UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center,

Respondent.

RESPONDENT'S BRIEF REGARDING THE PARAMETERS OF THE EVIDENTIARY HEARING[1]

In accordance with the Court's scheduling order of December 20, 2019 (ECF No. 58), Respondent Jeffrey Searls files this brief regarding the parameters of the upcoming evidentiary hearing on matters of 8 U.S.C. § 1226a(a)(6).

I. Burden of Proof

Petitioner bears the burden of proving by a preponderance of the evidence that his detention is unlawful. "[T]he traditional rule in habeas corpus proceedings is that the petitioner must prove, by the preponderance of the evidence, that his detention is illegal." *Bolton v. Harris*, 395 F.2d 642, 653 (D.C. Cir. 1968); *see, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) ("Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later

[1] Respondent respectfully maintains a standing objection to the convening of an evidentiary hearing, as all relevant factual information necessary for judicial review is contained within the administrative record. *See, e.g.*, Respondent's Supplemental Memorandum of Points & Authorities Concerning Petitioner's Detention under 8 U.S.C. § 1226a at 24-31 (ECF No. 30). By arguing for parameters of an evidentiary hearing, Respondent does not concede that an evidentiary hearing is appropriate.

seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel."); *Liuksila v. Turner*, 351 F. Supp. 3d 166, 174 (D.D.C. 2018) (in an extradition-based habeas proceeding, "the petitioner[] must prove by a preponderance of the evidence that he is being unlawfully held").

Respondent acknowledges that the Court found that detention under the regulation, 8 C.F.R. § 241.14(d), raised constitutional concerns because, in the Court's view, that regulation failed to impose a clear and convincing evidence standard on the government. Order at 24 (ECF No. 55). However, the Court did not hold that a preponderance standard could *never* satisfy the Due Process Clause. To the contrary, the Court appreciated that due process is "a flexible concept that varies with the particular situation." *Id.* at 20 (quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)). The Court applied that principle to note that the preponderance standard in the regulation's context "increases the risk of inappropriate confinement and fails to impress upon the factfinder the importance of the decision to deprive an individual of his or her liberty." *Id.* at 24.

Here, the statute provides a robust procedure not available with the regulation: judicial review by a federal judge, who then serves as a second "factfinder" to be "impress[ed] upon." *Id.*; *see* 8 U.S.C. § 1226a(b)(1). The availability of Article III evidentiary review here is a countervailing due process consideration that makes placing the burden on Petitioner constitutionally valid. Having factual habeas review is a significant procedural benefit for Petitioner. It provides "a mode for the redress of denials of due process of law." *Fay v. Noia*, 372 U.S. 391, 402 (1963); *see, e.g.*, *Heikkila v. Barber*, 345 U.S. 229, 236 (1953) (explaining that habeas corpus is a form of procedural due process itself, as its use is "the enforcement of due

process requirements"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting) ("[T]wo ideas central to Blackstone's understanding [are] due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned . . . .").

The Supreme Court instructed in *Boumediene v. Bush* that an assessment of the adequacy of a statutory review scheme is highly dependent on context. The Court explained that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." 553 U.S. 723, 779 (2008); *see id.* at 814 (Roberts, C.J., dissenting) (observing that the "scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert"). Even in cases such as detention by executive order, where the Supreme Court has articulated a "pressing" need for collateral review, a meaningful writ is one that grants the tribunal the authority to review the cause for detention and the power to detain. *Id.* at 783. Indeed, the availability of judicial review under 8 U.S.C. § 1226a provides Petitioner with the adequate safeguards to challenge the lawfulness of his detention.

