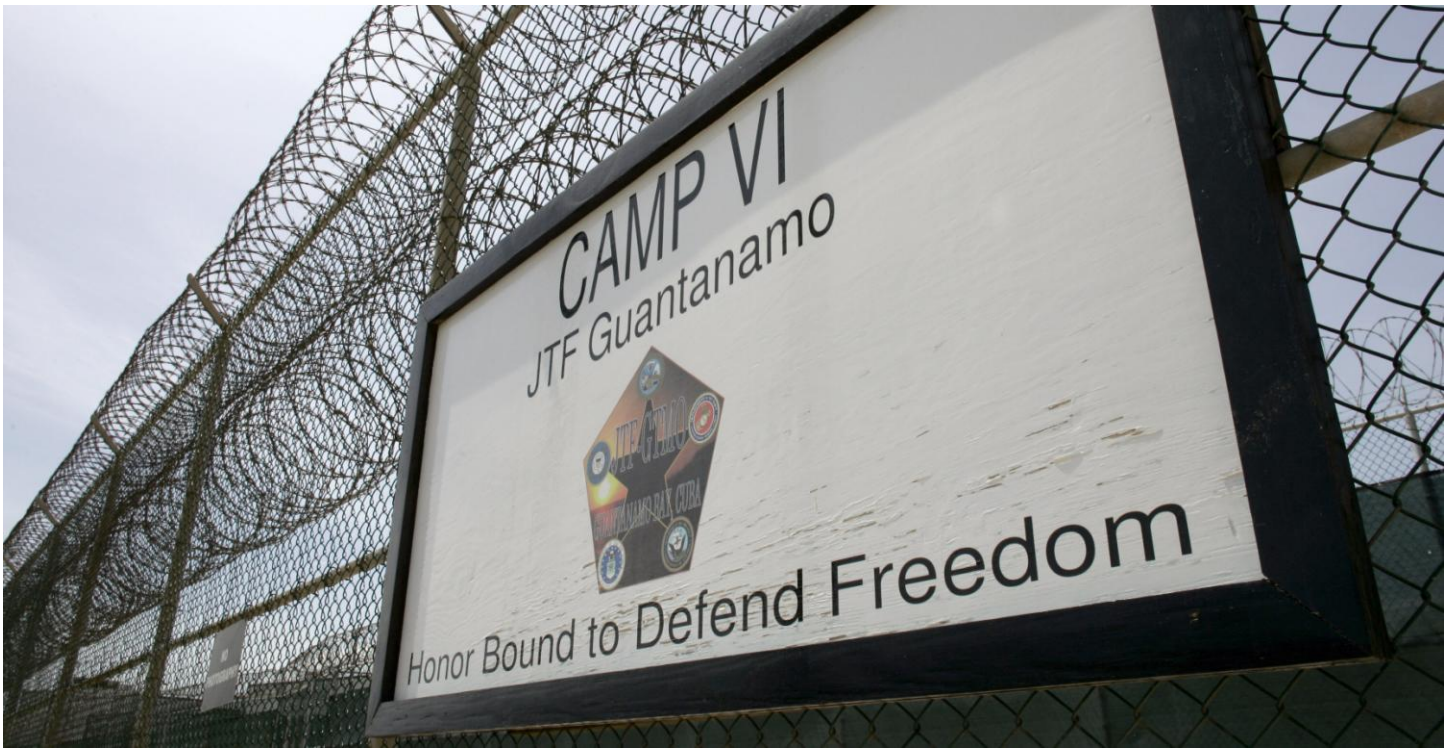
HARVARD LAW SCHOOL | BROOKINGS
PROJECT ON LAW AND SECURITY



The Emerging Law of Detention 2.0

The Guantánamo Habeas Cases as Lawmaking

April 2012

Benjamin Wittes
Robert M. Chesney
Larkin Reynolds
The Harvard Law School National Security Research Committee

This paper is being maintained and expanded in collaboration with the Harvard Law School National Security Research Committee, a student practice organization that provides legal research services for academics and policymakers on a variety of national security law issues.

The Harvard Law School National Security Research Committee (NSRC) provides independent, non-partisan legal research services for academics, policymakers, and other professionals in the national security community. Projects are conducted by current Harvard Law School students with faculty supervision. The following NSRC members contributed to this paper:

Jeffrey Bayne
Gilad Bendheim
Jonathan Deng
Jim Bob Kingman
Julia Lohmann
R. Taj Moore
Jordan Moran
Ioannis Naziris
William Payne
Joshua Roselman
Pio Szamel
Marissa Weinrauch
William C. Marra, Project Coordinator
Miranda Dugi, NSRC Director

Table of Contents

INTRODUCTION*

Benjamin Wittes is a senior fellow in Governance Studies at the Brookings Institution.

Robert M. Chesney is a nonresident senior fellow in Governance Studies at The Brookings Institution.

Larkin Reynolds is a legal fellow in Governance Studies at The Brookings Institution.

For the seven years following the September 11 attacks, the American debate over the propriety of military detention of terrorist suspects focused on the question of whether federal judges could exercise habeas corpus jurisdiction over detainees at Guantánamo Bay, Cuba. The Supreme Court answered that question affirmatively in the summer of 2008, but in doing so, it declined to address a number of the critical questions that define the contours of any non-criminal detention system. Congress could have legislated with respect to these questions and sought to define the rules, but it has not done so to date.

Many civil libertarians and human rights activists have praised Congress's inactivity, while some other commentators have leveled sharp criticisms. Whatever its merits, however, it is critical to understand that congressional inaction does not mean that the Obama administration has abandoned the option of non-criminal detention of terrorist suspects, nor does it mean that there exists no process to define the rules governing both current detentions and, at a minimum, those prospective detentions that take place at the base. Rather, the decision means that for good or ill, these rules will be written by judges through the common-law process of litigating the habeas corpus cases of the roughly 170 detainees still held at Guantánamo.

This state of affairs puts a premium on these cases not merely as a means of deciding the fate of the individuals in question but as a law-making exercise with broad implications for the future. The law established in these cases will in all likelihood govern not merely the Guantánamo detentions themselves but any other detentions around the world over which American courts might acquire habeas jurisdiction—although, as we discuss briefly below, the prospects for wider habeas jurisdiction are unclear. What's more, to the extent that these cases establish substantive and procedural rules governing the application of law-of-war detention powers in general, they could end up impacting detentions far beyond those immediately supervised by the federal courts; indeed, they might even have an indirect but significant impact on superficially unrelated military activities, such as the planning of operations and decisions to target suspected enemy combatants with lethal force. In short, the legislature's passivity to date combined with President Obama's decision not to seek new law to address these questions have together delegated to the courts a remarkable task: defining the rules of military detention.

Despite the scope of their mandate, the courts' actual work product over the past few years has received relatively little attention. The district and appellate

* The authors received substantial assistance on this paper from The Hoover Institution Task Force on National Security and Law, whose partnership with Brookings on national security law has become invaluable in so many ways. The authors also would like to thank Daniel J. Hickman, Elizabeth Valentini, Jeremy A. Simon, and Ursula L. Gwynn for their assistance preparing the report for publication. Please note that we have used a non-standard citation system in this paper in an effort to aid readers in referencing source material.

court judges have not been idle; far from it. To date, district judges have issued 38 merits opinions covering 59 different detainees, and the D.C. Circuit Court of Appeals has issued 11 decisions on appeal. As we shall explain, these numbers do not give an altogether accurate picture of the litigation's complexity, but the press has duly noted each of these decisions and has kept a running scorecard of detainee wins versus government wins. Yet at the same time, it has paid almost no attention to the broader contours of the law of detention that is emerging from these decisions.[1]

Our purpose in this report is to describe in detail and analyze the courts' work to date—and thus map the contours of the nascent law of non-criminal counterterrorism detention that is emerging from it. As we shall describe, the Supreme Court, in deciding that the federal courts have jurisdiction over habeas corpus cases from Guantánamo, gave only the barest sketch of what such proceedings should look like, leaving a raft of questions open for the district and appellate court judges:

- Who bears the burden of proof in these cases, and what is that burden—which is to say, who has to prove what?
- What are the boundaries of the President's detention power—that is, assuming the government can prove that the detainee is who it claims him to be, what sort of person is it lawful to detain under the laws of war?
- What sort of evidence can the government use?
- And how should the courts handle hearsay and evidence that may have been given involuntarily?

None of these questions, and many others besides, has clear answers emanating from either Congress or the Supreme Court. On all of them, the lower federal court judges are making the law.

In January 2010, the Governance Studies department at Brookings released a paper entitled "The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking." In the paper, two of the present authors sought to describe the enormous diversity of opinion among the lower court judges to whom the inactivity of the Supreme Court, Congress, and the executive branch had effectively delegated the task of writing the law of detention. In the year that has followed, a great deal has changed. A number of appellate decisions have given the lower court considerable guidance on questions that were seriously contested when we published the original paper. Some of the parameters of the law of detention that were altogether unsettled then have come into sharper focus as a

[1] For an important exception to this rule, see Chisun Lee, *An Examination of 41 Gitmo Detainee Lawsuits*, PROPUBLICA, Jul. 22, 2009, http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722 (last updated Dec. 17, 2009).

result. And lower court judges have, to some degree, fallen into line. On other issues, by contrast, the law remains more or less as it was then, uncertain and subject to greatly divergent approaches by district judges with profoundly differing instincts. While in some areas, in other words, the judges have developed relatively clear rules, in others they continue to disagree. And, as then, the D.C. Circuit may not prove to be the final word. Its decisions may be merely interim steps on the way to Supreme Court consideration—meaning that the entire law of detention as it stands now could prove to be a kind of draft, a draft whose parameters remain sharply disputed and that might be torn up at any time.

The original paper is, in many respects, thus an out-of-date account of this draft—no longer an accurate guide to what is contested and what is at least tentatively resolved. Rather than simply produce a new edition of the paper, one that would just as quickly become obsolete, we decided to adapt it into a more dynamic document—one that we can update in real time as the law of detention emerges further and to which we can add additional sections covering issues we ignored the first time around.

Welcome to the Emerging Law of Detention, Version 2.0.

The sections of this report are adapted from those of the original paper, on which they significantly expand, and we expect to add additional sections as the case law develops. In some areas, the development has been, and will continue to be, relatively rapid. In other areas, things change slowly. The goal is to provide, at all times, a reasonably up-to-date account of how the law of detention is changing and where it is heading on each of the bewildering array of questions on which individual judges and combinations of appellate judges are picking and choosing among the possible directions of the law.

Two of the present authors have argued for detention legislation in the past and continue to believe congressional involvement is crucial to the healthy development of America's detention system. We have also made no secret of having significant concerns about the habeas process as a lawmaking device, though it is essential to emphasize that we are not criticizing the judges in question, who have no choice but to decide the case that have come before them with whatever guidance they have been given. All that said, our purpose in this report is not to engage the debate over whether the United States needs detention legislation. It is, rather, to describe the developing system under the rule-making mechanism currently in place. We hope our description provides insights into the emerging law of detention for those who oppose, as well as for those who agree with, our views of contested current policy questions.

This report proceeds in several parts. In the first section, we briefly describe the legal background that gave rise to these habeas corpus cases: the Supreme Court's decisions recognizing federal-court jurisdiction over Guantánamo and addressing to a limited extent the contours of a legal process for detainees adequate to satisfy constitutional concerns. We highlight in particular the extent

to which the court left the key questions open, a move that in the absence of further congressional action effectively delegated the writing of the rules to the judiciary. In the sections that follow, we examine the law as it is developing with respect to several of the most important questions concerning the governance of non-criminal, law-of-war-based detentions. In particular, we look at the judges' approaches to the following questions:

- the burden of proof;
- the substantive scope of the government's detention power;
- the question of whether a detainee's relationship with an enemy organization, once established, is permanent or whether it can be vitiated by time or events;
- whether the government is entitled to presumptions in favor of either the accuracy or authenticity of its evidence;
- the use of hearsay evidence;
- the use of evidence alleged to result from coercion; and
- the government's use of a "mosaic theory" of evidentiary interpretation.

We may add more sections, on issues like discovery, in the coming months and will endeavor to keep the existing sections current as new cases develop.

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,

---

[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

---

[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

---

[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

---

[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.)

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

[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.").

showing and persuade the Court that its evidence is, at a minimum, "credible."[44] 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]

---

[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 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.").

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

[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.

standard's source, it seemed for a time that the district court had forged a 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

---

Dec. 15, 2009) (Urbina, J.) (adopting "the provisions of the amended CMO," subject to scheduling modifications set forth in prior orders).

[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).

emphasized that the court reserved the question.[62]

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

---

[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 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.

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:

> [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

---

[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.

nor testify on his own behalf"[76] and, as Judge Gladys Kessler put it, a detainee "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

---

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. 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.

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 "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

---

[83] Id. at 82.

[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.

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 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

[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).

[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.

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 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

---

[97] *Id.* at 75.

[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.

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 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

---

[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).

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 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)).

Chapter 3 – The Scope of the Government's Detention Authority

The early operative consensus among district court judges concerning the burden of proof—a consensus the D.C. Circuit has now destabilized—is the exception in these cases, not the rule.[111] More commonly, the judges have split sharply over fundamental questions, with significant implications for the ultimate bottom-line results, and the appeals court has had to step in to impose some harmony. A case in point in this regard is the dispute among the judges over the scope of the government's detention authority. The district judges fractured almost immediately on this question, but more recently the D.C. Circuit has stepped in to impose a degree of uniformity. The end result is a strong endorsement of the functional test for determining whether a given individual is part of an AUMF-covered group—a test that has proven very favorable to the government—coupled with dicta (though no holding as yet) endorsing the notion that persons also may be subject to detention for providing material support to AUMF-covered groups. Meanwhile, the recent enactment of the National Defense Authorization Act for Fiscal Year 2012 provides, for the first time, both an explicit statutory foundation for detention authority and express endorsement of both the membership and support tests for detainability.[112]

The answer to the question of whom to detain, as Matthew Waxman has written, may "seem obvious at first. The government should detain individuals to *prevent* terrorism and, to that end, it should detain *terrorists*" (emphasis in original).[113] But, as Waxman argues, it is actually not obvious at all. There are any number of ways one can define the class of people subject to non-criminal detention, and the extant law gives only limited guidance as to the permissible bounds of this authority. Unsurprisingly, therefore, district judges in the first wave of post-*Boumediene* litigation articulated an array of significantly different standards. By reversing and remanding district court opinions that applied a relatively stringent test, the D.C. Circuit Court has been gradually expanding the scope of the government's detention authority. As illustrated in both Judge Kavanaugh's majority opinion in *Uthman* and Judge Silberman's majority opinion in *Almerfedi*, increasingly-bare fact patterns have been held sufficient to establish by a preponderance of evidence that an individual was "part of" Al-Qaeda, the Taliban, or other associated forces.[114] Although it seems that the bar

---

[111] The text in this section draws significantly on Part III of Robert Chesney's article *Who May Be Held? Military Detention Through the Habeas Lens*, sections of which appear here by permission of the Boston College Law Review. *See* Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011).

[112] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2011) [hereinafter "NDAA"].

[113] Matthew Waxman, *Administrative Detention: Integrating Strategy and Institutional Design*, *in* LEGISLATING THE WAR ON TERROR 44 (Benjamin Wittes ed., 2009).

[114] *See* Uthman v. Obama, 637 F.3d 400, 404 (D.C. Cir. Mar. 29, 2011); Almerfedi v. Obama, 654 F.3d 1, 6–7 (D.C. Cir. June 10, 2011).

towards establishing the propriety of a detention is being lowered, however, a number of important questions remain unresolved.

Continuity and Change in Executive Branch Assertions of Authority between the Bush and Obama Administrations

Both the source and the substantive scope of the government's authority to use military detention have been the subject of intense controversy throughout the post-September 11 period. The Bush administration asserted that both Article II of the Constitution and the September 18, 2001, Authorization for Use of Military Force ("AUMF") gave it the power to detain for the duration of hostilities both members and supporters of entities—including Al Qaeda, the Taliban, and "associated forces"—that are engaged in hostilities against the United States or its allies. The Supreme Court partially upheld this claim in *Hamdi.* A plurality of the Court determined in that case that the AUMF implicitly conferred authority to employ the traditional "incidents" of warfare, that these incidents included the power to detain enemy fighters in at least some circumstances, and that this authority would apply at least to a person who "fought against the United States in Afghanistan as part of the Taliban."[115] This holding left open the question of whether the AUMF (or Article II, for that matter) similarly provided for such non-criminal detention of persons captured in other circumstances. Less obviously, it also left open a set of difficult issues concerning what it meant to be a "member" or "part" of any of these organizations, at least some of which are better characterized as loose associational networks than as hierarchical organizations.

Such questions are central to whether detention authority lawfully may extend to any number of military detainees at Guantánamo and elsewhere. The issue did not return to the Supreme Court until the *Boumediene* decision in 2008, however, since the courts up until that point were primarily occupied with threshold questions of jurisdiction. And while the Supreme Court had the question of the substantive scope of the government's detention authority briefed before it in *Boumediene*, it ultimately elected not to address it.[116] As it did with so

---

[115] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion). *See also id.* at 561-63 (Thomas, J., concurring) (providing a fifth vote in support of detention authority based on the government's Article II argument). It is not entirely clear how best to describe *Hamdi*'s holding on this question. Immediately after the relatively narrow language quoted in the text above, the plurality emphasizes that its conclusion is confined to the "detention of individuals falling into the limited category we are considering . . . ." *Id.* at 518. On the other hand, the plurality elsewhere refers to "the definition of enemy combatant that we accept today" as including those who are "'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'" *Id.* at 526.

[116] *See, e.g.*, Brief for the *Boumediene* Petitioners at 33-43, Boumediene v. Bush, 553 U.S. 723 (2008) (contesting the substantive scope of the government's detention authority), *available at* http://www.scotusblog.com/archives/Boumediene_merits_brief.pdf.

many other procedural and substantive questions, it left the nature and scope of the government's detention authority to the district courts to resolve in the course of carrying out the habeas review it mandated.

The intervening election of a new administration raised the possibility that the executive branch might revise or even abandon its claim to military detention authority. In March 2009, however, the Obama administration filed a brief in the *Hamlily* habeas litigation that departed only in three relatively minor ways from the Bush administration's earlier approach. First, the new administration asserted that henceforth its claim to detention authority would rest on the AUMF, rather than on any claim of inherent Article II power, and that its AUMF-based authority ought to be construed in accordance with the laws of war. Second, the Obama administration dropped the label "enemy combatant" in favor of the less provocative practice of referring simply to persons detainable pursuant to the AUMF.[117] These moves, notably, did not generate particular controversy among the district-court judges. Those who explicitly addressed the source-of-authority issue appeared to accept that the proper frame of reference is indeed the AUMF. And no judge thus far has suggested that the government may have broader authority by virtue of any inherent Article II arguments. Nor has any expressed doubt that the AUMF provides at least *some* form of detention authority.

The judicial reception of the administration's third move differed. In its *Hamlily* filing, the administration asserted that its detention authority extends to both members of AUMF-covered groups and to non-members who provide *substantial* support to such groups.[118] That is to say, it accepted the Bush administration's claim that it could detain not just members of the organizations in question but also those who provide support to such groups despite not being members. But it limited its claim of authority to circumstances where the support qualifies as substantial.

At the district court level, this two-track model encountered considerable difficulties. While one judge endorsed it without qualification, others raised a variety of objections to it. Complicating matters, these objections were not consistent with one another, and as a result, there were at least four competing positions regarding the substantive scope of the government's detention authority as of the beginning of 2010. A series of subsequent decisions by the D.C. Circuit, however, has eliminated some—though not all—of this variety. Although there has been little progress toward a clearer standard for what constitutes "substantial support," the expansion of what evidence will suffice to establish the government's detention authority seems to have made this issue less important. Especially in cases with elements of both support and possible

[117] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. Mar. 13, 2009) (No. 05-763), ECF No. 175.

[118] *Id.*

membership, the support prong of the two-track model appears have been subsumed by the lenient functional test that has emerged to determine if an individual is more likely than not "part of" an AUMF-covered group.

Most recently, Congress has stepped into the game. At the end of 2011, the legislature passed, as part of the fiscal year 2012 National Defense Authorization Act (NDAA), a codification of both the "part of" and "substantial support" standards as grounds for detention. Section 1021 of the NDAA "affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons," which it defines as including anyone "who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[119]

Contesting Membership and Support as Sufficient Conditions

The bulk of the post-*Boumediene* cases dealing with the substantive-scope question have focused on the role of membership and independent support as sufficient conditions for detention. These opinions reflect widespread agreement among the judges that associational status alone—in other words, membership in an AUMF-covered group—can serve as a sufficient condition to justify detention. Consensus breaks down, however, when it comes to fleshing out the meaning of membership, and likewise when it comes to determining whether independent support—the provision of material support to an AUMF-covered group by a non-member—can serve as an alternative sufficient condition.

These issues arose initially before Judge Leon during the waning days of the Bush administration, in the habeas merits hearing for the *Boumediene* petitioners themselves, on remand from their Supreme Court victory.[120] In October 2008, Judge Leon issued an opinion characterizing both the petitioners and the government as having urged him to "draft" his own preferred legal standard regarding the boundaries of detention authority.[121] This he refused to do, arguing that his role instead was merely to determine whether the administration's position was consistent with a pair of *domestic* legal considerations: the AUMF, and any further authority the President might have under the "war powers" of

[119] NDAA, *supra* note 112, § 1021.

[120] *See* Boumediene v. Bush, 583 F. Supp. 2d 133 (D.D.C. Oct. 27, 2008). Recall that Judge Leon years earlier in *Khalid v. Bush* had declined to reach this question on the ground that the detainees lacked any substantive rights supporting such an inquiry. 355 F. Supp. 2d 311 (D.D.C. Jan. 19, 2005).

[121] *Boumediene*, 583 F. Supp. 2d at 134.

Article II of the Constitution.[122] Without substantial elaboration, Judge Leon concluded that the government's two-track standard was compatible with both.[123]

There things stood a few months later when the Obama administration first expressed its views on the scope of its detention authority in the brief it filed on March 13th before Judge Bates in the *Hamlily* litigation. As discussed above, the March 13th definition largely preserved the Bush administration's two-track model.[124] But before Judge Bates had the chance to address the merits of the revised position in *Hamlily,* Judge Walton did so in *Gherebi v. Obama*.[125]

Gherebi, in brief, permitted detention where the government could demonstrate that the individual participated in the military chain of command of an AUMF-covered group, but excluded detention for members of the group outside the military chain of command and for non-members who provide support to the group.[126] Judge Bates's subsequent ruling in *Hamlily* similarly rejected the notion that detention authority properly extended to mere supporters who did not participate in an AUMF-covered group's chain of command.[127] *Hamlily* differed from *Gherebi* in important ways, however: *Hamlily* did not specify a distinction between a group's military and non-military wings, and *Hamlily* observed that some conduct that might appear to be mere "support" under the *Gherebi* approach might also be characterized as proof of a functional form of membership.[128]

Notwithstanding these similarities, other district judges subsequently disagreed with one another as to whether there was a genuine difference between *Gherebi* and *Hamlily.* Judge Hogan, for example, held that there was no appreciable difference.[129] Judge Kessler, on the other hand, stated that there was, and that she preferred the *Gherebi* approach.[130] Meanwhile, Judge Urbina in *Hatim v. Obama* articulated an understanding of the chain-of-command test that appeared distinct from what either Judge Walton or Judge Bates had in mind.[131] Specifically, *Hatim* suggested that merely notional status within a chain of

---

[122] *Id.*

[123] *See id.*

[124] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. Mar. 13, 2009) (No. 05-763), ECF No. 175.

[125] *See* 609 F. Supp. 2d 43 (D.D.C. Apr. 22, 2009).

[126] *See id.* at 66–70.

[127] *Hamlily*, 616 F. Supp. 2d 63.

[128] *See id.* at 76-77. *See also* Hatim v. Obama, 677 F. Supp. 2d 1, 6 n.3 (D.D.C. Dec. 15, 2009).

[129] *See* Anam v. Obama (Al Madhwani), 653 F. Supp. 2d 62, 64 n.2 (D.D.C. Sept. 14, 2009) (stating that *Hamlily* is "not inconsistent" with *Gherebi*, and that any apparent difference "is largely one of form rather than substance").

[130] *See* Al Odah v. Obama, 648 F. Supp. 2d 1, 6–7 (D.D.C. Aug. 24, 2009).

[131] *See* 677 F. Supp. 2d at 6-7.

command was not enough; one must have actually obeyed specific orders in the past in order to be a member in this sense, and hence to be detainable.[132] And Judge Huvelle introduced a distinct concern in the *Basardh* litigation, holding that the government must also prove that a person would be dangerous if released, regardless of membership status[133]—a position that has since been rejected by the D.C. Circuit, as we discuss in more detail in the next chapter.

In any event, the nuanced disagreement among Judges Walton, Bates, and Urbina, if disagreement there truly was, became moot once the chain-of-command question came before the D.C. Circuit. In a series of cases in 2010, the Circuit expressly rejected the proposition that one must be part of any chain of command—let alone that of the military wing of an organization—in order to qualify as a member subject to military detention under the AUMF. And perhaps more significantly, the Circuit also has revived the proposition that detention authority extends also to non-member supporters of AUMF-covered groups.

The Circuit first spoke to these issues in *Al Bihani v. Obama* in January 2010.[134] In that case, the majority opinion by Judge Brown, joined by Judge Kavanaugh and joined in the judgment by Judge Williams, opened in an unexpected vein, declaring that the international laws of war simply have no bearing on the question of who lawfully may be detained without criminal charge under the AUMF.[135] Only *domestic* law sources, in their view, should be considered in the course of determining the legal bounds of detention authority. Accordingly, the panel looked for guidance in the personal jurisdiction provisions found in the Military Commissions Act of 2006 and its eponymous successor from 2009.[136] Those provisions stated that military commissions may proceed against aliens who are members of AUMF-covered groups and also those who are not members but who nonetheless provide support to such groups.[137] Reasoning that a person subject to military commission prosecution under the two MCAs *a fortiori* would be subject to detention under the AUMF, the panel majority in *Al Bihani* concluded that proof of independent support can serve as a sufficient condition for detention separate and apart from proof of membership in an AUMF-covered group.[138] In addition, the panel observed, albeit in *dicta*, that attending a training camp sponsored by an AUMF-covered group would "overwhelmingly, if not definitively, justify the government's detention of such a

---

[132] *See id*.

[133] *See* Basardh v. Obama, 612 F. Supp. 2d 30, 35 (D.D.C. Apr. 15, 2009).

[134] 590 F.3d 866 (D.C. Cir. Jan. 5, 2010).

[135] *See id.* at 871-72. Judge Stephen Williams joined in the judgment while questioning the majority's claim that international law was irrelevant. *Id.* at 882-85.

[136] *See id.* at 872-73.

[137] Military Commissions Act of 2006, sec. 3, §§ 948a(1), 948c, Pub. L. No. 109-366, 120 Stat. 2600, 2601-02; Military Commissions Act of 2009, sec. 1802, §§ 948a(7), 948b(a), 948c, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2575-76 (codified as amended at 10 U.S.C. §§ 948a et seq.).

[138] *See* 590 F.3d at 872–73.

non-citizen,"[139] as might staying at a guesthouse associated with an AUMF-covered group's recruitment process.[140]

These aspects of *Al Bihani* garnered a great deal of academic interest but ended up having no lasting impact. The panel's rejection of international law was undone by a majority of the active circuit judges who, though unwilling to grant Al Bihani's petition for *en banc* review, did publish an explanatory statement declaring the panel's rejection of international law to be *dicta*.[141] Thus, in the Circuit's more recent decision in *Al Warafi*, the panel did not hesitate to remand a petition for further factfinding relating to certain provisions of the First Geneva Convention concerning the detention of medical personnel—an approach that plainly treats the laws of war as relevant in at least some fashion to the scope of detention authority.[142] Moreover, the passage of the NDAA—perhaps unintionally—seems to have settled the matter in favor of the relevance of international law. The authorization to detain members and supporters of enemy forces in the NDAA explicitly invokes international law. As the new statute puts it, the AUMF authority "includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition *under the law of war*."[143] And the law defines these dispositions as including "detention *under the law of war* without trial until the end of the hostilities authorized by the Authorization for Use of Military Force."[144]

It is more difficult to describe the fate of the *Al Bihani* panel's conclusions with respect to non-member support and to the evidentiary significance of training-camp attendance and guest-house residency as proof of membership. As an initial matter, those issues had not actually been presented by the fact pattern in *Al Bihani*, and hence they too could be dismissed as *dicta.* Nonetheless, they seem to have had some impact on subsequent panel decisions.

The question of whether independent support suffices on its own as a detention predicate also remained somewhat uncertain until the NDAA, notwithstanding *Al Bihani*'s endorsement of the support prong. On the one hand, subsequent Circuit opinions, though not actually confronting an independent-support scenario, have gone out of their way to emphasize *Al Bihani*'s treatment of this point. In *Hatim v. Gates*, for example, a panel of the D.C. Circuit consisting of Judges Henderson, Williams, and Randolph issued a *per curiam* opinion characterizing *Al Bihani* as having had "held" that detention could be predicated not only on membership but also on the provision of material support.[145] The more recent opinion in *Uthman v. Obama*—written by Judge Kavanaugh, and

[139] *See id.* at 873 n.2.

[140] *See id.*

[141] *See* G. Al Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. Aug. 31, 2010).

[142] *See* Al Warafi v. Obama, 409 Fed. Appx. 360, 361 (D.C. Cir. Feb. 22, 2011).

[143] NDAA, *supra* note 112, § 1021 (emphasis added).

[144] *Id.* (emphasis added).

[145] Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. Feb. 15, 2011).

joined by Judges Garland and Griffith—also notes that *Al Bihani* stated that independent support may suffice.[146]

On the other hand, the executive branch grew anxious about this conclusion, at least in circumstances where the petitioner ostensibly rendered support to an AUMF-covered group from outside the geographic confines of Afghanistan. The independent-support issue was expected to be put to the test directly in *Bensayah v. Obama*. Bensayah was the last of the original *Boumediene* petitioners, the only one whom Judge Leon found subject to detention after remand from the Supreme Court. Judge Leon had expressly relied on independent support as a ground for detention in that case. Specifically, he had found Bensayah subject to detention not for being an Al Qaeda member (though Judge Leon did not rule this out) but, instead, for having provided support to Al Qaeda in the form of facilitating the travel of would-be fighters to Afghanistan.[147] A casual observer might have assumed, therefore, that the appeal would oblige the D.C. Circuit to give further consideration to the sufficiency of independent support as a detention ground.

A more rigorous observer, on the other hand, would anticipate that the Circuit's decision ultimately would focus on the membership ground instead. Several months earlier, Charlie Savage of the *New York Times* had reported the existence of a "pronounced" disagreement among "top lawyers in the State Department and the Pentagon," as well as the Justice Department and other agencies, with respect to "how broadly to define the types of terrorism suspects who may be detained without trial as wartime prisoners."[148] According to Savage's account, the debate arose initially when the government was obliged to develop its revised detention position in *Hamlily*.[149] As noted above, the government ultimately chose to make some changes to its position, but did not abandon the claim that it had authority to detain both members and non-member supporters of AUMF-covered groups. This did not end the internal debate, however, but instead merely delayed it until the administration might be faced with the choice of whether to defend a specific case on independent-support grounds—particularly one involving a detainee captured in a location geographically remote from the battlefield.[150]

The need to develop a position on appeal in the *Bensayah* litigation, Savage wrote, provided just such an occasion:

> The arguments over the case forced onto the table discussion of lingering discontent at the State Department over one aspect of the Obama position

[146] Uthman v. Obama, 637 F.3d 400, 402 n.2 (D.C. Cir. Mar. 29, 2011).

[147] Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. Nov. 20, 2008).

[148] Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 28, 2010, *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html?pagewanted=all.

[149] *See id.*

[150] *See id.*

> on detention. There was broad agreement that the law of armed conflict allowed the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.[151]

Assuming the accuracy of this account, then, the specific dispute involved the conjunction of the independent-support ground with the use of detention authority for captures away from the conventional battlefield. Savage reported that the State Department's newly arrived Legal Advisor, Harold Koh, championed the view "that there was no support in the laws of war" for the claim of detention authority in that circumstance, while the Defense Department's General Counsel, Jeh Johnson, disagreed.[152] Savage indicated that the question was then put to the Justice Department's Office of Legal Counsel, which eventually produced an equivocal memorandum "stating that while the Office of Legal Counsel had found no precedents justifying the detention of mere supporters of Al Qaeda who were picked up far away from enemy forces, it was not prepared to state any definitive conclusion."[153]

Nonetheless, a position was needed for the *Bensayah* appeal.[154] According to Savage's account, the solution was to "try to avoid that hard question" by "chang[ing] the subject" in *Bensayah*. Rather than defend the decision below on the ground relied upon by Judge Leon—that Bensayah could be detained because he provided support to Al Qaeda—the government would instead seek affirmance on the ground that Bensayah was a functional member of Al Qaeda.[155] And thus, the Justice Department's Civil Division came to make a most unusual filing on the eve of oral argument in the case, explaining to the court in a brief letter that the "Government's position is that this case is best analyzed in terms of whether Bensayah was functionally 'part of' al Qaida, and that the district court's judgment can and should be affirmed solely on that ground."[156] Indicating that the internal debate had not yet been resolved, moreover, the letter added that

> the Government is not foreclosing its right to argue in appropriate cases that the AUMF, as informed by the laws of war, permits detaining some

---

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See id.*

[155] *See id.*

[156] Letter from Sharon Swingle of the Justice Department's Civil Division to the Clerk of the United States Court of Appeals for the District of Columbia Circuit at 1, Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. Sept. 22, 2009) (No. 08-5537).

> persons based on the substantial support they provide to enemy forces, even though such persons are not themselves 'part of' those forces. The Government continues to defend the lawfulness of detaining certain individuals who provide substantial support to, but are not part of, al Qaida or the Taliban.[157]

At the time he wrote, Savage did not know how this strategy would play out with the D.C. Circuit. Nonetheless, he concluded his account with a perceptive observation regarding the larger significance of the issue: "The outcome of the yearlong debate could reverberate through national security policies, ranging from the number of people the United States ultimately detains to decisions about who may be lawfully selected for killing using drones."[158]

Ultimately, the Circuit reversed and remanded in *Bensayah v. Obama*,[159] though it is far from clear that the government's decision not to advance the independent-support argument caused that outcome or that geographic constraints entered into the analysis. In addition to limiting its legal theory on appeal, it turns out, the government also had decided not to continue to rely on certain inculpatory statements that had been made by another detainee. The latter move proved decisive, as the panel found that the remaining evidence did not suffice to prove that Bensayah had engaged in the recruiting and logistical-support activities that the government had alleged, and hence that the government had failed to show that Bensayah was a functional member of Al Qaeda.[160] By the same token, presumably, this body of evidence likewise would not have sufficed to sustain an independent-support argument. In any event, the litigation continues; the Circuit remanded the case not with orders to grant Bensayah's petition, but rather for Judge Leon to reconsider the merits including any new evidence of functional membership that the government might put forward.[161]

The Circuit has thus not yet had another opportunity to confront a fact pattern clearly turning on a claim of support independent from a membership argument. The government has made a point of litigating all other cases featuring evidence of support in a fashion that construes that support as a matter of constructive membership, thus sublimating the support prong almost entirely to the "part of" prong. That said, the issue has since been settled by statute—to wit, the NDAA's language explicitly makes substantial support an independent ground for detention.

By contrast, the *Al Bihani* panel's favorable treatment of training camp attendance and guest-house residency as evidence of membership has received

---

[157] *Id.* at 1–2.

[158] Savage, *supra* note 148.

[159] 610 F.3d 718, 727 (D.C. Cir. June 28, 2010).

[160] *Id.* at 726.

[161] *Id.* at 727.

consistent approval in subsequent panel decisions. In *Al Odah v. Obama,* for example, Chief Judge Sentelle and Judges Rogers and Garland repeated *Al Bihani*'s suggestion that training-camp attendance alone might well be sufficient to make out the case for detention on membership grounds.[162] Then, just two weeks later, in *Al Adahi v. Obama*, Judges Randolph, Henderson, and Kavanaugh found that evidence of a detainee's attendance at both a training camp and a guesthouse constituted "powerful" evidence of functional membership, and sharply criticized a district judge for suggesting otherwise.[163] More recently, the panel in *Uthman* observed that the reason guesthouse attendance has been viewed as relevant to membership "is plain: It is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake, either by the guest or by the host."[164] And in *Esmail v. Obama,* a panel consisting of Judges Tatel, Brown, and Silberman issued a *per curiam* opinion stating that "[w]e have observed that training at al Farouq or other al Qaeda training camps is compelling evidence that the trainee was part of al Qaeda."[165]

Several of the D.C. Circuit's decisions have also grappled with the significance of other evidence offered by the government as suggestive of membership or support. Regarding some of these evidentiary markers, the appellate-court judges seem to have more or less agreed that they are, at a minimum, probative on the question of membership, even if they do not have clearly delineated margins. Several distinct markers have appeared—and been considered probative of membership—in different D.C. Circuit decisions. The adoption of a more holistic "totality of the circumstances" test for determining if an individual is "part of" an AUMF-covered group seems to indicate that a great many combinations of these markers will suffice to meet the preponderance of the evidence standard. Such factors include whether the petitioner was captured near Tora Bora,[166] whether he was carrying a large amount of cash at the time of capture,[167] whether he associated "with other al Qaeda members,"[168] whether he

---

[162] *See* Al Odah v. Obama, 611 F.3d 8, 17 (D.C. Cir. June 30, 2010). *See also* T. Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010) (describing that the petitioner had conceded that his attendance at the Al Farouq training camp sufficed to show he was "part of" Al Qaeda for at least a few months).

[163] 613 F.3d 1102, 1108 (D.C. Cir. July 13, 2010).

[164] Uthman v. Obama, 637 F.3d 400, 406 (D.C. Cir. Mar. 29, 2011). *See also* Razak Ali v. Obama, 741 F. Supp. 2d 19, 25–26 (D.D.C. Jan. 11, 2011); Khalifh v. Obama, No. 05-1189, slip op. at 12 (D.D.C. May 29, 2010).

[165] Esmail v. Obama, 639 F.3d 1075, 1076 (D.C. Cir. Apr. 8, 2011) (*per curiam*). The opinion also notes that the length of training at issue in that case—"at least a month—makes this particularly strong evidence" in contrast to the seven-to-ten day period at issue in *Al Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. July 13, 2010). *See id.*

[166] *See, e.g.*, *Esmail*, 639 F.3d at 1076 ("In short, the fact that Uthman was captured in December 2001 near Tora Bora suggests that he was affiliated with al Qaeda."); *Al Odah*, 611 F.3d at 11, 16 (finding it "significant" that a detainee was captured near Tora Bora in late 2001).

[167] Almerfedi v. Obama, 654 F.3d 1, 6 (D.C. Cir. June 10, 2011).

[168] *See, e.g.*, *Esmail*, 639 F.3d at 1076 (noting that petitioner was "with two other men, both of whom had participated in the fighting" when captured); *Uthman*, 637 F.3d at 405; Salahi v. Obama, 625

attended religious schools where others were recruited to fight for Al Qaeda,[169] or whether he traveled to Afghanistan along a distinctive path used by Al Qaeda members.[170] In Judge Silberman's opinion in *Almerfedi,* three of these markers were considered "adequate" to carry the government's burden of proof when considered together.[171]

Consistent with these decisions, another set of Circuit decisions has explicitly rejected the view—common to Judge Walton in *Gherebi,* Judge Bates in *Hamlily*, and Judge Urbina in *Hatim*—that proof of membership requires some kind of participation in a group's chain of command. Participation in a chain of command might be a *sufficient* condition to prove membership but it is not a *necessary* condition, according to the Circuit in both *Awad v. Obama*[172] and *Barhoumi v. Obama.*[173]

Finally, the Circuit has had a chance since *Bensayah* to comment—albeit only implicitly—on the question of geographic constraints at least in the context of *membership*-based detention. In *Salahi v. Obama*, in November 2010, a circuit panel dealt with a Mauritanian detainee whom the government alleged to be an Al Qaeda member but who was neither captured in Afghanistan nor alleged to have been involved in combat in or near Afghanistan (at least not after the early 1990s).[174] The appellate panel expressed no concerns about the theoretical assertion of detention authority in such circumstances, but instead remanded so that the district court could re-weigh the evidence under a different standard than the one Judge Robertson used to grant the habeas petition in the district court.[175] Implicit rejection of geographic constraints in the membership setting, of course, does not compel the same with respect to detention based solely on independent support, but it could indicate that such an argument would at least be considered by a future appellate panel.

F.3d 745, 753 (D.C. Cir. Nov. 5, 2010) (noting that a district court may be able to "infer from Salahi's numerous ties to known al-Qaida operatives that he remained a trusted member of the organization"); Awad v. Obama, 608 F.3d 1, 9-10 (D.C. Cir. June 2, 2010) (noting that Al Qaeda fighters treated Awad "as one of their own").

