No. 20-888

In the Supreme Court of the United States

ABDUL RAZAK ALI, PETITIONER

v.

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that his detention at Guantanamo Bay, Cuba, violates the Due Process Clause of the Fifth Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Ali v. *Obama*, No. 11-5102 (Feb. 28, 2014)

Supreme Court of the United States:

In re Bakhouche, No. 11-7229 (Jan. 9, 2012)

Ali v. *Obama*, No. 13-10450 (Oct. 6, 2014)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 959 F.3d 364. A prior order of the court of appeals is not published in the Federal Reporter but is available at 2019 WL 850757. The opinion of the district court (Pet. App. 32a-47a) is reported at 317 F. Supp. 3d 480.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2020. Petitions for rehearing were denied on July 29, 2020 (Pet. App. 48a-49a, 50a). The petition for a writ of certiorari was filed on December 28, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the attacks of September 11, 2001, Congress enacted the Authorization for Use of Military Force (AUMF), which authorizes the President "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." Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), five Members of this Court agreed that the AUMF authorizes the President to detain enemy combatants for as long as the conflict lasts. A plurality of the Court ruled that "Congress' grant of authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain [members of enemy forces] for the duration of the relevant conflict," relying on the "clearly established principle of the law of war" that requires release of prisoners of war only after the cessation of "active hostilities." *Id.* at 520-521. Justice Thomas "agree[d] with the plurality" that "Congress has authorized the President" "to detain those arrayed against our troops," and stated that in his view, "the power to detain does not end with the cessation of formal hostilities." *Id.* at 587-588 (Thomas, J., dissenting).

In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress "affirm[ed]" that the President's authority under the 2001 AUMF includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." Pub. L. No. 112-81, § 1021(a) and (c)(1), 125 Stat. 1562. This authority includes the power to detain individuals who were "part of or substantially supported al-Qaeda, the

Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." § 1021(a) and (b)(2), 125 Stat. 1562.

2. In prior litigation, the lower courts determined that following the September 11, 2001 attacks, petitioner Abdul Razak Ali—identified by Internment Serial Number (ISN) 685—admitted when he was first interrogated that he had traveled to Afghanistan from his native Algeria to fight against U.S. and Coalition forces. *Ali* v. *Obama*, 741 F. Supp. 2d 19, 26 (D.D.C. 2011), aff'd, 736 F.3d 542 (D.C. Cir. 2013), cert. denied, 574 U.S. 848 (2014); *Ali* v. *Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013) (opinion of Kavanaugh, J.), cert. denied, 574 U.S. 848 (2014).

In 2002, petitioner was apprehended at a four-bedroom safehouse in Faisalabad, Pakistan. He was captured along with "an al Qaeda-associated terrorist leader named Abu Zubaydah," "four former trainers from a terrorist training camp in Afghanistan, multiple experts in explosives, and an individual who had fought alongside the Taliban." *Ali*, 736 F.3d at 543. The safehouse's living quarters contained a "device typically used to assemble remote bombing devices," "electrical components," and "documents bearing the designation 'al Qaeda.'" *Ibid.* Petitioner had lived in the safehouse for 18 days, and the record "strongly suggests" that, while there, he "participated in Abu Zubaydah's terrorist training program." *Ibid.* Soon after his capture, petitioner falsely identified himself to an FBI investigator as "Abdul Razzaq of Libya," and he maintained that lie for two years. *Ibid.*

Since June 2002, petitioner has been detained as an unprivileged alien enemy combatant at Guantanamo Bay. *Ali*, 736 F.3d at 543. In 2005, petitioner sought habeas relief from his detention. *Id.* at 544-545. After this Court decided *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the district court held a three-day hearing and ruled that petitioner's detention was lawful. The district court "ha[d] no difficulty concluding that the Government [has] more than adequately established" that "petitioner was in fact a member of Abu Zubaydah's force that had gathered in that Faisalabad guesthouse to prepare for future attacks against U.S. and Allied forces." *Ali*, 741 F. Supp. 2d at 27.

