No. 10-

Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD,

Petitioner,

v.

BARACK H. OBAMA, DAVID M. THOMAS, JR., TOM COPEMAN, and ROBERT M. GATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The risk of misclassifying an individual as an enemy combatant varies by the circumstances of capture. The risk of error is minimized when individuals are captured in the midst of battle, such as the detainee in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The risk is increased when the individual is not engaged in armed conflict when captured, such as the Petitioner, an amputee who was surrendered at a civilian hospital in Afghanistan. In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that aliens detained at Guantanamo Bay are entitled to a "meaningful opportunity" to challenge the factual basis of their detention. The Court of Appeals has held that in all Guantanamo habeas cases—regardless of the risk of erroneous detention—all evidence, including hearsay, is admitted without precondition, witnesses are not required (and thus cannot be confronted), and preponderance of the evidence is the applicable standard of proof.

Do the procedural rules adopted by the Court of Appeals for all Guantanamo habeas proceedings provide individuals who were not engaged in armed conflict when captured with a "meaningful opportunity" to challenge their indefinite detention?

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The unclassified version of the decision of the United States Court of Appeals for the District of Columbia Circuit is published at 608 F.3d 1, and is reproduced in the Appendix ("App.") at App. 1. The unclassified version of the decision of the United States District Court for the District of Columbia (Robertson, J.) is published at 646 F. Supp. 2d 20, and is reproduced at App. 24. The classified versions of both decisions are maintained under the control of the Court Security Office and can be provided to the Court if required.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2010. Awad filed a timely petition for panel rehearing on July 19, 2010, which the Court of Appeals denied on September 1, 2010. App. 39. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

More than two years ago, this Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), that aliens detained at Guantanamo Bay have a constitutional right of habeas corpus. The Court recognized that the right would prove empty if detainees did not have a "meaningful opportunity" to demonstrate their detention is erroneous. The Court left initial development of those meaningful standards to the inferior courts.

In a series of cases, the United States Court of Appeals for the District of Columbia has considered the question and defined a uniform standard for the District Court to use in all Guantanamo habeas cases. Under the Court of Appeals' approach, all hearsay is admitted without precondition or explanation: There is no foundation that needs to be established; there is no authentication requirement; and there is no requirement to demonstrate the reliability of evidence before it is admitted. Witnesses are not required under any circumstance and are rarely, if ever, offered by the government. Eliminating all such traditional requirements for the admission of evidence would be of less moment if the Court of Appeals insisted upon a standard of proof sufficient to protect non-combatant detainees from the real risk of erroneous detention on the basis of unreliable evidence, but instead, the Court of Appeals chose to pair its evidentiary free pass with the preponderance of the evidence standard.

The Court of Appeals' chosen approach presents a serious and clear issue for this Court to consider. In the Court of Appeals' view, one standard of review applies to all detained at Guantanamo even though the risk of erroneous detention is not the same for all. Some—like the petitioner in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)—were captured on the battlefield engaged in combat. Others—like Petitioner Awad—were not. Awad was a patient in a civilian hospital in Afghanistan. While at the hospital, a large portion of his severely injured leg was amputated. During Awad's recovery from that serious operation, a group of al Qaeda fighters overtook the hospital. Awad was surrendered to coalition forces during the siege, not taken while

engaging in hostilities. On the basis of a case the government constructed entirely from multi-layer hearsay—a case the District Court charitably termed "gossamer thin"—the Court of Appeals affirmed Awad's indefinite and potentially lifetime detention under a preponderance of the evidence standard.

Boumediene recognized the tension between the detainee's liberty interest and the government's interest in detaining those individuals who threaten the security of the United States. *Boumediene* directed courts to balance those competing interests in determining how to conduct habeas review, including the procedural and substantive standards appropriate to different types of cases. Here, the Court of Appeals' one-size-fits-all procedural regime fails to consider at least two factors significant to determining the level of scrutiny appropriate to avoiding an erroneous detention: (i) the absence of a prior trial-type determination of detainable status; and (ii) the circumstances of capture. This violates the Court's directive in *Boumediene* and is an avulsive shift in the course of habeas jurisprudence.

Habeas corpus is an adaptable remedy, *Boumediene*, 553 U.S. at 779, but the Court of Appeals has turned the Great Writ into a rubber stamp. Under the Court of Appeals' rule, lifetime detention of an individual who was not engaged in hostilities when captured can be based on rank hearsay considered against the lowest burden of proof. That is not the "meaningful review" *Boumediene* envisioned.

This Petition presents the issue unambiguously and there is no need to await more lower-court illumination. First, no circuit conflict can develop

because the D.C. Circuit is the exclusive forum for Guantanamo habeas proceedings. Second, more adjudications will not generate different perspectives because the Court of Appeals has stated clearly that the evidentiary rule and standard of proof will be the same in all cases. The Court of Appeals has reaffirmed its rule in multiple decisions and has rejected *en banc* review. If this Court does not address this issue, the Court of Appeals will be the last word on what constitutes a "meaningful opportunity" for individuals held at Guantanamo to challenge their detention. That should not be the ultimate resolution of this question of paramount national importance.

