Chapter 1 – Historical Context for the Current Habeas Litigation

To better understand the current habeas litigation, it is useful first to review past Supreme Court cases on Guantánamo detentions, including in particular the 2004 decision in *Hamdi v. Rumsfeld* and the 2008 decision in *Boumediene v. Bush*.[2] Both decisions touch upon questions of process in the context of military detention, although they do so neither consistently with one another nor in any great detail.

In *Hamdi*, the plurality opinion by Justice Sandra Day O'Connor concluded that a citizen detainee challenging his detention has a Fifth Amendment due-process right "to receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[3] At the same time, Justice O'Connor wrote, the exigencies of the circumstances—in that case, the fact that the detention occurred in a zone of active military operations—might justify the tailoring of the proceedings to "alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[4] For example, the plurality wrote, the district court might need to accept hearsay as the government's most reliable available evidence, and it might also adopt a presumption in favor of the government's evidence, as long as it were rebuttable, without offending the Constitution.[5] Justice O'Connor also expressed confidence that the district courts would employ a "prudent and incremental" fact-finding process, balancing "matters of national security that might arise in an individual case" with "the constitutional limitations safeguarding essential liberties."[6]

That same day, the Court held in *Rasul v. Bush* that the federal habeas corpus statute granted federal courts jurisdiction to hear claims of non-citizen detainees held at Guantánamo.[7] As a result, federal judges could suddenly address both the substantive scope of the executive branch's authority to employ military detention and the nature of the process to be employed in determining whether any particular individual falls within the scope of that authority. Congress soon responded with the Detainee Treatment Act (DTA) of 2005, which at first blush appeared to eliminate statutory habeas jurisdiction in favor of a potentially more-limited form of judicial review committed exclusively to the D.C. Circuit Court of Appeals.[8] This initiative fell flat in 2006, however, when the Supreme Court in *Hamdan v. Rumsfeld* concluded that the legislation should be read not to apply at all to then-existing habeas petitions.[9] Congress responded once again,

[2] Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

[3] *Hamdi*, 542 U.S. at 533.

[4] *Id.*

[5] *Id.* at 534.

[6] *Id.* at 539.

[7] Rasul v. Bush, 542 U.S. 466, 483-84 (2004).

[8] Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (amending 28 U.S.C. § 2241).

[9] Hamdan v. Rumsfeld, 548 U.S. 557, 574-84 (2006).

passing the Military Commissions Act of 2006—which revived the DTA's jurisdictional provisions and made them more clearly applicable to pending cases.[10] That, in turn, set the stage for the 2008 decision in *Boumediene.*

In *Boumediene*, the Court definitively established two points. First, it ruled that the Constitution's Suspension Clause applies to non-citizens held by the military at Guantánamo, thus restricting Congress's power to limit the courts' habeas jurisdiction.[11] Second, the Court held that the limited judicial review afforded under the DTA's direct appeals system did not adequately substitute for habeas review, in significant part because the D.C. Circuit's review authority did not appear to afford detainees an opportunity to present fresh evidence tending to show that they were not within the scope of the government's detention authority.[12] Finding this fatal in the DTA, the Court determined that the federal courts must have constitutionally based jurisdiction to hear habeas petitions. The Court, however, declined to detail the procedural or substantive contours of this habeas review beyond giving some rather opaque clues. The Court explicitly left the specific questions to "the expertise and competence of the District Court."[13] Absent further legislative intervention, the decision in *Boumediene* operates as an express invitation to the district courts to resolve these questions in the first instance.

Under *Hamdi* and *Boumediene*, only two categories of detainees have access to habeas: U.S. citizens held anywhere and non-U.S. citizens held at Guantánamo or in the United States. Non-citizen detainees elsewhere, by contrast, do not have access to the courts. Whether this will change in the long-term remains a subject of active litigation. In *Al Maqaleh v. Obama*, Judge John Bates had the first opportunity to interpret and apply *Boumediene* to a facility beyond Guantánamo.[14] The case involved habeas petitions brought by four individuals with Yemeni, Tunisian, and Afghan citizenship captured outside Afghanistan and held by the United States military at the Bagram Theater Internment Facility ("BTIF").[15] Judge Bates consolidated the four petitions and analyzed their claims under the three-part test established in *Boumediene*, finding that habeas was available for the non-Afghans detained at Bagram, but not for the one Afghan petitioner.[16] After Judge Bates delivered this decision in April 2009, it looked at least possible that non-Afghan Bagram detainees would gain the same rights as those held at Guantánamo. But this soon changed when the D.C. Circuit

[10] Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241).