[169] *See, e.g.*, *Esmail*, 639 F.3d at 1076 (discussing that Esmail had studied at the Al Qaeda-affiliated Institute for Islamic/Arabic Studies, which was "relevant" in light of other evidence); *Uthman*, 637 F.3d at 405 (discussing that Uthman attended religious schools where others were recruited to fight for Al Qaeda, and while this fact was "not alone of great significance, [it] can assume greater significance when considered in light of other facts suggesting al Qaeda membership"); *Al Adahi*, 613 F.3d at 1105-09; Al Odah v. Obama, 611 F.3d 8, 16 (D.C. Cir. June 30, 2010).

[170] *See, e.g.*, *Uthman*, 637 F.3d at 405; *Al Odah*, 611 F.3d at 16.

[171] *Almerfedi*, 654 F.3d at 6.

[172] 608 F.3d at 10–12.

[173] 609 F.3d 416, 424–26 (D.C. Cir. June 11, 2010).

[174] *Salahi*, 625 F.3d at 748.

[175] *Id.* at 752–53 (noting that the district court "looked primarily for evidence that Salahi participated in al-Qaida's command structure").

What Is Now Clear and What Is Not

As a result of the foregoing string of D.C. Circuit decisions and the NDAA, important aspects of the government's detention authority appear settled, at least at a high level of generality. Membership in an AUMF-covered group is a sufficient condition for detention, as is substantial support of such a group. But other questions remain. What precisely counts as "membership" in a clandestine, diffused network such as Al Qaeda? In what precise circumstances does independent support provide an alternative ground for detention? Does the location of a person's capture or underlying activities matter with respect to the support criterion?

With respect to the exact meaning of membership, some things have been made clear while others remain uncertain—perhaps inevitably so. The cases do establish that proof of participation in a formal chain of command would be sufficient but is not necessary to demonstrate membership. They are relatively clear, moreover, that training-camp participation is highly significant as proof of membership, possibly even sufficient on its own for that purpose. And the cases further suggest that the same may be true for mere guesthouse attendance in at least some contexts. Absent those elements, however, it remains unclear which forms of involvement with the affairs of an AUMF-covered group distinguish those who can be detained from those who cannot. The question seems to depend upon the gestalt impression conveyed by the totality of the circumstances, measured against unspecified—and potentially inconsistent—metrics of affiliation held by particular judges. Consider, in that regard, how Judge Bates in 2010 summarized the task district judges now face:

> "[T]here are no settled criteria," for determining who is "part of" the Taliban, al-Qaida, or an associated force. "That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization." The Court must consider the totality of the evidence to assess the individual's relationship with the organization.[176]

Even when the training camp or guesthouse elements are present, moreover, it is not clear that they will *always* suffice. One recent district-court opinion gives substantial weight to the fact that a detainee attended a Taliban-controlled guesthouse, particularly when viewed in combination with evidence that a Taliban recruiter gave the man money, a passport, and a ticket for air travel, and that the man twice went near to the front lines and received a weapon from a person who likely was a Taliban member.[177] Guesthouse attendance is certainly now a recognized part of the "damning" circumstantial evidence available to the

[176] Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. Sept. 3, 2010) (citation omitted).

[177] *See* Sulayman v. Obama, 729 F. Supp. 2d 26, 53 (D.D.C. July 20, 2010).

government to establish detainability.[178] But it is not clear that it will do on its own, particularly if the guesthouse attendance is short, if the house is not so obviously connected with enemy recruiting, or the stay takes place in circumstances not necessarily suggestive of membership or recruitment. Indeed, in one case, Judge Kennedy found that a brief stay at a guesthouse on the night that house was raided by Pakistani forces did not suffice to establish detainability.[179] The government did not appeal.

Similar issues could yet emerge in connection with the training-camp variable. Like guesthouses, training camps can vary in terms of their provenance and connotations. Some clearly were or are operated by Al Qaeda or the Taliban, but not all were; fact patterns may arise that raise difficult questions of attribution and inference.[180] Of course, it may be that no further refinement of the variables defining membership is possible in this setting, and that the status quo represents the realistic maximum when it comes to defining this criterion.

Another unresolved issue relates to the question of what *mens rea* the government must establish in the course of establishing a person became a member or supporter of an AUMF-covered group. In theory, this variable could range widely. At one extreme, the government might be obliged to prove that the person became a member or provided support with the specific intent of contributing to violence directed against the United States or even to a particular violent act. At the other, the government might be obliged to prove nothing more than that the person engaged in the relevant underlying conduct, regardless of his knowledge or intentions. Neither of those poles appear to have attracted judicial support, though there are few statements on this topic from which to draw such conclusions. Writing in *Khan,* Judge Bates observed that being "part of" the Taliban, al-Qaida, or an associated force requires "some level of knowledge or intent,"[181] but did not further explain what precisely must be known to or intended by the individual. The issue accordingly bears watching, particularly insofar cases emerge that depend entirely on support rather than

[178] *See Uthman,* 637 F.3d at 407.

[179] Abdah v. Obama, 717 F. Supp. 2d 21, 33–34 (D.D.C. May 26, 2010).

[180] *Cf.* Superseding Criminal Complaint, United States v. Maldonado, H-07-125M (S.D.Tex. Feb 13, 2007) (prosecuting defendant for receiving military-style training from Al Qaeda, though the training was provided by al Shabab in Somalia), *available at* http://www.foxnews.com/projects/pdf/Maldonado_Complaint.pdf.

[181] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. Mar. 13, 2009) (noting that the government's purported detention authority "does not encompass those individuals who unwittingly become part of the al Qaeda apparatus"); *accord Khan*, 741 F. Supp. 2d at 5. Judge Kessler has embraced this view as well, and, after ordering supplemental briefing in both *Al Adahi* (Al Nadhi) and *Al Adahi* (Al Assani), she decided that some level of knowledge or intent is required, at least under the membership prong. Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85, 93 (D.D.C. Mar. 10, 2010); *accord* Al Adahi v. Obama (Assani) 698 F. Supp. 2d 48, 56 (D.D.C. Mar. 10, 2010). Judge Hogan also embraced the view that some knowledge is required and wrote that proof of intent can be shown by indirect evidence. *See* Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 11–12 (D.D.C. Jan. 6, 2010) (writing that the government had failed to meet its burden with regard to whether the petitioner traveled to Afghanistan with the intent to receive weapons training).

membership.[182]

Finally, the case law to this point has not wholly settled the separate question of precisely when detention may be predicated on a showing of independent support to an AUMF-covered group, notwithstanding the affirmative statements to that effect found in the Circuit's decisions in *Al Bihani* and *Hatim* and the clear language of the NDAA. While the independent-support criterion is now clearly legitimate in at least some circumstances, it remains to be seen whether it must be limited to persons who were captured or acted in certain geographic locations and, for that matter, whether this criterion is confined to only certain types of support or to support rendered with certain specific mental states. To put the matter simply, it remains unclear what counts as substantial and whether any category of substantial support truly exists that would not also qualify the supporter as a constructive member under the "part of" prong.

[182] In federal criminal law, there are two statutes that criminalize the provision of material support. One, 18 U.S.C. § 2339A, requires proof that the defendant knew or intended that the support would be used to support any of several dozen predicate criminal acts. The other, 18 U.S.C. § 2339B, merely requires that the defendant know the identity of the actual recipient of the support and that the recipient either (i) has been formally designated as a foreign terrorist organization by the U.S. State Department or (ii) has engaged in conduct that would warrant such a designation.

Chapter 4 – Is Detainability, Once Established, Permanent?

A question closely related to the formal scope of the president's detention authority concerns whether a showing adequate to support a detention is, once established, fixed in stone or whether time or intervening events can weaken it. This issue shows up repeatedly in these cases, and the judges initially took strikingly different positions on it—though in recent months they appear to be moving toward common ground. This set of questions examines whether eligibility for detention is indelible in the sense that having once been a member or supporter of these groups, one always be detained.

Three clusters of issues lurk under this broad heading. First, does the passage of time in some fashion impact the government's evidentiary burden, such that evidence that would suffice to justify a detention at an early stage no longer suffices at the point of habeas review? Second, does detention authority lapse? And third, is it possible for a detainee to withdraw effectively from a relationship that otherwise would justify his detention, and if so, what circumstances suffice to demonstrate such a withdrawal? The cases to date only tease the first question, which lies beneath the surface of several of them but which the judges never squarely address. By contrast, the judges do deal directly with the second and third issues.

Does the Government's Burden Change over Time?

As noted above, the judges have generally either held or assumed[183] that the government must prove eligibility for detention by a preponderance of the evidence in order to withstand habeas review. At first glance this sounds straightforward enough. But that formulation obscures an important question: Did the same standard theoretically apply at the moment the government acquired custody of the person (as, for example, a "probable cause" standard would apply to the government in a criminal arrest of a suspected criminal) or did it somehow kick in only at the point of habeas review, after the standard increased over the course of the detention (as, for example, a "beyond a reasonable doubt" standard would apply to the government in a criminal trial after an arrest and an indictment on the basis of probable cause)?

The question is not merely academic. Detention operations take place in the shadow of the body of substantive and procedural law that the judges are developing in these habeas proceedings, including the burden of proof the government ultimately must meet. Even if it were clear that the preponderance

[183] *See, e.g.*, G. Al Bihani v. Obama, 590 F.3d 866, 878 n.4 (D.C. Cir. Jan. 5, 2010) ("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.").

standard applied only at the point of habeas review, personnel all along the chain of custody could be expected to factor this into their decision making and evidence-collection processes, provided that some realistic prospect of eventual judicial review existed. It will, for example, either impact the guidance given to commanders at temporary screening facilities who make determinations about whether to continue custody of an individual or the long-term detention review tribunals operating in connection with theater internment facilities—or both.

If the signals emerging from the habeas proceedings indicate instead that the preponderance standard applies from the moment of capture and uniformly throughout the period of custody, this effect will be even stronger. One way or the other, therefore, those determining whether to take custody of an individual in the first instance, or how to process him over time, will have to take account of rulings on this point.

If nothing else, this dynamic highlights the need for clarity in the applicable rules. While the judges have not directly addressed the issue in their opinions, it seems safe to say that there is some latent agreement in the opinions to date that the standard, even if it theoretically applies at the point of capture, cannot be invoked at that point. The judges have therefore opted not to concern themselves with how much evidence the government actually has, or needs, at the moment of capture. Perhaps as a consequence, the judges never seem to challenge the propriety of the initial decision to take the suspect into custody or the later decisions by military screening mechanisms to continue holding him, yet they uniformly examine the evidence supporting a detention with a care that nobody would apply or demand in the field or in those screening processes. Inherent in this approach is an understanding that, at some point after capture, the bar moved upward. In all of these cases, judicial discussion of the evidence is detailed, probing, and skeptical, far more so than the scrutiny that any field tribunal or review based on screening criteria under the laws of war would apply. And the stated standard the judges deploy—placing the burden of proof on the government by a preponderance of the evidence—seems considerably more stringent than the standard for an *initial* detention judgment.

Yet while the judges all implicitly acknowledge some degree of temporal disconnect in their assessment of facts that the government had been relying on for years prior to *Boumediene*, none of them clearly addresses precisely *how* the evidentiary standard used at the moment of habeas review differs from whatever standard must exist at the initial moment the government takes custody. Nor do they make clear at what point evidence initially suitable to detain a person becomes unsuitable, or whether the government is obliged to meet an incrementally increasing standard the longer a detention continues.

Notably, the majority opinion in the Supreme Court's *Boumediene* decision provides some tacit support for the evidentiary-escalator approach. In particular, Justice Kennedy's formulation suggests a three-tiered model involving an initial period of implied governmental discretion to detain at the point of capture,

followed by a limited period of short-term detention subject to "reasonable procedures for screening and initial detention," before giving way to full habeas review.[184] Unfortunately, Justice Kennedy does not elaborate on what procedures the Court would deem sufficient for the short-term detention stage, nor does he demarcate the transition from short-term to long-term detention, other than to say that the former lasts only for a "reasonable period of time."[185]

In short, the lower courts are operationalizing the preponderance standard as a rule of decision in habeas cases, rather than a rule of detention itself. This dates from one of Judge Hogan's first orders in the consolidated cases that followed *Boumediene*. He endorsed the government's suggestion that it be permitted to provide the court not simply with the records of prior detention adjudications, but with "the best and most current evidence supporting a detainee's detention . . . taking into account the material available to the Government today."[186] Judge Hogan held that all evidence gathered both prior and subsequent to capture could be included in the government's return, and thus foreclosed the possibility that petitioners would argue that their current detention was illegal because their capture lacked sufficient evidentiary support at the time it was made.[187]

In subsequent merits decisions, all of the other judges have implicitly endorsed the idea that no claim of a lawful detention will fail for a dearth of inculpatory evidence in the government's possession *at the moment of capture*. Rather, the government will have at least until the point of habeas review to collect enough evidence to convince the court by a preponderance of *all* the evidence—new and old—that it did not make a mistake. In other words, the evidentiary burden seems to escalate, but the government's evidence collection gets to continue as well.

Notwithstanding this flexibility, the current regime seems unstable and a recipe for confusion as long as it lasts. It asks the military to implement a detention system with one undefined legal threshold for initial capture and a different and presumably far higher threshold for judicial affirmation of subsequent detention. At the same time, it offers no clarity as to the mode, timing, or substance of the evidentiary escalator between the two. The current cases do not address the question directly enough to develop much sense of the emerging law on this point. It is still too inchoate to pin down.

---

[184] Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 2275 (2008).

[185] *Id.* Justice Kennedy also qualifies the obligation to take a more deferential approach in relation to short-term detention by stating that such detention must involve "lawful and proper conditions of confinement and treatment." *Id.* By implication, short-term detention violating that precept would be subject to more searching judicial review—or at least to the theoretical applicability of more demanding legal standards, even if judicial review does not yet attach.

[186] Notice at 3, *In re* Guantanamo Bay Detainee Litigation, No. 08-442 (D.D.C. July 9, 2008), ECF No. 39.

[187] Notably, many "captures" were not "captures" made by U.S. forces at all, but rather transfers to the United States of captures made by foreign governments.

Temporal Scope of Detention Authority

The second major issue concerns the duration of the government's detention authority. So far, at least, the judges have all but uniformly held or assumed that the government's detention authority lasts until the end of the relevant conflict. And none has suggested that we have reached that point yet. At the same time, the government has acknowledged in public statements that the AUMF as an instrument might not have indefinite vitality. This issue will thus likely arise more frequently, and with greater power, in the future than it has so far.

The basic framework here is not in dispute. As Justice O'Connor wrote for the *Hamdi* plurality, the Court understood Congress' grant of authority in the AUMF "to include the authority to detain for the duration of the relevant conflict." [188] The Court acknowledged that the conflict with the Taliban was somewhat atypical, and noted that its understanding of Congress's authority to detain might unravel if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[189] Nevertheless, the Court emphasized, that was not yet the reality: "Active combat operations against Taliban fighters apparently are ongoing in Afghanistan . . . [I]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are . . . authorized."[190]

That framework raises the question of how long the practical circumstances will remain sufficiently close to those of prior wars and how long active combat operations against a relevant group will continue. The lower courts have begun confronting detainees' arguments that the "relevant conflict" has now ended. So far, these arguments have gained no traction; the courts do not yet seem inclined to believe that the government's detention power has begun to unravel.

In the D.C. Circuit's panel decision in *Al Bihani*, for example, the petitioner contended that the conflict with the Taliban had ended and that he was thus entitled to release.[191] The judges, however, didn't buy it. Al Bihani offered three dates to mark the end of the conflict: the day Afghanistan established a post-Taliban interim authority, the day the United States recognized that authority, and the day Hamid Karzai was elected President.[192] Yet, on factual grounds, the Court observed that "there [were] currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan."[193] Further, the court wrote, if Al Bihani's argument were to hold, "the initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters

[188] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

[189] *Id.* at 520.

[190] *Id.*

[191] G. Al Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. Jan. 5, 2010).

[192] *Id.*

[193] *Id.*

captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs."[194]

The court was no more swayed by the contention that the conflict in which Al Bihani had been captured had morphed into a "different conflict" that entitled him to release, writing that "even the laws of war upon which he relies do not draw such fine distinctions. The Geneva Conventions require release and repatriation only at the 'cessation of active hostilities.'"[195] And, finally, the D.C. Circuit was careful to observe that deference to the political branches about the end of hostilities was ultimately controlling: "The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war."[196] The Court said it was obliged to give the democratic branches "wide deference . . . with regard to questions concerning national security."[197]

The D.C. Circuit thus seems content with the notion that detention may be justified as long as the political branches confirm that hostilities have not yet ended. How long the courts will continue to embrace this posture, however, is open to question. The ever-more-amorphous nature of the conflict and the potential that covert operations may continue even long after publicly acknowledged operations have ceased both seem to foreshadow tougher questions for the courts moving forward. As former Assistant Attorney General for National Security David Kris put it, "as circumstances change, if combat operations are concluded some day, it's not totally clear . . . how long into the future that detention authority will endure."[198]

Can a Detainee's Relationship with a Terrorist Organization be Vitiated?

Assuming some degree of detention authority exists and that a particular individual at one point in time was subject to it, can that authority lapse on an individual basis? That is, can the authority to detain be vitiated?

The lower-court judges have squarely addressed this question, and the law seems increasingly clear on two key points: first, a relationship with a terrorist

---

[194] *Id.* The court was similarly unpersuaded by the argument because it was premised on the end of the conflict with the *Taliban*, and it was unclear from the evidence whether Al Bihani was captured during hostilities with the Taliban.

[195] *Id.*

[196] *Id.* ("[T]ermination [of a state of war] is a political act.") (quoting Ludecke v. Watkins, 335 U.S. 160, 168-70, n.13 (1948) (internal quotation marks omitted).

[197] *Id.*

[198] Speech of David Kris at the Brookings Institution, Law Enforcement as a Counterterrorism Tool, June 10, 2010. Available at http://www.brookings.edu/2010/0511_law_enforcement_aspx.

organization that may be adequate to support detention can be broken such that detention is no longer lawful; and, second, this break must take place before the moment of capture. This agreement is relatively new—and key questions, as we shall explain, remain unsettled. Yet it does constitute significant progress.

For several years, the substantive rules governing vitiation were a mess. In one early habeas case, for example, Judge Robertson seemed to indicate that perhaps the sole relevant inquiry was whether the person had, *at any point prior to capture*, the requisite relationship with an enemy group.[199] And Judge Ellen Huvelle, for her part, ruled that a detainee's actions *subsequent* to capture could vitiate his relationship and thus his detainability.[200]

The law, however, has cleared up considerably. In *Salahi*, Judge Robertson clarified that he believed vitiation possible and found, in accordance with Judge Walton's decision in *Gherebi*,[201] that a relevant relationship must continue to exist *at the time of capture*.[202] And the D.C. Circuit has pretty clearly rejected Judge Huvelle's view, favoring instead the *Salahi*/*Gherebi* approach.

The rejection of Judge Huvelle's view of vitiation took place indirectly. Judge Huvelle was the only district-court judge to hold that events occurring *subsequent to capture*—indeed, events occurring while the detainee spent time in U.S. custody—sufficed to vitiate an otherwise-adequate relationship with Al Qaeda and thus required the detainee's release. In *Basardh*, the petitioner had joined Al Qaeda and learned how to use weapons at an Al Qaeda training facility.[203] At the time of his capture in late 2000, Basardh was hiding with Osama bin Laden and others in the mountains of Tora Bora and serving as a cook and a fighter. While in Guantánamo, however, he fully cooperated with the government, which resulted in beatings and threats to his life from other detainees.[204] His cooperation became public knowledge on February 3, 2009, when the *Washington Post* published a front-page article regarding his cooperation with the government and specifically referred to him by name.[205]

Judge Huvelle, drawing on language in *Hamdi* that focused on the purposes

---

[199] *See* Awad v. Obama, 646 F. Supp. 2d 20, 27 (D.D.C. June 2, 2009) (noting it appeared likely that the petitioner was, "for some period of time," part of Al Qaeda and affirming detention on that basis).

[200] Basardh v. Obama, 612 F. Supp. 2d 20 (D.D.C. Apr. 15, 2009).

[201] Gherebi v. Obama, 609 F. Supp. 2d 43, 71 (D.D.C. Apr. 22, 2009) (finding that "only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, *at the time of their capture*" were detainable) (emphasis added).

[202] Salahi v. Obama, 710 F. Supp 2d 1, 750 (D.D.C. Mar. 22, 2010) ("at the time of capture"). Note that, in *Gherebi*, Judge Walton was careful to note that even the Geneva Conventions' Common Article 3 was "not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to and fro as they please."). *See Gherebi*, 609 F. Supp. 2d at 67.

[203] Basardh v. Obama, 612 F. Supp. 2d 20 (D.D.C. Apr. 15, 2009).

[204] *Id.* at 32 (The petitioner "stated that '[m]y family and I are threatened to be killed . . . and this threat happened here in prison many times.'").

[205] *Id.*

of law-of-war-based detention, found that events during Basardh's time at Guantánamo sufficed to vitiate his relationship to Al Qaeda and thus required his release. Given his cooperation and the public knowledge of this cooperation, she decided that Basardh could "no longer constitute a threat to the United States."[206] In other words, becoming a cooperating witness against his fellows while in captivity—and the fact of his cooperation becoming known—sufficed to vitiate Basardh's prior relationship with Al Qaeda, and thus convinced Judge Huvelle that he would not rejoin the fight. In effect, Judge Huvelle's ruling introduced a requirement—informed, she believed, by language in the Supreme Court's *Hamdi* decision—requiring that a detainable petitioner possess a *current* likelihood of rejoining the enemy.

Other judges expressly declined to follow this rule, and at least one judge's refusal was affirmed on appeal. In that instance, *Awad*, the petitioner invoked Judge Huvelle's ruling in *Basardh* and suggested it stood for the proposition that a person cannot be held in detention if, at the time of the habeas review, he did not pose a personal threat of future dangerousness. Judge Robertson acknowledged "the power of Judge Huvelle's argument,"[207] but declined to follow her reasoning. In the case before him, the petitioner's leg had been amputated, and, Judge Robertson wrote, "[i]t seem[ed] ludicrous to believe that the petitioner "pose[d] a security threat now." Nevertheless, he found, the petitioner's future dangerousness was "not for [him] to decide."[208]

The D.C. Circuit, deciding *Awad* on appeal, agreed with Judge Robertson's rebuff of Judge Huvelle's approach and thus seems to have settled the question for the time being. On appeal to the D.C. Circuit, Awad argued that he was entitled to release because he did not personally pose any threat. Awad referenced the language of the AUMF itself, arguing that the lower court's finding contravened the

> text of the AUMF, Congress's purpose in enacting the law, and the law of war upon which the government purportedly relie[d]. By its plain terms, the AUMF only speaks to the prevention of "future acts of international terrorism against the United States."[209]

Judge Sentelle, however, writing for himself and Judges Garland and Silberman, found that the language in *Al Bihani* discussed above in connection with the temporal vitality of the AUMF foreclosed the petitioner's argument: "*Al-Bihani* makes plain that the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States

---

[206] *Id.*

[207] Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. Aug. 12, 2009).

[208] *Id.* at 25-26.

[209] Brief for Appellant at 49-52, Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (No. 09-5351).

or its allies if released but rather upon the continuation of hostilities."[210] The D.C. Circuit was not concerned with the differences between Awad's argument and Al Bihani's (the latter was based not upon the individual's future dangerousness but rather upon the shifting nature of the conflicts between the United States and its enemies); nevertheless, it leveraged *Al Bihani's* temporal holding into a rejection of any judicial examination of future dangerousness as a relevant consideration in habeas review.

Yet while they have rejected post-capture vitiation, the courts have moved toward a potentially significant degree of agreement that a detainee's disassociation from an organization prior to his capture *can* serve to entitle him to release. But although the judges agree on the rule in principle, they still do not seem to agree about which factors indicate a sufficient disassociation prior to capture. This will be a major area of dispute in future cases.

Nearly all the judges have, either explicitly or implicitly, ruled that the government must show that the detainee was a "part of" or "supporting" a terrorist organization *at the time of capture*.[211] This rule, in turn, leads to an important corollary: Someone whose relationship with a relevant group ended *prior* to the date of capture is not detainable. The rule now appears to have won over the D.C. Circuit as well.[212]

The issue of vitiation presented most vividly in *Al Ginco*, where Judge Leon laid out his test, which looked at determining "whether a pre-existing relationship sufficiently eroded over a sustained period of time" so as to render it inadequate to support detention as part of enemy forces.[213] In *Al Ginco*, a petitioner who might have satisfied the detention standard at one time argued that his relationship with Al Qaeda had soured prior to his capture by U.S. forces such that he was not detainable. According to Judge Leon, the government's evidence demonstrated that the petitioner stayed for five days at an Al Qaeda-affiliated guesthouse and eighteen days at an Al Qaeda training camp,[214] indicating the relationship was "at best—in its formative stage."[215] Judge Leon also found that, after the eighteen days at the training camp, Al Qaeda leaders

---

[210] *Awad*, 608 F.3d at 11. The *Awad* opinion makes its holding clear despite very distinguishable facts and arguments presented in *Al Bihani*.

[211] *See* Al Ginco v. Obama, 626 F. Supp.2d 123, 130 (D.D.C. 2009); Al Adahi, No. 05-0280, slip op. at 40-42 (D.D.C. Aug. 17, 2009); Hatim v. Obama, No. 05-1429, slip op. at 18 (D.D.C. Dec. 15, 2009); Khalifh, No. 05-1189, slip op. at 5, 19 (D.D.C. May 28, 2010) (noting that the government needed to show "detention was lawful at the time of capture," and that Khalifh was detainable because the evidence showed a "steady string of [Al Qaeda-related] activity right up until the time of his capture").

[212] *See, e.g.,* Alsabri v. Obama, 684 F.3d 1298, 1306–07 (D.C. Cir. Apr. 27, 2012) (holding that the district court did not err in finding that Alsabri remained a part of the Taliban or Al Qaeda at the time of his capture).

[213] 626 F. Supp. 2d at 129.

[214] *Id*.

[215] *Id*.

suddenly suspected the petitioner of spying on them and then tortured him into giving a false confession that he was a U.S. spy.[216] The Taliban then imprisoned the petitioner "for a substantial eighteen-plus month period."[217]

The government responded to these contentions by arguing that if an individual was ever detainable he would remain so always. Judge Leon disagreed, and his opinion reveals his surprise that the government would even force a decision on the question:

> By taking a position that defies common sense, the Government forces this Court to address an issue novel to these habeas proceedings: whether a prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered to be "part of" either organization at the time he was taken into custody. The answer, of course, is yes.[218]

Judge Leon then laid out his test, which looked at:

> 1. the nature of the relationship in the first instance; 2. the nature of the intervening events or conduct; and 3. the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee [was] taken into custody.[219]

Applying this test, Judge Leon found that the nature of the relationship in the first instance was preliminary and that Al Qaeda's subsequent torture of the petitioner resulted in a "total evisceration of whatever relationship might have existed."[220] Further, the petitioner's imprisonment at the Taliban's hands demonstrated "that any preexisting relationship had been utterly destroyed."[221] Judge Leon wrote that these facts led to the "inescapable" conclusion that Al Ginco's tie to Al Qaeda "was sufficiently vitiated that he was no longer a 'part of' al Qaeda at the time he was taken into custody by U.S. forces."[222]

Judge Leon was not alone in his view that, even when an individual might have met the standard for detention at one point in time, the government cannot prove the legality of continued detention with a "once a terrorist, always a terrorist" rule.[223] Other district judges have made similar findings based on less

---

[216] *Id.*

[217] *Id.*

[218] *Id.* at 128.

[219] *Id.* at 129.

[220] *Id.*

[221] *Id.* at 130.

[222] *Id.*

[223] *See* Khan v. Obama, 646 F. Supp. 2d 6, 18 (D.D.C. Aug. 18 2009) (ruling on a motion for judgment on the record and declining to adopt a "once a HIG communicator, always a HIG communicator"

dramatic evidence—for example, that a detainee was expelled from al Qaeda, and that a petitioner left al Farouq early because he was unhappy there—though the opinions based on those findings have not survived appeal.[224] Finally, while one judge has held that operating within an Al Qaeda-associated force twenty years earlier was sufficient to survive a judgment on the record, he was careful to note that such evidence alone would be insufficient at the merits stage—a holding that indicated that time alone could vitiate a relationship.[225] But while the D.C. Circuit seems comfortable with the abstract notion that pre-capture vitiation is *possible*, it has not yet affirmed any lower court's habeas grant issued on the basis of vitiation prior to capture.

By contrast, the D.C. Circuit has reversed a lower-court decision predicated in part on vitiation grounds. The case was that of Mohammed Al Adahi. In Al Adahi's district-court case before Judge Gladys Kessler, he argued that he had been expelled from Al Qaeda before his capture and thus could not be detained. Judge Kessler agreed, finding that the petitioner's relationship with Al Qaeda, if it had ever amounted to an adequate relationship at all, had terminated prior to his capture, and she ordered his release.[226]

Citing to *Al Ginco* and its test, Judge Kessler found that the detainee's initial relationship with Al Qaeda was primarily familial in nature, that his subsequent enrollment as an Al Qaeda trainee had not resulted in any continuing relationship, and that nothing suggested that he went on to occupy a structured role in the hierarchy of the enemy forces.[227] In addition, she found that the petitioner had been expelled from the camp and that none of the government's evidence suggested that the petitioner "did anything to renew connections with al-Qaida and or the Taliban" after his expulsion. Judge Kessler ultimately concluded that the petitioner's "brief attendance at [the training camp] and

---

approach where the government had shown Khan had served as an HIG radio operator some twenty years earlier). *See also* Khan v. Obama, 741 F. Supp. 2d 1 (D.D.C. Sept. 3, 2010) (denying petition on merits).

[224] Al Adahi v. Obama, No. 05-0280, slip op. at 24 (D.D.C. Aug. 17, 2009) (*rev'd with instructions to deny*, 613 F.3d 1102 (D.C. Cir. July 13, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 13-14 (D.D.C. Dec. 15, 2009), *rev'd and remanded*, 632 F.3d 720 (D.C. Cir. Feb. 15, 2011).

[225] *Khan*, 646 F. Supp. at 17.

[226] The government had other evidence in *Al Adahi*, but it did not fare well under Judge Kessler's review. It had presented evidence that the petitioner knew several of Bin Laden's bodyguards, for example, in support of the claim that he had become a bodyguard for Bin Laden himself. Judge Kessler concluded, however, that the petitioner's familiarity with the other bodyguards may have just arisen from his having met them on a few occasions. Likewise, the government had claimed that inconsistencies in the petitioner's testimony suggested that he participated in a battle as an Al Qaeda fighter. But Judge Kessler found that "[s]uch a serious allegation cannot rest on mere conjecture, with no hard evidence to support it." She then concluded that the petitioner simply "appeared to be attempting to escape the chaos of the time by any means that he could." Al Adahi, No. 05-0280, slip op. at 38 (D.D.C. Aug. 17, 2009).

[227] *Id.* at 24-25. Rather, "[the] [p]etitioner's demonstrated unwillingness to comply with orders from individuals at [the camp] shows that he did not 'receive and execute orders' from the enemy's combat apparatus.'"

eventual expulsion simply [did] not bring him within the ambit of the Executive's power to detain."[228] She thus determined both that the petitioner's relationship with Al Qaeda never reached a level sufficient to detain him and that, even if it had, whatever relationship did exist was vitiated at the moment of expulsion.[229]

The D.C. Circuit panel of Judges Randolph, Henderson, and Kavanaugh, however, approached the vitiation question very differently. Judge Randolph wrote that "affirmative disassociation" would be required to establish vitiation, and that such disassociation was something greater than an act of "accept[ing]" expulsion.[230]

Salahi also presented a vitiation issue at the district-court level and raised related questions on appeal. In the district court, Judge Robertson had considered a habeas petition from Mohammedou Ould Salahi, a detainee who admitted to having sworn *bayat* to Osama bin Laden in 1991.[231] Salahi contended that Al Qaeda had been a very different organization during that time and that, while he had maintained contacts over time, he had not remained an active "part of" the organization. As Judge Robertson framed it, the "question of when a detainee must have been a 'part of' al-Qaida to be detainable" was at the center of the case,[232] and he held that the government must prove "that Salahi's detention was lawful at the time of his capture."[233] After reviewing the evidence, Judge Robertson found that Salahi's 1991 oath of *bayat* and sporadic interactions with Al Qaeda subsequently did not suffice to tie him to the organization. Judge Robertson was careful to note, however, that if the government had proven Salahi *did* have a sufficiently close relationship with Al Qaeda to be detainable, some type of "affirmative act of disassociation" may have been required.[234]

By the time the case reached the D.C. Circuit, the government had conceded the position that a relevant relationship must exist at the time of capture, but insisted that its evidence met that threshold.[235] The D.C. Circuit, while it seemed clear on the standard, was not so sure the government had proven its case. In vacating and remanding the case for further findings, the panel opinion by Judge

---

[228] *Id*. at 41.

[229] *Id*. at 24-25 (stating: "Al-Adahi was expelled from Al Farouq after seven to ten days at camp… the Government has not established that he did anything to renew connections with al-Qaida and/or the Taliban. He did not, by virtue of less than two weeks' attendance at a training camp from which he was expelled for breaking the rules, occupy 'some sort of structured role in the hierarchy of the enemy force.'").

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

[231] Salahi v. Obama, 710 F. Supp 2d 1 (D.D.C. Mar. 22, 2010).

[232] *Id*. at 5 (noting that associations alone are insufficient) (citing Al Adahi v. Obama, No. 05-0280, slip op. at 18 (D.D.C. Aug. 17, 2009)).

[233] *Id*.

[234] *Id*. at 6 n.7.

[235] Salahi v. Obama, 625 F.3d 745, 747 (D.C. Cir. Nov. 5, 2010) (quoting the government's position that "*at the time of capture*, [the] detainee must be part of al-Qaeda." (emphasis added)).

Tatel on behalf of himself and Judges Sentelle and Brown took two significant steps within the context of vitiation: First, it expressly endorsed the notion that the relevant relationship must exist at the time of capture. Second, it cast light on the set of presumptions and burdens that might govern claims of disassociation in the future. Specifically, the panel found that Salahi's 1991 oath was alone insufficient to establish a present tie to Al Qaeda such that he would have the burden to prove acts of disassociation. While such a burden shift in other cases might be reasonable, Judge Tatel suggested, "the unique circumstances of Salahi's case [made] the government's proposed presumption inappropriate."[236] He went on:

> Bin Laden . . . did not issue his first fatwa against U.S. forces until 1992—the very year in which, according to Salahi's sworn declaration, Salahi severed all ties with al-Qaida. . . . Salahi's March 1991 oath of *bayat* is insufficiently probative of his relationship with al-Qaida at the time of his capture in November 2001 to justify shifting the burden to him to prove that he disassociated from the organization. In so concluding, we have no doubt about the relevance of Salahi's oath to the ultimate question of whether he was "part of" al-Qaida at the time of his capture. We conclude only that given the facts of this particular case, Salahi's oath does not warrant shifting the burden of proof.[237]

The D.C. Circuit once again endorsed the requirement of "affirmative disassociation" in a recent opinion issued in *Alsabri v. Obama*. In *Alsabri*, a three judge panel consisting of Judges Garland, Kavanaugh, and Ginsburg affirmed District Judge Urbina's finding that the petitioner, a Yemeni citizen, had traveled to Afghanistan in order to fight with the Taliban and remained associated with the Taliban or Al Qaeda when he was captured "just months" after leaving the front line.[238] In rejecting the petititioner's argument that he had not been or no longer was associated with those groups, Judge Garland wrote that Alsabri had offered "no evidence that he took steps to dissociate himself from those groups in the months between his departure from the battle lines and his capture."[239] Adopting the district court's finding that Alsabri's account of the period between his departure from the front lines and his capture was "not credible," the panel further commented that Alsabri had not offered any proof that he had taken steps during this period to establish contacts in Afghanistan outside the Taliban or Al Qaeda networks, attempted to obtain employment, or taken any other affirmative action that would be "inconsistent with being part of Al Qaeda or the Taliban. "[240] Absent any such evidence, the panel found no error in Judge

---

[236] *Id.* at 751.

[237] *Id.*

[238] Alsabri v. Obama, 684 F.3d 1298 (D.C. Cir. Apr. 27, 2012).

[239] *Id.* at 1307 (internal quotation marks omitted).

[240] *Id.*

Urbina's denial of Alsabri's habeas petition.[241]

Two other case have involve vitiation claims worth noting. *Hatim* presented a vitiation question in the district court that may still present on appeal. However, that case has now been remanded for additional factual findings that may or may not moot the issue after the district-court disposition on remand. In Hatim's case in the district court, the government had alleged that Hatim was detainable because he had attended the Al Farouq training camp, had fought against the Northern Alliance, and had stayed at Al Qaeda-affiliated guesthouses.[242] The petitioner denied the government's claims, including that he had attended Al Farouq, and further alleged that he had "told his interrogators repeatedly that he left al Farouq early because he was unhappy there."[243] Judge Urbina, who presided over the case, found that even if the government's claims regarding Al Farouq were true, the petitioner had "separated himself from the enemy armed forces' command structure prior to his capture," and he granted Hatim's petition.[244] The government appealed the decision, but the D.C. Circuit did not reach the vitiation issue. Instead, the *per curiam* opinion instructed the lower court to revise legally erroneous rulings relating to the substantive scope of the government's detention authority. It thus remains possible that the vitiation question in *Hatim* could appear once more.[245]

In *Khairkhwa v. Obama*, Judge Urbina again reached the question of vitiation, this time denying Khairkhwa's habeas petiton.[246] While Judge Urbina reaffirmed the *Salahi* rule that "to be lawfully detained, the petitioner must have been 'part of' those forces at the time of his capture,"[247] he was unpersuaded by the claim that Khairkhwa—a high ranking Taliban official who had varsiously "served as a member of the Taliban Supreme Shura, the Taliban's Acting Interior Minister and the Governor of Heart"[248] —had severed his ties with the Taliban in the months before his capture in early 2002. What is potentially interesting about Judge Urbina's ruling, though, is the implication that had the court found petioner's claims to be credible, they might have sufficed to prove vitiation and thus prohibit detention. In other words, Judge Urbina seems to leave open the possibility that a disassociation need not have occurred long before capture, and, more importantly, that an affirmative disassociation that occurs before capture might be sufficient to render detention illegal, even though it is undisputed that the detainee was still a high-level Taliban official when Operation Enduring

[241] *Id.*

[242] 677 F. Supp. 2d 1 (D.D.C. Dec. 15, 2009).

[243] *Id.* at 13-14.

[244] *Id.* at 14.

[245] *Id.*

[246] 793 F. Supp. 2d 1 (D.D.C. May 27, 2011).

[247] *Id.* at 44.

[248] *Id.* at 45.

Freedom commenced.

In the wake of the D.C. Circuit opinions in *Awad*, *Al Adahi*, *Salahi*, and *Alsabri* we can say with relative confidence that vitiation is possible, that it will generally but not always require some affirmative showing of separation, that burden-shifting *might* be appropriate in the right circumstances, and that the vitiation will need to have occurred prior to capture. These very broad parameters, however helpful, leave some very big questions: What does the successful vitiation case look like, and what does the ultimately unsuccessful one look like? Similarly, how far in advance of capture must an affirmative dissociation take place, and does the importance of the detainee's former position in the terrorist organization impact this time frame? The district and appellate judges clearly have different instincts that are likely to come to the fore in future cases.[249]

[249] *See* T. Al Bihani v. Obama, No. 05-2386, slip op. at 11 (D.D.C. Sept. 22, 2010) (Walton, J. describing that "the burden now shifts to the petitioner to produce evidence to rebut the government's case."). The government made similar arguments in its appeal in *Khalifh*, but that case was dismissed as moot. No. 10-5241 (D.C. Cir. Jan. 28, 2011) (order granting petitioner's motion to dismiss as moot).

Chapter 5 – Evidentiary Presumptions

As noted above, the plurality opinion in *Hamdi* recognized that difficult evidentiary issues may arise when courts conduct habeas review in the military-detention setting.[250] Indeed, in doing so, the plurality seemed to be authorizing a departure from the Federal Rules of Evidence ("Federal Rules"): "[T]he exigencies of the circumstances may demand," the plurality explained, "that . . . enemy combatant proceedings . . . be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[251] The plurality gave the example of permitting the use of hearsay, and, as we have explained, even went so far as to suggest that the burden of proof might lie with the defendant once the government came forward with a "credible" evidentiary showing to support a detention.[252] The justices were making this point in relation to the military detention of a U.S. citizen whose right to assert the protections of the Fifth Amendment's Due Process Clause the government did not contest. With little else on the subject in the *Boumediene* opinion, it is unsurprising that in subsequent habeas litigation the government requested several concessions of this type from the district court in cases of *non- U.S. citizens* with arguably a lesser array of rights. The government has, for example, repeatedly urged the judges to adopt both presumptions of authenticity and accuracy as to the government's evidence.[253]

The meaning of authenticity in this setting is relatively clear. It has to do with whether an item of evidence is what its proponent claims it to be. As we explain below, the D.C. Circuit has largely avoided weighing in on the question of whether there ought to be a presumption of authenticity, while the district judges have disagreed on the point.

