

No. __-__

IN THE
Supreme Court of the United States

HUSSAIN SALEM MOHAMMED ALMERFEDI,

Petitioner,

v.

BARACK OBAMA, 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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001) (“AUMF”), or *Boumediene v. Bush*, 553 U.S. 723 (2008), permits detention on the basis of three facts that are themselves not incriminating.

2. Whether the AUMF or *Boumediene* authorizes a standard of proof under which, if the government puts forward *some* credible evidence justifying the detainee’s detention, the detainee, to prevail, must rebut government’s evidence.

3. Whether the Court of Appeals’ manifest unwillingness to allow Guantanamo detainees to prevail in their habeas corpus cases calls for the exercise of this Court’s supervisory power.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellee in the court below is Hussain Salem Mohammed Almerfedi.

Respondents in this Court and the appellants in the court below are Barack Obama, President of the United States; Leon E. Panetta, Secretary of Defense; David B. Woods, Commander, Joint Task Force, GTMO; Donnie L. Thomas, Commander, Joint Detention Operations Group, JTF-GTMO.

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The opinion of the court of appeals, App. 1a, is reported at 654 F.3d 1. The district court's classified opinion granting the writ of habeas corpus was issued on July 8, 2010, *see* Classified Appendix; a redacted version of the classified opinion is reported at 725 F. Supp. 2d 18.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2011. *See* App. 23a. On August 23, 2011, this Court granted an extension for filing this petition until November 7, 2011.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Suspension Clause, U.S. Const. art. I, § 9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2004):

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism

against the United States by such nations, organizations, or persons.

STATEMENT OF THE CASE

Petitioner, Hussain Salem Mohammed Almerfedi, is a Yemeni citizen. He said that he left Yemen with the objective of emigrating to Europe and that he hired a “smuggler” to take him to Europe via Iran and Turkey. App. 32a. In December 2001, he was arrested by Iranian police in Tehran. App. 5a, 42a, 68a. The Iranians beat him and accused him of being an American spy. App. 68a. The Iranians later transferred Almerfedi, along with a group of other men held in Iranian prisons, to American custody in Afghanistan as part of a “prisoner exchange.” App. 2a. He was held in various prisons in Afghanistan for more than a year, and was then sent to Guantanamo Bay in May 2003, where he has been ever since. Although there is no evidence that Almerfedi was an enemy soldier, or was ever armed, or was ever part of a military force, or ever engaged in combat, or was ever even in a country where the United States was at war, the court of appeals held that his detention at Guantanamo is lawful. The detention is indefinite, possibly a life sentence.

1. District Court Proceedings

In 2005, Almerfedi filed a habeas corpus petition in the U.S. District Court in the District of Columbia. There was no progress in the case until this Court rendered its decision in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), holding that Guantanamo detainees are “entitled to the privilege of habeas corpus to challenge the legality of their detention.”

District Judge Paul L. Friedman held a three-day evidentiary hearing to consider the government's assertions that Almerfedi is lawfully detained under the Authorization for Use of Military Force ("AUMF"), because (1) he acted as an "al Qaeda facilitator" at al Qaeda guesthouses in Iran, (2) [REDACTED] and (3) he "actively associated with" an Islamic missionary organization when he stayed in Pakistan. App. 26a, 30a. Judge Friedman's 28-page decision evaluated the government's assertions based on the "totality of the evidence" and rejected all of them. App. 31a.

The court first dealt with the government's Tehran-guesthouse/"facilitator" theory, and found that it rested entirely on statements made by a detainee at Guantanamo named al-Jadani during interrogations in 2005 and 2006. App. 34a-35a. (Al-Jadani was returned to Saudi Arabia in 2007.) An interrogation in 2005 reported that al-Jadani had learned from a "group of unnamed detainees who arrived in Guantanamo in 2004" that someone named "Hussain Al-Adeni" was an al Qaeda "facilitator" who had stayed at a Tehran guesthouse. App. 36a-37a. The court questioned whether this was a reference to Almerfedi, because Hussain is a very common name, and Al-Adeni could refer to anyone from the city of Aden. App. 36a. Also, no information was provided about the source of the "group's" information, and the court found that it could be "multiple hearsay" or "rumor," "amount[ing] to no more than jailhouse gossip." App. 39a. Additionally, the "unnamed group" supposedly said that Almerfedi was at the Tehran guesthouse "from late 2000 into early 2001." App. 38a. The court found, however,

that the government had not shown that Almerfedi was in Iran prior to the fall of 2001. App. 39a. [REDACTED] The court declined to credit the 2005 interrogation reports. App. 39a.

