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# The Emerging Law of Detention

## The Guantánamo Habeas Cases as Lawmaking\*



© Reuters/Pool New - Guantanamo guard stands inside a doorway at Camp 6 detention facility at Guantanamo Bay U.S. Naval Base.

by

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President Obama's decision not to seek additional legislative authority for detentions at Guantánamo Bay, Cuba – combined with Congress's lack of interest in the task – means that, for good or for ill, judges must write the rules governing military detention of terrorist suspects. As the United States reaches the president's self-imposed January 22, 2010 deadline for Guantánamo's closure with the base still holding nearly 200 detainees, the common-law process of litigating their habeas corpus lawsuits has emerged as the chief legislative mechanism for doing so.

It is hard to overstate the resulting significance of these cases. They are more than a means to decide the fate of the individuals in question. They are also the vehicle for an unprecedented wartime 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 acquire habeas jurisdiction. 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. They might, in fact, impact superficially-unrelated military activities, such as the planning of operations, the selection of interrogation methods, or even the decision to target individuals with lethal force.

This peculiar delegation of a major legislative project to the federal courts arose because of the Supreme Court's 2008 decision that the courts have jurisdiction to hear Guantánamo habeas cases. While the justices insisted on a role for the courts, they expressly refused to define the contours of either the government's detention authority or the procedures associated with the challenges it authorized. All of these questions they left to the lower courts to address in the first instance. Combined with the passivity of the political branches in the wake of the high court's decision, this move placed an astonishing raft of difficult questions in the hands of the federal district court judges in Washington and the appellate judges who review their work.

Yet despite the scope of its mandate and the project's manifest importance, the courts' actual work product over the past year has received relatively little attention. While the press has kept a running scorecard of government and detainee wins and losses, it has devoted almost no attention to the rules the courts – in their capacity as default legislators – are writing for the military and for the nation as a whole. 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 military detention that is emerging from it.

Generally speaking, the law remains altogether unsettled. While in some areas judges have developed a strong consensus, in many other areas they have disagreed profoundly. They disagree about what the government needs to prove for a court to sign off on a detention, about what evidence it may employ in doing



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so, and about how deeply a court should probe material collected and processed for intelligence purposes, not litigation. Indeed, the judges of the federal District Court and D.C. Circuit Court of Appeals have, in the public opinions we reviewed, articulated differing approaches to or failed to authoritatively answer such elemental matters as:

- **The substantive scope of the government’s detention authority – that is, what sort of person falls within the category of individuals the government may lock up under its power to wage war against Al Qaeda and the Taliban.** Does this class include only members of enemy forces or also their supporters? Can one even distinguish between the two? If the government is allowed to detain supporters, will any support qualify a person for detention or does it have to be substantial support? And even if the government can prove that a person has the requisite connection to the enemy, must it also prove that he is likely to commit a dangerous act of some description if released?
- **Whether and when a detainee can sever his relationship with enemy forces such that his detention is no longer a legal option.** If a detainee once joined Al Qaeda, does he always count as Al Qaeda for legal purposes? Can he leave the group after some period of membership or association and thus no longer qualify for detention? Can he break with the group *after capture* by cooperating with authorities and thereby qualify no longer for continued detention? If a detainee can sever his relationship to the enemy, who has the burden of showing that he either did or didn’t do so? Does the detainee have to prove vitiation of the relationship or does the government have to prove its ongoing vitality?
- **What presumptions the courts should make regarding government evidence.** Should the rough and tumble of warfare make them more forgiving or more skeptical of evidence whose provenance may be inexact? Should they grant either a presumption of authenticity or a presumption of accuracy to government evidence?
- **How to handle hearsay evidence that courts in normal cases would eschew.** How should the courts handle intelligence reports whose sources the government may not identify? How should they handle statements by a detainee’s fellow prisoners in interrogations years ago when these witnesses may have long since left Guantánamo? And how should they handle interrogation statements by the detainees themselves?
- **How to handle detainee or witness statements alleged to have been extracted involuntarily or through abuse.** Who bears the burden of proving that a statement either was or was not given voluntarily? What level of coercion suffices to render a statement unusable in these proceedings? And where coercion has taken place, how long does the taint of it last and under what circumstances does it lift?

The judges have struggled with other foundational questions as well, questions on which they have either found common ground or in which their disagreements remain latent: Who bears the burden of proof in these cases and by what standard of evidence? How should the courts treat “mosaics” of relatively weak data – mosaics which routinely inform intelligence analysis but are quite alien to federal court proceedings? And to what extent, if any, does the showing required of the government escalate over time?

So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances. That is, some detainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges – who have articulated different standards – heard their cases. And some detainees whose incarceration these other judges have approved would likely have had habeas writs granted had the first group of judges heard their cases.

The current degree of disagreement among the judges may be reduced over time, as several of the cases are currently on appeal to the U.S. Court of Appeals for the D.C. Circuit and could easily head from there to the Supreme Court. These appeals should collectively go a long way towards narrowing the range of possible answers to the questions with which the lower court judges are now struggling. Or at least they may do so eventually. For the moment, the appeals are in various stages of development, with only one decided so far.

In the meantime, the lack of clarity regarding such important matters as the scope of the government’s detention power and the circumstances in which an interrogation statement can be used to justify a detention presents problems from the perspectives of both the detainees and the government. Neither can be sure of the rules of the road in the ongoing litigation, and the prospect that allocation of a case to a particular judge may prove dispositive on the merits can cut in either direction. Because it remains unclear how far the courts’ jurisdiction extends, moreover, nobody knows at this stage precisely how many cases these rules will ultimately govern and where else in the world they will have a direct impact. More fundamentally, because the courts in these cases are defining not merely the rules for habeas review but also *the substantive law of detention itself*, they have implications far beyond the litigation context. The rules the judges craft could have profound implications for decisions in the field concerning whether to initially detain, or even target, a given person, whether to maintain a detention after an initial screening, whether to employ certain lawful but coercive interrogation methods, and so forth.

## Introduction

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, and the *Washington Post* reported in September of 2009 that the Obama administration does not intend to ask it to do so.<sup>1</sup>

Many civil libertarian and human rights activists have greeted this decision with relief,<sup>2</sup> while some other commentators – including one of the present authors – have leveled sharp criticisms.<sup>3</sup> Whatever the decision's merits, however, it is critical to understand that it 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 and prospective detentions. 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 just-under-200 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 acquire habeas jurisdiction. What's more, to the extent that these cases establish substantive and procedural rules governing the application of law-of-war detention powers in

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<sup>1</sup> Peter Finn, *Administration Won't Seek New Detention System*, WASH. POST, Sept. 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html?hpid=moreheadlines>; Peter Baker, *Obama to Use Current Law to Support Detention*, N.Y. TIMES, Sept. 23, 2004, available at [http://www.nytimes.com/2009/09/24/us/politics/24detain.html?\\_r=2](http://www.nytimes.com/2009/09/24/us/politics/24detain.html?_r=2) (clarifying that the Administration's decision deals only with Guantanamo and does not preclude seeking prospective detention authority for future captures).

<sup>2</sup> Peter Finn, *Administration Won't Seek New Detention System*, WASH. POST, Sept. 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html?hpid=moreheadlines> (quoting Senior Legislative Counsel at the ACLU stating: "This is very welcome news and very big news. Going to Congress with new detention authority legislation would only have made a bad situation worse. It likely would have triggered a chaotic debate that would have been beyond the ability of the White House to control – and would have put U.S. detention policy even further outside the rule of law").

<sup>3</sup> Benjamin Wittes, *Obama's Dick Cheney Moment*, WASH. POST, Sept. 29, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/story/2009/09/28/ST2009092802638.html?sid=ST2009092802638>.

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 the decision to target an individual with lethal force. In short, the legislature's passivity to date combined with President Obama's decision not to request its involvement in writing law to address these questions have together delegated to the courts a remarkable task: Defining the rules of military detention.

Despite the scope of its mandate, the courts' actual work product over the past year has received relatively little attention. Its judges have not been idle; far from it. District judges have issued 20 merits opinions covering 41 different detainees and the D.C. Circuit Court of Appeals has ruled on one case 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 score-card 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.<sup>4</sup>

Our purpose in these pages 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 intelligence data or evidence that may have been given involuntarily?

None of these questions, and many others besides, have clear answers. On all of them, federal court judges are making law.

