ORAL ARGUMENT: NOT YET SCHEDULED
No. 10-5319

In the United States Court of Appeals for the District of Columbia Circuit

ADNAN FARHAN ABD AL LATIF,
Petitioner-Appellee,

v.

BARACK OBAMA, et al.,
Respondents-Appellants.

On appeal from the United States District Court
for the District of Columbia, Civil Action No. 04-1254,
Hon. Henry H. Kennedy, Jr., District Judge

Brief of Petitioner-Appellee

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December 23, 2010

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Respondents-Appellants.

Rulings under review. References to the rulings under review appear in the Brief for Respondents-Appellants.

Related cases. In addition to the "related cases" discussed in the Brief for Respondents-Appellants, there have also been four other appeals in the action below: Nos. 08-5236 and 08-5461, which are no longer pending, and Nos. 10-5235 and 10-5282, which are pending and concern the lawfulness of other petitioners' detentions.

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TABLE OF AUTHORITIES

Cases

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* Authorities upon which the Petitioner-Appellee chiefly relies are marked with asterisks.

Statutes and Rules

Other Authorities

GLOSSARY

ARB	Administrative Review Board
[redacted]	
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
FBI	Federal Bureau of Investigation
FD-302	FBI Report of Investigation
ISN	Internment Serial Number
JA	Joint Appendix
JTF GTMO	Joint Task Force, Guantánamo Bay
KB	"Knowledgeability Brief"
LNU	Last Name Unknown
NCIS	Naval Criminal Investigative Service
SIR	Summary Interrogation Report
[redacted]	

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INTRODUCTION

The petitioner, Adnan Latif, was seized in December 2001 by Pakistani authorities. Shortly thereafter, he was turned over to the United States and sent to Guantánamo Bay. [redacted]

The Government argues that Latif received weapons training and fought with the Taliban. The only basis for its claims is a heavily redacted [redacted] report [redacted] The Government concedes that its case "turned on the accuracy" of this report. Gov't Br. 5. As the district court found, however, the report is not a reliable record [redacted]

For nearly a decade, Latif has repeatedly denied any assertion that he was part of al Qaeda or the Taliban. He has repeatedly explained that he traveled to Pakistan seeking treatment for medical problems stemming from a 1994 car accident, and the evidence is unrebutted that he suffered a broken skull, cerebral hemorrhage, and punctured eardrum. He has described these medical problems and his efforts to seek treatment, not only to interrogators, but also in three administrative hearings and to the

district court. His account was also corroborated by the medical records from his 1994 accident; by his intake form when transferred to U.S. custody, which said that he was captured with "medical papers," not weapons; and by the declaration of a medical doctor and former Army brigadier general who reviewed his medical records from Guantánamo Bay. The district court expressly found that the petitioner's account of his activities in Pakistan and Afghanistan was plausible and corroborated by other evidence.

The Government reargues the facts. The district court's findings, however, are reviewable only for clear error, as the Government concedes. Those findings were based on a careful analysis of the record and are not erroneous, much less clearly so. They were amply supported by record evidence.

The judgment should be affirmed, and Latif, who has spent almost his entire adult life at Guantánamo Bay, should be allowed to go home.

JURISDICTION

This appeal is from the district court's Judgment and Memorandum Opinion of July 21, 2010, granting a writ of habeas corpus to the petitioner. JA 169, 170–97. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241.

The Government states that this Court has appellate jurisdiction under 28 U.S.C. § 1291 ("final decisions" of district courts) and § 2253(a) ("final order" in a habeas case). The case in the district court includes other petitioners, whose habeas claims have not yet been resolved. The Judgment may be appealable under 28 U.S.C. § 1292(a)(1) as an order granting an injunction, because it requires the Government to "take all necessary and appropriate diplomatic steps to facilitate Latif's release forthwith." JA 169; *see Belbacha v. Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008); *Cobell v. Kempthorne*, 455 F.3d 317, 321–22 (D.C. Cir. 2006).

STATEMENT OF THE ISSUE

1. Whether the district court clearly erred in finding that the Government failed to meet its burden of showing that the petitioner was part of the Taliban or al Qaeda.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Respondents-Appellants.

STATEMENT OF FACTS

Petitioner Adnan Farhan Abdul Latif was seized in Pakistan in December 2001 by Pakistani authorities. He was later transferred to United States custody and sent to Guantánamo Bay in January 2002.

The Government contended that Latif is detainable because he was "part of" al Qaeda or the Taliban. The district court concluded that the Government had not proved its allegations by a preponderance of the evidence. Accordingly, it granted Latif's petition for a writ of habeas corpus.

The Government contends that the district court's decision must be reversed because the district court did not properly weigh the evidence. The Government's brief, however, does not even *acknowledge* the vast majority of Latif's evidence. *See* Gov't Br. 3–10. Moreover, the Government makes unqualified factual assertions that are at odds with the district court's findings. A statement of the facts found by the district court, and the evidence supporting them, is set forth below.

A. Petitioner Adnan Farhan Abdul Latif

Latif was born in 1976 in Yemen. JA 174, 525. As the district court found, he suffered serious head injuries in a car accident in 1994. JA 174, 470, 525. He received treatment at a Yemeni hospital before being flown to the Islamic Hospital in Amman, Jordan. JA 174, 461, 470, 525. The Yemeni

government paid for his treatment. JA 525. Doctors at the Jordanian hospital diagnosed Latif with a broken skull, cerebral hemorrhage, and punctured eardrum. JA 499. The doctors treated his injuries and recommended he return six months later for further care. *Id.*

According to Latif, he continued suffering after he was released from the hospital. JA 174, 461, 464, 470–71, 525–26. He experienced severe headaches, vision and hearing problems, and pain so intense it prevented him from working. JA 525–26. In 1995 he was diagnosed with vision and hearing loss by a Yemeni government medical board, JA 501, and the Yemeni Ministry of Public Health recommended he return to Jordan for surgery and therapy at his own expense, JA 503. Latif, however, could not afford to pay for the necessary treatment. JA 461, 464, 470–71, 526.

With his medical problems lingering and the Yemeni government refusing to help, Latif explains that he sought charitable assistance. JA 190–92, 461, 464, 470–71, 526. He asked people at clinics, mosques, and other organizations if they knew of anyone who could help. JA 526. He even obtained a letter from the speaker of the Yemeni Parliament urging others to help. *Id.* Eventually he met a Yemeni man, Ibrahim Alawi, who said he could arrange for free treatment in Pakistan. JA 191, 461–62, 526.

According to his account, Latif traveled to Pakistan in the summer of 2001 to meet Alawi. JA 191, 196, 526. Alawi was in Afghanistan when Latif left Yemen, and Latif found him at an Islamic studies center in Kabul that Alawi helped run. JA 175, 191, 526–27. Alawi offered to let Latif stay at the center until they could leave for a clinic in Pakistan. JA 191, 527. Latif was in Afghanistan when the U.S. began bombing in October 2001, and was told that he should flee the country. *Id.* He took this advice and went to Pakistan, where he was seized by Pakistani officials in late 2001. JA 175.

