10-439 SEP 28 2010

NO.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Rules of Evidence and 28 U.S.C. § 2246 limit the admissibility of hearsay in a habeas corpus case challenging indefinite imprisonment, potentially for life.

2. Whether a preponderance of the evidence standard, rather than a clear and convincing evidence standard, is sufficient under the Due Process Clause of the Constitution and 28 U.S.C. § 2241 to support a ruling in favor of indefinite imprisonment, potentially for life.

PARTIES TO THE PROCEEDING BELOW

The appellants in the proceeding below were Fawzi Khalid Abdullah Fahad Al-Odah and his next friend, Khaled Al-Odah.

The appellees in the proceeding below were the United States of America and the respective successors of George W. Bush, Donald Rumsfeld, Richard B. Myers, Rick Baccus and Terry Carrico in their official capacities.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Fawzi Khalid Abdullah Fahad Al-Odah, along with his next friend, Khaled Al-Odah, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The unclassified version of the opinion of the District Court (Kollar-Kotelly, J.) denying Petitioner's habeas corpus petition is available at *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009), and is reprinted at Appendix B (App. a21-a57). The unclassified version of the opinion of the Court of Appeals affirming the District Court's decision is available at *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), and is reprinted at Appendix A (App. a1-

a20). The classified versions of both opinions are maintained under the direction 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 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

U.S. Const. amend. V; 28 U.S.C. §§ 2241 and 2246; Fed. R. Evid. 802 and 1101(e). These provisions are set forth in relevant part in Appendix F (App. a74-a77).

INTRODUCTION

In *Boumediene v. Bush*, this Court held that prisoners at Guantanamo, no less than any other person imprisoned by the government, are entitled to invoke the writ of habeas corpus to seek their liberty. As the Court there noted, "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." 553 U.S. 723 , 797 (2008). Such judicial review, however, is only as meaningful as the procedures that are adopted to effectuate the Great Writ. By ignoring the plain language of the Federal Rules of Evidence, which are applicable by their terms to habeas corpus proceedings, and by applying a lower standard of proof than has ever been approved by this Court for review of prolonged detention, the District Court and the Court of Appeals have effectively gutted this Court's holding in *Boumediene* that habeas corpus is a fun-

damental right to which detainees in Guantanamo are entitled. This Court should not permit its decision to be undermined by the lower courts through such procedural unfairness.

Specifically, both the District Court and the Court of Appeals have disregarded the plain language of the Federal Rules of Evidence enacted by Congress and have allowed the indiscriminate admission of hearsay, denying the detainees any meaningful opportunity to test the reliability of statements made against them. The courts below have also applied a burden of proof lower than any ever approved by this Court in a case involving prolonged imprisonment, allowing the government to justify indefinite detention by a mere preponderance of the evidence, rather than by clear and convincing evidence. The result of these procedures are habeas hearings that lack meaningful, rigorous standards by which to admit evidence and make ultimate factual determinations. Such procedures advance neither the nation's national security, nor the rule of law, nor the values that habeas proceedings vindicate. Instead, these avoidable defects further degrade and diminish any remaining confidence in the ongoing system of indefinite military confinement.

While these procedural questions arise in the specific context of the Guantanamo cases, they will have a broader and more longstanding impact. The Guantanamo cases will establish the procedures for habeas proceedings of all prisoners in connection with the current armed conflict who are entitled to seek relief under 28 U.S.C. § 2241, potentially including even United States citizens detained within the United States (*see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S.

507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)). This Court therefore should grant review and reverse the decision below to ensure that *Boumediene's* core principle – that no one may be imprisoned without a fair hearing before an independent judicial officer – is not rendered hollow by the flawed procedures adopted by the lower courts.

