[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 24, 2009]
No. 08-5537

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, ET AL.
Petitioners-Appellees,

BELKACEM BENSAYAH,
Petitioner-Appellant,

v.

BARACK H. OBAMA, ET AL.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF FOR RESPONDENTS-APPELLEES

MICHAEL F. HERTZ
Deputy Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ROBERT M. LOEB
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioner-Appellant is Belkacem Bensayah. The additional petitioners in the district court, who are appellees in this Court, are Hadj Boudella, Lakhdar Boumediene, Mustafa Ait Idir, Saber Lahmar, and Mohamed Nechla, on their own behalf; and Abassia Bouadjmi, Sabiha Delic-Ait Idir, Anela Kobilica, Emina Planja, Emina Lahmar, and Badra Baouche, as next friends of petitioners.

Respondents-appellees are Barack H. Obama, Robert F. Gates, Jay Hood, and Nelson J. Cannon.

B. Rulings Under Review

Petitioner appeals from the November 20, 2008, order of the district court (Leon, J.) denying Bensayah's petition for a writ of habeas corpus. *See* JA 3256-3269 (unclassified memorandum order), JA 7141-7166 (classified oral opinion). Petitioner also appeals from prior interlocutory rulings of the district court, including the Oct. 27, 2008, order adopting a legal standard for detention, JA 2765-2768, and the Aug. 27, 2008, case management order establishing procedures for adjudicating the habeas corpus petition, JA 958-961.

C. Related Cases

This case was previously before this Court on appeal in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

There are currently a number of additional appeals of district court orders granting or denying a writ of habeas corpus to individuals detained at Guantanamo Bay, Cuba. *Basardh v. Gates*, No. 09-5200 (D.C. Cir.), is a government appeal from a district court ruling that the court may order release of a member of the enemy forces on the ground that the individual will not rejoin the battle or engage in any future act of terrorism. *Al Alwi v. Obama*, No. 09-5125, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus. *Al Bihani v. Obama*, No. 09-5051, is also an appeal by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

Counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Sharon Swingle
Sharon Swingle
Counsel for Respondents-Appellees

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF AUTHORITIES vi

GLOSSARY x

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 3

A. Factual and Procedural Background 3

B. District Court Ruling 4

C. Post-Trial Proceedings 11

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 17

ARGUMENT 18

I. BENSAYAH'S CONDUCT AS AN AL QAIDA FACILITATOR FORMS A LAWFUL BASIS FOR HIS DETENTION UNDER THE AUMF 18

A. The AUMF Authorizes Detention Consistent With The Laws Of War 18

B. The Government's Detention Authority Is Not Limited To Individuals Who "Directly Participate" In Hostilities. 27

C. Bensayah's Conduct As An Al Qaida Travel Facilitator Providing Critical Recruiting, Transportation, And Logistical Support To Enemy Forces Is A Lawful Basis for Detention Under the AUMF. 30

II. THE DISTRICT COURT'S FINDINGS THAT BENSAYAH WAS AN AL QAIDA FACILITATOR WHO PLANNED TO FACILITATE THE TRAVEL OF FIGHTERS TO AFGHANISTAN, TO FACILITATE TRAVEL OF INDIVIDUALS LEAVING AFGHANISTAN, AND TO TAKE UP ARMS HIMSELF, WERE NOT CLEARLY ERRONEOUS. 34

A. The District Court's Factual Findings Are Not Clearly Erroneous. 34

B. Petitioner's Challenges To The District Court's Factual Findings Are Meritless. 38

C. The Post-Judgment Disclosures to Petitioner Do Not Support Reversal. 43

D. The District Court Did Not Err In Making Factual Findings Under A Preponderance-Of-The-Evidence Standard. 44

E. If This Court Cannot Affirm, The Court Should Order Remand To Permit Consideration Of Additional Evidence. 46

III. THE PROCEDURES EMPLOYED BY THE DISTRICT COURT PROVIDED PETITIONER WITH A FULL AND FAIR OPPORTUNITY TO CONTEST THE LAWFULNESS OF HIS DETENTION. 47

A. The District Court Did Not Err Or Abuse Its Discretion In Its Disclosure And Discovery Rulings.. 47

B. The District Court Did Not Abuse Its Discretion In Allowing The Government To Introduce Additional Evidence On Rebuttal, Or In Denying Petitioner Sur-Rebuttal And Rebuttal-Stage Discovery. 56

CONCLUSION. 61

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases:

Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009). 17, 46, 51

Amadeo v. Zant, 486 U.S. 214 (1988).. 17

Anderson v. Bessemer City, 470 U.S. 564 (1985).. 18

Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007). 49, 57

**Boumediene v. Bush*, 128 S. Ct. 2229 (2008). 1, 3, 4, 16, 23, 47, 48, 49, 59

Burns v. Wilson, 346 U.S. 137(1953). 48

Geders v. United States, 425 U.S. 80 (1976). 58

**Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C. 2009). 24, 25, 28, 29, 30, 32

Hamdan v. Rumsfeld, 548 U.S. 557 (2006).. 21

**Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). 16, 20, 32, 44, 47, 48, 52

**Hamlily v. Obama*, 616 F. Supp.2d 63, ___,
2009 WL 1393113 (D.D.C. May 19, 2009). 24, 25, 27, 28, 29, 32

**Harris v. Nelson*, 394 U.S. 286 (1969). 48, 52

Illinois v. Gates, 462 U.S. 213 (1983).. 40

In re Iraq and Afghanistan Detainees Litig., 479 F. Supp.2d
105 (D.D.C. 2007).. 48

Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). 26, 32

---

* Authorities chiefly relied upon are marked with an asterisk.

Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009). 1

Lichter v. United States, 334 U.S. 742 (1948). 23

The Paquete Habana, 175 U.S. 677 (1900). 23

**Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). 5, 15, 19, 38, 39

Ex Parte Quirin, 317 U.S. 1 (1942). 20, 26

In re Territo, 156 F.2d 142 (9th Cir. 1946). 33

United States v. Bruner, 657 F.2d 1278 (D.C. Cir. 1981). 39

United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936). 23

United States v. Laws, 808 F.2d 92 (D.C. Cir. 1986). 38, 39

United States v. Salerno, 481 U.S. 739 (1987). 45

United States v. Thomas, 864 F.2d 188 (D.C. Cir. 1988). 34

Statutes and Rules:

28 U.S.C. § 2241. 1

*Authorization for the Use of Military Force ,
Pub. L. No. 107-40, 115 Stat. 224 (2001). . . 2, 14, 18, 19, 20, 22, 23, 28, 34

Fed. R. Civ. P. 52(a)(6). 17

Habeas Rule 6(a). 48, 52

Miscellaneous:

Army Regulation 190-8, Ch. 1, § 1-6 (1997). 45

C. Bradley & J. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005). 20, 24

Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949:
Art. 3 28
Art. 4 . . . . . 22, 26

In re: Guantanamo Bay Detainee Litig., Misc. No. 08-442, Nos. 05-0763, 05-1646, 05-2378, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. 175 (D.D.C. Mar. 13, 2009). 19

Int'l Comm. of the Red Cross, Commentary on Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949 (Pictet, ed. 1960). 27

Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 (Sandoz *et al.*, eds. 1987). 29, 30

Y. Naqvi, *Doubtful Prisoner of War Status*, 84 RICR 571 (2002). 45

Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas (Sept. 21, 2001), http://www.oas.org/OASpage/crisis/RC.24e.htm.. 22

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977. 29

Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977:
Art. 1(1). 28, 29
Art. 13. . . . . 28, 29

Statement by NATO Secretary General(Oct. 2, 2001),
http://www.nato.int/docu/speech/2001/ s011002a.htm. 22

Statement by North Atlantic Council (Sept. 12, 2001),
http://www.nato.int/docu/pr/2001/ p01-124e.htm. 22

M. Schmitt, *U.S. Security Strategies: A Legal Assessment*,
27 Harv. J.L. & Pub. Pol'y 737 (2004). 21, 22

U.N. General Assembly Security Council Resolution of Sept. 12, 2001
(S/RES/1368). 21

United Nations Charter, Art. 51. 21

W. Winthrop, Military Law and Precedents (2d ed. 1920). 27

GLOSSARY

AUMF. . . . . Authorization for Use of Military Force

[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 24, 2009]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5537

LAKHDAR BOUMEDIENE, ET AL.
Petitioners-Appellees,

BELKACEM BENSAYAH,
Petitioner-Appellant,

v.

BARACK H. OBAMA, ET AL.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS-APPELLEES

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See Kiyemba v. Obama*, 561 F.3d 509, 512-513 (D.C. Cir. 2009).[1] The district court issued an

---

[1] *But see Boumediene v. Bush*, 128 S. Ct. 2229, 2278 (2008) (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at

order denying a writ of habeas corpus to petitioner Belkacem Bensayah on November 20, 2008, JA 3268, and entered final judgment on November 25, 2008. JA 3270. Petitioner Bensayah filed a timely notice of appeal on December 30, 2008. JA 3272. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUES

1. Whether the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), authorizes the detention of an al Qaida facilitator who planned imminently to facilitate the travel of individuals seeking to join hostilities in Afghanistan, to facilitate the travel of others leaving Afghanistan, and to take up arms himself against U.S. and coalition forces.