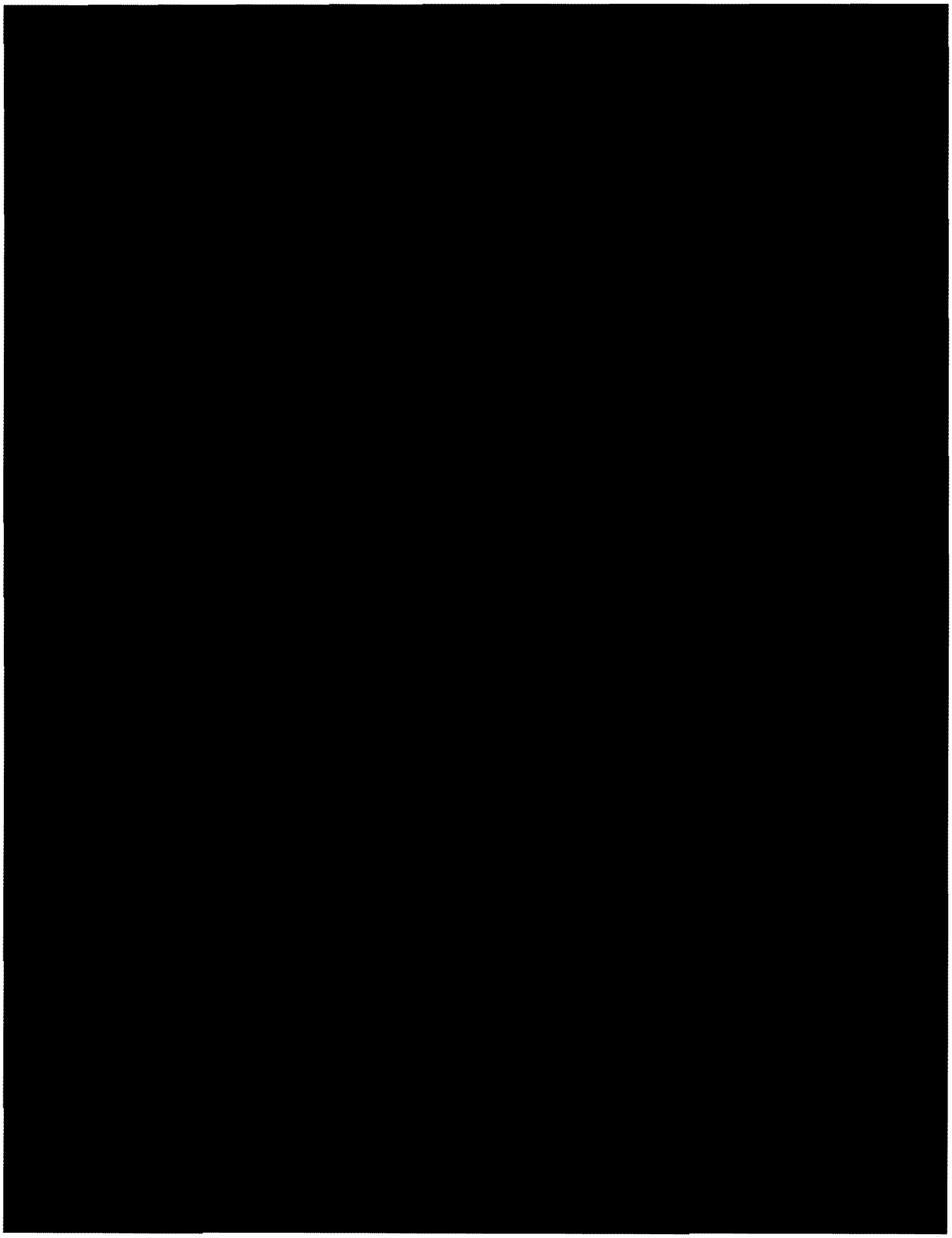
B. The Government's evidence

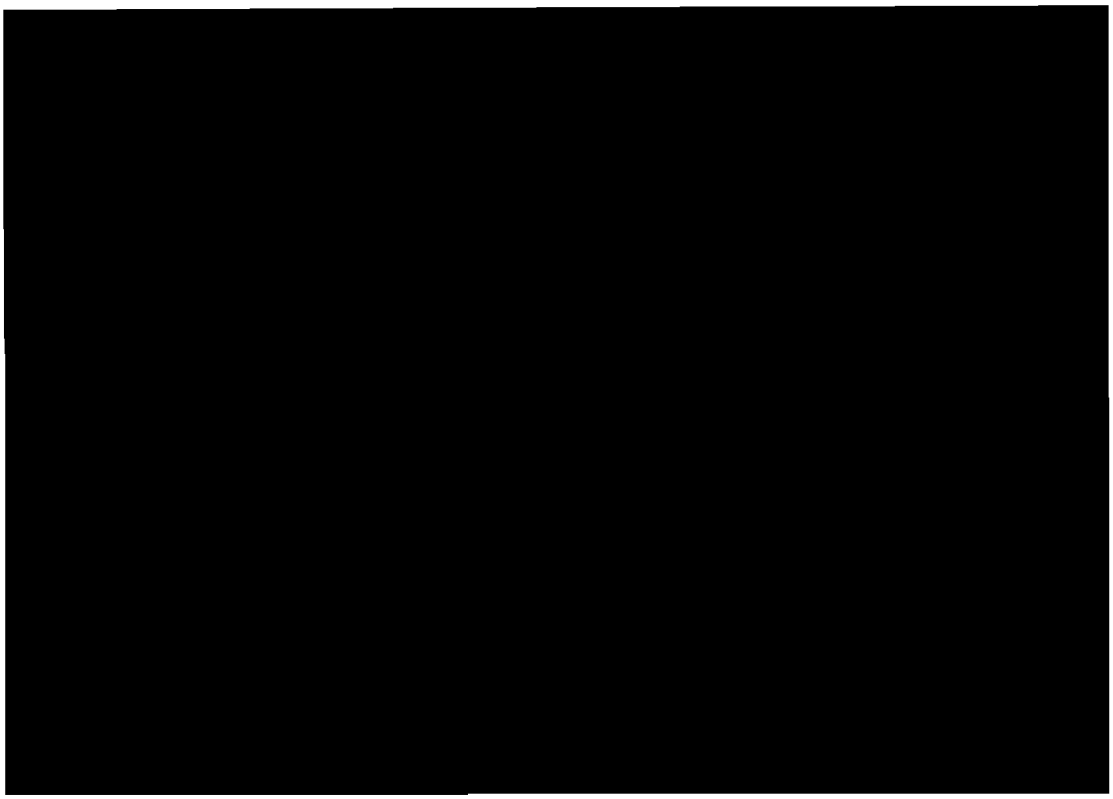
The Government relied on just a few exhibits to support its allegations that Latif was part of al Qaeda or the Taliban. As discussed below, the district court found its evidence unpersuasive.

1. [redacted]

The most critical piece of evidence before the district court was a heavily redacted, anonymous [redacted] report [redacted] The Government concedes that the case "turned on the accuracy" of this report. Gov't Br. 5.

[redacted]





The district court's opinion analyzes the document in great detail, carefully considering its reliability. The petitioner denied that he ever had any connection with the Taliban. He further denied that he ever told anyone that he received weapons training or fought with the Taliban. JA 527–28. He argued that the statements in the report were likely a product of

[redacted]

The district court found that the document was "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." JA 194. The court observed that "there is serious question as to whether the document accurately reflects [redacted] and had "presented a plausible alternative story to explain his travel." JA 195. The court explained that these errors [redacted]

The court also found that "there is no corroborating evidence for any of the incriminating statements in the [report] as they relate specifically to [Latif]." *Id.* Notably, the court observed, no one saw Latif "at a training camp or in battle," and no other evidence "links Latif to Al Qaeda, the Taliban, a guest house, or a training camp." *Id.* If Latif really had been a Taliban trainee and fighter, many people would have seen him, yet no one

ever identified Latif as one. *See also* JA 773 ("No other detainees have identified [Latif], except as having been seen at various detention facilities.").

These findings were supported by the record. [redacted] It is undisputed, however, that Latif traveled to Jordan for treatment for *himself,* for injuries to his *head,* that he suffered in a *car accident.* JA 174. [redacted]

The document is also internally inconsistent, [redacted]

[redacted]

The document also lacks objective indicia of reliability. [redacted]

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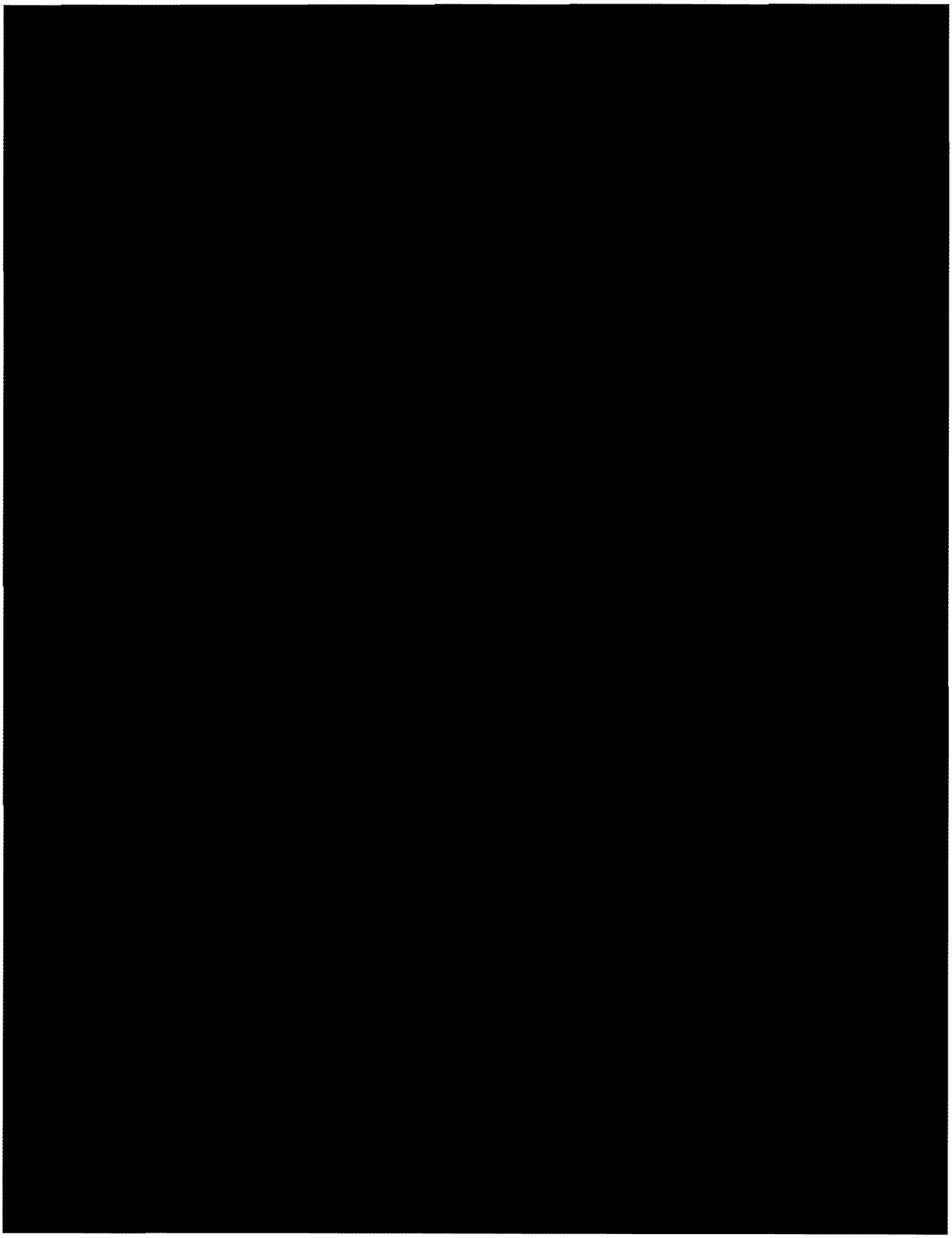