Things are more complicated with respect to the idea of a presumption of accuracy. The problem arises because the notion of accuracy in this setting is ambiguous, encompassing at least two possible meanings. First, it could refer to the idea that a factual proposition contained in or otherwise supported by a given item of evidence is, in fact, true. Second, it might instead refer to the idea that a factual proposition contained in a document or other medium was recorded from a third source without error, separate and apart from whether the proposition itself is true. All of which has come to matter because the D.C. Circuit in *Latif*[254] endorsed the presumption of accuracy, appearing to reference

---

[250] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[251] *Id.*

[252] *Id.* at 533–34.

[253] The government enjoyed both presumptions in proceedings taking place under the CSRT procedure. *See* Parhat v. Gates, 532 F.3d 834, 841 (D.C. Cir. June 20, 2008) (quoting GORDON R. ENGLAND, SEC. OF THE NAVY, IMPLEMENTATION OF COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES 2 (2004)).

[254] Latif v. Obama, 666 F.3d 746 (D.C. Cir. Oct. 14, 2011).

the second meaning but prompting a dissent suggesting that the majority in that case instead had the first in mind—or at least that this would be the practical effect of adopting the presumption.[255]

It is tempting to conflate the two concepts of a presumption of authenticity and a presumption of accuracy. Both, after all, connote deference; the government seeks to justify both presumptions on grounds of practical exigency, and courts and litigants often discuss both presumptions in the same breath in motions and opinions in these proceedings. They are conceptually distinct, however, and should be analyzed and addressed separately and in relation to the Federal Rules.

We begin with the question of evidentiary authenticity. Under the Federal Rules, the proffer of any evidence that is not in-court testimony might lead to questions about its authenticity.[256] That is, is the evidence in question what its proponent claims it to be? This question has nothing to do with the weight the fact finder ought to give this piece of evidence, but rather relates simply to the question of whether it should be admissible in the first instance. To give a pedestrian example, a defendant in a negligence suit involving a car accident might object on authenticity grounds to a plaintiff's attempt to introduce as evidence a piece of tire tread that purportedly comes from the defendant's vehicle. In that case, the proponent of the evidence has the burden of proving by the preponderance of the evidence that the tire tread did indeed come from the defendant's vehicle, with the judge serving as fact finder for purposes of this threshold question of admissibility. Should the proponent carry this burden, the objection is overcome and the tire tread will be admitted, if it is relevant and no other objections arise. Whether it then proves to have any weight with the jury, however, or how much weight the jury might give it, is an altogether different question.

The issue of authenticity is at least a theoretically significant one in these cases. In several of the cases, the government has sought to introduce documentary or physical evidence obtained overseas in contexts that make it relatively difficult to establish authenticity through traditional methods, such as asking witnesses to testify to the chain of custody. When the government in these proceedings asks for a presumption of *authenticity* on these grounds, it effectively is asking the judge to reverse the usual practice of requiring the proponent of evidence to prove its authenticity before it is admitted.[257]

A request of this type seems compatible with the practical concerns and

---

[255] *Id.* at 779 (Tatel, J., dissenting).

[256] *See* FED. R. EVID. 901(a).

[257] *See* Al Adahi v. Obama, 692 F. Supp. 2d 85, 90 n.5 (D.D.C. March 10, 2010) (quoting 2 K. BROUN, MCCORMICK ON EVIDENCE § 221 (6th ed.) ("[T]he requirement of authentication requires that the proponent, who is offering a writing into evidence as an exhibit, produce evidence sufficient to support a finding that the writing is what the proponent claims it to be.")).

accommodations the Supreme Court plurality discussed in *Hamdi*.[258] Indeed, for that reason, the suitability of this presumption, which does away with the requirement to prove authenticity *as a prerequisite* to admission, had some resonance with the district judges. Judge Kessler, for example, granted a government request for such a presumption in *Ahmed*[259] and *Mohammed*,[260] and in the *Al Adahi* cases,[261] as did Judge Urbina in *Hatim*[262] and *Alsabri*[263] and Judge Friedman in *Almerfedi*.[264] And though Judge Robertson was particularly skeptical of the notion of an *accuracy* presumption, he also seemed to grant the authenticity presumption implicitly in *Awad*, *Salahi*, and *Khalifh* insofar as he admitted all proffered evidence and gave it the weight he "believe[d] it deserve[d]."[265]

But not all the judges have followed this approach. Judge Kollar-Kotelly, has rejected a request for a presumption of authenticity. In *Mutairi*, for example, she began by noting that the habeas proceedings are bench trials in the sense that the judge serves as fact finder, and that "[o]ne of the central functions of the Court in . . . [these] case[s] is 'to evaluate the raw evidence' proffered by the Government and to determine whether it is 'sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of clarity.'"[266] When she turned to address her reservations about the requests, Judge Kollar-Kotelly's analysis did not clearly differentiate between the requested authenticity presumption and the requested accuracy presumption. Nevertheless, she seemed to speak directly to authenticity concerns when she

---

[258] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004).

[259] Ahmed v. Obama, 613 F. Supp.2d 51, 54–55 (D.D.C. May 11, 2009).

[260] Mohammed v. Obama, 704 F. Supp. 2d 1, 5–6 (D.D.C. Nov. 19, 2009).

[261] *Al Adahi*, 692 F. Supp. 2d at 90–91; Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 54 (D.D.C. Mar. 10, 2010), Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85, 90–91 (D.D.C. Mar. 10, 2010).

[262] Hatim v. Obama, 677 F. Supp. 2d 1, 8 (D.D.C. Dec. 15, 2009) (granting the government's motion for a presumption of authenticity of interview and intelligence reports by analogy to the FED. R. EVID. 803(6) business-records exception).

[263] Alsabri v. Obama, 764 F. Supp. 2d 60, 66 (D.D.C. Feb. 3, 2011) (mentioning that "the government's evidence would, in appropriate circumstances, be afforded a presumption of authenticity.").

[264] Almerfedi v. Obama, No. 05-1645 (D.D.C. Mar. 1, 2010) (in a pre-merits hearing proceeding, according any evidence that had been created and maintained in the ordinary course of business a rebuttable presumption of authenticity).

[265] Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009) (noting that he would not presume the accuracy of information, that he had "instead formally 'received' all the evidence offered by either side [and had] assessed it item-by-item"); Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010); Khalifh v. Obama, No. 05-1189, slip op. at 5 (D.D.C. May 28, 2010). *See also* Bostan v. Obama, 662 F. Supp. 2d 1, 6-7 (D.D.C. Aug. 19, 2009) (describing the government's interpretation of the admissibility holding in Khiali-Gul v. Obama, No. 05-877 (D.D.C. Apr. 22, 2009)).

[266] Al Mutairi v. United States, 644 F. Supp. 2d 78, 83–84 (D.D.C. July 29, 2009) (quoting Parhat v. Gates, 532 F.3d 834, 847 (D.C. Cir. 2008)). *See also Hatim*, 677 F. Supp. 2d at 10 (Urbina, J.) (discussing the same concern for the court's role as fact finder in discussing the presumption of accuracy).

turned the government's exigency and practicality justifications on their head: "Some of the evidence advanced by the Government has been 'buried under the rubble of war,'" she noted, "in circumstances that have not allowed the Government to ascertain its chain of custody, nor in many instances even to produce information about the origins of the evidence."[267] In her view, far from providing a basis for a presumption of authenticity, this fact created good grounds to doubt its appropriateness, and she even provided a salient example of how a typographical error led to a misidentification.[268] She used a similar approach, and often similar language, to respond to the requests for these presumptions in *Al Rabiah*, *Al Odah*, and *Al Kandari*.[269] Judge Rosemary Collyer also declined to allow an authenticity presumption in *Barhoumi*, though her rationale for that decision is not public.[270]

In any event, authenticity turns out not to be nearly as important an issue in practice as it is in theory. The cases to date turn overwhelmingly not on tangible evidence but on detainee statements—statements either by the petitioner himself or by other detainees or intelligence sources. So even when the government wins a presumption of authenticity, the presumption does not turn out to be worth much. In one case, for example, Judge Robertson went so far as to observe that authenticity concerns were inherently irresolvable: "The government's case relies on 'raw' intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps not knowable)."[271] He therefore took a holistic approach to admitting and weighing the evidence. In general, it seems that while petitioners have continued to raise authenticity objections, in no case has a judge actually disbelieved that the government's evidence was what the government said it was.

Requesting a presumption of *accuracy* (or "reliability" or "credibility") for the government's evidence is a different matter. Whereas authenticity speaks to a threshold question of admissibility, accuracy might or might not. If accuracy is understood to refer merely to whether a given document has accurately reported a factual proposition derived from some other source, then it too might be understood as a threshold question of admissibility. Indeed, on that understanding, accuracy is but another form of authenticity. But if accuracy instead is understood to refer to the weight the fact finder should attach to a

---

[267] *Al Mutairi*, 644 F. Supp. 2d at 84 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004)).

[268] *Id.* (noting that the government had erroneously believed for over three years that Al Mutairi manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report).

[269] Al Rabiah v. United States, 658 F. Supp. 2d 11, 17 (D.D.C. Sept. 17, 2010); Al Odah v. United States, 648 F. Supp. 2d 1, 5 (D.D.C. Aug. 24, 2009); Al Kandari v. United States, 744 F. Supp. 2d 11, 19 (D.D.C. Sept. 15, 2010).

[270] Barhoumi v. Obama, No. 05-1056, slip op. at 1 (D.D.C. Sept. 3, 2009) ("[T]he documents are admitted with no presumptions of accuracy or authenticity.").

[271] Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009) (discussing a purported list of names of fighters trained at Tarnak Farms).

particular item of admitted evidence, matters stand differently. On that view, to presume the accuracy of evidence would be to presume that the evidence establishes that which it is offered to prove. Such a presumption, if given, would be consistent to some degree with the language in *Hamdi*, where the plurality expressly contemplated the possibility of a rebuttable presumption *in favor of* the government's evidence.[272] But as noted above, the judges in the post-*Boumediene* habeas cases have elected instead to place the burden of proof on the government. A presumption of accuracy for the individual items of evidence the government puts forward would be in considerable tension with that approach.[273]

Before the Circuit Court's opinion in *Latif*, judges in post-*Boumediene* habeas cases had treated requests for presumptions of accuracy as referring to the idea of factual truth, and had universally declined to afford a presumption of "accuracy" as a result. *Latif*, however, released in November 2011, has greatly complicated the issue. The majority granted a presumption of "regularity" for intelligence documents put forward by the government, reasoning that

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C.Cir.2007). The presumption applies to government-produced documents no less than to other official acts. See Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002) (holding that "an official tax receipt" of a foreign government "is entitled to a presumption of regularity.") Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. 2011).

The majority suggested that the presumption merely went to the question whether such documents correctly record factual propositions derived from other sources, not the truth of those propositions themselves. The dissent warned, however, that such a distinction might not be maintained. While *Latif*'s ultimate implications remain unclear, the presumption it adopts creates considerable tension and could be viewed as a sharp departure from earlier approaches.

The Lay of the Land Before *Latif*

Given the burden of proof in these cases, it is perhaps unsurprising that none of the publicly available rulings on the presumption of accuracy prior to *Latif* had

[272] *Hamdi*, 542 U.S. at 534.

[273] *See, e.g., Awad*, 646 F. Supp. 2d at 23 ("The suggestion of a presumption of reliability and credibility goes too far because it would seem to place the burden of rebuttal on the petitioner."). Interestingly, placing the "burden of rebuttal on the petitioner" is expressly what the Supreme Court condoned in *Hamdi*.

favored the government—even as the government continued to request just that presumption.[274] Even when judges declined to grant the accuracy presumption, though, they did so with some eye toward alleviating the practical hardship on the government. Judge Kessler, for example, was careful to note that "[d]enial of the Government's request for a rebuttable presumption of accuracy does not mean, however, that the Government must present direct testimony from every source, or that it must offer a preliminary document-by-document foundation for admissibility of each exhibit."[275] The judges, for the most part, insisted on making a credibility determination on each piece of evidence the government put forward, but they assessed the credibility in the "context of the evidence as a whole."[276]

The D.C. Circuit, for its part, remained relatively quiet about these two evidentiary presumptions before handing down its decision in *Latif*. In *Al Bihani*, the D.C. Circuit reviewed a district-court opinion that had, in the case management order, expressly reserved the court's *right* to allow presumptions of accuracy and authenticity in favor of the government's evidence, but had not expressly adopted either one—at least as evidenced in its merits opinion.[277] The district court found for the government, and on appeal the petitioner's challenges included an attack on what the petitioner argued was the district court's adoption of a presumption of the accuracy of the government's evidence.[278] The D.C. Circuit wrote that this challenge was, along with his other procedural attacks, on "shaky ground"; according to the court, *Boumediene* had expressly granted leeway for "[c]ertain accommodations . . . to reduce the burden habeas corpus proceedings will place on the military."[279] The panel did not make a separate finding about the presumption argument itself, however, but rather discussed the claim in the context of its ruling on the hearsay challenge.[280] The panel noted that "the district court clearly reserved that authority [to independently assess the executive's actions] in its process and assessed the

---

[274] 252 Motion to Admit Hearsay Evidence with a Presumption of Accuracy and Authenticity, Al Zarnuki v. Obama, No. 06-1767 (D.D.C. Feb. 2, 2011), ECF No. 293.

[275] Al Adahi v. Obama, 692 F. Supp. 2d 85, 91 (D.D.C. March 10, 2010); Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 54 (D.D.C. Mar. 10, 2010) (assessing the evidence against Al Assani and stating "there is absolutely no reason for this Court to presume that the facts contained in the Government's exhibits are accurate").

[276] *See, e.g.*, Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. Mar. 24, 2010) (Leon, J.) (writing that the court must assess the "'accuracy, reliability, and the credibility" of each piece of evidence in the context of the evidence as a whole."); Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 54–55 (D.D.C. May 11, 2009); Hatim v. Obama, 677 F. Supp. 2d 1, 18 (D.D.C. Dec. 15, 2009) (Urbina, J.) (writing that the government's "justification for detention fares no better when the court views all of the evidence as a whole").

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

[278] *G. Al Bihani*, 590 F.3d at 875.

[279] *Id.* at 876 (quoting Boumediene v. Bush, 553 U.S. 723, 795 (2008)).

[280] *Id.* at 881 (finding that Al Bihani's claim that the district court's denial of an evidentiary hearing violated his right to a hearing was "groundless").

hearsay evidence's reliability as required by the Supreme Court."[281] The court then went on to quote the district court's case management order, in which Judge Leon had stated he would "determine, as to any evidence introduced by the Government, whether a presumption of accuracy and/or authenticity should be accorded."[282] Because the district court had considered the "ample contextual information" and "what weight to give various pieces of evidence," and had given Al Bihani the opportunity "to rebut the evidence and to attack its credibility," the panel concluded that the district court had not erred.[283]

Despite the varied treatment of these questions from the district courts, no actual rulings before *Latif* turned on evidentiary presumptions. Indeed, the government prevailed in several cases in which courts had denied its requests for evidentiary presumptions.[284] One such case was *Al Odah*, in which the district court denied both of the government's requests but found in favor of the government nonetheless. The D.C. Circuit affirmed this decision.[285] What's more, in a number of district court cases, petitioners prevailed on the merits even where courts *did* grant the government's request for an authenticity presumption.[286] This was true in *Al Adahi*,[287] and in that case the government did not even appeal the denial of the accuracy presumption but won on the appeals court by arguing other issues.[288] In the one case in which the petitioner on appeal claimed that the district court had impermissibly granted a presumption of accuracy—*Al Bihani*[289]—the D.C. Circuit found otherwise.[290]

Latif Changes Things

These evidentiary standards may have shifted in the wake of the D.C. Circuit's *Latif* opinion, which granted a presumption of "regularity" to government

---

[281] *Id.* at 880.

[282] *Id.* (citations omitted).

[283] *Id.*

[284] *See, e.g.,* Al Odah v. Obama, 648 F. Supp. 2d 1 (D.D.C. Aug. 24, 2009) (disallowing the government's requests for evidentiary presumptions and denying the detainee's petition); Al Kandari v. Obama, 744 F. Supp. 2d 11 (D.D.C. Sept. 15, 2010).

[285] Al Odah v. United States, 611 F.3d 8 (D.C. Cir. June 30, 2010).

[286] Al Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. March 10, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 18 (D.D.C. Dec. 15, 2009).

[287] *Al Adahi*, 692 F. Supp. 2d 85 (granting the detainee's petition where the government's evidence was permitted a presumption of authenticity).

[288] Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Brief for Appellants, *Al Adahi*, 613 F.3d 1102 (outlining arguments on appeal but not discussing authenticity ruling).

[289] *See* Brief for Petitioner at 52, G. Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010) (No. 09-5091).

[290] 268 *See G. Al Bihani*, 590 F.3d at 880–881 (finding, implicitly, that the district court had not adopted such a presumption).

evidence including, most strikingly, to intelligence reports of the type commonly used in habeas proceedings.

While the number and scope of redactions makes the opinion difficult to confidently assess, *Latif* clearly turns on the reliability of a single government intelligence report, which District Court Judge Kennedy found to be unreliable. Nearly all details concerning this report — its author, its subject, and its flaws – are redacted. But the centrality of the report and the fact that it would apparently alone justify Latif's detention were it reliable raises the question of what presumptions, if any, Judge Kennedy should have made concerning its reliability. Specifically, was he right to make no presumption as to the integrity of the document and merely assess its reliability? And if not, would a presumption of reliability in the case of the report be overcome by its flaws?

Judges Brown and Henderson hold that Judge Kennedy was wrong not to afford a presumption of regularity to the preparation of the document. Judge Brown's opinion starts with the assumption that a presumption of regularity supports official acts of public officers in the absence of reason to doubt their regularity.[291] This is true of publicly-produced documents no less than other actions, she argues.[292] So just as a tax document is presumed to accurately report a tax filing, and just as in a normal habeas case, the courts presume regularity in the underlying criminal proceedings, the courts here should presume regularity in the preparation of the intelligence report at issue. The Supreme Court in *Hamdi*, Judge Brown notes, explicitly invited such an approach, writing that 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."[293] Judge Brown makes clear that she is not suggesting that there should be any "presumption of *truth*. But the presumption of regularity does not require a court to accept the truth of a non-government source's statement."[294] Rather, she writes:

> [I]ntelligence reports involve two distinct actors – the non-government source and the government official who summarizes (or transcribes) the source's statement. The presumption of regularity pertains only to the second: it presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement. There are many conceivable reasons why a government document might accurately record a statement that is itself incredible. A source may be

[291] Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. Oct. 14, 2011).
[292] *Id.*
[293] *Id.* at 749 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004)).
[294] *Id.* at 750.

> shown to have lied, for example, or he may prove his statement was coerced. The 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."[295]

Rather than remanding the case for a determination by Judge Kennedy in the first instance as to whether the presumption has been overcome by the flaws he found, however, Brown proceeded to rule on the point: "[W]e can only uphold the district court's grant of habeas if Latif has rebutted the Government's evidence with more convincing evidence of his own. Viewed together, both [REDACTION] and the other evidence he uses to attack its reliability fail to meet this burden."[296]

Judge Brown's opinion casts this holding narrowly, as an incremental development in the court's treatment of hearsay reliability questions. Yet in dissent, however, Judge Tatel' casts it as a far more radical step. He starts with a different baseline understanding of the presumption of regularity. To him, the presumption of regularity stems from the mundane fact that routine business is normally not fouled up.[297] All the cases applying the presumption, he notes, "have something in common: actions taken or documents produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar. As a result, courts have no reason to question the output of such processes in any given case absent specific evidence of error."[298] The Report on which this case hinges, he argues, stands in sharp contrast, having been:

> produced in the fog of war by a clandestine method that we know almost nothing about. It is not familiar, transparent, generally understood as reliable, or accessible; nor is it mundane, quotidian data entry akin to state court dockets or tax receipts. Its output, a [REDACTION] intelligence report, was, in this court's own words, "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes."[299]

[295] *Id.*
[296] *Id.* at 755–56.
[297] *Id.* at 771 (Tatel, J., dissenting).
[298] *Id.*
[299] *Id.* at 772 (quoting majority opinion at 748).

Judge Tatel stresses that he is not positing that such material is inherently unreliable, but rather that the court "should refrain from categorically affording it presumptions one way or the other."[300] As he puts it,

> One need imply neither bad faith nor lack of incentive nor ineptitude on the part of government officers to conclude that [REDACTION] compiled in the field by [REDACTION] in a [REDACTION] near an [REDACTION] that contain multiple layers of hearsay, depend on translators of unknown quality, and include cautionary disclaimers that [REDACTION] are prone to significant errors; or at a minimum, that such reports are insufficiently regular, reliable, transparent, or accessible to warrant an automatic presumption of regularity.[301]

For Judge Tatel, the language in *Hamdi* permits the use of a presumption with respect to individual pieces of evidence, but it does not require its use for all intelligence reports. The relevant command from above, for him, is the requirement in *Boumediene* that "habeas review be 'meaningful'"—a command that he sees as jeopardized by the majority's standard, which assumes government evidence valid unless proven otherwise.[302] As Judge Tatel wrote, "I fear that in practice it comes perilously close to suggesting that whatever the government says must be treated as true. In that world, it is hard to see what is left of the Supreme Court's command in Boumediene that habeas review be 'meaningful.'"[303]

At least in conceptual terms, *Latif* could be a game changer. At a minimum, it puts the burden of proof on the detainee challenging a government intelligence report (or, less frequently, on the government when a detainee tries to introduce a government intelligence report) to show that there is some reason *not to credit* the translation, transcription, and summary of a complicated interview. Given the role that these intelligence reports play in the Guantanamo cases, that is a significant change that will likely weaken the hand of detainees in the district court. Previously, when a district judge confronted an intelligence report, the government had to persuade the judge that the report summarized an interview that (a) was accurately translated, (b) was accurately recorded, (c) was accurately summarized, and (d) contained relevant statements that were likely true. In *Latif*, the D.C. Circuit instructed the lower court to simply presume points (a) through (c) in the absence of some reason to doubt them. The government now need take responsibility only for (d).

---

[300] *Id.* at 773.
[301] *Id.* at 774.
[302] *Id.* at 779 (quoting Boumediene v. Bush, 553 U.S. 723, 783 (2008)).
[303] *Id.* (citations and internal quotations omitted).

Whether it's as big a change in practice as it is in principle, however, remains to be seen. For one thing, very few cases will turn—as *Latif* apparently does—on the credibility of a single document in circumstances in which that document's credibility, in turn, is doubtful enough that it will stand or fall on the presumptions the court does or does not afford it. Moreover, much will depend in the future on whether the D.C. Circuit, assuming the Supreme Court does not decide to hear *Latif*, reads the case in the future in a narrow or broad fashion. That is, only future cases will tell whether Judge Brown is correct that it is merely an incremental step in the treatment of evidence or whether it is, as Judge Tatel alleges, a change great enough to alter fundamentally the scope of review under *Boumediene*.

Chapter 6 – Detainee Admissions and Hearsay Evidence

In many, if not most, of the habeas cases, the government depends heavily on various kinds of out-of-court statements. Some are contained in documents specifically generated for purposes of the habeas litigation, such as affidavits or declarations from military or government personnel. Others appear in documents generated originally for other purposes, such as reporting and analyzing intelligence. These documents include intelligence community reports that record or summarize information provided by various assets and sources; records and summaries of statements made by detainees during interrogation (Intelligence Information Reports (IIRs) or Summary Interrogation Reports (SIRs)); law-enforcement documents such as those used by the Federal Bureau of Investigation and known as Field Documents (FD-302s) and Form 40s (FM-40s); and transcripts and summaries of statements made by detainees when appearing before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), the administrative panels the Bush administration set up to review detentions. At first, each of these categories of documents presented difficult questions in terms of their admissibility, in addition to concerns over the probative value of the material once admitted. In particular, habeas petitioners argued that the Federal Rules of Evidence ("Federal Rules") should apply in full, but the Circuit has rejected this view and the Supreme Court recently denied *cert.* on the question. The admissibility question seems pretty well settled at this stage—at least at the appellate-court level. Yet while these efforts have produced a jurisprudence that is clear on a few high-altitude principles of law, there remains a great deal of leeway to the district courts to call the shots as to how much weight a particular piece of hearsay will get—a matter on which the different judges differ markedly. This, in turn, leaves some concern that the outcome of any given case might depend a great deal on which district-court judge presides over it.

In ordinary civil or criminal litigation, of course, the rules are quite different from those that govern Guantánamo habeas proceedings. Judges would most likely exclude the evidence described above for a number of reasons. As a threshold matter, the Federal Rules of Evidence require that witnesses have personal knowledge of the facts about which they testify, and that principle applies by extension to the underlying source of a hearsay statement, even if the statement otherwise would have been admissible.[304] The Federal Rules also generally forbid the admission of hearsay statements.[305] And while the rules provide for many exceptions to this bar, hearsay derived from custodial interrogation is unlikely to trigger any of the usual exceptions to the hearsay ban, because the likelihood that a particular interrogator would be unable to testify as

[304] FED. R. EVID. 602.

[305] FED. R. EVID. 802.

to the circumstances surrounding the original statement would be fatal to many attempts to invoke those exceptions.[306] And, of course, in any criminal proceeding the use of out-of-court testimonial statements by persons not now available for cross-examination—such as the ever-growing category of persons who have since been released from detention—would run into the Sixth Amendment's unyielding guarantee of a defendant's right to confront the witnesses against him.

Notwithstanding this backdrop of federal evidentiary rules, the plurality opinion in *Hamdi* explicitly invited the use of hearsay in the context of a habeas proceeding brought by an American citizen held in military custody. Indeed, the plurality recognized that practical exigencies may make hearsay the best evidence available in some circumstances.[307] The plurality in *Hamdi* did not elaborate on the point, however, and the issue received only indirect treatment in *Boumediene*.[308] As a result, the lower courts in the wake of *Boumediene* immediately began fashioning various tests for dealing with hearsay, which often formed the core of the government's case.[309]

The key dispute at this stage concerned the role of reliability in assessing hearsay evidence. Was hearsay admissible only upon satisfaction of a reliability test? Or was all hearsay admissible, with reliability merely impacting the *weight* to be given such evidence? The question split the district judges. In *Al Bihani*, however, the D.C. Circuit resolved it: Hearsay will not be excluded simply because it is hearsay, but courts will be charged with assessing its reliability after formally "admitting" the evidence. This appeared at first to be an important development, suggesting that parties would have more latitude to rely on hearsay. But it turns out to be less important than it initially appeared; admitted hearsay that receives little or no weight proves no more useful to a party than

---

[306] A petitioner's own statements would not be considered hearsay. *See* FED. R. EVID. 801(d)(2)(A) (excluding a party's own statements from the definition of hearsay). The interrogation statements of *other* detainees, however, would be considered hearsay subject to Rule 802. The most plausible exception in the interrogation context would be Rule 804(b)(3), which encompasses statements made against a person's civil or criminal interests. But application of that exception in the context of military detention would be unpredictable in light of the inevitable argument that the detainee at the time had competing interests—especially currying favor with interrogators—that would preclude reliance on the usual assumption that a person does not make false inculpatory statements. And in any event, all the Rule 804 exceptions require that the declarant be unavailable to testify in the current proceeding, a condition which may not be satisfied if the detainee remains in U.S. custody.

[307] Hamdi v. Rumsfeld, 542 U.S. 507, 533-534 (2004).

[308] *See* Bostan v. Obama, 662 F. Supp. 2d 1, 6 (D.D.C. Aug .19, 2009) (observing that *Boumediene* "did not address the issue of hearsay at all in that case other than to criticize the effects of its unbridled use by the government" in the CSRTs). In many cases, the chief evidence against a detainee consists of statements by the petitioner himself or of statements by the petitioner and other detainees.

[309] Cases in which the petitioner's own statements formed the core of the government's case include, for example, Al Kandari v. Obama, 744 F. Supp. 2d 11 (D.D.C. Sept. 15, 2010); Al Adahi v. Obama, No. 05-0280 (D.D.C. Aug. 17, 2009) (where the court assessed "statements of Petitioner, as well as statements made by other detainees").

inadmissible hearsay. The inquiry hasn't ended, just moved—and as it turns out, the judges still have very different senses of what sort of hearsay evidence is reliable.

Origins and Evolution of the Reliability Test

The courts' emphasis on reliability did not emerge in a vacuum. Rather, the judges appear to have concluded that the D.C. Circuit's *Parhat* decision required them to pay a great deal of attention to reliability.[310] *Parhat* was not a habeas case; rather, it was the sole decision on the merits by the D.C. Circuit pursuant to the now-defunct system for review of CSRT determinations established by the DTA. In *Parhat*, a unanimous D.C. Circuit panel concluded that the CSRT had had insufficient evidence to justify its determination that certain detainees were lawfully detained.[311] The panel emphasized that its suggestion was not "that hearsay evidence is never reliable—only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability."[312]

Following *Parhat*—usually citing it, in fact—but before *Al Bihani*, a few judges of the district court imposed a generalized prerequisite of reliability when deciding whether to admit hearsay. Judges Hogan, Walton, and Bates all fell into this camp, as evidenced by their early case-management orders or opinions. The case management order crafted by Judge Hogan in November 2008 to govern the majority of the habeas cases, for example, excluded unreliable hearsay explicitly.[313] Under that CMO, hearsay could be admitted at the merits stage *only* upon motion in advance of any merits hearing. The judge would determine if the evidence was "relevant and material" to the lawfulness of petitioner's detention, with the movant bearing the burden of establishing that the evidence was "reliable" and that "the provision of nonhearsay evidence would unduly burden the movant or interfere with government efforts to protect national security."[314] Echoing this perspective, Judge Walton in *Bostan* adopted Judge Hogan's two-pronged approach; anything not admissible under the Federal Rules or 28 U.S.C.

---

[310] *See, e.g.* Abdah v. Obama (Uthman), 708 F. Supp. 2d 9, 24-25 (D.D.C. Apr. 21. 2010) (quoting Parhat v. Gates, 532 F.3d 834 (D.C. Cir. June 20, 2008)).

[311] Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. June 20, 2008) (finding that key portions of the government's case turned entirely on assertions of fact made by unidentified sources in four U.S. government intelligence documents and the court's determination that the form of hearsay in that case was insufficiently reliable to be accepted as evidence in support of the government's claims).

[312] *Id.* at 849. Drawing support from unreliable statements, the panel observed, would be to deprive the detainee of a fair opportunity to rebut the government's case, effectively establishing an irrebuttable presumption in favor of the government's evidence. *Id.*

[313] *In re* Guantánamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Nov. 6, 2008).

[314] *Id.*

Sec. 2246 would be admissible only if it satisfied Judge Hogan's test.[315] Judge Walton further observed that "[n]othing in [the] dicta from the plurality's opinion in *Hamdi* remotely suggests that hearsay should be routinely admitted into evidence regardless of the circumstances surrounding a detainee's detention."[316] Judge Walton used the test again in Toffiq Al Bihani's case, and there expanded on what it meant to be reliable.[317] Judge Bates expressly concurred with this approach in his first *Khan* opinion, and, for a while, continued to apply it in his case-management orders in other cases.[318]

Other judges, by contrast, viewed reliability not as a prerequisite for admissibility but rather as a key consideration to be applied in assessing the weight of the evidence. In decisions prior to *Al Bihani*, Judge Leon admitted hearsay as long as it was "relevant and material to the lawfulness of petitioner's detention," and he said that consideration of reliability comes "later."[319] Judge Kollar-Kotelly, for her part, repeatedly stated that the "Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it shall make determinations in the context of the evidence and arguments presented during the Merits Hearing—including any arguments the parties have made concerning the unreliability of hearsay evidence."[320] Judge Robertson treated hearsay in the same manner,[321] as did Judges Kennedy[322] and Kessler.[323]

---

[315] Bostan v. Obama, 662 F. Supp. 2d 1, 8 (D.D.C. Aug. 19, 2009) ("government must establish the admissibility of its hearsay evidence by showing (1) that the evidence is admissible "under the Federal Rules of Evidence, as modified by 28 U.S.C. § 2246," or (2) that "the proffered hearsay is reliable *and* . . . that the provision of non-hearsay evidence would unduly burden the government . . . or interfere with the government's ability to protect national security.").

[316] *Id.* at 5-6. In this opinion Judge Walton also elaborated on the meaning of "undue burden," and introduced a four-part test for discerning whether one existed.

[317] T. Al Bihani v. Obama, 662 F. Supp. 2d 9 (Sept. 8, 2009).

[318] *See* Khan v. Obama, No. 08-1101 (D.D.C. Feb. 20, 2009) (in Section II(c) of the case management order, adopting Judge Hogan's two-pronged approach); Moammar Badawi Dokhan v. Obama, No. 08-987 (D.D.C. Mar. 3, 2009) (same).

[319] Boumediene v. Bush, No. 04-1166, Aug. 27, 2008 (adopting the approach in Section II(d)); Boumediene, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (admitting hearsay and stating that the judge will consider its reliability later); Al Alwi v. Bush, No. 05-2223 (D.D.C. Oct. 31, 2008) (doing the same in Section II(d)).

[320] Al Rabiah v. Obama, No. 02-828, slip op. at 5 (D.D.C. Sept. 17, 2009) (citing Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. June 20, 2008)). *See also* Al Odah v. United States, 684 F. Supp. 2d 1, 5 (D.D.C. Aug. 24, 2009) (same); Al Mutairi v. United States, 644 F. Supp. 2d 78, 83 (D.D.C. July 29, 2009) (same).

[321] Khiali-Gul v. Obama, No. 05-877, slip op. at 4 (D.D.C. Apr. 22, 2009) (Robertson, J.) (admitting hearsay into evidence "with the assurance that the Petitioner's arguments [against admissibility would] be considered when assessing the weight of the admitted evidence"); Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. Aug. 12, 2009); Salahi v. Obama, 710 F. Supp 2d 1 (D.D.C. Mar. 22, 2010);

[322] Writing in *Abdah* (Uthman), *Abdah* (Esmail), *Al Harbi* (Mingazov), *Abdah* (Odaini), and *Abdah* (Al Latif) ("the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all the evidence presented to support the parties' arguments").

Judge Urbina, in *Hatim*, expressly chose the prerequisite approach from Judge Hogan's CMO, but he later announced in his merits opinion that he had considered hearsay along with the rest of the government's evidence.[324]

Even before Al Bihani, the distinction between the admissibility of a piece of evidence and the weight afforded it once admitted seemed a trifle academic. Indeed, Judge Walton suggested as much in an interlocutory opinion in Bostan:

> Whether the assessment of a piece of hearsay's evidentiary worth is made at a preliminary hearing on the admissibility of proferred evidence or at the close of merits proceedings after being provisionally admitted into the record, the bottom line is that hearsay of no evidentiary worth will not be considered when the Court makes its factual findings.[325]

This language, along with Judge Kollar-Kotelly's, highlights the fact that the judges in these cases serve both as evidentiary gatekeepers and as factfinders, and that the distinction between excluding and discrediting evidence may as a result be far less important than when a judge keeps material from sight of a jury. This is especially true in light of the way the judges tend to evaluate evidentiary reliability; when they have doubts about reliability, the evidence in question seldom retains any of its value. Rather, the judges treat the question as binary; with few exceptions, they tend to credit the evidence in full or disregard it altogether.[326] This makes the weight inquiry in practice look a great deal like the admissibility inquiry, at least in effect if not in theory.

In any event, the D.C. Circuit's decision in *Al Bihani* resolved this debate in favor of a weight, rather than an admissibility, test. In *Al Bihani*, the petitioner claimed the government's introduction of hearsay violated his right to confront witnesses against him under the Sixth Amendment's Confrontation Clause. The court disagreed, concluding in an opinion written by Judge Janice Rogers Brown not only that did the petitioner not have a Confrontation Clause right but also that he did "not enjoy a right to the psychic value of excluding hearsay."[327] It further held that "whatever right he has is not an independent procedural entitlement. Rather, it operates only to the extent that it provides the baseline

---

[323] Ali Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. May 11, 2009), Al Adahi v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009), Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48 (D.D.C. Mar. 10, 2010), and Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010), Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

[324] Hatim v. Obama, 677 F. Supp. 2d 1, 7-10 (D.D.C. Dec. 15, 2009) (noting that hearsay was admitted, with reliability objections to be taken into account in the course of weighing the evidence).

[325] Bostan v. Obama, 662 F. Supp 2d 1, 7 (D.D.C. Aug. 19, 2009).

[326] The small exceptions include Judge Friedman's opinion in Almerfedi v. Obama, 725 F. Supp. 2d 18, 24 (D.D.C. July 8, 2010) (noting that while he did not discount a particular identification altogether, he could not, without more, "be certain" that the detainee's statements referred to the petitioner).

[327] G. Al Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. Jan. 5, 2010).

level of evidentiary reliability necessary for the 'meaningful' habeas proceeding *Boumediene* requires under the Suspension Clause."[328] Considering the petitioner's hearsay challenges, the panel first noted that the petitioner's statements contained in the interrogation reports were not hearsay; rather, they were admissions.[329] Secondly, it observed that the reports' having been translated by an interpreter did not "affect their status."[330] And although the panel agreed with the petitioner that the fact that "the otherwise admissible answers were relayed through an interrogator's account" did introduce a "level of technical hearsay,"[331] it went on to say that

> the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits. . . . A procedure that seeks to determine hearsay's reliability instead of its mere admissibility comports not only with the requirements of this novel circumstance, but also with the reality that district judges are experienced and sophisticated fact finders. Their eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries.[332]

The D.C. Circuit wrote that the district court's assessment of the admissions presented by the government as "credible and consistent," and its use of "ample contextual information," was appropriate.[333] The court noted that *Parhat* "did not reject hearsay as inadmissible, but rather deemed it insufficient to support detention because the panel could not 'assess the reliability' of its 'bare assertions' in the absence of contextual information."[334] The dictates of *Parhat* and *Hamdi* are fulfilled, the panel said, as long as the judge, having admitted hearsay, reserves his authority to assess the "sufficiency of the Government's evidence."[335] And, the *Al Bihani* court said, the district judge had done just that: He had expressly reserved his authority to assess the weight of any evidence submitted, and he expressly gave the detainee an opportunity to rebut the government's claims.[336] Because the district court was able to weigh contextual information

---

[328] *Id.*

[329] *Id.*

[330] *Id.* at 879.

[331] *Id.* ("Other information, such as a diagram of Al Qaeda's leadership structure, was also hearsay.").

[332] *Id.* at 879-80.

[333] *Id.* at 880. Notably, the district court had opted not to rely on detainee admissions that he later recanted.

[334] *Id.* at 879-80 (quoting *Parhat*, 532 F.3d at 847).

[335] *Id.* at 879 (quoting Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 2271(2008) (internal quotation marks omitted).

[336] *Id.*

appearing in the record and because it was reasonable for the district court to draw inferences from the fact that the petitioner did not "contest the truth" of many of the admissions in the government's proffered hearsay, the district court had not erred.[337]

Later opinions of the D.C. Circuit have followed *Al Bihani*, albeit with ambiguity on a key point that raised a momentary issue for the lower courts. In *Awad*, the D.C. Circuit's second habeas merits decision, the panel discussed the petitioner's claim that the district court had erred by relying upon "unreliable hearsay evidence."[338] The court cited *Al Bihani* and then observed that "hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable"[339]—which was, actually, the opposite of what the panel in *Al Bihani* had said. The next merits opinion, *Barhoumi*, added to the confusion when it wrote that *Awad* "explained that *Al-Bihani* stands for the proposition that 'hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable.'"[340]

In other words, notwithstanding *Al Bihani*'s strong language *rejecting* reliability as a prerequisite for admissibility, these two opinions used language indicating that a reliability assessment was, in fact, a necessary step to be carried out prior to the admission of evidence. Making the matter still more confusing, however, the D.C. Circuit panels in *Awad* and *Barhoumi* actually endorsed the methodologies of Judges Robertson and Collyer, who had admitted all hearsay and evaluated reliability only in determining the hearsay's weight. Moreover, in *Barhoumi* the court wrote that "[a]lthough under *Al-Bihani* and *Awad* hearsay evidence is always admissible in Guantanamo habeas proceedings, such evidence must be accorded weight only in proportion to its reliability."[341] Given the outcomes in the two cases, it seems likely that the language in *Awad* and *Barhoumi* was actually not meant to cloud the precise meaning of *Al Bihani* but was, rather, careless. And, in fact, Judge Walton decided to disregard the *Awad* language in *Sulayman*. He first observed the curious language in *Awad*:

> Unlike *Al-Bihani*, in which the circuit seemingly concluded that the admissibility of the government's hearsay evidence was mandatory . . . , the language used by the circuit in *Awad* appears to suggest that the admissibility of the government's hearsay evidence is conditional on whether the evidence is reliable, as this member of the Court concluded in its June 12, 2009 order.[342]

---

[337] *Id.*

[338] Awad v. Obama, 608 F.3d 1, 7 (D.C. Cir. June 2, 2010).

[339] *Id.*

[340] Barhoumi v. Obama, 609 F. 3d 416, 422 (D.C. Cir. 2010).

[341] *Id.* at 427-28.

