Chapter 2 – Burden of Proof

We begin our survey with an issue that may appear, at first glance, to be a matter of strong consensus among the judges: the allocation and calibration of the burden of proof. After *Boumediene*, all of the district court judges chose and applied the same standard, achieving a degree of unanimity that is unusual among the major issues these cases raise. In all of the Guantánamo habeas cases that have proceeded to disposition, the judges purport to have required that the government carry the burden of showing, by a preponderance of the evidence, that the detainee falls within the definition of the detainable class.

This apparent consensus, however, weakens on closer inspection. For one thing, both appeals court judges and the detainees themselves are attacking the preponderance of the evidence standard from opposite sides, creating a kind of pincer action against its continued use. Habeas petitioners have asked and will likely continue to ask the Supreme Court to adopt a higher standard, and the D.C. Circuit in more than one decision has strongly intimated that a lower standard may be more appropriate. Second, the operation of the preponderance standard in practice has changed subtly as a result of D.C. Circuit rulings, lessening the government's burden in important respects even within the confines of the same notional standard. In particular, the *Latif* decision could be read—and, indeed, is read by the dissenting judge in that case—to place some of the burden on the detainee, by giving a presumption in the favor of the "regularity" of the government's evidence and thus forcing the detainee to show that the government's evidence is neither sufficient nor reliable. Although this has yet to take the form of a *de jure* change in the burden of proof, its effects may turn out to be tantamount to at least a partial reversal of the placing of the burden on the government.

It may seem obvious now that the habeas judges would select a preponderance-of-the-evidence standard and allocate that burden to the government. As it happened, however, the Supreme Court had given decidedly mixed signals on these questions in two prior cases. When the Court decided *Hamdi* in 2004, a plurality of the justices suggested the government might be entitled to a rebuttable presumption in favor of its evidence, "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."[43] This would seem to imply putting the burden on the detainee to *disprove* the government's case, rather than putting the burden on the government to prove it. However, the plurality also insinuated in the very next sentence that the government does bear some responsibility to make an initial showing and persuade the Court that its evidence is, at a minimum, "credible."[44]

[43] Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) ("Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.").
[44] *Id*. at 534 ("Thus, once *the Government puts forth credible evidence* that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence

In application, this language may not necessarily impose a presumption favoring the government at all but, rather, may instead imply that the government must still satisfy a burden before the "onus" shifts to the petitioner to persuade the court of anything.[45] In any event, the plurality said only that a burden-shifting scheme would be constitutional—not that it would be the only permissible procedure or the most appropriate one.[46]

In *Boumediene*, the justices once again failed to provide a clear rule.[47] There the Court in one sentence seemed to embrace, without much explanation, the notion that the government, rather than the petitioner, would bear the initial burden. "The extent of the showing *required of the government* in these cases is a matter to be determined," the majority wrote.[48] Yet other language in Justice Kennedy's majority opinion seemed to suggest that adequate habeas review might permit the burden to be placed on the petitioner: When reviewing the writ as it existed in 1789—which the court had long identified as the absolute floor of the writ's protections—Justice Kennedy wrote, "[t]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[49] Together, the equivocal language from the two cases created something of a muddle.[50]

In response, in the early stages of post-*Boumediene* wrangling, the

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with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.") (emphasis added).

[45] There is at least one case in which a district judge expressly employed the *Hamdi* approach in the post-*Boumediene* habeas context: Khan v. Obama, 646 F. Supp. 2d 6 (D.D.C. July 31, 2009) (Bates, J.). The court also discussed the possibility of tension between this framework and the proposition that the government bears the burden of proof under a preponderance standard. *Cf.* Basardh v. Obama, 612 F. Supp. 2d 30, 35 n.12 (D.D.C. Apr. 15, 2009) ("Under habeas corpus law, the government bears the *initial* burden of establishing a sufficient basis for the lawful detention of a person seeking a writ of habeas corpus.") (emphasis added).

[46] *Hamdi*, 542 U.S. at 533. The Supreme Court was clear in *Hamdi* about at least a few things: that a citizen detainee captured abroad must have notice of the factual basis for his detention and a fair opportunity, before a neutral decisionmaker, to rebut any evidence brought against him. In *Boumediene*, "meaningful" opportunity to challenge the basis was the benchmark. Boumediene v. Bush, 553 U.S. 723, 779 (2008).

[47] *Boumediene*, 553 U.S. at 785.