2. Whether the district court's factual findings were clearly erroneous.

3. Whether the district court erred or abused its discretion in adopting and applying the procedures used to adjudicate petitioner's habeas corpus petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory provisions are contained in an addendum to petitioner's brief.

---

all.").

STATEMENT OF THE CASE

Petitioner appeals the district court's denial of a writ of habeas corpus. Following a bench trial, the district court found that Bensayah was an al Qaida facilitator who planned to "facilitat[e] the travel of others to join the fight" against the United States in Afghanistan, to facilitate the travel of people leaving Afghanistan, and to travel to Afghanistan himself "to take up arms against the United States." JA 3267-3268, 7150, 7156. The district court held that Bensayah is lawfully detained pursuant to the AUMF. JA 3267-3268.

STATEMENT OF FACTS

A. Factual and Procedural Background.

Bensayah is an Algerian citizen who was taken into custody by the Bosnian Government in Bosnia and Herzegovina in October 2001, and subsequently taken into custody by the U.S. Government in January 2002, along with five other Algerian citizens resident in Bosnia. *See* JA 7118-7120. The six men were transported to Guantanamo Bay for military detention. *See* JA 7120.

In July 2004, following the Supreme Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), Bensayah and the other five detainees filed habeas corpus petitions challenging the lawfulness of their detention. *See* JA 7120; *see also* JA 69-86 (amended petition). The petitions were initially dismissed, but were reinstated by the

Supreme Court, which ruled that petitioners were constitutionally entitled to habeas corpus review of their detention. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

In accordance with *Boumediene*'s observation that the petitioners were "entitled to a prompt habeas corpus hearing," not "additional months * * * of delay," 128 S. Ct. at 2275, the district court moved quickly to adjudicate their claims. After a seven-day bench trial in November 2008, the district court upheld as lawful the detention of petitioner Bensayah. JA 3268.

B. District Court Ruling.

1. The district court held that the government had shown by a preponderance of the evidence that Bensayah was an al Qaida facilitator who planned to facilitate the travel of individuals who sought to go to Afghanistan to join the hostilities against U.S. and coalition forces, as well as numerous individuals seeking to leave Afghanistan. JA 7132-7133, 7156. The district court also found that Bensayah planned to travel to Afghanistan to fight U.S. forces. JA 3267, 7132. The court held that Bensayah's conduct in facilitating the travel of fighters was a legally sufficient basis for detention. JA 7132-7134.

As the district court explained in detail in its classified ruling, the most significant piece of evidence against Bensayah [redacted]

The district court held that it was required under *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008), to evaluate [redacted] to determine whether it was "presented in a form or with sufficient additional information [to] permit[] the fact-finder to assess its reliability." JA 7149 (quotation marks omitted). [redacted]

[redacted]

The district court outlined "significant" evidence establishing Bensayah's connection to al Qaida and corroborating [redacted] report of such a link — including "physical evidence * * * directly linking Bensayah to alleged senior al-Qaeda operative and facilitator [redacted] JA 7151. Bensayah's home phone number and his alias "Abu al-Majid" were listed in an address book believed to belong to [redacted], which was recovered from the residence where [redacted] was captured and included phone numbers of [redacted] immediate family. [redacted] In addition, a piece of paper with [redacted] name and a cell phone number used by [redacted] between January 2001 and late 2001 was recovered in Bensayah's bedroom during an October 2001 search of his residence. JA 7152, 220, 1296, 3025, 3033, 6190. Furthermore, Bensayah's phone number was listed on a document discovered in December 2001 in a former residence of Osama bin Laden. *See* JA 7152, 220, 544, 561. Bensayah's phone number was also found on materials seized from "suspected al-Qaeda premises in

Kabul, Afghanistan and the fort at Koh-i-Khan Nashin in the Helmand province in late 2001." JA 7152, 3072, 3075. Although the district court recognized that the existence of any one phone number "in isolation may be insufficient" to connect Bensayah to al Qaida and [redacted], "taken together there is sufficient evidence to draw such a connection and thereby corroborate" [redacted] that Bensayah was acting as an al Qaida facilitator. JA 7152.

[redacted]

In addition, the district court highlighted the evidence of Bensayah's extensive experience in obtaining and traveling with fraudulent passports, which had been identified at trial as "a hallmark of extremist trade craft behavior." JA 7153. Although Bensayah testified that he had only owned four passports in his life, JA 1295, his counsel conceded at trial that he possessed least five passports, most of

them fraudulent, at the time of his arrest in October 2001. *See* JA 7153-7154, 6113-6118. The government introduced evidence that Bensayah had 10 passports at the time he was arrested, JA 383-384, and provided specific identifying details for 7 different passports, JA 6079-6107, some of which Bensayah denied possessing or claimed to have previously destroyed or abandoned. *See* JA 522, 1295. Bensayah used his "multiple fraudulent passports" to avoid detection and possible deportation when he traveled around the Middle East and Europe. JA 7154.[2] The district court concluded that this evidence of possession and extensive use of multiple fraudulent passports supported the [redacted]

Finally, the district court pointed to evidence that undermined Bensayah's own credibility, much of which related to Bensayah's apparent involvement in terrorist and militant activities at earlier periods. The district court concluded that this evidence raised serious questions about Bensayah's whereabouts in the early 1990s

[2] As the district court emphasized, Bensayah himself admitted to obtaining a fraudulent Yemeni passport in Saudi Arabia, traveling from Saudi Arabia to Yemen on an expired Algerian passport, leaving Yemen on the expired Algerian passport and then entering Syria on the fraudulent Yemeni passport, and then ultimately making his way to Bosnia on the fraudulent Yemeni passport, obtaining a Bosnian passport in the false name listed on the fraudulent Yemeni passport, later getting a Bosnian passport in his true Algerian name, and then getting married by using a Bosnian translation of his Algerian passport, which he had fraudulently altered. JA 7154.

and his own account of those years. JA 7155. As the district court noted, Bensayah claimed to have traveled from Algeria to Saudi Arabia in 1990 and to have spent the next five years living on alms at the Noble Sanctuary in Mecca. JA 7155, 260. But one of the other petitioners explained that it would have been nearly impossible to stay in Mecca for more than a short period, JA 231, and when Bensayah was confronted with the implausibility of his account, he changed his story and claimed to have stayed only a month or two. JA 7155, 435.

Bensayah's original account of his stay in Mecca between 1990 and 1995 was also contradicted by a statement from Umar Faruq, an al Qaida operative who was interrogated at Bagram before escaping and later being killed fighting against coalition forces. JA 7155. Faruq told interrogators that Bensayah — *aka* al-Majd — was in Turkey and in Bosnia at a mujahedin camp in 1993, and in Derunta, Afghanistan, the location of a terrorist training camp, in 1995. JA 7155, 370, 2989. Faruq identified Bensayah as a "veteran of the jihad" who "always searched for different places to go and fight." JA 7155, 371.

The district court found that these inconsistencies regarding Bensayah's whereabouts rendered "his proffered explanations in response to the Government's allegations" incredible. JA 3267. The court held that evidence of Bensayah's "connections to al-Qaeda, his connections to senior operative and al-Qaeda facilitator

[redacted], and his travel history" using multiple and fraudulent passports, along with evidence of his lack of credibility, was sufficient corroboration to credit and rely upon [redacted] regarding Bensayah's role as an al Qaida facilitator. JA 7156.

The district court found that the government had established by a preponderance of the evidence that "Bensayah is an al-Qaeda facilitator who intended to facilitate the movement of men into Afghanistan" to fight against U.S. and coalition forces, and also "to facilitate the movement of people out of Afghanistan into Bosnia" and to join the hostilities in Afghanistan himself. JA 7156, 3267-3268. The district court held that Bensayah's conduct in facilitating the travel of fighters to Afghanistan constituted "direct support to al-Qaeda in furtherance of its objectives," and was a lawful basis for detention under the government's authority to detain any "individual who was part of or supporting Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." JA 7156, 7122-7123, 3267-3268.

2. The district court granted the writ of habeas corpus to the remaining five petitioners, holding that the government failed to prove that they planned to travel to Afghanistan to join the hostilities. JA 7157, 7164-7165. [redacted]

[redacted] The government did not appeal that ruling, and — with the exception of one petitioner for whom resettlement efforts remain ongoing — the remaining petitioners have been released from U.S. custody.

C. Post-Trial Proceedings.

Several months after the district court judgment, the government produced additional material to Bensayah's counsel that was discovered or created in the course of preparing the factual return for [redacted], and that would have been disclosed to Bensayah's counsel if it were available when his petition was being litigated. *See Boumediene v. Obama*, No. 04-cv-1166(RJL), Exhibit 1 for Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(2) (D.D.C. filed May 27, 2009).