The district court further found that the 2006 interrogation reports were also unreliable. These reports purportedly summarized statements made by Almerfedi to al-Jadani at Guantanamo. The reports, however, did not describe Almerfedi as a “facilitator.” App. 40a n.9. The reports claimed that Almerfedi was at a Tehran guesthouse at “some time during 2002 and 2003,” App. 41a, but as the district court found, this was “virtually impossible” because Almerfedi was arrested by the Iranians in December 2001 or January 2002 and had been in custody ever since. App. 42a. The court noted that even if Almerfedi had not been arrested until January 2002, “[t]his one-month window is a slender reed” for concluding that the reports were accurate in stating that he was in Iran in 2002 and 2003. App. 43a.

The court also found that, aside from al-Jadani’s statements, there was no other evidence “that petitioner was an al Qaeda facilitator in Iran helping fighters infiltrate Afghanistan.” App. 45a. The court noted that if the government’s allegations were true, other witnesses likely would have been able to identify Almerfedi as a facilitator. *Id.* The court also found that there was nothing in Almerfedi’s background that suggested that he had the necessary motivation or skills to work as an al Qaeda “facilitator”:

The government has presented . . . no evidence of petitioner’s motive, no evidence that he had

any history of anti-western or pro-al Qaeda beliefs, and no evidence that he associated with those who advocated such beliefs. Nor is there any evidence that petitioner, who is uneducated, is a sophisticated traveler or document forger — skills that likely would be necessary for al Qaeda facilitators. Furthermore, it is implausible that al Qaeda would post petitioner to a guesthouse in Tehran because it is undisputed that he does not speak Farsi.

App. 45a.

The district court summarized its findings about the Tehran guesthouse/facilitator allegations as follows:

A handful of interrogation reports, based upon at least one, and frequently numerous levels of hearsay, which may not even be referring to petitioner, which report implausible allegations alongside a few arguably incriminating ones, and which are not supported by significant additional corroborating evidence, do not show by a preponderance of the evidence that petitioner stayed in a Tehran guesthouse, much less that he was a facilitator for al Qaeda.

App. 46a.

Second, [REDACTED]

Third, the court rejected the government's assertion that Almerfedi's stay in Lahore, Pakistan at the headquarters of an Islamic organization called Jama'at al-Tablighi ("JT") was "consistent with" its claim that he was an al Qaeda facilitator in a Tehran guesthouse. App. 47a. Although the district court noted that the United States has classified JT as a terrorist support entity and that the evidence presented by the government "strongly suggests that individual JT members or those who had infiltrated JT used the organization "as a cover for terrorist groups," it held that "this premise does not lead to the conclusion that petitioner did so." App. 51a. The court found that JT was an established, long-standing Islamic spiritual organization, involving huge numbers of people around the world with as many as a million people attending its annual meeting in Pakistan. App. 47a. There was no evidence that assistance to terrorist groups was "official or otherwise known JT policy," and because JT is a "massive organization," any assistance to al Qaeda may not have been the work of the "organization as a whole." App. 51a. The court found that the government's evidence about Almerfedi's stay at the JT Center "fail[ed] utterly" to "corroborate" the assertion that he was an al Qaeda facilitator. App. 52a. In sum, there was "no evidentiary basis on which to conclude that petitioner's association with JT or his stay in its Lahore Center, either standing alone or in conjunction with other evidence presented by the government, are adequate to justify petitioner's detention." *Id.*