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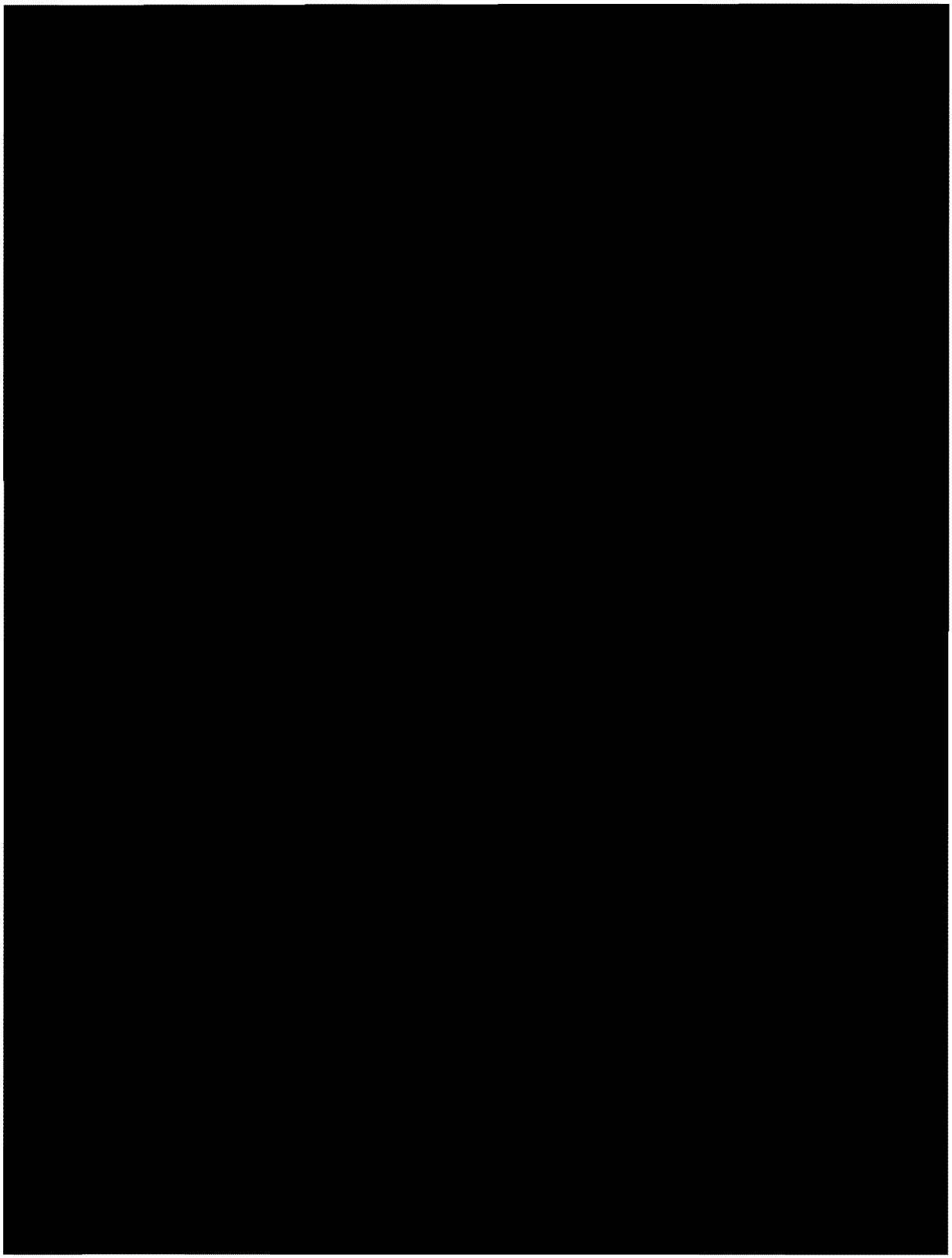

[redacted]

3. Ibrahim Alawi and Abu Khalud

The Government also contended that Ibrahim Alawi, the Yemeni man who Latif says offered to help him find medical care in Pakistan, is really an al Qaeda recruiter named Abu Khalud. The Government cited summaries of interrogations of other detainees, who identified Abu Khalud as a recruiter and who said that Abu Khalud's real name was Ibrahim Ba'alawi.

Latif submitted extensive evidence that Ibrahim Alawi was not Abu Khalud. First, they were known by different names. Latif's interrogation summaries refer to his benefactor as "Ibrahim Alawi," JA 473, "Ibrahim ((Aliwee))," JA 464, "Ibrahim Aliwee," JA 475 [redacted] or "Ibrahim A'lim," JA 461. *See also* JA 829 (handwritten notes saying "Ibrahim Allum"); JA 914 (handwritten notes saying "Ibrahim Ailim"). In contrast, interrogations of other detainees on which the

[redacted]

Government relies consistently refer to Abu Khalud as Abu Khalud or something similar, and only sometimes recite Ibrahim Ba'alawi as his "real name." *See* JA [redacted] 251, 262, 267, 270, 274, 284, 289, 293, 297, 928. There is no evidence that Latif ever referred to Alawi as Abu Khalud.

Moreover, Abu Khalud's "real name" of "Ba'alawi" is phonetically distinct from "Alawi," and they are distinct Arabic names, both common in Yemen, that expert declarations confirmed are unlikely to be confused. JA 861, 870. The Government's assertion below that "Alawi" is just a spelling variation of "Ba'alawi" had no support in the record; the declaration it cited suggests that some sounds can be spelled in multiple ways, not that the "Ba" sound could be dropped entirely. JA 447–48.

Second, physical descriptions of Alawi and Abu Khalud were strikingly different. According to an FBI agent's [redacted] notes, Latif described [redacted] as "skinny," with a "big beard." JA 829. In contrast, Abu Khalud, the al Qaeda facilitator, is described by others as "heavy" and "rotund," with a "short beard and moustache," JA 924; as "large," JA 275; as "very fat" with a "short beard," JA 880; as "stocky" with a "short, sparse, black beard and mustache," JA 267; and as "a big guy, well built," with "a small beard," Merits Hearing Joint Ex. 43 at ¶ D.4.C. Similarly, Latif said that [redacted] was 30 to 40 years old. JA 829. Abu Khalud, on the other hand, is described as

being born in 1975, JA 923, which would make him 27 at the time; as being "slightly older than" a 26-year-old detainee, JA 880; as being of age 27, JA 275; as being "27–28 years old," JA 270; and as being "approximately 27-years-old," JA 267.

Notably, Abu Khalud is described as having been "shot in the head" in Bosnia, JA 293; as having a "[r]ound scar in middle of forehead from bullet injury," JA 275; and as having a "plastic plate on the left side of his skull, where he had been shot in Bosnia," JA 924. There is no evidence that Alawi had any such scar or plate, or had ever been to Bosnia.

Third, according to Latif, Alawi had two children: a son[6] [redacted] and a daughter[6] [redacted] JA 470, 830. In contrast, Abu Khalud had "one daughter[6] [redacted] JA 924.

Fourth, Abu Khalud is from Taiz, *see* JA 267, 270, 274, 293, 297, [redacted] 880, 923, while Latif described [redacted] as being from Ibb, *see* JA 464, 470 ("Ebb"), JA 829 ("Eb"). Abu Khalud recruited for al Qaeda at a Yemeni soccer club, JA 270, 880, and at Taiz mosques and religious centers, JA 274, 297, 880. [redacted] on the other hand, collects money for charities, JA 461, 470–71, 829, 914, and there is no evidence he is connected to a soccer club, a mosque, the city of Taiz, or al Qaeda.

C. The petitioner's evidence

The district court reviewed substantial and corroborated evidence that Latif left Yemen seeking medical treatment, not to fight with the Taliban or al Qaeda, and was not part of al Qaeda or the Taliban.

1. The interrogations of Latif

[redacted] In more than a dozen interrogations and statements in the record, Latif explained that he had been badly injured in a car accident years before, that his medical problems continued into 2001, and that he traveled to Pakistan and Afghanistan in search of free medical care.

Latif mentioned his medical problems, or his purpose of traveling to seek medical care, more than a dozen times, starting as early as December 2001, just two or three days after the "debriefing" in Pakistani custody:

- [2] [redacted] Latif's intake form from his transfer to U.S. custody says that he went to Pakistan "for treatment of ear problem," that he possessed "medical papers" but no weapons when captured, and that he denied any "affiliation" with al Qaeda. JA 568–69.
- [2] [redacted] A military interrogation summary says that Latif "traveled to Afghanistan to receive medical attention"; that years earlier, he had been treated in Jordan for a skull fracture and eye

and ear problems from a car accident; and that he went to Pakistan for free treatment because he could not afford it on his own. JA 464.