First, the government provided the factual return filed in [redacted] habeas action, which establishes that [redacted] was part of and substantially supported al-Qaida and associated forces by facilitating travel for terrorist training camps; maintaining a close relationship with and actively supporting Osama bin Laden; and directly aiding enemy forces in Afghanistan, including by facilitating their retreat.

Exh. 5, Rule 60(b) Motion. The return — which does not rely on any post-detention statement by [redacted] to justify his detention, *id.* at 7 n.2 — also notes that [redacted] did not identify himself as a member of al Qaida despite his close association with the group, apparently because he never formally swore allegiance to bin Laden. *Id.* at 23-24 n. 13. [redacted]

Petitioner has moved in the district court for a new trial on the basis of this additional material, which the government has opposed; the motion is scheduled for argument on July 23, 2009. Petitioner has stated that, if the district court indicates it would grant the motion, he will seek a remand for entry of judgment.

SUMMARY OF ARGUMENT

I. The AUMF authorizes the detention of individuals who are part of, or substantially support, enemy armed forces. That grant of authority is informed by the laws of war, which permit the detention of all members of hostile armed forces, as well as individuals who provide integral logistical support to those forces.

Petitioner errs in claiming that the President's detention authority is limited to individuals who directly participate in hostilities. The law of war permits military action against all persons who are part of an enemy force. The law-of-war sources that petitioner cites govern the treatment of prisoners of war; they do not define the boundaries of President's detention authority under the AUMF as informed by the laws of war.

The district court found that Bensayah was an al Qaida travel facilitator who planned imminently to facilitate the travel of enemy fighters to Afghanistan, to facilitate the travel of persons from Afghanistan to Bosnia, and to take up arms himself on the battlefield against the United States. Bensayah's critical logistical

support in recruiting and transporting fighters to the front lines, and in effectively enlisting in the hostile force himself, makes him detainable under the AUMF. Detention is not barred simply because petitioner was captured away from Afghanistan, in connection with a conflict being waged across the globe by an organization made up of fighters from many countries. Nor is his detention barred by the fact that petitioner was apprehended before successfully completing his plan to transport fighters to Afghanistan to oppose U.S. and coalition forces and to join the hostilities himself.

II. The district court's factual findings were not clearly erroneous. The critical intelligence report established that Bensayah was an al Qaida facilitator who planned to facilitate the transport of fighters to Afghanistan, facilitate the travel of additional people away from Afghanistan to Bosnia, and to go himself to take up arms against the United States. This report was corroborated by substantial additional evidence that Bensayah had sought a visa to travel to Iran en route to Afghanistan; possessed and used multiple fraudulent passports; previously participated as a jihadist in other armed conflicts; had direct ties to al Qaida and appeared to have [redacted] and other al Qaida operatives; and lacked credibility in his account of events — thereby establishing the reliability of the

report's statements relating to Bensayah under the standards set out in *Parhat v. Gates*, 532 F.3d at 847-849.

Bensayah challenges the significance and reliability of various individual pieces of evidence, but his arguments do not undermine the district court's determination that the evidence was relevant and credible *in toto*. Petitioner also argues that newly-disclosed information undermines the district court's findings, but that information has not been considered by the district court and is not properly before this Court — and, in any event, fully supports the judgment. Finally, Bensayah challenges the district court's use of a preponderance-of-the-evidence standard, but the Supreme Court has explicitly endorsed the use of a "credible evidence" or "preponderance of evidence" standard in reviewing wartime detention, *Hamdi v. Rumsfeld*, 542 U.S. 507, 534, 538, 590 (2004). Unlike the contexts that petitioner relies on, in this setting the difficulties in evidence-gathering and risk of error weigh in favor of a preponderance standard.

III. Petitioner's procedural challenges are also without merit. The district court's procedural rulings comported with *Hamdi*'s directive to take "prudent and incremental" steps in conducting factfinding on wartime detention, 542 U.S. at 539, while giving petitioner a full and fair opportunity to challenge his detention.

Petitioner challenges the scope of government disclosure of exculpatory information, but the government produced all information reviewed in litigating the petition that tended materially to undermine the legal theory for detention — a standard that petitioner agreed to, and that was consistent with *Boumediene*'s description of the constitutionally required elements of a habeas proceeding. Petitioner also argues that he should have been permitted greater discovery, but he failed to make any tailored showing that the vast amounts of classified material he sought would be necessary and helpful to his case.

The district court also acted within its broad discretion over trial management in permitting the government to introduce additional evidence at the rebuttal stage, and in denying petitioner's request for additional discovery or sur-rebuttal. Petitioner waived the chance to preview all relevant rebuttal evidence before trial, and his request for rebuttal-stage discovery was not clearly relevant and narrowly tailored. The district court's procedural rulings were legally correct, and reflect no abuse of discretion.

STANDARD OF REVIEW

This Court reviews for clear error the district court's factual findings on habeas corpus review, affirming if the findings are "plausible in light of the record viewed in its entirety." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quotation marks omitted);

see also Anderson v. Bessemer City, 470 U.S. 564, 574-575 (1985) (clear error review applies regardless of whether factual findings are based on testimonial or documentary evidence); Fed. R. Civ. P. 52(a)(6). The district court's rulings on discovery are reviewed for abuse of discretion. *See Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (noting district court's "broad discretion in its handling of discovery"). The district court's legal conclusions are reviewed de novo.

ARGUMENT

I. BENSAYAH'S CONDUCT AS AN AL QAIDA FACILITATOR FORMS A LAWFUL BASIS FOR HIS DETENTION UNDER THE AUMF.

A. The AUMF Authorizes Detention Consistent with the Law of War.

1. The AUMF authorizes the use of military force against those "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF, § 2(a).

The President construes the AUMF to permit the detention of persons who "were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." The current detention standard was

set out in a March 13, 2009, filing in habeas proceedings in district court, *see In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Nos. 05-0763, 05-1646, 05-2378, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. 175, at 1 (D.D.C. Mar. 13, 2009) ("March 13 filing"), and represents a refinement of the prior standard articulated by the Department of Defense in establishing administrative tribunals to review the military detention of persons held at Guantanamo. *See* JA 3263 (applying detention standard encompassing individuals who were "part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces"); *see also Parhat*, 532 F.3d at 837-838. Although the district court applied the prior standard in upholding petitioner's detention as lawful, we explain below (at pp. 30-34, *infra*) that the March 13 refinement of the President's detention authority under the AUMF does not affect the outcome in this case.

2. The September 11 attacks were carried out by al Qaida, which was harbored by the Taliban regime in Afghanistan. By explicitly authorizing the use of military force against "nations, organizations or persons" that were involved in any way in the September 11 attacks (or that harbored those who were), Congress

indisputably intended to empower the President to take action against al Qaida and the Taliban. Indeed, the principal purpose of the AUMF is to eliminate the threat posed by those groups.[3]

Furthermore, it is well-established that the power to use military force under the AUMF includes the power to detain members of al Qaida and the Taliban. The capture and detention of members of an enemy force are "'important incident[s] of war.'" *Hamdi*, 542 U.S. at 518 (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)); *see also Hamdi*, 542 U.S. at 588-589 (Thomas, J., dissenting). Members of enemy forces can be detained even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Quirin*, 317 U.S. at 38.

3. The detention authority conferred by the AUMF is informed by the laws of war. *See Hamdi,* 542 U.S. at 521 (plurality op.). The laws of war include

---

[3] The use of military force against a non-state armed force is consistent with historic practice in the United States. Congress has previously authorized the use of force against non-state actors, including slave traders, pirates, and Indian tribes, and U.S. military forces engaged military opponents with no connection to the enemy state in the Mexican-American War, the Civil War, and the Spanish-American War. *See* C. Bradley & J. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2066-2067 (2005) (collecting citations). Presidents also have used force against non-state actors outside of authorized conflicts. *See id.* (noting use of military force in the Chinese Boxer Rebellion, against Mexican rebel leader Pancho Villa, and in the 1998 missile attacks against al Qaida targets in Sudan and Afghanistan).

prohibitions and obligations that have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 603-604 (2006). The laws of war have evolved primarily in the context of armed conflicts between states, and are less well-codified with respect to armed conflicts against non-state groups, such as the current, novel conflict with al Qaida and the Taliban. The President's detention authority is properly understood to permit the detention in this conflict of persons whose relationship to al Qaida or the Taliban would render them subject to detention in analogous circumstances in a traditional international armed conflict.

