No. 11-1027

IN THE
SUPREME COURT OF THE UNITED STATES

ADNAN FARHAN ABDUL LATIF,
Petitioner,

v.

BARACK H. OBAMA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

The government's principal argument is that this Court should duck the issues presented by the petition until the completion of a remand proceeding in the district court and further proceedings in the D.C. Circuit, which would keep the Court on the sidelines for years to come. The pain of this delay would be suffered entirely by the petitioner, who has already been at Guantanamo for more than ten years. Four years ago, this Court told the Executive Branch that "the costs of delay can no longer be borne by those who are held in custody" at Guantanamo. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008). The petition presents legal issues that have now been settled in the D.C. Circuit by the decision below, and will not be affected by whatever might occur on remand. The principal legal issue is the D.C. Circuit's holding that, as a matter of law, anonymous intelligence reports of prisoner interrogations, even ones based on interpreters of unknown and untested competence translating from English to Arabic and Arabic to English, and even ones conducted [redacted] are not only automatically admissible in habeas proceedings, but in all proceedings are entitled to a presumption that everything attributed to a prisoner was actually said by the prisoner. The legal validity of this unprecedented presumption is ripe for consideration by this Court.

1. The government contends that the case is in an "interlocutory posture" and that "the interests of judicial economy would best be served by denying review now." Opp. 12-13. The argument is meritless.

First, there is nothing "interlocutory" here. The decision of the district court was a final judgment, entered after both sides had had a full opportunity to be heard, and appeal to the D.C. Circuit was not interlocutory. In any event, this Court in fact grants petitions challenging appellate rulings that require remand or other further proceedings.[1]

Second, petitioner has been confined at Guantanamo for more than ten years. The liberty interests of the petitioner surely trump whatever "judicial economies" might be achieved by postponing consideration until after the remand is concluded and further appeals exhausted. Four years ago, this Court observed that detainees at Guantanamo Bay "are entitled to a prompt habeas corpus hearing," and rejected an argument that the prisoner should first be required to exhaust administrative remedies. *Boumediene*, 553 U.S. at 794-95. The same rationale applies with even greater force here, because the remand delay will be exacerbated by the fact that the original district judge has retired and a new judge with no prior involvement in the case has been appointed.

Third, there are no "judicial economies." The D.C. Circuit's opinion and Judge Tatel's dissent have perfectly framed the legal issues presented by the petition, particularly with regard to the D.C. Circuit's holding that all interrogation reports, including those involving language translations and written [redacted]

[1] *See, e.g., Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (discovery request); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973) (antitrust suit); *Olmstead v. L.C.* ex rel. *Zimring*, 527 U.S. 581 (1999) (partial summary judgment); *Northcross v. Bd. of Educ. of Memphis, Tenn., City Schools*, 397 U.S. 232 (1970) (school desegregation plan); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (parole guidelines).

[redacted] must as a matter of law be presumed to be accurate renditions of what was said by the person who was interrogated. The remand will not change these legal issues. The district court and any panels of the D.C. Circuit in follow-on appeals are bound by the decision, which will have a substantial impact across multiple cases regardless of the outcome in this case. As a respected commentator has observed, the decision in this case "demonstrates the futility of further percolation" and is a "good vehicle" for review by this Court of Guantanamo-related issues. Jonathan Hafetz, *The D.C. Circuit and Guantanamo: The Defiance Reaches New Heights*, Balkinization, Nov. 16, 2011, http://balkin.blogspot.com/2011/11/dc-circuit-and-guantanamo-defiance.html.

The government argues that remand is "especially appropriate" because it has recently "located" relevant documents. Opp. 7-8, 13-14. These documents are not in the record. They were produced neither to the district court nor to the court of appeals, despite the government's obligation to produce all documents on which it relies to justify detention prior to the habeas hearing, which occurred in June 2010. Amended Case Management Order, ¶1 (Dec. 8, 2008). (This is the first time that the government has ever purported to describe the content of the documents to a court.) The petitioner should not be penalized, nor the government rewarded, for the government's lackadaisical handling of its own evidence. In any event, the "new evidence," Opp. 13a, includes the same errors as the interrogation report, App. 128a, and provides no additional information about the identity or competence of the interpreter.