Generally speaking, the law remains unsettled. While in a few discrete areas, judges have developed a strong consensus, in many more such areas, they have disagreed profoundly. As Judge Thomas Hogan – who handled common issues for most of the judges on the district court – put it in a hearing in December, “we have

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<sup>4</sup> 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).

been operating under procedures drawn up by the court, and principally [by] myself, and the judges who have adopted much of these procedures [are operating] in a new venue that has been untested....” The result is that “we have . . . in this court now a difference in substantive law that will be applied among the District Court judges. . . . We have different rules and procedures being used by the judges, [and] different rules of evidence being used by the judges.”<sup>5</sup>

Indeed, as we shall show, so fundamentally do the judges disagree that their differences are almost certainly affecting the outcomes in the individual cases they are hearing. That is, detainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges who have articulated different standards heard their cases. And the reverse is also true. Although the work of the D.C. Circuit to date imposes a limited degree of uniformity on a few of the key questions, much remains contested. And the D.C. Circuit, in any event, is not likely the final word. Its decisions may be merely interim steps on the way to Supreme Court consideration.

In other words, as Judge Hogan suggests, the parameters of the emerging law of detention remain sharply disputed. There are several possible answers to each of a bewildering array of questions, with individual judges and combinations of appellate judges picking and choosing among many possible permutations. And the judges are picking very differently from one another.

Such variety to some extent naturally comes along with common law process. Yet as D.C. Circuit Judge Janice Rogers Brown recently observed, that process “depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple.”<sup>6</sup> Those elements are largely if not entirely absent in the Guantánamo litigation, however, as Judge Brown also notes as she pleads for the political branches to intervene.

Absent such intervention, the few appeals that have emerged from this litigation bear great weight. The government has appealed only two of the judgments against it, preferring not to contest many of the adverse judgments, while of the nine detainees who have lost their cases, eight have appealed and the ninth may yet do so. So far, only one of these appeals has been decided – and only by the mid-level appellate court. What’s more, only two other cases are currently briefed in unclassified filings reviewable by the public. While the appeals collectively present many of the district judges’ disputes for harmonization, that process will require a long period of appeals up and down the appellate ladder. The range of possible directions the courts could go, as we shall show, is broad and has enormous ramifications for the future utility of the non-criminal detention option – and possibly also for military operations far removed from the habeas litigation process.

For some readers, our description of the range of opinion among the judges

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<sup>5</sup> Transcript of Hearing at 5-6, *Anam v. Obama*, No. 04-1194 (D.D.C. Dec. 14, 2009).

<sup>6</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 1 (D.C. Cir. Jan. 5, 2010).




may seem like a couched argument for legislative intervention in detainee policy. For those sympathetic to calls for detention legislation, the diversity of approaches among the judges will seem chaotic and strong evidence of the need for legislative rules. By contrast, those suspicious of calls for legislation will likely see the diversity of judicial practice to date as an unsurprising and unthreatening feature of common law development – and they may also see greater common ground among opinions whose differences we highlight. We do not mean to adopt a false pose of neutrality on the question of whether legislation is desirable. Two of the present authors have argued for legislation in the past and we continue to believe congressional involvement crucial to the healthy development of America’s detention system. Moreover, we make no secret of having significant concerns about the habeas process as a lawmaking device. That said, our purpose here is not to engage the debate over whether the United States needs detention legislation or not. It is, rather, to describe in as neutral a fashion as possible 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 asserting 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, which in the absence of further congressional action effectively delegates the writing of the rules to the district court. In the sections that follow, we examine the different judges’ approaches to several of the most important questions concerning the governance of non-criminal counterterrorism detentions. In particular, we look at the judges’ approaches to the following questions:

- the burden of proof;
- the notional scope of the government’s detention power;
- the question of whether a detainee’s relationship with an enemy organization 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 evidence.

We next examine the impact on several of the cases of applying the standards articulated by district judges who articulated alternative answers to some of these questions, concluding that the differences between the judges are profound enough to raise serious questions about the stability of the outcomes in at least several cases. In light of this fact, we then turn to the current spate of appeals and



examine whether they are presenting the D.C. Circuit with a meaningful opportunity to begin harmonizing the law. We conclude that the D.C. Circuit currently has before it a wide swath, though by no means all, of the important questions and has begun the process of redirecting the lower court in a number of respects. That redirection itself, however, depends on both future cases and on subsequent appeals of the lone decision the appellate body has so far rendered. In the final section, we attempt to identify several of the critical questions the courts will have to address before any stable detention system can come into being.

## Historical Context for the Current Habeas Litigation

To better understand the current habeas litigation, it is useful to first 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*.<sup>7</sup> 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 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.” 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.” In particular, the plurality acknowledged that the district court might need to accept hearsay as the Government’s most reliable available evidence, and it suggested that it might even be appropriate to adopt a presumption in favor of the government’s evidence. Justice O’Connor concluded by instructing the court below to proceed with caution in the course of a prudent and incremental factfinding process.<sup>8</sup>

That same day, the Court held in *Rasul v. Bush* that the federal habeas corpus statute established jurisdiction over the claims of non-citizen detainees held at Guantánamo.<sup>9</sup> 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. 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.<sup>10</sup> Congress responded once again, passing the Military Commissions Act of 2006—which revived the DTA’s jurisdictional provisions and made them more clearly applicable to pending cases. 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

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<sup>7</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>8</sup> *Hamdi*, 542 U.S. at 533-34.

<sup>9</sup> *Rasul v. Bush*, 542 U.S. 466, 488 (2004).

<sup>10</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Guantánamo, thus delineating Congress's power to limit the Court's access to habeas corpus review.<sup>11</sup> Second, the court held that the limited amount of 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.<sup>12</sup> The Court declined to detail the procedural or substantive contours of constitutionally-required habeas review, however, beyond stating that "[t]he extent of the showing required of the government in these cases is a matter to be determined" and that such questions are "within the expertise and competence of the District Court."<sup>13</sup> 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.

### ***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 instances or whether the government has prevailed.<sup>14</sup> The press generally cites somewhat lopsided sheer numbers: 32 detainee victories versus nine for the government, thusfar. 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, it does not fully capture the complexity of the current proceedings.

The 32 detainee victories, for starters, 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. The government, it 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.<sup>15</sup> *Parhat* was not a habeas case, however, but rather the sole "merits" decision rendered under the DTA review system struck down as inadequate in *Boumediene*.<sup>16</sup> 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. Indeed,

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<sup>11</sup> *Boumediene*, 128 S.Ct. at 2275.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2271.

<sup>14</sup> See, e.g., Carol Rosenberg, *Guantanamo captives winning lawsuits*, MIAMI HERALD, Sept. 9, 2009, available at <http://www.miamiherald.com/news/americas/guantanamo/courts/story/1221242.html>.

<sup>15</sup> *Parhat v. Gates*, 532 F.3d 834, 844 (D.C. Cir. 2008).

<sup>16</sup> *Parhat*, 532 F.3d at 835; See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

even before *Parhat*, the government had long been attempting to identify states willing to accept transfer of the Uighurs (thus far succeeding with most but not all members of the group).<sup>17</sup> These cases have since become part of the habeas discussion because the remaining Uighur detainees are now proceeding under the rubric of habeas in an effort to obtain an order requiring the government not just to release them, but to release them into the United States specifically. But their habeas petition never put at issue the government's power to hold them as military detainees for the duration of hostilities. From this perspective, it is a touch misleading to consider them as part of the broader habeas scorecard.

A second significant 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.<sup>18</sup> 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 “scorecard” account of the habeas system.


Yet if one cannot usefully assess the post-*Boumediene* habeas system in terms of the accessible but oversimplified scorecard approach, how should one assess it? In our view, it is at least as important to understand the rules of substance and procedure that are emerging in common-law fashion from the ongoing litigation. 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 the third week of January in 2010, including all decisions on the merits and the key interlocutory rulings in cases that may not have reached merits disposition. We do not speculate about those decisions which have been

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<sup>17</sup> *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009).

<sup>18</sup> *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”).



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 18 separate written or oral opinions on the merits by nine 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 Table of the merits rulings discussed in this paper appears in Appendix I; a brief synopsis of each district court merits decision appears in Appendix II.)

## Burden of Proof

Our review opens with the one subject that has generated a surprising degree of consensus among the judges, notwithstanding the tension between the *Hamdi* and *Boumediene* decisions on the point: the allocation and calibration of the burden of proof.