Petitioner appealed, arguing that he was not a member of Abu Zubaydah's force and had "mist[aken] the Abu Zubaydah facility for a public guesthouse." *Ali*, 736 F.3d at 544. The court of appeals rejected that argument because "[i]t strain[ed] credulity." *Id.* at 547. The court held that petitioner's "presence at an al Qaeda or associated terrorist guesthouse" would alone "constitute[] 'overwhelming' evidence that [he] was part of the enemy force," *id.* at 545 (citation omitted), noting that the court had "previously affirmed the detention of an[other] individual captured in the same terrorist guesthouse as [petitioner]," *ibid.* (citing *Barhoumi* v. *Obama*, 609 F.3d 416, 425, 427 (D.C. Cir. 2010)). And the court held that petitioner's affiliation with the enemy force was further confirmed by other evidence, including that "terrorist leader Abu Zubaydah himself," as well as other "senior leaders of Zubaydah's force," were also staying at the guesthouse, and that the guesthouse "contained documents and equipment associated with terrorist operations." *Id.* at 546; see generally *id.* at 546-550.

The court of appeals declined to credit petitioner's alternative account, which "'pile[d] coincidence upon coincidence'": that petitioner "ended up in the guesthouse by accident and failed to realize his error for more than two weeks"; that Abu Zubaydah and his senior leaders "tolerated an outsider living within their ranks"; that a different person with the same biographical information happened to travel to Afghanistan to fight against U.S. and Coalition forces; and that, "despite knowing that he was an innocent man, [petitioner] lied about his true name and nationality for two years." *Ali*, 736 F.3d at 550 (citation omitted). The court concluded that the government had "prove[n]" petitioner's "status by a preponderance of the evidence." *Id.* at 544.

This Court denied petitioner's petition for writ of certiorari from the court of appeals' decision. *Ali* v. *Obama*, 574 U.S. 848 (2014).

In 2009, President Obama convened a task force to determine "whether it is possible to transfer or release" individuals detained at Guantanamo "consistent with the national security and foreign policy interests of the United States." Exec. Order No. 13,492, § 4(c)(2), 74 Fed. Reg. 4897, 4899 (Jan. 27, 2009). The task force recommended detainees for transfer if any threat they posed could be adequately mitigated. After reviewing petitioner's case, the task force did not recommend petitioner for transfer or release. See 10-cv-1411 D. Ct. Doc. 36-1, at 2 (D.D.C. July 8, 2013) (discussing review of petitioner).

In 2011, President Obama established a Periodic Review Board to determine whether continued law-of-war detention of certain Guantanamo detainees remains necessary to protect against a continuing significant threat to the security of the United States. Exec. Order

No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011). Each time the Board has considered petitioner, it has recommended that he remain detained. The Board's most recent file review of petitioner occurred on February 10, 2021, though no determination has yet been issued.[*]

3. In 2018, petitioner filed a motion in district court that amounted to a renewed petition for a writ of habeas corpus. Identical motions were filed on behalf of ten other detainees, notwithstanding the different facts underlying the bases for detention of each of them.

Petitioner's motion—like all the other motions—advanced three arguments. First, the motion argued that all 11 movants must be released because their continued detention is inconsistent with the AUMF. D. Ct. Doc. 1529, at 29-37 (Mar. 12, 2018). Second, the motion argued that, regardless of whether movants' detention was statutorily authorized, movants are entitled to release because the Due Process Clause of the Fifth Amendment imposes an independent limit on the duration of their law-of-war detention, without regard to whether hostilities are continuing. *Id.* at 15-22 (invoking substantive due process). Finally, the motion argued that, to the extent petitioner's detention is indefinite, the Due Process Clause requires the government to prove the lawfulness of that detention with clear and convincing evidence. *Id.* at 22-26 (invoking procedural due process). The motion did not explain how that standard would have altered the district court's earlier determination that petitioner was properly detained under the AUMF, which petitioner did not challenge. Pet.

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[*] These determinations can be viewed at U.S. Dep't of Def., *Periodic Review Secretariat*, https://www.prs.mil/, by accessing the categories beneath the "Review Information" tab and searching for "ISN 685."

App. 39a-40a & n.6. Nor did the motion address the D.C. Circuit's decision upholding the legality of petitioner's detention. The motion merely discussed, in general terms, the purported unconstitutionality of the preponderance-of-the-evidence standard governing habeas petitions brought by Guantanamo detainees.