[11] Boumediene v. Bush, 553 U.S. 723, 771 (2008).

[12] *Id.* at 790-92.

[13] *Id.* at 796.

[14] Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. Apr. 2, 2009).

[15] *Id.* at 8-9.

[16] *Id.* at 86-87. The Afghan detainee's case was subsequently dismissed for lack of jurisdiction upon the government's motion. Wazir v. Gates, 629 F. Supp. 2d 63, 68 (D.D.C. June 29, 2009).

disagreed with Judge Bates's analysis.[17] In an opinion written by Chief Judge Sentelle on behalf of himself and Judges Tatel and Edwards, the D.C. Circuit came to the opposite conclusion, holding that federal district courts had no jurisdiction over habeas claims from "aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war."[18]

The question, however, remains in play. A series of motions filed after the D.C. Circuit decision have put several underlying issues back before Judge Bates.[19] And the Supreme Court has not yet considered the matter. For now, however, habeas jurisdiction remains available only to U.S. citizens, non-U.S. citizens held by U.S. forces at Guantánamo Bay, and any detainees who might someday be brought stateside. It is from their cases that the law of detention is emerging.

The Habeas Cases So Far: Refining the Scorecard

Most media coverage of the post-*Boumediene* proceedings in federal district court has understandably focused on the bottom-line question of which side wins: whether particular detainees have prevailed on the merits in specific cases or whether the government has. The press generally cites somewhat lopsided sheer numbers: 38 detainee victories versus 21 for the government, thus far.[20] Before turning to the substance of the emerging case law, a few words are in order regarding this "scorecard" of the habeas proceedings. While the press's binary approach is accurate on its own terms, it has certain analytical flaws as an approach and does not fully capture the complexity of the current proceedings.

In the first instance, there is a definitional question concerning which cases to include in the tally of wins and losses. For example, the detainee victories include 17 Uighur detainees. At one level, this makes sense. The government, after all, had long asserted the authority to detain these individuals militarily, and the D.C. Circuit Court of Appeals in *Parhat v. Gates* rejected that claim.[21] The government, the court held, lacked sufficient evidence to support its contention that the Uighurs were associated with the East Turkistan Islamic Movement (ETIM) or that ETIM in turn was adequately associated with Al Qaeda to warrant application of military detention authority.[22] *Parhat* was not a habeas case,

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[17] Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. May 21, 2010).

[18] *Id.* at 99.

[19] Second Amended Petition for Writ of Habeas Corpus, No. 06-1669 (D.D.C. Apr. 4, 2011), ECF No. 63.

[20] *See, e.g.*, Carol Rosenberg, *Guantánamo Timeline: Captives Sue for Release*, MIAMI HERALD, Mar. 11, 2011, *available at* http://www.miamiherald.com/2009/09/03/v-fullstory/1216218/guantanamo-timeline-captives-sue.html.

[21] Parhat v. Gates, 532 F.3d 834 (D.C. Cir. June 20, 2008).

[22] *Id.* at 844.

however, but rather the sole "merits" decision rendered under the DTA review system struck down as inadequate in *Boumediene*.[23] In the aftermath of *Parhat*, the government accepted that the Uighurs were not subject to detention, and it did not defend the propriety of their detentions as enemy combatants in the habeas cases they later pursued.[24] Indeed, even before *Parhat*, the government had long been attempting to identify states willing to accept transfer of the Uighurs (succeeding with most but not all members of the group).[25]

Remaining Uighur detainees proceeded under the rubric of habeas to seek an order requiring the government not just to release them, but to release them into the United States specifically.[26] But these petitions, which ended in a refusal to grant such an order from the D.C. Circuit[27] and a denial of a *cert.* petition from the Supreme Court,[28] never put at issue the government's power to hold them as military detainees for the duration of hostilities. From this perspective, it is misleading to consider them as part of the broader habeas scorecard.[29]

A second significant definitional complication concerns the indeterminate number of habeas petitions that judges have dismissed on grounds that the petitioners do not wish to pursue them or on grounds that they haven't clearly authorized their lawyers to represent them.[30] We can only speculate as to why these detainees have elected to opt out of the habeas process. It may be that some do not object to the government's contention that they are subject to detention under the laws of war, in which case one might plausibly include them in the government's victory total—much like a guilty or *no lo contendere* plea in a criminal proceeding. But others likely do not trust the habeas process or do not want to grant it legitimacy by participating in it. It would not make sense to count such cases as governmental wins. As we cannot easily know the precise motivations, we merely note the existence of this category, and recognize that it further illustrates the limited utility of the binary approach.