Under the laws of war, nations lawfully can use military force in armed conflicts against irregular terrorist groups such as al Qaida. The United Nations Charter recognizes the inherent right of states to use force in self-defense in response to any "armed attack," not just attacks that originate with states. Art. 51. The day after the 9/11 attacks, the U.N. Security Council adopted Resolution 1368, which affirmed the "inherent right of individual or collective self-defence in accordance with the Charter" and determined "to combat by all means threats to international peace and security caused by terrorist acts." U.N. General Assembly Security Council Resolution of Sept. 12, 2001 (S/RES/1368); *see also* M. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 Harv. J.L. & Pub. Pol'y 737, 748 (2004)

(recognizing that Security Counsel Resolution 1368 "implicitly acknowledg[ed] the acceptability of using military force against terrorists under the law of self-defense"). The North Atlantic Treaty Organization and the Organization of American States treated the 9/11 attacks as "armed attacks" for purposes of their collective self-defense provisions.[4] The AUMF invokes this internationally recognized right to self defense. *See* AUMF, Preamble (it is "both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad"). Other nations joined or cooperated closely with the United States' military campaign against al Qaida and the Taliban. *See* M. Schmitt, 27 Harv. J. L. & Pub. Pol'y at 748-749 & n.69.

Law-of-war principles also permit the detention of members of an opposing armed force, without regard to whether the force is a formal armed force of a state or a non-state armed group like al Qaida. *See* Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949 (Third Geneva Convention), Art. 4 (contemplating detention of members of state armed forces and militias). Moreover,

---

[4] *See* Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas (Sept. 21, 2001), http://www.oas.org/OASpage/crisis/RC.24e.htm; Statement by North Atlantic Council (Sept. 12, 2001), http://www.nato.int/docu/pr/2001/p01-124e.htm; Statement by NATO Secretary General(Oct. 2, 2001), http://www.nato.int/docu/speech/2001/s011002a.htm.

this Court should defer to the President's judgment that the AUMF, construed in light of law-of-war principles, authorizes him to treat members of irregular forces as state military forces are treated for purposes of detention. *See* AUMF, § 2(a) (authorizing the President to use "all necessary and appropriate force" against those "he determines" planned, authorized, committed, or aided the September 11 terrorist attacks or harbored them); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (court construes customary international law de novo only in the absence of a "controlling executive or legislative act or judicial decision"). A deferential approach in this context is consistent with the commonsense understanding that "[t]he war power of the national government 'is the power to wage war successfully,'" *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (citation omitted), as well as the Supreme Court's directive in *Boumediene* that, "[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches." 128 S. Ct. at 2276 (citing *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

4. Accordingly, the President has authority under the AUMF, as informed by the laws of war, to detain any individual who was part of al Qaida or Taliban forces, the principal organizations that fall within the AUMF's authorization of

force.[5] *See Gherebi v. Obama*, 609 F. Supp.2d 43, 68-69 (D.D.C. 2009); *Hamlily v. Obama*, 616 F. Supp.2d 63, ___, 2009 WL 1393113, at *4-*8 (D.D.C. May 19, 2009).

Because the armed groups that the President is authorized to take action against under the AUMF neither abide by the laws of war nor issue membership cards or uniforms, any determination of whether an individual is part of these forces for purposes of detention must turn on an analysis of the individual's role. Furthermore, the nature of the al Qaida organization, which is made up of numerous terrorist cells acting with significant autonomy but taking direction from al Qaida leadership, *see* C. Bradley & J. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. at 2109 (collecting sources), underscores the need for the detention authority under the AUMF to extend to all individuals who are functionally part of the al Qaida organization and involved in its operations against the United States. The fact that al Qaida purposefully blurs the line between its members and innocent civilians, and that its members frequently conceal their affiliation, should not redound to its benefit.

---

[5] The AUMF does not limit the "organizations" it covers to al Qaida and the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al Qaida and the Taliban. The United States' detention authority under the AUMF also extends to individuals who would be detainable in analogous circumstances in a traditional international armed conflict under principles of co-belligerency. *See Hamlily v. Obama*, 616 F. Supp.2d 63, ___, 2009 WL 1393113, at *7 (D.D.C. May 19, 2009).

Accordingly, a determination that an individual is part of al Qaida forces for purposes of detention will necessarily be heavily fact-intensive and based on a totality of the circumstances. Evidence relevant to a determination that an individual was part of al Qaida or Taliban forces could range from formal membership, such as by swearing loyalty, to functional participation through means such as taking combat positions, attending training camps, or performing non-combat support functions for enemy forces. An al Qaida member who is "tasked with housing, feeding, or transporting al-Qaeda fighters," for example, "could be detained as part of the enemy armed force notwithstanding his lack of involvement in the actual fighting itself." *Gherebi*, 609 F. Supp.3d at 69. Similarly, an individual who "did not identify himself as a member" of al Qaida but nevertheless "undertook certain tasks within the command structure or rendered frequent substantive assistance to al Qaeda, whether operational, financial or otherwise," could be treated as part of the organization. *Hamlily,* 2009 WL 1393113, at *9.

In determining whether an individual is part of al Qaida or the Taliban for purposes of detention, furthermore, it is critical to recognize that the President's detention authority is not limited to persons captured on the battlefield in Afghanistan. Law-of-war principles contemplate the detention of members of hostile armed forces without regard to whether they have engaged in combat. *See* Third

Geneva Convention, Art. 4. Limiting the detention authority to persons captured on the battlefield would "contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005); *see also Ex Parte Quirin*, 317 U.S. at 37-38. An individual who effectively "enlists" in an armed group and plans to join the battle is also properly treated as part of the enemy force.

5. The AUMF, in addition to authorizing the detention of individuals who are part of enemy forces, also authorizes the detention of individuals who are not part of enemy forces but provide the type of substantial support that justifies detention in analogous circumstances in an armed conflict between states. Thus, the Third Geneva Convention contemplates detention of persons "who accompany the armed forces without actually being members thereof," including "civilian members of military aircraft crews," "supply contractors," and "members of labour units or of services responsible for the welfare of the armed forces." Art. 4(A)(4). As the International Committee of the Red Cross's Commentary on Article 4(A)(4) explains, the addition to this provision in the 1949 treaty was intended to encompass certain "classes of persons who were more or less part of the armed force" without being

formal members thereof. Int'l Comm. of the Red Cross, Commentary on Third Geneva Convention 64 (Pictet, ed. 1960); *see also, e.g.*, W. Winthrop, Military Law and Precedents 789 (2d ed. 1920) (contemplating detention of "civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways"). Just as al Qaida's refusal to distinguish its combatants justifies a less formal approach to determining who is "part of" its forces, that same refusal, together with al Qaida's non-state status, justifies a functional assessment of what type of "substantial support" by an individual who is not part of an enemy force justifies detention under the AUMF as informed by the laws of war. In addition to being an independent basis for detention for individuals who are not part of an enemy force, evidence of substantial support in a non-traditional conflict "may play a role under the functional test used to determine who is a 'part of'" al Qaida. *Hamlily*, 2009 WL 1393113, at *9.

B. The Government's Detention Authority Is Not Limited To Individuals Who Directly Participate In Hostilities.

Bensayah argues that, because he is not a member of a state armed force, the laws of war give him the protected status of a civilian, and permit his detention only if he "directly participated in hostilities against the United States as part of a non-State armed force." Br. 71-72. As every court to consider this argument has agreed,

however, the AUMF and the laws of war do not limit the United States' detention authority to the narrow category of individuals who are direct participants in hostilities. *Gherebi*, 609 F. Supp. 2d at 65 (argument "gets things exactly backwards"); *Hamlily*, 2009 WL 1393113, at *5-*7 (characterizing argument as "flawed"); JA 5519-5525, 2767-2768.

The plain text of the AUMF — which authorizes military action against the "organizations" and "persons" that "planned, authorized, committed, or aided" the 9/11 attacks — defeats Bensayah's argument that only those individuals directly participating in hostilities may be detained. The laws of war also recognize that military action may be taken against all persons who are part of armed groups. Common Article 3 of the Geneva Conventions provides standards for the treatment of persons who are part of armed forces in non-international armed conflict and have been rendered *hors de combat* by detention. Those provisions presuppose that states engaged in a conflict with a non-state armed group can detain individuals who are part of the group. Likewise, the Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, expressly applies to "other organized armed groups" participating in certain non-international armed conflicts, distinguishing those forces from the civilian population. Arts. 1(1), 13. The Commentary to that Protocol

explains that "[t]hose who belong to armed forces or armed groups may be attacked *at any time*." Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, at 1453 (Sandoz *et al.*, eds. 1987) (Commentary on Additional Protocols) (emphasis added).

Petitioner relies on the Third Geneva Convention and the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, but those sources merely require that individuals be treated humanely and afforded the protections given to prisoners of war. They do not purport to define the outer limits of the President's authority to detain individuals who are part of, or provide substantial support to, an enemy force. *See, e.g., Gherebi*, 609 F. Supp. 2d at 65-66; *Hamlily* 2009 WL 1393113, at *6.