STATEMENT

Awad has been imprisoned at the United States Guantanamo Naval Base since early 2002, nearly a quarter of his life. Awad filed a petition for a writ of habeas corpus in 2005 under 28 U.S.C. § 2241(a), challenging the lawfulness of his detention at Guantanamo. His petition waited in limbo for a number of years as various jurisdictional questions were litigated through the federal court system.

A. Precedential Backdrop

In 2004, this Court reversed the Court of Appeals and held in *Rasul v. Bush*, 542 U.S. 466, 485 (2004), that the statutory habeas jurisdiction of federal courts extended to detainees at Guantanamo Bay. That same year a plurality of this Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-537 (2004) that due process required a United States citizen being held as an enemy combatant to have a

meaningful opportunity to contest the factual basis for his detention.

The next year Congress enacted the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2739, which purported to strip the federal courts of habeas corpus jurisdiction in cases filed by Guantanamo detainees. The DTA also provided that the D.C. Circuit shall have "exclusive" jurisdiction to review decisions of the Combatant Status Review Tribunals ("CSRT"), which the Deputy Secretary of Defense established to determine whether individuals detained at Guantanamo were "enemy combatants."

This Court then held in *Hamdan v. Rumsfeld*, 548 U.S. 557, 583-84 (2006), that the DTA did not apply to cases pending at the time of the DTA's enactment. Congress responded by enacting the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), which purported to strip the federal courts of habeas corpus jurisdiction in all cases, pending or otherwise, filed by Guantanamo detainees. The Court of Appeals held that the MCA did not violate the Suspension Clause of the Constitution and ordered that the habeas cases be dismissed for lack of jurisdiction. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007).

This Court again reversed the Court of Appeals. It held that the Suspension Clause has full effect at Guantanamo and that the jurisdiction-stripping provision of the MCA unconstitutionally suspended the writ. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008). Specifically, the Court held that the CSRT and DTA processes were inadequate substitutes for the writ. *Id.* The Court found that the detainees

were entitled to a prompt habeas hearing that constituted a "meaningful opportunity" to challenge the bases of their detentions. *Id.* at 779, 783. Boumediene left to the inferior courts the development of "meaningful" standards.

B. The District Court Proceedings

After this Court's decision in *Boumediene*, Awad's case proceeded. The government filed a factual return that asserted the grounds for Awad's detention. The government claimed that Awad was an al Qaeda fighter properly detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF").

Awad made several requests for discovery, all of which were met with blanket objections that the District Court sustained. Awad then submitted his traverse in which he denied being part of al Qaeda. Both parties moved for judgment on the record.

1. *The Undisputed Facts*

The parties do not dispute that Awad grew up in Yemen and traveled to Afghanistan in September 2001 at age 19. JA-96, ¶¶ 1, 3, 5; JA-121, ¶¶ 1, 3, 5.[1] The parties also do not dispute that Awad was seriously injured near Kandahar airport by an air raid that severely injured his right leg. JA-98, ¶ 13; JA-122, ¶ 13. As a result of the injury, a large portion of that limb was amputated. JA-107, ¶ 26; JA-115, ¶ 26. The parties also agree that after the air raid, Awad arrived at Mirwais hospital, where

[1] Citations to JA- __ are to the Joint Appendix filed below.

his leg injury was treated. JA-98, ¶ 15; JA-122-23, ¶ 15. The parties, however, dispute the date and circumstances of Awad's arrival at the civilian hospital. *Id.*

The parties further agree that al Qaeda fighters overtook the hospital at some time during the first week of December 2001 and that local Afghan forces laid siege to the hospital. JA-98, ¶ 14; JA-122, ¶ 14. One of the al Qaeda fighters in the hospital was former Guantanamo detainee Majeed al Joudi, who later purported to identify Awad as one of the al Qaeda fighters. App. 6-7. Al Joudi was captured by Afghan forces when he was tricked into leaving the barricade area. App. 4. Al Joudi denied being an al Qaeda fighter himself, but the government concluded that he lied in that regard. App. 14.

There is no dispute that Awad was surrendered by the insurgents to Afghan forces at Mirwais hospital in December 2001, after his lower leg was amputated. JA-98, ¶ 17; JA-123, ¶ 17. It is undisputed that Awad was not carrying any weapons or documents when he was surrendered. JA-98, ¶ 19; JA-123, ¶ 19. In January 2002, the siege ended when the Afghan forces killed the al Qaeda fighters inside the hospital. JA-98, ¶ 16; JA-123, ¶ 16.