As noted above, a plurality of the Supreme Court had suggested in *Hamdi* that the government might be entitled to a rebuttable presumption in favor of its evidence in a habeas proceeding of this kind. The government asked for such a presumption when litigating the details of Judge Hogan's Case Management Order that was meant to govern the bulk of these cases after the *Boumediene* decision. Judge Hogan, however, rejected the request, holding instead that the government should bear the burden of proving that a detainee satisfies the grounds for detention, and that it must do so by the preponderance of the evidence.<sup>19</sup> Most of his colleagues who have addressed the issue separately have followed suit.<sup>20</sup> Judge Colleen Kollar-Kotelly adds that "[a]ccordingly, [the] petitioner need not prove his innocence nor testify on his own behalf."<sup>21</sup> And Judge Gladys Kessler elaborates on this point: "Just as a criminal defendant need not prove his innocence, a detainee need not prove that he was acting innocently. . . . [T]he fact that the Petitioner may not be able to offer air-tight answers to every factual question posed by the Government does not relieve the Government of its obligations to satisfy its burden of proof."<sup>22</sup>

This result finds at least partial support in *Boumediene*. While the Supreme Court in that case did not specify the nature of the burden of proof in these cases, it did appear to assume that the government, rather than the petitioner, would bear that burden: "The extent of the showing *required of the government* in these cases is a matter to be determined" (emphasis added), the majority wrote.<sup>23</sup>

Whether or not the issue is truly settled, however, is not entirely clear. The D.C. Circuit's recent decision in *Al Bihani* sharply rejects the petitioner's argument that the government should be subjected to a still-higher burden of proof, such as a clear-and-convincing evidence or even a beyond-a-reasonable-doubt standard.<sup>24</sup> It is far more equivocal on whether the government's burden might be lower. Indeed, the panel majority opens the door to further debate in two respects.

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<sup>19</sup> *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, CMO §ILA (D.D.C. Nov. 6, 2008) ("The government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful.")

<sup>20</sup> *See, e.g.*, *Boumediene v. Bush*, 579 F. Supp. 2d 191, 195-96 (D.D.C. 2008); *Awad v. Obama*, 646 F. Supp.2d 20, 23-24 (D.D.C. 2009); *Ahmed v. Obama*, 613 F. Supp.2d 51, 53 (D.D.C. 2009); *Al Odah v. Obama*, 648 F. Supp.2d 1, 7-8 (D.D.C. 2009); *Hatim v. Obama*, No. 05-1429, slip op. at 31 (D.D.C. Dec. 16, 2009).

<sup>21</sup> *See, e.g.*, *Al Odah*, 648 F. Supp.2d at 7-8. 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. 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.

<sup>22</sup> *Al Adahi*, No. 05-0280, slip op. at 13 (D.D.C. Aug. 17, 2009).

<sup>23</sup> *See Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008).

<sup>24</sup> *See Al Bihani v. Obama*, No. 09-5051, slip op. at 19 (D.C. Cir. Jan. 5, 2010).

First and most significantly, the panel goes out of its way to state that the Constitution does not necessarily require the government to meet even the preponderance standard. In what reads as an invitation to the government to litigate the issue further, the court notes that it is not ruling out the possibility that 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.”<sup>25</sup>

Second, the panel also takes up the question of whether the preponderance standard is in tension with *Hamdi*'s assertion that the Constitution would permit a presumption in favor of the government's evidence implemented through some kind of burden-shifting framework like the plurality in *Hamdi* described. According to the *Al Bihani* panel, such a framework in fact would “mirror” the preponderance standard.<sup>26</sup> That conclusion makes sense, however, only if one assumes that the government would actually have to meet the preponderance standard at the first stage of this burden-shifting framework. In that case, though, it is hard to see how the framework actually entails any presumption favoring the government. In any event, *Al Bihani*'s discussion of the issue raises the prospect of future litigation to clarify the matter.

However that plays out in the long run, the allocation of the burden of proof to the government in the interim has proven significant in at least three merits decisions, all of which involve detainees who failed to offer credible exculpatory accounts of their activities. In *El Gharani*, *Al Mutairi*, and *Mohammed*, Judges Colleen Kollar-Kotelly, Richard Leon, and Gladys Kessler openly doubt the petitioners' credibility, describing their versions of the events in their cases as respectively “implausible,” “troubling,” and “fantastic.”<sup>27</sup> But because the burden of proof lies with the government, the judges observe, this failure could not on its own permit the government to prevail.

For example, in *El Gharani*, Judge Richard Leon concludes 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.”<sup>28</sup> Specifically, Judge Leon determines that the government's evidence “reveals nothing about the petitioner with sufficient clarity... that can be relied upon by [the] Court.”<sup>29</sup>

Likewise, in *Al Mutairi*, Judge Kollar-Kotelly describes the petitioner's version

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<sup>25</sup> *Id.* at 20 n. 4.

<sup>26</sup> *Id.* at 19-20. There is at least one case in which a district judge has expressly employed the *Hamdi* approach in the post-*Boumediene* habeas context. See *Khan v. Obama*, 646 F. Supp.2d 6 (D.D.C. July 31, 2009) (Bates, J.). The court in that instance discusses the possibility of tension between this framework and the proposition that the government bears the burden of proof under a preponderance standard.

<sup>27</sup> *Al Mutairi v. United States*, 644 F. Supp.2d 78, 87-88 (D.D.C. 2009); *El Gharani v. Bush*, 593 F. Supp.2d 144, 149 (D.D.C. 2009); *Mohammed v. Obama*, No. 05-1437, slip op. at 28 (D.D.C. Nov. 19, 2009).

<sup>28</sup> *El Gharani*, 593 F. Supp.2d at 149.

<sup>29</sup> *Id.*



of events as “implausible and, in some respects, directly contradicted by other evidence in the record.”<sup>30</sup> Nonetheless, she reads nothing into the fact that the detainee is, in her judgment, likely lying about his own conduct. She concludes, rather, that although his “described peregrinations within Afghanistan lack credibility, the Government has not filled in these blanks nor 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.”<sup>31</sup> Most dramatically, in *Mohammed*, Judge Kessler concludes not merely that the detainee’s story is “patently fantastic” but also that the government has proven that he 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.” Despite these findings, however, she declines to draw any negative inference from the petitioner’s lies.<sup>32</sup>

In all of these cases, the judges determine that even though it is unlikely that the events had occurred as the petitioner contended, the government has not established the likelihood that its version was accurate either – and rule in favor of the detainee.

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<sup>30</sup> *Al Mutairi*, 644 F. Supp.2d at 87.

<sup>31</sup> *Id.* at 53.

<sup>32</sup> *Mohammed*, slip op. at 28, 74-75.

## The Scope of the Government's Detention Authority

The consensus among the judges concerning the burden of proof is the exception in these cases, not the rule. More commonly, they split sharply over fundamental questions, with significant implications for the ultimate bottom-line results. The different conclusions the judges have reached regarding the scope of the government's detention power illustrate this tendency.

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).<sup>33</sup> But as Waxman argues, it is actually not obvious at all. There is any number of ways in which 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, different judges on both the district and appeals courts have articulated what may prove to be significantly different standards. While the D.C. Circuit has, at least for now, taken a broad view of the government's detention power, the question has generated some dissension among the appellate judges too and is, in any event, certain to generate subsequent appeals.

### ***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 the "traditional incidents" of lawful warfare on American operations, 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 bore arms for the Taliban in Afghanistan.<sup>34</sup> This holding obviously 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 means to be a "member" or "part" of any of these organizations, at least some of which are better characterized as loose

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<sup>33</sup> MATTHEW WAXMAN, *LEGISLATING THE WAR ON TERROR* 44 (Benjamin Wittes ed., Brookings Institution Press 2009).

<sup>34</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 561-563 (2004) (Justice Thomas provided a fifth vote in support of the executive's authority, emphasizing the government's Article II argument).

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* litigation 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. As it did with so 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.<sup>35</sup> These moves, notably, have not generated particular controversy among the district court judges. Those who have explicitly addressed the source-of-authority issue appear 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 differs. In its *Hamlily* filing, the administration asserted that its detention authority extends to members and *substantial* supporters of Al Qaeda, the Taliban, and associated forces.<sup>36</sup> 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. The judges have differed at least to some extent in their assessments of this claim.

### **Contrasting Judicial Interpretations: As Many as Four Distinct Positions**

Several distinct, or at least apparently distinct, positions have emerged regarding the scope of the government’s authority, raising the possibility that it currently

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<sup>35</sup> Brief of Respondent, *Hamlily v. Obama*, 616 F. Supp.2d 63 (D.D.C. 2009) (No. 05-0763).