Under petitioner's argument, the President would have no authority under the AUMF and the laws of war to detain lower-level members of al Qaida or the Taliban captured away from the battlefield. If taken literally, his argument would seem to prohibit the detention of high-level al Qaida leaders including bin Laden, so long as those leaders were not fighting at the time of their capture. This Court should decline petitioner's invitation to apply narrowly the rules governing humane treatment and prisoner-of-war status to define the outer limits of a state's detention authority — an

approach that would "cripple" the President's "capability to effectively combat" al Qaida and Taliban forces, *Gherebi*, 609 F. Supp.2d at 66, and would also give non-state armed forces an incentive to camouflage themselves as civilians, thereby posing an even greater threat to the communities from which they launch attacks against U.S. and coalition forces. *Cf.* Commentary on Optional Protocols 619 (recognizing that "members of armed forces feigning civilian non-combatant status are guilty of perfidy").

C. Bensayah's Conduct As An Al Qaida Travel Facilitator Providing Critical Recruiting, Transportation, and Logistical Support To Enemy Forces Is A Lawful Basis For Detention Under The AUMF.

The district court found that Bensayah was an al Qaida travel facilitator who provided "direct support" to the armed group in its conflict with the United States in Afghanistan. JA 3267, 7133. The district court's factual findings justify Bensayah's detention under the AUMF, as construed in light of the laws of war.

The district court found that Bensayah "intended to facilitate the movement of men into Afghanistan * * * to join the fight against the United States." JA 7156. The court also found that, in anticipation of the U.S./coalition invasion of Afghanistan, Bensayah intended to facilitate the movement of people out of Afghanistan into Bosnia, including both a number of people before his departure from Bosnia and also 30-40 additional travelers once Bensayah arrived in Tehran, Iran, en route to

Afghanistan. JA 7157, 7150. And the court found that Bensayah himself planned "to take up arms against the United States," JA 3267-3268, and that Bensayah had also encouraged others to fight against the United States and offered to make the necessary arrangements in Afghanistan to receive them. *See* 7146, 7151, 7153.

Furthermore, the district court underscored the extensive record evidence that suggests Bensayah was in communication with al Qaida leaders and operatives. JA 7151-7152 (emphasizing evidence of Bensayah's "connections to al-Qaeda"). As the district court found, there was evidence "directly linking Bensayah" to al Qaida travel facilitator [redacted], supporting an inference that communications between the men took place. JA 7151. The district court also noted circumstantial evidence that Bensayah was in contact with other al Qaida members or operatives, including evidence that his phone number was found in multiple al Qaida locations including a former residence of Osama bin Laden. JA 7152. And the district court identified evidence showing Bensayah's critical skills in obtaining and traveling with fraudulent passports, JA 7153-7154, as well as evidence of his prior involvement in terrorist and militant activities as a jihadist. JA 7155.

Taken together, and as set out in greater detail below (at pp. 34-38, *infra*), the evidence demonstrates that Bensayah played a critical role in the al Qaida force by recruiting fighters and assisting with their transport to the battlefield in Afghanistan,

including by procuring fraudulent passports to enable them to travel without detection. Bensayah also intended to take up arms himself to fight as part of the enemy force. And Bensayah planned to facilitate the travel of individuals away from the area of anticipated hostilities. This conduct constitutes the type of substantive and critical assistance to al Qaida armed forces that is a lawful basis for detention under the AUMF, as informed by the laws of war. *See, e.g., Hamlily*, 2009 WL 1393113, at *9 ("frequent substantive assistance to al Qaeda, whether operational, financial, or otherwise," can establish that individual is a "part of" the group and subject to detention); *Gherebi*, 609 F. Supp.2d at 69 (reasoning that "al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters" can be detained as part of armed force).

Bensayah's role in al Qaida, and the nature of his responsibilities, correspond to the roles played by members of state armed forces such as recruiters and logistical officers, who facilitate the enlistment and travel of military recruits. The laws of war do not prohibit the detention of the military captain and crew of an enemy ship used to transport combatants to an area of hostilities, regardless of whether fighting forces are aboard the ship at the time it is seized. Similarly, the military pilot of an enemy transport plane used to ferry troops to the front line may be detained regardless of whether there are combatants aboard his plane when he is taken into custody.

Although petitioner emphasizes that he was not in Afghanistan when detained by U.S. officials, proximity to the fighting in Afghanistan is not determinative of the detention authority conferred by the AUMF. This is particularly true in the context of the armed conflict with al Qaida, in which the "battlefield" is not easily defined. *See also Khalid*, 355 F. Supp. 2d at 320 (observing that "the 9/11 attacks were orchestrated by a global force operating in such far-flung locations as Malaysia, Germany, and the United Arab Emirates"). Not only is facilitation of the travel of fighters more dispersed for an organization such as al Qaida, it is an especially critical component of al Qaida operations, the fighting force of which is composed of individuals from many countries, who may have to travel great distances to join the hostilities.

Petitioner also incorrectly contends that he cannot be detained based on evidence that he *planned* to join hostilities and to act as a travel facilitator for other fighters, unless his conduct actually "advanced [the] enemy's military objectives." Br. 24. But the basic purpose of military detention is to prevent detainees from "taking up arms" against U.S. and coalition forces. *Hamdi*, 542 U.S. at 518; *see also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (purpose of detention "is to prevent the captured individual from serving the enemy"); *cf.* AUMF, § 2(a) (empowering the President to act to "prevent any future acts" of terrorism against the United States").

That rationale applies fully to an individual who has agreed to join hostilities and has recruited others to do so; has agreed to facilitate the travel of fighters to the battlefield; and has taken steps to effectuate his plan by communicating with al Qaida operatives and seeking travel documents — but is detained before his plans can be fully effectuated. Nothing in the AUMF suggests that Congress intended to disable the Executive from detaining such persons until they succeed in reaching the battlefield and attacking U.S. forces.

II. THE DISTRICT COURT'S FINDINGS THAT BENSAYAH WAS AN AL QAIDA FACILITATOR WHO PLANNED TO FACILITATE THE TRAVEL OF FIGHTERS TO AFGHANISTAN, TO FACILITATE TRAVEL OF INDIVIDUALS LEAVING AFGHANISTAN, AND TO TAKE UP ARMS HIMSELF, WERE NOT CLEARLY ERRONEOUS.

A. The District Court's Factual Findings Are Not Clearly Erroneous.

When viewed in the light most favorable to the district court's judgment, as this Court is required to do, *see, e.g., United States v. Thomas*, 864 F.2d 188, 191 (D.C. Cir. 1988), the evidence amply supports the district court's factual findings.

2 [redacted]

Bensayah brought to his work as an al Qaida facilitator extensive experience in procuring and traveling on fraudulent passports. He had as many as ten passports in his possession at the time of his arrest in October 2001, many of which had been fraudulently obtained and/or altered. JA 383-384, 7153. The government produced specific identifying details for seven passports found when Bensayah was arrested — some of which he claimed to have previously destroyed or abandoned, and one of which was issued just two months before his arrest. *See* JA 6079-6107, 207, 522, 1295; *see also* JA 1294 (Bensayah's testimony that he worked for four years as a civil registry clerk preparing birth and death certificates). Bensayah used his "multiple fraudulent passports" to avoid detection and possible deportation when he traveled around the Middle East and Europe. JA 7154; *see also* JA 387 (intelligence report recounting Bensayah's testimony in Bosnian criminal proceedings that he obtained

multiple fraudulent passports to escape detection and possible deportation while traveling throughout the Middle East, and his guilty plea to charges of document forgery). As petitioner's own expert testified, the use of fraudulent travel documents "is indeed correlated to terrorist facilitation." JA 1357. This evidence of possession and extensive use of multiple fraudulent passports corroborated and supported the [redacted] that Bensayah was an al Qaida travel facilitator. *See* JA 7154, 3267.

Bensayah was also an experienced participant in other armed conflicts prior to the conflict between al Qaida and U.S. and coalition forces in Afghanistan. In the words of acknowledged al Qaida terrorist Umar Faruq, Bensayah was a "veteran of the jihad" who "always searched for different places to go and fight." JA 7155, 371. Bensayah had gone to Bosnia in 1993 as a mujahedin, and then to Derunta, Afghanistan, the location of a terrorist training camp, in 1995, and he planned in 2001 to go back to Afghanistan to fight on behalf of enemy forces. *See* JA 370-371, 890-891, 7155.

Bensayah had direct ties to al Qaida, including communications with [redacted] and other al Qaida operatives. Bensayah's name and phone number were found in [redacted]

by Bosnian authorities in October 2001. JA 7152, 220, 705. Bensayah's phone number was also listed on a document found in December 2001 in a former residence of bin Laden in Afghanistan, as well as on materials seized from suspected al Qaida premises in Kabul, Afghanistan and the fort at Koh-I-Khan Nashin in the Helmand province in late 2001. *See* JA 7152, 220, 554, 561, 3072, 3075.

Finally, Bensayah's own account of his activities, including his denial of working as a travel facilitator for al Qaida and his claim never to have met or had any contact with [redacted], was proven to be not credible. Bensayah's account of his activities between 1990 and 1995— that he lived in Mecca on alms at the Noble Sanctuary — was contrary to the account given by Faruq, JA 370-371, characterized by another petitioner in this case as "almost impossible," JA 231, and recanted by Bensayah himself. JA 435. Circumstantial evidence of contacts between Bensayah and [redacted] was also inconsistent with Bensayah's repeated claims that he never met or communicated with [redacted]. JA 212, 215-216, 218, 223.