2. *Government's Facts—Disputed*

The government constructed its narrative on a 100% hearsay record. It contended that Awad traveled to Afghanistan in September 2001 to join the fight, where he allegedly trained at the al Qaeda Tarnak Farms camp. App. 25-26. After attending Tarnak Farms, the government alleged that Awad

was injured in December 2001 in an airstrike near Kandahar Airport along with other al Qaeda fighters he met at Tarnak Farms. JA-107 ¶ 29, App. 26. That injured group of al Qaeda fighters, allegedly including Awad, went to Mirwais Hospital in Afghanistan for treatment. App. 26. The group of fighters then barricaded themselves inside the hospital while United States and associated forces laid siege to the hospital. *Id.* The government further alleged that Awad's fellow al Qaeda fighters gave him up to Afghan forces. *Id.*

3. *Awad's Response To The Government*

Awad disputed the government's allegations of his association with al Qaeda and of his enemy combatant status. Awad traveled to Afghanistan to visit another Muslim country, intending to return home after a few months. App. 27. He was injured in early November 2001 by an air raid in Kandahar. *Id.* He was taken to Mirwais hospital for treatment, where a substantial part of his leg was amputated. JA-98 ¶ 13. While in the hospital he was virtually immobile and heavily sedated, falling in and out of consciousness. App. 27. Awad told the District Court in his affidavit that "[a]t no point did [he] associate with, coordinate with or take up arms with alleged al Qaeda members in the hospital." JA-303, ¶ 12.

4. *The Hearing*

The District Court held a merits hearing on July 31, 2009. The proceeding would be more accurately characterized as an oral argument. No evidence was formally admitted during the hearing because the

parties had previously submitted all of the evidence to the Court. No witness testified at the hearing, which consisted solely of argument by counsel for the government and Awad.

C. The District Court's Opinion

On August 12, 2009, the District Court issued a Memorandum Order Denying Writ of Habeas Corpus. The District Court admitted all of the government's hearsay exhibits—the government offered nothing else. App. 29. The court indicated that it would assess each piece of evidence "for consistency, the conditions in which the statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay." *Id.* The District Court also determined that the AUMF gives the President authority to detain persons "who were part of" al Qaeda. App. 28.[2]

The District Court found that Awad came to Afghanistan to join the fight. App. 36. The District Court, however, rejected much of the government's remaining narrative, including the allegation that Awad trained to become an al Qaeda fighter at Tarnak Farms. *Id.* All the government offered to support the allegation was a list of names found at Tarnak Farms, which contained two references (one

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[2] The District Court rejected Awad's argument that it was improper to detain him unless the government demonstrated that he poses a continuing threat. App. 30. The District Court concluded that "Awad is a marginally literate" individual "who has spent more than seven of his twenty six years—since he was a teenager—in American custody. It seems ludicrous to believe that he poses a security threat now, but that is not for me to decide." *Id.*

crossed out) to "Abu Waqas," a nickname attributed to Awad. App. 6. The District Court found that "[w]e do not know the purpose of the list or when it was written" and further found there was "no reliable evidence that [Awad] actually trained" at Tarnak Farms. App. 32, 36.

The District Court found that Awad was injured during an air attack in November 2001 and arrived at Mirwais hospital shortly thereafter, where his leg was amputated. App. 10, 35, 36 n.8. The District Court therefore rejected the government's allegation that Awad was injured in December 2001 with the other al Qaeda fighters and arrived at the hospital with them. App. 35-36.

The District Court further found that Awad at some point in time joined the fighters behind the barricade inside the hospital. App. 38. For what allegedly occurred inside the hospital, the District Court relied largely on the double hearsay statements found in an interrogation report that were attributed to al Joudi, who purported to identify Awad as one of the al Qaeda fighters. App. 6-7, 33-34.

The District Court found that in December 2001 Awad was surrendered to Afghan forces in the hospital. App. 33. The District Court rejected the only purported first-hand evidence of Awad's capture relied on by the government—an interview report with the individual who claimed to have led the group that had taken Awad into custody—as "internally inconsistent [and] completely unreliable." App. 35.

The District Court did not identify any direct evidence that Awad performed a single hostile act

against United States or coalition forces. Rather, the determining factor appears to have been the purported correlation of similar names on four documents, including the Tarnak Farms list and the al Joudi interrogation report, a correlation the District Court found to be "too great to be a mere coincidence." App. 37. The District Court stated in its conclusion that the "[t]he case against Awad is gossamer thin. The evidence is of a kind fit only for these proceedings and has very little weight." App. 38. Nevertheless, the court concluded that "it appears more likely than not that Awad was, for some period of time, 'part of" al Qaida." *Id.* Awad appealed the denial of the habeas petition to the Court of Appeals.

D. The Court Of Appeals' Decision

While Awad's appeal was pending the Court of Appeals decided *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *en banc denied,* 619 F.3d 1 (D.C. Cir. 2010), which was the first appellate decision from a merits determination of a Guantanamo habeas petition. The Court of Appeals' opinion in this case was the second.

Awad appealed on the grounds, among others, that the District Court erred in resting its decision on unreliable hearsay and by applying a preponderance of evidence standard of proof.

The Court of Appeals rejected the argument that the District Court used unreliable hearsay, finding that Awad had the burden to establish the evidence's unreliability and that he had failed to do so. App. 12-13. The court also reaffirmed the statement in *Al-Bihani* that all hearsay evidence in Guantanamo

habeas cases is admissible; the only issue is reliability. App. 12 (citing *Al-Bihani*, 590 F.3d at 879). After summarizing the evidence offered by the government, the Court of Appeals found that the district court did not commit clear error in holding that Awad was part of al Qaeda. App. 16.