The scorecard approach also belies the vast complexity of the habeas cases. In particular, it flattens the outcomes of many multi-layered processes into what looks like a single Super Bowl score, creating an oversimplified picture of what

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[23] *Id.* at 835. *See also* Boumediene v. Bush, 553 U.S. 723, 795 (2008). In fact, after *Parhat*, the D.C. Circuit dismissed all DTA-based appeals. *See*, *e.g.* Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. Jan. 9, 2009).

[24] Kiyemba v. Obama, 561 F.3d 509, 515 (D.C. Cir. Apr. 7, 2009).

[25] Adam Liptak, *Justices Won't Hear Uighur Case*, N.Y. TIMES, Mar. 1, 2010, at A16.

[26] *In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 34 (D.D.C. Oct. 8, 2008).

[27] Kiyemba v. Obama, 555 F.3d 1022, 1028-29 (D.C. Cir. Feb. 18, 2009).

[28] Kiyemba v. Obama, 130 S. Ct. 1880 (Mar. 22, 2010).

[29] One might also read the outcome in *Parhat* to support the idea that the statutory review scheme established by the DTA and endorsed by the Bush administration *did* provide sufficient procedural leeway for detainees to successfully challenge their detentions.

[30] *See*, *e.g.*, Salih v. Obama, No. 08-1234 (D.D.C. Dec. 30, 2009) (order dismissing petition without prejudice "due to failure to provide necessary authorization"); Kuman v. Obama, 725 F. Supp. 2d 72, 77-78 (D.D.C. July 23, 2010).

are often merely interim results. Given the scorecard's prevalence in the media, it is worth offering a richer, more textured numerical portrait.

Since the Supreme Court decided *Boumediene*, 21 non-Uighur petitioners have prevailed in their habeas cases in district court. Of these cases, the government did not appeal or dropped the appeal as to 14 of the petitioners.[31] This number includes five of the six *Boumediene* petitioners.[32] Of the seven losses the government *did* appeal, it prevailed in *Al Adahi* and *Uthman*, the cases that have so far proceeded to disposition on the merits.[33] In *Salahi*, and *Hatim*, the D.C. Circuit has ordered a remand.[34] The other three cases are pending at various stages of appeal the D.C. Circuit.[35]

Now consider the habeas denials at the district-court level. The government has prevailed in 21 of the petitioners' cases,[36] and petitioners have appealed all of these cases save one—a case in which an appeal will almost certainly materialize.[37] In five of those, the detainees lost their appeals.[38] In October Term

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[31] *See* Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. Nov. 20, 2008); Gharani v Bush, 593 F. Supp. 2d 144, 149 (D.D.C. Jan. 14, 2009); Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 66 (D.D.C. May 11, 2009); Al Ginco v. Obama, 626 F. Supp. 2d 123, 130 (D.D.C. June 29, 2009); Al Halmandy v. Obama, No. 05-2385 (D.D.C. July 30, 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78, 96 (D.D.C. July 29, 2009); Al Rabiah v. United States, 658 F. Supp. 2d 11, 42 (D.D.C. Sept. 17, 2009); Abdah (Odaini) v. Obama, 717 F. Supp. 2d 21, 35 (D.D.C. May 26, 2010); Basardh v. Gates, No. 09-5200 (D.C. Cir. Dec. 14, 2010) (dismissing appeal); Mohammed v. Obama, No. 05-5224 (D.C. Cir. Jan. 11, 2011) (dismissing appeal as moot).

[32] *Boumediene*, 579 F. Supp. 2d at 198 (granting writ for Mohamed Nechla, Mustafa Ait Idir, Hadj Boudella, Lakhdar Boumediene, Saber Lahmar).