In the face of this evidence, the district court did not commit clear error in finding that Bensayah was an al Qaida travel facilitator who, in anticipation of the imminent invasion of Afghanistan by U.S. and coalition forces, planned to facilitate the travel of enemy fighters to Afghanistan, to facilitate the travel of persons from

Afghanistan to Bosnia, and to travel himself to join the hostilities against U.S. and coalition forces.

B. Petitioner's Challenges To The District Court's Factual Findings Are Meritless.

Petitioner challenges the district court's reliance on [redacted], arguing that "raw" intelligence cannot support detention under this Court's ruling in *Parhat*, Br. 25-29, and also cannot be used to corroborate other intelligence reports, Br. 29-30, 42-43. Even assuming for the sake of argument that *Parhat*'s analysis under the Detainee Treatment Act applies to the different context of habeas review, *Parhat* expressly recognizes that an intelligence report can be relied upon so long as it is presented "in a form, or with sufficient additional information," to permit an evaluation of its reliability. 532 F.3d at 849. Although *Parhat* refused to rely on an unsourced report to corroborate another unsourced report without additional information demonstrating reliability, 532 F.3d at 849, the Court did *not* hold that intelligence reports as a class are inherently unreliable. In the analogous Fourth Amendment context, the Court has relied on one informant's hearsay statement to corroborate another informant's statement, although neither was viewed as reliable standing alone. *See United States v. Laws*, 808 F.2d 92, 100-103 (D.C. Cir. 1986).

[redacted]

[redacted] and set out the reasons why the report's statements about Bensayah were

reliable. [redacted] The court also carefully detailed the substantial corroboration of statements in [redacted] not only by intelligence reports but also by other evidence, including [redacted]

Petitioner argues that, under *Parhat*, there was not an adequate basis to credit [redacted] statement that Bensayah planned to facilitate travel for al Qaida. Br. 28-29. In evaluating the credibility of an intelligence report, however, the relevant question is whether corroborating evidence suggests that the report is reliable, *Parhat*, 532 F.3d at 847-848, *not* whether each statement in the report is independently corroborated. *See also Illinois v. Gates*, 462 U.S. 213, 244-245 (1983) (holding that extrinsic evidence showing that "an informant is right about some

---

[6] Citing expert witness testimony, petitioner asserts that "'onward travel' from Iran to Afghanistan would have been infeasible in late September 2001." Br. 33-34. The actual testimony was that "[t]ravel in and out of Afghanistan was difficult by the end of September 2001," JA 1360 — underscoring the crucial role played by travel facilitators.

things" establishes that he is "more probably right about other facts," even if the evidence does not corroborate informant's claims of illegal conduct).

Petitioner also argues that his possession of and travel with multiple fraudulent passports might have been innocent or, at most, evidence of illicit activity other than terrorism. Br. 32-34. But Bensayah's possession of multiple fraudulent passports, as well as his acknowledged and widespread use of fraudulent passports to escape detection when traveling, were clearly relevant to his ability to serve as an al Qaida facilitator. *See* JA 1357 (testimony of petitioner's expert witness) ("Travel fraud is indeed correlated to terrorist facilitation.").

Although petitioner challenges the district court's reliance on evidence of Bensayah's activities between 1990 and 1995, Br. 35-36, his credibility was significantly undermined by discrepancies in his account of those years. Bensayah claimed never to have traveled to Afghanistan, JA 219, for example, but Umar Faruq stated that he encountered Bensayah in Derunta, Afghanistan, the location of a terrorist training camp. JA 370-371.

Petitioner also asserts that the district court erred in relying on Faruq's statement because it might have been the product of coercion, Br. 36-39, but the district court was not clearly erroneous in rejecting this claim. There was no evidence that Faruq was mistreated in the interview reflected in the government's exhibit, *see*

JA 6285, and government counsel represented to the court that he had "no knowledge that the information [from Faruq] that we are relying on is the product of anything that would be considered harsh interrogation." JA 6573. The only evidence submitted by petitioner in support of the argument that Faruq's testimony was coerced were a newspaper article and a book, which themselves relied solely on hearsay statements by detainees' counsel and an interview with Faruq the reliability of which was highly questionable. *See* JA 6290-6295, 6486-6487, 6575-6580, 1395. The district court did not commit clear error in crediting Faruq's testimony in the face of this record.[6]

Petitioner also suggests that Faruq's testimony might have been about another "al-Majd," Br. 39, but the interview report indicates that the purpose of the interview was to ascertain Faruq's knowledge of "Bensayah Belkacem, aka, Al Majd," JA 370, suggesting that some means of identification occurred. Faruq also testified that he knew Bensayah as "Abu Majd al Jaza-iri," JA 370 — *i.e.*, "Abu Majd" the Algerian, *see* JA 2953 — and provided other details confirming that he was referring to Bensayah, including that Al Majd "would always talk about going back to Bosnia to

---

[6] We show below (at pp. 54-55, *infra*), that the district court did not abuse its discretion in denying petitioner's overbroad discovery request for every statement made by Faruq over a three-year period of confinement and all other information relating to his detention.

marry a woman and obtain a Bosnian passport," and that he talked frequently about "another Algerian who was his best friend but got killed." JA 370-371. In any event, any error by the district court in relying on Faruq's testimony was harmless in light of significant additional evidence undermining Bensayah's credibility.[7]

Petitioner also challenges the district court's reliance on circumstantial evidence linking him to [redacted] and al Qaida. Br. 46-48. Evidence that Bensayah had [redacted] phone number and that Bensayah's phone number were found in [redacted] personal address book and a residence of bin Laden as well as another suspected al Qaida location supported the inference that Bensayah communicated with multiple al Qaida operatives — thereby corroborating the statement in [redacted] that petitioner was an al Qaida facilitator. Petitioner also suggests that his contact with [redacted] might have been innocent, Br. 47-48, but the evidence before the district court showed that Bensayah repeatedly denied ever meeting or communicating with [redacted]. *See, e.g.*, JA 212, 215-216, 218, 223.

Finally, petitioner argues that, even if Bensayah was connected to [redacted], the government failed to prove that [redacted] was an al Qaida facilitator.

---

[7] *Compare* JA 213, 216, 220, 223, 433 (Bensayah's repeated claims never to have used the name "Abu Majd"), *with* JA 260 (Nechle identified Bensayah as "Abu Majid"); JA 295, 304 (Boumediene identified Bensayah as "Majd" or "Abu Majd"); *see also* JA 2947-2948 (noting that translation of Arabic names into English can lead to somewhat different spellings).

Br. 48-51. In particular, petitioner challenges the district court's reliance on a statement in the "9/11 and Terrorist Travel" Report, JA 2957-2985, which petitioner alleges was the product of coercive interrogations. The government no longer relies on the statement in the "9/11 and Terrorist Travel" Report quoted by the district court that [redacted] was "Al Qaeda's most seasoned travel facilitator," or on other statements in the "9/11 and Terrorist Travel" Report sourced to interrogations of [redacted] after his capture by the United States, in defending the lawfulness of petitioner's detention. However, the additional evidence predating [redacted] detention by U.S. officials that connects [redacted] to al Qaida, *see, e.g.,* JA 3139-3140, 3144, is sufficient to support the district court's judgment without consideration of those statements.

C. The Post-Judgment Disclosures To Petitioner Do Not Support Reversal.

In addition to challenging the district court's factual findings, Bensayah asserts that the material disclosed to Bensayah post-judgment undermines the factual foundation for the district court's decision. Br. 17.

As an initial matter, any consideration of the new information by this Court would be premature. Petitioner's Rule 60(b) motion is currently pending in district court, where the government has opposed a new trial on the ground that the new material is not likely to change the outcome. If and when the district court issues a

ruling, the parties can determine whether to appeal and, if so, whether to seek consolidation with this appeal.