<sup>36</sup> *Id.*

varies from courtroom to courtroom. Most significantly, the pattern of opinions suggests disagreement with respect to whether a person must in some sense be a member of a group such as Al Qaeda in order to be detained, or if instead, an independent actor's support to the group can suffice. In addition, the pattern of opinions also suggests a latent potential for disagreement with respect to the ways in which the laws of war might further refine this analysis – including disagreement regarding the particular actions that would suffice to establish the requisite degree of association or support. Indeed, the D.C. Circuit's *Al Bihani* ruling reveals that the judges may not agree even with respect to the threshold question of whether it is appropriate to refer to the laws of war – or at least to customary law of war principles – in defining the scope of detention authority the AUMF conveys.

The most widely-accepted position among the district judges has its roots in the *Hamlily* decision by Judge John Bates. *Hamlily* was the first case to respond to the Obama administration's revised definition.<sup>37</sup> In it, Judge Bates accepts that the AUMF confers authority on the executive branch to detain *members* of Al Qaeda, the Taliban, and associated forces. But he rejects the proposition that independent *support* – even if substantial – can provide a distinct ground for detention.

At first blush, this appears to be a substantial defeat for the administration, but it is not entirely clear that, if eventually adopted by the courts, it would wholly warrant that description. Judge Bates emphasizes that there are “no settled criteria” for identifying *formal* membership in Al Qaeda (though proof that a detainee took an oath of allegiance might suffice). Accordingly, courts must be open to proof of *functional* membership, he writes. For example, a functional member of Al Qaeda might be one who is “tasked with housing, feeding, or transporting al-Qaeda fighters.”<sup>38</sup> Such a person might just as well be depicted by other judges or by the government as an Al Qaeda *supporter* and Judge Bates recognizes as much when he states that proof of support “may play a role under the functional [membership] test” even though it is not a ground for detention in its own right.<sup>39</sup> The “key inquiry,” in all events, is “whether the individual functions or participates within or under the command structure of the organization – *i.e.*, whether he receives and executes orders or directions.”<sup>40</sup>

*Hamlily*, in other words, precludes detention of entirely-independent actors who happen to provide support to Al Qaeda, but it considers acts of support to be relevant evidence of functional membership as long as the government can establish an element of direction and control in the relationship between the group and the individual. Subsequently, at least four other judges – Hogan, Robertson,

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<sup>37</sup> *Hamlily v. Obama*, 616 F. Supp.2d 63, 70-78 (D.D.C. 2009).

<sup>38</sup> *Id.* at 75.

<sup>39</sup> *Id.* at 76.

<sup>40</sup> *Id.* at 75.

Kollar-Kotelly, and Lamberth—have expressly adopted this interpretation.<sup>41</sup>

A fifth judge—Urbina—likewise has expressly adopted the *Hamlily* definition, but his actual application of the test suggests that he may have in mind something more restrictive than the other judges. In *Hatim v. Obama*, Judge Ricardo Urbina adopts the *Hamlily* standard but then goes on to address the sufficiency of the government’s attempt to satisfy that standard by proving that the detainee had attended Al Qaeda’s Al Farouq training camp. In that context, he states that even if the government could prove that the petitioner attended that camp and that he understood that he thereby became part of the “al-Qaida apparatus,” the government’s burden would still require it to present evidence to the effect that he had actually *received and executed orders* from Al Qaeda and thereby “participated” in its command structure, rather than simply received its training.<sup>42</sup> It may be that the other judges subscribing to *Hamlily* would take the same view, but it seems more likely that this entails a degree of engagement beyond what most or all of them have in mind under the heading of functional membership.<sup>43</sup>

In *Gherebi*, Judge Reggie Walton advances a position closely related to the *Hamlily* standard, but potentially distinct. He initially seems to accept that either membership *or* substantial support can trigger detention authority, just as the Obama administration urged. He goes on to explain, however, that in practical terms his version of the authority would “encompass 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.”<sup>44</sup> Whether this approach truly differs from the *Hamlily* approach depends, of course, on whether one thinks that the concept of membership under the laws of war would encompass the “functional membership” scenario. Judge Hogan has held that there is little or no daylight between these positions,<sup>45</sup> while Judge Kessler perceives at least some difference and opts for the *Gherebi* approach over that of *Hamlily*.<sup>46</sup> Insofar as the laws of war

<sup>41</sup> See, e.g., *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. Sep. 14, 2009) (Hogan, J.); *Awad v. Obama*, 646 F. Supp.2d 20, 23 (D.D.C. 2009) (Robertson, J.); *Al Mutairi v. United States*, 644 F. Supp.2d 78, 85 (D.D.C. 2009) (Kollar-Kotelly, J.); *Mattan v. Obama*, 618 F. Supp.2d 24, 26 (D.D.C. 2009) (Lamberth, J.).

<sup>42</sup> *Hatim v. Obama*, No. 05-1429, slip op. at 19-20 (D.D.C. Dec. 16, 2009).

<sup>43</sup> Complicating matters, Judge Urbina also includes language in his recapitulation of the *Hamlily* standard that hints at an inclination to distinguish between the “military” and “non-military” functions of AUMF-covered organizations. After announcing his agreement with Judge Bates, he summarizes his view by stating that the government must prove “that the petitioner served as part of the enemy *armed forces* . . .” *Id.* at 9 (emphasis added). If intended to incorporate the military/non-military distinction, it might follow that in Judge Urbina’s view only arms-bearing members of AUMF-covered groups, or persons relatively directly involved in their activities, come within the scope of detention authority—to the exclusion of financiers, propagandists, recruiters, and any number of other key figures in such organizations. It is possible, of course, that he intended nothing so significant by the use of the “armed forces” qualifier.

<sup>44</sup> *Gherebi v. Obama*, 609 F. Supp.2d 43, 70-71 (D.D.C. 2009).

<sup>45</sup> See *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. Sep. 14, 2009) (describing *Hamlily* as “not inconsistent” with *Gherebi*, and stating that the difference between them “is largely one of form rather than substance”).

<sup>46</sup> *Al Adahi v. Obama*, No. 05-0280, slip op. at 10-11 (D.D.C. Aug. 17, 2009); See also *Al Odah v. Obama*, 648 F. Supp.2d 1, 6-7 (D.D.C. 2009). See also *Mohammed v. Obama*, No. 05-1437, slip op. at 9 (D.D.C. Nov. 19, 2009). Curiously, Judge Kessler in a different case appears to adopt without comment or qualification the Obama Administration’s preferred definition. See *Ahmed*, 613 F. Supp.2d 51, 54 (D.D.C. 2009). Presumably this does not signify a retreat from her adoption of the *Gherebi* standard in *Al Adahi*, particularly because she returns to the *Gherebi* standard in *Mohammed*.

do not provide a concrete answer to this question, the prospect for divergent applications remains.

In contrast to the relatively-limited interpretations espoused in both *Hamliily* and *Gherebi*, Judge Leon appears to accept the possibility that detention may be justified not just for formal and functional members, but also in the case of a person who has provided support on an independent basis. Judge Leon first encounters this issue in connection with the *Boumediene* petitioners on remand from the Supreme Court decision in their case. Writing prior to the Obama administration's revision to its claim of authority and the *Hamliily* and *Gherebi* decisions, Judge Leon adopts the Bush Administration's definition of "enemy combatant" – including the authority to detain both members and supporters of Al Qaeda, the Taliban, and associated forces – as the measure of detention authority in the habeas litigation.<sup>47</sup> Subsequently, at the merits stage in that case, Judge Leon upholds the government's claim of authority to hold detainee Bensayah on the ground that he had provided support to Al Qaeda.<sup>48</sup>

Judge Leon has not subsequently confronted a petition that would require him to accept or reject the government's continuing claim of authority to detain on grounds of support alone. In his more recent *Al Ginfo* decision, however, he implies that the only problem he might have in that circumstance would be to determine "whether to adopt the government's new definition" in which support must be "substantial" to warrant detention – not whether to reject altogether the notion of detention based on support.<sup>49</sup> Indeed, he expresses some degree of impatience with the effort by the Obama administration to narrow modestly the scope of its detention authority.<sup>50</sup>

Significantly, the D.C. Circuit's *Al Bihani* decision comes down squarely on the side of the broader interpretation favored by the government and, it seems, Judge Leon.<sup>51</sup> Indeed, *Al Bihani* construes the AUMF to support not just the narrower support ground the Obama administration favors, but also the original Bush administration variant – in which support did not necessarily have to qualify as substantial.<sup>52</sup> The panel majority (consisting of the opinion's author, Judge Brown, as well as Judge Brett Kavanaugh) notes that the Military Commissions Act of 2006

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<sup>47</sup> See *Boumediene v. Bush*, 583 F. Supp.2d 133, 135-36 (D.D.C. 2008) ("Therefore, notwithstanding the fact that the Supreme Court and our Circuit Court have not as yet passed on the lawfulness of this definition under the AUMF and Article II, this Court will adopt the same definition that was employed in the CSRT hearings for each of these six detainees.").