The Court of Appeals also rejected Awad's challenge to the standard of proof. Relying on *Al Bihani* and this Court's plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality op.), the Court of Appeals held that "the preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF." App. 20-21.

E. The Current State Of Guantanamo Habeas Litigation

The Court of Appeals has issued five Guantanamo decisions since the opinion below. Not one detainee has prevailed before the Court of Appeals and had his habeas petition granted. In three of the cases, the Court of Appeals found in favor of the government. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (affirming denial of Guantanamo habeas petition); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (reversing grant of Guantanamo habeas petition), *petition for cert. filed*, No. 10-487 (U.S. Oct. 8, 2010); *Al-Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (affirming denial of Guantanamo habeas petition), *petition for cert. filed*, 10-439 (U.S. Sept. 28, 2010). In the fourth case, the Court of Appeals vacated the District Court's grant of the habeas petition and remanded the case for further proceedings consistent with the opinion. *Salahi v. Obama*, No. 10-5087, 2010 WL 4366447, at

*8 (D.C. Cir. Nov. 5, 2010). And in the fifth case, the Court of Appeals remanded the case for further consideration of the government's evidence on whether the detainee was part of al Qaeda. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010) (remanding case "for the district court to determine whether, considering all reliable evidence, Bensayah was functionally part of al Qaeda."). There are approximately 20 cases involving Guantanamo habeas petitions currently pending before the Court of Appeals and many more are pending before the District Court.

REASON FOR GRANTING THE PETITION

THE INDISCRIMINATE ADMISSION OF EVIDENCE AND THE USE OF A PREPONDERANCE OF THE EVIDENCE STANDARD, TAKEN TOGETHER, DO NOT SUFFICE TO PROTECT AGAINST THE REAL RISK OF ERROR INHERENT IN THE INDEFINITE DETENTION OF INDIVIDUALS WHO WERE NOT ENGAGED IN ARMED CONFLICT WHEN CAPTURED

A. The Boundaries Set By *Boumediene* and *Hamdi*

In 2008, this Court held in *Boumediene* that aliens detained at Guantanamo Bay have the constitutional right of habeas corpus. In doing so, the Court left open the question of "[t]he extent of the showing required of the Government in these cases." 553 U.S. at 787.

Boumediene did not explicitly decide the procedural and substantive standards that would govern the habeas proceedings, but it did establish certain guidelines. The "privilege of habeas corpus entitles the prisoner to a meaningful opportunity" to challenge the basis for their detention. *Id.* at 779. The "writ must be effective" and the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783. To determine the necessary scope of review, the Court must look to "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Id.*

In any habeas proceeding, the scope of review "in part depends upon the rigor of any earlier proceedings." *Boumediene*, 553 U.S. at 781. With Guantanamo detainees, there has been no previous judgment by a court of record; the detention is by executive order. *Id.* "Where a person is detained by executive order . . . the need for collateral review is most pressing." *Id.* at 783. Here, the Court of Appeals appears not to have given any significance to the absence of a prior adversarial proceeding conducted with due process protections.

The Court stressed in *Boumediene* that "above all," habeas corpus is an "adaptable remedy. Its precise application and scope change[s] depending upon the circumstances." *Boumediene*, 553 U.S. at 779. To determine "the process due in any given instance," the Court has turned to the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Hamdi*, 542 U.S. at 529; *Boumediene*, 553 U.S. at 781. *Mathews* requires that courts balance the private and governmental

interests by analyzing "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews*, 424 U.S. at 335).

"It is beyond question that substantial interests lie on both sides of the scale" in the Guantanamo detention cases. *Hamdi*, 542 U.S. at 529. The detainee's interest "is the most elemental of liberty interests—the interest in being free from physical detention" by the government. *Id.* While these are civil cases, the detainees are on trial for their liberty. The consequence of an erroneous detention is the "significant" risk of "detention of persons for the duration of hostilities that may last a generation or more." *Boumediene*, 553 U.S. at 785. Awad, for example, has already been detained for nearly nine years. The interest on the government side is also substantial—"ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[3] *Hamdi*, 542 U.S. at 531.

Taken together, *Boumediene* and *Hamdi* teach that a uniform procedural regime for all Guantanamo habeas cases is unacceptable. "[T]he risk of an erroneous deprivation of [a liberty interest]," *Boumediene*, 553 U.S. at 781, varies

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[3] However, as the years of indefinite detention drag on to nearly a decade, the national security considerations grow weaker. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker").

depending on the circumstances of the case, particularly the facts relating to the capture. With classic battlefield combat involving the uniformed armies of nation states, the risk of erroneously detaining an individual is small. That was the situation presented in *Hamdi*, which involved an alleged enemy combatant who was captured while carrying an assault rifle, as part of a Taliban unit, in a "foreign combat zone." *Hamdi*, 542 U.S. at 512-13, 523.[4] The risk of erroneous deprivation of liberty is much higher, however, in cases like Awad's. There is no evidence that Awad was engaged in combat against the United States or coalition forces at any time.

The question for this Court is whether providing individuals held at Guantanamo with a "meaningful opportunity" to challenge their detention means that procedural rules in Guantanamo habeas cases must adapt to diverse circumstances of capture. The Court of Appeals' rules decidedly do not.