[33] Al Adahi v. Obama, 613 F.3d 1102, 1111 (D.C. Cir. July 13, 2010), *cert. denied*, No. 10-487 (Jan. 18, 2011). Uthman v. Obama, No. 10-5235 (D.C. Cir. Mar.29, 2011).

[34] Salahi v. Obama, 625 F.3d 745 (D.C. Cir. Nov. 05, 2010); Hatim v. Gates, 632 F.3d 720 (D.C. Cir. Feb. 15, 2011); Al Warafi v. Obama, No. 10-5170 (D.C. Cir. Feb. 22, 2011).

[35] *See* Abdah (Latif) v. Obama, No. 04-1254 (D.D.C. July 21, 2010), *appeal docketed*, No. 10-5319 (D.C. Cir. Dec. 21, 2010), *en banc hearing petition denied* (D.C. Cir. Jan. 11, 2011); Almerfedi v. Obama, 725 F. Supp. 2d 18 (D.D.C. July 8, 2010), *appeal docketed*, No. 10-5291 (D.C. Cir. Jan. 4, 2011); Al Harbi v. Obama (Mingazov), No. 05-2479 (D.D.C. Mar. 13, 2010), *appeal docketed*, No. 10-5217 (D.C. Cir. June 28, 2010).

[36] Obaydullah v. Obama, No. 08-1173 (D.D.C. Oct. 19, 2010); Al Kandari v. United States, No. 02-828 (D.D.C. Sept. 15, 2010); Toffiq Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010); Khan v. Obama, No. 08-1101 (D.D.C. Sept. 3, 2010); Sulayman v. Obama, 729 F. Supp. 2d 26 (D.D.C. July 20, 2010); Abdah (Esmail) v. Obama, 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010); Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. Mar. 24, 2010); Khalifh v. Obama, No. 05-1189 (D.D.C. June 14, 2010); Al Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. Dec. 30, 2008); Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1 (D.D.C. Jan. 6, 2010); Al Adahi v. Obama (Al Nahdi), 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010); Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48 (D.D.C. Mar. 10, 2010); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. Dec. 30, 2008); Ghaleb Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. Jan. 28, 2009); Fahad Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. Aug. 24, 2009); Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. Aug. 12, 2009); Barhoumi v. Obama, No. 05-1505, slip op. (D.D.C. Sept. 3, 2009); Hammamy v. Obama, 604 F. Supp. 2d 240, (D.D.C. Apr. 2, 2009); Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. November 20, 2008); Razak Ali v. Obama, 741 F. Supp. 2d 19 (D.D.C. Jan. 11, 2011); Alsabri v. Obama (Feb. 3, 2011).

[37] In *Obaydullah*, No. 08-1173, the appeal deadline is May 24th, 2011.

2010, four petitioners filed *cert*. petitions, and the Supreme Court denied all of them.[39] In the two cases in which the petitioner has prevailed on any measure at the D.C. Circuit, *Bensayah* and *Al Warafi*, the results are in limbo because the D.C. Circuit remanded the matters to the district court with instructions to hear additional evidence.[40] One appeal, that of Abdul Al Hadi, was dismissed as moot pursuant to a joint motion of the parties, and *Khalifh* was dismissed pursuant to the petitioner's own motion.[41] The remaining nine cases are pending at various stages at the D.C. Circuit.[42]

Summarizing the above information into tabulatable figures reveals the following statistics:

- Uighur cases in which detention was deemed or conceded unlawful: 17
- Petitioners' district-court wins pending at D.C. Circuit: 3
- Petitioners' district-court wins not appealed by the government or cases in which the government's initial appeal was later dismissed: 14
- Petitioners' district-court wins resulting in a remand by the D.C. Circuit to district court, with remand pending: 2
- Petitioners' merits wins at D.C. Circuit: 0

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[38] Tofiq Al Bihani v. Obama, No. 10-5232 (D.C. Cir. Feb. 10, 2011) (granting joint motion for summary affirmance); Ghaleb Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010); Al Odah v. United States, 611 F.3d 8 (D.C. Cir. June 30, 2010); Awad v. Obama, 608 F.3d 1 (D.C. Cir. June 2, 2010); Barhoumi v. 609 F.3d 416 (D.C. Cir. June 11, 2010). Barhoumi, in addition, has filed a Rule 60(b)(2) motion in district court after learning of a set of documents the government did not produce at the merits stage, so that outcome is particularly tentative. Motion for Relief from Order Pursuant to Rule 60(b)(2), Barhoumi v. Obama, No. 05-1506 (D.D.C. Sept. 1, 2010).