- [redacted][2] An interrogation summary says that Latif "went to PK to receive treatment for his ear"; that "he required an ear operation"; and that Latif said his medical records "would prove that he had traveled to PK and AF for treatment." JA 575–76.
- [redacted][2] An FBI [redacted] summary says that Latif suffered a cerebral hemorrhage that required emergency treatment in Jordan; that he needed eye and ear surgery, but could not afford it; that he sought charity and met [redacted] who offered to arrange for free treatment in Pakistan; and that he decided to accept [redacted] offer and travel to Afghanistan and Pakistan. JA 461–62; *see also* JA 913–15 (handwritten interview notes).
- [redacted]
- [redacted][2] Separate FBI and DOD summaries apparently describe the same joint [redacted] The DOD summary says that Latif "was questioned in depth about the medical circumstances surrounding his travel to AF"; that Latif had fractured his skull in a car accident and been treated in Jordan; and that he "required additional surgery in Pakistan." JA 468. The FBI summary adds that the accident caused "a broken skull, concussion, and broken ear

bone, which continues to affect his hearing"; that Latif sought help from charities and the government; that he met [redacted] who ran a charity; and that Latif traveled to Afghanistan "to seek medical treatment for his injured ear." JA 470–71; *see also* JA 826–31 (handwritten notes, noting [redacted]

- [2] [redacted] An FBI [redacted] summary says that Latif says his innocence can be verified by the Yemeni government, that Latif is disabled and went to Jordan and Pakistan because there are no good hospitals in Yemen, and that [redacted] took him to Pakistan to help him get treatment. JA 473.
- [2] [redacted] An interrogation summary says Latif "traveled to AF to receive medical attention" and said "a phone call to Yemen to verify his status as a medical patient" would "clear his whole case up." JA 739.
- [2] [redacted] An Air Force interrogation summary says that Latif "reaffirmed" that he traveled to Afghanistan seeking treatment for head and eye injuries that "occurred as a result of an automobile accident when he was a teenager"; that Latif could not afford treatment; that he met Ibrahim Aliwee, who told him that he could receive free medical care in Pakistan; and that Latif left Yemen for treatment. JA 475.
- Undated, circa September 2004: A summary of Latif's CSRT proceeding says that Latif said medical records show he left Yemen for treatment; that Latif wanted the Government to contact the Yemeni Ministry of Health and the Jordanian hospital to get the

records; that Latif was diagnosed in Jordan but could not afford treatment; and that he went to Pakistan where it was cheaper. JA 480–82.

- March 28 and 30, 2005: Latif's election form and statement for his first ARB proceeding says that he went to Afghanistan to meet Ibrahim Aliwee, who would take him to Pakistan to treat major health problems. JA 487–90.
- Undated, circa March 2005: A summary of the first ARB hearing says that Latif traveled to Afghanistan to meet with Ibrahim Aliwee for medical treatment; that he needed surgery for eye and ear problems from a skull fracture and internal bleeding after a car accident; and that Latif said he had asked the first tribunal (i.e., the CSRT) to review his medical records, which it had not done. Under questioning, Latif clarified that he went to Pakistan to get treatment, but was waiting in Afghanistan for Ibrahim to escort him to Pakistan. JA 515–23.
- February 15 and 16, 2007: Latif's election form and statement for the third ARB proceeding says that he is disabled; that he traveled to Jordan and Pakistan for medical treatment; and that his medical records, which he had asked the Government to review, would show that he sought treatment. JA 709–11, 713–15.
- May 10, 2009: In his declaration to the district court, Latif explained that he was in a serious car accident in 1994; that the accident broke his skull, punctured an eardrum, and caused a hemorrhage above his left eye; that he continued to experience severe headaches and vision

and hearing problems; that the Yemeni government recommended additional care; that he could not afford treatment and sought charity; that a man named Ibrahim offered to arrange for free treatment in Pakistan; and that he traveled to Afghanistan to find Ibrahim, not to fight. JA 525–30.[5]

The district court credited Latif's account of his travels to Afghanistan and Pakistan, finding that it was "plausible" and "not incredible," and that it was corroborated by medical evidence. JA 195–96. It also found that the Government's arguments "attacking the credibility of Latif's story," including claims that his story was inconsistent and that he had "more than one cover story," were "unconvincing." *Id.*

2. *The corroborating medical evidence*

Latif's statements that he went to Pakistan and Afghanistan for medical treatment were corroborated by evidence of his injuries.

First, records from the Islamic Hospital in Jordan state that Latif was admitted in July 1994 following a head injury. JA 499.[6] He was diagnosed

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5. In addition to the interrogations and statements listed above, Latif was apparently interrogated on at least five other days, for which no summaries are in the record. JA 648, 773. Latif may have been interrogated many more times, but the district court did not require the Government to produce all of Latif's interrogation summaries. The Government presumably would, however, have produced and relied on them if they had contradicted Latif's account or corroborated its accusations.

6. The hospital confirmed from computer records in June 2010 that Latif had been a patient in 1994. JA 963.

with a broken skull, hole in his left eardrum, and hemorrhage that led to blood concentration above his left eye. *Id.* He was treated with medicine and clinical monitoring, and a doctor recommended that Latif return in six months for further testing. *Id.*

Second, Yemeni government records confirm Latif's continuing problems after his release from the hospital. A July 1995 Yemeni "Military Medical Decision Form" diagnoses Latif with "[l]oss of sight in the left eye" and "[l]oss of hearing." JA 501. A Yemeni Ministry of Public Health report diagnoses Latif with "a wide circular hole" in his left eardrum and recommends that he return "to the previous center outside for more tests and therapeutic and surgical procedures at his own expense." JA 503.

Third, Latif's intake form, which was prepared when he was taken into custody by the United States, says that he had "medical papers," but no weapons, when he was seized. JA 568.

Fourth, Latif's account is consistent with his extensive medical history since he was sent to Guantánamo Bay. Latif has reported problems with his hearing while at Guantánamo Bay, and has worn a hearing aid in the past. JA 1041–42. His medical file is more than 5,000 pages long. JA 889. Dr. Stephen Xenakis, a medical doctor and retired Army brigadier general, examined a portion of his medical file, including records of neurological

and optometric examinations, and concluded that Latif's symptoms are consistent with postconcussion syndrome. He further concluded that "[w]ith reasonable medical certainty, the history of complaints and the impairments reported by Petitioner are credible." JA 966–72.

3. [redacted]

In July 2009, the Government moved [redacted]

The Government asserted that the [redacted]

"consistent with the national security and foreign policy interests of the United States and the interests of justice." *Id.* at 1 (quotation marks omitted). The Government said it would [redacted]

It seems highly improbable that [redacted]

4. Flaws in the Government's evidence

There was extensive evidence that the Government's intelligence reports frequently fail to reflect accurately the interrogations they describe.[7]

The record in this case provided an unusual opportunity to examine the reliability of the Government's evidence because it contains two summaries, written by different people, apparently describing the same interrogation. JA 468, 470–71, 826–31. One summary, an FBI FD-302, states that Latif was interrogated on May 29, 2002, by a group that included agents from the FBI and NCIS, an FBI linguist named [redacted] document is an SIR, *see* JA 174, created by [redacted], JTF GTMO," JA 468. The SIR notes that "FBI linguist [redacted] interpreted, JA 468; this is presumably the same FBI linguist [redacted] It is thus likely that the interrogator who created

7. The district judge in this case has handled several Guantánamo Bay habeas cases. In one of those cases, the court noted that it "has learned from its experience with these cases that the interrogation summaries and intelligence reports on which respondents rely are not necessarily accurate and, perhaps more importantly, that any inaccuracies are usually impossible to detect." *Abdullah v. Obama,* Civ. No. 06-01668, Doc. 203, Order and Memorandum 3 (D.D.C. May 6, 2010). The court added that "in the rare instances in which the Court has had evidence before it that makes an assessment of the accuracy of an interrogation summary possible, that evidence has demonstrated that the summaries are of questionable accuracy." *Id.*

the SIR was the [redacted] mentioned in the FD-302.[8]

Despite the fact that the two summaries apparently describe the same interrogation, they contain critical differences. The SIR contains just two short passages describing Latif's account of his medical problems:

> Source claimed he was injured in a car accident when he was 16-years-old. As a result, he required additional surgery in Pakistan. ***Source was unable to provide details concerning his accident or medical condition.***

JA 468 (emphasis added). And:

> Source claimed he had fractured his skull in an automobile accident. He also claimed he had surgery in [Jordan] to alleviate swelling in his head. Source's head was visually examined by interviewer and there were no scars or defects identified.

Id. Far from Latif being "unable to provide details concerning his accident or medical condition," however, the FD-302 notes many details, including details of the car accident, his specific injuries, his treatment, and his efforts to obtain further treatment:

> Al Latif stated that when he was fourteen years old, he was in a serious car accident, where the vehicle rolled over and gave him a broken skull, concussion, and broken ear bone, which continues to

8. The inference that the two summaries describe the same interrogation is reinforced by several details common to the two documents: Latif's legal and religious names; the fact that that he prefers his religious name; the name, leader, home town, and size (100–200 members) of his tribe; and the facts that he fractured his skull in a car accident and obtained treatment in Jordan. JA 468; 470–71.