<sup>48</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (concluding that it is "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. There can be no question that facilitating the travel of others to join the fight against the United States in Afghanistan constitutes direct support to al-Qaida in furtherance of its objectives and that this amounts to 'support' within the meaning of the 'enemy combatant' definition governing this case.").

<sup>49</sup> *Al Ginfo v. Obama*, 626 F. Supp.2d 123, 127 (D.D.C. 2009). Judge Leon was aware of the *Hamliily* decision at this time. See *id.* at 129 n. 7 (citing *Hamliily*).

<sup>50</sup> See *id.* (expressing uncertainty as to the reason the administration dropped the "enemy combatant" label, and observing that the administration has "go[ne]" so far as to advocate that the Court adopt an even higher standard regarding "the support ground for detention").

<sup>51</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 8 (D.C. Cir. Jan. 5, 2010).

<sup>52</sup> See *id.*

defined the specific category of persons subject to trial by commission to include those who “materially supported hostilities” against the United States and its coalition partners, and that the Military Commissions Act of 2009 contains comparable language. “[A]ny person subject to a military commission trial,” the majority concludes, “is also subject to detention.”<sup>53</sup> As to Al Bihani’s argument that such an interpretation of the AUMF would be inconsistent with the boundaries of detention authority permitted by the laws of war, the majority holds not only that Al Bihani’s reading of those laws is “unpersuasive,” but also that those laws in any event are “not a source of authority for U.S. courts” and cannot be construed “as extra-textual limiting principles for the President’s war powers under the AUMF.”<sup>54</sup>

These aspects of the holding, among others, prompted a separate opinion from the panel’s third member, Senior Judge Stephen Williams. Most notably, Judge Williams expresses particular concern with the majority’s claim that the laws of war do not constrain the meaning of the AUMF, observing that this view “appears hard to square with the approach that the Supreme Court took in *Hamdi*.”<sup>55</sup> In addition, he maintains a conspicuous agnosticism with respect to whether support alone can justify detention. In the spirit of Judges Bates, Walton, and Hogan, he maintains that the line between membership and support may be ephemeral, and notes that Al Bihani by his own account was so “enmeshed” in the “55<sup>th</sup> Brigade” (an Arab unit fighting on behalf of the Taliban and therefore encompassed in its own right by the AUMF) as to make the distinction among the various formulations of membership and support irrelevant in this instance.<sup>56</sup>

*Al Bihani* provides a degree of guidance to the otherwise-divided lower court with respect to the scope of authority issue, but is not likely the last word on the subject. Aside from the prospect of further litigation in that same case (whether in the form of *en banc* review or a *certiorari* petition), other cases – such as the appeal of Judge Leon’s decision denying Bensayah’s petition, which at least purported to rest on support grounds – may provide the occasion for further refinement, or even reconsideration, of the scope issue.

### **Questions that Remain to Be Answered**

Whatever becomes of the panel opinion in *Al Bihani*, many questions concerning the scope of the government’s detention authority remain to be resolved. First, does the standard advanced by the administration – and accepted by Judge Leon and the D.C. Circuit – with its overt assertion of authority to detain non-members who engage in some form of support, really differ in practical terms from the *Hamlily* standard of functional membership or the *Gherebi* standard of membership

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<sup>53</sup> See *id.* at 9.

<sup>54</sup> *Id.* at 8-9.

<sup>55</sup> See *id.* at 6.

<sup>56</sup> *Id.* at 4-6.

as informed by the laws of war? Theoretically it is possible that it does, as *Hamliily* appears to require evidence of some sort of command-and-control or agency relationship, whereas the broader definitions do not, thereby permitting detention instead to rest on the independent provision of support. This difference could prove critical in the event of cases involving sympathetic but independent actors who provide financial and other support services to Al Qaeda; it is not an accident, after all, that the Bush and Obama administrations both have endeavored to preserve support as a separate ground for detention.

It is true, of course, that none of the merits opinions to date—not even *Al Bihani*—have actually turned on whether the government can detain an independent supporter of Al Qaeda or another such AUMF-covered group. This does not show the principle to be unimportant, however. Aside from the possibility that cases presenting precisely that fact pattern may yet emerge from the existing detainee populations at Guantanamo (or Bagram, should habeas jurisdiction ultimately prove to extend that far), one must also bear in mind the impact that a scope-of-authority determination may have on future detention decisions. Indeed, a conclusive judicial determination adopting a narrow understanding of the range of groups and individuals subject to detention under the AUMF may raise comparable questions regarding the range of groups and individuals subject to targeting or other military measures.

A second unresolved matter is whether the judges ultimately will splinter more sharply in light of their varying understandings of what it means to be “part of” an AUMF-covered group, given that none of these entities much resembles a hierarchical membership organization. It is one thing to come to a consensus that membership counts to justify detention, but quite another to reach agreement as to the practical indicia of that status. Does attendance at a training camp or lodging at a sponsored guest house count? The majority in *Al Bihani* goes out of its way, in dicta, to suggest that *either*, standing alone, might suffice.<sup>57</sup> But as noted above in connection with Judge Urbina’s *Hatim* decision, and as noted below in connection with a variety of other cases, at least some of the district judges insist upon much more than that.<sup>58</sup> Moreover, should *Al Bihani* be reversed on the question of whether the laws of war condition the appropriate interpretation of the AUMF, we may also see significant fragmentation regarding what the laws of war have to say on both this subject and on the question of independent support.

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<sup>57</sup> See *id.* at 10 n. 2 (“evidence supporting the military’s reasonable belief of either of those two facts . . . would seem to overwhelmingly, if not definitively, justify the government’s detention” of a noncitizen seized abroad).

<sup>58</sup> Whether such behavior can suffice to support detention is a question that intertwines with other matters, such as the possibility that a once-adequate relationship can be vitiated by events occurring before or even after capture. We take up that topic in the next section.



## 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 have taken strikingly different positions on it. Put simply, is eligibility for detention indelible in the sense that having once been a member or supporter of these groups, one can always be detained? Or instead can changed circumstances vitiate the underlying relationship such that detention is no longer a legal option? And if a relationship can be vitiated, does the detainee bear the burden of proving that such vitiation took place or does the government bear the burden of proving that a relationship continues to exist?

Two 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? In other words, is there some escalating evidentiary burden on the government as time goes on? Second, 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 deal directly with the second issue – and take notably different positions on it.

### ***Does the Government's Burden Change Over Time?***

As noted above, the judges uniformly hold or assume 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 or did it somehow change over the course of the detention?

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 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 evidentiary collection processes, provided that some realistic prospect of eventual judicial review existed.<sup>59</sup> If the signals emerging from the habeas proceedings

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<sup>59</sup> Cf. *Al Maqaleh v. Gates*, 604 F. Supp.2d 205 (D.D.C. 2009) (holding that some detainees at the Bagram Internment Facility may pursue habeas relief).

indicate instead that the preponderance standard applies 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 take account of these rulings on this point. It will either impact commanders at temporary screening facilities who are determining whether to continue custody of an individual or the long-term detention review tribunals operating in connection with theater internment facilities – or both.

If nothing else, this dynamic highlights the need for clarity in the applicable rules. Unfortunately, the case law to date is quite muddled with respect to this question. By and large the judges have not directly addressed the issue. It is, however, latent in many of their opinions. The reason is that 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 feel obliged in retrospect to examine the evidence supporting the 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 has moved upwards.

All of the judges take this approach to some degree, though the degree seems to vary. At the deferential end of the spectrum, Judge James Robertson seems simply to accept that if the evidence was good enough to justify detaining the petitioner under the laws of war as an original matter, the laws of war still permit that person's detention until the end of hostilities. Judge Robertson characterizes the case against the petitioner in *Awad* as "gossamer thin" and the evidence "of a kind fit only for these unique proceedings [redaction] and ha[ving] very little weight."<sup>60</sup> However, he nonetheless states that the President still has the authority to detain the petitioner because "[c]ombat operations in Afghanistan continue to this day and – in my view – the President's 'authority to detain for the duration of the relevant conflict' which is 'based on longstanding law-of-war principles' has yet to 'unravel.'"<sup>61</sup> In other words, the evidence might be lousy, but if it ever justified the detention, it still does and it will through the duration of the current conflict.