[48] *Id.* at 787 (emphasis added).

[49] *Id.* at 779 (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)). Indeed, the *Al Adahi* panel invoked this tension in its July opinion. Al Adahi v. Obama, 613 F.3d 1102, 1104 n.1 (D.D.C. July 13, 2010).

[50] *See* Judge A. Raymond Randolph, Joseph Story Distinguished Lecture at the Heritage Foundation: The Guantanamo Mess (Oct. 10, 2010) ("*Boumediene* contains language that seems to support both petitions.").

government proposed a rebuttable "credible-evidence" standard,[51] and petitioners asked for a clear-and-convincing standard and sometimes even a reasonable-doubt standard.[52] In the case management orders issued and adopted to govern the myriad procedural questions common to the petitioners, the district judges uniformly settled on the preponderance-of-the-evidence standard.[53] Among the judges who offered an explanation for this result, some referenced the language of the "extent of the showing required from the government" from *Boumediene*[54] and others recalled the burden-shifting language from *Hamdi*.[55] Other judges—including Judge Hogan, whose case management order was meant to govern the bulk of the cases following *Boumediene*—did not identify the rationale underlying their selection of this approach.[56] Whatever the standard's source, it seemed for a time that the district court had forged a

[51] The government's counsel urged the court to adopt nothing more demanding than the *Hamdi* framework, which it said was *a fortiori* constitutionally sufficient for aliens detained as enemy combatants outside the United States. But the government conceded *Hamdi*'s implementation would entail an initial burden on the government to "put[] forth credible evidence." Government's Brief Regarding Procedural Framework Issues at 11, *In re* Guantanamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008) (Misc. No. 08-442).

[52] For example, the detainees argued for a clear-and-convincing standard in the consolidated proceedings before Judge Hogan. Petitioners' Joint Memorandum of Law Addressing Procedural Framework Issues at 9-14, *In re* Guantanamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008) (Misc. No. 08-442); Brief for Appellees at 48, G. Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. Sept. 15, 2009) (No. 09-5051).

[53] Judge Hogan's case management order held that the government should bear the burden of proving an individual is lawfully detained, and that it must do so by a preponderance of the evidence. *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Nov. 6, 2008) (stating, I §II.A of the CMO, that "[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful."). The CMO provided that "judges to whom the cases are assigned for final resolution ('Merits Judges') may alter the framework based on the particular facts and circumstances of their individual cases." *Id.* Many judges simply adopted Judge Hogan's order. *See, e.g.*, Al-Qurashi v. Obama, 733 F. Supp. 2d 69, 79 (D.D.C. Aug. 3, 2010) (Huvelle, J.); Abdah v. Obama, Abdah v. Obama (Uthman), 708 F. Supp. 2d 9 (D.D.C. Apr. 21, 2010) (Kennedy, J.); Hatim v. Obama, Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. Dec. 15, 2009) (Urbina, J.); Al Odah v. United States, 648 F. Supp. 2d 1, 7-8 (D.D.C. Aug. 24, 2009) (Kollar-Kotelly, J.). Other judges issued separate orders that followed suit. *See, e.g.*, Boumediene v. Bush, 579 F. Supp. 2d 191, 195-96 (D.D.C. Nov. 20, 2008) (Leon, J.) (referring to his CMO from August 27, 2008); Khan v. Obama, No. 08-1101 (D.D.C. Feb. 20, 2009) (Bates, J.).

[54] *See, e.g.*, *Al Odah*, 648 F. Supp. 2d at 7. At least two judges interpreted it to refer not to the burden of proof at all but to the Court's deferral to the district judges the questions surrounding the "enemy combatant" definition. *See* Sulayman v. Obama, 729 F. Supp. 2d 26, 31-32 (D.D.C. July 20, 2010) (Walton, J.); Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. Apr. 22, 2009) (Walton, J.); Boumediene v. Bush, 579 F. Supp. 2d 191, 194 (D.D.C. Nov. 20, 2008) (Leon, J.).

[55] *See, e.g.*, Khan v. Obama, 646 F. Supp. 2d 6, 9-10 (D.D.C. July 31, 2009 (Bates, J.).