The government's purported concern that failure to consider the documents might lead to an "unwarranted" release of petitioner is impossible to take seriously.

[redacted]

There is no evidence that Latif was a "terrorist" or ever in a position to give orders to anyone else.

2. a. The government argues that the application of a "presumption of regularity" for intelligence documents comports with "well established" case law and Rule 803(8) of the Federal Rules of Evidence. Opp. 16-17.

The cases cited by the government do not involve raw intelligence documents, much less documents created [redacted] As explained by the dissent and as further elaborated by an amicus brief filed in this case, such a presumption has previously been applied only where the documents in question have been "produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar" to the courts.[2] App. 70a-

[2] *See, e.g., Parke v. Raley*, 506 U.S. 20, 30 (1992) (state court conviction); *Lackawanna County Dist. Att'y v. Cross*, 532 U.S. 394, 403-04 (2001) (final judgment). The cases cited by the government also do not involve the liberty interests at stake here, where the government claims the power to imprison an individual indefinitely, without charge or trial, on the basis of an anonymous raw intelligence report. *See, e.g., National Archives &*

71a; Brief of Amici Curiae Former Intelligence Professionals and Scholars of Evidence and Criminal Procedure, at 6-11. There is no "common-law presumption of regularity," Opp. 19, that applies to intelligence documents, especially raw reports of the type involved here.

If anything, Federal Rule of Evidence 803(8) undercuts the government's position. That rule concerns only the admissibility of government documents. It does not purport to cloak them with presumptive accuracy. Indeed, documents reflecting matters observed by law enforcement personnel and fact findings from government investigations are not even admissible in criminal cases, where, as here, the government seeks to deprive an individual of liberty. Fed. R. Evid. 803(8).

2. b. The interrogation report in the case bears no resemblance to court dockets, tax receipts, or other routinely and transparently prepared governmental documents that have been afforded a presumption of regularity.[3] Rather, it was prepared [redacted] Moreover, the interrogation required translation of both questions and answers because Latif speaks only Arabic. [redacted]

Records Admin. v. Favish, 541 U.S. 157 (2004) (FOIA case); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (civil deportation proceeding).

[3] The government suggests that the district judges in Guantanamo cases had not rejected the "presumption of regularity" later adopted by the D.C. Circuit in this case. Opp. 19 n.2. In fact, they did so, as explained by the amicus brief filed by thirteen highly respected former federal judges. Brief of Retired Federal Judges at 11-17; see also App. 75a-76a (Tatel, J., dissenting).

[redacted] It is widely known that the U.S. security agencies after 9/11 had utterly inadequate translator resources for use in the "war on terror." *See* Pet. 18-19; Brief of Amici Curiae Former Intelligence Professionals and Scholars of Evidence and Criminal Procedure at 17.

The government suggests that wartime reports are trustworthy because the authors did not expect that they would be used in litigation. Opp. 17. The raw reports were designed to be analyzed along with other raw intelligence for the wartime activities of the moment. They were not designed for determining whether an individual should be detained indefinitely. The fact that the interrogators were unaware of the judicial consequences that would be attached to their reports undermines rather than supports their credibility.

The government also argues that two "government declarations" showed that the reports could be trusted. Opp. 4, 19, 21. In fact, the declarations are worthless for this purpose. [redacted]

[redacted]

2. c. The government mis-describes *Boumediene*, claiming that the CSRT process required a "presumption in favor of the Government's evidence," with no opportunity to rebut. Opp. 17-18. In fact, the presumption in the CSRT context was nominally "rebuttable," and it was invalidated. *See* 553 U.S. at 788. The *Boumediene* Court, moreover, specifically stated that the evidentiary presumption suggested by the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004), "did not garner a majority of the Court." 553 U.S. at 784.