B. The Minimal Procedural Protections Adopted By The Court Of Appeals For All Detainees Do Not Allow Meaningful Review In A Case Like Awad's

The Court of Appeals' rulings that one standard applies to all Guantanamo habeas proceedings defies

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[4] Of course, individuals detained on or near the battlefield may have a meritorious petition for a writ of habeas corpus. A plurality of the Court recognized that in the circumstances of *Hamdi*, the habeas procedures must ensure that an "errant tourist, embedded journalist, or local aid worker has a chance to prove military error." *Hamdi*, 542 U.S. at 534.

this Court's mandate to adapt the writ proceedings according to a petitioner's circumstances. *See Boumediene*, 553 U.S. at 779-80.

1. *The Evidentiary Standard*

The evidentiary rule adopted by the Court of Appeals for the Guantanamo habeas cases is clear: Everything offered by the parties is admitted into evidence. The Court of Appeals held that hearsay "is always admissible"; the issue is "what probative weight to ascribe to whatever indicia of reliability it exhibits." *Al-Bihani*, 590 F.3d at 879. The rule imposes no requirement on the government, however minimal, to demonstrate that it would be burdensome to prove enemy combatant status with non-hearsay evidence. The government is not even required to authenticate the hearsay it offers. The testimony of witnesses is not required under any circumstance. Thus, the detainee has no opportunity to confront the declarant(s) of the hearsay indiscriminately admitted into evidence against him.

This case shows the consequences of a zero-level admissibility threshold. The government offered a list of names found at the al Qaeda Tarnak Farms training camp as evidence that Awad received his training there. The District Court rejected the evidence as unreliable because it could not determine the significance of a name appearing on the list. App. 32, 36. Yet, the District Court later relied on that list as support for the proposition that Awad was "part of" al Qaeda. App. 38. Thus, the District Court continued Awad's nine-year detention indefinitely based on an inexplicable document. Like a particle in quantum physics, the Tarnak Farms list exists in simultaneous states of significance and

insignificance. What the District Court did and the Court of Appeals approved cannot constitute meaningful review of Awad's detention.

There is a stated requirement that the court may base its decision on only reliable hearsay. App. 12. This has proved to be no limitation at all because the Court of Appeals adopted the least demanding method of demonstrating reliability. Under its rule, one piece of unreliable evidence can be elevated to reliable status through another piece of evidence that itself is unreliable. *See Bensayah*, 610 F.3d at 726. Under the Court of Appeals' rule, there need not be even a single piece of evidence that possesses indicia of reliability to support a finding that a man is an enemy combatant, and on that basis to imprison him for an indefinite number of years, indeed, potentially for the rest of his life.

2. *The Standard Of Proof*

The law generally recognizes three standards of proof for different types of cases. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 423 (1979). On the other end of the spectrum, in a criminal case, "beyond a reasonable doubt" is used "to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.* at 423-24. The intermediate standard is clear and convincing evidence, which is often used in civil cases involving allegations of quasi-criminal wrongdoing by the defendant and thus the "interests

at stake . . . are deemed to be more substantial than mere loss of money." *Id.* at 424.

No decision by this Court has ever approved using a standard less demanding than proof by clear and convincing evidence in a case involving prolonged detention. *See, e.g., Addington*, 441 U.S. at 427 ("the 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"); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (holding that alien deportation orders must be supported by "clear, unequivocal and convincing evidence"); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (stating that government must prove case by clear and convincing evidence in order to prevail in denaturalization proceeding).

When faced with the issue of proper standard of proof for potentially lifetime detention, the Court of Appeals chose the mere preponderance of the evidence standard for all cases involving Guantanamo detainees. The court first reached that conclusion in *Al-Bihani* and then reaffirmed it in this case. *Al-Bihani*, 590 F.3d at 878; App. 20-21.

Under the Court of Appeals' standards, an individual not engaged in enemy activity may be captured and detained for eternity by meeting the burden of proof used in a negligence action, but without the requirement of competent evidence that would be essential to prove liability in a fender bender. Awad asks this Court to consider whether those standards are sufficient for cases where someone could be, in effect, jailed for life.

C. In Adopting The Minimal Procedural Protections, The Court of Appeals Misinterpreted This Court's Prior Decisions

The procedural rules adopted by the Court of Appeals for all Guantanamo cases regardless of circumstance directly conflicts with *Boumediene* and *Hamdi*.

Boumediene mandates that the habeas court determine the appropriate inquiry in light of the circumstances of the petitioner's case. *Boumediene*, 553 U.S. at 789. But none of the Court of Appeals' Guantanamo decisions show that the court performed the balancing of interests that *Boumediene* requires or recognized that different circumstances of Guantanamo detainees require adaptation of the writ inquiry. The Court of Appeals adopted minimal procedural protections that are almost entirely focused on the government's interests. *Boumediene* recognizes that "[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military," but the Court made clear that those accommodations shall not "impermissibly dilut[e] the protections of the writ." *Id.* at 795.