[56] *See, e.g.*, Awad v. Obama, 646 F. Supp. 2d 20, 23-24 (D.D.C. Aug. 9, 2009) (Robertson, J.) (applying Judge Hogan's omnibus CMO); Ahmed v. Obama, 613 F. Supp. 2d 51, 53 (D.D.C. May 11, 2009) (Kessler, J.) (applying "in large part, the provisions of [Judge Hogan's order], while modifying it somewhat, as noted in Appendix A to Dkt. No. 152"); Hatim v. Obama, 677 F. Supp. 2d 1, 4 (D.D.C. Dec. 15, 2009) (Urbina, J.) (adopting "the provisions of the amended CMO," subject to scheduling modifications set forth in prior orders).

consensus out of a morass.

The consensus, however, now shows signs of fragility. For starters, habeas litigants contend it lacks sufficient rigor. In petitions for *certiorari* in the *Al Odah* and *Awad* cases, the petitioners asked the Supreme Court to consider the issue and adopt a clear-and-convincing standard in place of preponderance.[57] The Supreme Court declined to review the question, however, though petitioners will likely continue raising it in future petitions for review.[58] The question has arisen repeatedly in D.C. Circuit litigation as well. While the courts have so far shown no appetite for a standard higher than preponderance, the justices' Delphic comments to date on the subject do not rule out the possibility of their embracing a more exacting standard.

The bigger threat to the preponderance standard likely comes from the D.C. Circuit, which has in two cases openly suggested that a *lesser* burden on the government may be constitutional. The D.C. Circuit first addressed this issue in *Al Bihani*, in which the petitioner argued that the government should be held to a beyond-a-reasonable-doubt standard or, in the alternative, a clear-and-convincing-evidence standard.[59] The panel majority rejected the petitioner's argument and held that a preponderance standard was constitutional.[60] Yet the panel did more; it went out of its way to state that the Constitution did not necessarily require the government to meet even that, and that the panel was employing the preponderance standard on an *arguendo* basis only. This suggested that, should the government choose to litigate the issue further, it might have a receptive audience in the appellate court.[61] Since *Al Bihani*, several D.C. Circuit opinions have repeated *Al Bihani's* holding on that point and emphasized that the court reserved the question.[62]

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[57] Petition for Writ of Certiorari at 20, Al Odah v. Obama, No. 10-439 (U.S. Sept. 28, 2010); Petition for Writ of Certiorari at 28, Awad v. Obama, No. (U.S. Dec. 12, 2010).

[58] Awad v. Obama, 79 U.S.L.W. 3362 (U.S., Apr. 04, 2011) (No. 10-736), denying cert. to Awad v. Obama, 608 F.3d 1 (D.C. Cir. June 2, 2010); Al Odah v. United States, 79 U.S.L.W. 3228, U.S., Apr. 04, 2011 (No. 10-439), denying cert. to Al Odah v. United States, 611 F.3d 8 (D.C. Cir. June 30, 2010).

[59] G. Al Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. Jan. 5, 2010).

[60] Id. ("Our narrow charge is to determine whether a preponderance standard is unconstitutional. Absent more specific and relevant guidance, we find no indication that it is.").

[61] Id. at 878 n.4 ("In particular, we need not address whether a some evidence, reasonable suspicion, or probable cause standard of proof could constitutionally suffice for preventative detention of non-citizens seized abroad who are suspected of being terrorist threats to the United States."). See also Hussein v. Obama, 2011 WL 5114842, at *8 n.11 (D.D.C. October 12, 2011) (acknowledging that the District of Columbia Circuit has "left open the question of whether a lower standard of proof could constitutionally suffice as well", and finding that it need not resolve such question, given that the government in this case has established the lawfulness of the petitioner's detention by a preponderance of the evidence).

[62] See, e.g., Awad v. Obama, 608 F.3d 1, 10-11 (D.C. Cir. June 2, 2010) (noting that "[t]he Al-Bihani holding follows the Supreme Court's guidance to lower courts in the Hamdi plurality . . . let us be absolutely clear. A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF," and

Then, in July 2010, a second D.C. Circuit panel went a step further. In *Al Adahi*, Senior Judge Randolph—writing also for Judges Henderson and Kavanaugh—openly expressed doubt that the preponderance standard was necessary.[63] The Government had accepted the standard in its original briefing before the court, and continued to support that approach even after the Court asked for additional briefing on the issue post oral argument.[64]