[342] Sulayman v. Obama, 729 F. Supp. 2d 26, 41 n.9 (D.D.C. July 20, 2010).

But, Judge Walton explained, because *Awad* had also quoted *Al Bihani*'s statement that "hearsay is always admissible" and because "a three-judge panel of the District of Columbia Circuit is "without authority to overturn a decision by a prior panel of [the circuit]," admitting all evidence prior to making reliability determination was the correct approach, even though it meant that Judge Walton's own views had been rejected.[343] The admissibility-versus-weight question thus now seems largely settled, absent future Supreme Court intervention.[344]

The D.C. Circuit has glancingly touched on other issues related to hearsay in subsequent opinions. Most importantly, it has repeatedly emphasized that it reviews the lower courts' view of the weight of the evidence only for "clear error." In *Barhoumi* the court wrote:

> When reviewing for clear error, we may not reverse a trial court's factual findings "even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently. . . . [W]e ask whether, "on the entire evidence," we are "left with the definite and firm conviction that a mistake has been committed."[345]

Thus, far from micromanaging the district court's assessment of a given piece of hearsay, the D.C. Circuit will largely defer on matters of reliability. In *Awad*, for example, the panel rejected the petitioner's complaint that it was error for the district court to discredit documentary hearsay for one purpose but to credit it for another.[346] The same was true in *Al Odah*, where the D.C. Circuit seemed uninterested in second-guessing the district court's evidentiary assessment.[347]

The appellate court will not always defer, however. In the *Barhoumi* decision, the D.C. Circuit found plain, though harmless, error when it addressed the petitioner's argument that certain statements contained in a diary submitted by

---

[343] *Id.*

[344] Petition for Writ of Certiorari, Awad v. Obama (No. 10-736) (cert. denied Apr. 4, 2011); Petition for Writ of Certiorari, Al Odah v. Obama, (cert. denied) 79 U.S.L.W. 3567 (Apr. 4, 2011) (No. 10-439).

[345] *Barhoumi*, 609 F.3d at 423 (citations omitted). *See also Awad*, 608 F.3d at 7 ("We review a district court's factual findings for clear error, regardless of whether the factual findings were based on live testimony or, as in this case, documentary evidence.").

[346] *Awad*, 608 F.3d at 8. The petitioner claimed that because the government believed that a detainee's exculpatory statements about his own behavior were incredible, the government could not then urge the court to rely on that same detainee's statements incriminating Awad.

[347] Al Odah v. United States, 611 F.3d 8, 12 (D.C. Cir. June 30, 2010) (citation of district-court opinion omitted). Evaluating the district court's admission of hearsay evidence, the D.C. Circuit observed that the district court permitted the use of hearsay by both parties—not just the government—and had expressly stated that it was considering each piece of evidence for reliability before crediting its claims. That the evidence was hearsay was, the D.C. Circuit said, "of no consequence." The panel noted the district court's observation that the hearsay was "corroborated by 'multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad,'" an assessment the D.C. Circuit's own *Al Bihani* ruling had blessed, and thus was not error. *Id.*

the government lacked sufficient indicia of reliability. The panel disagreed. It wrote that, far from seeming unreliable, statements in the diary demonstrated internal consistency, first-hand knowledge of the diary author's account, and consistency with other, uncontested record evidence.[348] Additionally, the "lengthy and highly detailed descriptions of real-world persons, places, and events tend[ed] to enhance the credibility of the diary as a whole."[349] The petitioner had also challenged the district court's reliance on the diary because, he argued, it contained inconsistencies between it and another diary—thus showing it was unreliable. The D.C. ultimately agreed with the petitioner in part and disagreed in part; it wrote that the district court's conclusion, which was that two diary entries described the same event, was incorrect. But in the D.C. Circuit's estimation, the particular inconsistency did not obviate the corroborative value of the diary completely.[350] Therefore, the D.C. Circuit's disagreement with the district court did not result in an outright reversal of the district court's treatment of evidence, though it does show that clear error review is not a blank check to the district-court judges.[351]

Taken together, the D.C. Circuit's opinions have identified in broad strokes the rules regarding hearsay. They are, first, that hearsay is always admissible; second, that it should only be credited to the extent it is reliable; and third, that an appeals court should defer to the district judges on matters of reliability except where those judgments are plainly wrong. But while these principles seem coherent and reasonable, they also have the paradoxical effect of ensuring that similar cases will be treated differently. The lower court judges differ significantly on what constitutes reliability; an appellate posture of deferring to them all guarantees a measure of differential justice depending on whose courtroom a detainee finds himself inside.

---

[348] *Barhoumi*, 609 F.3d at 428-29. The court discussed the indicia of reliability, including that Barhoumi's own admissions were consistent with the government's claim that the diary was picked up from a guesthouse, and that characteristics of the statements themselves "reduce[d] any concern that the diary is a government fabrication." The court wrote: the diary "itself suggest[d] that al-Suri possessed first-hand knowledge of Zubaydah and his organization." *Id.* at 429. It was not problematic that the diary's author, al-Suri, was not known personally to the government. Even the fact that the government presented the contents of the diary in an intelligence report (rather than offering the diary itself) did not bother the court: "[T]he al-Suri diary is contained in an intelligence report, it represents a discrete piece of physical evidence, and the nature and reliability of that evidence is not altered just because it bears the label 'intelligence.'" *Id.*

[349] *Id.*

[350] *Id.* at 428-429.

[351] *Id.* at 430 (agreeing with Barhoumi "that three weeks is too large a mismatch to support the district court's conclusion that the diary entries depict the same event," but went on to explain that "[o]nly the al-Suri diary refers to Barhoumi as arriving from Tora Bora, and [the other diary] contains nothing that contradicts that account.").

Hearsay Assessment in Practice

Hearsay takes many forms. Most often, the government seeks to introduce statements obtained from detainees in interrogation. These statements might have been given by the petitioner himself or by another detainee about the petitioner.[352] The use of these statements raises two clusters of concerns. First, detainees frequently allege that their own inculpatory statements—or those of other detainees—were the product of torture or coercion and hence are definitionally unreliable.[353] In that setting, the hearsay analysis becomes inextricably intertwined with coercion concerns. We treat the coercion issue in detail in a separate section concerning voluntariness. For now, we concentrate on the second set of major issues raised by the use of detainee statements: What constitutes reliability in hearsay or, put another way, when should a court rely in whole or in part on hearsay evidence to conclude that the government has met its burden? On these questions, the judges have developed some high-altitude common ground, while considerable differences emerge on close inspection.

Compounding the diversity between the judges is the difficulty inherent in comparing different judges' handling of hearsay evidence in practice. Unlike the judges' discussions of points of law, where they have tended to explain their reasoning in depth, their assessments of the credibility and reliability of evidence involve a lot of instinct and impression. Indeed, as in other areas of Guantánamo habeas law, occasionally even their terminology varies; Judge Walton seems to use "accurate" as a synonym for "reliable," where Judge Leon, for example, does not.[354] A given judge will not generally consider the way a different judge would have handled a piece of evidence that may or may not be similar to the one before her in a given case. She will simply make a decision concerning whether the item's reliability satisfies her and act upon that decision—often without reference to anyone else. The result is that the areas of agreement and disagreement between the judges are generally not explicit. And while it is clear that some judges are more comfortable relying on hearsay than others are, it is generally difficult to map one judge's standards of reliability onto any other judge's.

Judge Walton is unique among the judges in having attempted to distill a

---

[352] This type of evidence should be distinguished from other types of detainee statements that might be introduced to support or rebut ancillary issues in the litigation, such as purported abuse. *See, e.g.* Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 35-36 (D.D.C. Apr. 8, 2010) (discussing detainee admissions in the context of ascertaining the credibility of torture allegations.).

[353] *See* Mohammed v. Obama, 689 F. Supp. 2d 38, 62 (D.D.C. Nov. 19, 2009) ("[R]esort to coercive tactics by an interrogator renders the information less likely to be true.").

[354] *Compare* T. Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010) (explaining that reliability should be shown through proof that the information is generally "accurate") *with* Judge Leon's language in Al Warafi v. Obama, 704 F. Supp. 2d 32, 39-40 (D.D.C. Mar. 24, 2010) (explaining that while there was "no dispute that [the] documents [were] accurate," they were only reliable "in part.").

coherent legal test for hearsay's admissibility, and in having converted that test from a test of admissibility in his early opinions into a post-*Al Bihani* test regarding weight.[355] In his *Sulayman* opinion, Judge Walton ultimately concluded that the D.C. Circuit's *Al Bihani* decision did away with his "reliability test" as to admissibility, though he still found that the test remained "illuminating for the purpose of determining the probative value of each piece of hearsay evidence."[356] While the issues his test tries to address appear to one degree or another in all of his colleagues' work, no other judge has followed him explicitly. The clearest way to illustrate the diversity of practice on the district court today, then, is to start with Judge Walton's test and then show how the other judges are accounting for the concerns it reflects.

In *Sulayman*, Judge Walton wrote that, for each hearsay statement on which the government seeks to rely that does not meet the requirements of the Federal Rules or 28 U.S.C. Sec. 2246, the government must:

> [E]stablish the reliability of those statements by making the following showing: (1) that with regards to the specific statements that the government seeks to rely upon, those statements "were made under circumstances that render them intrinsically reliable or were made by reliable sources"; (2) that "with respect to statements crucial to the government's case, that it would be unduly burdensome to call the sources as witnesses or provide declarations under oath in lieu of live testimony"; (3) "that the statements purportedly made by these sources were interpreted by a reliable interpreter," e.g., "an interpreter who works for the FBI or who has an ILR score of at least 3 in English," unless

[355] In his 2009 opinion in *Bostan*, Judge Walton rejected the suggestion that he review the government's hearsay in "context" before determining its admissibility, but clarified that this was not tantamount to a judgment that the government's proffered hearsay government must have "intrinsic indicia of reliability" to be admitted into evidence; he said *independently reliable* evidence could be used as corroboration. He also wrote that "the more significant a fact the government seeks to establish through the use of hearsay is, the heavier its burden will [have to] be to justify the Court's consideration of hearsay as a substitute for its non-hearsay alternative." Bostan v. Obama, 662 F. Supp. 2d 1, 4, 8 (D.D.C. Aug. 19, 2009). Later in *T. Al Bihani*, Judge Walton considered a petitioner's concern with statements attributed to him as reported or interpreted by unidentified interrogators or interpreters, and wrote that "hearsay information contained in the regularly prepared intelligence reports that are relied upon in these cases should be deemed sufficiently reliable to be admitted, unless sufficient credible evidence at the merits hearing establishes that the information is unreliable." T. Al Bihani v. Obama, 662 F. Supp. 2d 9, 12 (D.D.C. Sept. 8 2009). In a subsequent opinion *Bostan*, he relied on his *T. Al Bihani* opinion and wrote: "[S]tatements made by other detainees cannot be admitted into evidence merely because they are 'detailed,' or because they are corroborated by other evidence. Rather, the government must establish either that specific statements were produced under circumstances that guarantee their trustworthiness, or 'that independently admissible evidence can be used to assess whether the *source* of a particular statement is sufficiently reliable in general to permit the admission of any statements by that source into evidence.'" Bostan v. Obama, 674 F. Supp. 2d 9, 19 (D.D.C. Oct. 23, 2009) (quoting *T. Al Bihani*, 662 F. Supp. 2d at 17-20) (citations omitted).

[356] *Sulayman*, 729 F. Supp. 2d at 41.

> the statement being interpreted is one "that a person with an ILR score of 2+ would reasonably be able to understand and articulate in English"; and (4) "that the interpreted statements were recorded by the interrogator in a manner that is reliable," and that in cases involving statements crucial to the government's case, such a showing be made by the interrogator's live testimony, the submission of "a declaration or affidavit approximating such testimony," or, "as a last resort, . . . a global affidavit describing the process used by interrogators," unless the government can show that it would be an undue burden to comply with this requirement.[357]

He then admonished: "If the government cannot meet at least one of these four requirements with respect to each document that it seeks to rely upon in justifying the petitioner's detention, then the Court will not ascribe any probative weight to that evidence absent compelling reasons to the contrary."[358]

None of the other judges has followed Judge Walton's test—which itself lacks details about the meaning of certain terms like "intrinsically reliable" or "reliable sources." And while Judge Kessler in an early case did explain that she looked to a "list of factors that any neutral fact-finder must consider such as: consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of declarant about the matters testified to, levels of hearsay, recantations, etc," she was careful to note that this list was "non-exclusive."[359] Absent a clear test for reliability, then, it is unsurprising that what is important to a judge in one courtroom may not be of import to another judge sitting down the hall.

Petitioner Admissions

One area of convergence among the judges involves the habeas petitioners' own inculpatory statements, which they often eventually recant. These recantations (whether they be in live testimony or a written declaration or affidavit) leave the courts, as Judge Leon put it, "posed with the novel dilemma of choosing between two diametrically opposed accounts by petitioner[s]."[360] To be sure, such statements, when introduced by the government, do not constitute hearsay

[357] *Id*. at 41-42.

[358] *Id*. at 42.

[359] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 55 (D.D.C. May 11, 2009).

[360] G. Al Bihani v. Obama, 594 F. Supp. 2d 35, 39 (D.D.C. 2009). *See also* Sulayman v. Obama, 729 F. Supp. 2d 26, 42 (D.D.C. July 20, 2010) (discussing "a declaration or affidavit" as "approximating" live testimony).

under the Federal Rules.[361] Yet while a statement itself made by the petitioner is an admission, the statement might pass through one or two levels of hearsay: that of the interpreter's translation of the statement into English, which the D.C. Circuit has called "technical" hearsay,[362] and that of the interrogator's recorded memorial of the translated exchange between himself and the detainee.[363] Interrogation records that have been kept in the normal course of business are not necessarily automatically credited in their entirety, but some judges have ruled that their similarity to business records is a factor that the court will consider in favor of their accuracy.[364]

In many cases, the petitioner does not contest the underlying facts in his own prior statements, such as patterns of travel or concessions that he performed certain acts; he challenges instead the inferences that the court should draw from those facts.[365] In these instances, judges predictably tend to credit the earlier statements. In such cases, we should not expect to see—and do not actually see—

---

[361] G. Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010) ("We first note that Al-Bihani's interrogation answers themselves were not hearsay; they were instead party-opponent admissions that would have been admitted in any U.S. court."). *See also Sulayman*, 729 F. Supp. 2d at 37 ("With regards to the first level of potential hearsay—the statements of the source—the Court observed that 'insofar as the petitioner's own statements are concerned, this is a non issue,' as those statements are considered 'party admissions' that are admissible under the Federal Rules of Evidence.") (Walton, J.); Al Kandari v. United States, 744 F. Supp. 2d 11, 24 n.14 (D.D.C. Sept. 15, 2010) ("It is of course settled that Al Kandari's 'interrogation answers themselves [are] not hearsay; they [are] instead party-opponent admissions that would [be] admi[ssible] in any U.S. Court.'"). Both district judges quoted *Al Bihani*.

[362] In *Al Bihani*, the D.C. Circuit was careful to note that a translation does introduce a level of "technical" hearsay, but held that the fact a statement is translated does not affect its admissibility status. 590 F.3d 866, 879 (D.C. Cir. Jan. 5, 2010) ("That they were translated does not affect their [non-hearsay] status."). *See also* Barhoumi v. Obama, 609 F3d 416 (D.C. Cir. June 11, 2010) (holding that "the additional layer of hearsay added by the diary's translation renders it somewhat less reliable than it otherwise would be (particularly if the government had provided information regarding its translation)," but rejecting petitioner's contention that the district court clearly erred in relying on the diary).

[363] Sulayman v. Obama, 729 F. Supp. 2d 26, 45 (D.D.C. July 20, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 10 (D.D.C. Dec. 15, 2009); Alsabri v. Obama, No. 06-1767, slip op. at 9, 12 (D.D.C. Feb. 3, 2011) (noting that nothing about the purported translation or transcription errors called into question the "inherent reliability of the reports").

[364] *See, e.g.* Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. May 11, 2009) ("Petitioner's counsel in discovery, have all been maintained in the ordinary course of business, the Court will presume, pursuant to Fed.R.Evid. 803(6), that its documents are authentic."); *Alsabri*, slip op. at 12 *(*"fact that these reports were prepared by government agents in the course of their normal intelligence gathering duties provides a degree of support for their reliability").

[365] For example, in *Salahi*, Salahi admitted having said that he wanted to "work a little bit," but disclaimed the inference proposed by the government that "work" meant working for Al Qaeda. 710 F. Supp 2d 1, 10 (D.D.C. Mar. 22, 2010). And in *Abdah v. Obama* (Esmail), 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010), the government claimed that Esmail's training at Al Farouq tended to show he was a member of Al Qaeda; and Esmail did not dispute his prior admission of receiving training there, but rather "offer[ed] reasons that his participation in training courses do not prove that he was part of Al Qaeda."). *See also* Al Adahi v. Obama, No. 05-0280, slip op. at 21 (D.D.C. Aug. 17, 2009) (noting that petitioner admitted to having attended Al Farouq training camp).

judges prodding the government to provide corroboration for the statement itself. Rather, the toughest argument for the government is not about whether the underlying fact is true but about what sort of significance it has under the relevant legal standard.

In the courts' treatment of *contested* petitioner admissions, by contrast, judges must choose between competing factual assertions that derive from the same source, albeit at different times and under arguably different circumstances. Generally, the courts seem to credit prior inculpatory admissions unless the petitioner presents a good reason not to, and a petitioner's simple claim that the government's account is wrong is typically not good enough to convince a court to discount a statement.[366] Something that rises above a generalized claim that the court should doubt a statement's accuracy, however, does give the courts pause in their credulousness of the government's allegations. The courts are particularly attuned to situations in which the government may be seeking to have its cake and eat it too. For example, in *Anam*, Judge Hogan declined to credit inculpatory statements made in interrogation reports in which the petitioner's reliability had been repeatedly described by U.S. government officials as "having 'not been determined.'"[367] Similarly, in *Al Rabiah*, Judge Kollar-Kotelly declined to credit a prior admission where it was clear from the documents that government interrogators themselves expressed doubts about the admission's reliability.[368]

Where the inconsistencies lie mainly as between a set of inculpatory admissions and later exculpatory recantations or within a set of inculpatory admissions, the judges tend to find some reason to satisfy themselves that one set or another is more credible. For example, in *Al Kandari*, Judge Kollar-Kotelly assessed two sets of conflicting petitioner statements. She did not even look beyond the statements themselves to come to a conclusion regarding which set of statements was more credible. She simply noted that the statement denying the relevant government allegation was "made without further explanation," and was thus not credible, and that the detainee's inculpatory statement, by contrast, was "consistently admitted" across several interrogations.[369] She thus credited the inculpatory admission. In *Mohammed*, Judge Kessler took a subtly different approach.[370] In that case, Judge Kessler observed that there were inconsistencies between the petitioner's early interrogation statements and a later declaration he had submitted for the habeas litigation. Comparing the relative credibility of the two sets of statements, she noted first that the "declaration [did] not explain"

---

[366] G. Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. Jan. 28, 2009); Al Odah, (Kollar-Kotelly, J., finding that the government's account was more persuasive); Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. July 29, 2009) (same).

[367] Anam v. Obama v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 9 (D.D.C. Jan. 6, 2010).

[368] Al Rabiah v. Obama, 658 F. Supp. 2d 11 (D.D.C. Sept. 17, 2009).

[369] Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010).

[370] Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

details in the earlier interrogation statements. But, she continued, statements of a third party confirmed the government's account, and she thus credited the earlier, inculpatory admissions. Judge Kessler effectively sought out corroboration for the earlier admission.

Corroboration

The subtle distance between Judge Kessler and Judge Kollar-Kotelly in these two opinions reveals the importance of corroborating evidence in the context of contested petitioner admissions. While Judge Kessler did not say that the corroboration she found in *Mohammed* was necessary to her decision, she gave the distinct impression that it likely was very helpful in that case.[371] *Mohammed* draws attention to another trend: Judges seem particularly amenable to crediting *corroborated* prior admissions, though it is not clear that corroboration is a necessary condition for reliability in such cases. Judge Bates, for example, held in his *Khan* decision that materials outside the "four corners" of a statement that was itself of questionable reliability could corroborate that statement and render it reliable.[372] Judge Lamberth in *Al Warafi* similarly credited interrogation reports containing admissions over later, contrasting recantations because the government had provided corroboration; in his words, the government had "demonstrated the accuracy of the interrogation summaries and reports by including the original notes of the interrogators."[373] And in Esmail's case, Judge Kennedy seemed to believe corroboration from another detainee's account was important when he decided to credit the prior admission over a subsequent declaration.[374] Conversely, the government's lack of adequate corroborating evidence was definitely a factor in *Abdah* (Al Latif), when Judge Kennedy decided to credit the petitioner's subsequent recantation over a prior interrogation report.[375] Judge Robertson made similar rulings in both directions in *Khalifh*.[376] Put simply, the judges are more confident crediting corroborated petitioner admissions that pass through levels of "technical" hearsay, but they have never said that corroboration is strictly required.

---

[371] *Id.* at 54-55

[372] Khan v. Obama, 741 F. Supp. 2d 1, 17 (D.D.C. Sept. 3, 2010).

[373] Al Warafi v. Obama, 704 F. Supp. 2d 32, 39 (D.D.C. Mar. 24, 2010). Judge Lamberth does not elaborate on what about the underlying notes adds to the accuracy of the reports, but seems to suggest later that they lend corroborative value when considered with the interrogation summary and interrogation reports: "Petitioner's recent denials of his statements in the interrogation reports do not outweigh his previous consistent admissions." *Id.* at 41.

[374] Abdah v. Obama (Esmail), 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010).

[375] No. 04-1254, slip op. at 40-41 (D.D.C. Aug. 16, 2010).

[376] No. 05-1189, slip op. at 11, 15 (D.D.C. May 28, 2010) (Robertson, J., finding "independent corroboration" for the petitioner's statement regarding how he lost his leg, and later noting that the fact the government had "presented no corroboration" among several reasons he doubted a purported petitioner confession about having been at Taloqan and Tora Bora).

Third-Party Statements

Perhaps unsurprisingly, the courts seem to display more trepidation—and more diversity of practice—when it comes to the statements of third-party declarants. These declarants are generally other detainees who may or may not still be in U.S. custody and thus may or may not be available for testimony during the habeas proceeding. At the most basic level, the judges now all seem to begin from the standpoint that a statement is not unreliable simply because it is hearsay. They also all seem to acknowledge that statements from third-party declarants present reliability problems greater than those presented by admissions by the petitioners themselves. As a result, some judges have displayed a reluctance to consider third-party statements when doing so is not necessary to resolve a detainee's status; where it is possible for them to resolve a case based on the petitioner's own admissions (even contested admissions) and other non-hearsay evidence, they do.[377] But when they must consider third-party hearsay, the judges are receptive to arguments about the reliability of the statements and they give the arguments fulsome treatment in their merits opinions. They do generally seem to prefer hearsay statements to have some type of corroboration, and seem to require it if the petitioner plausibly challenges the statement's credibility. They do not necessarily agree, however, regarding the quantity or quality of corroboration that will suffice to back up a contested piece of hearsay evidence. The D.C. Circuit has given only limited—and largely deferential—guidance on how courts should treat third-party statements.

Judge Kessler's opinions have represented one end of the spectrum in their approach to hearsay. She seems to employ something of a hair trigger in rejecting the government's hearsay evidence as flawed, discarding government evidence liberally in situations in which detainees present even *possible* reasons to doubt reliability and almost beginning her assessment of statements from a position of skepticism. As she wrote in *Ali Ahmed*, the government's evidence was not entitled to a presumption of accuracy because the statements contained second-level hearsay, had been alleged to have been obtained by torture, and did not "purport[] to be a verbatim account of what was said."[378] She then rejected a

[377] Judge Leon observed in one of his early opinions, for example, that courts should only undertake assessments of other detainees' statements when the court "has no other choice." Al Alwi v. Bush, 593 F. Supp. 2d 24, 29 (D.D.C. Dec. 30, 2008). *See also* Mohammed v. Obama, 689 F. Supp. 2d 38, 53 n.15 (D.D.C. Nov. 19, 2009) ("The Government has provided sufficient evidence on this point even without the contested statements made by Binyam Mohamed. Because his testimony is not necessary to prove the factual allegations regarding guesthouses, the Court will not address Petitioner's objections to his testimony in this section."); Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010) (observing that the court could not make a decision regarding which account regarding a statement concerning the petitioner's passport was accurate, but stating that, because the presence or absence of the passport at the time of detention was "not material" to the court's decision). *Id.* at 91-92.

[378] Ali Ahmed v. Obama, 613 F. Supp. 2d 51-56, 59 (D.D.C. May 11, 2009). When assessing four particular statements, Judge Kessler noted that one of the detainee statements was made by the same detainee whose testimony Judge Leon rejected in *El Gharani*—and Judge Kessler agreed with

number of the statements, and not only those of a detainee who had a documented history of mental health problems,[379] or of a detainee whom Judge Leon had deemed unreliable in a different case,[380] but also statements of a detainee whose statements she characterized as "cursory and equivocal."[381] In that instance, she wrote, the fact that the statements were "in and of themselves . . . equivocal and lacking in detail or description" was "most important[]."[382]

In *Al Adahi*, where the government's evidence included "classified intelligence and interview reports" and statements of the petitioner and other detainees, Judge Kessler credited the other detainees' statements in the reports only to the extent the petitioner did not contest them.[383] While she accepted, for example, that the detainee stayed in a guest house for one night—a fact that the petitioner had admitted repeatedly—she decided not to credit the other detainees' statements, which she described as "vague and uncorroborated."[384] Indeed, because the third-party statements she did credit contained facts identical to statements the detainee himself had made, it is hard to discern whether she primarily credited the third-party hearsay itself or whether that evidence was in fact superfluous corroborative evidence of facts that were actually "proven" by the detainee's own admissions. For Judge Kessler, it seems, a petitioner needs to raise a legitimate doubt about a piece of government evidence for her to discount it, but raising that doubt is not hard.

Other judges seem less eager to toss out hearsay as unreliable—to the point that they seem to have been persuaded by government arguments, made early in the habeas litigation, that a court should not discount hearsay unless the petitioner presents affirmative evidence that the statement is unreliable, rather

---

Judge Leon's skeptical assessment of him. A second witness, she ruled, gave statements that were "equivocal and lacking in detail or description" and "riddled . . . with equivocation and speculation," while a third gave inconsistent statements, had a history of mental health problems, and may have faced torture. The fourth apparently also had credibility problems, though redactions in the opinion make it impossible to discern what they were. *Id.* at 57-58. She noted among a particular statement's infirmities that it did "not purport to be based on [redacted] direct observations. It is simply a declarative statement that [redacted] trained at some point, without any information as to how [redacted] knew that." ("Even more troubling is the fact that, in later interrogations, when [redacted] was asked to list the names of those he trained with, he did *not* include the Petitioner."). *Id.* at 61. Ultimately Judge Kessler granted the petition.

[379] *Id.* at 58 (describing his mental health problems and "inconsistent identifications.").

[380] *Id.* at 56-57 (noting that "[a]lthough the Government tries to establish the credibility of [redacted] statements and distinguish *this* case from Gharani [redacted] statements cannot be credited").

[381] *Id.* at 58-59.

[382] *Id.*

[383] Al Adahi v. Obama, No. 05-0280 (D.D.C. Aug. 17, 2009).

[384] *Al Adahi*, slip op. at 27 (noting her distrust of a detainee's "vague and uncorroborated" statements and declining to credit the proffered hearsay).

than just a claim to that effect.[385] For these judges, the rule that a statement is reliable in the absence of a good reason to doubt it does not translate into an especially tough slog for the government, because their sense of a "good reason" is more demanding than that of their colleagues. This is true particularly where the statement exhibits some internal features suggesting reliability. In *Rezak Ali*, for example, Judge Leon considered hearsay to assess a contested claim that the petitioner stayed at a particular guesthouse and had participated in one of Abu Zubaydah's various training programs while he was there. He characterized the statements of "fellow guesthouse dwellers" as "credible" without explaining what exactly about them made them so. He thus implied that on their face they were believable even though the petitioner challenged their accuracy.[386] He also described the evidence behind claims that the petitioner had been with Abu Zubaydah's force in various places in Afghanistan as "credible."[387] He made note of a photo-based identification, the particularity of the detainee's recollection, as well as corroboration of the statements in a diary. And when discussing evidence about whether the government had shown that the petitioner had ties to Abu Zubaydah's Al Qaeda-associated force, he described third-party statements, in combination with corroborating evidence, as "*more than* enough credible evidence," implying that the third-party statements might have even been sufficiently reliable without the corroboration.[388] Judge Kollar-Kotelly's opinion in *Al Kandari* and Judge Kennedy's opinion in *Abdah* (Esmail) also stand in some degree of contrast to Judge Kessler's approach.[389]

Corroboration

The notion that a statement will be considered reliable in the absence of a professed reason to doubt its reliability has another nuance: Where a statement exhibits flaws that rise to a certain level of gravity, nearly all of the judges will acknowledge their skepticism about its reliability but they will then entertain arguments that the statement can be rehabilitated by some form of corroboration. As stated above, however, the judges do not necessarily agree about how much or what type of corroboration the government must present to back up a contested piece of hearsay evidence.

Several judges have found arguments about corroboration persuasive when

---

[385] *See, e.g.* T. Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010) (recounting the government argument that "hearsay information contained in the regularly prepared intelligence reports . . . should be deemed sufficiently reliable to be admitted, unless sufficient credible evidence . . . establishes that the information is unreliable").

[386] Razak Ali v. Obama, No. 10-1020, slip op. at 12 (D.D.C. Jan. 11, 2011) .

[387] *Id*. at 13.

[388] *Id*. at 13 (emphasis added).

[389] Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010); Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 37 n. 16 (D.D.C. Apr. 8, 2010) ("that an SIR lacks certain details does not make the information it does include inaccurate").

considering the reliability of otherwise unreliable material. For example, Judge Bates in *Khan* found that "raw" intelligence reports were "amply corroborated by . . . reliable evidence," and he later concluded that "reliable" evidence served sufficiently to corroborate reports from an "unnamed Afghan government official" that he could credit those reports.[390] Judge Kessler also seemed to look for corroboration where evidence was of doubtful quality in *Al Adahi*.[391] Though she found none and noted that corroboration was lacking, she implied that if the government *had* been able to provide some corroboration, she might have found in its favor on that issue. In *Awad*, Judge Robertson considered allegations supported by statements in various pieces of documentary evidence, as well as statements of other detainees. He went so far as to chart out the overlap between the facts alleged in each of the pieces of evidence and found that the mutual corroboration was "too great to be mere coincidence."[392] He thus credited the government's claim, and ultimately ruled in its favor as well. The D.C. Circuit upheld Judge Robertson's reading, explaining that that it was not error for to have discredited documentary hearsay for one purpose but credited it for another.[393]

But the premise that corroborating evidence can convert otherwise unreliable evidence into reliable support has a significant dissenter; Judge Walton has explicitly disagreed with this interpretation.[394] He wrote in *Bostan* that

> the use of otherwise reliable corroborating evidence as a means to assess the reliability of otherwise unreliable hearsay is ultimately misguided, as its ultimate effect is only to possibly mislead the factfinder (in this case,

[390] Khan v. Obama, 741 F. Supp. 2d 1, 8 (D.D.C. Sept. 3, 2010), citing Khan v. Obama, 646 F. Supp. 2d 6, 17 (D.D.C. Aug. 18 2009) (concluding that Khan's HIG activities during the Soviet invasion were "amply corroborated by . . . reliable evidence" and later finding that the "reliable information" of one individual "corroborate[d] the reliability of the same information provided by [REDACTED] and the unnamed Afghan government official."). That the government put information in subsequent declarations did not alone suffice to convince Judge Bates to credit otherwise unreliable statements. In *Khan*, the detainee challenged the declarations themselves. Judge Bates's credulity is a function of the fact that the contents of the declarations, when closely scrutinized, convinced him that the government's evidence is not only what the government claimed it to be, but was also as reliable as the government claimed it to be.

[391] Judge Kessler stated that a "vague and uncorroborated" statement of another detainee was insufficient evidence to credit a statement the government alleged revealed a meeting with Al Adahi at an "unnamed Kandahar guesthouse." Al Adahi, No. 05-0280, slip op. at 20 (D.D.C. Aug. 17, 2009).

[392] Awad v. Obama, 646 F. Supp. 2d 20, 27 (D.D.C. Aug. 12, 2009).

[393] *Awad at* 8. The petitioner claimed that because the government believed Al Joudi's exculpatory statements about his own behavior were incredible, the government could not then urge the court to rely on Al Joudi's statements incriminating Awad.

[394] Bostan v. Obama, 674 F. Supp. 2d 9, 25 (D.D.C. 2009) ("This member of the Court respectfully disagrees with Judge Bates insofar as he suggests that hearsay can be deemed reliable if it is "corroborated by otherwise reliable evidence.").

the Court) into thinking that the weight of the government's evidence is greater than it actually is.[395]

Complicating the issue further is the fact that not all corroborating evidence carries equal weight in the different courtrooms, and the judges have given different indicators about what types of details tend to shore up hearsay statements that might otherwise be of dubious value. In *Almerfedi*, for example, Judge Friedman wrote that he would have had more confidence in the reliability of the statements contained in an IIR "if there was any evidence in the record to corroborate them."[396] Yet the quality of corroborating evidence was important to Judge Friedman as well; he required something more than mere "snippets" of "circumstantial" evidence.[397] When Judge Leon discussed the sufficiency of corroboration in *Obaydullah*, he wrote that "what matter[ed]" in the case was "that the automobile found in the petitioner's compound that night contained the residue of dried blood, a fact that is consistent with the pre-raid intelligence claim that petitioner was seen using a vehicle to ferry wounded individuals to a local hospital, once again corroborating the government's intelligence."[398] It is impossible to know whether Judge Friedman would have considered the dried blood in the *Obaydullah* automobile merely "circumstantial" or whether Judge Leon would have been as unpersuaded as was Judge Friedman of the "snippets" the latter confronted.

The importance of corroboration is nowhere as easy to spot as in cases where, with corroboration lacking, the court opts *not* to credit the claim in question. Judge Leon's decision in *El Gharani* provides just such an illustration. In that case, Judge Leon observed that one of the statements of a detainee was "plagued with internal inconsistencies," and he wrote that in the absence of corroborating evidence, the court could not rely on the allegation.[399] Similarly, in *Al Mutairi*, Judge Kollar-Kotelly assessed a set of statements that contained inconsistencies across one another, and she declined to credit the statements absent corroboration.[400] Although it is difficult to discern in both of these cases whether the inconsistencies themselves were the pivotal factors leading the courts to

---

[395] *Id.* This language may indicate that Judge Walton judges the utility of corroborating evidence from it perfectly overlaps with evidence that was perfectly overlapping in scope.

[396] Almerfedi v. Obama, 725 F. Supp. 2d 18, 25 (D.D.C. July 8, 2010) (emphasis added).

[397] *Id.* at 27-28 ("these snippets of circumstantial or 'corroborating' evidence add little to the government's unreliable direct evidence that petitioner stayed in Tehran guesthouses in 2002, or, indeed, at any time.")

[398] Obaydullah v. Obama, 744 F. Supp. 2d 344, 351 (D.D.C. Oct. 19, 2010).

[399] El Gharani v. Bush, 593 F. Supp. 2d 144, 147-149 (D.D.C. 2009) (deciding, in a case in which the government's evidence consisted "principally of . . . statements made by two other detainees while incarcerated at Guantánamo Bay," not to "accredit [the] allegation").

[400] 644 F. Supp. 2d 78, n.12 (D.D.C. July 29, 2009). *See also* Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 58 (D.D.C. May 11, 2009) (describing "inconsistent identifications" and declining, based on the inconsistency and other deficiencies, to credit the statements).

disregard the statement,[401] it seems obvious that corroboration is crucial where inconsistency is an issue; otherwise, the court has very little in the way of tools for choosing between the two opposing claims.

The D.C. Circuit has made very few rulings concerning corroboration. The appeals court upheld Judge Robertson's analysis of the corroborating evidence in *Awad*, noting that the district court had "considered the circumstances of the document, and weighted it accordingly."[402] It also affirmed the district judges' use of corroborating evidence in *Al Odah* and *Barhoumi*.[403] But the D.C. Circuit has not always deferred to the district judges' analysis of evidence offered as corroboration. In particular, its opinion in *Bensayah* and its review of Judge Leon's assessment in that case stands in contrast to the breezy approval it gave to Judge Robertson's treatment in *Awad*.[404] In fact, in *Bensayah*, the court made an important statement about the relationship between reliability and corroborative evidence as it barred the use of an exhibit that the district court had found both reliable and corroborative of other evidence in the record. Judge Ginsburg, writing for the panel, first noted that raw hearsay evidence was not categorically inadmissible.[405] Rather, he wrote, in determining whether a particular piece of evidence should be admitted against the petitioner, credibility will be a function of the sufficiency of the corroborating evidence the government offers. The court wrote:

> The only direct evidence the Government offered in support of its contentions about Bensayah was contained in a classified document [REDACTED] from an unnamed source and in certain other pieces of evidence it claimed corroborated that document. . . . We disagree with Bensayah's broad contention that two pieces of evidence, each unreliable when viewed alone, cannot ever corroborate each other. We agree, however, with his alternative argument that even if the additional evidence relied upon by the district court in this case is itself reliable, it is

[401] *El Gharani,* 593 F. Supp. at 147-48 (noting that some statements were facially problematic because the documents containing the inculpatory statements revealed that the government itself doubted the credibility of the interrogation subjects). *Ali Ahmed* 613 F. Supp. at 58 (Kessler, J. taking note of flaws in the statements beyond their inconsistencies such as that the individual who made the statements had a "background of mental health problems.").

[402] 608 F.3d 1 (D.C. Cir. June 2, 2010).

[403] Al Odah v. United States, 611 F.3d 8, 12 (D.C. Cir. June 30, 2010) (finding no abuse of discretion in the district court's determination that the government's proffered hearsay had been "corroborated by 'multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad'"); Barhoumi v. Obama, 609 F.3d 416, 429 (D.C. Cir. June 11, 2010) (upholding the district court's view that "an intelligence report's reliability can be assessed by comparison to 'exogenous information.'") (quoting Parhat v. Gates, 532 F.3d 834, 848 (D.C. Cir. June 20, 2008)).

[404] 610 F.3d 718 (D.C. Cir. June 28, 2010).

[405] *See id.* at 725-726.

not sufficiently corroborative to support reliance upon the statements concerning Bensayah in [REDACTED]." [406]

The court noted that, in the time since the district court's decision, the government had "eschewed" a piece of evidence that Judge Leon had relied upon during the lower-court case, and barred the district court's use of that document on remand.[407] Though the specifics of the court's reasoning are so heavily redacted as to render spotty any detailed assessment we might offer here, the D.C. Circuit's ruling here did two things: First, it disagreed with the district court's use of a key piece of corroborating evidence such that the document that evidence purported to corroborate was barred from consideration on remand. Second and more importantly, the court indirectly cast doubt on Judge Walton's ruling regarding corroborating evidence. Recall that Judge Walton had written that "the use of otherwise reliable corroborating evidence as a means to assess the reliability of otherwise unreliable hearsay is ultimately misguided." The D.C. Circuit did not merely appear to disagree on this point, it seemed to take an approach to corroboration far more lenient than the one Judge Walton found "misguided"—not only allowing reliable evidence to corroborate unreliable evidence but potentially allowing *unreliable* evidence to do so as well. This strongly suggests that Judge Walton's approach, if challenged, might not be sustained.

Source Information

Another area of concern to all of the judges when they consider hearsay has been the nature of the source of the information itself. And in this area, too, there has been little D.C. Circuit intervention to guide the lower courts. The judges agree that reliability involves a minimum level of information about the underlying source of the statement; the judges do not agree, however, about what that minimum is. Often, source information is contained in so-called "raw" intelligence reports that have not been processed by the intelligence community. The absence of source information, including the identity of the source and information about how the source procured the information, presents a concern—particularly in the absence of other indicia of reliability in the statement. The issue the judges grapple with is how *much* concern to give source information.

Judge Leon's very first GTMO opinion, *Boumediene*, provides a good lens through which to view the importance of source information.[408] In the case, the government offered information concerning all six of the *Boumediene* petitioners

[406] *Id.* at 721, 726.

[407] *Id.* at 726.

[408] Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008).

in a classified document from "an unnamed source."[409] Judge Leon wrote that, as pertaining to five of the petitioners, he could not "adequately assess the credibility and reliability" of the information.[410] The evidence from the government contained "some information about the source's credibility and reliability," but not enough under *Parhat*, in Judge Leon's opinion.[411] "For example," he wrote, "the Court has no knowledge as to the circumstances under which the source obtained the information as to each petitioner's alleged knowledge and intentions."[412] Although he did not elaborate further on the particular deficiencies of the evidence, it was clear he found it lacking in important ways and he then granted those detainees' petitions.

With regard to the one petitioner whose petition he *denied*—Belkacem Bensayah—the nature of the information regarding the unnamed source's statements was no different, but the government had "met its burden by providing additional evidence that sufficiently corroborate[d] allegations from this unnamed source that Bensayah is an al-Qaida facilitator."[413] This showed that corroborating evidence can sometimes compensate, at least to some degree, for a dearth of detail concerning sources.