[redacted]

D. The District Court Did Not Err In Making Factual Findings Under A Preponderance-Of-The-Evidence Standard.

Bensayah challenges the district court's use of a preponderance-of-the-evidence standard to make factual findings in support of detention, Br. 80-84, but his argument is squarely foreclosed by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). A majority of the Court in *Hamdi* agreed that the Constitution was satisfied by proceedings in which the government presented "credible evidence that the habeas petitioner meets the enemy-combatant criteria." *Id.* at 534 (plurality op.); *see also id.* at 590 (Thomas, J., dissenting) (reasoning that no process beyond "good-faith executive determination" is required). *Hamdi* also held that the Constitution would be satisfied by permitting a U.S. citizen to challenge his detention as an enemy

combatant in a status determination hearing under Army Regulation 190-8, *see id.* at 538, 590, which specifically provides for application of a "preponderance of evidence" standard. Ch. 1, § 1-6(e)(9) (1997).[8]

Petitioner relies for a heightened standard of proof on cases involving pre-trial criminal detention or civil detention outside of the military context, but the Supreme Court has explicitly distinguished that setting from the very different context of detention "in times of war." *United States v. Salerno*, 481 U.S. 739, 748 (1987). Military detention during the armed conflict with al Qaida seeks to protect the United States and U.S. nationals from an enemy armed force capable of catastrophic and large-scale terrorist attacks. In this context, the risk of error tips decidedly in favor of security. Because of the difficulties inherent in gathering and presenting information in this midst of an armed conflict, furthermore, adoption of a heightened standard of proof would transfer a disproportionate risk of error to the United States

---

[8] Army Regulation 190-8 implements Article 5 of the Third Geneva Convention, which requires that a "competent tribunal" determine the status of an individual for whom there is "doubt" about his entitlement to be treated as a prisoner of war. Like the United States, Canada has implemented Article 5 through regulations that apply a "balance of probabilities" standard to decide status. *See* Y. Naqvi, *Doubtful Prisoner of War Status*, 84 RICR 571, 588-589 & n.88 (2002) (citing Art. 13(g), Prisoner-of-War Status Determination Regulations, SOR/91-134, Department of Justice Canada, 1 Feb. 1991)).

— in particular, to U.S. forces abroad. Petitioner's proposed heightened evidentiary standard should be rejected.

E. If This Court Cannot Affirm, The Court Should Order Remand To Permit Consideration Of Additional Evidence.

In the government's view, the record evidence amply supports the district court's factual findings and its ultimate judgment denying the writ of habeas corpus to petitioner. If this Court were inclined to disagree, however, the appropriate disposition of the appeal would not be to direct the district court to issue the writ, but rather to remand for further factfinding. In addition to the information considered by the district court in upholding Bensayah's detention, the government, as part of the proceedings below, tendered substantial additional evidence *in camera* and *ex parte*, which the district court declined to consider. [redacted]

Because petitioner's counsel were not provided with the information (which was classified at a higher level than the lead attorneys' security clearances), the district court declined to review it. If this Court concludes that the current record is insufficient to support detention under the government's refined detention standard, the case should be remanded so that the district court can consider in light of this Court's decision in *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009), the

additional information submitted by the government *ex parte* and *in camera*, before this Court makes a final determination whether Bensayah's detention is lawful.

III. THE PROCEDURES EMPLOYED BY THE DISTRICT COURT PROVIDED PETITIONER WITH A FULL AND FAIR OPPORTUNITY TO CONTEST THE LAWFULNESS OF HIS DETENTION.

In addition to contesting the factual findings of the district court, Bensayah challenges numerous procedures employed by the district court in the course of adjudicating his habeas petition. As the Supreme Court recognized in *Boumediene*, questions regarding the appropriate procedures for habeas review "are within the expertise and competence of the District Court to address in the first instance," 128 S. Ct. at 2276, and the district court's rulings were neither the product of legal error nor an abuse of discretion.

A. The District Court Did Not Err Or Abuse Its Discretion In Its Disclosure And Discovery Rulings.

At the outset, it is critical to recall the directive of the Supreme Court that any "factfinding process" in reviewing the basis for wartime detention must be "prudent and incremental." *Hamdi*, 542 U.S. at 539 (plurality op.); *see also Boumediene*, 128 S. Ct. at 2276 (emphasizing the need for deference to the political branches in reviewing the "procedural and substantive standards used to impose detention to prevent acts of terrorism").

Even in a run-of-the-mill habeas case, discovery is entirely discretionary, *see Harris v. Nelson*, 394 U.S. 286, 293-294 (1969); Habeas Rule 6(a), and the scope of habeas review is particularly narrow in cases involving the military during armed conflict. *See Burns v. Wilson*, 346 U.S. 137, 139 (1953). *Hamdi* specifically rejected the trial court's imposition of procedures akin to those "that accompan[y] a criminal trial," including "extensive discovery," 542 U.S. at 528, 531-533, and *Boumediene* did not identify discovery as one of the critical, constitutionally-compelled elements of adequate habeas review. 128 S. Ct. at 2270.

The *Hamdi* plurality also noted that the proceedings may need to "be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U.S. at 533; *cf. In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp.2d 85, 105 (D.D.C. 2007) (recognizing that discovery process "afford[s] [our enemies] a mechanism" to obtain information "about military affairs and disrupt command missions"). As we next demonstrate, the standards adopted by the district court for disclosure and discovery properly balance "the national security interests of the United States during the war with the civil liberty interests of [] aliens to be free from unlawful detention as enemy combatants." JA 7114.

1. Under the district court's case management order, the government was required to disclose to petitioner "any evidence contained in the material reviewed in

developing the return for the petitioner, and in preparation for the hearing for the petitioner, that tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention." JA 959. That disclosure obligation is fully consistent with providing a detainee the opportunity to challenge "the sufficiency of the Government's evidence" and to "supplement the record on review" with additional "exculpatory evidence." *Boumediene*, 128 S. Ct. at 2270. At the same time, however, it comports with the Supreme Court's instruction that habeas proceedings should be tailored to protect the government's security and practical interests, and "need not resemble a criminal trial." *Boumediene*, 128 S. Ct. at 2269.

Petitioner argues that the government should have been required to search every department and agency for potentially exculpatory material, not just the material reviewed in developing the government's factual return and preparing for hearings in the case. Br. 58-60. No habeas court has imposed such a sweeping obligation, which would impose significant burdens on the military while conferring limited benefits, at best, on petitioner. Habeas review of detention is intended to allow a detainee to challenge the government's evidence and to submit his own best evidence to the Court, *Boumediene*, 128 S. Ct. at 2270, not to provide free-ranging access to the government's files. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), which petitioner relies on, is not a helpful guidepost for the appropriate scope of

disclosure or discovery in habeas proceedings. That decision addressed the requirements of a specific regulatory and statutory scheme, not at issue here, as well as a detention determination that was not the product of an adversarial process, unlike the habeas proceedings in the trial court.

Furthermore, petitioner's counsel abandoned any request for a broader scope of disclosure in the district court, where he agreed that the information reviewed by the government in preparing the factual return was "properly characterized as a good starting point," and explained that his concerns were to ensure government compliance and an ongoing obligation to disclose. JA 3448-3452; *see* JA 3452 ("[W]e are not asking them to have to go out and affirmatively search to find everything everywhere."). Especially against this backdrop, the district court did not err or abuse its discretion in limiting the disclosure obligation to information reviewed by the government in the course of litigating the habeas proceedings.[9]

In addition to challenging the scope of the government search for exculpatory evidence, petitioner also challenges the scope of information required to be disclosed under the district court's case management order. But the district court standard is

---

[9] Petitioner also argues that the district court should have required Department of Justice attorneys to undertake an independent review of information held by other agencies, Br. 60, but he does not identify any request for such a procedure in the district court.

essentially same standard advocated by petitioner. *Compare* JA 959 (requiring disclosure of evidence that "tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention"), *with* Petitioners' Joint Opening Memorandum Regarding Habeas Procedures 32, Dkt. 129 (asserting that government should be required to disclose "evidence that tends to undermine the Government's theory of a Petitioner's continued detention"). Although petitioner claims that the standard is inconsistent with *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009), *Al Odah* concerns only "counsel's access to classified information contained in factual returns filed by the government in support of the petitioners' detention." *Id.* at 548 n.4. It does not purport to establish a standard for mandatory disclosure in habeas proceedings of information not relied upon by the government. The district court's case management order provided petitioner with extensive mandatory disclosure as well as the opportunity to seek and obtain for-cause discovery, and was not an abuse of discretion.

Petitioner likewise errs in claiming that the inadequacy of government disclosure is demonstrated by additional information provided by the government post-judgment. Br. 61. That information was not reviewed by counsel in preparing or litigating the habeas petition in this case, and accordingly was not required to be disclosed under the district court's case management order. Furthermore, some of

that information, [redacted], did not exist at the time of the habeas proceedings in this case. In any event, the fact that isolated material is inadvertently omitted from production does not establish that a search for documents was inadequate.

2. Petitioner argues that the district court imposed unduly stringent conditions on discovery, *see* Br. 62-63, but the standard adopted by the district court was wholly appropriate. The district court permitted discovery by leave of the court "for good cause shown," following a written request for discovery that (1) was narrowly tailored; (2) specified why the request was likely to produce evidence relevant and material to the petitioner's case; (3) specified the nature of the request, such as interrogatories or document requests; and (4) explained why the burden on the government to produce was neither unfairly disruptive nor unduly burdensome. JA 959. This standard is consistent with the general rule in habeas proceedings that discovery requires leave of the court, based on a showing of good cause. *See* Habeas Rule 6(a). Requiring the petitioner to show that the discovery sought will not be "unduly burdensome" or "unfairly disruptive" is also consistent with the directive in *Hamdi* to proceed with "caution" and take "prudent and incremental" steps, 542 U.S. at 539, as well as the more general principle that discovery should not be permitted

in habeas proceedings if it would be unduly "burdensome and vexations." *Harris*, 394 U.S. at 297.

