No. 11-7020

In The
Supreme Court of the United States

MUSA'AB OMAR AL-MADHWANI

Petitioner,

v.

BARACK H. OBAMA, ET AL.

Respondents.

On Petition for 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

Petitioner has been detained at Guantánamo Bay, Cuba for over nine years. His petition for writ of *habeas corpus* challenges the legality of that detention.

I. Whether the Court of Appeals' expansive detention standard, approving detention based on peripheral association with others now suspected of being associated with al Qaeda or on mere presence at a guesthouse or training camp, is inconsistent with this Court's rulings on the permissible scope of executive detention under the Authorization for the Use of Military Force.

II. Whether the Court of Appeals' denial of due process protections to Guantánamo Bay detainees is inconsistent with the law and this Court's decision in *Boumediene v. Bush*.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals were:

1. Petitioner Musa'ab Omar Al-Madhwani, a prisoner at Guantánamo Bay Naval Station;

2. Respondents President Barack Obama; Secretary of Defense Robert Gates; Admiral Jeffrey Harbeson, United States Navy, Commander, Joint Task Force-GTMO; and Army Col. Donnie Thomas, Commander, Joint Detention Group, Guantánamo Bay.

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The opinion of the Court of Appeals is reported at 642 F.3d 1071 and is reproduced in the appendix hereto ("App.") at App. 1-14. The transcript of the district court's unclassified oral ruling denying the petition for writ of habeas corpus is not reported, but is included in the appendix (App. 15-71). The transcript of the classified portion of the district court's oral ruling denying the petition for writ of habeas corpus, which was subsequently reviewed and declassified, is not reported, but is included in the appendix (App. 72-102). The district court's written opinion (which explicitly incorporated its earlier oral ruling) denying the petition for writ of habeas corpus (App. 103-116) is reported at 696 F. Supp. 2d 1. The district court's denial of reconsideration is unreported and unavailable on any electronic database; an unclassified version of the ruling is included in the appendix (App. 118).

JURISDICTION

The Court of Appeals issued the opinion at issue in this case on May 27, 2011. On August 17, 2011, this Court granted Petitioner an extension of time until October 24, 2011, to file this petition for a writ of certiorari. This Court has jurisdiction to review the Court of Appeals' opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

> Joint Resolution
>
> To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.
>
> * * *
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> * * *
>
> § 2(a) In General.—That the 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

Musa'ab Al-Madhwani is a Yemeni national who has been imprisoned at the U.S. Naval Station in Guantánamo Bay, Cuba for virtually his entire adult life. An easy-going teenager, unable to find work, Al-Madhwani was lured to Afghanistan by strangers in a coffee shop with the promise of a month-long adventure. Al-Madhwani is a peaceful man who had secured a waiver to avoid mandatory military service in the Yemeni army, but who, upon his arrival in Afghanistan, was forced to attend a military training camp for approximately three weeks after his passport and travel documents were confiscated. Al-Madhwani was finally allowed to leave when the camp was closed after the events of September 11, 2001. Al-Madhwani

travelled for the next year as a refugee, leaving Afghanistan, trying to return home to Yemen. In September 2002, he was captured by Pakistani police, who tortured him into making false confessions. Al-Madhwani was transferred to the custody of the United States, which sent him to the Dark Prison, where he was brutally tortured by or under the command of American forces. He was then shipped to the Bagram prison, where he was further tortured at the hands of American agents. Ultimately, he was taken to Guantánamo Bay, Cuba, where he continued to be subjected to harsh and coercive treatment, all according to the findings of the district court, which findings remained undisturbed on appeal. Although the district court found that he was not dangerous or a threat to the United States, it nevertheless decried that its "hands [were] tied," App. 106, and held that Al-Madhwani may be imprisoned indefinitely, possibly for the rest of his life. Two more years have now passed.

1. District Court Proceedings

A. The District Court Determined That Al-Madhwani Is Not A Threat To The United States, And Questioned Whether There Is Any Basis For His Continued Detention

The district court found that Al-Madhwani is not a threat to the United States and suggested the government release him. App. 25-27, 68-69, 92, 115. Repeatedly questioning whether there is any real basis for his continued detention, the court found that Al-Madhwani's record, including the government's own documents, "do[es] not give any basis for his continued detention" but instead shows

he is "a lot less threatening" than scores of detainees the government had recently released. App. 27, 69, 115.