The district court denied the motion in its entirety. Pet. App. 32a-47a. As to petitioner's statutory claim, the court ruled—applying decisions of this Court and the D.C. Circuit—that the detention authority contained in the AUMF authorizes the government to detain enemy combatants while hostilities are ongoing, even if those hostilities are protracted. *Id.* at 39a-41a. As to petitioner's substantive and procedural due process claims, the district court determined that "a string of Supreme Court cases" and D.C. Circuit precedent required the conclusion that the "'due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.'" *Id.* at 45a (citation omitted).

4. On appeal, petitioner sought initial hearing en banc as to his constitutional arguments. The court of appeals denied the petition. See 2019 WL 850757. Judge Tatel, joined by Judge Pillard, concurred in the denial of initial hearing en banc. The concurring opinion construed petitioner's constitutional arguments to sound in procedural due process and not substantive due process. *Id.* at *2. The concurring opinion acknowledged that the court of appeals had previously stated that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Id.* at *1 (quoting *Kiyemba* v. *Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), vacated, 559 U.S. 131 (2010) (per curiam), reinstated in relevant

part, 605 F.3d 1046, 1047-1048 (D.C. Cir. 2010) (per curiam), cert. denied, 563 U.S. 954 (2011)). But the concurring opinion suggested that the statement in *Kiyemba* "neither implicated the right to procedural due process nor decided whether its protections reach Guantanamo." *Ibid.*

5. A panel of the court of appeals subsequently held, in a case involving a different petitioner, that although *Kiyemba* foreclosed "substantive due process claim[s] [brought by Guantanamo detainees] concerning the scope of the habeas remedy," it did not decide "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment (or any other constitutional source) in adjudicating their habeas petitions." *Qassim* v. *Trump*, 927 F.3d 522, 528 (D.C. Cir. 2019) (citation omitted). The *Qassim* court remanded the case to the district court to consider that question in the first instance. *Id.* at 532.

6. After *Qassim* was decided, a panel of the D.C. Circuit affirmed the denial of petitioner's request for habeas relief. Pet. App. 1a-31a.

a. The panel majority began its analysis by stating that, in light of the court of appeals' decision in *Qassim*, "[t]he district court's decision that the Due Process Clause is categorically inapplicable to detainees at Guantanamo Bay was misplaced." Pet. App. 6a. While observing that *Boumediene* had "held that Guantanamo Bay detainees must be afforded those procedures necessary to ensure 'meaningful review' of the lawfulness of their detention," the majority stated that "[c]ircuit precedent has not yet comprehensively resolved which 'constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions,' and whether those 'rights are housed' in the Due Process Clause, the

Suspension Clause, or both." *Id.* at 6a-7a (citations omitted).

The majority found it unnecessary to comprehensively resolve those questions in this case, either. It first addressed petitioner's contention "that the Due Process Clause's procedural and substantive requirements apply wholesale, without any qualifications, to habeas corpus petitions filed by all Guantanamo detainees." Pet. App. 7a. The majority stated that that argument "sweeps too far," as it is "in substantial tension with the Supreme Court's more calibrated approach in *Boumediene*, which tied the constitutional protections afforded to Guantanamo Bay detainees' habeas corpus proceedings to their role in vindicating the constitutional right to the Great Writ and the judicial role in checking Executive Branch overreach." *Id.* at 8a. The majority also determined that argument to be inconsistent with the court of appeals' prior decision in *Kiyemba*, which "held that, for Guantanamo Bay detainees, the claimed substantive due process right to release into the United States had no purchase because a noncitizen who seeks admission to the United States generally 'may not do so under any claim of right.'" *Ibid.* (citation omitted).