A court could conceivably balance the competing interests of the detainees and the government and conclude that only the most minimal of protections are due to the detainees. The Court of Appeals, however, did not even do that much work. It interpreted the "center of the *Boumediene* opinion" to be the "primacy of independence over process." *Al-Bihani*, 590 F.3d at 880. As support, the Court of Appeals quoted this Court's statement that the

"'judicial officer must have adequate authority to make a determination in light of the relevant law and facts.'" *Id.* (quoting *Boumediene*, 553 U.S. at 787). According to the Court of Appeals, "meaningful review" is provided so long as the detainee has access to the federal courts; additional procedural protections are unnecessary. But the writ requires more than access to the courts for review to be meaningful. The beginning of the paragraph from which the Court of Appeals quotes states that "[t]he extent of the showing required by the Government in these cases is a matter to be determined." *Boumediene*, 553 U.S. at 787. *Boumediene* did not exalt independence over process; it left the critical question of process for another day and demanded that the lower courts face the issue squarely. That, the Court of Appeals has not done.

What process is appropriate to test whether a Guantanamo detainee is proven to be an enemy combatant and to reduce the risk of an erroneous detention? Consideration of two factors this Court has held to affect the scope of habeas review in other contexts shows why the Court should grant certiorari here and provide the lower courts with direction on how to implement "meaningful review."

1. *Prior Adjudication As A Factor In The Scope Of Habeas Review*

The overwhelming majority of habeas cases filed each year involve collateral attacks on prior criminal-court convictions and immigration proceedings. Guantanamo cases are nothing like either of those proceedings. The risk of erroneous deprivation in a Guantanamo case is higher than in the typical habeas case because there has been no

prior determination in a court or tribunal that uses evidence and burdens of proof that usually apply before sending someone off to jail.

Boumediene told the lower courts that the appropriate procedures for habeas review "depends upon the rigor of any earlier proceedings" in the case. *Boumediene*, 553 U.S. at 781. In *Al-Bihani*, the Court of Appeals ignored this crucial point, reasoning that the lowest burden of proof was appropriate for Guantanamo detainees because in "some domestic circumstances [the burden] has been placed *on the petitioner* to prove his case under a clear and convincing standard." *Al-Bihani*, 590 F.3d at 878. Essentially, if habeas law allows the burden to shift to a citizen-petitioner, the preponderance standard *a fortiori* protects a Guantanamo detainee. To support its conclusion, the Court of Appeals cited to 28 U.S.C. § 2254(e)(1), which concerns the federal review of a state court judgment. *Al-Bihani*, 590 F.3d at 878.

The Court of Appeals' analogy is wrong and its holding ignores *Boumediene*. Post-conviction habeas is nothing like a Guantanamo case. In habeas review after a criminal conviction, the state has already had to prove its case beyond a reasonable doubt. "[C]onsiderable deference is owed to the court that ordered confinement" because "it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding." *Boumediene,* 553 U.S. at 782. The Guantanamo cases are completely different because "the detention is by executive order," not by trial with due process protections. *Id.* "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive

detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

2. *Circumstances Of Capture As A Factor In The Scope Of Habeas Review*

All Guantanamo cases start with an elevated risk of erroneous detention. The level of risk varies with the circumstances surrounding the detainee's capture.

The Court of Appeals' approach fails because it lumps all Guantanamo detainees into a single class even though they are not all similarly situated. The same rule should not apply to an individual captured on the battlefield, to an individual surrendered at a hospital, and to an individual grabbed off the street in Pakistan. *Boumediene* requires the courts to adapt habeas review of enemy combatant claims to the new paradigm where the executive captures and detains people in scenarios other than active combat.

The increased risk of erroneous detention is due in large part to the government's expansion of the enemy combatant definition. The further the definition of enemy combatant moves away from individuals engaged in armed conflict on behalf of a nation state, the more difficult it is to distinguish between combatants and civilians. The traditional definition of enemy combatant arises from the classic paradigm of battlefield combat between the armed forces of nation states. This form of warfare involves strong indicia of affiliation with the armed force. Foremost among these is appearance on the battlefield fighting on behalf of the enemy force.

Other indicia of affiliation include wearing the uniform of the armed force and citizenship in one of the nation states at war. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1088 (2008) (noting that "the error rate of relatively casual procedures in a traditional war is thought to be relatively low because captured soldiers are likely to be in uniform"). Often, no inquiry into affiliation will even be necessary—the combatants will identify themselves as such to obtain the benefits that arise from prisoner-of-war status. *Id.* at 1089.

To date, this Court has used an enemy combatant definition based on these established law-of-war principles. The most recent example is in *Hamdi*, a case that the government characterized as a "classic wartime detention" involving an "archetypal battlefield combatant." Brief for the Respondents at 20-21, 28, *Hamdi*, 542 U.S. 507 (No. 03-6696). Based on the definition offered by the government, a plurality of the Court defined the term "enemy combatant" as "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and *who engaged in an armed conflict against the United States there.*" *Hamdi*, 542 U.S. at 516 (emphasis added) (internal quotation marks omitted). The plurality determined that Hamdi could be classified as an enemy combatant because he "was carrying a weapon against American troops on a foreign battlefield." *Id.* at 522 n.1.