Even Judge Robertson, however, does not seem to take the view that *no* evidentiary escalation has taken place in the years of *Awad*'s detention. His 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, of course, the stated standard Judge Robertson purports to deploy – placing the burden of proof on the government by a preponderance of the evidence – seems considerably more stringent than the test for an *initial* detention judgment.

The other judges all seem to go considerably further. While none ever

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<sup>60</sup> *Awad v. Obama*, 646 F. Supp.2d 20, 27 (D.D.C. 2009).

<sup>61</sup> *Id.*

questions the decision to initially detain a suspect, they seem to suggest that evidence that may have justified the initial detention will not serve in retrospect to convince a court to bless it.<sup>62</sup> Yet while these judges all suggest some degree of temporal shift in their assessment of evidence, none of them clearly addresses precisely *how* the evidentiary standard has changed over the course of the detention. Nor do they make clear at what point evidence initially suitable to detain a person became unsuitable or whether the government is obliged to meet an incrementally increasing standard the longer a detention continues.

Eventually the courts must address this issue directly if the legislature will not, given its potential impact on ongoing military operations in the field. Notably, the majority opinion in the Supreme Court's *Boumediene* decision provides support for the evidentiary-escalator approach, though it does so without answering the most important questions. 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.<sup>63</sup> Unfortunately, Justice Kennedy does not elaborate regarding the procedures that the Court would deem sufficient at 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."<sup>64</sup>

In any event, the current regime seems both 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.

### ***Can a Relationship with a Terrorist Organization be Vitiating?***

By contrast, the district judges have taken on squarely the question of vitiating—that is, whether a relationship adequate to support a detention, once established, can be broken such that detention is no longer lawful. And while they agree at a high level of generality that to justify a detention the government must establish that the detainee had or has a meaningful relationship with an

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<sup>62</sup> See, e.g., *Ahmed v. Obama*, 613 F. Supp.2d 51, 56 (D.D.C. 2009).

<sup>63</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

<sup>64</sup> *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.

enemy organization, they do not agree even at a high level of altitude concerning the circumstances under which a person can withdraw from such a relationship. (The D.C. Circuit has not yet confronted this question.) A sextet of decisions, rather, suggests a potentially significant degree of disagreement.

In one case, Judge Ellen Huvelle finds 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 to Al Qaeda and thus required the detainee’s release. In another, Judge Robertson explicitly disagrees with Judge Huvelle and appears to suggest that the sole relevant inquiry is whether the person *at any point prior to capture* had the requisite relationship with an enemy group. Judges Leon, Kessler, Urbina and Bates require the requisite relationship to still exist at the time of capture but do not necessarily agree with Judge Huvelle regarding the circumstances in which post-capture vitiation might also be possible—in which case theirs would be a distinct third position.

### *Relationship Vitiating Prior to Capture*

Judges Leon, Kessler, Urbina and Bates have ruled that the government may not detain someone whose relationship with Al Qaeda ended *prior* to the date of capture.<sup>65</sup> The issue presents most clearly in *Al Gingo*, where Judge Leon lays out a test for 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.<sup>66</sup> This test requires looking 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.<sup>67</sup>

The petitioner in *Al Gingo* had briefly joined Al Qaeda, but the relationship had soured quickly. According to Judge Leon’s findings, 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.<sup>68</sup> Judge Leon describes this relationship as “at best—in its formative stage.”<sup>69</sup> After the eighteen days at the training camp, Al Qaeda leaders suddenly suspected the petitioner of spying on them and then tortured him “for months into giving a false confession.”<sup>70</sup> The Taliban then imprisoned the petitioner “for a substantial

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<sup>65</sup> See *Al Gingo 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).

<sup>66</sup> *Al Gingo*, 626 F. Supp. 2d at 129.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

eighteen-plus month period.”<sup>71</sup>

Judge Leon evidently regards it as obvious that vitiation is possible and expresses incredulity that the government would 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.<sup>72</sup>

Applying the test outlined above, he finds 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.” The petitioner’s ultimate imprisonment at the Taliban’s hands further demonstrates “that any preexisting relationship had been utterly destroyed.”<sup>73</sup> Judge Leon concludes that owing to “the limited and brief nature of [petitioner’s] relationship with al Qaeda... [combined] with the extreme conduct by his captors over a prolonged period of time, the conclusion is inescapable that his preexisting relation... 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.”<sup>74</sup>

In a second case, *Al Adahi*, Judge Kessler likewise finds that the petitioner’s relationship with Al Qaeda had terminated prior to his capture, if it had ever amounted to an adequate relationship at all. *Al Adahi* is similar to *Al Ginco* in that the government relied on proof that the petitioner attended an Al Qaeda training camp, and in that the petitioner claimed to have departed the training early under bad terms with the sponsors. *Al Adahi* differs in two important respects, however. First, the petitioner in *Al Adahi* did not claim to have been detained or abused as a result of this falling out. Rather, he claimed he was spared such treatment on account of his sister’s recent marriage to a man with close ties to Osama Bin Laden. And that claim leads to the second distinction. The petitioner in *Al Adahi* had become an Al Qaeda trainee after having traveled to Kandahar with his sister “to attend a celebration of the marriage” hosted by Bin Laden himself. The petitioner met Osama Bin Laden there, and then met with him again a few days later, before going on to stay at a Taliban guesthouse and then to attend the Al Qaeda training camp.<sup>75</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Al Ginco v. Obama*, 626 F. Supp.2d 123, 128 (D.D.C. 2009).

<sup>73</sup> *Id.* at 130.

<sup>74</sup> *Id.*

<sup>75</sup> 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 concludes, however, that the petitioner’s familiarity with the other bodyguards may have just arisen from his having met them on a few

Faced with this evidence, Judge Kessler concludes that the detainee's initial relationship with Al Qaeda seems to have been primarily familial in nature. Citing *Al Gingo*, she further concludes that his subsequent enrollment as an Al Qaeda trainee had not resulted in a continuing relationship. It had lasted only seven to ten days, and no evidence suggested that he went on to occupy a structured role in the hierarchy of the enemy forces. 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."<sup>76</sup> In addition, she finds, the government had presented no evidence to suggest that after expulsion from the camp the petitioner "did anything to renew connections with al-Qaida and or the Taliban."<sup>77</sup> Judge Kessler ultimately concludes that the petitioner's "brief attendance at [camp] and eventual expulsion simply do not bring him within the ambit of the Executive's power to detain."<sup>78</sup> She also notes that the petitioner's "conduct after training at Al Farouq does not demonstrate that... [he] took any affirmative steps to align himself with al-Qaida... The Government offered no substantive evidence that he continued on a course of substantial support for al-Qaida."<sup>79</sup> Judge Kessler thus determines both that the petitioner's relationship with Al Qaeda never reached a level sufficient to detain him and that whatever relationship did exist had been vitiated.<sup>80</sup>

Judge Urbina offers a similar perspective in *Hatim*. In that case, the petitioner denied the government's claim that, among other things, he had attended Al Farouq. Judge Urbina notes that even if he accepts the government's claim as true, and even if he further accepts that the detainee as a result became part of the Al Qaeda command structure, he still would not approve of the detention because the government failed to disprove Hatim's alternative argument that he had "separated himself from the enemy armed force's command structure prior to his capture."<sup>81</sup>

Finally, Judge Bates reaches a related conclusion in *Khan*, albeit in the course of ruling on a motion for judgment on the record prior to the completion of discovery, rather than in relation to a determination on the merits after an evidentiary hearing.<sup>82</sup> In *Khan*, the government argued, among other things, that the petitioner is subject to detention in light of his connection to Hezb-i-Islami

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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 finds that "[s]uch a serious allegation cannot rest on mere conjecture, with no hard evidence to support it." She then concludes 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).

<sup>76</sup> *Id.* at 24-25.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 41.

<sup>79</sup> *Id.* at 39-40.

<sup>80</sup> *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.'")

<sup>81</sup> *Hatim v. Obama*, No. 05-1429, slip op. at 21 (D.D.C. Dec. 16, 2009).

<sup>82</sup> See *Khan v. Obama*, 646 F. Supp.2d 6 (D.D.C. 2009).