Judges Bates takes a similar approach. If source information is entirely missing, the information might be deemed "inherently unreliable." The information can then only be saved if "other reliable evidence corroborates the information contained in the report."[414] In *Khan*, the government submitted raw intelligence reports describing the petitioner's role within Hezb-i-Islami Gulbuddin ("HIG"), an associated force of the Taliban and Al Qaeda. These "raw" reports fell into the "inherently unreliable" category because the sources for the reports were confidential.[415] In deciding a motion for judgment on the record, Judge Bates individually assessed a dozen such reports, finding in each instance that he could not make a reliability determination because the government had either not identified the original source of the relevant assertions or merely described the source as a "senior level Afghan tribesman."[416] For the same reasons the D.C. Circuit was concerned about the source of the information *Parhat*, it was crucial for Judge Bates that he have source information to be able to independently assess reliability and credibility.[417] The public version

---

[409] *Id.* at 198.

[410] *Id.* at 197.

[411] *Id.*

[412] *Id.*

[413] *Id.* at 198.

[414] Khan v. Obama, 646 F. Supp. 2d 6, 14 (D.D.C. Aug. 18, 2009).

[415] *Id.* at 13.

[416] *Id.* at 14.

[417] *Id.* at 11-12, 15 (describing that a lack of such information prevented a court from making a determination about the reliability of the information and made a rebuttable presumption "effectively irrebuttable") (quoting Parhat v. Gates, 532 F.3d 834, 846-47 (D.C. Cir. June 20, 2008)).

of Judge Bates's opinion on this point does not clearly identify precisely what his considerations are, but an unredacted passage in it does state that the reliability assessment should consider the presence or absence of information about "why the source had indirect access to this information, what kind of control the collector had over the source, or what kind of motivation or wittingness the source had when making the statement," as well as some level of detail "regarding the circumstances in which the information was obtained."[418]

By the time Judge Bates decided the same case on the merits in late 2010, the government had provided additional declarations about the same intelligence reports that Judge Bates previously had found "inherently unreliable."[419] He assessed the reliability of two people: an unidentified person and an "unnamed Afghan official."[420] Judge Bates clearly believed that relying on anonymous information could still be consistent with *Parhat*, and he focused instead on whether the source had given the information voluntarily, on the intelligence collectors' ability to independently verify the source's accounts, and on whether the information in question also became the basis for a life-threatening capture operation.[421] He accepted additional sworn declarations that all stopped short of revealing the identity of the source, observing that the officials had credibly been able to "independently verify much of the information" in the reports. Judge Bates noted that intelligence collectors had, "based on their training," made conclusions about whether the source was reliable."[422] And, analyzing the collectors' analysis, he was satisfied that the reports' contents were "generally accurate."[423] After *Khan*, then, it seems clear that, at least in Judge Bates's court, the government does not necessarily need to share the source's identity if sufficient indicators in other declarations and affidavits "provide the information necessary to assess the sources' reliability under the principles accepted in the intelligence community."[424]

Judge Kennedy also expressed concern about source information in *Abdah* (Uthman), to the point that he concluded that the "limited information" about the source was enough of a problem to warrant discrediting that source's

---

[418] *Id.* at 14. Judge Bates noted that the intelligence community itself espoused certain criteria for assessing source credibility, and he stated that these factors gave him "some insight" about what information should be available to the courts. *Id.* at 12. *Accord* Boumediene v. Bush, 579 F. Supp. 2d 191, 197 (D.D.C. November 20, 2008) ("Suffice it to say, however, that while the information in the classified intelligence report, relating to the credibility and reliability of the source, was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is not sufficient for the purposes for which a habeas court must now evaluate it.").

[419] Khan v. Obama, 741 F. Supp. 2d 1 (D.D.C. Sept. 3, 2010).

[420] *Id.* at 14.

[421] *Id.* at 15.

[422] *Id.*

[423] *Id.* at 13 (quoting T. Al Bihani v. Obama, 662 F. Supp. 2d 9, 20 n.12 (Sept. 8, 2009)).

[424] *Id.*

statements entirely.[425] The government had alleged that the petitioner was a bodyguard for Osama bin Laden under the alias "Hudaifa"; this was based on the fact that two detainees had alleged that "Hudaifa" was part of bin Laden's security detail. After discussing the evidence of alleged mistreatment of the two detainees, Judge Kennedy—who was notably meticulous about distinguishing between reliability arguments based on alleged torture and those based other factors—went on to say that, even if the detainees' statements were considered "outside the context of the coercion that limits their value," the importance of their allegation—that "Hudaifa" was a bodyguard—was only relevant if "Hudaifa" was indeed an alias for Uthman.[426] Judge Kennedy then wrote that a statement by a co-detainee, Bukhari, that Uthman was a member of Osama bin Laden's security detail, was unpersuasive because it was not clear that the statement was based on personal knowledge.[427] Judge Kennedy continued: "Without more information as to how Bukhari came to believe that Uthman was part of Usama bin Laden's security detail, the Court cannot evaluate the credibility of the statement and therefore cannot rely on it."[428] From this ruling alone, it is unclear whether declarations of the type that satisfied Judge Bates in *Khan* would have provided enough information to satisfy Judge Kennedy about the source had they been available for him to consider, but his concern for having the information is just evident.

Other judges have demonstrated similar concerns about source information, but they, like Judge Kennedy, have generally done so in the course of excluding information and thus not given as a clear a roadmap as did Judge Bates for what sort of information would be sufficient to rehabilitate a questionable statement. In *Bacha*, Judge Huvelle expressed intense frustration with the government's reliance on intelligence reports at all—and particularly those containing assertions from unspecified sources. After suppressing the petitioner's own statements, and after learning from government counsel that the government might respond by offering a new source of evidence against the petitioner, Judge Huvelle required any new evidence to involve a specifically identified source, and even suggested that the source would have to testify subject to cross-examination either live at the evidentiary hearing or at least in the form of a

[425] Abdah v. Obama (Uthman), 708 F. Supp. 2d 9 (D.D.C. Apr. 21, 2010).

[426] *Id.* at 17.

[427] *Id.* at 14-19; *cf.* Alsabri v. Obama, No. 06-1767 (D.D.C. Feb. 3, 2011) slip op. at 8 n.15 (noting that a third party's statements were reliable because they were "based on his personal knowledge, were not the result of torture, and the petitioner himself relied on them").

[428] *Abdah* (Uthman), slip op. at 28. *But see Abdah* (Esmail) (Kennedy, J., writing that he was not persuaded by petitioner's effort to point to discrepancies in his own prior statements as indication that they were unreliable). Judge Kennedy wrote that the discrepancies were not "sufficiently important to have bearing on the Court's determination regarding the main, relevant facts." *Id.* at 37 n.16.

deposition if the person were unavailable for testimony.[429]

Judge Friedman also excluded information based on a lack of source information in *Almerfedi*, where he wrote that the lack "information provided about the source or sources of the group's information" in an interrogation report of a detainee made the statements within it "inherently unreliable."[430] He then explained why:

> The only source identified for ISN 230's information about petitioner is an unnamed group of detainees who arrived in Guantanamo in 2004. Not only does ISN 230 not identify who they are, but there is no information provided about the source or sources of the group's information. It could be based on personal knowledge, hearsay, multiple hearsay, or rumor. Although hearsay evidence is admissible in these proceedings, the Court still must determine whether the hearsay statements are accurate, reliable and credible. Information that came from an unnamed group of detainees, for which the original source cannot be pinpointed, amounts to no more than jailhouse gossip, if that, and cannot serve as the basis for petitioner's detention. The Court will not credit any of these four documents.[431]

Judges Huvelle and Friedman seem to require a specific identification of the source, not merely information about the circumstances in which the government obtained the statement. Judges Leon and Bates do not, and Judge Kennedy seems like he might be amenable to unspecified sources as long as there is some indication of how the source came across his information. To complicate matters further, in *Bostan*, Judge Walton seemed to signal a potential middle-of-the-road approach to source information: He indicated the possible suitability of *ex parte* disclosure of source identity, employing special procedures similar to those envisioned in the Classified Information Procedures Act (CIPA),[432] as one way to alleviate the burden on the government while providing the court with enough information to decide whether in the circumstances it is appropriate for the judge to consider the evidence.[433] Absent a clear statement from the D.C. Circuit regarding the necessity of source information, then, there seem to be three schools of thought regarding how to analyze it in the Guantánamo habeas

---

[429] *See* Transcript of Hearing at 6-7, Bacha v. Obama, No. 05-2385 (D.D.C. Jul. 16, 2009) (insisting upon "a live witness for this one… either there is a witness who is going to put this guy there subject to real cross examination like a real case instead of all of this intelligence and attributing it to people who are either cooperators, unknown, unidentified. . . . The real people can show up. You can bring them to me in whatever form. If you have to go to Afghanistan to take a deposition, fine.").

[430] Almerfedi v. Obama, 725 F. Supp. 2d 18, 25 (D.D.C. July 8, 2010).

[431] *Id.* at 25.

[432] Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025.

[433] *Id.* at 26-27.

context.

Conclusion

Together, the courts' opinions are forming a relatively clear set of rules on a certain key principle: hearsay is admissible and should receive weight to the extent it is reliable. But the opinions continue to diverge with respect to the indicia of reliability in specific instances. In practice, a given piece of hearsay evidence may play a very different role in a habeas case depending on the identity of the judge presiding. Given the D.C. Circuit's avowed reluctance to disturb factual findings, and given the difficulty of formulating more specific doctrinal rules defining the hallmarks of reliability, this is probably not going to change much as further cases develop.

Chapter 7 – The Admissibility and Weight of Involuntary Statements

Even assuming that hearsay concerns do not require the exclusion or discounting of statements provided to interrogators or otherwise given in a custodial setting, problems often still arise concerning the voluntariness of those statements. In a criminal proceeding, after all, involuntary statements are not admissible as a matter of due process, and custodial interrogation without counsel is regarded as so inherently coercive that the Supreme Court has generally required judges to exclude the resulting statements. Whether judges should take the same approach in the context of detainee habeas review, and if not where they should instead draw the line, is a pressing question given the significant weight the government places on detainee statements in these cases and the frequency with which allegations of outright coercion arise.

Unfortunately, the law on this issue remains unsettled in key respects. The courts do agree on some overarching points. A statement will not be discredited merely because it was given in a custodial context without access to counsel or the benefit of a *Miranda*-style statement of rights,[434] for example, and no one has suggested the admissibility of the fruits of coercion rising to the level of torture. But between these poles, the judges vary in their approaches. Complicating matters further, the judges also vary in their approach to evidentiary disputes concerning whether abuse occurred in the first place. Indeed, the law relating to the handling of involuntary statements arguably has seen the least progress among all the major issues raised in the habeas litigation.

There are at least three distinct questions whenever a coercion allegation arises in connection with proffered evidence: First, in what circumstances is a statement inadmissible because of voluntariness concerns—i.e., what is the actual standard for resolving that question? Second, was the petitioner in fact mistreated, as alleged? And third, in circumstances where the detainee was *previously* subject to abuse, how much time must pass and how much must circumstances change between the time of the coercive treatment and later-extracted statements to alleviate the "taint" caused by the earlier mistreatment?

Two caveats are important to note at the outset of this discussion. First, many of the judges' coercion discussions are more redacted than are their discussions of other issues that arise in these opinions, and thus are more difficult to analyze. By necessity, our analysis proceeds from the publicly released opinions, though the classified opinions would undoubtedly provide a much more comprehensive view of what is going on in the cases.

Second, courts are as eager to avoid needlessly considering allegedly coerced

[434] Indeed, some rulings denying habeas relief hinge on allegedly involuntary admissions. *See, e.g.*, Al Odah v. Obama, 648 F. Supp. 2d 1 (D.D.C. Aug. 24, 2009); G. Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. Jan. 28, 2009); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. Dec. 30, 2008).

statements as they are eager to avoid third-party hearsay unnecessarily. Where judges do not need to rely on allegedly coerced statements, they tend not to clutter their opinions with consideration of that evidence. One example of this was in *Khalifh*, Judge Robertson's final Guantánamo merits opinion before his retirement.[435] In *Khalifh*, the petitioner had alleged that certain of his own statements that the government had offered against him were products of his mistreatment. Judge Robertson wrote that he didn't need to resolve the credibility of the torture allegations themselves, but rather could resolve the case by setting aside the statements that occurred within the "window of alleged mistreatment" from late 2004 to early 2005 because "none of the statements from the window period [were] necessary for the government to prove its case *in toto*."[436] While Judge Robertson set aside that evidence, he did credit one statement that was allegedly derived from mistreatment, a statement that was corroborated by other evidence on record.[437] He found that the petitioner was a part of Al Qaeda and associated forces and denied the petition. In the D.C. Circuit case of *Al-Madhwani v. Obama*, Judge Henderson followed a similar approach in declining to review the district court's consideration of Al-Madhwani's coercion claims on the grounds that "the record contains sufficient evidence unaffected by any claim of coercion to uphold the district court's determination that Madhwani was ''part of'' al-Qaida."[438]

As with hearsay, a certain high-altitude agreement masks significant divergence in practice and approach in this area. On the one hand, the district judges have been relatively uniform in their adoption of a standard for separating admissible and inadmissible statements, referring to the test in terms of "voluntariness." They do not appear to construe voluntariness in this context as strictly as would be done in the criminal setting (or else all statements derived from long-term custodial interrogation without counsel would be excluded),[439] though they do borrow from criminal law the notion that voluntariness, whatever that label entails, turns on an assessment of the totality of the circumstances.

Yet while the judges have dealt with allegations of abuse in almost half of the Guantánamo merits cases, neither the district nor the circuit judges have addressed the issue systematically. This is surprising, because interrogation statements so often form the core of the government's evidence against habeas petitioners, and because these statements so often face challenge on

---

[435] Khalifh v. Obama, No. 05-1189 (D.D.C. May 28, 2010).

[436] *Id.*, slip op. at 6 (discussing what was allegedly the third of three "confessions," made outside the "taint window"). Judge Roberson found the alleged confession "ambiguous at best" and did not credit it. *Id.*

[437] *See id.*, slip op. at 13 ("In one interview Khalifh admitted to losing his leg while clearing mines for the Taliban. This could be discounted, by itself, because it occurred during the window period, but it has independent corroboration.").

[438] Al-Madhwani v. Obama, 642 F.3d 1071, 1074 (D.C. Cir. May 27, 2011)

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

voluntariness grounds. Because of the diversity of practice, the government's capacity to carry its burden in cases turning on interrogation statements might vary significantly from courtroom to courtroom. Making matters worse, the consensus among the district judges that at least exists with respect to the notion of using some form of voluntariness as the touchstone of admissibility has not actually been endorsed by the D.C. Circuit, and hence might yet prove vulnerable on appeal.[440]

When Must Statements Be Excluded or Given No Weight?

Despite extensive litigation, it remains unclear where the "voluntariness" line is being drawn in the habeas setting. All the judges seem to accept that government mistreatment can indeed require the exclusion or discounting[441] of statements directly derived from abusive methods because mistreatment affects the statements' reliability. They also agree that abuse can taint even subsequent statements derived from non-abusive methods, and that the government bears the burden of proving that a statement is reliable despite prior mistreatment of the person who gave it.[442] On the other hand, none appears to believe that the mere fact that a statement was rendered in the context of long-term custodial interrogation without counsel renders such statements too involuntary to be admitted or credited, however much that result might be compelled were the voluntariness standard of criminal law actually applied. Unfortunately, no consensus has emerged with respect to just what this modified approach to voluntariness actually requires.

In theory, judges might draw that line anywhere along a spectrum that ranges from torture, through cruel, inhuman, and degrading treatment, and on to still-lesser forms of coercion that may be lawful but that exceed the baseline

---

[440] *See, e.g.*, Obaydullah v. Obama, 688 F.3d 784 (D.C. Cir. Aug. 3, 2012) (finding that petitioner's failure to produce evidence demonstrating coercion, combined with affirmative evidence of non-coercion, permits the admissibility of petitioner's statements).

[441] Judge Huvelle in particular often uses a separate proceeding. *See, e.g.*, Al Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. Aug. 3, 2010). Others, like Judge Robertson, tend to "formally 'receive' all the evidence" and give it the weight the judge believes it deserves. *See, e.g.*, Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010) (discussing evidence allegedly "taint[ed]" by coerced evidence); Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009).

[442] *See Salahi*, 710 F. Supp. 2d at 6; Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 7-8 (D.D.C. Jan. 6, 2010). *But see Al Qurashi*, 733 F. Supp. 2d at 79-80 n.15 (Huvelle, J.) (stating that the court will "assume that the government must prove the voluntariness of petitioner's statements by a preponderance of the evidence," but noting the government's argument that "'[i]n a federal habeas action, the burden of proving that the confession was involuntary rests with the petitioner.'") (citations omitted). The presumption of regularity regarding the government's evidence does not override concerns about coerced statements. *See* Latif v. Obama, No 10-5319, slip op. at 8 (D.C. Cir. Oct. 14, 2011, reissued Apr. 27, 2012) (Henderson, J., concurring) (noting that "the presumption of regularity does not. . . answer the reliability inquiry if the detainee claims he was coerced in making admissions").

level of coercion inherent in long-term detention at Guantánamo. Alternatively, the courts might draw it according to some more objective measure, such as whether a statement was obtained through the use of a method found on the list of interrogation approaches specifically authorized in the Army Field Manual on interrogation (or simply whether the method was consistent with the Geneva Conventions, if an answer to that question could be discerned).[443] Nearly three years after *Boumediene*, however, the judges have made remarkably little progress in addressing the issue.

Consider, for example, the approach taken by Judge Kollar-Kotelly in *Al Rabiah*. Her model involved a relatively bright-line standard keyed to two external sources: the Army Field Manual and the Geneva Conventions. Because interrogators violated those standards in that case, she concluded, all the directly resulting testimony was unreliable.[444] Judge Kollar-Kotelly explained that according to the Army Field Manual these techniques are "not necessary to gain the cooperation of interrogation sources . . . [and are] likely to yield unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."[445] Judge Kollar-Kotelly did not explicitly hold that any statement derived from interrogation using tactics outside the Field Manual is *per se* unreliable, and her discussion is clouded by her observation that reasons other than the coercion itself made her doubt the statements' reliability.[446] Still, her discussion is distinctive among the judges of the district court, most of whom have taken a more impressionistic approach and none of whom have hinted at reliance on these particular sources as a proxy for

---

[443] *See, e.g.*, Khairkhwa v. Obama, 793 F. Supp. 2d 1., 28 (D.D.C. May 27, 2011) (citing the interrogation report, which stated that "the direct approach orchestrated with the pride and ego up (proper military protocol) and love of country were and have been the approaches used by interrogators to elicit information from [informant]" as probative that informant's statement was not coerced) (citations omitted).

[444] Al Rabiah v. United States, 658 F. Supp. 2d 11, 39-40 (D.D.C. Sept. 17, 2009) (noting that the petitioner would "request time to pray or otherwise ask for a break, and then he would provide a full confession through an elaborate or incredible story. . . . Ultimately, his interrogators grew increasingly frustrated with the inconsistencies and implausibilities associated with his confessions and began threatening him with rendition and torture, and decided to place him in [a program of disrupted sleep]. These tactics violated both the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, but they did not produce any additional confessions.").

[445] *Id.* at 45.

[446] For example, Judge Kollar-Kotelly pointed to the evidence in the interrogation records themselves, that the Al Rabiah's interrogator did not credit the confessions they had elicited. *Id.* at 34 (agreeing with the assessment of "Al Rabiah's interrogators, as well as Al Rabiah's counsel in this case, that Al Rabiah's confessions are not credible. Even beyond the countless inconsistencies associated with his confessions that interrogators identified throughout his years of detention, the confessions are also entirely incredible."). She also observed that the government itself relied not on the confessions in their entirety but rather on the "least detailed and least inculpatory version of Al Rabiah's confessions." *Id.* For Judge Kollar-Kotelly, this "underscore[d] the lack of reliability and credibility associated with the confessions themselves" and she was "unwilling to credit confessions that the Government cannot even defend as believable." *Id.*

determining voluntariness.

In the end, however, even as Judge Colleen Kollar-Kotelly's suggested approach may have had doctrinal appeal because of its clarity, the D.C. Circuit seems to have little appetite for such line drawing—at least where the Geneva Conventions are concerned. The D.C. Circuit did not opine directly on Judge Kollar-Kotelly's ruling, since the government did not appeal its loss in *Al Rabiah*. But it signaled an unreceptiveness to Geneva Convention claims generally in *Al Adahi*, where Judge Randolph dismissed the petitioner's argument that his interrogation statements should be suppressed because they were gathered in violation of Geneva Convention provisions that require that covered individuals "shall in all circumstances be treated humanely."[447] As Judge Randolph wrote in his opinion: "Even if the Convention had been incorporated into domestic U.S. law and even if it provided an exclusionary rule, Congress has provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings."[448] And while, as explained in Chapter 3, this holding may now be in question because of the cryptic outcome in *Al Warafi*, it remains the D.C. Circuit's most notable comment regarding the admission of statements allegedly gathered in violation of the Conventions. That, of course, still leaves open the question of whether Judge Kollar-Kotelly's approach with respect to the Army Field Manual might have legs in the future.

Competing Approaches to Evidentiary Disputes Concerning Involuntariness

Even assuming that more of a consensus existed as to the precise meaning of voluntariness in this context, disputes would still arise as to other matters. Judges assessing allegations of torture or coercion must determine as an initial matter whether they believe any mistreatment took place, how severe that mistreatment was, and whether it renders resulting statements unreliable. Sometimes, this inquiry is made easy by decisions by the government not to contest allegations of abuse—either out of recognition of their truth or out of a tactical decision not to litigate the circumstances of intelligence interrogations. This happened in Judge Huvelle's courtroom in *Bacha*,[449] for example, and in

[447] Corrected Reply Brief For Appellee at 22-23, Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. July 13, 2010) (No. 09-5333), ECF No. 1226767.

[448] *See Al Adahi*, 613 F.3d at 1111 n.6 (noting that, "[e]ven if the Convention had been incorporated into domestic U.S. law and even if it provided an exclusionary rule, Congress has provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings.").

[449] Bacha v. Obama (Jawad), No. 05-2385 (D.D.C. July 17, 2009). In *Bacha*, in fact, the government not only did not contest the fact of mistreatment, but it did not oppose detainee efforts to suppress evidence on taint grounds, thus depriving the judge of the occasion to opine on the issue in any detail. Judge Huvelle indicated that she would have been receptive to the petitioner's suppression motion even if the government had opposed it. *See id.* slip op. at 2-18.

Judge Robertson's in Salahi.[450]

At the other end of the spectrum, there are cases in which a detainee claims to have been treated improperly at some point in time, but not necessarily in connection with the interrogation that produced the statements in question. Such was the case in *Al Kandari*, where Judge Kollar-Kotelly found herself considering mistreatment allegations and whether to credit them. An antecedent question was presented, however: Whether Al Kandari was even alleging that the coercion he claimed to have suffered led him to make the statements in question. Al Kandari's counsel admitted that his statements were not the result of his treatment by government officials, and even admitted that his generalized claims of abuse were "not relevant" to the court's decision.[451] Such concessions simplify adjudication in some cases, but they do little to clarify the law of coercion.

Where the presence of coercion is both relevant and contested, the judges have adopted a variety of strategies for assessing the issue—strategies that are not always consistent between courtrooms, or even within the same courtroom.

One such approach is to focus on the strength of the government's efforts at rebuttal of abuse allegations. Consider, for example, one of Judge Hogan's decisions, *Anam*. Judge Hogan wrote in that case that the petitioner's allegations were not adequately rebutted, at least in part because the government had inexplicably (according to Judge Hogan) failed to offer contrary testimony from the interrogators with firsthand knowledge of the matter, despite having at least one available.[452] He seems to have expected that the government would offer such testimony since it would not have been difficult to have procured it. Similarly, in *Awad*, Judge Robertson apparently considered rebuttal evidence key to evaluating a coercion claim. In that case, the petitioner claimed that "any incriminating statements he made were made 'as a result of torture, the threat of torture or coercion and are therefore unreliable.'"[453] Judge Robertson dealt with the allegation only in a footnote. He wrote that only one of the petitioner's coercion allegations—that "interrogators threatened to withhold medical treatment until . . . [the petitioner] provided them information"—was "specific" enough to consider. And he rejected the complaint on the basis that the government supported its argument with "interrogators' notes" that revealed, in Judge Robertson's view, "that Awad was provided care and that he used his medical condition as an excuse to avoid answering difficult questions."[454] Judge

[450] Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. Mar. 22, 2010). In *Salahi*, it was not seriously contested that petitioner Salahi was subject to mistreatment, and so the core of Judge Robertson's analysis deals with whether the mistreatment would impact his statements' reliability—not on whether he believed the allegations.

[451] Al Kandari v. Obama, 744 F. Supp. 2d 11, 42-23 (D.D.C. Sept. 15, 2010).

[452] *See* Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 7 n.5 (D.D.C. Jan. 6, 2010) (noting that "the Government chose not to call those interrogators as witnesses and even moved to quash Petitioner's subpoena to call one of the interrogators who was available to testify.").

[453] Awad v. Obama, 646 F. Supp. 2d 20, 24 n.2 (D.D.C. Aug. 12, 2009).

[454] *Id.*

Robertson ultimately credited the petitioner's admissions.[455]

One problem with this approach, as noted above, is that we still lack a clear answer to the underlying question of how much and what type of mistreatment a detainee has to experience before the alleged abuse renders the resulting statements inadmissible or deserving of little or no weight. Of course, one reason this issue has received scant attention from the judges is that they have often found the coercion to have been so extreme that the statements' lack of reliability was simply not in question. For example, Judge Hogan in *Anam* discussed the severity of government abuse and its effect on the reliability of statements made by petitioner Musa'ab Omar Al Madhwani in Afghanistan and Pakistan, before his transfer to Guantánamo.[456] Judge Hogan did not offer any definition of the standard he ultimately used to discount the statements alleged to have been procured by mistreatment, but merely identified the conditions that in his judgment crossed the line in this particular instance: Al Madhwani's original confessions, for example, were given after where he was suspended in his cell by his left hand for days, and after the guards at the prison blasted his cell with music 24 hours a day at very high levels.[457] Such mistreatment continued at another site in Afghanistan, before the detainee's transfer to Guantánamo. Ultimately, Judge Hogan concluded, "it is clear from the records that any statements the petitioner provided in Afghanistan or Pakistan were coerced."[458]

While in cases like *Anam*, where the alleged abuse was both uncontested by the government and extreme, such an impressionistic standard raises little controversy, the judges clearly have different impressions about when alleged abuse crosses the line in less extreme scenarios. At one end of the spectrum, Judge Kessler has suggested that merely making statements at a detention site where abuse was taking place—even if the abuse involved someone *other* than the detainee—is grounds for doubting the value of that statement, apparently on the ground that the mere fear of potential torture suffice to preclude a finding of voluntariness. In *Ali Ahmed*, Judge Kessler stated that the witness's testimony had "been cast into significant question, due to the fact that it was elicited at Bagram amidst actual torture or fear of it."[459] Later in the *Ali Ahmed* opinion, she considered the statements of a different detainee that the government offered as evidence that Ali Ahmed received military training. She wrote that the witness in question "made the inculpatory statement at Bagram Prison in Afghanistan, about which there have been widespread, credible reports of torture and detainee abuse." She then rejected the government's attempt to rehabilitate one

[455] Because of the scope of redactions in the opinion however, it is difficult to discern to what extent the opinion—which denied Awad's petition in the end—actually relied on these statements or otherwise addressed the rules Judge Robertson found applicable to such claims.

[456] *Anam* (Al Madhwani), 696 F. Supp. 2d 1.

[457] *Id.* at 6.

[458] *Id*.

[459] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. May 11, 2009).

of the allegedly coerced statements evidence by showing that it was made during "the same interrogation session where he made inculpatory statements about himself."[460] Judge Kessler concluded that "[a]ny effort to peer into the mind of a detainee at Bagram, who admitted to fearing torture at a facility known to engage in such abusive treatment, simply does not serve to rehabilitate a witness whose initial credibility must be regarded as doubtful." [461] In this case, Judge Kessler seemed to treat the mere fact of coercion's taking place in a facility holding the detainee as presumptive grounds for discounting any statement by that detainee.

No other judge has followed this approach. And, indeed, Judge Kessler herself has treated coercion claims in more recent opinions rather differently, suggesting that some variation exists even within her own jurisprudence. In her most recent pair of decisions, concerning petitioners Al Nadhi and Al Assani, Judge Kessler confronted arguments that statements made by a detainee known as "Riyadh the Facilitator" were unreliable because, the petitioners claimed, Riyadh had been rendered to Jordan and tortured before arriving at Guantánamo.[462] Judge Kessler wrote that she would apply a totality-of-the-circumstances test and consider "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators" in determining whether prior coercion carries over into a second statement—factors that she did not explicitly consider in *Ali Ahmed*, where she did not consider any factors other than the fact of "widespread, credible reports of torture."[463] She concluded in both of the more recent cases that because the petitioners had presented no information about the extent of torture suffered by Riyadh or its impact on his statements, she would credit his statements.[464] These later two cases are not necessarily inconsistent with her earlier approach in *Ali Ahmed* or *Mohammed*, because the allegations of abuse in *Al Nadhi* and *Al Assani* were, in her judgment, completely unsupported; indeed, she wrote, the petitioner "presented no information" to back up his claims. And it is certainly possible that, had the detainees persuaded her that others were abused in facilities in which Riyadh the Facilitator was being held, she would have suppressed his statements too. But her methodology does seem to have shifted at least somewhat from her approach in *Ali Ahmed*, where the petitioner had made no allegation that the *specific* witness had been abused yet where she still excluded that witness's statements.

---

[460] *Id.* at 61.

[461] *Id.* at 62.

[462] Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 59 n.14 (D.D.C. Mar. 10, 2010); Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85, 96 n.13 (D.D.C. Mar. 10, 2010).

[463] *Ali Ahmed*, 613 F. Supp. 2d at 61.

[464] *Al Adahi* (Al Assani), 698 F. Supp. 2d at 59 n.14 ("Petitioner has presented no information on the extent of torture suffered by Riyadh or its impact on his statements. Without such information, the Court is not prepared to reject the Government's evidence as unreliable. Therefore, the Government's evidence stands as unrebutted and must be accepted as credible.").

Judge Kennedy takes a different approach to refereeing disputes regarding the credibility of mistreatment allegations in two of his cases, *Abdah* (Esmail) and *Abdah* (Uthman)—an approach that also seems less than entirely consistent between the two cases. In these cases, the government conceded that the alleged mistreatment, if proven to the extent the petitioner had alleged, would require the exclusion of statements derived from that mistreatment. In both of these cases, after announcing a standard for his assessment—that "resort to coercive tactics by an interrogator renders the information less likely to be true,"[465] Judge Kennedy engaged in a fact-intensive inquiry to evaluate the allegations. In Uthman's case, he ended up crediting the petitioner's allegations in full and thus did not credit the statements alleged to have been made as a result of them—and he ultimately granted the petition. In *Abdah (Esmail)*, however, Judge Kennedy did not end up believing the allegations as advanced by the petitioner, and he thus credited the statements that were allegedly made as a result of them—and ultimately denied Esmail's petition.

In *Abdah* (Uthman), the statements of two detainees, Hajj and Kazimi, formed part of the government's case against the petitioner. The petitioner claimed that their statements were made as the result of abuse, and the government contested these allegations. The petitioner presented evidence of the claim in the form of declarations from Kristin Wilhelm, an attorney who represented Hajj, describing the torture that Hajj allegedly experienced, and of Martha Rayner, a Professor at Fordham University Law School and counsel for Kazimi.[466] To contest the allegations, by contrast, the government produced a witness who testified for the government at the hearing, a criminal investigator for the Criminal Investigation Task Force ("CITF").

Judge Kennedy reviewed the declarations of both attorneys who represented the detainees and the testimony of the CITF investigator. As an initial matter, he declared that he was not persuaded by the government's contention that Wilhelm and Raynor's declarations fell short because they were "not direct, sworn statements of the detainees themselves."[467] He then went on to reject the government's rebuttal evidence: "The investigator's testimony added to the record persuasive evidence that the investigator herself did not mistreat Hajj or Kazimi and that the investigator did not observe any torture, or even any signs of abuse in the demeanor or physical state of either man, while the investigator was with them."[468] But it had failed to effectively rebut the evidence of abuse because "the investigator [had] no knowledge of the circumstances of either detainee's confinement before his arrival at Bagram and quite limited knowledge of his

[465] Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 28 n.3 (D.D.C. Apr. 8, 2010) ("The Court agrees with Esmail's underlying legal argument: statements that are the product of torture are unreliable."); Abdah v. Obama (Uthman), 708 F. Supp. 2d 9, 16 (D.D.C. Apr. 21, 2010).

[466] Abdah v. Obama (Uthman), 708 F. Supp. 2d at 18-19 (D.D.C. Apr. 8, 2010).

[467] *Id.* at 16.

[468] *Id.* at 15.

treatment there."[469] For Judge Kennedy, that the investigator testified to meeting with each man in an interrogation room on each of several days for approximately four hours at a time was insufficient: "The investigator did not see Hajj or Kazimi other than during those four-hour sessions and did not inquire of them, or anyone else, about their treatment in the various prisons in which they were held."[470] Not only did the testimony of the government's witness fall short of outweighing the detainees' attorneys' accounts, it didn't even give the court a "reason to doubt the veracity of the declarations."[471] And so, because the government had failed to rebut the petitioner's allegations, Judge Kennedy decided to disregard the inculpatory statements because, he found, the treatment described in the two declarations rose to the level of "torture," and because that treatment was "recent."[472]

The government's main counterargument was that the statements were nevertheless reliable for two reasons: first, because the CITF investigator had testified that he believed Hajj and Kazimi were truthful in response to questions and, second, because one of the detainees, Kazimi, had said in an interview with the investigator that he had been unfairly accused of more allegations than had other detainees because he had been truthful with interrogators.[473] Judge Kennedy was skeptical of these arguments, though his reasons were somewhat vague: he simply stated that the conditions in which the detainees were interrogated were coercive and that the reasons for crediting them in spite of the coercion did not "outweigh the reasons to infer, based on the coercive circumstances so close in time to the interrogation, that they are unreliable."[474] Because the reasons did not speak directly to the issue of whether there had been a sufficient break in the stream of events "sufficient to insulate the statement from the effect of all that went before," Judge Kennedy concluded that the statement must be discounted.

The government challenged this ruling on appeal,[475] writing that Judge Kennedy's finding of "ongoing torture" at Bagram was "unexplained" and "patently inadequate" in light of evidence that one of the detainees, Hajj, "felt relaxed during the interviews at Bagram but that he felt free to complain about matters regarding his treatment and conditions of confinement."[476] But, on

---

[469] *Id.* at 19-20.

[470] *Id.* at 20.

[471] *Id.* at 16.

[472] *Id.*at 14.

[473] *Id.* at 16 n.7.

[474] *Id.* at 16-17.

[475] See Brief for Appellant-Respondent at 50, Uthman v. Obama, No. 10-5235 (D.C. Cir. Mar. 29, 2011) (stating that the district court's "fleeting reference to the "ongoing" torture of Hajj was patently inadequate. The district court neither made any finding about the nature of the "ongoing" torture at Bagram; nor did it explain the basis for its finding.").

[476] *Id.*

appeal, the D.C. Circuit did not engage the question; it reversed Judge Kennedy's opinion based only on only those facts he had explicitly found using other record evidence, and thus did not need to delve into the specifics of the evidence Judge Kennedy had rejected.[477]

In *Abdah* (Esmail), by contrast, Judge Kennedy was far more dubious of the petitioner's account, and in the end, he actually accepted as evidence for the government's allegations all of the statements that the petitioner alleged to have been coerced. As in *Abdah* (Uthman), in *Abdah* (Esmail) the petitioner challenged statements given to interrogators as being the product of coercive abuse.[478] And Judge Kennedy once again assessed in detail the record evidence on the issue. Although he found that there was "evidence in the record to support the contention that Esmail was subjected to mistreatment while in United States custody," he believed that Esmail had exaggerated the claims of severe mistreatment of the kind that would bring the reliability of his statements into doubt. And in sharp contrast to his approach in *Uthman*, he seemed to accept the testimony of interrogators that they had not witnessed any abuse, notwithstanding their inability to witness the conditions of a given detainee's treatment all of the time.

Judge Kennedy first reviewed carefully three different sources of Esmail's allegations: the summary of his CSRT testimony and two declarations provided in 2009 and 2010. Then he examined documents from a variety of sources that Esmail alleged corroborated the general practice of torture at the U.S. detention facilities in Bagram and Kandahar.[479] He concluded that Esmail had been mistreated. He then turned to government-submitted rebuttal declarations from two interrogators who worked at Bagram and at Kandahar. Judge Kennedy credited the Bagram interrogator's declaration, believing his claims about a lack of abuse of detainees at Bagram, during interrogations and at other times, based on his assertions that, "[w]hen [he] interrogated detainees, they were not stripped, hooded, or shackled" and he personally "did not threaten the detainees with harm to themselves or to their families."[480] This witness also swore that he had not seen any other interrogators or other people employ coercive interrogation techniques.[481] And he rebutted one of Esmail's allegations specifically by attesting that there were no dogs present when he interrogated him.[482] Summarizing the degree of overlap between the allegations and the

[477] *Id.* at 19 (describing that the court took note of certain evidence that the "detainees were relaxed, showed no signs of abuse, appeared truthful, and did not feel compelled" to tell an interrogator whatever he wanted to hear, but "nevertheless concluded that the statements of Hajj and Kazimi could not be used because they had been tortured before they came to Bagram, and that the torture of I Hajj was 'ongoing' when he was questioned at Bagram").

[478] 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010).

[479] *Id.* at 31.

[480] *Id.*

[481] *Id.* at 31.

[482] *Id.* at 32.

rebuttal, Judge Kennedy wrote that the declarations confirmed "some portions of Esmail's description of his treatment, such as being forced to be naked in the presence of guards and being held in a cold location," but discredited the "other, more serious allegations, such as Esmail's being threatened with dogs or thrown in a ditch of waste."[483]

But Judge Kennedy concluded that although he believed that Esmail had been "mistreated," Esmail had not "endure[d] the severe abuse he describe[d]."[484] He also examined the statements in the documents themselves, and found that "nothing about the summaries of Esmail's statements suggests to the Court that they are the product of coercion, whereas there are indications to the contrary."[485] All told, Judge Kennedy found Esmail's statements voluntary, even while he seemed to believe that Esmail had been forced to be naked in front the guards and held in a cold location. Those conditions did not render the detainee's statements unreliable, at least in this case.

What was curious about these two cases is that the government witnesses in *Abdah* (Esmail) seemed to have no more personal knowledge of the actual treatment of the individual who was allegedly coerced than did the CITF investigator whose testimony Judge Kennedy found insufficient in *Abdah* (Uthman) to rebut the petitioner's claims. Judge Kennedy recognized in *Abdah* (Esmail) for example, that neither interrogator had "witnessed" the severe events Esmail alleged and that the declarations did not "directly disprove" each of Esmail's significant allegations. But "direct" contradiction was seemingly what he required of the government's witness in *Abdah* (Uthman); in *Abdah* (Esmail) he did not demand the same perfect match between the allegations of torture and the personal observation of the rebuttal witness. He wrote that the government witnesses were more credible than the petitioner, though he did not explain the apparent incongruity with *Uthman*. It is, of course, true that, in *Esmail*, a number of other factors apart from the competing testimony and declarations likely influenced Judge Kennedy's assessment of the competing claims. Such factors included medical records the government produced that cast doubt on the veracity of the allegations, discrepancies in Esmail's two sets of allegations, and the fact that information Esmail claimed to have given only because he was forced to say it was "independently corroborated" by other information in the record.[486] But Judge Kennedy also examined the inculpatory statements themselves—a step he had not taken in *Uthman*—and found that the

[483] *Id.* at 33.

[484] *Id.* at 36.

[485] *Id.* at 36.

[486] *Id.* at 35 ("It is reasonable to infer based on the late addition of allegations that could reasonably be expected to appear in the First Declaration that Esmail has embellished his statements with false allegations in an effort to create an advantage for himself in this litigation."). Judge Kennedy also found the timing of the alleged abuse to be implausible: "Based on the timing of these interviews, there was little opportunity for Esmail to be affected by mistreatment in U.S. custody such that his statements became unreliable." *Id.* at 36.

interrogation summaries did "not read as they likely would were the interviewee speaking out of fear."[487]

Judge Huvelle also dealt with an exaggerating petitioner in the *Al Qurashi* case and decided to deny the petitioner's motion to suppress statements that were allegedly the product of mistreatment.[488] Specifically, the petitioner had requested that she suppress his confession that he had attended the Al Farouq training camp because, he said, he made the confession to an FBI interrogator only after having been beaten by Pakistani authorities while in Pakistani custody.