2. d. The government suggests that the reliability of the interrogation report at issue in this case is corroborated by the fact that some of its details jibe with details reported in later interrogations of Latif. Opp. 21-22. This has it backwards. Latif was interrogated numerous times after he was taken into U.S. custody, and he consistently explained that he was not a member of al Qaeda or the Taliban, but was seeking medical care. *See* Class. App. 134a-135a, 140a. The report at issue in this case is the outlier, prepared in the worst possible conditions [redacted] while Latif was [redacted] The fact that this single report is out of line on significant facts with numerous interrogations done in much better circumstances is proof of its unreliability.

The government's suggestion that the "presumption...is unlikely to affect the outcome," Opp. 21, is also incorrect. The D.C. Circuit did not find that any of the district court's findings were clearly erroneous. It was only the district court's

failure to apply a presumption of accuracy to a single interrogation summary that led the D.C. Circuit to reverse. If this Court invalidates the presumption, then the district court's finding that the summary was unreliable would stand, and the grant of the writ would have to be affirmed.

3. The government as much as concedes that the D.C. Circuit reverses habeas grants whenever its own review of the evidence "as a whole" "demonstrate[s] that it is more likely than not that the petitioner was 'part of' al-Qaeda." Opp. 24. But whether the government demonstrates that a detainee was a member of an enemy force is the central factual determination for which the district court is responsible. Judge Tatel's observation that the court of appeals had "engaged in an essentially de novo review of the factual record" was spot on. *See* App. 86a.

The further suggestion that the district court "made two fundamental errors that required a remand," Opp. 26, is likewise misguided. One of these supposed errors is the failure by the district court to make an explicit finding as to Latif's credibility. But credibility was relevant in the D.C. Circuit's view because "[o]nly a credible story could overcome the presumption of regularity." App. 31a. Absent the presumption, Latif's credibility would have no relevance, because a detainee's lack of credibility does not justify detention and is not a substitute for evidence that the detainee was part of an enemy force. In any event, as Judge Tatel explained, the district court made a fully adequate credibility analysis. App. 95a-96a.

The second "error" is that the district court supposedly did not view the evidence in a "holistic analysis." Opp. 27-29. Judge Tatel also shredded this claim.

See App. 106a-112a. In any event, this supposed error likewise assumes that the court of appeals was correct in imposing a "presumption of regularity." *See id.* 49a-50a ("In light of our application of the presumption of regularity, there can be no question on remand but that all of this evidence must be considered – and considered as a whole."). Absent the presumption, the district court's finding that the interrogation summary was unreliable would have to be affirmed.

4. The petition explained that classification of some parts of the opinion of the D.C. Circuit and the district court should not impede a public resolution of the relevant issues in this Court. The government presumably agrees because it does not dispute this observation. Moreover, on April 24, 2012, the government provided a much less redacted copy of the D.C. Circuit opinion, based on its recent determination to declassify portions of the relevant interrogation report. On April 27, 2012, the court of appeals reissued the opinion on its public electronic docket with many fewer redactions. This should be followed soon by the removal of comparable redactions from the district court opinion and underlying evidence.

5. The government asserts that the approach of the court of appeals in Guantanamo cases has been "even-handed." Opp. 25. The reality, however, is that the D.C. Circuit has decided nineteen Guantanamo habeas appeals on the merits, and in not one has the court affirmed or required the grant of habeas. Pet. 24.[4]

[4] In addition to the cases noted in the petition, the court has affirmed three additional habeas denials. *Kandari v. United States*, No. 10-5373, 2011 WL 6757005 (D.C. Cir. Dec. 9, 2011) (unpublished per curiam), cert. pet. pending; *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir. 2012); *Alsabri v. Obama*, No. 11-5081 (D.C. Cir. Apr. 27, 2012).

CONCLUSION

The Court should grant the petition.

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