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.
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court remanded this case to the lower courts to develop appropriate procedures "in the first instance" for habeas hearings challenging indefinite military confinement. 553 U.S. at 733. Those courts have disregarded the statutes, rules, and Supreme Court precedents governing habeas procedures, thereby undermining this Court's decision through procedural rulings. This Court should confirm the required procedural standards necessary to fulfill its decision that Guantanamo detainees are entitled to habeas hearings to test their detention by the executive branch.

In the Brief for Respondents in Opposition ("Opp."), the government states that review of the decision below is not warranted because, in the Guantanamo habeas cases, the Court of Appeals and District Court have consistently upheld the admission of hearsay without regard to the Federal Rules of Evidence and have consistently applied the preponderance of the evidence standard of proof. Opp. at 6-7. It is precisely for these reasons that this Court's review of the Court of Appeals' decision of important federal questions is warranted. The central question in *Boumediene* was not whether the United States could detain individuals in Guantanamo, but rather what process is due to such individuals. The Court's answer – the writ of habeas corpus – requires evidentiary procedures and a standard of proof that truly effectuate the liberty interest embodied in the writ.

Without review, the decision of the Court of Appeals will prescribe the procedures that will apply not only to the Guantanamo habeas cases but to habeas cases involving all future cases of military detention in the "War on Terror," including potential detention of U.S. citizens. The questions presented by this Petition go to the reliability of the fact finding process in habeas cases, and to the heart of the liberty interest protected by the writ of habeas corpus. There is no basis for the rejection of the clear statutory mandates reflected in the Federal Rules of Evidence and 28 U.S.C. § 2246. And this Court has never approved as minimal a burden of proof in cases involving potential lifetime deprivation of liberty as the preponderance of the evidence standard upheld by the D.C. Circuit here. Both of these important federal questions require this Court's review.

> "[I]n our tripartite system of government," it is the duty of this Court to "say 'what the law is.'" *Boumediene v. Bush*, [553 U.S. at 765] (quoting *Marbury v. Madison*, [5 U.S. (1 Cranch) 137, 177 (1803)]). This duty is particularly compelling in cases that present an opportunity to decide the constitutionality or enforceability of federal statutes in a manner "insulated from the pressures of the moment," and in time to guide courts and the political branches in resolving difficult questions concerning the proper "exercise of governmental power." *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part); *see generally Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006); *Hamdan*, [548 U.S. at 588] (quoting *Ex parte*

> *Quirin*, 317 U.S. 1, 19 (1942)). This is such a case. . . . It is incumbent upon us to provide what guidance we can on these issues now. Whatever conclusion we reach, our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation.

Noriega v. Pastrana, 130 S. Ct. 1002, 1002-03, *rehearing denied*, 130 S. Ct. 1942 (2010) (Thomas, J., dissenting from denial of certiorari).

A. Admissibility of Hearsay

The government argues that habeas proceedings for prisoners in military confinement are "unique," and that the Federal Rules of Evidence applicable in all other habeas corpus cases under 28 U.S.C. § 2241 should not apply. Opp. at 7-8. This is a policy argument, not a rule of decision for the district court. The courts are not free to abrogate the Federal Rules of Evidence based on their own policy preferences. Yet, in this case, as in all Guantanamo habeas cases to date, the District Court erred in admitting, over Petitioner's objection, all hearsay evidence, without regard to the restrictions and requirements of the Federal Rules of Evidence.[1]

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[1] As explained in the Petition (at 8), the District Court then relied on hearsay specifically challenged by Petitioner to support its factual conclusions that Petitioner followed a route to Afghanistan traveled by others who allegedly went there for purposes of jihad (App. a36, a38), that he was captured with an-

(footnote cont'd)

In order to escape the plain language of Fed. R. Evid. 1101(e), which applies the Federal Rules of Evidence to habeas corpus cases under 28 U.S.C. § 2241 except as otherwise provided by statute, the government argues that the district court's habeas jurisdiction comes solely from the Constitution, and not from 28 U.S.C. § 2241. Opp. at 10-11. This argument conflicts with two centuries of decisions of this Court, as well as the holding of *Boumediene* itself. It is well established that lower federal courts have no jurisdiction other than that which is conferred by statute. *See Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute . . . ."); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution."). As this Court held in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807): "[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law."

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other individual with alleged ties to al Qaeda (App. a44), and that he attended the al Farouq training camp (App. a51, a55).