> effect [*sic*] his hearing. Al Latif was riding in a truck without seats that was used by his friend [redacted] for transporting Yemeni grapes. Following the accident, Al Latif was unconscious and taken to a Yemeni hospital in Sanaa, Yemen. After being unconscious for one month, Al Latif was taken to the Jordanian Islamic Hospital by [redacted] Al Latif could not recall any of the doctors that treated him, but they drained the blood from his skull, and fixed a large wound in his scalp. In addition to taking him to the hospital, [redacted] also paid for his initial treatment in Jordan. Following his initial treatment in Jordan, the doctors stated that he would have to return for another treatment.
>
> Because the next treatment was very expensive, Al Latif went to a number of charitable organizations, looking for assistance in paying his medical expenses. Al Latif went to a number of government offices in Yemen seeking assistance. Eventually, Al Latif met a man from his home town Ebb, Yemen, named [redacted] who collected money and controlled a charity called Gameiat Al Hekma. Another charity associated with Al Latif is Gameit Al Hekma. The man who introduced Al Latif to [redacted] is [redacted] who is also from Al Odain, Yemen. [redacted] collected money for his charities from all of the Gulf states. ...
>
> Al Latif indicates that the reason he traveled to Afghanistan from Yemen was to seek medical treatment for his injured ear. The trip was sponsored by Gameit Al Hekma and he stayed in the center of Kabul, Afghanistan.

JA 470–71.

There were other discrepancies between the documents. For example, the FD-302 says that Latif said that he traveled to Afghanistan "to seek medical treatment for his injured ear." JA 471. The SIR, in contrast, says that Latif "was in Afghanistan to aid in the improvement of the Islamic studies center in Kabul," confusing what he *did* in Afghanistan with his

purpose in going there. JA 468. Likewise, the FD-302 says that Latif "attended school at Medressa Al Sha'ab in Yemen for approximately two or three years, and eventually graduated." JA 470. The SIR, however, says that Latif "claimed to he [*sic*] never graduated from high school." JA 468. The two documents also disagree about how old Latif was when he was in the car accident: the FBI FD-302 says he was 14, JA 470, while the SIR says he was 16, JA 468. They even disagree about Latif's citizenship: the FD-302 says he had a Yemeni passport, JA 470, while the SIR accuses him of claiming Bangladeshi citizenship, JA 468.

The Government argued below that these two documents show that Latif's story changed over time. Resps.' Mot. for Judgm. on the Rec. 23–24, 28 n.8. Once it was pointed out that they were from the same day and likely describe the same interrogation, the Government dropped that allegation; its brief in this Court does not even cite the SIR.[9] Rather than show that Latif's story changed, the two documents demonstrate how easily an

9. The point is valid even if the summaries reflect not the same interrogation but back-to-back interrogations on the same day. There is no reason to think that Latif would be able to give numerous details of his medical history in one interrogation, while being "unable to provide details concerning his accident or medical condition" in another interrogation on the *same day,* let alone that he would give different details about his age, education, or citizenship. This was not a new account; he had provided it during at least four previous interrogations. JA 461–62, 464, 575–76, [redacted] 913–15.

interrogator can get the facts wrong, whether due to poor translation, inaccurate notetaking, or unfamiliarity with the detainee's background and culture, or for some other reason.

The Government's protracted confusion about Latif's citizenship provides another example of how inaccuracies find their way into the Government's summaries of Latif's interrogations. Latif's intake form when he was transferred to U.S. custody[2] [redacted] specifically reports his nationality as "Yemin" [*sic*]. JA 568. Guantánamo Bay medical records from January 2002 likewise identify Latif as "Yemeni" and his place of birth as "Yemen." JA 597–98. Somehow, by[2] [redacted] a Government "Knowledgeability Brief" said that Latif "claims Bangladeshi citizenship." JA 458.[10] This was corrected on[2] [redacted] just a few days later, to note that Latif claims Yemeni citizenship, not Bangladeshi citizenship. JA 582. Latif's full ISN incorrectly contained the country code for Bahrain, which the creator of the "Knowledgeability Brief" apparently misread as meaning Bangladesh. JA 582.

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10. It's not clear from the record just what a "Knowledgeability Brief" is. Unlike several other types of intelligence reports in the record, *see* JA [redacted] 554–56, Merits Hearing Joint Ex. 35, the Government did not submit a declaration explaining the purpose of "Knowledgeability Briefs" or describing how they are created.

There is no reason to think Latif had anything to do with this error, yet it haunted him for years. For instance,[2] [redacted] he was asked about Bahrain and told the interrogator he had never been there; the summary reports that "[s]ource is not Bahraini—he is from Yemen." JA 464. [redacted] more than three months after the error had been corrected, it was actually held against him by another interrogator, who wrote: [redacted] In the KB, he claimed to be from Bangladesh." JA 468. In 2003, he again confirmed to interrogators that he had never been to Bahrain and had never *heard of* Bangladesh. JA 739. Yet in 2004, the Government continued to think that Latif claimed to be from Bangladesh, apparently relying on the long-since-debunked "Knowledgeability Brief," and [redacted] his citizenship were cited as a reason that he should remain detained. JA 649, 766.

Some of the problems with the Government's interrogation summaries may have reflected translation errors, which the record shows were pervasive.[11] A professor of Arabic from Georgetown University explained

11. Others may have reflected the skills of the interrogators. The record contained evidence that the interrogators who performed battlefield vetting were "incompetent," and that as a result "the vast majority of Guantanamo detainees were innocent." JA 787–89 (declaration of Col. Lawrence B. Wilkerson (Ret.), former Chief of Staff to Secretary of State Colin Powell).

that, even in the best of circumstances, live interpretation between Arabic and English presents unusually difficulties even when the interpreter is fully fluent in both English and the correct Arabic dialect. JA 676–97. Yet many of the interpreters in Pakistan and at Guantánamo Bay were far from fluent in *any* dialect, let alone the correct one. A retired major general who had organized the Guantánamo Bay intelligence operation after the September 11 attacks declared that "[t]he military linguists were worthless" and were right "out of school." JA 700. One linguist told a newspaper that she "[didn't] fully understand" Arabic and that "it was not uncommon for her to mistake one word for another," including the Arabic words for "communist" and "x-ray." JA 184, 780–81.

Translation problems also appeared in the administrative hearings in this case. For instance, the transcript of the CSRT proceedings quotes Latif as giving the name "Agnahn Purhan Abjallil," JA 484, and as saying "that is not my name" when the Personal Representative said his name, JA 480. Yet the audio recording indicates that Latif did not say "that is not my name," and that he correctly gave his name as Adnan Farhan Abdul Latif, not Agnahn Purhan Abjallil. JA 889–90, 917–18.

Many of the [redacted] DOD documents in this case, including the [redacted] report on which the Government's case rests, have annotations like

[redacted] *see also* JA 261, 267, 283, 291, 297, 819, 923 [redacted] Intelligence experts have confirmed the importance of these warnings. Paul Pillar, who served as the National Intelligence Officer for the Near East and South Asia between 2000 and 2005, explained that "intelligence agencies and consumers of intelligence would not treat these intelligence reports as reliable without assessing them in light of other independent reporting on the same subject matter" because they "consist of unanalyzed raw reporting." JA 654. He also explained that it is particularly difficult for an intelligence consumer to assess a report's accuracy when information about its source is unavailable, JA 656, as is the case for many of the exhibits here.

Likewise, Arthur Brown, the former Chief of the East Asia Division of the CIA's Clandestine Service, said that "quality control was routinely a problem" at the CIA because "intelligence collectors often did not exercise much screening over the raw data they collected." JA 660. This problem "became even more acute" after the September 11 attacks, especially for raw data that was possibly related, even remotely, to terrorism. *Id.* Because the intelligence community feared being blamed for the "next" terror attack, it

"tolerated—and, to a large extent, tacitly encouraged—the distribution of unreliable, unverified, faulty, and even erroneous intelligence reports." *Id.*

[redacted]

D. The district-court proceedings

Latif filed his petition for a writ of habeas corpus in 2004. JA 118–45. His case was stayed until the Supreme Court held that district courts have jurisdiction over habeas petitions by detainees at Guantánamo Bay. *Boumediene v. Bush*, 553 U.S. 723 (2008).

In July 2009, the Government moved [redacted] The district court granted the motion, [redacted] After discovery finished, the parties filed briefs addressing the issues in the case, and the Court held a merits hearing on June 7 and 8, 2010. At the hearing, the parties presented evidence and argument on all the issues.

The district court granted the petition for a writ of habeas corpus in a Judgment and Memorandum Opinion of July 21, 2010, JA 169, 170–97,

finding that the Government had not "demonstrated by a preponderance of the evidence that Latif was part of al Qaeda or an associated force," JA 197. The Government appeals.

SUMMARY OF THE ARGUMENT

I. The district court properly applied the correct legal standard and concluded that the Government had failed to meet its burden of showing that Latif was more likely than not part of al Qaeda or the Taliban. Consistent with this Court's command, it evaluated the reliability of the evidence and concluded that it simply did not prove what the Government was required to prove.

The district court found that the most critical piece of evidence, the [redacted] report [redacted] was not sufficiently reliable to justify Latif's detention because it was uncorroborated [redacted] This finding was well supported. The report is highly redacted, with no known author, [redacted]

The district court found that Latif, in contrast, had presented a plausible account of his travels that was corroborated, and that the

Government's assertions that it was a "cover story" were unsupported and unconvincing. Latif consistently explained, more than a dozen times over nearly a decade, that he went to Afghanistan and Pakistan seeking medical help. As the district court found, the "fundamentals" of Latif's account "have remained the same," and were corroborated by independent evidence.

The district court's findings were supported by the record and were certainly not clearly erroneous. Accordingly, the district court's judgment should be affirmed.

II. The Government's claims of error consist largely of claims that the district court did not weigh the evidence as the Government would have liked, and are in any event meritless.