Lacking an "adversary presentation"[65] on the issue, the *Al Adahi* panel ultimately chose not to resolve it. Instead, it adopted the basic holding of *Al Bihani* on the *permissibility* of the preponderance standard,[66] with Judge Randolph going out of his way to state that the Court was "aware of no precedents in which eighteenth century English courts adopted a preponderance standard."[67] He described historical habeas standards, including challenges to deportation proceedings and selective service decisions, in which the government merely had to produce "some evidence."[68] He described challenges to the decisions of courts martial, where the government needed to show only that the military prisoner's claims had received "full and fair consideration" during the military tribunal.[69] And he described criminal proceedings following arrest, in which "probable cause for the arrest" had been acceptable.[70] He concluded by expressing "doubt . . . that the Suspension Clause requires the use of the preponderance standard."[71] Together, *Al Bihani* and *Al Adahi* stand as an invitation to the government to reopen the subject of the standard of evidence at any time in the future. While the current administration has shown no inclination to do so, some future administration might well avail itself of the opportunity.

Judge Laurence Silberman recently added his voice to those calling for a lower standard. In his concurring opinion in *Abdah (Esmail)*, he wrote:

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noting that the analysis "does not establish that preponderance of the evidence is the constitutionally-required minimum evidentiary standard"); Barhoumi v. Obama, 609 F.3d 416, 422-23 (DC Cir. June 11, 2010) (rejecting the argument that Al Bihani's language permitting the preponderance standard was "mere dicta"); Bensayah v. Obama, 610 F.3d 718, 723 (D. C. Cir. June 28, 2010) (stating that the argument favoring clear and convincing evidence had been "overtaken by events"); Al Odah v. United States, 611 F.3d 8, 13 (D.C. Cir. June 30, 2010) (rejecting the petitioner's request for clear and convincing evidence because it failed "under binding precedent in this circuit").

[63] Al Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. July 13, 2010).

[64] Supplemental Brief for the Appellants at 15-16, Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. Mar. 17, 2010) (Nos. 09-5333, 09-5339).

[65] Al Adahi, 613 F.3d at 1105.

[66] Id. at 1105, n.2. The government conceded that the preponderance standard was appropriate for that case but reserved the right to invoke a different standard in other "contexts involving . . . military detention." Id. The court observed that the government never explained why there should be a difference in other contexts. Id.

[67] Id. at 1104.

[68] Id.

[69] Id.

[70] Id.

[71] Id. at 1105.

> [T]here are powerful reasons for the government to rely on our opinion in *Al-Adahi v. Obama*, which persuasively explains that in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary—and moreover, unrealistic. I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*).[72]

He does caution that he would "certainly . . . release a petitioner against whom the government could not muster even 'some evidence,'" but his bottom line is clear: the preponderance standard is unneeded, almost naïve.[73]

What's more, a court need not formally alter the burden of proof in order for its practical impact to change. Indeed, the meaning of the preponderance standard has shifted in subtle but important ways recently. Specifically, superficially unrelated language in the *Al-Adahi* opinion seems to have lowered the government's burden by making clear that courts not only may, but also should, consider a detainee's lack of credibility as a factor in favor of government evidence.[74] *Almerfedi* confirms this approach in allowing consideration of the detainee's "incredible explanations" in addition to the government's evidence in deciding that the government had met its burden.[75] This has effectively placed some burden on the detainee to present a consistent, credible account of his activities, whether that account derives from statements gathered entirely prior to the habeas hearing or, if he testifies at the hearing, from the pre-hearing accounts read in light of his hearing testimony.

Prior to *Al-Adahi*, the lower courts had consistently interpreted the fact that the government bore the burden of proof in a fashion that made detainee credibility all but irrelevant. It wasn't just that the judges took the view that, as Judge Colleen Kollar-Kotelly wrote, the petitioner "need not prove his innocence nor testify on his own behalf"[76] and, as Judge Gladys Kessler put it, a detainee

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[72] Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. April 8, 2011) Silberman, J., concurring) (citations omitted).

[73] *Id.*

[74] Al Adahi v. Obama, 613 F.3d 1102, 1110–11 (D.C. Cir. July 13, 2010).

[75] *See* Almerfedi v. Obama, 654 F.3d 1, 7 (D.C. Cir. June 10, 2011). The *Almerfedi* court acknowledged that the government's evidence was weaker in this case than others, leading to a larger reliance on the detainee's own admissions to meet the government's burden. *See Id.* at 6–7.