Accordingly, the Tenth Circuit has found the availability of habeas review to be a significant factor in due process analysis: "aliens who believe that their continued detention [under a mental-health detention provision, 8 C.F.R. § 241.14(f),] is unlawful may challenge ICE's determination by seeking a writ of habeas corpus in federal court. This is sufficient to satisfy the requirements of the Due Process Clause." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008)

Here, the Court previously found that the lack of a burden on the government *combined with* a lack of judicial factfinding "violate[d] the requirements of procedural due process in the

framework of [the] regulation." Order at 24. The Court has found that the statute makes judicial factfinding available to Petitioner. *Id.* at 25-27. That procedure warrants placing the burden on Petitioner. He should carry the burden of demonstrating that the government erred in ordering his detention under § 1226a.

Alternatively, if the Court disagrees that the burden of proof lies with Petitioner, then it should find that the *Hamdi* burden-shifting framework applies here. While *Hamdi* involves detention of *U.S. citizens*, not removable terrorist aliens such as Petitioner, *see* Respondent's Memorandum if Points & Authorities in Opposition to the Amended Petition for Writ of Habeas Corpus at 15-16 (ECF No. 17-4) (explaining why Due Process permits different treatment for removable aliens and for terrorists), *Hamdi* is instructive in establishing an evidentiary process that balances the "risk of an erroneous deprivation" of a detainee's liberty interest with undue procedural burdens on the government. *Hamdi*, 542 U.S. at 534 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under that scheme, "once the Government puts forth credible evidence that the habeas petitioner meets" the relevant criteria (there, the "enemy-combatant criteria") the Supreme Court held, "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Hamdi*, 542 U.S. at 534. The Court should hold that the government's administrative record supporting the Acting Secretary's detention decisions makes a prima facie *Hamdi* case, and hold that the burden has now shifted to Petitioner "to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.*

II. Standard of Proof

The burden on Petitioner should be the preponderance standard, consistent with the usual rule in habeas proceedings. *See Bolton*, 395 F.2d at 653.

Should the Court disagree that Petitioner bears the burden at the evidentiary hearing, the standard on the government should also be preponderance of the evidence.

The Supreme Court in *Hamdi* blessed a preponderance standard on the government in the Guantanamo Bay detention cases. Under the *Hamdi* burden-shifting regime, the government still bears the ultimate burden of persuasion: preponderance of the evidence. *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) ("He argues that the government has to meet its burden by clear and convincing evidence. He is incorrect. We have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo Bay, Cuba.").

The *Hamdi* approach should extend here, which involves similarly special threats: national security risks. *See Hamdi*, 542 U.S. at 534; *cf. Addington v. Texas*, 441 U.S. 418 (1979) (applying a clear and convincing evidence standard, but in a non-habeas context, and in a case predating the *Hamdi* line of cases). Again, the availability of Article III evidentiary review—which the Court held is available under the statute but not the regulation—is a countervailing due process consideration that makes up for a lessened burden under the statute.

If the Court places the burden on the government at the evidentiary hearing, it should apply the *Hamdi* framework, which ultimately requires the government to satisfy a preponderance standard. *See Awad*, 608 F.3d at 11.

III. Deference to the Acting Secretary's Determination

Regardless of the burden and the standard of proof, the Court should grant broad deference to the factual conclusions drawn by the Acting Secretary—that Petitioner's release will threaten the national security of the United States—because he is implementing a counter-terrorism provision. Combining the principles of limited review in habeas cases and limited

review in matters of national security, this Court's habeas review under 8 U.S.C. § 1226a(b)(1) should not be *de novo* and should defer to the Executive Branch.

The standard of review of an administrative immigration decision in a habeas case is generally more limited than on direct review. *Heikkila*, 345 U.S. at 235-36 (discussing the heavy deference to administrative factfinding in immigration habeas cases, subject to "the enforcement of due process requirements"). Indeed, the Supreme Court has been "clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers." *Id.* at 233-34; *see INS v. St. Cyr*, 533 U.S. 289, 311-13 (2001) (stating that immigration habeas review is narrower than judicial review, which are historically distinct forms of review); *see also Boumediene*, 553 U.S. at 783 ("Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order.").