A. The Government's primary argument rests on a false premise. This is not a case, as the Government argues, where someone made an admission and then sought to recant it [redacted] The district court agreed, based on all of the evidence, that the Government failed to prove [redacted] Because the [redacted] report was the only evidence purporting to show Latif as a member of an enemy armed force, this finding was dispositive.

The Government's further claim that the district court failed to make credibility findings is incorrect. The district court in fact made explicit findings about Latif's credibility, finding his account "plausible," "corroborated," and "not incredible," and rejecting the Government's arguments "attacking the credibility of Latif's story" as "unconvincing."

B. The Government's argument that the court imposed a burden of proof on the Government that exceeded the preponderance standard is risible. The district court repeatedly stated that it was applying the familiar "more probable than not" standard.

C. The Government complains that it could not cross examine Latif because he submitted a declaration. It never, however, asked to cross examine him, and it stipulated to the hearing procedures, thus waiving any right that it might have had to do so. Moreover, it has had Latif in custody for nearly a decade, examining him at will. Latif, in contrast, was not permitted to depose or cross examine *any* witnesses. The Government relies principally on an anonymous and highly redacted report that hides from Latif and the Court the identities of the persons involved in, and all the circumstances of, the [redacted] it describes. The district court properly weighed the evidence, including the weight to be given to Latif's declaration.

D. The Government complains that the district court did not sufficiently defer to its documents or give enough weight to generic declarations saying that intelligence documents are supposed to be carefully prepared. This Court, however, has expressly directed judges in habeas cases to consider the reliability of evidence, just like in any other case. It would be inappropriate to deem a document accurate and reliable just because it was prepared [redacted], and the district court correctly found, based on the specific facts in this case, that the critical [redacted] report is not in fact reliable.

E. The Government argues that the district court should have found that Latif had a "shifting" "cover story." The district court carefully examined the Government's argument and found it "unconvincing." This finding was not clearly erroneous. Latif's account has been detailed and consistent in all "fundamental" respects, and the supposed inconsistencies identified by the Government are unimportant and/or unfounded.

F. The evidence that supposedly "corroborates" the Government's theories did not do so, being variously irrelevant, not inconsistent with the district court's findings, or outweighed by other evidence.

STANDARD OF REVIEW

In a recent Guantánamo Bay habeas case, this Court held that whether the Government has proven alleged conduct is a factual question reviewed for clear error. *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). The Court explained that "[w]hen reviewing for clear error, we may not reverse a trial court's factual findings even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. Rather, we ask whether, on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed." 609 F.3d at 423–24 (quotation marks, citations, and alterations omitted) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)).

In another recent Guantánamo Bay habeas case, this Court reiterated that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (quotation marks, citation, and alterations omitted). The Court explained that this deferential standard applies "whether the factual findings were based on live testimony or, as in this case, documentary evidence." 608 F.3d at 6–7 (citing *Anderson*, 470 U.S. at 572).

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROOF.

The district court recognized that the Government had the burden to show that Latif's detention is lawful by a preponderance of the evidence. JA 172. Accordingly, the Government needed to show that it is more likely than not that Latif was part of al Qaeda or the Taliban. *Id.* In applying that standard, the district court was required to "evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993), *quoted in Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008).

The district court did exactly as commanded. It received more than 100 exhibits; considered more than 100 pages of briefing; and conducted a two-day merits hearing, at which there was a searching and exhaustive examination of all of the relevant evidence. Its opinion demonstrates a detailed grasp of the evidence and the parties' arguments. JA 174–94.

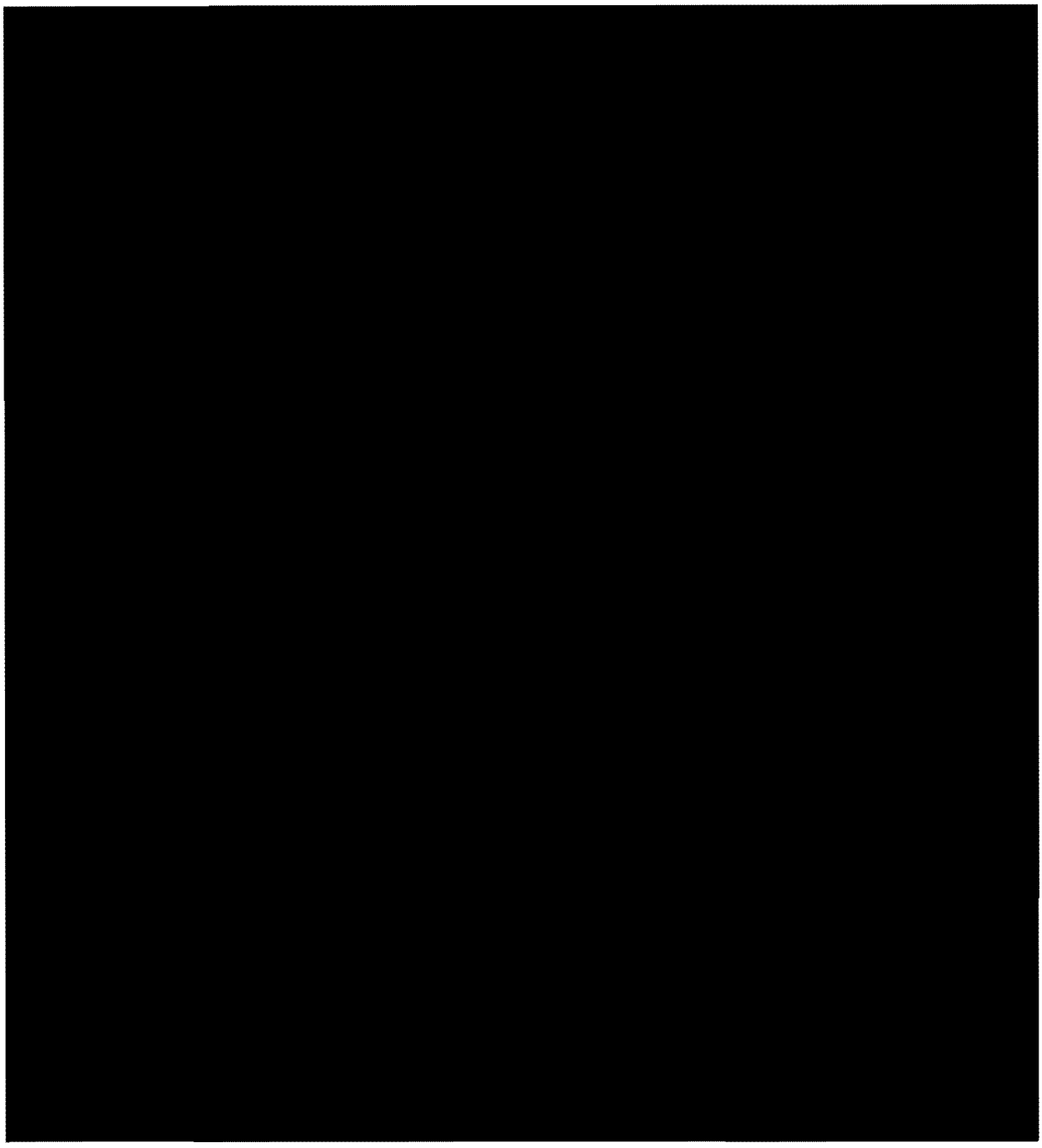
The court evaluated the Government's evidence and found that it simply did not satisfy the Government's burden. It found that the most critical exhibit, the [redacted] report, was not

reliable, JA 194–95, and that the Government's other major pieces of evidence, [redacted] did not even refer to Latif, JA 175–76. These findings were amply supported by the record.

The district court found that "there is serious question as to whether the [redacted] report] accurately reflects [redacted] the incriminating facts in the [report] are not corroborated, and Latif has presented a plausible alternative story to explain his travel." JA 195. The court was well justified each of these observations. The [redacted] report is the *only* document in the record claiming that Latif traveled to Afghanistan to receive weapons training and fight for the Taliban [redacted] numerous other documents reflecting his repeated statements, over nearly a decade, that he was not affiliated with al Qaeda or the Taliban, and that he traveled to Afghanistan in search of medical care. JA 461–62, 464, 470–71, 473, 475, 480–82, 487–90, 515–23, 525–30, 568, 575–76, [redacted] 709–15, 739, 826–31, 913–15.

Moreover, there is ample support concluding that the [redacted] report was not reliable because [redacted]

The absence of *any* corroboration of Latif's supposed weapons training or time on the front line is telling because, if he had trained and fought, hundreds of people would have seen him at these locations. No other detainee has identified him as fighting or training, or as having any connection with the Taliban or al Qaeda. JA 195. If there were any truth to the Government's claim, there would have been some other witness, out of the hundreds detained and interrogated by the Government, who would have corroborated the claim. None did. JA 773 ("No other detainees have identified [Latif], except as having been seen at various detention facilities.").