76 *See*, *e.g.*, Al Odah v. United States, 648 F. Supp. 2d 1, 7–8 (D.D.C. Aug. 24, 2009). *See also* Al Rabiah v. United States, 658 F. Supp. 2d 11, 19–20 (D.D.C. Sept 25, 2009). In some instances, habeas petitioners have pursued "expedited" motions for judgment pursuant to which the court assumes the truth of the government's factual claims and then tests their legal sufficiency, in a manner akin to Rule 12(b)(6) adjudication. *See*, *e.g.*, Razak Ali v. Obama, No. 09-745 (D.D.C.

"need not prove that he was acting innocently."[77] Detainees could prevail even when their exculpatory accounts were found to be "implausible," "troubling," or "patently fantastic."[78] The courts tended to view the government's evidence in complete isolation from whatever exculpatory account the detainee provided; even if the detainee's account was far-fetched, it would add no value to the government's otherwise insufficient evidence. The judges treated such situations as a tie, so to speak, that went to the detainee.

This understanding of the government's burden proved beneficial for petitioners in a number of early cases. For example, in *El Gharani*, Judge Richard Leon concluded that "notwithstanding the substantial and troubling uncertainties regarding the petitioner's conduct and whereabouts prior to his detention by Pakistani officials, the Government has failed to establish by a preponderance of the evidence that [the] petitioner . . . was 'part of or supporting' al Qaeda or the Taliban prior to or after the initiation of force by the U.S. in 2001."[79] Specifically, Judge Leon determined that the government's evidence presented nothing more than "murky" images of membership in al Qaeda[80] and "reveal[ed] nothing about the petitioner with sufficient clarify . . . that can be relied upon by [the] Court."[81]

Likewise, in *Al Mutairi*, Judge Kollar-Kotelly described the petitioner's version of events as "implausible and, in some respects, directly contradicted by other evidence in the record."[82] Nonetheless, she read nothing into the fact that the detainee was, in her judgment, likely lying about his own conduct. She concluded that although his "described peregrinations within Afghanistan lack[ed] credibility," the Government had not "supplanted . . . [the petitioner's] version of his travels and activities with sufficiently credible and reliable evidence to meet its burden by a preponderance of the evidence."[83]

More dramatically, in *Mohammed v. Obama*, Judge Kessler concluded that the detainee's explanation of his recruitment to Al Qaeda and related travel was

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Nov. 19, 2009) (order denying motion for expedited judgment). Cf. Khadr v. Bush, 587 F. Supp. 2d 225, 229 (D.D.C. Nov. 24 2008) (observing that motions under Rules 12(b)(6) or 56 of the Federal Rules of Civil Procedure are proper in habeas proceedings). In that setting, of course, the government's evidence is not put to the test.

[77] Al Adahi v. Obama, 2009 WL 2584685, *5 (D.D.C. Aug. 21, 2009). In fact, Judge Kessler invoked the preponderance standard as part of the Supreme Court's holding even though Boumediene specifically left that issue unresolved: "The Court did not define what conduct the Government would have to prove, by a preponderance of the evidence, in order to justifiably detain individuals -- that question was left to the District Courts." Id. at 1 (emphasis added).

[78] See, e.g., Al Mutairi v. United States, 644 F. Supp. 2d 78, 87–88 (D.D.C. July 29, 2009); El Gharani v. Bush, 593 F. Supp. 2d 144, 149 (D.D.C. Jan. 14, 2009); Mohammed v. Obama, 689 F. Supp. 2d 38, 49 (D.D.C. Nov. 19, 2009).

[79] El Gharani, 593 F. Supp. 2d at 149.

[80] Id.

[81] Id.

[82] Al Mutairi, 644 F. Supp. 2d at 87.

[83] Id. at 82.

"patently fantastic."[84] However, because the government failed to provide reliable evidence that he had "received any training in weaponry or fighting, or that he engaged in actual fighting of any kind on behalf of al-Qaida and/or the Taliban," his conduct did not meet the standard for detention.[85] In her view, the petitioner's lack of credibility added nothing to the government's claim that Mohammed was an enemy combatant.86

Yet when the D.C. Circuit confronted a government appeal from a case in which a detainee's credibility fell short,[87] it took a dramatically different approach. In *Al Adahi*, Judge Randolph's opinion for the panel reversed a decision granting the writ to a detainee who had provided incredible accounts of his connections to Al Qaeda.[88] The opinion took Judge Kessler to task for failing to take into account that "false exculpatory statements are evidence—often