Moreover, "national security is an area where courts have traditionally extended great deference to Executive expertise." *N. Jersey Media Grp. Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). Courts are "ill-equipped to determine [the] authenticity and utterly unable to assess [the] adequacy" of Executive Branch determinations involving "foreign-policy objectives" and "foreign-intelligence products and techniques." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)

Thus, the Judiciary has "traditionally shown the utmost deference" with regard to "the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). In such instances, there may be "a presumption in favor of the Government's evidence" in habeas review. *Hamdi*, 542 U.S. at 533-34; *see also St. Cyr*, 533 U.S. at 314 n.38 (recognizing that "the scope of review on habeas is considerably more limited than on [Administrative Procedure Act]-style review," which required a deferential standard for reviewing agency factfinding, *see* 5 U.S.C. § 706(2)); *Boumediene*, 553 U.S. at 779 ("[T]he courts should give "proper deference . . . to the political branches" and "accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security").

Here, Petitioner was determined to pose a serious threat of terrorism by the Acting Secretary of Homeland Security, with the additional advice from other government departments, including the Director of the Federal Bureau of Investigations and the Acting Director of U.S. Immigration and Customs Enforcement. Therefore, in receiving evidence from Respondent under any standard or burden, the Court should bear in mind the context under which this case arises. Accordingly, the Court should appropriately defer to the previous factual determinations of dangerousness made by the Acting Secretary of Homeland Security, who applied his own expertise in assessing a national security threat, and rely on that threat assessment in determining whether Petitioner's detention is lawful.

IV. Hearsay Evidence

The Court should reject any reading of the jurisdiction and evidence rules that would categorically bar Respondent's testimony and reports as hearsay, to the extent it deems such to be hearsay and the Court should permit the introduction of the administrative record into evidence.

Respondent asks the Court to determine that it will consider hearsay evidence on a case-by-case basis. Petitioner has intimated that the Court would err in admitting hearsay evidence. But that argument is foreclosed by *Hamdi*, which recognized (even for U.S. citizens) that the admission of hearsay in these types of proceedings is consistent with the Constitution. 542 U.S. at 533-34. "The district court is uniquely qualified to determine the credibility of hearsay." *Latif v. Obama*, 666 F.3d 746, 751 (D.C. Cir. 2011). In weighing the parties' evidence, "courts must not consider each piece of government evidence by itself, but rather in connection with all the other evidence" in the record. *Almerfedi v. Obama*, 654 F.3d 1, 4 (D.C. Cir. 2011); *see also Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010). Hearsay evidence should not be categorically excluded from the evidentiary hearing.

In particular, the Court should permit evidence from U.S. Immigration and Customs Enforcement agents, officers, or contractors who collected intelligence from confidential informants, whose identities are shielded by the confidential informant privilege or who are unavailable under the Federal Rules of Evidence. The Court should also consider all evidence in the administrative record. The Court should admit this evidence even if it determines such evidence is hearsay and that such evidence would otherwise be barred by the Federal Rules of Evidence's hearsay rules.

That is because the Court is not constrained by the Federal Rules of Evidence. Although the evidence rules may generally apply to standard habeas proceedings under 28 U.S.C. § 2241, they govern such proceedings only to the extent that a federal statute or rule does not "provide for admitting or excluding evidence independently from these rules," Fed. R. Evid. 1101(e). *See also Boumediene*, 553 U.S. at 795 (acknowledging that "accommodations can be made" for the unique circumstances of the proceedings for military detainees). By requiring a district judge to

"summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U.S.C. § 2243, the habeas statute envisions flexible equitable proceedings—proceedings that in this context require recognition of the types of material available in the context of detention of a national security threat with a final order of removal who is presently unable to be removed. In other contexts, the Supreme Court has emphasized that the habeas statutes must be read against a background understanding that "habeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and it has "relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata" although the language of the habeas statute at issue, 28 U.S.C. § 2255, did not provide for such an inquiry. *Id.*