The lesson of those cases, the majority concluded, was that "the determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis, applying *Boumediene*'s functional approach." Pet. App. 9a. By contrast, the majority continued, "[t]he type of sweeping and global application asserted by [petitioner] fails to account for the unique context and balancing of inter-

ests that *Boumediene* requires when reviewing the detention of foreign nationals captured during ongoing hostilities." *Ibid.* And the majority emphasized that petitioner had "abstained from pressing any more gradated or as-applied Due Process Clause argument here," *ibid*, and had thereby forfeited any such argument, *id.* at 8a n.2.

b. The majority then went on to consider petitioner's "particular categories of constitutional objections," holding that for each "the Due Process Clause is of no help to him." Pet. App. 9a.

i. The majority first addressed Ali's argument that "his continued detention for more than seventeen years violates substantive due process," either because "his continued detention is driven by a new blanket and punitive policy against releasing detainees" or because "'perpetual detention' based on an 'eighteen-day stay in a guest-house' shocks the conscience." Pet. App. 9a-10a (brackets and citation omitted). The majority explained that petitioner's "detention is long because the armed conflict out of which it arises has been long, continuing to the present day," and noted that petitioner "does not dispute that hostilities authorized by the AUMF are ongoing." *Id.* at 10a-11a. Thus, "[w]hatever subjective motivations Ali might impute to the government, its original and legitimate purpose for detaining him—recognized by the law of war and Supreme Court precedent—persists." *Id.* at 11a; see *id.* at 16a (noting that petitioner acknowledged that "if the hostilities covered by the AUMF were a more traditional type of war that continued for th[e] same length of time, there would be no substantive due process objection to continued detention").

The majority further observed that the Periodic Review Board had repeatedly "recommended continued detention [of petitioner] because of the threat [petitioner's] release would pose," and concluded that petitioner therefore "has little ground to stand on in claiming that time has dissipated the threat he poses." Pet. App. 11a. "[T]he fact that hostilities have endured for a long time, without more, does not render the government's continued detention of [petitioner] a shock to the conscience, in light of the dangers the Periodic Review Board has found to be associated with his release." *Id.* at 13a. In that regard, the majority rejected petitioner's attempt "to downplay his connection to Zubaydah's force," given his presence at the guest house "in the company of senior terrorist leaders" and his "active[] studying in their English program while there, acquiring a skill that would have equipped him to harm the United States." *Ibid.* Petitioner thus "ha[d] provided no sound basis for concluding that either his ability or his desire to rejoin opposing forces has diminished." *Ibid.*

ii. The majority also rejected petitioner's contentions that, to uphold his detention, procedural due process "requires the government to show, by clear and convincing evidence, that continued detention is necessary to avoid specific, articulable dangers"; "precludes the use of hearsay evidence"; and "bars the presumption of regularity with respect to the government's evidence," concluding that "[c]ircuit precedent forecloses each of those arguments." Pet. App. 14a. The majority observed that the court of appeals had, for example, "repeatedly held" that an "individual's status as an enemy combatant need only be proved by a preponderance of the evidence," and that hearsay evidence may be used

in habeas proceedings. *Ibid.* The majority also observed that "it is not at all clear that the presumption [of regularity] has even been used in Ali's case," but that circuit precedent foreclosed petitioner's argument in any event. *Ibid.*

As for petitioner's contention that "a new balancing" of the factors determining the process due was required because "the government's asserted security interest in his continued detention grows weaker while his liberty interest grows stronger" with the passage of time, the majority explained that the court of appeals' prior cases deciding what procedures were permissible had "contemplated that detentions could last for the duration of hostilities." Pet. App. 15a.

The majority also rejected petitioner's argument that the AUMF could be read to limit the duration of detention as a matter of constitutional avoidance. Pet. App. 16a. The majority stated that the constitutional avoidance canon has no role to play "because the specific constitutional claims that Ali presses have already been considered and rejected by circuit precedent," such that "there are no constitutional rulings to be avoided." *Id.* at 17a.

iii. Judge Randolph concurred in the judgment. In his view, decisions of this Court and the court of appeals made it "'well established' that the protections of the Fifth Amendment's Due Process Clause 'do not extend to aliens outside the territorial boundaries' of the United States, including those held at Guantanamo Bay." Pet. App. 17a (quoting *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001)). After canvassing those cases in detail, *id.* at 18a-30a, Judge Randolph explained that he would affirm because petitioner could not invoke the Due Process Clause. *Id.* at 31a.

c. The court of appeals denied a petition for rehearing or rehearing en banc, with no judge calling for a poll. Pet. App. 48a-50a.