Nor did the district court abuse its discretion in applying this discovery standard. Petitioner's counsel submitted ten motions seeking discovery, comprising over 80 individual requests for documents and information, and the district court held more than 50 hours of hearings to address and resolve these requests. *See* JA 3261 (noting that petitioner "was successful in a number of instances, and the Court ordered the Government to produce additional non-exculpatory information"). In each ruling challenged by petitioner, the district court acted within its broad discretion in denying discovery for which petitioner had failed to make the necessary threshold showings.

Petitioner contends that he was improperly denied discovery relating to the source of a critical intelligence report, [redacted] Petitioner also requested an order barring the government from using at trial any information that was not disclosed in this discovery. JA 1027. Because the

petitioner had not filed a traverse at the time this discovery request was made, and the government accordingly did not know what factual matters might be in dispute, the government complained that the request "put[] the cart before the horse" and seemed to be aimed not at obtaining discovery, but instead at restricting the government's ability to produce responsive information at the rebuttal stage of proceedings. JA 4836-4838. Furthermore, and as the district court noted, the lack of source or corroborating information would bear directly on the weight to be given the intelligence reports. JA 4851. In addition, the government offered to provide source information to the district court *in camera* and *ex parte*, if the court found for a particular intelligence report that it was necessary to have additional information about the source. JA 4854.[10] Under these circumstances, the district court did not abuse its discretion in denying petitioner's sweeping, omnibus request for all corroborating information relating to the sources of dozens of intelligence reports.

Similarly, petitioner challenges the denial of discovery relating to detainee Umar Faruq, from whom the government sought to introduce a single interview report

---

[redacted]

evidencing Bensayah's lack of credibility. Br. 64-65. That discovery request sought disclosure of all reports from any interrogation of Faruq during the three-year period of his detention, as well as all documents "relating to Mr. Faruq's capture, the conditions of his confinement, and information including the dates of any harsh or coercive methods of interrogation used." JA 980. When the district court inquired whether discovery could be focused in any manner, such as by determining whether Faruq's statements in interrogation actually conflicted with petitioner's own account of the facts, petitioner's counsel responded that the only way to evaluate Faruq's testimony was to examine the universe of all statements Faruq had ever made in any interrogation, and the conditions in which they were made. JA 4311-4313. Again, the district court did not abuse its discretion in rejecting this request for massive amounts of classified material, virtually none of which could be expected to relate to Bensayah and for which no tailored showing was made.

Finally, petitioner challenges the district court's refusal to compel a government search of 19 additional intelligence reports, which the government had not relied upon, for potentially exculpatory material. Br. 59-60. The government objected to this request because petitioner had not "articulate[d] why he believes these 19 [documents] might contain material that's relevant and material to his ability to prepare the traverse nor why he believes there may be exculpatory information in

these documents." JA 4210-4211. The district court's denial of petitioner's request was fully justified by petitioner's failure to make a targeted showing of need.

B. The District Court Did Not Abuse Its Discretion In Allowing The Government To Introduce Additional Evidence On Rebuttal, Or In Denying Petitioner Sur-Rebuttal And Rebuttal-Stage Discovery.

Bensayah also asserts that he was "ambush[ed]" by the government's rebuttal case and improperly denied the opportunity to take discovery following rebuttal or to submit additional evidence in sur-rebuttal. Br. 53-57. Bensayah has waived any challenge to the procedures followed by the district court in the rebuttal stage of proceedings, which were not in any event an abuse of discretion or the product of legally error.

1. Bensayah was specifically offered an opportunity to preview all relevant rebuttal material *prior to trial*, but he rejected that choice and elected instead to wait to see the evidence when it was introduced in the rebuttal stage of proceedings. On November 4, 2008, before the trial began, the district court proposed requiring the government to submit its entire prospective rebuttal case *in camera* and *ex parte*, for the court to review and determine what evidence "should be brought to the attention of detainee counsel in advance of the hearings so that they can do whatever [] due

diligence they need to do before the hearing starts." JA 5786.[11] Bensayah objected to this proposal, however, on the theory that evidence would be before the district court "before it is made available * * * to Petitioner's counsel." JA 5791.

The district court emphasized that the "operating principle behind all classified information usage is need-to-know," and that a similar review process might apply even at the rebuttal stage of proceedings. JA 5791-5792. However, the court offered to let Bensayah "take your chances" by waiting to see if "the Government decides it's going to put [evidence] in its rebuttal case," and, if so, trying at that stage of proceedings to "convince" the district court that "we need to suspend the hearing for a day or two." JA 5793. Bensayah's counsel indicated that he preferred to wait, even if this meant he would see rebuttal evidence for the first time "a day before [the government] would introduce it" or even "the same day." JA 5793-5794. Notably, at the time he made this election, Bensayah was aware that the case management order did not provide for sur-rebuttal and that the order required all discovery to be completed before the hearing began. JA 959. In the face of this election, this Court should reject Bensayah's argument that he was given an inadequate opportunity to review rebuttal evidence or seek additional discovery.

---

[11] The procedure proposed by the district court was similar to the process for *in camera* and *ex parte* review of classified information described in *Bismullah v. Gates*, 501 F.3d 178.

2. The district court acted within its broad discretion over trial management in allowing the government to introduce evidence on rebuttal relating to [redacted] connection to al Qaida. *See generally Geders v. United States*, 425 U.S. 80, 86-87 (1976). Petitioner was clearly on notice that the government intended to link Bensayah to [redacted], whom the government characterized as "a senior al-Qaida operative," JA 133, and had ample opportunities to submit evidence in response. *See also* JA 7064 (district court questioning whether petitioner is "really contesting that [redacted], a high-value detainee down in Guantanamo, is a senior al-Qaeda * * * operative?"). Furthermore, the district court's case management order specifically permitted the government to submit "either additional or rebuttal evidence" following the close of petitioner's case. JA 960.

3. The district court did not abuse its discretion in denying the motion for additional discovery petitioner filed on the penultimate day of trial — which the court denied on the basis that the discovery sought was unnecessary to petitioner's case, *not* because the court refused to consider any discovery request made after the beginning of trial. *See* JA 6914-6915 ("The court * * * has made its hallmark in this instance flexibility" and "considered [] and looked at" this request); *cf.* Br. 47. Petitioner sought discovery relating to the government's rebuttal case, but had previously received some of the same exhibits at an earlier stage of the proceedings. *See* JA

6671, 6675, 2852-2903. Furthermore, although petitioner argued that he needed discovery relating to Zubaydah, his effort to obtain such discovery prior to the trial was stymied when Zubaydah's counsel indicated that his client would not answer interrogatories, *see* JA 4527-4528, 4658-4659, 6943-6944, and petitioner did not pursue additional discovery at that time. When he belatedly did so near the end of trial, many requests were highly attenuated to the key issues in the case, *e.g.,* JA 3155, 3144 (seeking al Qaida records indicating that [redacted] was previously member of the Islamic Movement Party of Egypt"); JA 3156, 3070-3111 (seeking entire unredacted address book), and others sought highly sensitive source information without any tailored showing of need. *See, e.g.,* JA 3155-3156; *cf. Boumediene*, 128 S. Ct. at 2276 (noting government's "legitimate interest in protecting sources" and noting that district court should "use its discretion to accommodate this interest to the greatest extent possible").

4. The district court did not abuse its discretion in refusing two declarations proffered by petitioner as sur-rebuttal evidence — which was not provided for under the case management order, *see* JA 960. One declaration was prepared by counsel for

[redacted]

process that could take days or weeks. *See* JA 6831, 6835-6836. The declaration was submitted without the government's consent at what the district court characterized as "the eleventh hour and 50th minute" of trial, JA 6941, and the district court noted that the declaration was likely to have minimal probative value as the lawyer's hearsay statement about what his client allegedly told him. JA 6942.

The second declaration was from petitioner's "intelligence expert," Paul Pillar, explaining his view why intelligence reports relied on by the government were unreliable. *See* JA 3187-3189, 6937-6938. The court did not abuse its discretion in denying admission of the declaration, which was both of limited probative value and also duplicative of an earlier declaration. *See* JA 6938, 1385-1387.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

MICHAEL F. HERTZ
Deputy Assistant Attorney General

DOUGLAS N. LETTER
/s/ Thomas M. Bondy
THOMAS M. BONDY
ROBERT M. LOEB
/s/ Sharon Swingle
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530 0001

JULY 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 13,745 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2009, I filed and served the foregoing Corrected Brief for Respondents-Appellees by delivering an original and fourteen copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

Stephen H. Oleskey
Robert Kirsch
Gregory P. Teran
Mark P. Fleming
Joshua D. Jacobson
Allyson J. Portney
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, MA 02109

Seth P. Waxman
Paul R.Q. Wolfson
Robert J. McKeehan
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

Douglas F. Curtis
Paul M. Winke
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, NY 10022