[84] Mohammed v. Obama, 689 F. Supp. 2d 38, 49 (D.D.C. Nov. 19, 2009).
[85] Id. at 67. Interestingly, though the government had "credibly" proven that Mohammed used fake identities and passports, frequented radical mosques in London where a "recruiter . . . then paid for and arranged his trip to Afghanistan," and stayed in a guest house in that country "with direct ties to al-Qaida and its training camps," Judge Kessler declined to draw any negative inference from the petitioner's lies. "While it is not his burden to demonstrate why he traveled to Afghanistan, when he does offer an explanation that is so unbelievable, and the Government provides credible support for its interpretation of Petitioner's motivation, the Court must choose between the two. In this instance, the Court fully credits the Government's argument that Petitioner was recruited and traveled via a terrorist pipeline." Id. at 49.
[86] See also Abdah v. Obama, 708 F. Supp. 2d 9, 13 (D.D.C. Apr. 21, 2010) (stating that the petitioner Uthman "need not prove that he is unlawfully detained; rather, [the government] must produce 'evidence which as a whole shows that the fact sought to be proved'" and granting petition because respondents failed to meet that burden); Abdah v. Obama, 717 F. Supp. 2d 21, 35 (D.D.C. May 26, 2010) (holding that "to find that [petitioner's] version of events is a cover story in the complete absence of information suggesting that he was anything other than a student would render meaningless the principle of law that places the burden of proof on respondents rather than [petitioner]"); Almerfedi v. Obama, 725 F. Supp. 2d 18, 25 (D.D.C. July 8, 2010); Abdah v. Obama, 708 F. Supp. 2d 9, 13 (D.D.C. April 21, 2010) ("Accordingly, [petitioner] need not prove that he is unlawfully detained; rather, respondents must produce 'evidence which as a whole shows that the fact sought to be proved,' that [petitioner] was part of Al Qaeda, 'is more probable than not.'" (citation omitted)). Similarly, in the Salahi case decided after Al Bihani, Judge Robertson, applying the preponderance standard, wrote that the petitioner's explanation about false passports "rais[ed] unanswered questions about the lawfulness of his activities and the nature of his relationship with [known Al Qaeda members]"; however, Salahi's petition was granted because the government's evidence, viewed with "skepticism," did not persuade the court that he was more likely than not "part of" Al Qaeda and thus lawfully held. Salahi v. Obama, 710 F. Supp. 2d 1, 11–13 (D.D.C. Apr. 9, 2010). The issue of whether the preponderance standard permits district-court judges to adopt positions of "skepticism" toward the government's evidence was challenged in the government's appeal of Salahi. See Corrected Brief for Appellants at 51-52, Salahi v. Obama, 625 F.3d 745 (D.C. Cir. Nov. 5, 2010) (No. 10-5087). At oral argument in September, Judge Sentelle seemed at a minimum interested in the issue of whether such language might signal the district court's use of a higher-than-required evidentiary standard, though this issue may prove to be more semantic than significant.
[87] Al Adahi v. Obama, 2009 WL 2584685 (D.D.C. Aug. 21, 2009).
[88] Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. July 13, 2010).

strong evidence—of guilt."[89] The panel continued, "[o]ne of the oddest things about this case is that despite an extensive record and numerous factual disputes, the district court never made any findings about whether Al-Adahi was generally a credible witness or whether his particular explanations for his actions were worthy of belief."[90] And it found "incomprehensible" that Judge Kessler had disregarded the fact that Al Adahi's account was "contradicted by . . . undisputed evidence."[91] Most importantly, it further suggested that a false story itself could be evidence of training in counter-interrogation tactics: "Put bluntly, the instructions to detainees are to make up a story and lie."[92] And Judge Randolph chastised the district court for its refusal to hold the detainee's shifty accounts against him: "The court was wrong, and clearly so."[93]

The lower-court judges appear to have gotten Judge Randolph's message. In *Al Kandari*, one of the district-court cases since *Al Adahi* to present this issue, Judge Kollar-Kotelly once again faced a petitioner's story that she found "utterly implausible."[94] Though she still stuck by her statement that "Al Kandari need not prove his innocence nor testify on his own behalf" and that the court would draw "no inference based on Al Kandari's decision not to testify in this case," she cited language from the *Al Adahi* opinion and wrote that the combination of Al Kandari's "implausible explanation"—which was "of some probative value,"[95]—and the fact that the explanation was "consistent with al Qaeda counter-interrogation tactics" supported "a reasonable inference" that the government's version of events was correct and that "Al Kandari was not in Afghanistan solely to assist with, and did not engage solely in, charitable work, as claimed."[96] While this inference standing alone would not have supported a finding that Al Kandari became "part of" the forces of the Taliban or al Qaeda," Judge Kollar-Kotelly considered it "in the context of the other record evidence" and denied the writ.[97] Judge Reggie Walton, in Toffiq Al Bihani's case, made a similar judgment. In that case, Judge Walton denied Al Bihani's petition, finding that "[i]n fact, the inherent incongruity in the petitioner's account strongly suggests that he is

[89] Id. at 1107.