STATEMENT OF THE CASE

Petitioner has been imprisoned as an alleged enemy combatant at the U.S. Naval Base at Guantanamo for almost nine years. He and eleven other Kuwaiti detainees filed their complaint in this case, through their next friends, on May 1, 2002, making this case the oldest pending case challenging indefinite detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Along with his father and next friend, Khaled Al-Odah, Petitioner was the lead petitioner in *Al Odah v. United States*, No. 03-343, *decided sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004), in which this Court held that the District Court had jurisdiction under 28 U.S.C. § 2241 over habeas corpus cases brought by detainees held at Guantanamo, and that those detainees, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through habeas actions. 542 U.S. at 481. In *Rasul*, this Court remanded the cases for consideration by the District Court, but did not address what procedures the district court would apply in deciding this and other habeas corpus cases. "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now." *Id.* at 485.

On remand in the District Court, the government moved to dismiss, claiming that prisoners in Guantanamo lacked any rights that the District Court could enforce. The District Court denied the government's motion in relevant part but granted the government leave to file an interlocutory appeal. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). While the interlocutory appeal was pending, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, which purported to strip the federal courts of habeas corpus jurisdiction in cases filed by alleged enemy combatants. The Court of Appeals then ruled that the Military Commissions Act did not violate the Suspension Clause of the Constitution and ordered the habeas cases dismissed for lack of jurisdiction. *Al Odah v. United States*, No. 05-5063, *decided sub nom.*, *Boumediene v. Bush*, 476 F.3d 981 (2007).

Petitioner was the lead petitioner in *Al Odah v. United States*, No. 06-1196, *decided sub nom.*, *Boumediene v. Bush*, 553 U.S. 723 (2008), in which this Court reversed the Court of Appeals and held that the jurisdiction-stripping provision of the Military Commissions Act was invalid under the Suspension Clause. This Court again remanded the detainees' cases for consideration by the District Court, but again did not address what procedures the District Court would apply in deciding the cases, leaving it to the District Court to decide evidentiary and other procedural issues "in the first instance." *Boumediene*, 553 U.S. at 733. This Court suggested that the government would bear the burden of establishing the facts justifying confinement, but left for another day the question of what that burden should be. "The ex-

tent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage." *Id.* at 787.

Upon remand, the District Court consolidated Petitioner's case with the habeas cases of most other Guantanamo detainees before Senior Judge Thomas F. Hogan for the purpose of coordinating the cases and setting hearing procedures (subject to modification by the individual trial judges). The parties jointly briefed their positions on the principal disputed procedural issues including, most importantly, the standard for admissibility of hearsay evidence and the burden of proof to be applied. Petitioner and other habeas petitioners argued that admissibility of hearsay is governed by the Federal Rules of Evidence and 28 U.S.C. § 2246, and that the government should bear the burden of proof by clear and convincing evidence. The government argued that all hearsay is admissible without regard to the Federal Rules of Evidence and the habeas statute, and without regard to whether it was reliable or necessary. The government further argued that it should bear the burden only of submitting "credible evidence" in its factual returns, and that the burden should then shift to the habeas petitioners to rebut the government's evidence with "more persuasive evidence."

The District Court issued its Case Management Order, provisionally ruling that hearsay would be admissible without regard to the Federal Rules of Evidence or the habeas statute so long as the party offering the hearsay could show that it was reliable and that offering non-hearsay evidence would pose an undue burden or would interfere with protection of national security. The District Court further ruled

that the government would bear the burden of proof, but only by a preponderance of the evidence.[1]

Following the issuance of the Case Management Order, Petitioner's case was returned to Judge Colleen Kollar-Kotelly for hearing on the merits. The government did not call a single witness at the hearing, nor did it offer any testimony by affidavit relating directly to Petitioner. The only evidence offered by the government at the hearing consisted of 162 documentary exhibits, largely consisting of unsworn interrogation reports of subjects about whom little or nothing is known, most of which were taken years after the fact under undisclosed circumstances by unknown interrogators whom the government did not make available for cross-examination or to answer interrogatories. Petitioner objected to most of the government's exhibits on hearsay grounds, and on the ground that the government did not even attempt to make the showing specified by the Case Management Order that the hearsay was reliable and that offering non-hearsay evidence would pose an undue burden or would interfere with protection of national security.