The court also considered Almerfedi's claim that he had no connection with al Qaeda, but was simply trying to emigrate to Europe. Almerfedi said that he could not get a visa in Yemen to a European country, that he therefore had gone to the JT Center in Lahore with the hope of traveling with a JT missionary group to Europe, that his plan was "derailed" by the 9/11 attacks, that he then retained a smuggler who promised to take him to Europe by traveling through Iran and Turkey, and that he placed himself completely under the control of the smuggler. App. 32a, 44a. The court concluded that "[w]hile the government has cast suspicion on petitioner's explanation and raised doubts about parts of petitioner's story — a story which he has told consistently since the time of his capture — the government simply has not shown by a preponderance of the evidence that petitioner had any ties to al Qaeda or to the Taliban or that he ever stayed at an al Qaeda guesthouse in Iran [REDACTED] App. 51a.¹

Because the government failed to show by a preponderance of the evidence that Almerfedi's detention was justified, the court granted the writ and ordered his release. App. 26a, 51a-52a.

¹ The veracity of Almerfedi's story was confirmed when he voluntarily took a polygraph examination at Guantanamo, which indicated he was truthful when denying that he ever associated with al Qaeda and when explaining his reasons for leaving Yemen. App. 16a n.1.

2. Court of Appeals Proceedings

On appeal, the government argued that the district court had failed to consider the evidence “as a whole,” particularly evidence concerning the plausibility of Almerfedi’s emigration story. App. 6a-7a. It requested that the court of appeals remand the case for reconsideration by the district court. 7a. It did *not* request the court of appeals to decide the case itself and to deny the writ outright, yet that is what the court of appeals did. In a decision written by Senior Circuit Judge Silberman, the court held “as a matter of law” that the government had justified the detention of Almerfedi. App. 2a.

The court purported to apply the “preponderance of evidence” standard of proof.² App. 8a. Citing the plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the court held that the government need only “put forth credible facts demonstrating that the petitioner meets the detention standard, which is then compared to a detainee’s facts and explanation.” App. 10a. The government’s evidence must only “meet at least a certain minimum threshold of persuasiveness,” and, if it does, then “Almerfedi . . . must ‘rebut [the government’s] evidence with more

² The court of appeals suggested that petitioner sought application of a “reasonable doubt” standard. App. 7a. The district court had applied the “preponderance” standard. App. 26a, 27a, 52a. Petitioner did not argue that this was error or that a reasonable doubt standard needed to be applied for him to prevail.

persuasive evidence that he falls outside the criteria [for detention].” App. 12a. This is similar in practical effect to the “some evidence” standard that Judge Silberman had appeared to advocate in an earlier Guantanamo case. *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (concurring opinion).

The court then found that the government met its evidentiary burden “without regard to consideration of al-Jadani’s statements,” App. 13a, which Judge Friedman had found to be unreliable, holding that the following “three facts, when considered together, are adequate to carry the government’s burden”:

First, Almerfedi acknowledges that he stayed for two and a half months at Jama’at Tablighi, an Islamic missionary organization that is a Terrorist Support Entity “closely aligned” with al Qaeda. He asserts he refused to join the organization and remained largely incommunicado, but he stayed there for free. Although that evidence is probative, by itself it presumably would not be sufficient to carry the government’s burden because there are surely some persons associated with Jama’at Tablighi who are not affiliated with al-Qaeda. But if we add Almerfedi’s travel route, which is quite at odds with his professed desire to travel to Europe (and brought him closer to the Afghan border where al Qaeda was fighting), and also that he had at least \$2,000 of unexplained cash on his person when captured, notwithstanding his claim to have given that much to Ali (which was all he brought from Yemen), the government’s case

that Almerfedi is an al Qaeda facilitator is on firmer ground.

App. 11a-12a (citation omitted).