Gulbuddin (“HIG”), an associated force engaged in hostilities against the United States and its allies in Afghanistan. In denying Khan’s motion for judgment on the record, Judge Bates observes that the government had evidence that Khan had served as an HIG radio operator some twenty years earlier. Combined with certain other evidence – and bearing in mind that the procedural posture at this preliminary stage requires inferences to be drawn in the government’s favor – Judge Bates concludes that this suffices to support the government’s claim that the petitioner actually remained involved in HIG at the time of his capture in 2002. Judge Bates goes out of his way, however, to clarify that the government cannot detain Khan simply based on his role in HIG two decades earlier, writing that “the Court will not adopt a ‘once a HIG communicator, always a HIG communicator’ approach.”<sup>83</sup>

### *Relationship Vitiating After Capture*

Whereas *Al Gingo*, *Al Adahi*, *Hatim*, and *Khan* all address the question of whether a relationship can be vitiated *prior* to the date of capture, Judge Huvelle in *Basardh* confronts the more counter-intuitive question of whether the relationship can be vitiated as a result of *post-capture* events. Ultimately she concludes that it can, and that vitiation has taken place in the particular case before her.

In *Basardh*, the petitioner joined Al Qaeda and learned how to use weapons at an Al Qaeda training facility.<sup>84</sup> In contrast to the aborted relationship described in *Al Gingo* and *Al Adahi*, *Basardh* “[b]y late 2001 . . . was hiding with bin Laden and others in the mountains of Tora Bora, where he acted as a cook and a fighter.”<sup>85</sup> Subsequently, Pakistani officials captured him and turned him over to U.S. authorities. While in Guantánamo, however, the petitioner fully cooperated with the government, which resulted in beatings and threats to his life from other detainees. He stated that “[m]y family and I are threatened to be killed . . . and this threat happened here in prison many times.”<sup>86</sup> His cooperation became public knowledge on February 3, 2009, when “the *Washington Post* published a front-page article regarding [his] cooperation, specifically citing him by name.”<sup>87</sup>

In determining whether continued detention is legally available, Judge Huvelle

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<sup>83</sup> *Id.* at 18.

<sup>84</sup> Del Quinten Wilber, *Detainee-Informer Presents Quandary for Government*, WASH POST, Feb. 3, 2009, available at: [http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203337\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203337_pf.html).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (The article also indicates that the government doubts the petitioner’s information. The article states: “His trustworthiness was further thrown in doubt a little more than two weeks ago when a federal judge ordered a 21-year-old prisoner freed, saying he could not rely on Basardah’s word to justify the man’s confinement.” Presumably, the federal judge in question is Judge Leon, who stated in *El Gharani* that “[t]he credibility of this other detainee, however, has been seriously called into question by Government Personnel who specifically cautioned against relying on his statements without independent corroboration.” *El Gharani v. Bush*, 593 F. Supp.2d 144, 148 (D.D.C. 2009). Likewise, Judge Kessler, in *Ahmed*, stated that “[t]he Government relies on testimony of [redaction] an individual whose credibility has been cast into serious doubt – and rejected – by another Judge in this District.” *Ahmed v. Obama*, 613 F. Supp.2d 51, 56-57 (D.D.C. 2009) (citing *El Gharani*).

concludes that the court must look to the petitioner's *current likelihood* of rejoining the enemy.<sup>88</sup> Given his cooperation and the public knowledge of this cooperation, she decides that "the requested relief is warranted, for [the petitioner] can no longer constitute a threat to the United States."<sup>89</sup> In other words, the fact of becoming a cooperating witness against his fellows while in captivity – and the fact of his cooperation's becoming known – serves to vitiate a conceded prior relationship.

### *Detention Permissible if Relationship Ever Established*

In explicit contrast to Judge Huvelle's approach in *Basardh* – and arguably in implicit contrast to the positions of Judges Leon, Kessler, Urbina and Bates – Judge Robertson in *Awad* appears to adopt a strict approach to the vitiation question.

As noted above, the evidence in *Awad* is "gossamer thin," according to Judge Robertson's own account. The petitioner's leg had been amputated,<sup>90</sup> and Judge Robertson has difficulty imagining that he poses a threat going forward.<sup>91</sup> The petitioner accordingly had invoked Judge Huvelle's ruling in *Basardh*, suggesting that it stood for the proposition that a person cannot be held in detention if he does not pose a personal threat of future dangerousness, presumably regardless of his associational status.

Judge Robertson responds by acknowledging "the power of Judge Huvelle's argument in *Basardh*... that 'the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from joining battle.'"<sup>92</sup> But he declines to follow Huvelle's reasoning and refuses to consider "whether or to what extent continued detention... supports the AUMF's self-stated purpose of 'preventing... future acts of international terrorism.'"<sup>93</sup> Emphasizing the point, he states that "[i]t seems ludicrous to believe that... [the petitioner] poses a security threat now, but that is not for me to decide."<sup>94</sup> Judge Hogan, in *Anam*, likewise explicitly declines to follow Huvelle's approach to future dangerousness, saying, "the Government is authorized to detain an individual who was a 'part of' al-Qaida, even if that individual does not presently pose a threat to the security of the United States."<sup>95</sup>

But in his specific language, Judge Robertson appears to take a step further. What matters, instead of future dangerousness, he writes, is that the evidence suffices to prove that the petitioner "was, for some period of time, 'part of' al Qaeda" (emphasis added). This suffices to justify the detention, regardless of detainee's

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<sup>88</sup> *Basardh v. Obama*, 612 F. Supp.2d 30, 35 (D.D.C. 2009).

<sup>89</sup> *Id.*

<sup>90</sup> *Awad v. Obama*, 646 F. Supp.2d 20, 26 (D.D.C. 2009).

<sup>91</sup> *Id.* at 24.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Anam v. Obama*, No. 04-1194, slip op. at 4 (D.D.C. Jan. 6, 2010).



future dangerousness, and it does not on its face appear limited to membership at the time of capture. Judge Robertson does not explicitly address the question of whether a detainee can vitiate his relationship with the group *prior* to his capture — an issue the facts in his case do not present. Yet his language suggests that even pre-capture vitiation of the relationship might not be sufficient to spare a person from detention eligibility. Read in that way, *Awad* is in considerable tension not merely with Judge Huvelle’s ruling but with those of Judges Leon, Kessler, Urbina, and Bates.

It seems unlikely that Judge Robertson intends such a maximalist reading, which would seem to preclude *all* vitiation claims. For one thing, not even the government claims that vitiation is impossible. Judge Leon in *Al Ginco* quotes government counsel disclaiming this notion:

Happily, the Government, to its credit, does not go so far as to contend that any prior relationship with al Qaeda or the Taliban, however distant in the past and regardless of intervening circumstances, is a sufficient basis to hold an individual under the AUMF indefinitely. (Classified Oral Arg. Tr. 39, May 29, 2009 (“[W]e are not saying once a Taliban, always a Taliban.”).)<sup>96</sup>

Far more likely is that he is simply responding to the facts in the case, where whatever degree of affiliation the detainee ever had with the enemy he certainly still had on the day of his capture. There may, in other words, be no tension at all between Judge Robertson’s position and that of the others on this point. There is certainly, however, tension between Judges Robertson and Hogan on the one hand and Judge Huvelle on the other, and there is also probably tension between Judge Huvelle’s approach and that of the other judges.

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<sup>96</sup> *Al Ginco v. Obama*, 626 F. Supp.2d 123, 129 (D.D.C. 2009).

## 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. “[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.” The plurality gave the example of a rule permitting the use of hearsay, and even went so far as to suggest that the burden of proof might lie with the defendant once the government comes forward with a “credible” evidentiary showing to support the detention. The justices made this point in relation to the military detention of a U.S. citizen whose right to assert the protections of the Fifth Amendment Due Process Clause the government did not contest. Therefore, it is unsurprising that in the post-*Boumediene* habeas litigation the government has requested an array of this type of concessions 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.<sup>97</sup>

It is tempting to conflate these two concepts. Both, after all, connote deference; the government seeks to justify both on grounds of practical exigency, and they are often discussed simultaneously in both motions and opinions in these proceedings. They are conceptually distinct, however, and should be analyzed and addressed separately.

Begin with the question of evidentiary authenticity. Under the Federal Rules of Evidence, the proffer of any evidence might lead to questions about its authenticity. 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 once he or she accepts it as genuine. It relates simply to the question of whether it should be admissible in the first instance in the event of doubt as to what it is. To give a pedestrian example, a defendant in a car-wreck negligence suit 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 tire tread is then introduced into evidence. 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 a theoretically significant one in the habeas litigation. One could imagine the government seeking in many of these cases to introduce documentary or other tangible evidence obtained overseas in contexts

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<sup>97</sup> Most of the judges, to one degree or another, address these motions (excepting Judges Leon and Huvelle).

that make it relatively difficult to establish authenticity through traditional methods. 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 potentially-inauthentic evidence to carry the burden of proving its authenticity.