In a lengthy, 50-page opinion, Judge Huvelle reviewed the evidence, writing that she believed the petitioner's claims were "exaggerated." [489] She found that the allegations themselves seemed questionable and were riddled with "timeline inconsistencies."[490] Further, the alleged torture was not supported by "definitive medical evidence."[491] She found the petitioner's stated reasons for recanting to be "not credible," and she described her "[c]ommon-sense" observation that, had the petitioner been abused as he had alleged, there would have been "*some* form of marks upon the head, neck, or face, whether in the form of abrasions, bruises, swelling, or simply redness ."[492] She did, however, credit testimony from the FBI Special Agent who testified at the suppression hearing because she found his "demeanor and [the] substance of his testimony" credible.[493] And, unlike Judge Kennedy had done in *Abdah* (Uthman), Judge Huvelle did not expect the FBI Special Agent's testimony to contain evidence that he had personal knowledge of events that took place in the Pakistani prison; rather, she considered the evidence of interactions the Special Agent did have with the petitioner, where he had the opportunity to observe whether the petitioner "manifested any evidence of having been tortured."[494] In a sense, she used the evidence of the interactions that the Special Agent did have with the petitioner to infer the absence of mistreatment during time periods that the Special Agent did not personally observe the petitioner's treatment—a leap that Judge Kennedy seemed unwilling to make in *Uthman*.

---

[487] *Id.* at 34-35 (indicating incredulity about the more "sensational abuse" listed in Esmail's second declaration because the "additional allegations, were they truthful, could have appeared in the earlier declaration").

[488] Al Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. Aug. 8, 2010)

[489] *Id.* at 79 (describing how the court must "ask whether 'the confession is the product of an essentially free and unconstrained choice by its maker,' or whether 'his will has been overborne and his capacity for self-determination [has been] critically impaired.'" The answer to this question is determined by considering "the totality of all of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.") (quoting Culombe v. Connecticut, 367 U.S. 568. 602 (1961)).

[490] *Id.* at 87.

[491] *Id.*

[492] *Id.* at 84-88.

[493] *Id.* at 82.

[494] *Id.*

When Does the Taint of Prior Coercion Dissipate?

The degree of attenuation between mistreatment that the courts find and later statements has also become a major issue in the habeas cases. Courts that find that mistreatment took place continue to struggle with determining whether and when statements elicited in non-coercive contexts subsequent to the alleged mistreatment are tainted by the earlier coercion. They have focused on quantitative factors, such as the amount time between coercion and later, un-coerced interrogation, as well as qualitative factors, such as the identity of the interrogators or the forum in which the statement is made.

Early on in the Guantánamo habeas litigations, Judge Kessler presided over *Mohammed*.[495] In that case she faced allegations of coercion that occurred early on in the government's custody of one of the government witnesses, Binyam Mohamed, before he was transferred to Guantánamo. The government acknowledged Mohamed's mistreatment but argued that later statements given to interrogators at Guantánamo should not be discredited by it.[496] Finding, as Judge Kessler did, a dearth of case law on point and virtually nothing binding from the prior Guantánamo cases, she opted, at the government's suggestion, to turn to the criminal case law as a useful, albeit not perfect, analogy.[497] She mined Supreme Court case law, considered both Due Process arguments and reliability arguments, and adopted a voluntariness test for the statements:

> The use of coercion or torture to procure information does not automatically render subsequent confessions of that information inadmissible. The effects of the initial coercion may be found to have dissipated to the point where the subsequent confessions can be considered voluntary. The Government bears the burden of showing that the confessions are voluntary. To determine if the effects of the earlier coercion have dissipated—that is, to determine the voluntariness of the subsequent confessions—courts apply a "totality of the circumstances" test.

She noted that certain factors, such as "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second

---

[495] Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

[496] Specifically, the government conceded the petitioner had been badly abused over a long period of time by other governments to whom the United States had rendered the detainee before his return to U.S. custody and his transfer to Guantánamo. It did, however, claim that the rapport the FBI agent later built with him vitiated the taint of his prior abuse and that his statements implicating the petitioner should therefore be credited.

[497] *Mohammed*, 689 F. Supp. 2d at 61.

confession." But she also emphasized that "courts have never insisted that a specific amount of time must pass before the taint of earlier mistreatment has dissipated."[498]

To apply her standard, Judge Kessler spent 23 pages cataloguing and discussing Mohamed's mistreatment. She found that Binyam Mohamed had been

> physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans.[499]

To assess the gravity of mistreatment, she examined prior case law in which federal courts, in criminal cases, had considered whether to admit allegedly involuntary statements. In one case in which the individuals' statements had been excluded, the individuals had been "brutally beaten, whipped, and exposed to mock executions in the days before making a coerced confession and being thrust into the courtroom for a one-day show trial."[500] Judge Kessler found Mohammed's case was much more like that case than it was similar to other cases in which the treatment was much less severe.[501]

She also had taken a step distinct from some of her peers on the district court when she reviewed a number of scientific articles describing the effects of physical and psychological torture on prisoners. In her opinion, the articles supported her view that "even though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to [the FBI Special Agent], there is no question that . . . [f]rom Binyam Mohamed's perspective, there was no legitimate reason to think that transfer to

---

[498] *Id.* at 62-63 ("Further, courts should examine, *inter alia,* the age, education, intelligence, and mental health of the witness; whether he has received advice regarding his Constitutional rights; the length of detention; the 'repeated and prolonged nature of the questioning'; and the 'use of physical punishment such as the deprivation of food or sleep.' This multi-factor inquiry aims to uncover whether there has been a 'break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.'") (quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[499] *Id.* at 64.

[500] *Id.* at 64.

[501] *Id.* at 63. One of the less severe examples was a case in which the individual had been repeatedly questioned "by a police officer, in his own country, by his own fellow-citizens, at a police station, over several days without sleep and with only minimal amounts of food and water." The treatment in that case was unlike that experienced in *Reck v. Pate*, a case in which a murder suspect was "held incommunicado for eight days, questioned extensively for four, and interrogated while sick." 367 U.S. 433, 440-41 (1961).

Guantánamo Bay foretold more humane treatment; it was, after all, the third time that he had been forced onto a plane and shuttled to a foreign country where he would be held under United States authority."[502] Ultimately, she concluded that she could not credit Binyam Mohamed's confession as voluntary: "The earlier abuse had indeed 'dominated the mind' of Binyam Mohamed to such a degree that his later statements to interrogators are unreliable."[503] His will, she determined, "was overborne by his lengthy prior torture, and therefore his confessions to Agent [redacted] do not represent reliable evidence to detain Petitioner."[504]

The D.C. Circuit did not review this opinion. Though the government appealed it, the appeal was dismissed later for mootness.[505] In a different case, *Ahmed*, Judge Kessler seemed to go one step further, suggesting a presumption that torture will infect *all* future statements in the absence of specific reason to conclude otherwise. Discussing one of the detainees whose statements the government offered against the petitioner, Judge Kessler wrote that, "there is evidence that [he] underwent torture, which may well have affected the accuracy of the information he supplied to interrogators."[506] The detainee also said that he had "spent time at Bagram and the Dark Prison, and alleges that he has been tortured."[507] The same witness also claimed that "he made inculpatory statements … [REDACTED] because he feared further torture." The government did not dispute the allegations of torture at Bagram or the Dark Prison, but argued, rather, that the "residual fear" of torture had been overcome by June of 2004, when the detainee informed them that he had given them bad information in the past. The government argued that the fact that the identification was made *after* the detainee was comfortable enough with interrogators to confess to his earlier deceit should be taken as indication that he was no longer coerced. But Judge Kessler was unpersuaded: "Based on two of these interrogations . . . the Government asks the Court to assume that his alleged mistreatment at several detention centers was effectively erased from his memory. . . . [T]he Court cannot infer that past instances of torture did not impact the accuracy of later statements."[508] Judge Kessler rejected the government's attempt to rebut what appeared to be her presumption that torture had infected all subsequent statements, though she did not explain exactly why it fell short or what sort of showing would pass muster.

Judge Robertson takes a different approach to attenuation, suggesting in the one case in which he confronted the issue that he was looking for evidence of a

[502] *Id.* at 65

[503] *Id.* at 66.

[504] *Id.*

[505] Mohammed, No. 05-5224 (D.C. Cir. Jan. 11, 2011) (dismissing appeal as moot).

[506] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 57 (D.D.C. May 11, 2009).

[507] *Id.*

[508] *Id.* at 58.

"clean break" from the period in which coercion affected the reliability of detainee statements. In *Salahi*, it was not seriously contested that the government's mistreatment of the detainee would affect the reliability of any statements directly derived from the coercive interrogation sessions. But the government contended that the taint had lifted. As Judge Robertson summarized:

> The government acknowledges that Salahi's abusive treatment could diminish the reliability of some of his statements. But abuse and coercive interrogation methods do not throw a blanket over every statement, no matter when given, or to whom, or under what circumstances. Allegations of mistreatment certainly taint petitioner's statements, raising questions about their reliability. But at some point—after the passage of time and intervening events, and considering the circumstances—the taint of abuse and coercion may be attenuated enough for a witness's statements to be considered reliable—there must certainly be a "clean break" between the mistreatment and any such statement. Here, it is the government's burden to demonstrate that a particular statement was not the product of coercion, and that it has other indicia of reliability.[509]

Judge Robertson found "ample evidence . . . that Salahi was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003."[510] And he considered Salahi's position that every incriminating statement he made while in custody (even outside the June-September time period) was therefore unreliable. Like Judge Kessler's assessment of scientific evidence in *Mohammed*, he received expert testimony on the notion that the mistreatment "likely compromised the accuracy of the information [Salahi] provided to interrogators," but he found the expert's testimony "biased and unpersuasive."[511] Unlike Judge Kessler in *Ahmed*, however, Judge Robertson seemed comfortable with the notion that, once a detainee had grown sufficiently comfortable to disavow his earlier incriminating statements at least once, the "taint" of earlier mistreatment has dissipated sufficiently to consider subsequent statements given under non-coercive conditions as voluntary. He noted that the statement at issue was made both "a year after [Salahi's] coercive interrogation and after [Salahi] had disavowed earlier incriminating statements."[512] And while Judge Robertson ultimately discounted the interrogation statements in question, he made clear that he did so not because of any residual taint from the earlier mistreatment but because the statement was too sparse and too ambiguous to

[509] Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010).

[510] *Id.* at 6.

[511] *Id.* at 7 n.8.

[512] *Id.* at 10.

support the government's suggested inference from it.[513] Elsewhere in the opinion, he credits another statement made in December 2004, about a year after Salahi's coercive interrogation ended, indicating that perhaps one year was presumptively an adequate amount of time in Judge Robertson's view.[514]

In Anam, Judge Hogan offered his own manner of determining not only the level of abuse endured by the petitioner, but also whether the prior mistreatment might affect statements given at a later date and in a different location. And his focus, the consistency of threat to the detainee and the use by U.S. forces of the fruits of the coercive interrogation in eliciting statements later under non-coercive circumstances, differs significantly from Judge Robertson's approach. In Anam, as described above, the government sought to rely on statements that the petitioner, Al Madhwani, gave after allegedly severe mistreatment in Afghanistan or Pakistan and his subsequent transfer to less problematic conditions at Guantánamo.[515] There were 26 statements given by the petitioner at Guantánamo, and Judge Hogan concluded that 23 of them were "tainted by coercive interrogation techniques [and] therefore . . . lack[ed] sufficient indicia of reliability."[516] First, like other judges confronting this issue, he adopted a totality of the circumstances standard used in the criminal prosecution context to determine when taint has been vitiated sufficiently to allow a statement's use.[517] Second, Judge Hogan expressly allocated to the government the burden to disprove taint under this test: "Since the Government is relying on these twenty-six documents [from interrogations at Guantánamo], the Government has the burden of establishing that they are reliable."[518]

Assessing the government's evidence against the petitioner's allegations, Judge Hogan recognized the government's argument that the locations of the two sets of interrogations had changed, as had the officials who elicited the statements from the petitioner. In particular, he recognized that the prior abuse

---

[513] *Id.* at 11 ("The remaining evidence that Salahi was an active recruiter is less significant. Salahi made several incriminating statements after coercive interrogation that he was a recruiter and spread propaganda about al-Qaida, but in none of those statements did he say he was tasked to do so, nor did he provide detail about any specific recruiting missions he was given.").

[514] *Id.* at 10. But the statement, that Salahi had said he "wanted to work a little bit," did not help the government's case. While Judge Robertson did not dismiss the statement as the product of coercion, he held merely that it did not support the government's interpretation of its significance. *See also* Al Rabiah v. Obama, 658 F. Supp. 2d 11, 29-36 (D.D.C. Sept. 17, 2009) (using a "totality of the circumstances" test and declining to credit statements even after Al Rabiah "subsequently confided in interrogators [REDACTED] that he was being pressured to falsely confess," but taking note that interrogators themselves "never believed his confessions based on the comments they included in their interrogation reports."). *Id.* at 28.

[515] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1 (D.D.C. Dec. 14, 2009).

[516] *Id.* at 3.

[517] *Id.* at 7 ("criminal courts 'may take into consideration the continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession.'") (quoting United States v. Karake, 443 F. Supp. 2d 8, 87-88 (D.D.C. 2006)).

[518] *Id.* at 5.

had occurred while Pakistani and Afghan authorities held the petitioner, whereas the statements it actually sought to use were given to American interrogators at Guantánamo. But Judge Hogan determined that that even the Guantánamo statements were "tainted" by the prior treatment and thus could not be considered. This was in part because he found that the United States "forces were involved in both Afghanistan prisons where he was involved, and that the petitioner believed the United States government orchestrated the harsh interrogation techniques to which he was subject." Because the U.S. was involved both with the earlier conditions of confinement and his later detention at Guantánamo, Al Madhwani was "gripped by the same fear that infected his Afghanistan confessions."[519] Judge Hogan continued:

> [Al Madhwani's] Guantánamo interrogators did little to assuage that fear. According to the reliable evidence in the record, multiple Guantánamo interrogators on multiple occasions threatened Petitioner when he attempted to retract statements that he now claims were false confessions. Therefore, from Petitioner's perspective, his interrogators and custodians did not change in any material way during the period in question.[520]

Judge Hogan also found that Al Madhwani had received continued threats while at Guantánamo. The six-month time period that passed between the Afghanistan and Guantánamo confessions was itself insufficient, because the operative test was not the "length of time between a previously coerced confession and the present confession"; rather the operative time period was that between the present confession and the "removal of the coercive circumstances."[521]

Judge Hogan was also "particularly concerned" with another factor: whether the subsequent interrogators were aware of statements Al Madhwani made previously as a result of abuse, and whether this in some manner informed the construction of the subsequent, non-abusive interrogations.[522] Specifically, this approach suggests that if the government wishes in the future to obtain statements usable in habeas proceedings during the interrogation of someone with a non-frivolous claim of prior abuse, it may need to employ a "clean-team" approach—an interrogation approach designed to insulate the fruits of prior

---

[519] *Id.* at 7.

[520] *Id.* at 7 (footnote and citations omitted).

[521] *Id.* at 8.

[522] *See id.* (explaining that because the Guantánamo interrogators had access to and relied upon his coerced confessions from Afghanistan. . . . Far from being insulated from his coerced confessions, his Guantánamo confessions were thus derived from them."). Judge Hogan was also unpersuaded by the government's argument that the statements' internal consistency indicated they were reliable. *See id.* at 9.

harsh interrogations from later, non-coercive questioning.[523]

Notwithstanding his taint analysis of the Guantánamo interrogation statements, Judge Hogan ultimately did admit some of Al Madhwani's post-abuse statements—specifically, statements made in the context of three CSRT and ARB proceedings. He explained that the "circumstances surrounding" those statements were "fundamentally different" from those in which he gave the other statements during interrogations. In the CSRT and ARB proceedings were separated by "months, if not years," from the harsh interrogations.[524] The taint of prior abuse was also overcome in part by the fact that Al Madhwani's interlocutors there were not interrogators, that no one "who may have previously threatened" the petitioner was present at the proceedings, that Al Madhwani had assistance from a personal representative, and that Al Madhwani's actual statements to those bodies—including some denials of government allegations—suggested that he did not fear retaliation for giving statements other than those the interrogators wanted to hear.[525] Judge Hogan found the statements to the CSRT and the ARB "reliable" and, on the basis of those statements and other record evidence, denied Al Madhwani's petition.[526]

This aspect of Judge Hogan's ruling in *Anam* creates yet another divergence of practice on the district court, because it contrasts sharply with how Judge Urbina considered similar facts in *Hatim*.[527] As described in his merits opinion, the government's case against Hatim rested primarily on the claim that the detainee had attended Al Qaeda's Al Farouq training camp and that he stayed at a guesthouse used by Al Qaeda to facilitate the intake of its trainees. Hatim apparently confessed to these facts both during interrogations and when appearing before a CSRT. In the habeas proceedings, however, the petitioner sought to recant his admissions about Al Farouq, arguing that he was tortured while in U.S. custody in Afghanistan, that he falsely confessed to attending Al Farouq during interrogation sessions only in order to avoid abuse, and that he repeated this confession before his CSRT because he believed "he would be punished if he gave the tribunal a different account than what he had previously told interrogators."[528] Judge Urbina noted that the government did not contest the underlying torture allegation, and he conducted a taint analysis for both the later interrogation and CSRT statements.[529]

The situation, in other words, closely resembled the one Judge Hogan faced

---

[523] Josh White, Dan Eggen and Joby Warrick, *U.S. to Try 6 On Capital Charges Over 9/11 Attacks*, WASHINGTON POST, Feb. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/11/AR2008021100572.html (discussing the use of "Clean Teams").

[524] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 9 (D.D.C. Dec. 14, 2009).

[525] *Id.* at 9-10.

[526] *Id.* at 10.

[527] Hatim v. Obama, No. 05-1429 (D.D.C. Dec. 15, 2009).

[528] *See id.*, slip op. at 18.

[529] *See id.*, slip op. at 18-19.

in Al Madhwani's case, *Anam*. In both cases, the government did not rebut the allegations of mistreatment, and detainees argued that torture in Afghanistan tainted confessions given later in Guantánamo. And just as Judge Hogan did in Al Madhwani's case, Judge Urbina in *Hatim* placed the burden on the government to disprove the detainee's claim of taint and found that the mere change of location to Guantánamo and the passage of time did not suffice to vitiate the taint.

In contrast to Judge Hogan, however, Judge Urbina did not carve out an exception for CSRT statements, but rather treated them as equally tainted and thus unworthy of consideration:

> The petitioner also maintains that he told the CSRT that he had trained at al-Farouq only because he would be punished if he gave the tribunal a different account than what he had previously told interrogators. . . . As Judge Kessler has observed in another GTMO habeas case involving a third-party witness who claimed to have been tortured, when—as here—the government presents no evidence to dispute the detainee's allegations of torture and fails to demonstrate that the detainee was unaffected by his past mistreatment, the court should not infer that the prior instances of coercion or torture did not impact the accuracy of the detainee's subsequent statements.[530]

Judge Urbina noted a variety of reasons to doubt the government's case for detention even if he had been willing to accept the CSRT or interrogation statements into evidence, and thus we cannot say for certain that the apparent conflict between his approach and that of Judge Hogan is outcome-determinative in this particular instance. (Indeed, in *Anam*, Judge Hogan paid special attention to the "unrestrained tone and content of his remarks," which, he said, were "key to judging their reliability."[531]) However, Judge Urbina's decision to follow Judge Kessler's approach in this case—creating, effectively, an *inference* of taint that must be shown not to exist—clearly differs from Judge Hogan's view that a CSRT proceeding is somehow inherently different from and more protective than an interrogation. The government's disagreement with Urbina's approach showed up in the *Hatim* appeal—where the government argued both in its brief and at oral arguments that Judge Urbina's conclusion was "the product of an erroneous view of the showing of attenuation necessary to determine that statements are not the product of prior mistreatment."[532] Because the D.C. Circuit found that Judge Urbina had applied the wrong substantive standard for

---

[530] *Id*. at 12.

[531] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 10 (D.D.C. Dec. 14, 2009).

[532] Brief for Government at 26, Hatim v. Gates, 632 F.3d 720 (D.C. Cir. Feb. 15, 2011) (pointing out that the government did produce evidence about the petitioner's presence at Al Farouq that "indisputably could not have been affected by Hatim's alleged treatment at Kandahar").

detention and vacated the decision on that basis, it did not reach the issue of the allegedly coerced evidence, but rather remanded the case for further consideration.

Finally, Judge Kennedy also offered a brief taint analysis in his *Uthman* opinion—an analysis that was effectively *dicta* because the government had not argued that any of the statements at issue were sufficiently remote from the alleged coercion to be found voluntary on that ground. But his analysis nonetheless offers a few guideposts as to Judge Kennedy's thinking on the subject of attenuation. With regard to one of the detainees, Hajj, Judge Kennedy wrote that there was virtually no attenuation between allegedly involuntary statements given at Bagram, because his torture "was ongoing" at the time of the statements. The other detainee, Kazimi, "had arrived [at Bagram] directly from the CIA prison, at which he was tortured, only about a month earlier." So it seems that, in Judge Kennedy's view, a period of a month—at least where the locations of mistreatment and interrogation are a field facility and Bagram, respectively—does not create a "break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before."[533] Without more, the passage of a month will be insufficient to clear the taint of past abuse for Judge Kennedy. Beyond that, we know very little.

Conclusion

Given the prevalence of coercion claims in these cases, it is remarkable how little clarity has developed. While it is generally agreed that statements must be "voluntary" in order to be considered; little else about what interrogation conditions likely result in a violation of this standard is clear. We can say with certainty only that judges would not tolerate the fruits of torture, yet that they also are not precluding admission of statements merely because they are produced in the setting of long-term custodial interrogation without counsel. Nor is it clear whether the judges take the same approach to analyzing evidence where the claim of excessive coercion is contested. And while we know generally that mistreatment does taint later statements, for how long and until what circumstances change may vary a great deal from courtroom to courtroom.

The result is that, nearly three years into the post-*Boumediene* habeas regime, nobody knows what the rules are regarding coerced evidence. And since the D.C. Circuit has never spoken substantively to the issue of coercion, the entire edifice, such as it is, may turn out to be a house of cards when the appellate court finally addresses it.

[533] Abdah v. Obama (Uthman), 708 F. Supp. 2d at 16-17 (D.D.C. Apr. 8, 2010) (quoting Clewis v. Texas, 386 U.S. 707, 710 (1967)).

Chapter 8 – Mosaic Theory, Conditional Probability, and the Totality of the Evidence

The evidentiary issue that has so far had the most direct impact on the contours of the law of detention involves the proper methodology for assessing the evidence that a judge credits in any given case, and, in particular, whether there is some role in that methodology for a "mosaic" theory of assessing information. For a while, the notion that the government might satisfy its burden of proof with reference to an array of intelligence data produced a strong negative reaction among some of the lower court judges. But their opinions, in turn, have provoked a sharp response over the past year from the D.C. Circuit. The law that is emerging from the D.C. Circuit's reaction is highly favorable to the government's position and represents a dramatic change in the landscape over a relatively short period of time. This change has affected the bottom line outcome in several habeas cases, in the sense that petitioners who prevailed under the standards the district judges were using at the time had the D.C. Circuit reevaluate the favorable result. Moving forward, the government can be expected to prevail under the D.C. Circuit's standards far more frequently than it would have had the district court's approach remained intact.

Several different questions have arisen under the general heading of what judges alternately term "mosaic theory," or viewing evidence "as a whole." First, what is the relationship, if any, between the mode of analysis employed by a judge performing habeas review and that employed by an analyst generating conclusions for inclusion in an intelligence product? Second, can proven factual allegations—such as attendance at an Al Qaeda training camp or a stay at a Taliban safehouse—that fail to satisfy the government's burden of proof individually nonetheless collectively satisfy it? Third, can evidence that does not suffice on its own to prove a particular allegation nonetheless contribute, in context with other evidence, to carrying the ultimate burden of proof? The answers to the first two of these questions all seem significantly clearer today than they did a year ago—and the new clarity operates in the government's favor. The third question, however, remains far from resolved.

The idea of a "mosaic theory" has long described a relatively straightforward strategy for intelligence analysis. As one writer described it, mosaic theory is the idea that

> [d]isparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts.[534]

[534] David Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L. J. 628, 630 (2005).

The theory became the subject of some public attention and controversy in the 1980s, when it was increasingly used as justification for classifying otherwise innocuous information that a foreign intelligence service could use in combination with other information to generate knowledge of sensitive matters. Extrapolating from the same principles, the mosaic theory then also became central to government arguments for resisting disclosures under the Freedom of Information Act and for invoking the state secrets privilege; it eventually became associated with the larger debate concerning excessive government secrecy, overclassification, and the like.[535] But in the government's arguments—and in the manner we intend to employ it in this paper—the conceptual power of using the term "mosaic" to describe the larger picture painted by the government's evidence poses no inherent controversy; it is merely a metaphor for recognition of the latent probative value that seemingly innocuous or unrelated information may have when viewed in context, an approach that is widely used in many judicial contexts outside of habeas.

It bears brief mention that the question of how the courts evaluate specific pieces of evidence necessarily bleeds into the question of the substantive standard for detention discussed in Chapter 3. Though the two questions are conceptually distinct, their relationship is particularly important in the district court cases we discuss here, several of which came down before the D.C. Circuit obviated the command-structure standard. Judges using the command-structure test, which required evidence that a detainee had "receive[ed] and execute[ed] orders or directions," might tend to look for a discrete tile in the mosaic—a tile that shows an order received and obeyed. Even when such a judge insists she is looking at the evidence "as a whole," she might tend to have a narrower focal length than one who is looking for a probabilistic big picture. By contrast, a court focused on looking broadly at whether a detainee is in functional terms meaningfully "part of" the enemy may tend to zoom out and be more sympathetic to a mosaic approach.

In any event, the question of how judges should consider disparate pieces of evidence initially stirred great controversy among the district judges, who found themselves confronted with evidence consisting primarily of intelligence reports. Some judges felt the government was asking them to behave like intelligence analysts and approve detentions on the basis of hunches fed by conjectures from weak traces of information. And they bristled. For example, when mosaic language made its first significant appearance in the Guantánamo habeas litigation in Judge Leon's opinion in *El Gharani*, the government's evidence amounted to what Judge Leon called "a mosaic of allegations made up of statements by the petitioner, statements by several of his fellow detainees, and certain classified documents that allegedly established in greater detail the most likely explanation for, and significance of, petitioner's conduct."[536] And while

[535] *See id.*

[536] El Gharani v. Obama, 593 F. Supp. 2d 144, 148 (D.D.C. Jan. 14, 2009).

Judge Leon wrote that the allegations in question, "if proven, would be strong evidence of enemy combatancy,"[537] he found that the government's evidence failed to establish by the preponderance standard that any of the allegations were actually true: "Simply stated, a mosaic of tiles bearing images this murky reveals nothing about the petitioner with sufficient clarity, either individually or collectively, that can be relied upon by this Court."[538]

It is somewhat unclear whether Judge Leon meant "mosaic" as anything more than a simple metaphor quite distinct from how the mosaic *theory* had been used in previous FOIA cases, but Judge Gladys Kessler soon gave the concept much more detailed treatment in a series of opinions. In *Ali Ahmed*, Judge Kessler's first merits opinion, she responded to the government's argument that the allegations and the pieces of evidence supporting the allegations "should not be examined in isolation."[539] She noted that it "may well be true" that the mosaic "approach is a common and well-established mode of analysis in the intelligence community."[540] But she objected, arguing that application of a mosaic "approach" would tend to confuse the standards of habeas review with the standards of intelligence analysis. As she explained: "[T]he Court's obligation is to make findings of fact and conclusions of law which satisfy the appropriate and relevant legal standards as to whether the government has proven by a preponderance of the evidence that the [p]etitioner is justifiably detained."[541] She added:

> The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different, and certainly cannot govern the Court's ruling.
>
> Even using the [g]overnment's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together—just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse.[542]

---

[537] *Id.* at 149.

[538] *See id.* at 148-49.

[539] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 55 (D.D.C. May 11, 2009).

[540] *Id.* at 56.

[541] *Id.*

[542] *Id.* In *Mohammed*, she used similar language and applied similar skepticism, ultimately granting the detainee's petition. After describing the government's position—which was the same as the one it urged in *Ali Ahmed*, she rejected this "mosaic approach" and argued that the evidence must "be carefully analyzed—major-issue-in-dispute by major-issue-in-dispute—since the whole cannot

Later, in *Al Adahi*, Kessler refined her critique of the mosaic theory and appeared to challenge the very notion that the government might prevail based on circumstantial evidence alone. She first acknowledged that although "the Government avoid[ed] an explicit adoption of the mosaic theory, it is, as a practical matter, arguing for its application to the evidence in this case."[543] She then analyzed the government's evidence, finding that Al Adahi had ties to bin Laden, but that the ties could not "prove" he was part of Al Qaeda. She further stated that the evidence, however, "must not distract the Court from its appropriate focus—the nature of Al-Adahi's own conduct, upon which this case must turn."[544] Though she found that Al Adahi stayed in an Al Qaeda guesthouse, this was "not in itself sufficient to justify detention," and though he had attended an Al Qaeda training camp, this too was "not sufficient to carry the Government's burden of showing that he was" part of, or a substantial supporter of, Al Qaeda.[545] And having thus divided the evidence into its constituent pieces, Judge Kessler denied the likelihood of Al Adahi's membership in Al Qaeda, at least under the command-structure test she adopted with respect to the substantive scope of detention authority: "[U]nder the analysis in *Gherebi*, Petitioner cannot be deemed a member of the enemy's 'armed forces.' He did not, by virtue of less than two weeks' attendance at a training camp from which he was expelled for breaking the rules, occupy "some sort of 'structured' role in the 'hierarchy' of the enemy force."[546]

This methodology was influential with other district judges, several of whom wrote early habeas opinions that tended to view government evidence in a less integrated fashion than the government wished. Judges Robertson, Urbina, and Kennedy, for instance, all wrote opinions that granted detainee petitions after finding that the government's evidence, though probative in some areas, was insufficient on the ultimate question.[547] All of these cases led to government appeals in which the government claimed in part that the district court had unduly atomized the evidence it had found. And all led to outright reversals or the vacating and remanding of the lower court opinions.

The D.C. Circuit's redirection of the lower court on the proper approach to considering evidence in its entirety began with the dramatic repudiation of Judge

---

stand if its supporting components cannot survive scrutiny." Mohammed v. Obama, No. 05-1437, slip op. at 76 (D.D.C Nov. 19, 2009).

[543] Al Adahi v. Obama, No. 05-0280, slip op. at 11 (D.D.C. Aug. 17, 2009). *See also* Hatim v. Obama, 677 F. Supp. 2d 1, 5 n.1 (D.D.C. Dec. 15, 2009) (noting that the government was arguing for [the application of the mosaic theory] "as a practical matter") (quoting *Al Adahi*, slip op. at 11).

[544] *Id*. at 18.

[545] *Id*. at 20, 25. Further, evidence that the petitioner was arrested "in the company of individuals rumored to be part of the Taliban" was "only associational" and thus no more salient. *See id*. at 38.

[546] *Id*. at 24-25 (quoting *Gherebi*, 609 F. Supp. 2d at 68-69).

[547] Abdah v. Obama (Uthman), 708 F. Supp. 2d 9 (D.D.C. Apr. 21, 2010); Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. Mar. 22, 2010) (Robertson, J.); Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. Dec. 15, 2009) (Urbina, J.).

Kessler's methodology in *Al Adahi*. As noted above, Judge Kessler concluded that the government had proven several inculpatory facts by a preponderance of the evidence yet still found for the detainee because she did not believe those facts sufficed to prove that the petitioner was detainable. The D.C. Circuit, in a unanimous panel opinion written by Senior Judge A. Raymond Randolph, found that Judge Kessler's decision was flawed in two respects. First, she had applied a substantive detention standard that had since been superseded by later D.C. Circuit cases. Second, and more to the point for present purposes, Judge Kessler had erred in her overarching approach to the evidence. In a remarkable lecture about the nature of evidence—and without ever employing the term "mosaic"—Judge Randolph wrote that Judge Kessler's approach to interpreting those facts which she found was entirely misguided: Specifically, Judge Kessler had failed to "appreciate conditional probability analysis" which was, in the panel's view, the proper analytical approach for evaluating a given set of evidence:

> The key consideration is that although some events are independent (coin flips, for example), other events are dependent: "the occurrence of one of them makes the occurrence of the other more or less likely . . . ."
>
> . . . .
>
> Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (*e.g.*, whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist.[548]

As Judge Randolph's described Judge Kessler's conclusions:

> This is precisely how the district court proceeded in this case: Al-Adahi's ties to bin Laden "cannot prove" he was part of Al-Qaida and this evidence therefore "must not distract the Court." The fact that Al-Adahi stayed in an al-Qaida guesthouse "is not in itself sufficient to justify detention." Al-Adahi's attendance at an al-Qaida training camp "is not sufficient to carry the Government's burden of showing that he was a part" of al-Qaida. And so on. The government is right: the district court wrongly "required each piece of the government's evidence to bear weight without regard to all (or indeed any) other evidence in the case."[549]

In Judge Randolph's view, Judge Kessler's decision contained

[548] Al Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. July 13, 2010).

[549] *Id.* at 1105-06 (citations omitted).

> a fundamental mistake that infected the court's entire analysis. Having tossed aside the government's evidence, one piece at a time, the court came to the manifestly incorrect—indeed startling—conclusion that "there is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban." When the evidence is properly considered, it becomes clear that Al-Adahi was—at the very least—more likely than not a part of al-Qaida.[550]

Judge Randolph's opinion cast in considerable doubt the lower court's conclusions that the detainee's guesthouse stay and his training-camp attendance were not in and of themselves sufficient to justify his detention.[551] But its key contribution was in changing the nature of the evidentiary approach in general, by insisting that courts should view each allegation in the context of the other probative evidence on record. Summarizing those evidentiary elements, he wrote:

> The evidence against Al-Adahi showed that he did both—stayed at an al-Qaida guesthouse and attended an al-Qaida training camp. And the evidence showed a good deal more, from his meetings with bin Laden, to his knowledge of those protecting bin Laden, to his wearing of a particular model of Casio watch, to his incredible explanations for his actions, to his capture on a bus carrying wounded Arabs and Pakistanis, and so on.[552]

Subsequent D.C. Circuit decisions have followed *Al Adahi* on examining facts in

---

[550] *Id.* at 1106 (citation omitted).

[551] *See id.* at 1108. For example, the panel disagreed with Judge Kessler's analysis of the guesthouse evidence, which she had said was "not in itself sufficient to justify detention." The court wrote that, to the contrary, "Al-Adahi's voluntary decision to move to an al-Qaida guesthouse" was "powerful—indeed 'overwhelming[]'—evidence" that he was part of Al Qaeda. *Id.* The court made a similar conclusion regarding Al Adahi's attendance at Al Farouq. It disagreed with the district court that the evidence that Al Adahi had trained at Al Farouq was insufficient to carry the government's burden of showing that he was a part, or substantial supporter, of enemy forces." *Id.* at 1109. The attendance at the camp had, "to put it mildly," given the court "strong evidence that he was part of al-Qaida." Al Adahi at 1109. Finally, Judge Kessler's conclusion that Al Adahi did not "receive and execute" orders because he violated the camp rule against smoking tobacco was "error": "[H]is violation of a rule or rules did not erase his compliance with other orders." In particular, the evidence that Adahi had received and followed orders while he was at Al Farouq meant that, at a minimum, he had "affiliated himself" with Al Qaeda. The court never goes out of its way to say definitively that one piece of evidence in itself can provide a detainability litmus test. But on several points, *Al Adahi* intimates that some such evidentiary markers would alone tip the scale, and are more important than others.

[552] *Id.* at 1111. There were inklings of the D.C. Circuit's recalibration in its earlier opinions as well. In *Al Odah*, for example, the court explained that the district court had considered evidence that the detainee had been captured without his passport not probative of the government's theory on its own but incriminating "in the context of all the evidence in the case." The district court held that Al Odah was part of Al Qaeda and Taliban forces, and the D.C. Circuit affirmed the decision. 611 F.3d 8, 16 (D.C. Cir. June 30, 2010).

light of their interrelations with one another and the conditional probabilities those relationships create.[553] In *Salahi*, the D.C. Circuit vacated and remanded one of former Judge Robertson's district-court opinions. In that opinion, Judge Robertson had determined that the government had failed to satisfy its burden with respect to whether petitioner was part of the Al Qaeda "command structure," despite concluding that the government had proven that Salahi "was an al-Qaida sympathizer—perhaps a 'fellow traveler,' was in touch with al-Qaida members, and from time to time before his capture had provided sporadic support to members of al-Qaida."[554]

The D.C. Circuit's disagreement with Judge Robertson began with a systematic presentation of how his approach to the evidence had been superseded by the D.C. Circuit's later opinions in two important respects. First, the command-structure approach that Judge Robertson applied had since been rejected in three separate opinions.[555] Second, *Al Adahi* had ushered in a new methodology for how courts should consider evidence: Courts should view the government's evidence "collectively." Writing for the unanimous panel, Judge Tatel quoted from *Al Adahi*:

> [A] court considering a Guantanamo detainee's habeas petition must view the evidence collectively rather than in isolation. Merely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence "may be tossed aside and the next [piece of evidence] may be evaluated as if the first did not exist." The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof.
>
> Although the district court generally followed this approach, its consideration of certain pieces of evidence may have been unduly atomized. For example, the court found that Salahi's "limited relationships" with certain al-Qaida operatives were "too brief and shallow to serve as an *independent* basis for detention." Even if Salahi's connections to these individuals fail independently to prove that he was "part of" al-Qaida, those connections make it more likely that Salahi was a member of the organization when captured and thus remain relevant to the question of whether he is detainable.[556]

The D.C. Circuit followed its *Salahi* decision with *Hatim*, a very brief decision that

---

[553] This point has been cemented in several recent cases. *See e.g.*, Hentif v. Obama, 810 F.Supp.2d 33, 35 (D.D.C. Aug. 1, 2011); Latif v. Obama, 666 F.3d 746, 756 (D.C. Cir. Oct. 14, 2011).

[554] 710 F. Supp. 2d 1, 15-16 (D.D.C. Mar. 22, 2010).

[555] Salahi v. Obama, 625 F.3d 745, 747 (D.C. Cir. Nov. 05, 2010) (listing Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. June 28, 2010); and Awad v. Obama, 608 F.3d 1 (D.C. Cir. June 2, 2010)).

[556] *Id.* at 753 (quoting and citing *Al Adahi*, 613 F.3d at 1105, 1107).

reviewed Judge Urbina's decision granting habeas to the petitioner.[557] Judge Urbina had ruled that the government's evidence was insufficient under the substantive standards he applied. The panel of Judges Henderson, Williams, and Randolph, in their *per curiam* order, vacated this opinion on three separate grounds. Two related to Judge Urbina's narrow vision of the substantive scope of detention authority. The third, however, focused on his approach to the evidence: "the district court appeared to evaluate the evidence based on an approach we have since rejected in *Al-Adahi*."[558] This, it seemed, was just as fatal to Judge Urbina's decision as was his application of the outdated substantive standards.

More recently, in *Uthman v. Obama*, the D.C. Circuit again chastised a district-court judge for taking an unduly atomized view of the evidence. Judge Kennedy had given

> credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.[559]

He found, however, that, "[e]ven taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. . . . Certainly none of the facts respondents have demonstrated are true are direct evidence of fighting or otherwise 'receiv[ing] and execut[ing] orders.'"[560]

The D.C. Circuit saw this evidence very differently, and explained that circumstantial evidence, though perhaps "weak" in some respects, *does* become probative when viewed in the context of other such evidence. As Judge Kavanaugh wrote for the panel in *Uthman*: "the facts, *taken together*, are more than sufficient to show that Uthman more likely than not was part of al Qaeda."[561] He continued:

> Here, as with the liable or guilty party in any civil or criminal case, it remains *possible* that Uthman was innocently going about his business and just happened to show up in a variety of extraordinary places—a kind of Forrest Gump in the war against al Qaeda. But Uthman's account

[557] 632 F.3d 720 (D.C. Cir. Feb. 15, 2011).

[558] *Id.* at 721 (citing *Salahi*, 625 F.3d at 753; *Al Adahi*, 613 F.3d at 1105-06).

[559] Abdah v. Obama (Uthman), 708 F. Supp. 2d 9, 22 (D.D.C. Apr. 21, 2010).

[560] *Id.*

[561] Uthman v. Obama, No. 10-5235, slip. op. at 7 (D.C. Cir. Mar. 29, 2011) (noting, in footnote 5, that the court was only marshalling uncontested facts to reach its conclusion).

> at best strains credulity; and the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda.
>
> . . . .
>
> We do "not weigh each piece of evidence in isolation, but consider all of the evidence taken as a whole." Uthman's actions and recurrent entanglement with al Qaeda show that he more likely than not was part of al Qaeda.[562]

The message from the appeals court from these four cases is stark: Stop considering tiles and look at the larger picture the mosaic describes. Furthermore, it is insufficient for a district judge to merely *say* that he is considering the mosaic as a whole, when in reality he is not truly doing so. If the evidence has latent probative value when viewed in context with other items of evidence, it must be given its due weight.