The court then concluded that Almerfedi had not met his obligation “to rebut [the government’s] evidence with more persuasive evidence” because the district court had stated that his explanation for staying at the JT Center was “not . . . convincing” and that it was “perplexing” that his smuggler took him to Mashad, a city in Iran near the Afghanistan border, rather than in a westerly direction. App. 13a. The court characterized the district court’s observations as findings of “dubious accounts,” which it equated to “false exculpatory statements.” *Id.* It agreed, however, that Almerfedi stayed at the JT Center and went to Mashad, just as he said. *Id.*

The court also stated in dictum that Judge Friedman had “clearly erred” in finding al-Jadani’s statements to be unreliable. App. 13a. The fact that al-Jadani’s statements purported to place Almerfedi in Tehran in late 2000 and early 2001 (when the only evidence was that he was still in Yemen) and 2003 (when he was actually in American custody) were deemed by the court to be “inconsequential” mistakes. App. 15a. The fact that al-Jadani did not identify the “other detainees” who had told him that Almerfedi was an al Qaeda facilitator was deemed to be “quite understandable” because the court theorized that “al-Jadani would be reluctant to point them out to U.S. authorities.” 14a. The court did not attempt to square its acceptance of al-Jadani’s statement that Almerfedi operated out of a guesthouse in Tehran with its conclusion that

Almerfedi spent virtually all of his time in September-December 2001 either in Lahore, Pakistan (two and a half months) or in Mashad, Iran (one month), which the court noted is 896 kilometers from Tehran.³ App. 4a.

Circuit Judge Rogers in a concurring opinion agreed with the majority that the facts concerning JT, Mashad, and the supposedly “large” amount of cash held by Almerfedi were a sufficient basis to justify detention. She disagreed, however, that Judge Friedman had committed clear error in rejecting al-Jadani’s statements as unreliable, and explained in detail why she believed the majority was wrong on this issue. App. 17a-22a.

REASONS FOR GRANTING THE WRIT

The court of appeals in deciding the Guantanamo habeas cases has not upheld a single grant of the writ. As explained, it has achieved this end in this case by expansively construing the Executive’s detention authority under the AUMF, by applying a relaxed burden of proof on the government, and by failing to give proper deference to the factual

³ Almerfedi stated that he left Yemen in early September 2001. App. 32a. There was no contrary evidence. The court of appeals stated that he was in Lahore for two and a half months and he was in Mashad for a month. App. 3a-4a, 11a. A government report shows that he was arrested by the Iranians in December, 2001, App. 68a, 27a, and the court of appeals said that it was “undisputed” that he was arrested in December 2001 or January 2002, App. 5a. This left only a few days for Almerfedi to have been in Tehran.

analysis and findings of the district court. The Court should grant the petition for certiorari and reverse the court of appeals in order to provide the Guantanamo detainees with the meaningful habeas remedy promised by *Boumediene*.

1. The court of appeals' decision expands the scope of the executive's detention authority far beyond anything provided by the AUMF.

The court held that “three facts” — that Almerfedi was at the JT Center in Pakistan, that he traveled to Mashad, Iran, and that he had \$2,000 with him when arrested by the Iranians — were themselves sufficient to meet the government's burden of justifying detention. App. 12a. None of these “facts” is incriminating. The district court found that at least a million people go to JT's annual meeting in Pakistan every year, and that it is a longstanding organization dating back to the British Raj, emphasizing “internal change, not political doctrine.” App. 47a. Even the government concedes that JT is a “legitimate Islamic missionary group.” *Id.* While some people may use JT as a cover for terroristic activity, there is no evidence even remotely suggesting that Almerfedi ever did so. *See* App. 47a-51a. Mashad is a city of more than two million people, and there is neither evidence nor a finding that Almerfedi while there ever met or stayed with any al Qaeda personnel or other enemies of the United States.⁴ The fact that he had \$2,000 was not

⁴ His statement that he went to Mashad because he was taken there by his Farsi-speaking smuggler was un rebutted. As is (...continued)

“unexplained”— he had saved for years to finance his trip to Europe, App. 45a-46a n.8 — and there was no evidence and no finding that this was an amount of money that was characteristic of an “al Qaeda facilitator,” as opposed to being a sum in the range of what one would expect of a person emigrating from Yemen to Europe.