The court noted the lack of any evidence that Al-Madhwani completed any weapons training, "fired a gun in battle or was on the front lines, or participated, planned, or knew of terrorist plots," or fought, undertook, or planned any attack or operation on behalf of al Qaeda or the Taliban. App. 27, 68-69, 115. The court agreed with an official government agent's own assessment of Al-Madhwani (reflected in documents presented to the district court) as a young, naive, unemployed Yemeni, "at best ... the lowest level Al Qaeda member," who should be returned home. App. 68-69, 90-92, 115. For all of these reasons, the district court "suggested that their basis for continuing to hold him is questionable." App. 92.

Despite these explicit findings, the district court believed its "hands [were] tied" by the "law as written," which it interpreted as requiring it to approve Al-Madhwani's continued detention. App. 29, 106. Calling it a "very close case," the district court emphasized that its ruling on the legality of Al-Madhwani's detention did *not* mean that the government *should* continue to detain Al-Madhwani. App. 26-27. But the court's admonition fell on deaf ears, and Al-Madhwani is now in his tenth year of imprisonment.

B. The District Court Concluded that Al-Madhwani Was Tortured Into Making Many False Confessions

Upon being captured and imprisoned in the Karachi jail, at the Dark Prison, at the Bagram prison, and ultimately at Guantánamo Bay, Al-Madhwani was brutally tortured by American agents. The trial court credited all of Al-Madhwani's

testimony in this regard: "I found his testimony with respect to the condition[s] of confinement to be credible, and it was not contradicted by any [evidence] in the record." App. 77.

The court concluded that the U.S. orchestrated and participated in the torture inflicted upon Al-Madhwani in Afghanistan and in Pakistan. App. 37. Guantánamo interrogators had access to and relied upon the false confessions wrung from Al-Madhwani in Afghanistan to cause him to continue to make identical and similar confessions at Guantánamo, and Al-Madhwani was gripped by the same fear and terror during the Guantánamo interrogations that he experienced in Afghanistan. App. 38, 45. The court determined that, from Al-Madhwani's perspective, the interrogators and the custodians did not change in any material way from Afghanistan to Guantánamo, and specifically found that the government contradicted *none* of Al-Madhwani's testimony regarding tortured confessions. App. 38-39, 77-78.

C. The District Court Denied the Petition for Writ of Habeas Corpus

Notwithstanding the fact that the district court threw out the vast majority of the evidence offered by the government, and despite the fact that the court complained that it was therefore presented with only a "severely truncated body of evidence" upon which to base its determination, App. 51, the court denied the writ.

2. Court of Appeals Proceedings

The Court of Appeals affirmed the district court's denial of the writ, concluding that Al-Madhwani was "part of" al Qaeda when he was captured, and rejecting Al-Madhwani's legal arguments.

REASONS FOR GRANTING THE PETITION

This case presents questions central to the rule of law. At Guantánamo Bay alone, over 170 men remain imprisoned by the United States, scores of whom are challenging the legality of their detention in the United States federal courts. The lower courts have endeavored to develop a coherent and consistent paradigm to review these cases, but consistency has been elusive, and even articulated standards have turned out to be illusory and have failed to provide proper guidance in resolving the challenges. As a result, the courts (and in particular the District of Columbia Court of Appeals) have resorted to virtually complete deference to Executive discretion, with the Court have Appeals having refused to rule in favor of *any* detainee on the merits of his claim. Fundamental questions of national importance pertaining to limits on executive power and application of notions of due process to the detainees at Guantánamo are raised by this and other such cases. This Court should grant certiorari to answer these vitally important questions.

I. The Court of Appeals' Detention Standard is Inconsistent with this Court's Rulings on the Permissible Scope of Executive Detention under the Authorization for the Use of Military Force

A. The Court of Appeals Has Adopted an Impermissibly Deferential Detention Standard

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), this Court acknowledged that the district courts would have to address the issue of the Executive's scope of detention authority in a piecemeal fashion by defining "[t]he permissible bounds" of the government's detention authority "as subsequent cases are presented to them." *Id.* at 522 n.1. In *Hamdi*, the Supreme Court spoke of the need for lower courts to define the permissible bounds of the "legal category of enemy combatant." 542 U.S. at 522 n.1. In attempting to define the scope of its authority to detain a class of individuals held at Guantánamo, the new Obama Administration ceased using the term "enemy combatant." As one district court pointed out, "irrespective of nomenclature, . . . [the district courts'] inquiry into the scope of the government's detention authority is essentially the same as that envisioned by the Supreme Court in *Hamdi*." *Hamlily v. Obama*, 616 F. Supp. 2d 63, 66 n.2 (D.D.C. 2009).