The district court found that Latif's account of his activities—that he left Yemen seeking free medical care, and did not join al Qaeda or the Taliban—was "plausible," corroborated "by medical professionals," and "not

incredible." JA 195–96. Those findings were solidly supported by the record. Summaries of numerous Government interrogations of Latif show that he was severely injured in a car accident in 1994; that he suffered from a skull fracture, a pierced eardrum, and a cerebral hemorrhage; that he was treated as a hospital in Jordan; that he returned to Yemen and could not afford follow-up care; that he continued to experience severe symptoms; that he left Yemen in hopes of getting free medical care in Pakistan; and that he was never part of al Qaeda or the Taliban. *See* JA 461–62, 464, 470–71, 473, 475, 480–82, 487–90, 515–23, 525–30, 568, 575–76, [redacted] 709–15, 739, 826–31, 913–15. This detailed account was corroborated: by medical records from the Jordanian hospital, JA 499, 963; by records from the Yemeni government, JA 501, 503; by his intake form, which showed he was captured with "medical papers," JA 568; and by his medical records at Guantánamo Bay, JA 889, 966–72.

The evidence in this case is so one-sided that the judgment should be affirmed even if this Court reviewed de novo. The standard of review, however, is highly deferential. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that it had been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*,

470 U.S. at 573–74. This Court has held en banc that when there is "contradictory testimony in the record, some of which supports the District Court's finding ..., we cannot conclude that the finding was clearly erroneous." *United States v. Microsoft Corp.*, 253 F.3d 34, 66 (D.C. Cir. 2001) (en banc) (per curiam). Far more than "some" evidence supports the district court's decision. It should be affirmed.

II. THE GOVERNMENT'S CLAIMS OF ERROR ARE BASELESS.

The Government's arguments are, for the most part, mere disagreement with the weight that the district court gave to different pieces of evidence. Such disagreements cannot amount to clear error when the district court's findings are plausible in light of the record as a whole. *Anderson*, 470 U.S. at 573–74. The district court correctly and carefully weighed the evidence under the appropriate standard, and its decision to grant the petition was supported by the law and the evidence.

A. The district court properly found that there was no reliable evidence showing that Latif was part of the Taliban or al Qaeda.

The Government's initial argument is that the district court supposedly failed properly to consider Latif's credibility or whether the [redacted] report "was inaccurate." Gov't Br. 15.

As a threshold matter, the argument rests on a false premise. The argument asserts that Latif [redacted] as shown by the [redacted] report, [redacted] The central issue in the case, however, was whether the [redacted] report was an accurate and reliable rendition [redacted] The district court found, based on a careful review of all the evidence, that the [redacted] report was riddled with reliability problems and that the court simply "cannot credit" the information in the report. JA 195. Accordingly, there was "serious question as to whether the [report] accurately reflects [redacted] JA 195. This finding, which was amply supported by the evidence, *see* pages 7–13, 25–33 above, meant that the Government had failed to prove that Latif had [redacted]

The Government concedes that its case "turned on the accuracy" of the [redacted] report, Gov't Br. 5, and it could not meet its burden of proof unless it [redacted]

convinced the district court that this anonymous, error-ridden report was a reliable source of facts. The Government asserts that "an assessment of Latif's credibility is essential" [redacted] The district court found, however, on the basis of convincing evidence, that the report was anything but reliable. Once the district court rejected the report's reliability, the Government's case necessarily collapsed. The credibility of the [redacted] report—not Latif's credibility—was thus a threshold and dispositive issue.

In any event, the court in fact considered the credibility of Latif's account. The district court's opinion says explicitly that Latif's account is "plausible," is "supported by corroborating evidence," and "is not incredible." JA 195–96.[13] The court also addressed Government's arguments "attacking the credibility of Latif's story," and explained why it found all of these arguments "unconvincing." JA 195–96. These findings were supported by the record. Latif repeatedly described his medical problems, his efforts to obtain free medical care, and his travels from Yemen to obtain that care. JA 461–62, 464, 470–71, 473, 475, 480–82, 487–90, 515–23, 525–30, 568, 575–76, [redacted] 709–15, 739, 826–31,

13. A finding that Latif's account is "not incredible" necessarily means that it is credible, just as a statement that is "not unbelievable" is therefore believable.

913–15. This account was corroborated by documentary evidence from Jordan, JA 499, 963, Yemen, JA 501, 503, and Guantánamo Bay, JA 889, 966–72, 1041–42; by expert declarations on travel between Yemen and Afghanistan, JA 720–35, 747–63; and by Latif's medical records from Guantánamo Bay, JA 966–1038. The district court's findings were not clearly erroneous. It should be affirmed.

B. The district court did not impose an elevated burden of proof.

The Government asserts that the district court imposed on it an elevated burden of proof beyond the preponderance of the evidence, while holding Latif "to a lower burden of proof." Gov't Br. 20. The argument is utterly baseless.

The district court explicitly and repeatedly said that it was applying the well-established preponderance test. JA 172, 194, 197. This was an experienced district judge, and there is no basis for concluding that he did not know what he was doing. As for the supposed imposition of a "lower burden of proof" on Latif, he had no burden of proof. The burden was entirely on the Government, and there was no requirement that Latif prove anything.

The Government argues that the court required it "to show that Latif '*must be lying* because he has told more than one cover story.'" Gov't Br. 19

(emphasis in Government brief). This misrepresents the district court's opinion, which did not say that the Government had to show that Latif "must be lying." The Government's quote comes instead from the court's characterization of *the Government's contention:* "The Court does not accept *respondents' contention* that Latif must be lying because he has told more than one cover story." JA 196 (emphasis added). (The district court then rejected the Government's premise that Latif told multiple cover stories. *Id.*)

The Government's two other examples likewise do not show any elevated burden of proof. The district court's comment, in a footnote, that a chain-of-custody document for cash taken from Latif "does not exclude the possibility" that Latif had medical records when he was seized simply explained that the document did not purport to be an exhaustive catalog of Latif's possessions at his seizure. JA 192; *see* JA 591–95. The document, in short, did not show one way or the other whether Latif had records when he was taken into custody. The Government also points to the court's comment that the [redacted] report does not show that its creators [redacted] The court followed this comment, however, by making specific findings about the report's lack of reliability, including

observing that the small readable portion of the document [redacted]

The district court applied the correct burden of proof. It should be affirmed.

C. *The district court was not required to penalize Latif for submitting a declaration.*

The Government asserts that the district court was required to discount Latif's credibility because his declaration was supposedly "conclusory" and uncorroborated, and because he submitted a declaration and was not cross examined. The argument incorrectly assumes that the issue in the case is Latif's credibility rather than the reliability of the Government's evidence. Moreover, even on its own terms, the argument is meritless.

Latif's declaration cannot be viewed in isolation. He has repeatedly been interrogated by Government agents and has given statements and been questioned at ARB and CSRT hearings. The Government has had the opportunity to question him at length, under prison conditions, where he was alone, unrepresented, and far from home. His statements contain numerous details, and if the Government wanted to explore supposed

inconsistencies, it had plenty of opportunity to do so.[14] The Government's claim that it was denied an opportunity to cross examine Latif is ludicrous given his long history of captivity.

Moreover, the Government never asked Latif's counsel or the district court for an opportunity to cross examine Latif. The parties stipulated to the hearing procedures, and the district court's order enforcing that stipulation notes only that "Petitioner *shall have an opportunity* to testify" and that he "will be subject to cross-examination *if he testifies*." Order 1, 3, Doc. 785 (Mar. 22, 2010) (emphasis added). The Government has therefore waived whatever right it may have had to demand that Latif testify live.

Regardless, the Government's own evidence was far more conclusory and uncorroborated than Latif's statement, and Latif had no opportunity to examine his accusers. None of the Government's witnesses testified at the hearing, and none was available for cross examination. Indeed, the Government did not even disclose the *names* of the person(s) who wrote the critical [redacted] report, even though the Government's case rests on only a few fragments in that one document. The document is almost fully redacted [redacted]

14. Given that the Government has kept Latif locked up in Cuba for nearly a decade, it can hardly complain, as it does, Gov't Br. 23, that Latif has not submitted additional evidence from people in Yemen or the Middle East.

[redacted]

[redacted] These would have been fertile subjects for cross examination, but Latif had no opportunity to perform such an examination.

The Government cites no authority for the proposition that a habeas petitioner must be penalized if he does not testify live. Nor could such a rule be the law; habeas cases routinely proceed on documentary evidence, *see* 28 U.S.C. § 2246 (granting district judges discretion to take evidence by affidavit in habeas cases), and it would make no sense to *require* an adverse inference in habeas cases in which the petitioner declines to testify while *prohibiting* such inferences in criminal cases. *See Griffin v. California*, 380 U.S. 609, 615 (1965).

The Government had the burden of proving its case, and a detainee's decision not to testify does not provide the affirmative proof that it must present to satisfy that burden. The district court considered Latif's declaration and the corroborating evidence, and did not clearly err in doing so. It should be affirmed.

D. The district court was not required to credit Government documents.

The Government asserts that the district court should have assumed that the anonymous [redacted] report was accurate because it

submitted declarations of Government employees saying that intelligence agencies try to be accurate, and because government officials are presumed to carry out their duties properly. *See* Gov't Br. 26–31. "This comes perilously close to suggesting that whatever the government says must be treated as true." *Parhat*, 532 F.3d at 849 (rejecting the Government's argument that the State and Defense Departments would not have put unreliable statements in intelligence reports). The Government is wrong on both the law and the facts.

On the law, this Court has expressly instructed district courts that it must determine whether evidence offered in Guantánamo Bay habeas cases is reliable, just like any other evidence. *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) (rejecting a challenge to hearsay interrogation summaries and holding that the district court must determine "what probative weight to ascribe to whatever indicia of reliability [they] exhibit[ ]"); *Al Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010) (approving district court's evaluation of the reliability of certain interrogation reports); *see also Parhat*, 532 F.3d at 846–50 (D.C. Cir. 2008) (vacating CSRT determination that was based on Government documents without sufficient indicia of reliability). The district court did exactly what is required.