The District Court admitted all of the government's exhibits into evidence, including those that did not fit within any exception to the rule against hearsay, and in spite of the lack of any evidence that the hearsay evidence was either reliable or necessary. *See* App. a25-a25 and a61. For example, the

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[1] The Case Management Order was later amended in certain respects not pertinent to Petitioner's appeal. A copy of the Case Management Order is attached as Appendix E.

District Court relied on unevaluated raw intelligence reports of interrogations of other detainees to support its conclusions that Petitioner followed a route to Afghanistan traveled by others who allegedly went there for the purposes of jihad (App. a36-a38), that he was captured with another individual with alleged ties to al-Qaeda (App. a44), and that he attended the al-Farouq training camp (App. a51-a55). On August 24, 2009, the District Court issued its judgment applying a preponderance of the evidence standard and denying Petitioner's habeas corpus petition. The District Court made clear in its opinion that it considered all hearsay, regardless of its admissibility under the Federal Rules of Evidence and the habeas statute, and without any reference to the hearsay standard articulated in the Case Management Order. *See* App. a25-a26.

Petitioner appealed to the Court of Appeals on the grounds, among others, that the District Court erred by admitting hearsay evidence and by applying a preponderance of the evidence standard of proof. Jurisdiction was proper in the Court of Appeals pursuant to 28 U.S.C. § 1291. While Petitioner's appeal was pending, a panel of the Court of Appeals decided *Al-Bihani v. Obama*, 590 F.3d 866, *rehearing denied*, __ F.3d __ (D.C. Cir. 2010), a case involving another Guantanamo detainee. Without even addressing the plain language of Fed. R. Evid. 1101(e), which applies the Federal Rules of Evidence to habeas corpus cases, the panel held in *Al-Bihani* that hearsay "is always admissible," and that the district court's only evidentiary task is to assess the amount of probative weight to ascribe to hearsay evidence. 590 F.3d at 879. The panel in *Al-Bihani* also addressed the stan-

dard of proof. Noting first that this Court had not answered the question in *Boumediene*, the panel held, "[a]bsent more specific and relevant guidance," that the preponderance of the evidence standard was adequate. *Id.* at 878. The Court of Appeals subsequently ruled the same way in *Awad v. Obama*, 608 F.3d 1, *rehearing denied*, __ F.3d __ (D.C. Cir. 2010), citing *Al-Bihani*.

Applying what it determined to be binding precedent in *Al-Bihani* and *Awad* concerning the admissibility of hearsay and the standard of proof, the Court of Appeals affirmed the District Court's decision denying Petitioner's request for a writ of habeas corpus. *See* App. a10-a13.

REASONS FOR GRANTING THE WRIT

This case presents the two most significant procedural questions the courts below have addressed in attempting to implement this Court's decision in *Boumediene* that the detainees are entitled to meaningful habeas corpus hearings: whether the plain requirements of the Federal Rules of Evidence apply to habeas corpus proceedings, and what is the appropriate standard of proof. These questions are fundamentally important to the fairness and accuracy of future habeas reviews of the detentions of the many detainees who are now held or will in the future be held in Guantanamo or elsewhere within the territorial jurisdiction of the United States under the Authorization for Use of Military Force. The Court of Appeals has decided these questions, but its decisions contravene the plain language of the Federal Rules of Evidence, the habeas statute, and prior decisions of this Court. The procedures adopted by the

Court of Appeals contravene the purpose of *Boumediene*.