ARGUMENT

Petitioner contends (Pet. i, 16-21) that this Court's review is warranted to determine whether the Due Process Clause applies in any respect to the detention of enemy combatants at Guantanamo Bay. Resolution of that question would not aid petitioner, however, because the court of appeals assumed that the Due Process Clause *does* apply, and concluded that petitioner's continued detention is lawful because it complies with due-process principles. Petitioner expresses disagreement with certain aspects of that conclusion, but he does not ask this Court to grant a writ of certiorari to address those more specific issues, and his contentions with respect to them are in any event meritless. The petition for a writ of certiorari should accordingly be denied.

1. Petitioner frames the sole question for this Court's review as whether the Due Process Clause applies "in any respect to the detentions of foreign nationals" at Guantanamo Bay, Pet. 16; accord Pet. 2, and argues at length that the conclusion that it does not apply is inconsistent with this Court's decisions, Pet. 18-21. But petitioner identifies no place in the decision below where the court of appeals reached that question; indeed, at no point in the argument section of his petition does he quote or even cite the court's opinion. See Pet. 16-30. That is because the court rejected petitioner's arguments on the basis that, even assuming the Due Process clause applies, it "is of no help to him," while continuing to leave open the general question of the Clause's applicability. Pet. App. 9a; see *id.* at 8a; *id.* at 17a (declining to apply constitutional avoidance canon

because "the specific constitutional claims that [petitioner] presses have already been considered and rejected"). Only the concurring judge would have reached the question petitioner now presses. See *id.* at 17a-31a. The question on which petitioner seeks review thus was not the basis for the judgment below.

To be sure, the court of appeals rejected petitioner's contention "that the Due Process Clause's procedural and substantive requirements apply wholesale, without any qualifications, to habeas corpus petitions filed by all Guantanamo detainees." Pet. App. 7a; see *id.* at 8a ("counsel is 'absolutely' 'asking for a broader rule' than one that just resolves [petitioner's] case") (quoting C.A. Oral Argument at 11:51-53 (Dec. 11, 2019), https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/DocsByRDate?OpenView&count=100&SKey=201912). But the court rejected that contention on the ground that "[t]he type of sweeping and global application asserted by [petitioner] fails to account for the unique context and balancing of interests that *Boumediene* requires," which the majority stated "should be analyzed on an issue-by-issue basis." *Id.* at 9a. And petitioner has now abandoned the sweeping argument he advanced below, instead pressing a narrower, and more distinct, position. See Pet. 17 (urging this Court to decide "whether the Due Process Clause applies at Guantánamo in *some* respect, or * * * does not apply in *any* respect"); Pet. 18 (contending that "at least some of the protections of the Due Process Clause must" extend to Guantanamo); Pet. 21 (asserting that the Clause "must apply" "in some measure"). The court of appeals had no occasion to address this narrower argument on the merits, because petitioner "abstained from pressing any more gradated or as-applied Due Process Clause argument." Pet. App.

9a; see *id.* at 8a n.2. And in any event, the court assumed—as just noted, see pp. 13-14, *supra*—that the Due Process Clause does apply in at least a limited form, but concluded that petitioner's specific due-process claims still lack merit.

Petitioner's other justifications for review of the question presented likewise collapse on inspection. Petitioner observes that in a case decided "[o]ne month after the denial of rehearing *en banc*" in his own case, the court of appeals adopted the view of the concurring judge here, holding that the Due Process Clause does not apply to detainees at Guantanamo. Pet. 14; see *Al Hela* v. *Trump*, 972 F.3d 120, 147-148 (D.C. Cir. 2020); Pet. 14-15, 17, 19. But petitioner does not—and cannot—explain how the rule later adopted in that case affected the outcome of his own case, which the court of appeals resolved on the assumption that petitioner could invoke the Due Process Clause. For the same reasons, the hypotheticals petitioner posits on the basis of *Al Hela*'s reasoning (Pet. 27-31) have no relevance here; petitioner frankly acknowledges that they are "not presented by" his own case. Pet. 27.