On the facts, the district court was right to subordinate the generic assertions of Government officials that their agencies' reports are generally reliable to the specific reasons in the record for believing that *this* report is unreliable. The [redacted] report indicates, on its face, that it is unreliable. [redacted] *see* pages 11–12 above. It is uncorroborated by any other evidence that Latif fought or received weapons training. JA 195. It is largely redacted and [redacted]

Moreover, the record contains substantial evidence that Government reports of interrogations of Guantánamo Bay detainees are error-prone. *See* pages 25–33 above. For instance, Latif has been repeatedly questioned about whether he is really Bahraini or Bangladeshi, all because of a

typographical error in 2002. *See* JA 458, 464, 468, 582, 649, 739. His supposed duplicity in claiming to be from a country he had never heard of, where his language is not spoken, was even held against him by an interrogator and by a brigadier general assessing his suitability for transfer. *See* pages 29–30 above.

Oddly, the Government seeks deference to its own documents [redacted]

[redacted] The district court properly analyzed the reliability of the Government's evidence. It should be affirmed.

E. The district court did not err in rejecting the Government's "cover story" theory.

The Government asserts, parsing its own unreliable reports as if they were videotaped depositions, that Latif has given "shifting" accounts over the years and that this reflects a "cover story." Gov't Br. 34. The assertion is baseless.

First, none of the interrogation summaries of Latif is in his words—he speaks Arabic, not English, and the summaries are written by a variety of

people who speak English, not Arabic. The fact that the various authors of these documents may not have always been consistent with each other would be unremarkable even if there were no language barrier, and here that barrier was a very high one. *See* pages 30–31 above. There is no reason to assume that any minor inconsistencies originated with Latif rather than with the translator or the interrogator. Also, Latif has been subject to psychiatric monitoring for depression since as early as June 2002, JA 768, and this might have added to the effort needed for an accurate interrogation.

Second, none of the supposed inconsistencies has any tendency to show involvement with the Taliban or al Qaeda. For instance, whether Latif spent his time in the "center of Kabul" or at a "teaching center in a village outside of Kabul," Gov't Br. 34, has nothing to do with the allegations that he was part of al Qaeda or the Taliban. The alleged inconsistencies do not provide what is glaringly missing in this case—reliable evidence that Latif was ever a part of al Qaeda or the Taliban. *See Bensayah v. Obama*, 610 F.3d 718, 727 (D.C. Cir. 2010) ("This finding at most undermines Behsayah's own credibility; [it does not] tie[ ] him to al Qaeda.").

Third, apart from the unreliable [redacted] report, all of the "fundamentals" of his account "have remained the same," as the district court found. JA 196.

Those fundamental facts include his adamant denials of any involvement with al Qaeda or the Taliban; his serious head injury from a car accident in Yemen; his inability to pay for the necessary medical treatment; and his expectation and hope that Ibrahim Alawi would get him free medical care. *See* pages 18–22 above. The commanding officer of DOD's Criminal Investigative Task Force expressly noted in 2004 that Latif's statements to interrogators had "been relatively consistent." JA 773.

Fourth, the district court reviewed the Government's arguments about the alleged "cover story" and inconsistencies, and explained why it found them all "unconvincing." JA 195–96. These findings were not clearly erroneous. Some of the supposed inconsistencies, for instance, do not represent changes in Latif's general account, but closely track it. For example, the Government asserts that "the claimed purpose of Latif's trip to Afghanistan has changed," Gov't Br. 36, citing an assertion in the February 2002 "Knowledgeability Brief" that Latif went to Afghanistan "to help Ibrahim ((Aliwee)) improve the Islamic studies center in Kabul." JA 458.[15] Yet Latif has consistently said that he stayed at the Islamic studies center until Ibrahim could take him to Pakistan. *See* JA 465, 475, 493, 526–27, 575–76, 915. The only "discrepancy" is that the "Knowledgeability Brief"

15. This is the same unreliable document that introduced the bizarre accusation that Latif claimed to be from Bangladesh. JA 458.

says Latif went there *to* help at the center, rather than doing so *while* he was waiting for Ibrahim to take him for medical treatment. Such a trivial error is easily explained by mistranslation or misunderstanding and hardly reflects a "shifting" "cover story." Indeed, as the district court noted, JA 196, Latif corrected the Presiding Officer at one of his ARB proceedings, explaining that he had *not* gone to Afghanistan to help Ibrahim. JA 521 ("Him to help me, not me helping him. I went there for him to help me.").

Others of the supposed inconsistencies aren't even inconsistent. For instance, the Government says Latif claimed to be both a student and a teacher. Gov't Br. 38. (It's unclear why someone developing a cover story would make such a shift; being a teacher is no more or less incriminating than being a student.) The exhibit the Government cites for Latif claiming to be a student says that he studied with the students but lived at the center with "three teachers who stayed there with him," JA 465, and the exhibit it cites for Latif claiming to be a teacher says only that he "*helped* teach 30 students per day," JA 575 (emphasis added). These statements—which come from Government interrogation summaries, not transcripts of testimony—are all consistent with someone who stayed at the center studying and helping the teachers. Likewise, Latif consistently explained that he sought treatment in Pakistan for his serious injuries, but he also

explained that he saw a doctor in Afghanistan, and got shots and pills, while waiting to go to Pakistan. JA 465, 520, 575. There is no contradiction, and even if there were, the record suggests it would stem from mistranslation or misunderstanding, not a "shifting" "cover story." *See* JA 196.

The Government points to a declaration by an officer at the Defense Intelligence Agency who explains that al Qaeda members are trained to tell [redacted][1] Gov't Br. 39 (citing JA 562). Latif's account, however, bears little resemblance to al Qaeda's instructions, and it surely is rare to have a [redacted][1]" that is backed by years of medical records. Rather than answering questions [redacted][1] JA 562, Latif has given numerous details of his travels. From just his stay at the Islamic studies center, for example, he recounted the name of the center; its neighborhood; the number of inhabitants of the neighborhood; the names and nationalities of his roommates; what the studiers did; even how his physical quarters were arranged. JA 465, 575.

Notably, the Government's brief includes exactly the same type of inconsistency of which it accuses Latif. The Government asserts that "Latif has provided no explanation as to how he paid for his trip." Gov't Br. 23. Eleven pages later, however, it says that "Ibrahim 'paid [Latif's] way' to Pakistan." Gov't Br. 34 (quoting JA 464 and erroneously citing JA 465).

Latif in fact explained in two interrogations, six weeks apart, that when he decided to find Alawi, Alawi's aide Sa'id Ahmed provided Latif with US$200 and 2000 Pakistani rupees for the trip—precisely the sort of detail al Qaeda allegedly warns against. JA 462; *accord* JA 464, 914. In any event, supposed discrepancies that have nothing to do with al Qaeda or the Taliban, whether introduced by Latif, a translator, or an interrogator, are no substitute for reliable evidence that Latif was part of the Taliban or al Qaeda. The district court correctly concluded that there was no such reliable evidence. It should be affirmed.

F. The district court properly rejected supposedly corroborating evidence of the Government's allegations.

The Government argues that the district court ignored evidence that supposedly corroborated its accusations, pointing to details from the unreliable [redacted] report that persisted in Latif's account or that were consistent with the historical record. Gov't Br. 41–51. The fact, however, that a few of the details in the report are correct does not make the document reliable with respect to its Taliban allegations. [redacted] There are few facts in the report to begin with, and the most important—those relating to the Taliban—are uncorroborated. [redacted]

[redacted] when it was Latif who went to Jordan to treat a head injury from a car accident. *See* pages 7–13, 18–24 above. The report is also a striking outlier, contradicted by every other interrogation summary and statement of Latif, all of which show zero connection with Taliban or al Qaeda. The district court was thus correct in recognizing the inference [redacted]

The Government points out that the [redacted] report asserts that Latif [redacted] While in U.S. custody, Latif mentioned someone named Abdul Fadel, an imam at a mosque in Kabul; the name appears as early as Latif's [2] [redacted] [2] [redacted] intake form. JA 465, 569 (intake form), 575 ("Abdul ((Al-Fadil))"), 915 ("Abdel Fadl") [redacted]

The Government also argues that there is other evidence that "square[s] with the conclusion" that Latif was part of the Taliban. Gov't Br. 47. None of this "other evidence" does so. [redacted] the fact that he fled from Kabul when bombs started falling, a common-sense reaction which the court found was not incriminating, JA 196; and an unproved and insupportable theory that Alawi was Abu Khalud, *see* pages 15–17 above.

The Government does not come close to showing that the district court's findings were erroneous, much less that they were clearly so. *See Microsoft*, 253 F.3d at 117 (en banc) (per curiam) (clear-error review applies even to "findings the court of appeals might consider sub-par") (citing *Amadeo v. Zant*, 486 U.S. 214, 228 (1988)). Its judgment should be affirmed.

CONCLUSION

The district court properly determined that the Government failed to prove that the petitioner was more likely than not a part of al Qaeda or the Taliban. This Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing classified brief of the petitioner-appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and contains 13,866 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1).

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing classified brief of the petitioner-appellee were served today upon the following counsel of record for the respondents-appellants via the Court Security Officer.

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