[90] *Id.* at 1110.

[91] *Id.* at 1107.

[92] *Id.* at 1111. The court also noted that "al-Qaida members are instructed to resist interrogation by developing a cover story, by refusing to answer questions, by recanting or changing answers already given, by giving as vague an answer as possible, and by claiming torture." *Id.* at 1112.

[93] *Id.* at 1110. *See also* Uthman v. Obama, 637 F.3d 400, 406 (D.C. Cir. Mar. 29, 2011); Esmail v. Obama, 639 F.3d 1075, 1076–77 (D.C. Cir. Apr. 8, 2011) (*per curiam*).

[94] Al Kandari v. United States, 744 F. Supp. 2d 11, 35 (D.D.C. Sept. 15, 2010). It bears noting that elsewhere in the opinion Judge Kollar-Kotelly found the petitioner's lack of recollection "implausible" but stated that she drew "no inferences for or against" him regarding that alone. *Id.* at *Id.* at 33 n.22.

[95] *Id.* at 35.

[96] *Id.* at 74-75.

[97] *Id.* at 75.

providing 'false exculpatory statements' to conceal his association with al-Qaeda."[98] This observation, backed by a citation to *Al Adahi*, led Judge Walton to discredit Al Bihani's exculpatory account and to rule that the government had met its burden.[99]

In *Almerfedi*, the D.C. Circuit confirmed that the government may satisfy its burden by using the lack of credibility of the detainee's own story. In *Almerfedi*, the court held that the district court had erred in not considering the lack of credibility of the detainee's story as evidence that the detainee was in a detainable class.[100] *Almerfedi* seems to place some burden on the detainee to give a credible account of his travels, or else risk that his story will be used to help satisfy the government's burden.[101] While the *Almerfedi* court states that it is applying the preponderance standard, it also emphasizes that the court's job is not to "decide whether a petitioner definitively meets the detention standard—instead, it merely makes a comparative judgment about the evidence."[102] *Almerfedi* thus pushes the district court away from a vision of the preponderance standard in which it is seeking—as in a criminal case—to test whether the government has proven in some absolute sense that the detainee is who it claims him to be. It pushes towards a vision in which the court is simply assessing whose story, the government's or the detainee's, is more likely to be true. In combination with the insistence that lack of credibility of the detainee's story counts as part of the government's evidence, this approach subtly alters the meaning of the preponderance standard in practice.

At one level, this shift involves how the courts read and weigh evidence, not the burden of proof itself. But in practical terms, it means that a portion of the government's burden is shifted to the detainee.. Most detainees, unlike criminal defendants, cannot really stay mum and offer no story. They have all been interrogated many times and have thus often have already given accounts that include apparently damaging statements. Even if they decline to testify in their habeas proceedings, their lawyers file factual representations on their behalf in the courts. Before *Al Adahi* and *Almerfedi*, the government carried the entire burden; the detainee's statements could help him if the judge believed them but didn't seem to hurt him if the judge did not or if they were inconsistent with one another. After *Al Adahi* and *Almerfedi*, by contrast, some small part of the burden has shifted to the detainee, at least in operational terms. He now bears some

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[98] T. Al Bihani v. Obama, No. 05-2386, slip op. at 16 (D.D.C. Sept. 22, 2010).

[99] *Id.* at 16-17 (*citing Al Adahi,* 613 F.3d at 1107).

[100] The Circuit Court found that "the district court. . . erred by ignoring the implication of what it found to be dubious accounts because 'false exculpatory statements' amount to evidence in favor of the government." Almerfedi v. Obama, 654 F.3d 1, 7 (D.C. Cir. June 10, 2011).

[101] *Also See* Al-Madhwani v. Obama, 642 F.3d 1071, 1076 (D.C. Cir. 2011) (Court finds that evidence of detainee's stay at guesthouse and training camp as well as his carrying a rifle to unmistakably show that detainee was "part of" al-Qaeda when captured because detainee's account of "mere happenstance" is "implausible").