Ex parte Quirin, 317 U.S. 1 (1942), which *Hamdi* termed as the "most apposite precedent," 542 U.S. at 523, involved habeas challenges by German

saboteurs detained in the United States. At the direction of the German military, the saboteurs landed on the shores of the United States with explosives and the intent to destroy war industries and war facilities. *Quirin*, 317 U.S. at 21. The Court found that the saboteurs were enemy combatants because they engaged in hostile acts under the direction of the armed forces of the enemy. "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.* at 37-38.

The plurality in *Hamdi* recognized the traditional, limited definition of enemy combatant when it distinguished the case of *Ex parte Milligan*, 71 U.S. 2 (1866). There, the Court granted habeas relief to an American citizen who had been tried during the Civil War by a military commission for offenses including conspiring with a "secret society" to overthrow the government, liberate prisoners of war, and seize munitions of war. *Id.* at 6-7. The Court found that the petitioner was not an enemy combatant under the laws of war and therefore could not be subject to trial by a military commission. *Id.* at 131. In distinguishing the situation in *Hamdi* from *Milligan*, the plurality noted that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522.

In this case, the question of whether the detainee is an "enemy combatant" is not nearly as clear both because the government is using a broader definition

of "enemy combatant"[5] and due to the nature of the terrorist threat. Here, the government asserts that it can detain Awad because he is "part of" al Qaeda.[6] Unlike in *Hamdi*, the "enemy combatant" definition advanced here does not require that the detainee be "engaged in an armed conflict against the United States." *Hamdi*, 542 U.S. at 516. Without the requirement of a hostile act, in many cases it will be difficult to determine whether the detainee is an enemy or civilian. The nature of the "war on terror" renders this determination even more difficult. Traditional indicia of affiliation with enemy forces are of little, if any, use.

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[5] In *Hamdi*, the plurality stated that the lower courts would, in the first instance, define the permissible bounds of the "legal category of enemy combatant." 542 U.S. at 522 n.1. In 2009, the government gave a new label to the concept (whether the individual is "detainable") and ceased using the term "enemy combatant." For consistency with this Court's usage, the Petition will continue to use the term "enemy combatant."

[6] According to the government, the AUMF authorizes the President to "detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, (D.D.C. Mar. 13, 2009), Dkt. 1689. This Petition does not take a position on whether the government's attempt to broaden the definition of "enemy combatant" is within the scope of the Executive's detention authority under the AUMF.

Terrorists such as al Qaeda members are stateless fighters who do not wear uniforms. The difficulty of detection is exacerbated further because al Qaeda members try to blend into the surrounding community. "[T]hese factors make it much more likely that the traditional military detention process will result in erroneous detentions. The costs of such erroneous detentions are also higher in this war [because] . . . there is reason to believe the conflict could span generations." Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1100 (2008). With no requirement of a hostile act, and with no prior adjudication by a court of record, greater procedural safeguards are needed to address the increased risk of erroneous detention.

The appropriate approach under *Boumediene* and *Hamdi* is one that balances the competing interests in light of the circumstances of the case, specifically the risk of erroneous deprivation. This does not lead to *ad hoc* judgments in each case. Categories will develop depending on the circumstances of the capture.

If the government makes a threshold demonstration by credible evidence that the individual was captured while engaged in armed conflict, reduced procedural safeguards may be appropriate. Viewed from the other perspective, the question is whether the individual had a plausible reason other than affiliation with the enemy to be in the location where he was captured.

Here, the government would be unable to make such a showing. Awad was not captured while fighting. He was in a civilian hospital, medicated,

and with an amputated leg. He had a plausible reason, unrelated to combat or activity hostile to the United States, to be in the hospital from which he was surrendered. The District Court found that he arrived at the hospital a month before the al Qaeda fighters overtook the hospital. App. 35-36. Furthermore, the District Court rejected the "only first-hand evidence offered by the government about Awad's capture" as "internally inconsistent [and] completely unreliable." App. 35.

If the government cannot make a threshold showing of engagement in armed conflict, the risk of erroneous detention is at its peak. *Boumediene* therefore requires a commensurate adaptation of the review and evidentiary standards of the habeas proceeding. In this circumstance, the appropriate standard of proof is clear and convincing evidence. The appropriate evidentiary approach is suggested by *Hamdi*, which teaches that hearsay "may need to be accepted as the most reliable evidence" available to the government. 542 U.S. at 533-34. Thus, when the government offers hearsay evidence, the government must demonstrate why the court should accept less reliable evidence than it typically would in habeas cases. This is consistent with the balancing approach approved in *Boumediene* and the procedure set out by Judge Hogan's Case Management Order ("CMO"), which was meant to govern the bulk of the Guantanamo habeas cases at the District Court level (although the District Court in this case did not follow the CMO): A party may rely on hearsay if that party establishes that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to

protect national security." Case Management Order, at II.C, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, (D.D.C. Nov. 6, 2008), Dkt. 940.

The Court of Appeals gave no consideration to those factors. This Court should provide guidance for this and future cases.

