No. A-11-7020

In The
Supreme Court of the United States

MUSA'AB OMAR AL-MADHWANI
Petitioner,

v.

BARACK H. OBAMA, ET AL.
Respondents.

Supplemental Brief in Support of Petition for Writ of Certiorari

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INTRODUCTION

Petitioner, Musa'ab Omar Al-Madhwani, files this Supplemental Brief in Support of Petition for Writ of Certiorari to supplement the Petition filed in this Court on October 24, 2011. Respondents' Brief in Opposition to the Petition is due November 25, 2011. Petitioner hereby supplements his Petition to include analysis of the Court of Appeals for the District of Columbia Circuit's recent opinion in *Latif v. Obama, et al.*, No. 10-5319, 2011 U.S. App. LEXIS 22679 (D.C. Cir. Oct. 14, 2011). The *Latif* opinion was not yet available to counsel for Petitioner when the Petition was originally filed, as was noted in the Petition:

> On Friday, October 14, 2011, the Court of Appeals issued its decision in *Adnan Latif v. Obama*, Case No. 10-5319. In *Latif*, the court once again reversed the district court's granting of the writ in favor of the detainee. In doing so, the Court of Appeals maintained its perfect record of denying substantive relief to any detainee that has come before it. The Court of Appeals ordered that the opinion remain classified and unavailable to Petitioner's security-cleared counsel until at least October 28, 2011, which is after the deadline for the filing of

> this Petition. Accordingly, Petitioner cannot yet incorporate the *Latif* decision or its reasoning into the arguments presented herein.

(Pet. at 18 n.4.) Undersigned counsel has now been granted access to the classified *Latif* opinions, and therefore submits this additional analysis to supplement Petitioner's arguments that the Court of Appeals has adopted an impermissibly deferential detention standard (Pet. at 7-14; 28), and that the lower courts (and the D.C. Circuit Court of Appeals) desperately need appropriate guidance with respect to how to analyze the scores of Guantanamo habeas cases currently pending. (Pet. at 17-19; 21-26.)

ANALYSIS

The *Latif* decision is further evidence that the Court of Appeals has adopted a standard of review that confers unlimited deference to the Executive with respect to the lawfulness of the detention of Guantanamo Bay detainees, eliminating the judicial branch's responsibility to say "what the law is." *Marbury v. Madison*, 5 U.S. 137, 2 Cranch 137, 177, 2 L. Ed. 60 (1803). Further, the fractured nature of the various opinions of the panel members in *Latif* [1] demonstrates that the lower courts are in dire need of guidance from this Court regarding how to review the petitions for writ of habeas corpus authorized by *Boumediene v. Bush*, 553 U.S. 723 (2008).

I. The *Latif* opinion further demonstrates the Court of Appeals' absolute deference to the Executive when determining the lawfulness of Guantanamo Bay detainees' detention.

The district court in *Latif* granted the petition for writ of habeas corpus, finding that the government failed to meet its burden of justifying detention of the

[1] There were three separate opinions issued by the three panel members in *Latif*.

petitioner. In doing so, the district court, *inter alia*, refused to apply a "presumption of regularity" to an intelligence report offered into evidence by the government. *See Latif*, Slip Op. at 1. The Court of Appeals for the District of Columbia Circuit reversed the granting of the writ,[2] holding that intelligence reports in Guantanamo Bay detainee cases are entitled to a presumption of reliability, and remanded for additional factual findings by the district court. *Latif*, Slip Op. at 53.

The application of the presumption of regularity to intelligence reports is the latest step taken by the Court of Appeals toward completely abdicating responsibility for evaluating Guantanamo detainee cases and toward granting the Executive a "blank check" for indefinite detention, despite this Court's admonition that, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Judge Tatel, dissenting in *Latif*, noted the virtually absolute deference to the Executive established by the Court of Appeals, and expressed concern regarding the remaining role of the judicial branch in reviewing Guantanamo cases:

> Given the degree to which our evidentiary procedures already accommodate the government's compelling national security interests by admitting all of its evidence, including hearsay; given the heightened risk of error and unlawful detention introduced by requiring petitioners to prove the inaccuracy of heavily redacted government documents; and *given the importance of preserving the independent power of the habeas court to assess the actions of the*

[2] As noted in the Petition, the Court of Appeals maintained its perfect record of refusing to grant any petitioner relief, as it has affirmed every denial of the writ and reversed every grant of the writ. (Pet. at 12.)

> *Executive and carefully weigh its evidence*, I find this court's departure from our practice [of refusing to apply the presumption of regularity] deeply misguided.

Latif, Dis. Op. at 12 (internal quotation marks and citation omitted) (emphasis added). Judge Tatel's analysis is consistent with this Court's statement that, "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 765. The analysis conducted not only by the majority in *Latif*, but also by the Court of Appeals in each Guantanamo habeas case (certainly including Petitioner Al-Madhwani's case), would instead impermissibly "permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* (quoting *Marbury*, 5 U.S. 137).

Judge Tatel's dissenting opinion explicitly pointed out the conflict between the Court of Appeals' approach and this Court's precedent:

> Whether the presumption can be overcome by a preponderance of the evidence or by clear and specific evidence – this court never says which – I fear that in practice it "comes perilously close to suggesting that whatever the government says must be treated as true," *see Parhat [v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)]. In that world, *it is hard to see what is left of the Supreme Court's command in Boumediene that habeas review must be "meaningful."* 553 U.S. at 783.