In sum, petitioner seeks this Court's review of a question the court of appeals assumed in his favor, pointing instead to a later decision of the court of appeals that had no bearing on his own appeal. Petitioner asks this Court to decide issues not presented in his case or affected by the judgment or opinion below. That is not a basis on which this Court should grant review. Cf. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (observing that this Court ordinarily does not grant a writ of certiorari to review a question that "was not pressed or passed upon below") (citation omitted).

2. Even if the Court were willing to refashion the question presented, the remaining arguments petitioner presents likewise would not warrant review. Those arguments depend on fact-specific determinations related to petitioner that were not developed or considered below. And in any event, petitioner's arguments that the Due Process Clause entitles him to additional procedures above and beyond those he has already received lack merit.

a. In the court of appeals, petitioner contended that the use of a preponderance-of-the-evidence standard, the admission of hearsay evidence, and the use of a presumption of regularity for government documents were inconsistent with procedural-due-process principles. Pet. App. 14a-15a; see Pet. 21-23 (reciting list of evidentiary rules petitioner asserts are inconsistent with those same principles). As explained in greater detail below, those rules are fully in keeping with due process. See pp. 17-24, *infra*. But in any event, petitioner's arguments are too undeveloped to enable the fact-specific and context-dependent inquiry he now acknowledges is required under the Due Process Clause, Pet. 21, especially where that inquiry would have to take place in this Court in the first instance.

Petitioner's boilerplate filings in district court, which were identical to those filed on behalf of ten other Guantanamo detainees, made no attempt to address the prior analyses by the district court and court of appeals of the circumstances of his capture and his two-year deception of investigators, much less the prior conclusion that the record developed in connection with petitioner's original habeas petition supplied "overwhelming" evidence of the legality of his detention. *Ali* v. *Obama*, 736 F.3d 542, 545-546 (D.C. Cir. 2013) (opinion of Kavanaugh, J.)

(citation omitted), cert. denied, 574 U.S. 848 (2014); see D. Ct. Doc. 1529 (corrected motion for order granting writ of habeas corpus); D. Ct. Doc. 1528 (Mar. 9, 2018) (reply in support of motion). This makes the relevance of any of these complaints to petitioner's case difficult to perceive. For example, petitioner contends that a "'presumption of regularity'" for government documents "cannot possibly comport with due process." Pet. 23 (citation omitted). But he nowhere addresses the court of appeals' observation that it is "not at all clear that the presumption has even been used" in petitioner's case. Pet. App. 14a. Other complaints, such as the weight to be given to evidence of stays at al Qaeda-affiliated guesthouses or the ways in which pieces of evidence can be mutually reinforcing, Pet. 23, were not addressed by the lower courts at all, because petitioner did not raise them as separate challenges (much less as challenges particularized to his own case). See Pet. App. 14a (describing petitioner's procedural challenges).

The most petitioner offers on this score is the assertion that "application of procedural due process principles would almost certainly change the outcome" of his case, Pet. 25, apparently because evidence supporting his detention "was contested during his habeas hearing," Pet. 23. But petitioner did not present those arguments in his boilerplate filings in the district court, and neither the district court nor the court of appeals opined on them. Petitioner thus offers nothing to suggest that this Court's consideration of his due-process arguments would in any way affect the outcome of his own case.

b. In any event, petitioner's procedural-due-process contentions are meritless, as they fail to grapple with this Court's past statements about what process is ap-

plicable in resolving enemy-combatant habeas petitions. In assessing the process due to a U.S. citizen detained in the United States, a plurality of this Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533-534 (2004), explicitly recognized that any due-process analysis must be "tailored" to address the "uncommon potential" of "enemy-combatant proceedings * * * to burden the Executive at a time of ongoing military conflict." This includes accounting for the "practical difficulties that would accompany a system of trial-like process." *Id.* at 531-532. In striking that balance, the *Hamdi* plurality stated that a citizen-detainee in the United States would be provided due process under a system that applied "a presumption in favor of the [g]overnment's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided"; accepted hearsay "as the most reliable available evidence from the Government in such a proceeding"; and included a requirement that the government produce "credible evidence" of detainability before shifting the burden "to the petitioner to rebut that evidence with more persuasive evidence." *Id.* at 533-534. The Court also explained that the government could meet its initial burden by having "a knowledgeable affiant * * * summarize [detainee] records to an independent tribunal," so long as the detainee could also "present his own factual case to rebut the Government's return." *Id.* at 534, 538. And that framework is controlling for these purposes; a fifth member of this Court concluded that no process beyond a "good-faith executive determination" of detainability is required. *Id.* at 590 (Thomas, J., dissenting).