After this Court's decision in *Boumediene*, the district courts struggled to craft a standard of detention under the Authorization for the Use of Military Force ("AUMF") that comported with existing laws of war, and came to variable results. *See, e.g., Hamlily v. Obama,* 616 F. Supp. 2d 63 (D.D.C. 2009); *Gherebi v. Obama,* 609 F. Supp. 2d 43 (D.D.C. 2009). The district court in this case adopted the standard set forth in *Hamlily*, which required the government to demonstrate that Petitioner was "part of" al Qaeda and, *inter alia*, that being "part of" al Qaeda

requires "some level of knowledge or intent." *Hamlily,* 616 F. Supp. 2d at 75. The "key inquiry ... [is] whether the individual functions or participates within or under the command structure of the organization - i.e., whether he receives and executes orders or directions." App. 106 (quoting *Hamlily*, 616 F. Supp. 2d at 75).

In a series of appeals decided after the merits hearing in this case, the Court of Appeals for the District of Columbia has adopted a different standard, rejecting the "command structure" analysis and preferring instead an extremely broad, virtually limitless definition of the Executive's detention authority. As applied to the case of Petitioner Al-Madhwani, the Court of Appeals had to look no further than his mere attendance at a guesthouse that the government alleged was sponsored by al Qaeda and his brief, unintentional attendance at a training camp to conclude that he was therefore "part of" that organization, and therefore detainable under the AUMF:

> As we have noted before, "if a person stays in an al-Qaida guesthouse or attends an al-Qaida training camp, this constitutes 'overwhelming' evidence that the United States had authority to detain that person." *Al-Adahi*, 613 F.3d at 1109 (quoting *Al-Bihani*, 590 F.3d at 873 n.2).

App. 7.

As indicated by the panel, this fact has had dispositive influence over several detainees' previous appeals. Conspicuously absent from this sweeping pronouncement is any requirement of *intentional* conduct (in the instance of training camp attendance, an issue that was in serious dispute in this case, App. 112), or knowledge of al Qaeda sponsorship (in the instance of attendance at a guesthouse). Thus, even though the Court of Appeals noted that Al-Madhwani's

attendance at the training camp came only after his passport and other belongings had been confiscated from him, and therefore he only "reluctantly" attended and only as a condition to getting his passport and other property back, App. 6-7, it did not matter whether he intentionally did so, or whether he was not a "part of" al Qaeda despite his attendance.[1] Its belief that attendance at the camp sufficed to make him "part of" al Qaeda rendered these, and all other questions irrelevant.

Therefore, while the district court viewed this as "a very close case," App. 27, the Court of Appeals believed that the evidence "unmistakably showed" that Petitioner had associated with persons affiliated with al Qaeda. App. 10. The appellate opinion revolved around Petitioner's proximity to and "associations" with alleged al Qaeda members, such as praying with and watching television with a neighbor living in an adjacent apartment who was allegedly associated with al Qaeda. App. 7-10.

Significantly, the district court did not find that Petitioner had committed a single act to assist or support these "associates," or al Qaeda, or their cause. Quite the opposite. Lacking money, experience, and the ability to speak the local language, Petitioner's survival depended on the kindness of strangers. App. 115. The fact that some of these strangers may have had their own agendas unbeknownst to Petitioner does not render his acceptance of their assistance in any

[1] This is not hair-splitting. The government submitted evidence to the district court demonstrating that only a small percentage of those who attended training camps became members of al Qaeda. Indeed, according to the National Commission on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report*, at 67 (2004), 10,000 to 20,000 people went through Bin Laden's training camps, but only a few hundred were chosen to become

way sinister. No finding has ever been made that Petitioner's conduct furthered the cause of al Qaeda.

The Court of Appeals' holding rests on the broad standard it has now consistently applied to Guantánamo habeas cases:

> [T]he authority conferred by the AUMF covers at least "those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." Determining whether an individual is "part of" al-Qaida or the Taliban is an inquiry that "'must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual *in relation to the organization*.'"