Latif, Dis. Op. at 19 (emphasis added).

Judge Tatel's characterization of the majority opinion in *Latif* rings true of nearly all of the Court of Appeals' opinions deferring virtually entirely to the Executive: "the court's assault on *Boumediene* does not end with its presumption of

regularity. Not content with moving the goal posts, the court calls the game in the government's favor." *Id*. Respected commentators and scholars have already observed the that D.C. Circuit's jurisprudence has now evolved to an endpoint where the result is predetermined. *See, e.g.*, Benjamin Wittes, *Thoughts on Latif #5 – Of En Bancs and Cert Grants*, Lawfare, Nov. 13, 2011, http://www.lawfareblog.com/2011/11/thoughts-on-latif-5-of-en-bancs-and-cert-grants (noting that *Latif* "gives rise to a colorable claim that the principle that reins in habeas merit cases at the D.C. Circuit is that the government wins"); Jonathan Hafetz, *The D.C. Circuit and Guantanamo: The Defiance Reaches New Heights*, Balkanization, Nov. 16, 2011, http://balkin.blogspot.com/2011/11/dc-circuit-and-guantanamo-defiance.html (describing *Latif* as "the culmination of a series of D.C. Circuit decisions that have effectively gutted *Boumediene* by construing habeas in the narrowest of terms, reversing district judges who've sought to scrutinize the government's evidence, and denying judges any power to remedy unlawful detention"). Having seen multiple instances of defiance to this Court's mandates in *Boumediene*, this Court must now intervene to clarify the law of the land.

II. The fractured nature of the *Latif* opinions is further evidence that the lower courts need guidance from this Court with respect to reviewing Guantanamo Bay detainees' habeas petitions.

In *Latif*, the Court of Appeals issued a fractured opinion, with a 53-page opinion authored by Judge Brown, reversing the grant of the writ and remanding for additional factual findings by the district court; a 14-page concurrence authored by Judge Henderson, who concurred only in the judgment and would have reversed

the granting of the writ without even remanding back to the district court;[3] and a 45-page dissent authored by Judge Tatel, who would have affirmed the district court's granting of the writ.

This three-Judge panel could not agree on a multitude of things, not the least of which was the ultimate outcome. For example, Judge Brown and Judge Henderson disagreed as to whether the case should be remanded for additional factual findings by the district court. *See Latif*, Slip Op. at 2 ("We remand so the district court can evaluate Latif's credibility as needed in light of the totality of the evidence, including newly available evidence as appropriate."); *cf*. *Latif*, Con. Op. at 1 ("I believe remand for further factfinding will be a pointless exercise."). Additionally, Judge Brown and Judge Henderson did not believe that the district court had made a finding with respect to Latif's credibility, *Latif*, Slip Op. at 31 ("This district court's analysis in this case suffers from the same omission [of a credibility determination]."); *Latif*, Con. Op. at 5 (noting "the district court's failure to make any finding regarding Latif's credibility"); whereas Judge Tatel observed that the district court had already found Latif credible. *Latif*, Dis. Op. at 29 ("What else could the district court have meant other than that it found Latif's account convincing enough, plausible enough, consistent enough, and corroborated enough to give it at least some weight against the government's evidence?"). The Judges could not even agree on whether and how any so-called presumption of regularity had previously been applied in the Guantanamo *habeas* cases. *See Latif*, Slip Op. at 14 ("Rather than cast doubt on the viability of the presumption of regularity in this

[3] Judge Henderson authored the opinion in Petitioner Al-Madhwani's case.

context, our only pertinent post-*Boumediene* discussion of the presumption strongly suggests its continuing viability."); *cf. Latif*, Dis. Op. at 10 ("It is thus not at all surprising that our court has never before applied the presumption of regularity in Guantanamo Bay habeas cases despite numerous opportunities to do so.").

The disagreement among Court of Appeals Judges regarding the proper standards to apply to and analysis to conduct in the Guantanamo habeas cases has been building over time, and has resulted in the Court of Appeals' refusal to grant any petitioner relief, ever. These results cannot be mere coincidence. It appears that considerations arising from fear regarding the so-called "War on Terror" are infecting the outcomes of the cases, rather than a dispassionate application of the legal principles and values upon which our law is based. *See, e.g.*, *Esmail v. Obama*, 639 F.3d 1075, 1077-78 (D.C. Cir. 2011) (Silberman, J., concurring) ("I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter."); *see also* A. Raymond Randolph, *The Guantanamo Mess*, Oct. 20, 2010, *available at* http://www.heritage.org/Events/2010/10/Guantanamo-Mess (describing the current status of the review of Guantanamo habeas cases as, in the words of D.C. Circuit Judge Randolph, "a mess"). The fractured opinions in *Latif* provide only the latest evidence that the lower courts need guidance from this Court in order to properly analyze these cases. Petitioner Al-Madhwani's case was likewise analyzed under an improperly deferential standard, resulting in the indefinite

imprisonment of a young man that the district court was convinced should be released.

CONCLUSION

For the foregoing reasons, as well as those previously set forth in the Petition, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Darold W. Killmer, hereby Certify that I am a member of the bar of this Court, and that I have this 18th day of November, 2011, caused the foregoing Supplemental Brief in Support of Petition for Certiorari to be served on the following:

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