Indeed, by allowing wholesale reliance on hearsay without regard to the standards of admissibility established by the Federal Rules of Evidence, and by applying a standard of proof ill-suited for deciding whether a person should spend potentially the rest of his or her life in prison, the decision of the Court of Appeals departs from centuries of accumulated experience under the Constitution and the rule of law. It is no more in the interests of the United States than of present and future detainees for the law relating to indefinite, preventive detention to be built on such a shaky foundation.

Now that the lower courts have determined "in the first instance" the procedures to govern the habeas hearings mandated by *Boumediene*, this Court should decide, on the full record of this case, whether and to what extent the courts are free to ignore the Federal Rules of Evidence and whether a preponderance of the evidence is sufficient to support potential life imprisonment. Certiorari is appropriate under S. Ct. R. 10(c) because the Court of Appeals has decided important questions of federal law involving the proper balance between national security interests and fundamental liberty interests that have not been, but should be, settled by this Court, and because it has decided these important questions in a way that is contrary to the Federal Rules of Evidence, 28 U.S.C. §§ 2241 and 2246, and relevant decisions of this Court.

I. The Court of Appeals Undermined the Right Upheld in *Boumediene* by Ignoring the Plain Language of the Federal Rules of Evidence.

The Federal Rules of Evidence apply in habeas corpus cases under 28 U.S.C. § 2241 "to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority . . . ." Fed. R. Evid. 1101(e).[2] As explained in the Notes of the Advisory Committee on Rules,

> The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker v. Johnston*, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), upon trial-type proceedings, *Id.* 311, 83 S. Ct. 745, with demeanor evidence as a

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[2] In the absence of § 7 of the Military Commissions Act of 2006, which this Court struck down in *Boumediene*, the habeas statute that applies to Petitioner's case is 28 U.S.C. § 2241. *See Boumediene*, 553 U.S. at 777; *see also Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) ("[*Boumediene*] necessarily restored the *status quo ante*, in which detainees at Guantanamo had the right to petition for habeas under [28 U.S.C.] § 2241.").

> significant factor, *Id.* 322, 83 S. Ct. 745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Accordingly, the District Court should have applied the Federal Rules of Evidence in Petitioner's case, except as otherwise established by statute or applicable rule. The habeas statute provides a limited exception to the hearsay rule by allowing admission of affidavits in the court's discretion, but that exception triggers the opposing party's "right to propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246. Otherwise, hearsay is excluded under Fed. R. Evid. 802 unless it falls within an exception set forth in Fed. R. Evid. 803 through 807. The Court of Appeals, on the other hand, allowed the unrestricted admissibility of hearsay. "[T]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence." App. a12 (quoting *Awad*, 608 F.3d at 7). The court relied upon its precedent in *Al-Bihani*, which held "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." *Al-Bihani*, 590 F.3d at 879 (emphasis added). This holding contradicts the plain language of the Federal Rules of Evidence.

Within constitutional limits, there is no doubt that Congress could change the procedures and rules of evidence applicable to habeas corpus cases. This Court also has the authority to change the procedur-

al rules and rules of evidence pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, *et seq.* But unless and until the habeas statute and the Federal Rules of Evidence are changed, there is no need for this Court to address the constitutional limits. Similar to the situation presented in *Walker v. Johnston*, 312 U.S. 275, 285 (1941),

> It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which [the habeas statute] is derived was adopted by Congress. The question is what the statute requires.

In this case, as in all habeas corpus cases under 28 U.S.C. § 2241, the Federal Rules of Evidence, as adopted by statute, require exclusion of hearsay unless it falls within a hearsay exception set forth in Fed. R. Evid. 803 through 807, or as provided by statute. Neither the Court of Appeals nor the District Court was free to disregard those statutory requirements.