[102] *Almerfedi*, 654 F.3d at 5.

degree of burden of offering a credible account of his activity. Though the law does not seem to demand perfect consistency between all the details in a detainee's account,[103] the failure to offer a credible story will weigh in the government's favor—again, not so much so that an incredible account is alone sufficient to dictate the outcome, but in a manner that acts as a thumb on the government's side of the evidentiary scale.[104]

Finally, the *Latif* case appears to continue and even extend the trend of burden shifting to the detainee. In *Latif*, the D.C. Circuit adopted a "presumption of regularity" regarding government intelligence reports. Specifically, the majority applied such a presumption to the "accuracy" of the Government record, meaning the transcription of the source's statement as recorded by the government official.[105] This has brought the court that much closer to the government's preferred position on the matter.[106]

To be sure, the majority opinion downplayed the importance of such extension by asserting, *inter alia*, that "[t]he presumption of regularity—to the extent it is not rebutted—requires a court to treat the Government's record as accurate; it does not compel a determination that the record establishes what it is offered to prove."[107] In its actual application, however, the court's new stance may put further downward pressure on the burden of proof as assigned in post-Boumediene cases.[108] Indeed, even if the veracity of the content is not presumed under the *Latif* approach, virtually all stages of intelligence report compilation are now covered by the presumption. So although nominally, the burden of proof remains unchanged, a detainee rebutting an intelligence report will now have to show some grounds for alleging its unreliability, either in its translation, transcription, or summarization. Notably, Judge Tatel's dissent predicted that the presumption would have a more sweeping impact, potentially taking the teeth out of any meaningful habeas review altogether given the centrality of

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[103] *See, e.g.* Abdah v. Obama, 717 F. Supp. 2d 21, 35 (D.D.C. May 26, 2010) (Kennedy, J.) (finding that certain inconsistencies in petitioner's story, which the government argued demonstrated the detainee was "a liar," were "minor and therefore insignificant").

[104] It is unclear how other types of untruthfulness might bear out in the future. For example, in Mohammed's case at the district court, Judge Kessler found that, though the government argued that being deceitful in using false names was probative of the petitioner's membership in Al Qaeda, such deception was insufficient to show membership in the organization. The *Mohammed* appeal was dismissed as moot so the discrete point was not challenged. Mohammed v. Obama, No. 10-5034 (D.C. Cir. Jan. 6, 2011) (dismissing as moot). *See also* Bensayah v. Obama, 610 F.3d 718, 727 (D.C. Cir. June 28, 2010) (noting that "serious questions" that had been raised about Bensayah's whereabouts "in no way demonstrate[d] that Bensayah had ties to and facilitated travel for al Qaeda in 2001" and suggesting a limit for this view).

[105] Latif v. Obama, 666 F.3d 746, 750 (D.C. Cir. 2011).

[106] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion).

[107] *Latif*, 666 F.3d at 750.

[108] Note that the intelligence report in question was not only prepared under problematic circumstances but consisted of multiple levels of hearsay. *See id.* at 779 (Tatel, J., dissenting).

intelligence reports in previous cases.[109] Notwithstanding the majority's assertion to the contrary, extending an evidentiary presumption may be tantamount to a *de facto* reversal of the burden of proof.[110]

[109] Judge Tatel clarifies that he does not treat this type of evidence unreliable perforce, simply that he finds no justification in "affording it presumptions one or way or the other." *See id.* at 773.

[110] *See id.* at 770 ("[R]ather than apply ordinary and highly deferential clear error review to the district court's findings of fact, as this circuit has done when district courts have found the government's primary evidence *reliable*, the court, now facing a finding that such evidence is *unreliable*, moves the goal posts. According to the court, because the Report is a government-produced document, the district court was required to presume it accurate unless Latif could rebut that presumption. In imposing this new presumption and then proceeding to *find* that it has not been rebutted, the court denies Latif the "meaningful opportunity" to contest the lawfulness of his detention guaranteed by *Boumediene v. Bush*" (emphasis in original) (citation omitted)); *see also id.* at 783 ("It is in just this circumstance—where doubts about the government's evidence and confidence in the detainee's story combine with other evidence to fatally undermine the government's case—that a detainee may prevail even without the district court needing to credit the detainee's story by a full preponderance of the evidence. *To require otherwise would, in effect, inappropriately shift the burden of proof to Latif*" (emphasis added)).