D. The Court of Appeals' Procedural Rules Do Not Provide A Meaningful Opportunity To Rebut The Government's Allegations

With no practical restriction on the quality of evidence and the same standard of proof used in personal injury cases, the detainee does not have a "meaningful opportunity" to rebut the government's allegations. *Boumediene* held that the procedures of the CSRT hearings fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." 553 U.S. at 767. The "most relevant" of deficiencies were "the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant." *Id.* at 783. For example, while detainees could theoretically confront witnesses that testified during the CSRT proceedings, "given that there are in effect no limits on the admission of hearsay evidence . . . the detainee's opportunity to question witnesses is likely to be more theoretical than real." *Id.* at 784.

The system adopted by the Court of Appeals is no better than the CSRT proceedings regarding the detainee's opportunity to rebut the government's allegations. True, unlike the CSRT proceedings, the detainee has counsel, but for the detainee to have a

meaningful ability to rebut the government's factual assertions, the government should have to present evidence of a sort that, if false, can be disproved. The Court of Appeals' system does not meet this test.

The only purported restriction on evidence that can support detention in Guantanamo is that it must be reliable. As this Court has held in another context, however, "reliability" is no restriction at all. "Reliability is an amorphous, if not entirely subjective, concept" that is highly unpredictable. *Crawford v. Washington*, 541 U.S. 36, 63 (2004). It is an "open-ended balancing test[ ]" with a "[v]ague standard" that is "manipulable." *Id.* at 68.

That is particularly true under the Court of Appeals' rule, where reliability can be proved in a generalized fashion based on other evidence. The Court has rejected this "bootstrapping" approach before, finding that corroborating evidence does not provide "any basis . . . for presuming the declarant to be trustworthy." *Idaho v. Wright*, 497 U.S. 805, 823 (1990). The result of the Court of Appeals' rule in Guantanamo cases is an elusive test where a person can be detained potentially for life without a single piece of evidence that is itself reliable. For all practical purposes, the Court of Appeals created a presumption—an irrational one—that the government's evidence is reliable.[7]

To illustrate: In this and other Guantanamo cases, the government typically proves enemy

[7] In *Boumediene* this Court recognized that one of the central defects of the CSRT/DTA process was that the "Government's evidence is accorded a presumption of validity." *Boumediene*, 553 U.S. at 767.

combatant status using raw or unfinished intelligence reports consisting of either interrogator's notes summarizing a subject's purported statements during an interrogation session or notes by intelligence gatherers about documents recovered during hostilities. In the District Court, the government asserted that the *unfinished* intelligence reports it submitted were reliable because they were created during the intelligence gathering process. App. 29. But the government's sworn declaration in this case (JA-793) states that raw or unfinished reports are only the *first step* in an "intelligence cycle" that ends with reliability assessments made by intelligence analysts. There is no indication in the record that the originating agencies performed even a feeble check of the reports to determine if they contained reliable information.

This Court should consider whether the Court of Appeals' evidentiary standard comports with *Boumediene's* directive that the habeas petitioner receive a "meaningful opportunity" to challenge his detention. The record here shows that detainees in this situation have no meaningful way to rebut the government's case. As with the CSRT proceedings, no witness from the government testified in this or virtually any other Guantanamo habeas proceeding. Without witnesses to confront, there is no opportunity for cross-examination. Furthermore, with no witness laying the foundation for evidence, counsel for the government in essence testifies about the evidence and what it means. Thus, the detainee is presented with the daunting task of rebutting unsworn statements made under unknown circumstances that are purportedly summarized in a document.

In this case the government relied heavily on interrogation reports of a former detainee, al Joudi. The government admitted that many of the statements attributed to al Joudi were lies he told in an attempt to exculpate himself, i.e., contending that he was not part of the al Qaeda group. *See* App. 14. The government argued, however, that all of the purported statements inculpating others, including Awad, were true. In a traditional evidentiary context, this Court has found that self-exculpatory statements implicating others are "presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). Cross-examination was not an option here. Instead, Awad is detained based on unsworn statements attributed to an enemy combatant, who the government conceded was untruthful as to his own status and conduct. Those purported statements appear in a summary by an unknown agent that was neither reviewed nor adopted by the enemy combatant declarant. This is so far off the scale of reliable evidence that there is no word in the lexicon to describe it.

The risk of erroneous deprivation of liberty is high in a case like Awad's. That risk of erroneous deprivation increases exponentially when the preponderance of the evidence standard is applied. According to the District Court (and affirmed by the Court of Appeals), a "gossamer thin" case with evidence that "has very little weight" is sufficient to meet the preponderance burden and indefinitely detain Awad. App. 38. This Court has stated that in cases, such as this one, "involving individual rights, whether criminal or civil, 'the standard of proof [at a minimum] reflects the value society places on

individual liberty.'" *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)). The driving principle in *Boumediene* is that "[s]ecurity subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Boumediene*, 553 U.S. at 797. The Court of Appeals' preponderance standard denigrates the value that *Boumediene* placed on individual liberty by approving "no higher degree of proof than applies in a negligence case." *Woodby*, 385 U.S. at 285.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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