Thus, when required by the particular context, as well as "law and justice," 28 U.S.C. § 2243, habeas courts do, in fact, consider evidence that would be inadmissible under the hearsay rules. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 538 (2006) (when petitioner's claim for relief is based on allegations of "actual innocence," the "habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial' ") (quoting *Schlup*, 513 U.S. at 327-28); *see also Boumediene*, 553 U.S. at 781 (where exculpatory information is in question, the statements of "'unimpeached witnesses'" should not be ignored or removed from consideration; rather, their presence in the record should prompt the court to also allow petitioner the opportunity to "provide[] new evidence to exculpate the prisoner").

In this national security detention context especially, these adaptable habeas provisions compel the consideration of relevant, probative evidence. *See Boumediene*, 553 U.S. at 795-96. *Boumediene* specifically recognized "that the Government has a legitimate interest in protecting sources and methods of intelligence gathering," and noted "we expect that the District Court will

use its discretion to accommodate this interest to the greatest extent possible." *Id.* at 796; *see Hamdi*, 542 U.S. at 533-34 (embracing the use of hearsay as a necessary aspect of the military detention cases).[2]

Therefore, the Court should issue two orders. First, it should reject any reading of the jurisdiction and evidence rules that would categorically bar ICE agents', employees', and contractors' testimony and reports as hearsay, to the extent it deems such to be hearsay.

Second, the Court should permit the introduction into evidence of the administrative record supporting the Acting Secretary's detention decisions with regard to Petitioner. For the purpose of establishing reliability under judicial standards, this record has indicia of reliability analogous to those recognized in the Federal Rules of Evidence through the hearsay exception for public records. *See* Fed. R. Evid. 803(8). Records created and maintained by government officials are admissible in ordinary civil litigation on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember the details independently of the record." Advisory Committee Notes to 1972 Proposed Rules. Here—where the government has produced to Petitioner the full factual basis for his detention—the evidence is far more developed than the declaration that the *Hamdi* plurality concluded could properly be admitted to test a military detention. *Hamdi*, 542 U.S. at 558. The Court should admit the administrative record.

[2] Furthermore, the substantive goal of *Boumediene* and *Hamdi*—court review of the factual basis for detention—would be thwarted by the Court not permitting such individuals to testify or by the Court not receiving their reports into evidence based on the Federal Rules of Evidence's hearsay rules. Under *Hamdi*, the detainee "must receive notice of the *factual basis* for his classification" and a "fair opportunity to rebut the Government's factual assertions." 542 U.S. at 533 (emphasis added). The accounting of ICE individuals is the basis for the recommendations of the ICE Director and the FBI Director and, in turn, the decision of the Acting Secretary of Homeland Security.

V. Location of the Hearing

The Court should hold the hearing at the Buffalo Federal Detention Facility, instead of Rochester or Buffalo.

If the Court requires the presence of Petitioner—or other detained individuals—at the evidentiary hearing, the United States government and ICE's Enforcement and Removal Operations ("ERO"), specifically, would be required to transport those individuals from the Buffalo Federal Detention Facility to the Federal Courthouse for the date of the hearing. This poses a significant security concern for the transported individuals as well as government officers, as detailed in the Government's Opposition to Petitioner's Motion to Compel Appearance at his November 22, 2019 hearing (ECF No. 43) and the supporting declaration from ERO Buffalo (ECF No. 51) (filed under seal), arguments which Respondent incorporates here. These previously asserted concerns are amplified here, where there is a possibility that the U.S. government will have to transport and protect not just one individual (Petitioner), but potentially multiple others. These concerns can be mitigated by the Court holding the evidentiary hearing inside the federal courtroom at the facility in Batavia.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court limit the parameters of the evidentiary hearing in accordance with this brief.

Date: January 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I electronically filed the foregoing brief with the Clerk of the District Court using the Court's CM/ECF system, which will effect service on Petitioner's counsel.

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