For the most part, lower court judges seem to have heard the message. Several post-*Al Adahi* decisions have demonstrated, some without express language, that the district-court judges are now very cognizant of the new instructions from the D.C. Circuit. For example, in *Al Kandari*, decided two months after the D.C. Circuit delivered *Al Adahi*, Judge Colleen Kollar-Kotelly was careful to note that the evidence, "taken as a whole," made it more likely than not that Al Kandari was lawfully detained.[563] In Toffiq Al Bihani's case, Judge Walton held that petitioner admissions that he had stayed at Al Qaeda-affiliated guesthouses and associated with Al Qaeda or Taliban operatives after leaving an Al Qaeda-affiliated training camp supported the government's theory that, "at least on its face and taken as a whole," the petitioner was "part of" Al Qaeda at the time of his capture.[564] In *Obaydullah*, Judge Leon invoked the mosaic metaphor when he wrote:

> However, the combination of the explosives, the notebook instructions and the automobile with dried blood all fit together to corroborate the intelligence sources placing both the petitioner and Bostan at the scene aiding fellow bomb cell members who had been accidentally injured while constructing an IED. Thus, combining all of this evidence and corroborated intelligence, the mosaic that emerges unmistakably supports the conclusion that it is more likely than not that petitioner Obaydullah was in fact a member of an al Qaeda bomb cell committed to the

[562] *Id.* at 13-14 (quoting Al Odah v. United States, 611 F.3d 8 (D.C. Cir. June 30, 2010)). The D.C. Circuit took the same approach in *Esmail v. Obama*, its most recent case affirming the district court's conclusions. No. 10-5282, slip op. at 5 (D.C. Cir. Apr. 8, 2011).

[563] Al Kandari v. United States, 744 F. Supp. 2d 11, 59 (D.D.C. Sept. 15, 2010).

[564] T. Al Bihani v. Obama, No. 05-2386, slip op. at 33-34 (D.D.C. Sept. 22, 2010).

> destruction of U.S. and Allied forces. As such, he is lawfully detainable under the AUMF and this Court must, and will, therefore DENY his petition for a writ of habeas corpus.[565]

Judge Leon subsequently cited *Al Adahi* specifically in *Alsabri*:

> In assessing whether the government has met its burden, the court may not view each piece of evidence in isolation, but must consider the totality of the evidence. Even if no individual piece of evidence would, by itself, justify the petitioner's detention, the evidence may, when considered as a whole and in context, nonetheless demand the conclusion that the petitioner was more likely than not "part of" the Taliban or al-Qaida or purposefully and materially supported such forces.[566]

> More recently, in *Hussein v. Obama*, Judge Walton noted that the "facts, when viewed together, are more than sufficient to constitute the level of 'damning' circumstantial evidence that is needed to satisfy the government's burden of proof in this case."[567] Likewise, in *Bostan v. Obama*, he wrote that the "facts, when viewed collectively, demonstrated that the petitioner was more likely than not a 'part of' al-Qaeda."[568] This weighing of the evidence in its totality also appears in the more atypical case of *Khairkhwa v. Obama*, in which the court assessed whether or not the petitioner was a purely civilian Taliban official. Judge Urbina pointed out that it is unclear whether the government's contention that the petitioner served as a military commander during the Taliban's assaults on Mazar-e-Sharif "standing alone, would establish" lawful detention; however, when taken "together with the evidence of the petitioner's involvement with the Afghan mujahideen . . . [and] membership on the Taliban's Supreme Shura" it established that he was not merely a civilian official.[569]

Conclusion

The district court's initial resistance to a mosaic approach to these habeas cases probably reflects discomfort with affirming long-term incarcerations based not on several distinct elements that must individually be proven, as in a typical criminal case, but based on a single, collective assessment of whether the

[565] Obaydullah v. Obama, 744 F. Supp. 2d 344, 351 (D.D.C. Oct. 19, 2010).

[566] Alsabri v. Obama, No. 06-1767, slip op. at 15-16 (D.D.C. Feb. 3, 2011).

[567] Hussein v. Obama, 821 F.Supp. 2d 67, 78 (D.D.C. Oct. 12, 2011).

[568] Bostan v. Obama, 821 F.Supp. 2d 80, 88 (D.D.C. Oct. 12, 2011).

[569] Khairkhwa v. Obama, 793 F.Supp. 2d, 1, 32 (D.D.C. May 27, 2011).

evidence carries the government's ultimate burden, particularly where some or all of the evidence appears flimsy in isolation. But the D.C. Circuit has made clear as a substantive matter that the lower court is not to make a fetish of the government's inability to prove any one fact, and as a methodological matter, that it is to look at the facts the government has shown in light of one another and form a probabilistic judgment based on the more general portrait they paint.

That said, the additional clarity in the D.C. Circuit's recent cases does leave unanswered one major question about the mosaic approach: What should the judge do if the individual factual allegations, if proven, would have probative value if examined collectively, yet some or all of those individual allegations cannot themselves be proven by the appropriate standard of proof? The D.C. Circuit in *Al Adahi* and *Uthman* analyzed only those facts that Judge Kessler believed the government had shown by at least a preponderance of the evidence—in other words, those tiles that were not "inherently flawed," to use language from her earlier opinion.[570] In doing so, the D.C. Circuit implicitly suggested that courts should only factor into the mosaic those factual allegations the government has proven by a preponderance of the evidence in the context of answering the ultimate legal question. Neither decision, however, explicitly says this, and the court left doubt about this proposition when it wrote in *Bensayah* that "two pieces of evidence, each unreliable when viewed alone, [might sometimes] corroborate each other" in a manner sufficient to make a particular proposition proven by a preponderance of the evidence. In short, while emphasizing that mosaic analysis is critical in these cases, the D.C. Circuit has not yet clarified which tiles should and shouldn't show up in the mosaics it wants district judges to examine.

[570] Al Adahi v. Obama, No. 05-0280, slip op. at 12 (D.D.C. Aug. 17, 2009).

Appendix I

Case	Judge	Decision	Appeal status
Abdah v. Obama (Petitioner's name: Uthman)	Kennedy	Habeas granted	Appealed – Reversed and remanded with instructions to deny
Abdah v. Obama (Petitioner's name: Esmail)	Kennedy	Habeas denied	Appealed - Affirmed
Abdah v. Obama (Petitioner's name: Odaini)	Kennedy	Habeas granted	None - Petitioner transferred
Abdah v. Obama (Petitioner's name: Al Latif)	Kennedy	Habeas granted	Appealed
Ahmed v. Obama	Kessler	Habeas granted	None – Petitioner transferred
Al Adahi v. Obama	Kessler	Habeas granted	Appealed – Reversed and remanded with instructions to deny **Cert.* denied
Al Adahi v. Obama (Petitioner's name: Al Assani)	Kessler	Habeas denied	Appealed
Al Adahi v. Obama (Petitioner's name: Al Nadhi)	Kessler	Habeas denied	Appealed
Al Alwi v. Bush	Leon	Habeas denied	Appealed
Al Bihani v. Obama	Leon	Habeas denied	Appealed – Affirmed **Cert.* denied
Al Harbi v. Obama (Petitioner's name: Mingazov)	Kennedy	Habeas granted	Appealed
Al Kandari v. United States	Kollar-Kotelly	Habeas denied	Appealed
Al Mutairi v. United States	Kollar-Kotelly	Habeas granted	None – Petitioner transferred

Al Odah v. United States	Kollar-Kotelly	Habeas denied	Appealed - Affirmed *Cert. denied
Al Rabiah v. United States	Kollar-Kotelly	Habeas granted	None – Petitioner transferred
Al Warafi v. Obama	Leon	Habeas denied	Appealed – Affirmed in part and remanded in part
Almerfedi v. Obama	Friedman	Habeas granted	Appealed
Alsabri v. Obama	Leon	Habeas denied	Appealed
Anam v. Obama (Petitioner's name: Al Madhwani)	Hogan	Habeas denied	Appealed
Awad v. Obama	Robertson	Habeas denied	Appealed - Affirmed *Cert. denied
Barhoumi v. Obama*	Collyer	Habeas denied	Appealed - Affirmed
Basardh v. Obama	Huvelle	Habeas granted	Appealed – Later dismissed†
Boumediene v. Bush (Petitioners' names: Boudella, Boumediene, Idir, Lahmar, and Nechla)	Leon	Habeas granted	None – Petitioner transferred
Boumediene v. Bush (Petitioner's name: Bensayah)	Leon	Habeas denied	Appealed – Reversed and remanded†
Al Ginco v. Obama	Leon	Habeas granted	None – Petitioner transferred
Hatim v. Obama	Urbina	Habeas granted	Appealed – Vacated and remanded
Khalifh v. Obama	Robertson	Habeas denied	Appealed, Later dismissed†

Khan v. Obama	Bates	Habeas denied	Appealed
Mohammed v. Obama	Kessler	Habeas granted	Appealed, Later dismissed†
Obaydullah v. Obama	Leon	Habeas denied	Not yet appealed
Razak Ali v. Obama	Leon	Habeas denied	Appealed
Salahi v. Obama	Robertson	Habeas granted	Appealed – Vacated and remanded
Sliti v. Bush	Leon	Habeas denied	Appealed
Sulayman v. Obama	Walton	Habeas denied	Appealed
Toffiq Al Bihani v. Obama	Walton	Habeas denied	Appealed – Summarily affirmed on motion of the parties†

* Memorandum opinion not available
† Link to PACER document

Appendix II

Case: Boumediene v. Bush (04-1166)

Detainees: Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, and Saber Lahmar

Judge: Richard Leon

Date: November 20, 2008

Decision: Habeas granted for 5 petitioners; denied for 1 petitioner

Government allegations: The government contended that all six petitioners planned to travel to Afghanistan in late 2001 and "take up arms against the U.S. and allied forces." With regard to Belkacem Bensayah alone, the government contended he was an Al Qaeda "member and facilitator."

Petitioner response: The petitioners responded that "the Government ha[d] not shown by a preponderance of the evidence that any of the petitioners planned to travel to Afghanistan to engage U.S. forces, and, even if the Government *had* shown that petitioners had such a plan, a mere plan, unaccompanied by any concrete acts, is not—as a matter of law—'supporting' al-Qaida within the meaning of the Court's definition of 'enemy combatant."

Court findings: The court found that the government's evidence supporting the allegation that the five petitioners planned to travel to Afghanistan to take up arms against the United States was insufficient to support the claim that such a plot even existed. The court found that the government presented sufficient corroborating evidence to link Bensayah alone to Al Qaeda as a facilitator. The court found that the Government "established by a preponderance of the evidence that it [was] more likely than not Mr. Bensayah not only planned to take up arms against the United States but also facilitate the travel of unnamed others to do the same." The court thus denied Bensayah's petition for habeas and granted habeas to Boumediene, Nechla, Boudella, Idir, and Saber.

Appellate disposition: The government did not appeal the outcome as to the five petitioners whose petitions Judge Leon granted. The appeal as to petitioner Bensayah was remanded for further proceedings.

On appeal, the petitioner argued that the government's evidence was insufficient to support his detention. In particular, he argued that that items of evidence on which the district court relied were "categorically insufficient to corroborate" certain of the government's allegations. Because the government abandoned its claim that Bensayah was detainable for his "support" of the enemy, the D.C. Circuit vacated and remanded the case to the district court to take additional evidence and determine whether the petitioner was "functionally part of" Al Qaeda. It wrote:

> The evidence upon which the district court relied in concluding Bensayah "supported" al Qaeda is insufficient . . . to show he was part of that organization. Accordingly, we reverse the judgment of the district court and remand the case for the district court to hear such evidence as the parties may submit and to decide in the first instance whether Bensayah was functionally part of al Qaeda.

Case: Al Alwi v. Bush (05-2223)

Detainee: Moath Hamza Ahmed Al Alwi

Judge: Richard Leon

Date: December 30, 2008

Decision: Habeas denied

Government allegations: As the court summarized, the government alleged that the petitioner: (1) "stayed at guesthouses closely associated with the Taliban and al Qaeda;" (2) "surrendered his passport to a person at the guesthouse"; (3) "received military training at two separate camps closely associated with al Qaeda and the Taliban"; (4) "supported Taliban fighting forces on two different fronts in the Taliban's war against the Northern Alliance"; (5) stayed with the fighting force until after the United States initiated Operation Enduring Freedom in October 2001; (6) fled Khowst to Pakistan, but "only after his unit was subjected to two-to-three U.S. bombing runs"; and (7) served as a bodyguard to Osama bin Laden.

Petitioner response: The petitioner contended that he had "no association with Al Qaeda and that his support for, and association with, the Taliban was minimal and not directed at U.S. or coalition forces." He denied ever having been a bodyguard for Osama bin Laden.

Court findings: The court found that the government established by a preponderance of the evidence that the petitioner (1) stayed in a guest house closely associated with the Taliban and Al Qaeda; (2) surrendered his passport upon arrival at a guest house in Afghanistan; (3) "received training at one particular Taliban-related camp;" (4) and subsequently "traveled to two different fronts over the following year to support Taliban fighting forces;" and (5) stayed "with his Taliban unit until well after September 11, 2001, not leaving until after two-to-three U.S. bombing runs." The court determined that it had no need to decide whether the petitioner served as a bodyguard to Osama bin Laden or received training at the Al Farouq camp, as the other findings adequately met the definitional requirement of an "enemy combatant."

Case: Sliti v. Bush (05-429)
Detainee: Hisham Sliti
Judge: Richard Leon
Date: December 30, 2008
Decision: Habeas denied

Government allegations: The government alleged, as the court summarized, that the petitioner: "(1) traveled as an al Qaeda recruit to Afghanistan . . . at the expense of known al Qaeda associates and on a false passport provided to him by the same; (2) attended a Tunisian guesthouse . . . run by known al Qaeda associates; (3) received military training at a nearby camp affiliated with al Qaeda; (4) was arrested by and escaped from Pakistani authorities while carrying a false passport and an address book bearing the names of certain radical extremists; and (5) lived for a sustained period of time at a mosque in Afghanistan . . . based on the personal permission of its benefactor, who was a known al Qaeda terrorist." The government also contended that Sliti was "instrumental, along with others associated with the Tunisian guesthouse, in starting a terrorist . . . organization with close ties to al Qaeda."

Petitioner response: The petitioner acknowledged that he traveled to Afghanistan with the financial assistance, but claimed to have gone there only to get off drugs and find a wife. He also acknowledged briefly visiting a guest house but says he did not get along with the other residents. He denied attending any military training or having an address book on him when first detained by Pakistani authorities. While he admitted to living in the mosque, he claimed he only lived there because he had nowhere else to live. He denied any involvement with and any role in founding the terrorist organization.

Court findings: The court found that the petitioner: (1) traveled to Afghanistan on a false passport and with "considerable financial support provided to him by certain extremists with well-established ties to al Qaeda"; (2) "spent time at different stages of his trip with individuals closely associated with al Qaeda"; (3) stayed in a Tunisian guest house frequented by individuals "with close ties to terrorist organizations, including a senior al Qaeda operative"; and (4) "knew where the local military camp was located, what it looked like, and what code words were used by those attending." The court determined that reasonable inferences could be drawn that the petitioner traveled to Afghanistan as an Al Qaeda recruit and that there the petitioner more likely than not attended the local military training camp in Jalalabad. Habeas was denied.

Case: El Gharani v. Bush (05-429)

Detainee: Mohammed El Gharani

Judge: Richard Leon

Date: January 14, 2009

Decision: Habeas granted

Government allegations: The government alleged that El Gharani: "(1) stayed at an al Qaeda-affiliated guesthouse in Afghanistan; (2) received military training at an al Qaeda-affiliated military training camp . . . ; (3) served as a courier for several high-ranking al Qaeda members; (4) fought against U.S. and allied forces at the battle of Tora Bora . . . ; and (5) was a member of an al Qaeda cell based in London."

Petitioner response: The petitioner contended that he traveled to Pakistan at the age of 14 to escape discrimination, study computers and English, and improve his life, and remained there until his arrest in 2001. He denied allegations that he went to Afghanistan, stayed at an Al Qaeda guesthouse, received military training, and fought in the battle of Tora Bora. He denied "ever being a member of an al Qaeda cell based in London."

Court findings: The court found that the government "failed to establish by a preponderance of the evidence that petitioner el Gharani was 'part of or supporting' al Qaeda or the Taliban prior to or after the initiation of force by the U.S. in 2001." Therefore, the court granted Al Alwi's petition.

Case: Al Bihani v. Obama (05-1312)

Detainee: Ghaleb Nassar Al Bihani

Judge: Richard Leon

Date: January 28, 2009

Decision: Habeas denied

Subsequent Disposition: Decision Affirmed by D.C. Circuit Court of Appeals

Government allegations: The government alleged that the petitioner: "(1) stayed at an al Qaeda affiliated guesthouse in Afghanistan; (2) received military training at an al Qaeda affiliated training camp, and (3) supported the Taliban in its fight against the Northern Alliance and U.S. forces as a member of the 55th Arab Brigade."

Petitioner response: The petitioner admitted to traveling to Afghanistan to fight on behalf of the Taliban against the Northern Alliance. He denied intending to take up arms against U.S. forces, membership in either the Taliban or Al Qaeda, or ever having received military training. He claimed that his role with the 55th Arab Brigade was limited to cooking for the forces.

Court findings: The court found that the petitioner stayed at Al Qaeda-affiliated guesthouses, "admitted to serving under an al Qaeda military commander" and maintained "close ties to Taliban and al Qaeda affiliated forces as a member of the Arab Brigade." The court found that the petitioner's serving as a cook for an Al Qaeda-affiliated fighting unit that directly supported the Taliban was sufficient to meet the court's definition of "support." The petitioner need not have actually fired a weapon against the U.S. or coalition forces for the government to meet its burden. Based on these findings, the court denied Al Bihani's petition.

Appellate Disposition: Affirmed.

The petitioner argued that the district court had erred in using an improper detention standard pursuant to the AUMF, and, in particular, that the government's reliance on "support," or even "substantial support" of Al Qaeda or the Taliban as an independent basis for detention violates international law. He also argued that the district court had erred in adopting certain procedural rules in the course of deciding his case.

The court wrote that the AUMF authorized the President to lawfully detain individuals who were either members or who purposefully and materially supported Al Qaeda, the Taliban, and associated organizations:

> . . . Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "an 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," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces.

Because the district court had found that Al Bihani had rendered services to the 55th Arab Brigade that included "traditional food operations essential to a fighting force and the carrying of arms," he was detainable under the AUMF. It further opined that the petitioner could be held until the end of the conflict, which had not yet occurred.

The court also rejected each of Al Bihani's procedural claims. The district court had not erred in its adoption of a preponderance of the evidence standard of proof, its admission of hearsay evidence, its decisions not to hold a separate evidentiary hearing or to manage the discovery in a certain manner. Further, the district court had not impermissibly shifted the burden to the petitioner to prove the unlawfulness of his detention, and had not impermissibly presumed the accuracy of the government's evidence.

Case: Hammamy v. Obama (05-429)

Detainee: Hedi Hammamy

Judge: Richard Leon

Date: April 2, 2009

Decision: Habeas denied

Government allegations: The government alleged that the petitioner was an "enemy combatant" who was "part of or supporting al Qaeda or Taliban forces." Specifically, the court alleged that the petitioner: "(1) fought with Taliban or al Qaeda forces against U.S. and Afghan forces during the battle of Tora Bora, and (2) was a member of an Italy-based terrorist cell that provided support to various Islamic terrorist groups. . . . In that regard, the Government allege[d] that Hammamy left Italy, in part, to avoid being arrested by Italian authorities for his involvement in this particular terrorist cell . . . [and] attended a terrorist training camp in Afghanistan and was involved in an organization in Pakistan . . . the identity of which is too secret for an unclassified description."

Petitioner response: The petitioner denied fighting in the battle of Tora Bora, or ever having been a member of a terrorist cell in Italy. He further denied "ever attending military training camps in Afghanistan or being part of any organization in Pakistan that has engaged in terrorist conduct."

Court findings: The court found that the government had established that: (1) the petitioner's "identity papers were found after the Battle of Tora Bora in the Al Qaeda cave complex"; (2) an intelligence report described "an extensive Italian law enforcement investigation into [the petitioner's] . . . membership in, and the activities of, a terrorist cell that provided assistance and support to various Islamist terrorist organizations"; (3) Italian law enforcement authorities had charged "Hammamy and several associates with supporting terrorism, in part, by furnishing false documents and currency"; and (4) the petitioner had left Italy "to avoid being arrested." Therefore, the court denied Hammamy's petition.

Appellate disposition: Appeal dismissed (*sub. nom Al Hadi v. Obama*) following grant of the parties' joint motion for dismissal.

Case: Basardh v. Obama (05-889)

Detainee: Yasin Muhammed Basardh

Judge: Ellen Segal Huvelle

Date: April 15, 2009

Decision: Habeas granted

Government allegations: The factual allegations underpinning Basardh's initial detention remained "classified or protected" and were not publically documented, but the government contended that the AUMF, as interpreted by *Hamdi*, authorized it "to imprison [Basardh] regardless of whether he continue[d] to pose any threat of returning to the battlefield so long as the United States [was] still engaged in hostilities with al-Qaeda or the Taliban." The United States presented evidence that hostilities continued, but did not "offer an opinion" as to whether Basardh was "likely to rejoin" U.S. enemies upon release.

Petitioner response: The petitioner argued that he was being unlawfully detained because, based on his "post-detention conduct and his alienation from enemy forces," he posed no threat of returning to the battlefield. In addition, Basardh "cooperated his entire stay while [at Guantánamo]," and his cooperation had endangered his life. ARB proceedings recognized "that whether a detainee presented a current threat . . . [was] relevant to a determination as to whether he should be "release[d], transfer[red], or continue[d] to [be] detain[ed]."

Court findings: The court found that Basardh, because of his extensive, publicly known cooperation with the U.S. authorities, was no longer detainable. Because this cooperation had in fact endangered his life, Basardh "could no longer constitute a threat to the United States." The court also concluded that the "clear language of the AUMF, as interpreted in *Hamdi*," required the court to consider whether the petitioner possessed a "current likelihood of rejoining the enemy" in assessing whether his continued detention was authorized under the law. Based on the evidence and the legal standard of detention, the court found that Basardh could "no longer constitute a threat to the United States" because "any prospect of his rejoining those entities defined in the AUMF [was], at best, a remote possibility." The court thus granted Basardh's petition.

Appellate disposition: Appeal dismissed.

Case: Ali Ahmed v. Obama (05-1678)

Detainee: Alla Ali Bin Ali Ahmed

Judge: Gladys Kessler

Date: May 11, 2009

Decision: Habeas granted

Government allegations: The government alleged that the petitioner: (1) "received military training in Afghanistan;" (2) "fought in Afghanistan;" (3) used a *kunya* (a kind of nickname); (4) traveled in Afghanistan in 2001 with Al Qaeda, Taliban members, or both and (5) stayed at a guest house with Al Qaeda, Taliban members, or both.

Petitioner response: The petitioner denied "ever going to Afghanistan, training at an Al-Qaida camp, fighting against anyone, or being a member of a terrorist group." He claimed to have gone to Pakistan before September 11, 2001 to "find a religious school at which to study the Koran" and admitted to staying in a guest house for Yemenis in Pakistan, where he was arrested in March 2002.

Court findings: The court found that the government's evidence was based entirely on unreliable witnesses whose testimony was of little or no weight. "As to the claim of participating in fighting, the Government produced virtually no credible evidence; as to the claim of receiving military training, the conclusory nine-word hearsay statement . . . does not show that it is more likely than not that he received such training; as to the claim that he traveled to Afghanistan in 2001 . . . [the Government] did not prove [this claim]; as to the evidence that he stayed at [redacted], the Government . . . utterly failed to present evidence that he was a substantial supporter of al-Qaida and/or the Taliban . . . as to the Government's position about the significance of locating Petitioner's alleged kunya on a list, the Court finds the argument without any merit whatsoever." As a consequence, the government was unable to meet its burden of proof. The petitioner's request for habeas was granted.

Case: Al Ginco v. Obama (05-1310)

Detainee: Abdulrahim Abdul Razak Al Ginco (Janko)

Judge: Richard Leon

Date: June 22, 2009

Decision: Habeas granted

Government allegations: The government alleged that the petitioner: "(1) traveled to Afghanistan to participate in jihad on behalf of the Taliban; (2) stayed for several days at a guesthouse used by Taliban and Al Qaeda fighters and operatives in early 2000, where he helped clean some weapons; and (3) thereafter attended the Al Farouq training camp for a brief period of time." The government conceded, however, that Al Qaeda imprisoned and brutally tortured the petitioner into falsely admitting to being an American spy, which led to his subsequent 18 month imprisonment by the Taliban. The government contended that notwithstanding these events, the petitioner was still "a part of" Al Qaeda and/or the Taliban when taken into custody.

Petitioner response: The petitioner denied "going to Afghanistan to participate in jihad and, while he admits to staying briefly at a Taliban guesthouse, he claims he did so against his will." He was likewise taken to "involuntarily" to the Al Farouq training camp. He claimed that while at the training camp, he only received small arms training and was asked to leave after 18 days. At that point, Al Qaeda leaders accused him of being a spy and tortured and imprisoned him. The petitioner stressed that "by the point in time he was taken into U.S. custody in 2002 he was a free man" and that "even if he had had a prior relationship with al Qaeda or the Taliban in 2000, his subsequent torture and imprisonment . . . vitiate[d] that relationship to such a degree that he no longer was 'part of' al Qaeda or the Taliban."

Court findings: The court found that, given the petitioner's "limited and brief relationship with al Qaeda (and/or the Taliban)," his expulsion from the training camp, and his subsequent torture and imprisonment, no remnant of the preexisting relationship between the petitioner and Al Qaeda existed at the time of his capture. Therefore, the court held that the government could no longer lawfully detain the petitioner and granted the petition.

Case: Al Mutairi v. United States (02-828)

Detainee: Khalid Abdullah Mishal Al Mutairi

Judge: Colleen Kollar-Kotelly

Date: July 29, 2009

Decision: Habeas granted

Government allegations: The government alleged that: (1) "Al Mutairi trained with and became part of the Al-Wafa al-Igatha al-Islamia ("al Wafa") organization, which the Government argue[d] [was] an Al Qaeda-associated force; and (2) Al Mutairi trained and joined the forces of al Qaeda." The Government offered six areas of evidence in support of the petitioner's detention: "(1) the timing and path of his travel; (2) the loss of his passport and related inability to account for its loss; (3) his contacts with al Wafa, (4) [REDACTION] (5) [REDACTION], and (6) allegations of earlier experiences with extremist activity." At the merits hearing, the Government raised two additional allegations against the petitioner: (1) "that Al Mutairi fought with Osama bin Laden in Afghanistan in 1991," and (2) "that he attended a meeting in Pakistan of Lashkar-e Tayyiba ('LeT'), a designated terrorist organization with ties to al Qaida."

Petitioner response: The petitioner claimed he left Kuwait in 1999 with $15,000, which he planned to spend building a mosque. He claimed he donated some $6,000 of this money to charity, and subsequently attempted to return home through Pakistan, but could not because the border was sealed. He stayed with a friend for an additional three weeks, during which time he traveled to a village near Khowst. Prior to leaving Kabul, his bag, containing all his remaining funds and his passport, was stolen. He hired a guide to take him to the Pakistani border but was apprehended by Pakistani guards, who transferred him to American custody.

Court findings: The court described several problems with the petitioner's versions of events, but found that the government was nonetheless unable to meet its burden of proof. The court found the government had established that: (1) the petitioner's travel route in Afghanistan was consistent with the path taken by Al Qaeda recruits into Afghanistan to join jihad; (2) the petitioner's "travel from Kabul to a village near Khowst was consistent… with the route Taliban and Al Qaeda fighters" used when fleeing the Tora Bora mountains; and (3) the petitioner's lack of a passport was consistent with the behavior of an individual

who had joined Al Qaeda. The court acknowledged that this evidence demonstrated that the petitioner's conduct was consistent with an individual who may have joined Al Qaeda, but clarified that nothing in the record went beyond speculation that the petitioner actually did so. As the government had not established that the petitioner became "part of" a terrorist organization, the court granted Al Mutairi's petition.

Detainee: Adham Mohammed Ali Awad

Judge: James Robertson

Date: August 19, 2009

Decision: Habeas denied

Government allegations: As the court summarized, the government alleged that the petitioner: "volunteered or was recruited for Jihad soon after September 11, 2001 and traveled from his home . . . to Afghanistan; that he trained at the Al Qaida 'Tarnak Farms' camp outside Kandahar; that [he] and a group of other Al Qaida fighters were injured in a U.S. air strike at or near the airport in Kandahar and went to Mirwais Hospital for treatment; that these men then barricaded themselves in a section of the hospital; that U.S. and associated forces laid siege to the hospital; that Awad's comrades gave him up because they could not care for his severely injured [REDACTED] and that, after Awad's capture, his al Qaida comrades fought to the death."

Petitioner response: The petitioner claimed he traveled "to Afghanistan in mid-September 2001 in order to visit another Muslim country for a few months, intending to return home after his visit; that in early November 2001 he was injured and knocked unconscious during an air raid while walking through a market in Kandahar; that he woke up in Mirwais Hospital after part of his [redacted]; that he was heavily medicated, floated in and out of consciousness, slept constantly, and could barely sit up; and that he remained in this condition until his capture."

Court findings: The court found that although the evidence against the petitioner was "gossamer thin," the combination of the petitioner's confessed reasons for traveling to Afghanistan and the correlation of his name on several lists clearly tied to Al Qaeda made it "more likely than not" that he was at least briefly "part of" Al Qaeda. Therefore, the court denied the petition.

Appellate disposition: Affirmed.

The petitioner argued that the district court erred in relying on certain individual pieces of evidence, that two of the district court's factual findings were favorable to him and should have been given more credit, and that it was clear error for the district court to find that he was "part of" Al Qaeda based on his joining the other fighters behind the barricade in Mirwais Hospital. The D.C. Circuit wrote:

> Evidence from multiple sources clearly supports the proposition that in December of 2001 Awad joined a group of al Qaeda fighters who had barricaded themselves inside a hospital and that these a1 Qaeda fighters treated Awad as one of their own. The correctness of the district court's factual findings is further confirmed by the appearance of Awad's name on several al Qaeda documents.

In addition, the D.C. Circuit found that Awad's legal challenges—regarding the district court's use of the preponderance standard and rejection of a future-dangerous requirement—were foreclosed by its prior opinions. The D.C. Circuit affirmed the lower court's decision.

Case: Al Adahi v. Obama (05-280)
Detainee: Mohammed Al-Adahi
Judge: Gladys Kessler
Date: August 17, 2009
Decision: Habeas granted

Government allegations: The government alleged that the petitioner: (1) "had close familial ties to prominent members of the jihad community in Afghanistan;" (2) "stayed at al Qaida and/or Taliban guesthouses during his stay in Afghanistan in 2001;" (3) "attended al-Qaida's Al Farouq training camp in or around August of 2001" and served as an instructor there; (4) served as a body guard for Osama bin Laden; (5) "fought for al-Qaida, stayed in the company of al-Qaida fighters, and then was arrested on a bus while fleeing from Afghanistan."

Petitioner response: The petitioner contended that he traveled to Afghanistan to escort his newlywed sister to unite her with husband and to attend a celebration of the marriage. He stayed at a house, which appeared to be independent from any Al Qaeda structure, during the celebration. He briefly met Bin Laden, who hosted the celebration, at the wedding and again a few days later. He also met several of Bin Laden's bodyguards and temporarily attended training at Al Farouq to "satisfy his 'curiosity' about jihad." He was, however, expelled from Al Farouq for failure to take orders, and denied ever serving as an instructor at Al Farouq or as a bodyguard to Bin Laden.

Court findings: The court found that, while the petitioner stayed in a guest house and took brief training, there was no reliable evidence to suggest that the petitioner acted as a trainer, fought for Al Qaeda, or provided any actual support to Al Qaeda. The court ruled that the petitioner's relationship with Al Qaeda was insufficient to justify his continued detention and, therefore, granted the petition.

Appellate disposition: Reversed and remanded with instructions to deny the petition.

The D.C. Circuit found that the district court failed to appreciate "conditional probability" analysis in its assessment of the various allegations she found the government to have shown by a preponderance of the evidence. The D.C. Circuit wrote that the district court's conclusion

was simply not a "permissible view[] of the evidence." And it reached this conclusion through a series of legal errors, as we have discussed. We have already mentioned the suggestion in Al-Bihani that attendance at either an al-Qaida training camp or an al-Qaida guesthouse "would seem to overwhelmingly, if not definitively, justify" detention. . . .The evidence against Al-Adahi showed that he did both—stayed at an al-Qaida guesthouse and attended an al-Qaida training camp. And the evidence showed a good deal more, from his meetings with bin Laden, to his knowledge of those protecting bin Laden, to his wearing of a particular model of Casio watch, to his incredible explanations for his actions, to his capture on a bus carrying wounded Arabs and Pakistanis, and so on. One of the most damaging and powerful items of evidence against him is classified. In all there can be no doubt that Al-Adahi was more likely than not part of al-Qaida.

Case: Al Odah v. United States (02-828)

Detainee: Fawzi Khalid Abdullah Fahad ***Al Odah***

Judge: Colleen Kollar-Kotelly

Date: August 24, 2009

Decision: Habeas denied

Government allegations: The government alleged that the petitioner: (1) "traveled to Afghanistan seeking to join the Taliban in its fight against the Northern Alliance;" (2) took a route – Dubai, Karachi, Quetta, Spin Buldak, and Kandahar – that was "followed by some individuals who were seeking to enter Afghanistan for purposes of jihad;" (3) "followed a standard operating procedure for those entering al Qaida and Taliban-associated guesthouses," including relinquishing his "passport, identification, money, or other travel documents when entering a guesthouse or safe-house;" (4) was transported to a camp outside Kandahar that "was more likely than not Al Farouq;" (5) "received one day of training on an AK-47;" and (6) "eventually traveled to Jalalabad and the Tora Bora mountains," where he was captured with an AK-47.

Petitioner response: The petitioner admitted that he "traveled to Afghanistan in August 2001 and requested to meet with a Taliban official upon his arrival; that this same Taliban official brought him to a Taliban-operated camp near Kandahar . . . that he took one day of training with an AK-47 . . . that the Taliban official sent him to stay with an associate in Logar, Afghanistan, after September 11, 2001; that he surrendered his passport and other possessions to this individual; that he met with individuals who were armed and appeared to be fighters; that he accepted an AK-47 from these individuals; and that he traveled with his AK-47 into the Tora Bora mountains . . . [where he remained] during the Battle of Tora Bora, and was captured shortly thereafter." He contended that he traveled to Afghanistan in 2001 with money from his grandmother to "teach poor or needy people for two weeks." He stated he only stayed in Dubai for one night as part of his travel to Afghanistan and "wanted to leave Afghanistan after September 11" but "did not know how to safely exit the country."

Court findings: The court found that the government "met its burden to show by a preponderance of the evidence that Al Odah became part of Taliban and al Qaeda forces." It concluded that the petitioner's statements regarding his activities upon entering Afghanistan "lack[ed] credibility" and that the evidence "support[ed] a reasonable inference that Al Odah may have also been traveling

to Afghanistan to engage in jihad, and not to teach the poor and needy for two weeks." Furthermore, the court found that the petitioner's claim that his travels within Afghanistan after September 11 were not credible or motivated by "his desire to leave" the country. The court concluded that the petitioner "made a conscious decision to become part of the Taliban's forces, and . . . [did not become] innocently ensnared in fighting after unsuccessfully attempting to leave the country." Finally, the court found that it was [more likely than not that the camp [the petitioner attended] was Al Farouq, which also [made] it more likely than not, when combined with the other evidence on the record, that Al Odah became a part of the forces of the Taliban and al Qaeda." Therefore, the petitioner's request for habeas was denied.

Appellate disposition: Affirmed

Al Odah appealed the district court's denial, arguing that government could deprive a person of his liberty only if it met its evidentiary burden by clear and convincing evidence. The D.C. Circuit wrote the argument failed "under binding precedent in this circuit. It is now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF." Al Odah also challenged the district court's admission of hearsay evidence, but the D.C. Circuit disagreed, writing that "the Supreme Court in *Hamdi* stated that '[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government' in this type of proceeding." Finally the D.C. Circuit held that none of the district court's evidentiary findings constituted clear error, and so the D.C. Circuit affirmed the lower court's decision.

Case: Al Rabiah v. United States (02-828)

Detainee: Fouad Mahmoud Al Rabiah

Judge: Colleen Kollar-Kotelly

Date: September 17, 2009

Decision: Habeas granted

Government allegations: The government alleged that the petitioner: (1) "traveled to Afghanistan for approximately two weeks in July 2001 where he met Usama Bin Laden on four occasions and then returned to Kuwait until [a subsequent trip to the country] in October 2001"; (2) "fought at Tora Bora and took a leadership position by distributing supplies and managing resource disputes"; (3) was "part of al Qaeda because he traveled through Afghanistan with members of al Qaeda, stayed at al Qaeda guesthouses, and surrendered his passport to al Qaeda members pursuant to its standard operating procedures."

Petitioner response: The petitioner responded that he had "a history of traveling to impoverished and/or war-torn countries" to do charitable work. He contended that he traveled to Afghanistan "to complete a fact-finding mission related to Afghanistan's refugee problems and the country's non-existent medical infrastructure," and, as he had done in the past, filed a request-for-leave form with his employer. Once in Afghanistan, he found himself unable to leave; he wrote a letter to his family explaining that he had spent ten days helping refugees and that he was unable to leave Afghanistan via his entrance route. He argued that self-incriminatory statements he gave that appeared to support the government's allegations were obtained through coercion and threats.

Court findings: The court found that government's claims relied primarily on testimony from other detainees and from statements the petitioner made while detained. For various reasons, the court found that the government's evidence lacked reliability and credibility. Specifically, it found that the petitioner's statements were obtained either through coercive methods or under the taint of coercion and in violation of the Army Field Manual and the Geneva Conventions. The court concluded that the petitioner probably traveled to Afghanistan for charitable purposes, as he claimed, and that the government therefore failed to meet its burden of proof. The court granted the petition.

Case: Mohammed v. Obama (05-1347)

Detainee: Farhi Saeed Bin Mohammed

Judge: Gladys Kessler

Date: November 19, 2009

Decision: Habeas denied

Government allegations: The government alleged that the petitioner: (1) used an alias both before and after his detention; (2) used a false passport; (3) attended "two mosques in London" where Al Qaeda recruited people for jihad; (4) was recruited at one of them and traveled to Afghanistan along a route taken by Al Qaeda recruits; (5) stayed at a guest house in Afghanistan linked to Al Qaeda training; (6) trained at a terrorist training camp; and (7) participated in battle on behalf of the Taliban, Al Qaeda, or both.

Petitioner response: The petitioner denied any connection to terrorism. He contended that he left Algeria for family-related reasons, and to search for work in Europe. He admitted he had used fake names and false identification; worshipped at the mosques; obtaining funds from a man at a mosque to pay for his travel to Afghanistan; and staying at a guesthouse while in Afghanistan. He also maintained the London mosques which he attended "were simply centers of worship and community," and that he was "generally ignorant of the mosques' status in any terrorist network." He claimed that he traveled to Afghanistan because he was told that he could find a Swedish woman in Afghanistan whom he could marry to obtain lawful European residency.

Court findings: The court found the petitioner's story "patently fantastic." While the government proved
"by far more than a preponderance of the evidence" that the petitioner "was prepared to join al-Qaida and/or the Taliban, and that he set out for Afghanistan with the intention of doing so," traveled extensively in Europe using false names and documents, attended mosques in London with known ties to "radical, fundamentalist clerics advocating jihad," and stayed in guesthouses linked to Al Qaeda while in Afghanistan, the court found that the government did not provide sufficient evidence to suggest that the detainee actually trained under or fought for Al Qaeda. In the absence of such evidence, the court found, the government had not proved the detainee actually joined or substantially supported enemy forces. Therefore, the court granted the petition.

Appellate disposition: Appeal dismissed as moot.

Case: Hatim v. Obama (05-1429)

Detainee: Saeed Mohammed Saleh Hatim

Judge: Ricardo M. Urbina

Date: December 15, 2009

Decision: Habeas granted

Government allegations: The government alleged that the petitioner: (1) "trained at an al-Qaida terrorist camp;" (2) "stayed at al-Qaida and Taliban-affiliated safehouses;" (3) "operated under command of al-Qaida and the Taliban at the battlefront against the Northern Alliance;" and (4) "was identified by a witness as having fought in the battle of Tora Bora against the United States and its coalition partners." An additional allegation was reacted from the public opinion.

Petitioner response: The petitioner acknowledged that he was in Afghanistan when hostilities began in the fall of 2001. He claimed that he "fled to Pakistan out of fear" and that he was never part of Al Qaeda, the Taliban, or any associated force. He asserted that he "was never at al-Farouq" and that he was not part of al-Qaida or the Taliban's command structure at the time of his capture. Furthermore, the petitioner contended he was held for six months in Afghanistan, where he was beaten, permanently injured, and threatened with rape; he maintained that any inculpatory statements he made were given out of fear of further abuse.

