preponderance of the evidence standard is "particularly inappropriate." As discussed above, however, petitioner had ample opportunity to challenge the government's evidence, and he cannot now invoke unspecified and unchallenged errors in the admission of evidence to support his general argument that a more stringent standard of review is necessary.

a. Habeas proceedings involving military detainees are unique and require a flexible approach tailored to their specific circumstances. While the Court in *Boumediene* held in broad terms that courts considering Guantanamo habeas petitions "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," 553 U.S. at 783, it did not specifically address what substantive or procedural standards would be appropriate. See *id.* at 796-797. Instead, the Court directed the district courts to craft appropriate standards, stating that "[t]he extent of the showing required of the Government in these cases is a matter to be determined." *Id.* at 787.

Implementing that directive from this Court, the district courts have reached a consensus that the government should bear the burden of showing, by a preponderance of the evidence, that detention is lawful. See Pet. App. a69 (Case Management Order).[1] And while the court of appeals has suggested that a lower standard of proof might be constitutional, see *Al-Adahi*, 613 F.3d at 1104-1105; *Al-Bihani*, 590 F.3d at 878 & n.4, it has

[1] When the district court issued its Case Management Order in November 2008 adopting a preponderance standard, the government successfully challenged certain provisions of that order, but did not challenge its adoption of a preponderance standard and determined instead to meet that standard.

held that the preponderance of the evidence standard adopted and applied by all of the district courts satisfies the Constitution. See, *e.g.*, Pet. App. a11-a12; *Awad*, 608 F.3d at 10-11. None of petitioner's arguments demonstrate that the lower courts erred in applying that standard in evaluating his habeas petition.

b. As this Court has explained, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations." *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973) (internal quotation marks omitted). In *Boumediene*, this Court noted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." 553 U.S. at 783. For that reason, in the unique circumstances of the proceedings here, it is appropriate for the government to bear the burden of proof by a preponderance of the evidence, and not to apply the general habeas rule that a petitioner bears the burden to demonstrate his entitlement to the writ. See *Garlotte* v. *Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."). The early cases confirm that in cases of Executive detention "the ultimate burden of satisfying the judge" generally rested "with the respondent." R.J. Sharpe, *The Law of Habeas Corpus* 87-88 (1976). The preponderance standard adopted by the district court and upheld by the court of appeals is consistent with that approach because it requires the government to bear the ultimate burden of proof.

In accord with *Boumediene* and that historical background, where (as here) the Executive has not come for-

ward with a prior administrative or judicial adjudication of the matter that might support a more deferential review, the presumptive baseline for civil proceedings—that the party with the burden of persuasion must establish its case by a preponderance of the evidence—should apply. While a higher standard of proof attaches at a criminal trial, it would be inappropriate to apply that standard to this non-punitive, law-of-war detention. This unique setting provides an exception to the general presumption against executive detention, see *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (exception for detention arising as part of "the exigencies of war"), and "the law of war and the realities of combat may render [military] detentions both necessary and appropriate," *Hamdi*, 542 U.S. at 531 (plurality opinion).

Notably, the Army Regulation that establishes procedures for determining the proper status of certain military detainees in accordance with the laws of war and the Geneva Convention employs a preponderance of the evidence standard. See, *e.g.*, Army Regulation 190-8, ch. 1, § 1-6(e)(9) (1997) (inquiry into prisoner of war status). There is no basis for applying a higher standard here when adjudicating the lawfulness of the Executive's authority to detain an individual under the AUMF, as informed by the laws of war.

Moreover, as the district courts have unanimously held, the preponderance standard appropriately reflects the competing interests at stake in these habeas proceedings as they currently are conducted in the district court. Like any military detainee subject to detention under the laws of war, the individuals captured during the ongoing armed conflict and held at Guantanamo have an obvious interest in securing their liberty. On the other side of the balance, there are "weighty and

sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). The preponderance standard provides the traditional procedural framework that appropriately balances those interests.

c. Although petitioner insists (Pet. 19) that his liberty interests should tip the balance in favor of review under a more stringent clear-and-convincing-evidence standard, the lower courts' application of a preponderance standard allows for the "meaningful review" this Court envisioned in *Boumediene*, 553 U.S. at 783. Application of a higher standard has no historical support, would be inconsistent with military practices for adjudicating prisoner-of-war status, and would ignore the practical difficulties in obtaining and producing relevant evidence in these military detention cases. See, *e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007) (concluding that "detention on [the basis of a preponderance standard] seems to us to be acceptable in view of the difficulties of collecting and preserving evidence in battlefield conditions"). A higher standard is not necessary for "meaningful review" and would create an inappropriate risk of harm to the government and the public at large, given that wrongfully released fighters could rejoin the battle against United States troops and interests. See *Salerno*, 481 U.S. 748-749 (emphasizing that "society's interest" in detention is "at its peak" in times of war or insurrection").[2]

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[2] Although it is appropriate for the government to bear the burden of proof by a preponderance of the evidence in these unique circum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2011

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stances, the same approach may not apply in other contexts of review of military detention. See generally *Boumediene*, 553 U.S. at 786 (noting that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here"). For example, a formal military adjudication regarding the detainee's status could warrant substantial judicial deference. A less formal military decision might likewise warrant some degree of judicial deference. See, *e.g.*, *Hamdi*, 542 U.S. at 534; see also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949).

* The Acting Solicitor General is recused in this case.

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