App. 4-5 (emphasis added, citations omitted). This flexible, "case-by-case" approach, as applied in practice by the Court of Appeals, has been the justification for indefinite detention without charges upon a showing of even peripheral association with individuals who may be themselves associated with (or even "part of") al Qaeda, whether the detainee knew of that association or not, and has enabled the Court of Appeals to deny habeas relief in every Guantánamo case that has come before it. As one member of the Court of Appeals has candidly admitted, the Court of Appeals will affirm detention based solely on the judges' fear that a detainee might later commit a terrorist act, so long as the Government presents "some evidence" against the detainee. *Esmail v. Obama*, 639 F.3d 1075, 1077-78 (D.C. Cir. 2011) (Silberman, J. concurring). Such a slight evidentiary requirement is profoundly at odds with – even defiant of – the law and with this Court's teachings.

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members of al Qaeda. Mere camp attendance cannot be conflated with al Qaeda membership. Yet the Court of Appeals has done just that.

Indeed, there are no limiting principles whatsoever in the Court of Appeals' "flexible" approach to reviewing habeas appeals.

B. The Court of Appeals' Detention Standard Conflicts with this Court's Precedent.

Throughout the history of the Guantánamo litigation, the Court of Appeals for the District of Columbia Circuit has repeatedly concluded that federal courts should defer to the Executive Branch rather than closely inquire into the legality of detaining the Guantánamo prisoners, each time employing a different rationale. *See Boumediene v. Bush*, 553 U.S. 723, 734-36 (2008). First, the Court of Appeals based its holding that the detainees could not challenge their detention on the location of the prison, outside the territorial sovereignty of the United States. *Al Odah v. United States*, 321 F.3d 1134, 1145 (2003). This Court reversed. *Rasul v. Bush*, 542 U.S. 466, 473 (2004). Next, the Court of Appeals held that courts should defer to the Executive's view that a Guantánamo prisoner has no enforceable rights under the Geneva Conventions. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005). This Court reversed again. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006). Then the Court of Appeals held that the Military Commissions Act of 2006 retroactively stripped federal courts of *habeas* jurisdiction, and that the Guantánamo prisoners had no right to invoke the constitutional protection of the Suspension Clause. *Boumediene v. Bush*, 476 F.3d 981, 987, 990-91 (D.C. Cir. 2007). This Court reversed once again, directing the lower courts promptly "to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene*, 553 U.S. at 783, 794-95.

Finally forced by this Court to entertain the *habeas* challenges of Guantánamo prisoners, the Court of Appeals has now embraced an interpretation of the AUMF so malleable and so limitlessly deferential to the Executive as to render the right of *habeas corpus* "illusory." Inter-American Commission on Human Rights, *Resolution No. 2/11 Regarding the Situation of the Detainees at Guantánamo Bay, United States*, MC 259-02 (July 22, 2011). Instead of fulfilling its "duty . . . to call the jailer to account," *Boumediene*, 553 U.S. at 745, at least some members of the Court of Appeals have deferred entirely to the jailer, applying something akin to an "any evidence whatsoever" standard, out of fear of releasing a detainee who might someday commit some future act of terrorism:

> 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. 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*, 553 U.S. 723 (2008)).

Esmail, 639 F.3d at 1077-78 (Silberman, J., concurring). Accordingly, under the complete deference approach employed so far, the Court of Appeals has vacated every writ of habeas corpus the district court granted to a Guantánamo prisoner and affirmed every denial of the writ.[2]

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[2] The Court of Appeals also remanded several cases to the district court for additional fact-finding in light of the appellate court's more government-friendly detention standard. *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *see also Al Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011) (affirming denial of writ in part and remanding for additional fact-finding); *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (reversing denial of writ because government abandoned reliance on evidence underlying district court decision, and remanding so that government could present new evidence).

The Court of Appeals' interpretation of the AUMF cannot be squared with this Court's teachings. As this Court has repeatedly held, "guilt by association is a philosophy alien to the traditions of a free society" that has no place in American jurisprudence, even in the service of national security interests. *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966); *see also Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966); *Aptheker v. Sec. of State*, 378 U.S. 500, 510-11 (1964). Nothing in the AUMF or this Court's jurisprudence undermines this fundamental principle.

This Court has consistently interpreted the AUMF to limit the Executive's detention authority to those persons who engaged in hostile actions against the United States or its allies. The AUMF authorizes the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided 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.

Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001). Emphasizing the "narrow circumstances" and "limited category" of persons within the Executive's detention authority under the AUMF, the Court in *Hamdi* held:

> Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, 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.