Given that that framework is constitutionally permissible for U.S. citizens detained within U.S. sovereign territory, it is *a fortiori* sufficient for a noncitizen such

as petitioner who is detained at Guantanamo Bay. Petitioner does not even contend that his own habeas proceeding failed to satisfy those standards—nor could he, given that the process he was afforded was even more robust than the process this Court approved of in *Hamdi*. See, *e.g.*, *Ali* v. *Obama*, 741 F. Supp. 2d 19, 26 (D.D.C. 2011), aff'd, 736 F.3d 542 (D.C. Cir. 2013), cert. denied, 574 U.S. 848 (2014); Pet. App. 35a-36a. His contention that procedural due process necessarily requires a confrontation right of undefined scope (Pet. 21), for example, is flatly inconsistent with the *Hamdi* plurality's recognition that the summaries of "a knowledgeable affiant" could be sufficient as a matter of due process. 542 U.S. at 534. Similarly, his suggestion that the preponderance-of-the-evidence standard is constitutionally insufficient (Pet. 17, 24) cannot be squared with the conclusion that requiring the government merely to put forward "credible evidence" of the lawfulness of detention is consistent with due process. *Hamdi*, 542 U.S. at 533-534 (plurality opinion).

Petitioner also misconstrues the court of appeals' treatment of hearsay, conflating the rule concerning the admissibility of hearsay in habeas proceedings with a determination about the reliability of that hearsay. Pet. 22-23. The admissibility of hearsay in such proceedings follows from the *Hamdi* plurality's express recognition of the permissible role of hearsay evidence, and reflects "the reality that district judges are experienced and sophisticated fact finders" who (unlike juries) need not be shielded from unreliable hearsay. *Al-Bihani* v. *Obama*, 590 F.3d 866, 880 (D.C. Cir. 2010), cert. denied, 563 U.S. 929 (2011). But as that rationale suggests, once the hearsay evidence is admitted, district judges are tasked with determining what "probative weight to ascribe to

whatever indicia of reliability [the evidence] exhibits." *Id.* at 879. The mere fact that hearsay is admissible does not dictate that the hearsay be given a particular degree of weight, or any weight at all. Cf. *Bensayah* v. *Obama*, 610 F.3d 718, 726-727 (D.C. Cir. 2010) (concluding that the district court erred in treating certain evidence as sufficiently corroborated to support detention). And the court of appeals' decision in *Awad* v. *Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010), cert. denied, 563 U.S. 917 (2011), does not, as petitioner contends (Pet. 22), place the burden on a habeas petitioner to show unreliability in the first instance; rather, that case addressed a habeas petitioner's task in upsetting a district-court finding of reliability *on appeal* under the clear-error standard of review. See *id.* at 7-8 (finding no clear error in district court's decision to credit particular documents). To the extent petitioner wishes to contest specific inferences drawn from hearsay in his own case, cf. Pet. 23-24 (referring to "contested" sources of fact), this Court is not the appropriate forum to consider those arguments in the first instance.

Petitioner obliquely addresses the reasoning of *Hamdi* by contending that the passage of time requires a new balancing of due-process considerations. Pet. 25. But the *Hamdi* plurality prefaced its due-process analysis with the recognition that detention under the AUMF is authorized "for the duration of the relevant conflict." *Hamdi*, 542 U.S. at 520-521; see *id.* at 587-588 (Thomas, J., dissenting). The fundamental constitutional balance articulated by the *Hamdi* plurality accordingly remains the same so long as the conflict remains ongoing, because the government retains its interest in preventing enemy combatants from returning to the battlefield. See generally *Al-Alwi* v. *Trump*, 901