To conclude that these trivial “facts” justify detention is to eviscerate the purpose and meaning of the AUMF. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (plurality opinion), the Court held that the AUMF authorizes the President to detain the “limited category” of “individuals who fought against the United States in Afghanistan,” which includes “individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’” In broader terms, the plurality stated:

Under the definition of enemy combatant that we accept today as falling within the scope of Congress’ authorization [under the AUMF], Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” *and* “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict.

common in the experience of many illegal immigrants to the U.S., Almerfeddi was completely in the control of the smuggler. *See* App. 44a.

Id. at 526 (emphasis added). “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” the Court stated, “in permitting the use of ‘necessary and appropriate force,’ [in the AUMF] Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.” *Id.* at 519.

Even the Attorney General has pronounced that detention authority extends only as follows:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011, and persons who harbored those responsible for those attacks. The President also has the authority 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’ Revised Mem. Re: the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, Misc. No. 08-442, at 2 (D.D.C. Mar. 13, 2009).

The “three facts” found to be sufficient by the court of appeals do not come close to meeting the AUMF criteria for detention set forth above, and its decision represents a vast expansion of the executive’s authority to hold Guantanamo detainees,

potentially for life sentences. Almerfedi was not a combatant captured on a battlefield — he was never in Afghanistan, which is where the United States was fighting, and was not seized by the United States but by a harsh adversary, Iran (which accused him of being an American spy). App. [REDACTED] 68a. The “three facts” neither show nor suggest that Almerfedi was ever part of an enemy force, or was ever on a battlefield, or was ever armed, or that he had any “terrorist training,” or that he supported hostilities, or that he was part of al Qaeda or had any function in that organization, or that he had any qualifications to serve as a “facilitator” for al Qaeda or to serve in any other capacity. See App. 45a-46a. The “three facts” also do not show that Almerfedi ever did anything of a hostile or warlike nature. They show only that he was in two cities in Pakistan and Iran, with some money in his pocket at the time of his arrest.

Construing the AUMF to authorize detention in these circumstances contravenes *Boumediene* and violates the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. *Boumediene* held that Guantanamo detainees “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” 553 U.S. at 771. Writing for the Court, Justice Kennedy explained that “the writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers.” *Id.* at 765. “Within the Constitution’s separation-of-powers structure,” he stated, “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.” *Id.* at 797. And “[t]he test for

determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.” *Id.* at 765-66. Judicial enforcement of the Suspension Clause is therefore necessary to vindicate its purposes: “This Court may not impose a *de facto* suspension by abstaining from these controversies.” *Id.* at 771.

Here, the court of appeals is effectively “abstaining from these controversies” by construing the AUMF in a manner that vitiates *Boumediene’s* premise that “[t]he habeas court . . . [will] . . . conduct a meaningful review of . . . the Executive’s power to detain.”⁵ *Id.* at 783. The court should grant certiorari in order to resolve the scope of the AUMF’s detention authority.

2. The court of appeals applied a relaxed standard of proof that had the effect of denying a meaningful habeas remedy.

The district courts in the Guantanamo detention cases have uniformly ruled that the burden is on the government to prove by a preponderance of the evidence that detention is justified, as required by the Case Management Order entered by Judge

⁵ The court’s decision is already infecting decisions of the district court. Two recent decisions, relying on the decision in this case, justify detention based on such facts as stays at JT mosques in Pakistan, the possession of \$2,700 and some local currency, and concealment of a broken cell phone when arrested. *See Bostan v. Obama*, No. 05-883 (D.D.C. Oct. 12, 2011); *Hussein v. Obama*, No. 05-2104 (D.D.C. Oct. 12, 2011).

Hogan on November 6, 2008.⁶ *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, at 4 (D.D.C. Nov. 6, 2008). As defined by this Court, the preponderance test requires that the party with the burden must convince the fact finder “that the existence of a fact is more probable than its nonexistence.” *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

The court of appeals in this case purported to apply the preponderance standard, but in fact adopted a much lower standard, departing from the preponderance standard as defined by this Court. The court held that “[t]he government’s evidence . . . must meet at least a certain minimum threshold of persuasiveness,” App. 11a, and that it only has the “burden of deploying ‘credible evidence that the habeas petitioner meets the enemy-combatant criteria,’” App. 12a (quoting *Hamdi*, 542 U.S. at 534 (plurality opinion)). At that point, according to the court, the petitioner “must ‘rebut [the government’s] evidence with more persuasive evidence,’” on pain of losing the case. App. 12a (quoting *Hamdi*, 542 U.S. at 534).