Court findings: The court found that much of the government's evidence—regarding the allegations that the petitioner attended at Al Farouq, fought against the Northern Alliance, stayed at Al Qaeda guesthouse in Kabul, and fought in the battle at Tora Bora—lacked credibility and reliability. For many of the allegations, the court found that the evidence had been obtained either by torture or under the taint of prior torture. The credibility of the petitioner's alleged confessions were further called into question by a psychiatric record indicating the petitioner suffered from "severe psychological problems" while at Guantánamo. The court ruled that, while the government had established that the petitioner was captured in Pakistan without his passport, this alone was insufficient to justify his detention. The court granted the habeas petition.

Appellate disposition: Reversed and remanded for further proceedings.

The D.C. Circuit held that that the district court's determination that membership was the only acceptable ground for detention was "directly contrary to *Al-Bihani v. Obama*." Further, the district court erred in requiring the government to show Hatim was part of the "command structure" of Al Qaida or the Taliban to prove membership. Additionally, the D.C. Circuit wrote, "the district court appeared to evaluate the evidence based on an approach we have since rejected in *Al-Adahi*."

Case: Anam v. Obama (04-1194)

Detainee: Musa'ab Omar Al Madhwani

Judge: Thomas F. Hogan

Date: January 6, 2010

Decision: Habeas denied

Government allegations: The government alleged that the petitioner: "(i) traveled to Afghanistan with the intention of receiving weapons training; (ii) trained to use firearms at an al-Qaida training camp; (iii) traveled and associated with al-Qaida members; and (iv) engaged in a two-and-one-half hour firefight with Pakistani authorities."

Petitioner response: The petitioner contended that he traveled to Afghanistan with no intention of fighting and characterized "himself as a hapless individual" who got caught up in circumstances beyond his control. He admitted to traveling with Al Qaeda members and attending Al Farouq for twenty-five days. He further contended that many of the self-incriminatory statements he gave were extracted through harsh treatment and coercion while he was in prison in Afghanistan or out of fear on renewed abuse at Guantánamo.

Court findings: The court found that, although some of the statements the government relied on consisted of statements the petitioner provided under the taint of prior torture, the petitioner's later statements at his CSRT and ARB hearings were not the products of coercion; these statements alone were sufficient to justify continued detention of the petitioner. Relying on these statements, the court found that, while the petitioner neither traveled to Afghanistan with the intention of receiving weapons training nor participated in the firefight with Pakistani authorities, the government had shown that the petitioner "voluntarily attended an al-Qaida training camp for approximately twenty-five days and then traveled, associated, and lived with members of al-Qaida over the course of one year." These findings, the court found, made it more likely than not that petitioner was "part of" Al Qaeda. The court denied the petition.

Case: Al Adahi v. Obama (Assani) (05-280)
Detainee: Fahmi Salem Al-Assani
Judge: Gladys Kessler
Date: February 24, 2010
Decision: Habeas denied

Government allegations: The government alleged that the petitioner (1) was recruited by an al-Qaida operative and traveled to Afghanistan to join al-Qaida forces; (2) stayed at al-Qaida guesthouses and knew the guesthouses were affiliated with al-Qaida; (3) received military training at al-Qaida training camps and knew the camps were operated by al-Qaida; (4) served as a bodyguard for Usama Bin Laden; (5) knowingly served with an al-Qaida unit at Tora Bora and participated in hostilities against the United States or its allies; and (6) was captured on or near the battlefield at Tora Bora.

Petitioner response: The petitioner responded that he traveled to Afghanistan to receive military training, and not to fight. He also said that he stayed at these guesthouses but disputed that they were Al Qaeda safehouses, adding that even if they were, he did not know it. He admitted to spending approximately two weeks at the Al Farouq training camp in order to receive training on the Kalashnikov rifle but claimed he was not aware of Al Farouq's Al Qaeda affiliation during his time spent there. Finally, he said that by the time that he "learned that al-Farouq was run by al-Qaida, he had surrendered his passport and his money, and had no means of transporting himself out of Afghanistan" and thus "had no choice but to go along."

Court findings: The court found that the "Government has met its burden of demonstrating that Petitioner was recruited by al-Qaida members in Yemen, that he subsequently traveled at no cost to himself, and through al-Qaida-associated guesthouses"; "that he received military training at al-Qaida's Al Farouq camp, that while at the camp he became aware of its connection to al-Qaida and Usama Bin Laden but did not . . . dissociate himself from camp commanders"; "that he traveled to Tora Bora"; "that he obeyed orders . . . and that, after leaving Tora Bora . . . he was injured by Coalition bombs and captured." Therefore, the court denied Al Assani's petition.

Case: Al Adahi v. Obama (Al Nahdi) (05-280)

Detainee: Suleiman Awadh Bin Agil Al-Nadhi

Judge: Gladys Kessler

Date: March 10, 2010

Decision: Habeas denied

Government allegations: The government alleged, as the court summarized, that the petitioner (1) "travel[ed] to Afghanistan with the aid of al-Qaida facilitators;" (2) stayed at al-Qaida guesthouses; (3) knowingly attended al-Qaida's Al Farouq training camp and subsequently "travel[ed] to Tora Bora pursuant to a military order from al-Qaida's Al Farouq leadership;" (4) guarded "rear-echelon positions at Tora Bora while under al-Qaida's command, and [was] subsequent[ly] injur[ed] by Coalition bombs while retreating with al-Qaida forces;" and (5) participated "in hostilities against the United States or its allies."

Petitioner response: The petitioner contended that while he "decided to travel to Afghanistan to receive military training for its own sake and/or to help the Palestinian cause . . . [he] would not have gone if he had known he was being recruited to join al-Qaida." He contended that he stayed at a guesthouse for five to seven days, free of charge, and "did not leave the house to go outside because he was warned not to," and that the guests were "afraid to speak to one another." He did not dispute that he traveled with a group of Al Farouq members to Tora Bora but argued that "he had no choice to remain at the camp, since those who left were often considered spies and treated harshly."

Court findings: The court found that the government "met its burden of proof to demonstrate by a preponderance of the evidence that Petitioner heard a fatwa that called on him to fight alongside the Taliban, that he subsequently traveled . . . to Afghanistan, that he watched a jihadist video at one such guesthouse, that he received military training at al-Qaida's Al Farouq camp, that he left Al Farouq after a few weeks under orders from al-Qaida leadership, that he traveled to Tora Bora and assumed a role guarding a rear-echelon position at Camp Thabit . . . and that, after leaving Tora Bora, he was injured by Coalition bombs and captured." The court found that the petitioner did not attempt to disassociate himself from Al Qaeda or the Taliban. Given these findings, the court denied the petitioner's request for habeas.

Case: Abdah v. Obama (Uthman) (04-1254)

Detainee: Uthman Abdul Rahim Mohammed Uthman

Judge: Henry H. Kennedy, Jr.

Date: April 21, 2010

Decision: Habeas granted

Government allegations: The government alleged that the petitioner "traveled to Afghanistan to join Al Qaeda, and once there, he trained to be a fighter, fought against forces seeking to overturn the Taliban's regime, and became a bodyguard for Usama bin Laden."

Petitioner response: The petitioner contended that he "went to Afghanistan to teach the Quran to children and was not part of Al Qaeda." The petitioner further contended that he "was regularly beaten and threatened with electrocution and molestation" while held in Jordan, Hajj, and that he "eventually 'manufactured facts' and confessed to his interrogators' allegations 'in order to make the torture stop,'" therefore rendering his statements unreliable.

Court findings: The court found that the government failed to demonstrate that it was more likely than not that the petitioner was a bodyguard for bin Laden or that he attended a tactics course in Afghanistan. "In sum, the Court [gave] credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there." However, these allegations, even taken together did not "convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda." Therefore, the court granted Uthman's petition.

Appellate disposition: Reversed and remanded with instructions to deny the petition.

The D.C. Circuit found that the district court had erred in granting Uthman's petition because it had used the command-structure detention standard to assess

the government's allegations against Uthman, and that standard had since been rejected by the D.C. Circuit. The court explained:

Applying the functional standard mandated by our precedents, we conclude that the facts found by the District Court, along with uncontested facts in the record, demonstrate that Uthman more likely than not was part of al Qaeda. We therefore reverse the judgment of the District Court and remand with instructions to deny the petition for a writ of habeas corpus.

Case: Salahi v. Obama (05-0569)

Detainee: Mohammedou Ould Salahi

Judge: James Robertson

Date: April 9, 2010

Decision: Habeas granted

Government allegations: The government claimed the petitioner "was so connected to al-Qaida for a decade beginning in 1990 that he must have been 'part of' al-Qaida at the time of his capture." In particular, the government alleged that the petitioner, including that he (1) "was a recruiter for al-Qaida" and "recruited two of the men who became 9/11 hijackers and a third who became a 9/11 coordinator; (2) "actively supported his cousin, who is or was one of Osama Bin Laden's spiritual advisors;" (3) "carried out orders to develop al-Qaida's telecommunications capacity;" and (4) "had connections with an al-Qaida cell in Montreal." The government also claimed the petitioner trained for six weeks at al-Farouq and was given the kunya "Abu Musab."

Petitioner response: The petitioner admitted that "he trained at the al-Farouq training camp in Afghanistan in late 1990 and early 1991; that he swore bayat in 1991 . . . and that he returned to Afghanistan in early 1992 to fight in the battle at Gardez as a member of an al-Qaida mortar battery." He denied allegations that he was part of Al Qaeda after 1992, and claimed that he only joined in "the struggle against the communists" and "severed ties with al-Qaida [in 1992] and provided no further support to the organization." He argued that as a consequence of the extensive and severe mistreatment he was subjected to at Guantánamo Bay from June to September 2003, "every incriminating statement he made while in custody must therefore be discredited."

Court findings: The court found that the petitioner "was an al-Qaida sympathizer—perhaps a 'fellow traveler'; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida." The court also found Salahi fought with Al Qaeda in the 1990s, associated with nearly a half-dozen members and terrorists, and lived among Al Qaeda members in Montreal. However, the court concluded that, despite the government's fears that the petitioner may renew his membership with Al Qaeda, a "habeas court may not permit a man to be held indefinitely upon suspicion." Therefore, the court found that the government failed to meet its burden of proof in establishing that the petitioner was "part of" Al Qaeda during the time of his capture and granted Salahi's petition.

Appellate disposition: Reversed and remanded for further proceedings.

The D.C. Circuit wrote that, since the district court issued its decision, the appeals court had issued three opinions that "cast serious doubt on the district court's approach to determining whether an individual is 'part of'" Al Qaeda. In particular, the D.C. Circuit wrote, the district court erroneously determined that the petitioner needed to have been acting under express orders from Al Qaeda to be lawfully detained. This finding was error under recent D.C. Circuit law, the panel held. Because the district court had been using an incorrect approach in deciding the case, on remand it needed to resolve certain factual questions to determine facts germane to the proper standard. For example, more factfinding was needed to determine whether the government's evidence might "support the inference that even if Salahi was not acting under express orders, he nonetheless had a tacit understanding with al-Qaida operatives that he would refer prospective jihadists to the organization." Or, for example, "[d]id Salahi provide any assistance to al-Qaida in planning denial-of-service computer attacks, even if those attacks never came to fruition?" The court continued: "With answers to questions like these, which may require additional testimony, the district court will be able to determine in the first instance whether Salahi was or was not 'sufficiently involved with [al-Qaida] to be deemed part of it.'"

Case: Al Warafi v. Obama (09-2368)
Detainee: Muktar Yahia Naji Al Warafi
Judge: Royce C. Lamberth
Date: April 8, 2010
Decision: Habeas denied

Government allegations: The government alleged that the petitioner: (1) "traveled to Afghanistan to fight with the Taliban against the Northern Alliance after reading two fatwas in support of the Taliban"; (2) received weapons training at Khoja Khar, where he was stationed; (3) "volunteered to serve as a medical assistant on an as needed basis and provided medical treatment to wounded Taliban fighters"; and (4) "traveled to Mazar-e-Sharif on his commander's orders to surrender to the Northern Alliance."

Petitioner response: The petitioner admitted that he was "inspired by the fatwas" to travel to Afghanistan and that he followed the route provided in one of the fatwas. He argued that he traveled to Afghanistan to serve as an assistant in a medical clinic, and not to fight for the Taliban. He also denied traveling to Khoja Khar as a fighter, receiving weapons training there, or traveling to Mazar-e-Sharif on orders to surrender. Furthermore, as a consequence of his role as an assistant at a clinic, the petitioner argued that he was protected under Article 24 of the First Geneva Convention, which states that all medical personal exclusively engaged in caring for the sick and wounded must be protected and respected and may not be detained for the duration of hostilities.

Court findings: The court found that the evidence showed that the petitioner "more likely than not was part of the Taliban" because the petitioner "more likely than not went to Afghanistan to fight with the Taliban; received weapons training while stationed at the Khoja Khar line; volunteered to serve as a medic when the need arose; and surrendered on his commander's orders." The court found, in addition, that the petitioner did not qualify for privileged treatment under Article 24 of the Geneva Convention. The court wrote that under federal statutory law, "[n]o person may invoke the Geneva conventions . . . in any habeas corpus proceeding . . . as a source of rights in any court of the United States." Though the court was not convinced the petitioner remains a threat to the United States, it nonetheless found that the government met its burden of proof, denied Al Warafi's habeas petition.

Appellate disposition: Affirmed in part and remanded in part

The D.C. Circuit affirmed the district court's finding that Al Warafi was more likely than not a part of the Taliban, but remanded the case so that the district court could determine whether Al Warafi was "permanently and exclusively medical personnel within the meaning of Article 24 of the First Geneva Convention and Army Regulation 190-8, § 3-15(b)(1)-(2)." The court assumed, for the sake of argument, that the Convention and the Regulations were applicable. Finally, the court found, because the petitioner did not "carry an identification card or wear an armlet bearing the emblem of the Medical Services at the time of capture," on remand he would bear "the burden of proving his status as permanent medical personnel."

Case: Abdah v. Obama (Esmail) (04-1254)

Detainee: Yasein Khasem Mahammad Esmail

Judge: Henry H. Kennedy, Jr.

Date: April 8, 2010

Decision: Habeas denied

Government allegations: The government alleged that the petitioner (1) "traveled from Yemen to Afghanistan to receive military training for jihad at the urging and with the assistance of a known Al Qaeda recruiter;" (2) "received military training at Al Qaeda's Al Farouq training camp and at the Malek training camp and stayed at known Al Qaeda guesthouses between his training camp sessions;" (3) "attended the Institute of Islamic/Arabic Studies, which was directed by a high-ranking Al Qaeda leader;" and (4) "associated with Al Qaeda leadership, fought at the Battle of Tora Bora, and was captured while retreating from the battle" after September 11, 2001.

Petitioner response: The petitioner initially argued that his motive for traveling to Afghanistan two years prior to his detention was irrelevant; he later claimed that he was motivated by his love for a Yemeni girl. He also argued that even if he had been motivated by jihad, his "interest was in Chechnya, not in fighting the United States." In regards to the second allegation, the petitioner alleged that he "did not know that the training sessions he was attending were sponsored by Al Qaeda" and further, that "attendance at Al Farouq was not limited to members of Al Qaeda." He denied staying in any guesthouse that he "knew was run by Osama bin Laden or al Qaeda." Thirdly, the petitioner argued that his attendance at the Institute only demonstrated his devotion to religious studies, not his support for Osama bin Laden or Al Qaeda; he further contended that the member who ran the Institute "held beliefs that contracted those of Usama bin Laden." Finally, in response to the final claims, the petitioner alleged he was kidnapped and imprisoned by the Taliban shortly after returning to Kabul. He denied staying at a guesthouse in Jalalabad, ever seeing Osama bin Laden, or ever fighting at Tora Bora, or elsewhere.

Court findings: The court found that the petitioner: "(1) traveled to Afghanistan at the urging of an Al Qaeda facilitator, (2) attended Al Qaeda military training camps, (3) stayed at guesthouses which, if not exclusively patronized by Al Qaeda members, were at least affiliated with that organization, (4) took a religious study course at an Institute sponsored by Al Qaeda, (5) remained in Afghanistan after the attacks of September 11, 2001, and (6) went to Tora Bora, the site of a major battle against the United States, where he acted as a fighter for

Al Qaeda." As such, the court found that the government met its burden of proof and thereby denied the petitioner's request for habeas.

Appellate disposition: Affirmed.

The D.C. Circuit held that the district court had committed no reversible error in finding that the government had met its burden of proof. As the court wrote:

> [The petitioner] argues that the district court erred in finding that statements he made to American interrogators in Afghanistan and at Guantanamo Bay were voluntary. He also argues that the district court erred in relying on those statements despite the government's failure to provide sufficient evidence corroborating their content. But we have no need to consider either of those issues because the record contains sufficient facts—affected neither by the alleged coercion nor by the lack of corroboration—to support the district court's conclusion that Esmail was "part of" al Qaeda at the time of his capture.

Case: Al Harbi v. Obama (Mingazov) (05-2479)

Detainee: Ravil Mingazov

Judge: Henry H. Kennedy, Jr.

Date: May 13, 2010

Decision: Habeas granted

Government allegations: The government contended that the petitioner had (1) "traveled to Afghanistan as part of the Islamic Movement of Uzbekistan [IMU] and received military training from that organization," (2) "fought with the Taliban against the Northern Alliance" (3) "received military training at an Al Qaeda camp called Al Forouq and later received specialized explosives and poisons training at a different camp in Afghanistan called Kara Karga" and (4) "retreated from Afghanistan to Pakistan following the invasion by the United States and Coalition Forces after the attacks of September 11, 2011 and was captured in an Al Qaeda-linked guesthouse."

Petitioner response: The petitioner argued he was never a member of the IMU but that en route to Afghanistan, he "was involuntarily held . . . in a civilian camp . . . that was run by the [IMU]" and "did not try to escape because he 'believed that the Uzbeks running the camp would transport [him] to Afghanistan.'" He said he was then taken to Afghanistan with a group of refugees and held at "a detention center" in Bagram. He argued that the fact that he was kept separate from the rest of the travelers indicated he was "not trusted by the IMU" or training for the Taliban. The petitioner also claimed to have fabricated or embellished statements to interrogators indicating he was a high-value detainee (in his words, a "significant person") because he feared being sent back to Russia. He believed that conditions at Guantánamo would be favorable to those in both Bagram and Russia. The petitioner also denied fighting for the Taliban or attending training camps. Finally, while the petitioner did not deny traveling from Afghanistan to Pakistan or staying at the Jama'at Al Tabligh Islamic Center and a guesthouse in Pakistan, the petitioner contested the government's allegation that these facts led ineluctably to the inference that he had an affiliation with Al Qaeda.

Court findings: The court found that the evidence did "not support a finding that Mingazov was a member of the IMU." In addition, the court found that the petitioner did not fight with the Taliban and that the petitioner's "assertion that he made false statements to his American captors to avoid being sent to Russia

[was] credible." Finally, the court found that the petitioner's travel was not "incriminating" and that it was not "demonstrated that Mingazov was 'part of' the command structure of any terrorist organization"; consequently, the court granted Mingazov's petition.

Case: Khalifh v. Obama (05-1189)

Detainee: Omar Mohammed Khalifh

Judge: James Robertson

Date: May 28, 2010

Decision: Habeas denied

Government allegations: The government contended that the petitioner was detainable because he was "was present for fighting [against American forces] at Tora Bora and Taloqan" in the months prior to his capture in 2002. The government produced evidence that, while the petitioner lived in his home country of Libya, he affiliated himself in 1992 at the age of 20 with the Libyan Islamic Fighting Group ("LIFG") and remained active with group for three years. According to the government, "[t]he LIFG was an organization opposed to Libyan dictator Mummar al-Qaddafi, which slowly split into a faction that supported international terrorist networks and [a] faction that was strictly Libya-focused and anti-Qaddafi." The government also alleged that while in Afghanistan, Khalifh resided there (with possible short departures) until leaving for Pakistan sometime in 2001 or 2002. It is undisputed that he worked at the Jihad Wahl training camp in Afghanistan, and that sometime in 1998 or 1999, he lost a leg when he stepped on a landmine. It is undisputed that for a week in 1998, he had worked with the Taliban as a "minesweeper" or sapper.

Petitioner response: The petitioner did not contest the government's allegations regarding LIFG or his involvement with the organization. However, the petitioner did not concede that he was ever a member of Al Qaeda, the Taliban, or associated forces, and urged the court to find that, if he "was once a member of a detainable organization, his membership had lapsed by the time of his capture." Further, he urged the court to find that any of his own statements the government offered as evidence against him were the result of coercion.

Court findings: The court held that the government did not need to not show an affirmative act of "membership" after 9/11 to justify its detention of the petitioner, but that it must show that the petitioner was a part of al-Qaida, the Taliban, or related forces at the time of his capture. And, while the government "failed to establish probable cause to believe Khalifh was present for fighting at Tora Bora and Taloqan," the court found it probative that the petitioner had lost a leg while working as a minesweeper for the Taliban, and stayed with them in guesthouses: "Whatever interaction [Khalifh] might have had with the top

terrorists he met, whether it was limited or extended, his presence with them at guesthouses is quite powerful support to the inference that he was considered a member of al-Qaida (and/or associated forces) at the time." It further held that the "the 'part of al-Qaida' determination is a construct of all of the evidence." Finding that it was more probable than not that the petitioner "was a part of al-Qaida and associated forces through a steady string of activity right up until the time of his capture," the court denied Khalifh's petition.

Appellate disposition: Appeal dismissed by grant of the petitioner's motion for dismissal.

Case: Abdah v. Obama (Odaini) (04-1254)

Detainee: Mohamed Mohamed Hassan Odaini

Judge: Henry H. Kennedy, Jr.

Date: May 26, 2010

Decision: Habeas granted

Government allegations: The government alleged that the petitioner's presence at a guesthouse ("Issa House") upon its raid demonstrated that he was affiliated with an Al Qaeda network. The government called the petitioner's version of events into question and alleged that his "statements to interrogators [were] so inconsistent and implausible" as to indicate his testimony was untruthful. The government based these allegations on arguments that the petitioner's visa stated "his travel was [for] medical treatment" and not student purposes; that one witness of the Issa house claimed the petitioner was at the house for an extended period of three weeks or more; that the petitioner's statements regarding Jama'at Al Tabligh were "suspicious;" that there were "inconsistencies" in his stories; and that his assertion that he was a student was merely a "cover story" devised by members of the Issa house.

Petitioner response: The petitioner contended that he enrolled in Salafia University in November 2001 after leaving Jama'at Al Tabligh, a center for Islamic studies and missionary work in Pakistan, and that he befriended a student by the name of Emad at Salafia. Emad invited the petitioner to his off-campus home, a guesthouse referred to by the court as "Issa House." The petitioner contended that he decided to stay the night, and that "around 2:00 am, Pakistani police raided the house and seized all of its occupants." The petitioner denied "ever being approached by a Taliban or Al Qaida recruiter . . . ever being pressured by [Salafia University] to travel to Afghanistan to fight . . . [or] any knowledge concerning the possibility some of the men living at [Issa House] might have been aligned with, or sympathetic to the Taliban or Al Qaeda."

Court findings: The court found that the intelligence reports of the other twelve men seized in the raid of Issa House suggest that the petitioner's explanation of events was "true." The court acknowledged that some of the Issa House residents' "activities before arriving at the house were questionable and perhaps render them detainable pursuant to the AUMF." But it wrote that there was "nothing in the respondents' presentation" that showed by a preponderance of the evidence that the petitioner's presence at the guesthouse supported his

detention. The court found that there was "no evidence that Odaini [had] any connection to Al Qaeda" and that holding him in custody for eight years "has done nothing to make the United States more secure." The court found that the petitioner's detention was not authorized by the AUMF and "empathetically conclude[d] that Odaini's motion [for habeas] must be granted."

Case: Almerfedi v. Obama (05-1645)

Detainee: Hussain Salem Mohammad Almerfedi

Judge: Paul L. Friedman

Date: July 8, 2010

Decision: Habeas granted

Government allegations: The government alleged that the petitioner (1) "was an al Qaeda facilitator who frequented al Qaeda guesthouses in Iran [redacted] and helped fighters infiltrate Afghanistan from Iran to fight against coalition forces" and (2) was associated with Jama'at al-Tablighi, an Islamic missionary organization the government believed provided "logistical support and operational coverage to terrorist organizations." A third allegation was redacted from the public opinion.

Petitioner response: The petitioner denied the allegation that he was a part of Al Qaeda "or other terrorist groups" and claimed he had only an "innocent" association with Jama'at al-Tablighi. He claimed that he "wanted to leave Yemen and travel to Europe in order to find freedom, tolerance, and opportunity and to make a better life for himself." He associated himself with Jama'at al-Tablighi because he believed it would "fun and facilitate a missionary trip for him to Europe." He maintained that he stayed at the organization's headquarters for two-and-a-half months and was unable to travel to Europe after the September 11 attacks. He attempted to travel back to Tehran in December 2001 or January 2002, but was immediately arrested by the Iranian police.

Court findings: The court found that the government's main evidence, which was primarily based on the collective statements of another Guantánamo detainee, was "inherently unreliable." Further, the government failed to demonstrate that the petitioner "was ever in Iran before the [f]all of 2001," making it "unlikely that petitioner could have been in a guesthouse in Tehran in 2000 or early 2001." In addition, the court found that while the petitioner did not provide a "convincing explanation" for his two-and-a-half-month stay at the Jama'at al-Tablighi center, this did not in itself "lead to the conclusion that petitioner worked as an al Qaeda facilitator" while there. Therefore, the court found the government did not meet its burden of proof and the court granted the petition.

Case: Sulayman v. Obama (05-2386)

Detainee: Abd Al Rahman Abdu Abu Al Ghayth Sulayman

Judge: Reggie B. Walton

Date: July 20, 2010

Decision: Habeas denied

Government allegations: The government contended that: "(1) [the petitioner] attended an al-Qaida-affiliated training camp, specifically the Tarnak Farms camp; (2) he was recruited by an al-Qaida or Taliban operative who facilitated his travel to Afghanistan so that he could join the Taliban, al-Qaida, or their associated forces; (3) he stayed at al-Qaida and Taliban-associated guesthouses during his travels to, and time in, Afghanistan; (4) he served as a Taliban guard or interrogator at the Taliban's Sarpoza prison in Kandahar, Afghanistan; (5) he traveled to an area at or near the front lines in Afghanistan; and (6) he was captured on or near the battlefield at Tora Bora."

Petitioner response: The petitioner responded that "jihad was never mentioned before or during his trip to Afghanistan" and that he was merely offered "the opportunity to find a job, a wife, and a house." He did admit to staying at three guesthouses while in Pakistan and Afghanistan. He also admitted to FBI interrogators that he visited an area "approximately 20 kilometers north of Kabul" and traveled to this area "[w]hen the Arabs began being attacked in the streets of Kabul." He contended that he took an AK-47 to this "staging area" because there "were wild animals" in the mountains of Jalalabad and took the weapon to "protect" himself.

Court findings: The court found that the government met its burden of proof in establishing that the petitioner "was recruited by a Taliban operative, that the petitioner visited or stayed at several Taliban-affiliated guesthouses following his recruitment, and that the petitioner was present near the front lines of battle on two occasions, each time having taken possession of a deadly piece of weaponry from a fighter stationed at that location." Therefore, it was more likely than not that the petitioner was recruited by, and became a "part of" the Taliban forces; as such, the petitioner was deemed lawfully detained and denied habeas.

Case: Abdah v. Obama (Al Latif) (04-1254)

Detainee: Adnan Farhan Abd Al Latif

Judge: Henry H. Kennedy, Jr.

Date: July 21, 2010

Decision: Habeas granted

Government allegations: The government alleged that the petitioner "was recruited to travel to Afghanistan by a member of Al Qaeda and received military training from, and then fought with, the Taliban." The government further contended that the person who persuaded Latif to travel to Afghanistan was "Abu Khalud, an Al Qaeda facilitator," also known as Ibrahim Ba'alawi. The government also alleged that, while in Afghanistan, Al Latif went to a military training camp and fought with the Taliban in an area north of the city. Finally, the government contended that Al Latif had "told interrogators inconsistent stories," which it claimed "demonstrate[d] that Latif is lying to cover up his true activities."

Petitioner response: The petitioner contended that "the man he met named Ibrahim was not Abu Khalud and that Latif neither trained nor fought with the Taliban but instead was in Pakistan and Afghanistan to seek medical care." He claimed that he did not attend a military training camp but "stayed at an Islamic studies center waiting for Ibrahim to arrange his medical treatment." He submitted records that he claimed supported his version of events.

Court findings: The court found that the government's evidence was "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." It also found that Al Latif had "presented a plausible alternative story to explain his travel." Though that story was "not without inconsistencies and unanswered questions," the court wrote, it was "supported by corroborating evidence provided by medical professionals and it is not incredible." Because the government failed to show by a preponderance of the evidence that Al Latif was part of Al Qaeda or an associated force, the court granted his petition.

Case: Khan v. Obama (08-1101)

Detainee: Shawali Khan

Judge: John D. Bates

Date: September 3, 2010

Decision: Habeas denied

Government allegations: The government asserted "that it can detain Khan under the AUMF [Authorization for Use of Military Force] because he was a member of an HIG [Hezb-i-Islami] cell operating in Kandahar, Afghanistan, in 2002 and because HIG was "a terrorist organization that functions as an associated force of al-Qaida and the Taliban in hostilities against the U.S. and its coalition partners." The government offered as proof of Khan's relationship with HIG evidence that Khan had "a long-standing association with HIG, serving as a radio operator during the anti-Soviet jihad" and that Khan had "rejoined HIG after September 11, 2001" and was working as a communicator in 2002, prior to his capture in Kandahar.

Petitioner response: The petitioner largely conceded that HIG was associated with Al Qaeda and that he had been involved with the group prior to September 11, 2001, but he denied that he was a member of the group after September 11, 2001. He stated that he was merely "managing a small petrol shop in Kandahar and had no involvement in any terror cell or in any activities in opposition to the United States or its allies." He also alleged that there was no HIG cell operating in Kandahar at that time.

Court findings: The court found the government's evidence regarding the existence of the HIG cell in Kandahar to be more reliable than the petitioner's, and further found that the government had proven "that HIG is an associated force of al-Qaida and the Taliban." Because the court also found the government had "demonstrated that Khan was a communicator" for the Kandahar HIG cell, which it had held was sufficient to show Khan was properly detained, the court denied Khan's petition for release.

Case: Al Kandari v. United States (02-828)

Detainee: Fayiz Mohammed Ahmed Al Kandari

Judge: Colleen Kollar-Kotelly

Date: September 15, 2010

Decision: Habeas denied

Government allegations: The government alleged that the petitioner had traveled to Afghanistan to "join[] with and [fight] alongside members of al Qaeda, the Taliban, or associated forces." This claim, along with other evidence, made it "more likely than not that Al Kandari was part of al Qaeda, the Taliban, or associated forces," and thereby lawfully detained under the AUMF.

Petitioner response: The petitioner denied all allegations and claimed that he "traveled to Afghanistan for charitable purposes; engaged solely in charitable activities while there; and was captured while attempting to flee to Pakistan to avoid the ongoing fighting in Afghanistan."

Court findings: The court found that the petitioner's own statements and admissions, which formed much of the government's evidence against Al Kandari, were "credible, accurate, and reliable." Moreover, the court concluded that the petitioner's explanation of his time in Afghanistan was not "plausible" because it contained inconsistencies, was an incomplete explanation of his time in the country, and implausible in some respects. Given evidence that the court found accurate that the petitioner had been in the mountains during the battle of Tora Bora, that he was "given a Kalishnikov rifle and taught how to use it," and that he "met and associated with various members and high-level leaders of al Qaeda, the Taliban, or associated enemy forces," the court found that the petitioner was "more likely than not" a "part of forces associated with al Qaeda or the Taliban," and denied Al Kandari's petition.

Case: Toffiq Al-Bihani v. Obama (05-2386)
Detainee: Toffiq Nasser Awad Al Bihani
Judge: Reggie B. Walton
Date: September 22, 2010
Decision: Habeas denied

Government allegations: The government alleged that the petitioner was "part of al-Qaeda for at least some period of time between February 2001 and July 2001 because of his participation in military training while at the al-Farouq training camp." The government continued that the petitioner had "no intention of cutting is ties with Al-Qaeda" as demonstrated by his failure to leave the country when he had an opportunity to do so. Therefore, the government claimed, Al Bihani was "part of" the organization upon his capture.

Petitioner response: The petitioner conceded that he was part of Al Qaeda for at least part of the aforementioned time frame, that he continued to stay at Al Qaeda guesthouses after leaving Al Farouq, and that he was "apprehended at a house in Iran." But he argued that he was "no longer part of [Al Qaeda] at the time of his capture," and testified that "he had no real desire to engage in jihad while in Afghanistan." He claimed that, upon leaving Al Farouq, he sought to leave Afghanistan for Saudi Arabia (via a Pakistani airport) but stayed in Afghanistan out of fear of being captured at the border.

Court findings: The court found that the petitioner's "inculpatory admissions regarding his desire to prepare for jihad" and the evidence "that he received training at the al-Farouq training camp, and that he continued to associate himself with al-Qaeda operatives while going to and from various al-Qaeda-affiliated guesthouse" were credible. Further, his statements indicating that he "had no intention of engaging in jihad upon arriving in Afghanistan" and intended to "travel back to Saudi Arabia or Yemen upon leaving al-Farouq" were completely incredible. As such, the court found that the government met its burden of proof regarding the petitioner's membership in Al Qaeda and denied the Al Bihani's petition.

Appellate disposition: Summarily affirmed pursuant to a joint motion of the parties for purposes of expediting appeal to the Supreme Court.

As the D.C. Circuit said in its order granting the motion for the affirmance,

[a]lthough appellant objects to the district court's decision upholding his detention and contends the district court applied an erroneous legal standard, the parties jointly agree that this court's decisions foreclose appellant's arguments challenging the lawfulness of his detention under the Authorization for Use of Military Force. Accordingly, appellant joins the motion for summary affirmance in recognition of the futility of pursuing the current appeal and as an expeditious means to obtain a judgment of this court that will allow him to seek review by the Supreme Court.

Case: Obaydullah v. Obama (08-1173)

Detainee: Obaydullah

Judge: Richard J. Leon

Date: October 19, 2010

Decision: Habeas denied

Government allegations: The government alleged that the petitioner: "(1) was hiding on his property a cache of 23 anti-tank mines and seven plastic mine shells from which explosives had been removed; (2) was captured in possession of a notebook containing instructions and wiring diagrams for how to build a remote-control detonating device; (3) was storing an automobile that contained dried blood and Taliban propaganda; and (4) had repeatedly given false and implausible explanations regarding his knowledge of, and involvement with, these explosives, this notebook, and this automobile."

Petitioner response: The petitioner denied "any ownership interest in the mines and automobile recovered from his property;" argued that his notebook contained "nothing more that his notes from a bomb detection class he had been required by the Taliban to attend some eight months earlier, as well as notes from his business;" and that the government "falsely accused him of membership in this supposed al Qaeda bomb cell."

Court findings: The court found that "combining all of the evidence and corroborated intelligence, the mosaic that emerged supported the conclusion that it was more likely than not that petitioner was a member of an al Qaeda bomb cell committed to the destruction of U.S. and Allied forces."

Case: Razak Ali v. Obama (09-745)

Detainee: Abdal Razak Ali

Judge: Royce C. Lamberth

Date: September 24, 2009

Decision: Habeas denied

Government allegations: The government contended that the petitioner had "(1) lived with Abu Zubaydah and a cadre of his lieutenants during a two week period; (2) previously traveled with Abu Zubaydah's force through Afghanistan and ultimately fled with them through Afghanistan and Pakistan; and (3) took an English course (with an American accent) when he was staying at Abu Zubaydah's guesthouse."

Petitioner response: The petitioner denied "(1) ever being in Afghanistan, let alone being with Abu Zubaydah's force there; (2) ever taking an English course from Abu Zubaydah's trainers at the guesthouse; and (3) ever being a member, permanent or otherwise, of Abu Zubaydah's force." He claimed that the government had "mistakenly identified him as a member of Abu Zubaydah's force, who traveled with Abu Zubaydah in Afghanistan and fled with him to Pakistan before gathering at this particular guesthouse to start preparing for their next offensive against U.S. and Allied forces."

Court findings: The court first recognized that "our Circuit Court has *unequivocally* recognized that Abu Zubaydah and his band of followers have well established ties to al Qaeda and the Taliban and thus constitute an 'associated force' under the AUMF." It then found that "the petitioner's presence at [Zubaydah's] guesthouse is enough, *alone*, to find that [Razak Ali] was more likely than not a member of Abu Zubaydah's force." The court also wrote that it had "no difficultly concluding that the Government more than adequately established that it is more probable than not that the petitioner was in fact a member of Abu Zubaydah's force that had gathered in that Faisalabad guesthouse to prepare for future attacks against U.S. and Allied forces." Therefore, the court denied Razak Ali's petition.

Case: Alsabri v. Obama (06-1767)

Detainee: Mashour Abdullah Muqbel Alsabri

Judge: Ricardo M. Urbina

Date: February 3, 2011

Decision: Habeas denied

Government allegations: The government alleged that the petitioner (1) "went to Afghanistan to receive military-style training"; (2) "stayed at guesthouses in Pakistan and Afghanistan"; (3) "attended a training camp or . . . camps operated by or associated with" these organizations; and (4) "traveled to the battle lines in Afghanistan." The government based its first allegation on evidence that the petitioner was associated with a jihadist boardinghouse, was influenced by a veteran jihadist and a religious fatwa to fight in Afghanistan, and took a travel route typical for jihadists with travel companions who professed that "they were going to Afghanistan to become martyrs." As evidence of the third claim, the government alleged that the petitioner filled out an application for an Al Qaeda training camp, and subsequently trained there. Thus, the government's finally alleged that the petitioner was (5) "part of al-Qaida, the Taliban or other associated forces at the time of his capture."

Petitioner response: The petitioner denied having any association with Al Qaeda, the Taliban or other associated forces. In regards to the first claim, the petitioner contended he only had a "fleeting association" with individuals of the boardinghouse, though he admitted that some of his housemates had received jihadist and Taliban training; that he was merely encouraged to "seek out a better life" by the alleged veteran jihadist (whose name was redacted by the court); that there was no evidence to indicate he was influenced to take up arms as a result of the religious fatwa; and that he took a travel route typical for "any Arab man of limited means" and was not a jihadist, despite being in the company of self-professed jihadists. The petitioner admitted to knowing that some of the guesthouses he stayed at were associated with Al Qaeda or the Taliban, but argued that this did not prove that everyone staying at the guesthouses was associated with these forces. The petitioner further contended that filling out an application for an Al Qaeda training camp did not necessarily indicate that he attended the camp, and that he traveled to Taliban battle lines merely "as a tourist." Finally, the petitioner claimed to have distanced himself from these forces and returned to a house in Afghanistan during the summer of 2001.

Court findings: The court found that the petitioner had "developed significant and meaningful relationships with both veteran and future jihadists" was

influenced to travel to Afghanistan by a "veteran Taliban fighter" and a "religious fatwa" and traveled along a route used by jihadists with individuals "who admitted that they were going to engage in jihad and become martyrs." Accordingly, the court found that the petitioner "traveled to Afghanistan in order to fight." In addition, the court concluded that the petitioner stayed at multiple guesthouses he knew to be associated with Al Qaeda and the Taliban, further indicating he was "part of" Al Qaeda. The court additionally found that it was "more likely than not that the petitioner applied for and received military-style training from the Taliban or al-Qaida during his time in Afghanistan." The court found the petitioner's tourism cover story implausible, and concluded this further indicated he was "part of" Al Qaeda, the Taliban, or associated forces. Finally, the court found no evidence that the petitioner tried to distance himself from these forces. Thus, the government met its burden of proof in demonstrating the petitioner was "part of" these forces; the court consequently denied habeas.

About the Authors

Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He is the author of *Detention and Denial: The Case for Candor After Guantánamo*, Brookings Institution Press 2011. He is also the author of *Law and the Long War: The Future of Justice in the Age of Terror*, published in June 2008 by The Penguin Press, and the editor of the 2009 Brookings book, *Legislating the War on Terror: An Agenda for Reform*. He co-founded and co-writes the *Lawfare* blog (http://www.lawfareblog.com/), which is devoted to non-ideological discussion of the "Hard National Security Choices," and is a member of the Hoover Institution Task Force on National Security and Law.

Robert Chesney is a nonresident senior fellow in the Governance Studies program at the Brookings Institution and the Charles I. Francis Professor in Law at the University of Texas School of Law." He also co-founded and co-writes the Lawfare blog (http://www.lawfareblog.com/).

Larkin Reynolds is a legal fellow in Governance Studies at The Brookings Institution. She holds a BA from New York University and a JD from Harvard University, and is also a contributor to the Lawfare blog (http://www.lawfareblog.com/).

Governance Studies
The Brookings Institution
1775 Massachusetts Ave., NW
Washington, DC 20036
Tel: 202.797.6090
Fax: 202.797.6144
www.brookings.edu/governance.aspx

Editor
Christine Jacobs

Production & Layout
John S Seo
Beth Stone

Email your comments to gscomments@brookings.edu