F.3d 294, 299-300 (D.C. Cir. 2018) (discussing continued hostilities), cert. denied, 139 S. Ct. 1893 (2019). Abu Zubaydah was captured at the Faisalabad guest-house along with senior leaders of his group at the same time as petitioner, but petitioner (as the court of appeals emphasized) "does not dispute that hostilities authorized by the AUMF are on-going." Pet. App. 11a; see 2012 NDAA, § 1021(c), 125 Stat. 1562 (affirming authority to continue "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force").

c. Petitioner's invocation of substantive-due-process principles (Pet. 25-27) fails for similar reasons. As the court of appeals explained, petitioner's detention does not "shock[] the conscience." Pet. App. 10a. "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again," and that authority is "based on longstanding law-of-war principles." *Hamdi*, 542 U.S. at 518, 521 (plurality opinion); see *id.* at 518 (noting that the power to detain in war is a "fundamental and accepted * * * incident to war" that is accepted by "'universal agreement and practice'") (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)). Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted. *Id.* at 520-521. The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing—and petitioner has not disputed that they remain ongoing here. See Pet. App. 10a-11a.

Petitioner largely disregards this reasoning, instead insisting that substantive-due-process standards that apply to pretrial detention or civil commitment must be imported into law-of-war detention. Pet. 25-26 (citing

Kansas v. *Hendricks*, 521 U.S. 346, 358 (1997), and *United States* v. *Salerno*, 481 U.S. 739, 750-751 (1987)). In particular, he contends that these cases dictate that the government must demonstrate, by clear-and-convincing evidence, that petitioner specifically poses a danger, and that the ultimate determination must be made by a court. Pet. 17, 25-26.

But those cases offer no guidance about the standards that apply to the wholly different circumstance of detention under the law of war during an ongoing conflict, particularly given the history and continuing practice of such detention. An individualized determination of dangerousness has never been a prerequisite to the detention of enemy combatants. See *Awad*, 608 F.3d at 11 (explaining that the detention authority conferred by the AUMF is not contingent "on whether an individual would pose a threat * * * if released"; instead, the Executive's detention authority turns exclusively on "the continuation of hostilities"); Dep't of Def., *Law of War Manual* § 8.14.3.1 (updated Dec. 2016), https://go.usa.gov/xymRX ("For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities."). Indeed, petitioner acknowledges that the approach he advocates would be inconsistent with "traditional law of war detentions in an international armed conflict," Pet. 26, and he conceded before the court of appeals that "if the hostilities covered by the AUMF were a more traditional type of war that continued for this same length of time, there would be no substantive due process objection to continued detention," Pet. App. 16a. As the court of appeals recognized, petitioner

"cites no authority suggesting that the form of hostilities that enemy combatants undertake changes the law of war's authorization of their continued detention." *Ibid.*

Importation of inapposite standards from the context of civil commitment would be all the more anomalous because the question of petitioner's future dangerousness necessarily involves assessments of military conditions and national-security risks that the judiciary is ill-suited to address. As this Court has noted in upholding an order for the deportation of an "enemy alien[]" during wartime, a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility." *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948). Petitioner does not address that principle, much less attempt to justify a departure from it.

In any event, to ensure that military detention at Guantanamo remains "carefully evaluated and justified, consistent with [U.S.] national security and foreign policy," the Executive has implemented a process of periodic review that assesses whether certain Guantanamo detainees' continued detention is necessary to protect against a continuing significant threat to the security of the United States. Exec. Order No. 13,567, Pmbl.; see 2012 NDAA § 1023, 125 Stat. 1564-1565 (establishing requirements for procedures for periodic detention review of unprivileged alien enemy combatants detained at Guantanamo); Exec. Order No. 13,823, § 1(d), 83 Fed. Reg. 4831, 4831 (Feb. 2, 2018) (providing for continuation of the periodic review process). Pursuant to that process, the Executive has exercised its discretion to transfer out of U.S. custody most of the individuals detained at Guantanamo at the time of the issuance of the

Executive Order that initially established that process. The Executive has consistently determined through multiple periodic reviews, however, that petitioner poses a continuing significant threat to the security of the United States, and therefore should not be transferred. The court of appeals noted this repeated conclusion, and observed that petitioner therefore "has provided no sound basis for concluding that either his ability or his desire to rejoin opposing forces has diminished." Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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