The court’s reliance on the *Hamdi* plurality on this issue was inappropriate. The concurring opinion of Justice Souter, which was necessary to the Court’s judgment, specifically disagreed that “the

⁶ The government has supported the “preponderance” standard as the appropriate standard for Guantanamo cases, in which, as here, there has been no prior adjudication of the basis for detention.

Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi.” 542 U.S. at 553-54. The relevant precedent is this Court’s decision in *Boumediene*, decided four years after *Hamdi*. The Court in *Boumediene* pointed out that “the procedures suggested by the plurality in *Hamdi*” “did not garner a majority of the Court.” *Boumediene*, 553 U.S. at 784. The court of appeals did not even refer to *Boumediene*.

Boumediene emphasized that the scope of review in a habeas case “in part depends upon the rigor of any earlier proceedings.” *Id.* at 781. Where, as here, there has been no prior adjudication of guilt by a court, but only detention by “executive order,” “the need for collateral review is most pressing.” *Id.* at 783. The Court explained that a “criminal conviction in the usual course” is the product of a “disinterested” and “independen[t]” tribunal, which are not the “dynamics . . . inherent in executive detention orders.” *Id.* Thus, “[i]n this context the need for habeas corpus is more urgent.” *Id.* The Court added that “[t]he intended duration of the detention” also “bear[s] upon the precise scope of the inquiry.” *Id.* The Court did not attempt to determine the “extent of the showing required of the Government in these cases,” but emphasized that the habeas court must “conduct a meaningful review of . . . the cause for detention.” *Id.* at 783, 787.

Almerfeddi has not been charged with a crime or convicted of anything. The only judicial hearing of his case to date was the one conducted by Judge Friedman. He is, moreover, presented with the real prospect of indefinite, lifetime detention, if the court

of appeals' decision stands. Almerfedi has already been in U.S. custody for more than nine years, and the executive branch is apparently prepared to hold him there until he dies of old age. *Boumediene* teaches that the "intended duration of the detention" is relevant in determining the burden of proof. In this context, shifting the burden of proof to Almerfedi is fundamentally unfair. Indeed, in other settings involving prolonged detention, the Court has insisted on standards of proof higher than the preponderance standard. *See, e.g., Addington v. Texas*, 441 U.S. 418, 427 (1979) ("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 mere preponderance of the evidence"); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (alien deportation orders must be supported by "clear, unequivocal, and convincing evidence").

The fundamental unfairness of the court of appeals' approach is exacerbated by its ruling that once the government makes a "minimum threshold" showing, the detainee "must" provide a "persuasive" rebuttal. App. 11a, 12a. Almerfedi has been locked up in Cuba for nearly a decade with no realistic access to evidence as to what was happening in Pakistan or Iran in 2001, yet the court not only put a proof burden on him, it implicitly criticized him for "offer[ing] no evidence other than an explanation for his behavior." App. 12a. The court then treated that explanation as "false" simply because the district

court referred to a few parts of it as “not ... convincing” or “perplexing,”⁷ and it then deemed Almerfedi’s explanation of his non-involvement with al Qaeda as “evidence in favor” of detention. App. 11a.

This Court should now intervene to clarify both the standard of proof to be applied in the Guantanamo cases and the scope of the government’s burden. The court of appeals’ approach fails even to apply the classical preponderance standard, and it put a significant burden on Almerfedi to prove his innocence. This is a prescription for denying almost any Guantanamo petition, and fails to satisfy *Boumediene*’s command that the detainees at Guantanamo be given a “meaningful” habeas remedy. *Id.* at 779, 783.