Hamdi, 542 U.S. at 526 (quoting Government brief) (emphasis added); *see also id.* at 516-19 (stressing "narrow circumstances" and "limited category" of persons

detainable under AUMF). The *Hamdi* Court specifically rejected the Government's proposal that courts defer to the Executive so long as the Government presents "some evidence" that a prisoner is lawfully detained. *Id.* at 527, 532-33. Likewise, in *Rasul*, this Court observed that detaining persons who "have engaged neither in combat nor in acts of terrorism against the United States" is "unquestionably" unlawful. *Rasul*, 542 U.S. at 483 n.15. This Court reiterated in *Boumediene* that the AUMF authorizes "detention of individuals who fought against the United States in Afghanistan." *Boumediene*, 553 U.S. at 733. It is undisputed that Petitioner never engaged in combat and was never even remotely related to any acts of terrorism against the United States. The district court so found, App. 115, and the Court of Appeals did not question this factual finding.

The Court of Appeals' "guilt by association" detention standard – exemplified in this very case – is the polar opposite of *any* standard this Court has recognized as lawful under the AUMF. Rather than examining a person's *conduct*, the Court of Appeals focuses on "associations" – like praying and watching television in the company of a neighbor who might turn out to be affiliated with al Qaeda, without regard to the individual's awareness of such affiliations. And the standard itself is so infinitely flexible as to permit detention under virtually any set of facts, rather than a "limited category" of individuals. *Hamdi*, 542 U.S. at 516-19. That explains the outcome in this case.

C. The Court of Appeals' Detention Standard Conflicts with the Standard of Detention Developed by other Federal Courts

All of the habeas litigation brought by Guantánamo Bay detainees is consolidated in the United States District Court for the District of Columbia, and all of the appellate law is therefore developed by the Court of Appeals for the District of Columbia. Thus, there can be no "split in the circuits" on the issues unique to these cases, such as the scope of the Executive's detention authority under the AUMF for the detainees. There has nevertheless been considerable confusion and variance in the analysis of this question among the district courts, and one other federal circuit has weighed in on the question of the scope of the AUMF. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam), *judgment vacated as moot, Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

In *Al-Marri*, the *en banc* Fourth Circuit analyzed the case of Ali Al-Marri, a citizen of Qatar who was a legal resident of the United States when he was detained by the United States at a military brig in South Carolina. The *en banc* panel concluded that Petitioner's detention was unlawful in that he had not been afforded sufficient process to challenge his detention as an enemy combatant. *Id.* at 216. An opinion concurring in the judgment and joined by three Judges concluded that Petitioner's military detention was illegal and unconstitutional because it did not fall within the recognized exception to the normal criminal process for law-of-war detentions. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 247 (4th Cir. 2008) (Motz, J., concurring in the judgment). The plurality opinion in that case held that as a legal resident of the United States who was originally detained within the United States,

al-Marri could not be held in military custody as an enemy combatant. The Court of Appeals was highly fractured on the scope and application of the AUMF to that case, and on the rights to be afforded to someone like al-Marri who had been designated an "enemy combatant." No single view commanded a majority of that *en banc* court on the issues raised. Specifically, by a 5-to-4 vote, a majority of the court concluded "that, if the [g]overnment's allegations about al-Marri [were] true, Congress ha[d] empowered the President to detain him as an enemy combatant," while a second 5-to-4 ruling by a separate majority of the court determined that "al-Marri ha[d] not been afforded sufficient process to challenge his designation as an enemy combatant." *Id.* at 216.

This Court granted certiorari to review the matter, but the President's subsequent decision to refer the matter to civilian courts for criminal prosecution rendered the matter moot, and the grant of certiorari was vacated. *Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

Thus, while this Court recognized that resolving the thorny issues raised by the AUMF and its application to foreign nationals detained pursuant to the War on Terror was an issue of national significance, political maneuverings prevented the Court from providing much-needed guidance to the lower federal courts on those issues. This case presents another opportunity for the Court to do so.

D. The Detention Standard Devised by the Court of Appeals Presents an Important But Unsettled Question of Federal Law That Should be Resolved by this Court

This Court has not yet defined the reach of the Executive's detention authority under the AUMF. In *Hamdi*, the Court acknowledged that "[t]he permissible bounds of the category [of persons detainable under the AUMF] will be defined by the lower courts as subsequent cases are presented to them." *Hamdi*, 542 U.S. at 522 n.1. In *Boumediene*, the Court noted that "[t]he extent 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." *Boumediene*, 553 U.S. at 787.[3]

The Court of Appeals has now fashioned a detention standard so expansive as to be virtually unlimited. *See Esmail*, 639 F.3d at 1078 (Silberman, J., concurring) (noting that the Court "is unlikely" to accept certiorari in these cases because doing so "might obligate it to assume direct responsibility for the consequences of *Boumediene*"). This case is the most striking example yet of the Court of Appeals' overly permissive standard, allowing the Executive to detain an innocent and peaceful man who has never broken any law or harmed anyone, possibly for life, with no meaningful independent judicial review.