[39] *Ghaleb Al Bihani*, 79 U.S.L.W. 3568 (Apr. 4, 2011) (10-7814); *Al Odah*, 79 U.S.L.W. 3567 (Apr. 4, 2011) (No. 10-439); *Awad*, 79 U.S.L.W. 3567 (Apr. 4, 2011) (No. 736); *Al Adahi*, 131 S.Ct. 1001, 79 U.S.L.W. 3254 (Jan. 18, 2011) (No. 487).

[40] *Bensayah*, 610 F.3d at 727 (remanding on whether the detainee was "functionally part of" Al Qaeda; the parties have also been granted an extension of time in which to file a petition for rehearing) Al Warafi v. Obama, No. 10-5170, slip op. at 2 (D.C. Cir. Feb. 22, 2011) (remanding to the district court to "consider (or reconsider) Al Warafi's argument he was permanently and exclusively engaged as a medic and to make a finding on this issue").

[41] Al Hadi v. Gates, No. 09-5163 (D.C. Cir. June 10, 2010) (dismissing case as moot); Khalifh v. Obama, No. 10-5242 (D.C. Cir. Jan. 28, 2011) (granting petitioner's motion to dismiss as moot).

[42] Alsabri v. Obama, No. 06-1767 (D.D.C. Feb. 3, 2011); Al Kandari v. Obama, 744 F. Supp. 2d 11 (D.D.C. Sept. 15, 2010); Khan v. Obama, No. 08-1101 (D.D.C. Sept. 3, 2010); Sulayman v. Obama, 729 F. Supp. 2d 26 (D.D.C. July 20, 2010); Al Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. Dec. 30, 2008); Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1 (D.D.C. Jan. 6, 2010); Al Adahi v. Obama (Al Nahdi), 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010); Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48 (D.D.C. Mar. 10, 2010); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. Dec. 30, 2008).

- Government's district-court wins not appealed by the petitioner, including cases in which the petitioner's initial appeal was later dismissed: 2
- Government's district-court wins that will likely be appealed: 2
- Government's district-court wins pending at D.C. Circuit: 9
- Government's district-court wins resulting in a remand by the D.C. Circuit to district court, with remand pending: 2
- Government's merits wins at D.C. Circuit: 8
- Post-Boumediene merits decisions in which *cert*. has been denied: 4

Even this sort of richer numerical picture is ultimately inadequate. For any scorecard ignores—or, rather, downplays—the most important results in these cases. These are not numerical but qualitative in nature; that is, it matters how the litigants win and lose. In our view, it is far more important to understand the rules of substance and procedure that are emerging from the ongoing litigation than it is to count dispositions. These rules define the scope of the government's detention authority, and they craft the contours of a unique adversarial process for determining precisely who falls within the scope of that authority. These are matters of transcendent importance. They constitute the law of military detention going forward in the increasingly broad set of circumstances in which judicial review attaches, and they cast a shadow over operational planning and detention decisions even where such review is merely a non-trivial prospect. They will have a lasting impact both at Guantánamo and beyond.

Our aim is to describe this emerging body of law, and in doing so draw attention to the stakes attached to seemingly esoteric details. Toward that end, we have analyzed all of the relevant declassified district and appellate court habeas opinions as of May 11, 2011, including all merits decisions and the key interlocutory rulings in cases that may not have reached merits disposition. We do not speculate about those decisions which have been announced but whose reasoning has not been declassified, and we proceed mindful of the fact that even the declassified opinions often contain potentially significant redactions that encumber any effort to understand them completely. That said, the analysis covers 49 separate written or oral opinions on the merits by 24 different district or circuit judges, as well as a handful of interlocutory opinions. Across the spectrum of issues presented, these judges take strikingly different views of the key questions undergirding the emerging law of detention. (A hyperlinked Table of the merits rulings discussed in this paper appears in Appendix I, and a brief synopsis of each district-court and appellate-court merits decision appears in Appendix II.)