3. The court of appeals improperly usurped the district court’s role by conducting what can only be understood as a trial-court review of the evidence, and by mandating sua sponte that the writ be denied, even though the government itself sought only a remand for further consideration of the facts by Judge Friedman. App. 7a. The court of appeals

⁷ The district court’s observation that the trip to Mashad was “perplexing” was immediately followed by the explanation that “petitioner has consistently asserted that he was in the control of [the smuggler], he did not speak Farsi, and he had little experience with foreign travel.” App. 44a. The court added that such “snippets of circumstantial or ‘corroborating’ evidence add little to the government’s unreliable direct evidence that petitioner stayed in Tehran guesthouses.” App. 44a-45a.

did not give the required deference to the factual findings and analysis of the district court.

It is obvious that the court treated the question of whether Almerfedi was “an al Qaeda facilitator” as subject to de novo review, not clear error review. *See* App. 9a, 11a-12a. This allowed it to do its own evaluation of the evidence and to ignore the district court’s analysis of the facts, based on all of the evidence, that the government had not proved its case by a preponderance. At best, the “facilitator” issue was “a mixed question of law and fact” where the “mix weighs heavily on the ‘fact’ side,” and the district court was “better positioned . . . to decide the issue” than the appellate court. *Brown v. Plata*, 131 S. Ct. 1910, 1932 (2011). In such a circumstance, appellate review should be “deferential.” *Id.*

The court of appeals, however, gave no deference to Judge Friedman’s analysis of the facts, including his finding that the “al Qaeda facilitator” theory supposedly shown by al-Jadani’s statements was uncorroborated, belied by Almerfedi’s lack of any of the “skills that likely would be necessary for al Qaeda facilitators,” and “implausible” in view of Almerfedi’s inability to speak Farsi.⁸ App. 45a. Judge

⁸ On October 20, 2011, after the appeal was decided, the government for the first time disclosed information it had an obligation to disclose during discovery — that al-Jadani was subjected to very severe mistreatment at Guantanamo. This information casts further doubt on the reliability of his statements. Moreover, the “facilitator” accusation was supposedly learned by al-Jadani from an unnamed group of (...continued)

Friedman weighed the evidence and found that it did not support the government's theory. The court's willingness to re-weigh the evidence and to "duplicate [the] role of the lower court," *Anderson v. Bessemer City*, 470 U.S. 574, 573 (1985), is a further substantial reason why this Court should grant certiorari, so as to clarify the ground rules for deciding the Guantanamo detention cases.

The court of appeals also stated that Judge Friedman "clearly erred in finding unreliable al-Jadani's statements." App. 15a. Judge Rogers disagreed with this dictum, explaining in detail in her concurring opinion that there was no basis for a finding of clear error. App. 16a-22a.

The court's principal ground for finding al-Jadani's statements to be reliable was that their description of Almerfedi's "capture, which included arrest by the Iranians, transfer to the Afghans, and ultimate transfer to the Americans" "match Almerfedi's unique experiences." App. 14a-15a. In fact, there was no match. Al-Jadani apparently told his interrogator in 2006 that Almerfedi (or someone with a name similar to Almerfedi's) was captured in Iran in about late March 2002, and that Almerfedi was brought to Guantanamo in 2002. App. 57a, 61a. A DOD report from April 2003 written in Afghanistan states that Almerfedi was arrested in Tehran in December 2001. App. 42a, 68a. He was not sent to Guantanamo until 2003. App. 41a n.6. The al-

detainees who came to Guantanamo in 2004, and there is no evidence concerning their reliability. App. 54a.

Jadani statements also were wrong about when Almerfeddi was in Iran. One report said he was in Tehran in late 2000 or early 2001, when he was still in Yemen, and another said he was in Tehran in 2002-2003, when he in fact was in custody. App. 36a, 42a; *see supra* p. 11 n.3. Moreover, the facts accepted by the court of appeals — that Almerfeddi was at the JT Center in Pakistan for two and a half months and then in Mashad for a month — left no time for Almerfeddi to act as a facilitator in a Tehran guesthouse because he could only have been in Iran for a few days at most. *See supra* p. 11 n.3.