Without this Court's intervention, the Court of Appeals will continue deciding Guantánamo *habeas* cases based primarily on a fear of future terrorist attacks. As the sixteen Guantánamo appeals have shown, this approach inevitably – without

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[3] *See also id.* at 798 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined."); *id.* at 732 ("[W]hether the President has authority to detain these petitioners . . . and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.").

exception so far – results in denial of the writ.[4] Petitioner respectfully urges the Court to accept certiorari in this case in order to decide the question left open in *Hamdi* and *Boumediene*: the substantive limits of the Executive's detention authority conferred by the AUMF.

This question has significance beyond Petitioner's case, and even beyond the other 171 prisoners still imprisoned at Guantánamo, many of whom will soon mark their tenth anniversary of imprisonment there. Under the authority of the AUMF, the United States military is holding thousands of prisoners in Afghanistan and elsewhere. Human Rights First, Press Release (Oct. 6, 2011) (noting approximately 2,600 detainees in U.S. custody at Bagram Air Base), *available at* http://www.humanrightsfirst.org/2011/10/06/as-afghanistan-anniversary-approaches-bagram-detainees-still-without-due-process. The Court of Appeals' detention standard means that the Executive has unfettered discretion to detain anyone based on "guilt by association" and the other broad and permissive standards discussed herein.

Moreover, the Court of Appeals' approach could endanger the lives and liberty of American citizens around the world. "[A] rule permitting indefinite military detention of members of a 'terrorist' organization . . . could well endanger

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[4] On Friday, October 14, 2011, the Court of Appeals issued its decision in *Adnam 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.

citizens of this country or our allies. For example, a nation could employ this rule to treat American members of an environmental group, which it regards as a terrorist organization, as enemy combatants and so subject those Americans to indefinite military detention." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 235 n.18 (4th Cir. 2008) (Motz, J., concurring), *vacated as moot*, 129 S. Ct. 1545 (2009).

II. The Court of Appeals' Denial of Due Process Protections to Guantánamo Bay Detainees is Inconsistent with the Law and this Court's Decision in *Boumediene v. Bush*

In rejecting Petitioner's appeal, the Court of Appeals reiterated its view that "[t]his Court has . . . stated that the detainees [at Guantánamo Bay] possess no constitutional due process rights." *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509, 518 n.4 (D.C. Cir. 2009) (citing *Kiyemba v. Obama* (*Kiyemba I*), 555 F.3d 1022, 1026–27 (D.C. Cir. 2009)), *cert. denied*, 130 S. Ct. 1880 (2010). App. 11. That the Court of Appeals holds this erroneous view profoundly and fundamentally affects *all* of its analyses. Unlike certain other specific provisions in the Constitution, the right to due process is so fundamental and core to the interpretation and application of a variety of other constitutional guarantees, and to the very values underpinning the Constitution itself, that a belief that a person is not entitled to due process protections at all opens the door to arbitrary or oppressive governmental treatment of that person that would be intolerable under almost all circumstances. The Due Process clauses of the Constitution are the provisions on which the courts have relied to protect all persons against arbitrary or oppressive governmental action.

In *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004), this Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that decision before a neutral decisionmaker." Subsequently, in *Boumediene v. Bush*, 553 U.S. 723, 732 (2008), this Court held that detainees at Guantánamo Bay, regardless of citizenship, "have the habeas corpus privilege." The lower courts badly need guidance on the question of the application and scope of due process entitlements of Guantánamo detainees. In the wake of *Hamdi* and *Boumediene*, district courts wrestling with the question in the context of Guantánamo detainees have complained that "it remains uncertain to what extent the Due Process Clause applies to the [non-citizen] detainees at Guantanamo Bay." *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69, 78 n.14 (D.D.C. 2010). The Court of Appeals has misconstrued applicable Supreme Court precedent to conclude that non-citizen detainees at Guantánamo are not entitled to *any* protections provided by the Due Process Clause. App. 11; *see Kiyemba I*, 555 F.3d at 1026-27. In addition, the disparate treatment of detainees, which has resulted in the release of some detainees who may have even committed criminal acts against the United States, while other individuals remain indefinitely detained for merely allegedly "cross[ing] paths" with members of al Qaeda (as the district court determined in this case, App. 114), violates the detainees' due process rights. The district court observed that this disparity is present in this very case, when it noted that many detainees who were

more dangerous or culpable than petitioner have been released and sent home. App. 115.[5]

The Court of Appeals has employed an analytical paradigm so structurally defective – refusing to apply principles of due process to any detainee appeal, and directing that district courts do the same in their analysis of detainees' habeas petitions – that it is imperative that this Court grant certiorari to correct this defect.