In deciding that hearsay is "always" admissible in habeas corpus cases, the Court of Appeals relied on language in this Court's plurality opinion in *Hamdi*, stating that hearsay "may need to be accepted as the most reliable available evidence . . . ." *Al-Bihani*, 590 F.3d at 879 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004)). But the *Hamdi* plurality's uncontroversial statement does not support the conclusion that there is no restriction on hearsay at all, or that hearsay may be accepted in a manner contrary to rules established by Congress and this Court. There is no indication that the *Hamdi* plurality intended to modify or repeal Fed. R. Evid. 1101(e),

which specifically applies the rules of evidence to habeas corpus cases.[3] As this Court has held, its decisions must not be interpreted to modify procedural rules in the absence of the procedures required by the Rules Enabling Act:

> The procedure Congress ordered for such changes [to procedural rules], however, is not expansion by court decision, but by rulemaking under [28 U.S.C.] § 2072. Our rulemaking authority is constrained by §§ 2073 and 2074 . . . .

Swint v. Chambers County Comm'n, 514 U.S. 35, 48 (1995). The Court of Appeals should have applied similar restraint before casting aside the Federal Rules of Evidence and the habeas statute.

Rather, the plurality opinion in *Hamdi* must be read consistently with Fed. R. Evid. 802, which prohibits the admission of hearsay unless it falls within a recognized exception. The District Court had ample discretion to admit hearsay under one of the many exceptions to the hearsay rule, or in an affidavit following the procedures set forth in 28 U.S.C. § 2246. For example, capture reports and other records made contemporaneously with the prisoner's capture would typically be admissible either as records of

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[3] Indeed, the only hearsay evidence mentioned by the plurality in *Hamdi* is affidavit evidence, which, as noted earlier, is expressly permitted by the habeas statute, 28 U.S.C. § 2246. *Hamdi*, 542 U.S. at 538 ("As we have discussed, a habeas court in a case such as this may accept affidavit evidence . . . so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return.").

regularly conducted activity under Fed. R. Evid. 803(6) or as public records under Fed. R. Evid. 803(8). *See Hamdi*, 542 U.S. at 534. The U.S. Army's own regulations require such records to be kept on standard Department of Defense forms both with the capturing unit and with the prisoner upon transfer. *See* Army Regulation 190-8, ¶ 2-1(a)(1) (June 1, 1992). Although these records could be the best evidence of the cause of confinement, they were not presented in Petitioner's case. Government officials with relevant knowledge could testify through affidavits under 28 U.S.C. § 2246 without ever coming to court, provided that the Petitioner is given an opportunity to propound interrogatories or obtain an answering affidavit as set forth in the statute. Even statements by former detainees or other witnesses might be admissible under certain circumstances as statements against interest under Fed. R. Evid. 804(b)(3) if the government shows that the declarant is unavailable and that he truly would have perceived that his statements were so much against his interests that a reasonable person in his position would not have made them unless they were true. And if no other hearsay exception applies, the District Court would always have the discretion to admit hearsay under the residual exception in Fed. R. Evid. 807 in appropriate circumstances if the hearsay has circumstantial guarantees of trustworthiness and is more probative than any other evidence that the proponent can procure through reasonable efforts. The District Court thus had ample discretion to consider many forms of hearsay pursuant to the Federal Rules of Evidence. The Court of Appeals erred, however, in concluding that the District Court had discretion to

consider inadmissible hearsay without regard to the Federal Rules of Evidence.

Either Congress or this Court could change the Federal Rules of Evidence to accommodate the particular circumstances of a class of habeas cases such as Petitioner's. There are strong policy reasons, however, why the Federal Rules of Evidence should not be changed to allow unrestricted use of hearsay evidence in cases of this sort. The raw, untested interrogation reports of fellow prisoners of unknown credibility, with unknown motivations, made under uncertain circumstances years after the fact have been demonstrated time and again to be too unreliable to base judicial decisions upon them. But this Court need not address the policy considerations in Petitioner's case. The rule is unambiguous. The Court of Appeals erred in ruling that hearsay is "always" admissible as evidence in a habeas case.