The court of appeals dismissed the fact that al-Jadani's dates were impossible by asserting as a fact (with no record support) that these errors were "inconsequential."⁹ App. 15a. The court of appeals also engaged in de novo fact-finding by concluding, with no record support, that it was "quite understandable that al-Jadani was reluctant" to identify his unnamed sources "to U.S. authorities." 14a. The court's treatment of the al-Jadani statements is at odds with this Court's requirement

⁹ The court asserted that al-Jadani gave "both an incorrect date and a correct date for Almerfeddi's capture." App. 14a. In fact, he gave no date. He reportedly said at one point that Almerfeddi was captured in Iran "in approximately 2002," whatever that means, but otherwise said that Almerfeddi was in an Iran guesthouse "sometime during 2002 and 2003" and that Almerfeddi told him about supposed visits to the guesthouse by Iranian intelligence operatives in 2002 and in 2003. App. 60a-61a. None of this could possibly have occurred because Almerfeddi was in custody in 2002-2003.

that appellate review of a district court's factual findings must be deferential, and that findings should not be reversed absent a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

* * * *

The court of appeals has decided sixteen detainee cases on the merits. The court has not affirmed a single habeas grant, and it has remanded any denial that it did not affirm. In six of the cases, the detainee prevailed in the district court, but the court of appeals erased all six wins. It reversed three outright,¹⁰ and remanded the other three.¹¹ By contrast, the court affirmed eight of the ten government wins.¹² It remanded the other two.¹³

¹⁰ *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), cert. denied; *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), cert. pet. pending; *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011).

¹¹ *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011); *Latif v. Obama*, ---F.3d---, No. 10-5319 (D.C. Cir. Oct. 14, 2011) (classified opinion).

¹² *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), cert. denied; *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), cert. denied; *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), cert. denied; *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), cert. pet. pending; *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), cert. pet. pending; *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011).

¹³ *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); *Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011).

This case is maybe an extreme example of what has happened to Guantanamo habeas cases in the court of appeals, but it is not unique. The court has created a regime in which bringing a detainee habeas case in the D.C. Circuit is becoming an exercise in futility. As a practical matter, this would leave detainees where they were before *Boumediene* held that they “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” 553 U.S. at 771.

Judge Silberman the author of the majority opinion in this case, has not hidden his hostility to *Boumediene*, calling it a “defiant . . . assertion of judicial supremacy.”¹⁴ *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (concurring opinion). He as much as said that what his colleagues find determinative in a detainee habeas case is not whether the government met its burden by a preponderance of the evidence, even though the court itself purports to apply that standard. Instead, Judge Silberman stated:

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.

¹⁴ In a talk at the Heritage Foundation last year, Senior Circuit Judge Randolph compared the Justices in *Boumediene* to the characters in *The Great Gatsby*, “careless people, who smashed things up . . . and let other people clean up the mess they made.” See “The Guantanamo Mess,” www.heritage.org/Events/2010/10/guantanamo-mess.

Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do — taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even “some evidence.”

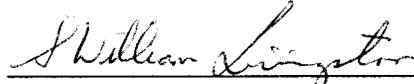
Id. (citation omitted).

The need for supervisory intervention by this Court in the Guantanamo cases is obvious and urgent. This Court should grant the petition for certiorari.

CONCLUSION

This Court in *Boumediene* stated that it was “not address[ing] the content of the law that governs petitioners’ detention” and that this was “a matter yet to be determined.” 553 U.S. at 798. The Court also left evidentiary and other procedural questions to be “address[ed] in the first instance” by the lower courts. *Id.* at 796. More than three years have now passed, and in the interim the court of appeals, as exemplified by this case, has gone far to deprive the detainees of a meaningful habeas remedy. Respectfully, the Court should now revisit the Guantanamo cases, by granting review so as to construe the AUMF to authorize detention only if the government can show that the detainee is a member of an enemy force fighting against the United States; to clarify the burden of proof to be applied in Guantanamo detention cases; and to restore the

court of appeals to a proper appellate role in Guantanamo detention cases.



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