A. The Court of Appeals Misapplied this Court's Precedent in the *Kiyemba* Cases

The Court of Appeals below relied on *Kiyemba v. Obama*, 561 F.3d 509, 518 n.4 (D.C. Cir. 2009) (*Kiyemba II*), for the proposition that "the detainees [at Guantánamo Bay] possess no constitutional due process rights." App. 11 (alteration in original). The *Kiyemba II* Court cites *Kiyemba I* to support this conclusion. This is not the only case in which the Court of Appeals has determined that Guantánamo detainees lack due process protections. *See, e.g., Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (relying on *Kiyemba I* for the proposition that "alien detainees at Guantánamo cannot invoke the Due Process Clause"). Further, the D.C. District Court has expressed considerable confusion regarding what, if any, due process rights are afforded to the Guantánamo detainees. *See Basardh v. Obama*, 612 F. Supp. 2d 30, 33 (D.D.C. 2009) ("[T]he Court is spared from having to wade into the

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5 For example, Salim Hamdan admitted pledging "bayat" (fealty) to Osama bin Laden and was convicted of five counts of providing material support for terrorism. He was sentenced to 5½ years' imprisonment but given credit for time served in Guantánamo. Hamdan has been free in his native Yemen since January 2009. *United States v. Hamdan*, No. 09-002, 2011 U.S. CMCR LEXIS 1 (C.M.C.R. June 24, 2011).

debate over whether the due process principles recognized by the Supreme Court in *Hamdi v. Rumsfeld* also apply to a non-U.S. citizen held at Guantanamo."); *Al-Qurashi v. Obama*, 733 F. Supp. 2d at 78 n.4.

The *Kiyemba I* Court reasoned that, "[d]ecisions of the Supreme Court and of this Court – decisions the district court did not acknowledge – hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba I*, 555 F.3d at 1026. In support of this conclusion, the *Kiyemba I* Court listed a variety of pre-*Boumediene* opinions, in which courts held that individuals outside the territorial jurisdiction of the United States are not afforded due process rights. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." (citing *Johnson*, 339 U.S. at 771)). Tellingly, the *Kiyemba I* Court failed to acknowledge the *Boumediene* Court's

rejection of this jurisdictional analysis, as the concurring opinion in *Kiyemba I* noted:

> The majority also offers that because petitioners are aliens outside the United States and have not applied for visas they are not entitled to the same due process as the aliens in *Zadvydas* and even *Clark*. However, in *Boumediene*, 128 S. Ct. at 2257, the Supreme Court rejected this territorial rationale as to Guantanamo, holding that detainees who were brought there involuntarily were entitled under the Constitution to seek habeas relief because "[i]n every practical sense Guantanamo is not abroad: it is within the constant jurisdiction [and 'plenary control'] of the United States."

Kiyemba I, 555 F.3d at 1038 (Rogers, J., concurring) (alterations in original).[6]

The *Kiyemba I* and *Kiyemba II* analysis ignores this Court's rejection of any strict application of a territorial jurisdiction test and its determination in *Boumediene* that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764. In fact, this Court has recognized that it "has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Id.* at 755. The *Boumediene* Court went to great lengths to explain the importance of its rejection of the formalistic territorial jurisdictional analysis:

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[6] Importantly, the *Kiyemba I* Court's analysis of the territorial jurisdiction over the U.S. Naval Base at Guantánamo Bay wholly ignored *Boumediene*. While the *Boumediene* Court noted that, "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States," *Boumediene*, 553 U.S. 769, the *Kiyemba I* Court noted, "[t]he Guantanamo Naval Base is not part of the sovereign territory of the United States." *Kiyemba I*, 555 F.3d at 1026 n.9. The Circuit Court's position is contrary to this Court's prior rulings.

> Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. 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. *Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution."* *Murphy* v. *Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L. Ed. 47 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would 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." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

Boumediene, 553 U.S. at 765 (emphasis added). The Court noted the uniqueness of the indefinite detention of the Guantánamo detainees:

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history.