II. The Court of Appeals Undermined the Right Upheld in *Boumediene* by Approving a Preponderance of the Evidence Standard to Uphold Indefinite Detention.

The Court of Appeals erred by approving the application of a preponderance of the evidence standard to Petitioner's case. This minimal standard is particularly inappropriate in a situation where Petitioner was detained without access to any factfinding court for more than seven years before his case was heard, and where the evidence presented was stale and almost entirely flimsy and untestable hearsay. With essentially no judicial gatekeeping on the quality of evidence, there must be some heightened standard

for the quantum of evidence to justify indefinite imprisonment.

In fact, no decision by this Court has ever approved anything less than proof by clear and convincing evidence in a case involving prolonged detention. The preponderance of the evidence standard requires nothing more than that the factfinder believe "that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (internal citation and quotations omitted). This standard is used principally in suits involving "a monetary dispute between private parties," where it is appropriate for the litigants to "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. 418, 423 (1979). In such cases, it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970). However, when "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money," then it is appropriate to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424. This Court has held, for example, that in spite of society's undoubted interest in detaining an individual who poses a danger to himself or others as a result of a mental disorder, "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." *Id.* at 427. *See also*

Woodby v. INS, 385 U.S. 276, 286 (1966) (holding that alien deportation orders must be supported by "clear, unequivocal and convincing evidence").[4]

Similarly, society has an undoubted interest in detaining members of enemy armed forces for the duration of the hostilities. But when the individual's membership in the enemy armed force is doubtful – where, as here, the individual is not wearing the uniform of an enemy armed force and is not captured on or near a battlefield – the liberty interest involved is too weighty to run the risk of falsely imprisoning a person based on a mere preponderance standard. Even in the civil context, this Court has upheld substantial deprivations of liberty only when justified by clear and convincing evidence. *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).

In *Al-Bihani*, the Court of Appeals cited to *In re Yamashita*, 327 U.S. 1, 8 (1946), for the proposition that "traditional habeas review did not entail review

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[4] The question is not simply whether a clear and convincing evidence standard is itself constitutionally compelled. Given that some process necessarily is due to make Petitioner's right to habeas meaningful, the appropriate burden of proof "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby*, 385 U.S. at 284. And, as noted above, this Court has never upheld prolonged imprisonment based on a standard of proof lower than clear and convincing evidence.

of factual findings, particularly in the military context," and to 28 U.S.C. § 2254(e)(1) for the proposition that "the burden in some domestic circumstances has been placed on the petitioner to prove his case under a clear and convincing standard." *Al-Bihani*, 590 F.3d at 878. Both of the circumstances cited by the Court of Appeals involve habeas review of a prior judgment of another tribunal before which the government bore the burden of proof beyond a reasonable doubt. Neither has any application to Petitioner's case, where habeas review was his first and only opportunity to challenge his imprisonment before any court.

As Judge Green in the District Court observed in an earlier stage of this case:

> Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror - and thus the period of incarceration - will last a lifetime may be even worse than if the detainee had been tried, convicted, and definitively sentenced to a fixed term.

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005). The extent of deprivation of liberty in Petitioner's case - measured either in terms of the length of the confinement or its indeterminate nature - equals or exceeds the impact of any other non-criminal detention, and, as in other cases of civil confinement, calls for a heightened burden of proof.

CONCLUSION

The lower courts have now addressed the procedural issues that this Court left open as an initial matter in *Boumediene*. The application of the Federal Rules of Evidence in habeas corpus cases such as Petitioner's and the standard of proof required to justify indefinite detention are important questions of federal law, decided wrongly by the Court of Appeals in a way that undercuts rather than upholds the right recognized in *Boumediene*. This Court should grant this petition to make clear that habeas proceedings must be conducted in the manner required by Congress in the Federal Rules of Evidence and the habeas statute and to make clear that the Executive may impose indefinite, potentially lifelong imprisonment only upon proof by clear and convincing evidence.

Respectfully submitted,

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