Boumediene did not overrule this longstanding principle. This Court had previously held in *Rasul v. Bush*, 542 U.S. 466 (2004), that the District Court had jurisdiction in Petitioner's case under 28 U.S.C. § 2241. *See Rasul v. Bush*, 542 U.S. 466 (2004). *Boumediene* held that § 7 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), which amended 28 U.S.C. § 2241 to withdraw habeas corpus jurisdiction, violated the Suspension Clause of the Constitution. *See Boumediene*, 553 U.S. at 795. Because 28 U.S.C. § 2241 is the "statute that would govern in MCA § 7's absence" (*Boumediene*, 553 U.S. at 777), this Court "necessarily restored the *status quo ante*, in which detainees at Guantanamo had the right to petition for habeas under [28 U.S.C.] § 2241." *Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

The recognition of statutory jurisdiction is consistent with other cases in which Congress sought to withdraw jurisdiction from federal courts in an unconstitutional manner. In such cases, the Court has disregarded the unconstitutional withdrawal of statutory jurisdiction, rather than finding a non-statutory source of jurisdiction. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 154 (1871).[2]

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[2] *Klein* and *Armstrong* addressed a post-Civil War statute that withdrew from the federal courts jurisdiction to hear claims for recovery of seized property brought by pardoned Confederates. *See* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 Md. L. Rev. 132 (1995); Lawrence G.

(footnote cont'd)

In short, the District Court's jurisdiction in this case comes from 28 U.S.C. § 2241, and not another source.

The government goes on to argue that MCA § 7 and its predecessor, the Detainee Treatment Act of 2005 ("DTA"), demonstrate that Congress did not intend for the Federal Rules of Evidence to apply in habeas corpus proceedings involving military confinement. Opp. at 11-12. In essence, the government suggests that the courts may infer from Congress's attempt to withdraw habeas jurisdiction that Congress would have exempted habeas cases challenging military confinement from the Federal Rules of Evidence if it had known that MCA § 7 violated the Suspension Clause. This argument is sheer speculation. If Congress had intended to exempt this category of habeas cases from the Federal Rules of Evidence, it could have done so in the two years since *Boumediene* was decided – and remains free to do so at any time. But unless and until Congress (or this Court, acting pursuant to its rulemaking capacity under the Rules Enabling Act) modifies the hearsay rules applicable to these cases, the District Court's responsibility is to apply the Federal Rules of Evidence and the habeas statute, not to disregard them based on the government's after-the-fact and counterfactual inferences from the DTA and MCA about Congress's alleged intent. The courts cannot rewrite an unconstitutional statute in order to conform to

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Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 71 (1981) ("It was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends.").

perceived but unwritten policy objectives. *See United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884-85 (1997).

B. Standard of Proof

The government misstates the question presented by the Petition as "[w]hether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings." Opp. at (I). The determination of the appropriate burden of proof in these cases does not depend solely upon the Constitution. As explained in the Petition, where the statute is silent as to the burden of proof, the appropriate burden of proof to be applied in habeas cases challenging military confinement "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). In spite of the government's description of the preponderance standard as the "traditional procedural framework" to balance the prisoner's liberty interests against the nation's security interests, the government cites to no case in which this Court has ever approved anything less than a clear and convincing evidence standard to support prolonged confinement.

In fact, as set forth in the Petition, this Court has never approved less than proof by clear and convincing evidence to support prolonged confinement. *See Woodby*, 385 U.S. at 286 (deportation); *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997) (civil commitment of sex offenders); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (civil commitment of criminal defendant found not guilty by reason of insanity); *United*

States v. Salerno, 481 U.S. 739, 750 (1987) (pre-trial detention based on dangerousness). As this Court held in *Addington v. Texas*, 441 U.S. 418 (1979):

> [C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. . . . [T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

See 441 U.S. at 425-27. In the military confinement context, as in the civil commitment context, the courts must strike an appropriate balance between liberty and security. In all other such cases, this Court has held that a preponderance of the evidence standard does not reflect "the value society places on individual liberty." *Id.* at 425. This line of precedent should not be abandoned - and certainly not without this Court's review.

The government argues that a preponderance of the evidence standard is consistent with Army Regulation 190-8, which provides for a preponderance of the evidence standard in military tribunals under Article 5 of the Geneva Conventions. The purpose of an Article 5 tribunal under Army Regulation 190-8 is not to determine whether prisoners should be indefinitely detained. It is to provide an expeditious hearing in exigent circumstances to determine whether the prisoner is entitled to the protections of the Geneva Conventions. Moreover, unlike the habeas hearing that Petitioner eventually received, an Article 5

tribunal is conducted at or near the time and place of capture when memories are fresh and eyewitnesses are likely to be available. Of course, no such hearing was conducted in Petitioner's case, and the government has consistently maintained that Petitioner, like all Guantanamo detainees, is not entitled to the protections of the Geneva Conventions. Petitioner's habeas corpus hearing was conducted in the ninth year of his captivity, not on or near a battlefield, but in a federal courtroom half a world away from the place of his capture, using evidence that originated largely from prisoners in Guantanamo and not from any battlefield. "[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Rasul*, 542 U.S. at 488 (Kennedy, J. concurring). The deference to Executive authority that might justify a more lenient standard of proof for battlefield hearings does not exist to justify such a standard in the judicial forum in which the Guantanamo cases are decided. The government should meet the burden of proof that this Court has consistently required for judicial determinations affecting individual liberty. This burden is appropriately higher than the burden that might be required in battlefield-expedient hearings, particularly because Petitioner never had such a hearing.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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