Id. at 770-71.[7]

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[7] The *Boumediene* Court also noted that, "[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional." *Boumediene*, 553 U.S. at 772.

In rejecting this Court's analysis of extraterritorial jurisdiction in *Boumediene*, the Court of Appeals has apparently capitulated to the pressures of dealing with the "war on terror." At least one judge on the Court of Appeals has acknowledged as much:

> My second point, not unrelated to the first, goes to the unusual incentives and disincentives that bear on judges on the D.C. Circuit courts – particularly the Court of Appeals – charged with deciding these detainee habeas cases. In the typical criminal case, a good judge will vote to overturn a conviction if the prosecutor lacked sufficient evidence, even when the judge is virtually certain that the defendant committed the crime. That can mean that a thoroughly bad person is released onto our streets, but I need not explain why our criminal justice system treats that risk as one we all believe, or should believe, is justified.
>
> When we are dealing with detainees, candor obliges me to admit that one can not help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a "Posnerian" – a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis – to recognize this uncomfortable fact.

Esmail, 639 F.3d at 1077-78 (Silberman, J., concurring). This candid admission flies in the face of this Court's admonition that our due process principles may not waver in the face of uncertainty. For "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi*, 542 U.S. at 532. Unless this Court provides limiting standards and clear guidance as to how such standards are to be applied in these cases, lower courts will continue to act out of fear, resorting to

the perceived safety of imprisoning men who have done nothing wrong out of fear that they may someday might.

B. The *Boumediene* Court's Suspension Clause Analysis Relied upon Due Process Principles

While the *Boumediene* Court was focused on the application of the Suspension Clause to detainees at Guantánamo, the Court repeatedly referenced due process standards in its analysis of the Suspension Clause. For example, the Court noted that, "[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context." *Boumediene*, 553 U.S. at 781. In addition, the Court contemplated the application of due process requirements to non-citizen detainees, and emphasized the potentially severe consequences of failing to provide the requisite protections:

> Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. . . . And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

Id. at 785.

In analyzing the adequacy of the procedures provided in the Detainee Treatment Act, the Court expressed concerns about arbitrary government activity: "Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power." *Id.* at 794.

Protecting against the arbitrary exercise of government power is the core purpose of the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action."). Indeed, "the touchstone of due process is protection of the individual against arbitrary action of government." *Id.* (internal quotation marks omitted).

This Court has recognized the potential for the arbitrary exercise of government power within the context of the Guantánamo detainees as a result of the overwhelming desire to detain those who might threaten national security:

> [A]s critical as the Government's interest may be in detaining those who *actually* pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi, 542 U.S. at 530 (emphasis added). In this case, District Judge Hogan recognized exactly that type of arbitrary exercise of government power, noting: "The Court fails to see how, based on the record, Petitioner poses any greater threat than the dozens of detainees who recently have been transferred or cleared for transfer." App. 115.

The *Boumediene* Court analyzed the Suspension Clause's application to Guantánamo detainees through the lens of due process principles. The Court of Appeals, through its analysis in the *Kiyemba I* and *Kiyemba II* opinions, has completely disregarded this Court's guidance regarding the application of the Due Process Clause to the Guantánamo detainees. The conflicting principles in

Boumediene, *Hamdi*, and the *Kiyemba* cases have left the Court of Appeals and the D.C. District Court confused as to what process is due to the detainees. This Court should grant certiorari in this case in order to clarify the judicial branch's role in protecting the individual rights of the Guantánamo detainees. What the Court said less than three years after the September 11 attacks remains true today:

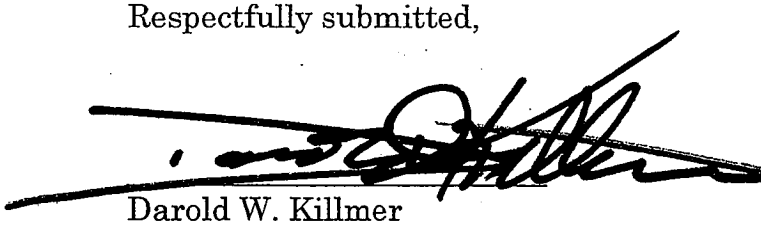
> We have long since made clear that a state of war is not a blank check for the President . . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Hamdi, 542 U.S. at 536 (internal citation omitted). Without guidance from this Court, the Executive will once again have a blank check to deny the detainees at Guantánamo their liberty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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