Such requests seem very much in keeping with the practical concerns and accommodations the Supreme Court plurality discusses in *Hamdi*. Perhaps for that reason, they have had some resonance with the judges. Judge Kessler, for example, grants such a request in *Ahmed* and *Mohammed*,<sup>98</sup> as does Judge Urbina in *Hatim*.<sup>99</sup>

But not all the judges have followed this approach. Judge Kollar-Kotelly in *Al Mutairi*, for example, rejects a request for a presumption of authenticity. Complicating matters, *Al Mutairi* involves a request for a presumption of *both* authenticity and accuracy, and Judge Kollar-Kotelly's analysis does not clearly differentiate between the two. She notes that these 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.'"<sup>100</sup> Speaking directly to authenticity concerns, however, she sounds a cautionary note that turns 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 notes, "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."<sup>101</sup> In her view, far from providing a basis for a presumption of authenticity, this fact creates good grounds to doubt it.

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 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.

And requesting a presumption of *accuracy* (or "reliability" or "credibility") for the government's evidence is a different kettle of fish altogether, or at least it ought to be treated as such. Whereas authenticity speaks to a threshold question of admissibility, accuracy speaks to the subsequent question of what weight the fact-finder should attach to a particular item of evidence that has been admitted. That is to say, to presume the accuracy of evidence would seem to be much the same as

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<sup>98</sup> See *Ahmed v. Obama*, 613 F. Supp.2d 51, 54-55 (D.D.C. 2009); *Mohammed v. Obama*, No. 05-1437, slip op. at 11 (D.D.C. Nov. 19, 2009).

<sup>99</sup> *Hatim v. Obama*, No. 05-1429, slip op. at 12 (D.D.C. Dec. 16, 2009) (assuming the authenticity of intelligence reports on a business-records theory).

<sup>100</sup> *Al Mutairi v. United States*, 644 F. Supp.2d 78, 83-84 (D.D.C. 2009) (citing *Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008)).

<sup>101</sup> *Id.* at 84.

presuming that the evidence does in fact establish that which it is offered to prove. This is 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 case as a whole*. 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. Given this understanding of the nature of a presumption of accuracy, it is unsurprising that none of the publicly-available rulings on the issue have favored the government on this point.<sup>102</sup>

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<sup>102</sup> See, e.g., *Ahmed v. Obama*, 613 F. Supp.2d 51, 54-55 (D.D.C. 2009); *Hatim v. Obama*, No. 05-1429, slip op. at 13 (D.D.C. Dec. 16, 2009).

## The Court's Treatment of 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. 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; 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 prior administration set up to review detentions. All of these types of documents present difficult questions in terms of their admissibility and probative value, and the judges arguably have spent more time grappling with these questions than with any other single point of procedure—with substantial impact on the ultimate merits determinations in many cases. Unfortunately, these efforts have produced a jurisprudence that is both difficult to comprehend and internally inconsistent in certain key respects.

The judges do seem to agree on one central point: hearsay must be “reliable” in order to factor into the court’s analysis of a habeas case’s merits. From there, however, things get complicated. As a threshold matter, the judges appear to disagree as to whether reliability is a necessary condition for admissibility or simply a critical factor in assessing the weight to be given the evidence—or even whether this distinction matters in the context of a bench trial, in which the judge acts as both evidentiary gatekeeper and factfinder. Setting that aside, the actual application of the reliability standard across numerous cases over the past year has generated a remarkably complex group of decisions. These seem to reflect both a set of shared underlying assumptions on the part of the judges and also a healthy dose of personal instinct and comfort with material quite different from the evidence judges normally see.

Some judges focus first on whether there is sufficient information regarding the hearsay statement—or, more specifically, regarding the original source of that statement—to permit a judgment as to its reliability in the first place. In actual practice, this has produced a prohibition on the use of anonymous statements, including in the context of intelligence reports where the intelligence community does not wish to disclose the actual identity of the source in question. Even where the government identifies its source, however, it does not follow that the judge will find that he or she has sufficient information about the source to make the requisite reliability determination.

Additional issues arise as well in the course of making actual reliability determinations—particularly in the important and recurring context of statements made by detainees under interrogation. The judges have determined many such statements to be inherently unreliable because of the interrogation methods

employed at the time or even previously, thus illustrating the extent to which the hearsay issue becomes intertwined with the voluntariness questions we discuss separately below. They do not necessarily agree, however, regarding where the line should be drawn between interrogation methods that produce admissible evidence and those that do not. And even where the detainee does not allege coercion, several of the judges have proven highly skeptical of inculpatory statements made by one detainee regarding another, and have required corroboration before relying on such statements – though they do not necessarily agree regarding the quantity or quality of the corroboration required.

In short, while the judges appear to agree on “reliability” as the appropriate test for hearsay material, they both disagree as to the mechanics of the reliability test and have very different senses of what degree of vetting and corroboration will render hearsay reliable in practice. The result is an arrangement in which judges use much the same vocabulary to describe rulings that likely differ significantly in practice.

### ***Hearsay Considerations in General and the Origins of the Reliability Test***

In ordinary civil or criminal litigation, of course, 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 regarding 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.<sup>103</sup> The Federal Rules also generally forbid the admission of hearsay statements in any event.<sup>104</sup> And while the rules provide for many exceptions to this bar, being unable to describe the circumstances surrounding the original statement would be fatal to many attempts to offer hearsay in this particular setting. In any event, hearsay derived from custodial interrogation is unlikely to trigger any of the usual exceptions.<sup>105</sup> What’s more, 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 in any criminal proceeding confront the Sixth Amendment’s unyielding guarantee of a defendant’s right to confront the witnesses against him.

Generally speaking, the Federal Rules of Evidence apply in habeas

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<sup>103</sup> FED. R. EVID. 602.

<sup>104</sup> FED. R. EVID. 802.

<sup>105</sup> A petitioner’s own statements would not be considered hearsay. *See* Federal Rule of Evidence 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.

proceedings.<sup>106</sup> Yet 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, recognizing that practical exigencies may make its use the best available alternative in some circumstances. More significantly, perhaps, the D.C. Circuit in *Al Bihani* expressly asserts that hearsay “is always admissible” in these habeas proceedings.<sup>107</sup> The admissibility of hearsay, however, turns out to be relatively cold comfort for the government in light of the reliability test the judges have adopted in the course of determining the weight of such evidence.

The reliability test did not emerge from a vacuum. On the contrary, the judges appear to believe it is the law of the circuit as a result of the D.C. Circuit’s earlier determination in the *Parhat* litigation. As noted above, *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 a CSRT in that instance had lacked sufficient evidence to justify its determination that certain detainees were subject to military detention. That outcome turned in substantial part on the Circuit’s conclusion that key portions of the government’s case turned entirely on assertions of fact made by unidentified sources in “four government intelligence documents,” and that this form of hearsay is not sufficiently reliable to be used as evidence in support of the government’s case. The intelligence reports on which the government relied, the court found, “repeatedly describe . . . activities and relationships as having ‘reportedly’ occurred, as being ‘said to’ or ‘reported to’ have happened, and as things that ‘may’ be true or are ‘suspected of’ having taken place. But in virtually every instance, the documents do not say who ‘reported’ or ‘said’ or ‘suspected’ those things.” The panel waved off the government’s argument that the repetition of certain assertions in multiple intelligence reports amounted to corroboration: “Lewis Carroll notwithstanding, the fact that the government has ‘said it thrice’ does not make an allegation true.” The panel emphasized that it was not suggesting “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.” Reliance on such statements, the panel observed, deprives the detainee of a fair opportunity to rebut the government’s case, effectively establishing an irrebuttable presumption in favor of the government’s evidence. Following *Parhat* – usually citing it, in fact – the judges of the district court in the Guantánamo habeas cases have imposed a generalized requirement of reliability when faced with hearsay submissions, and that practice received the further imprimatur of the Circuit in *Al Bihani*, albeit without further discussion of what the

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<sup>106</sup> See *Bostan v. Obama*, No. 05-833, slip op. at 10 n. 5 (D.D.C. Aug. 19, 2009) (“This member of the Court will . . . observe the Federal Rules of Evidence except where national security or undue burden to the government require otherwise, and the onus will be placed on the government to justify deviance from these rules rather than simply assume away any rules or requirements that the government deems inconvenient. This is not making up a new standard for detainee cases – it is simply requiring the government to justify any variance from well-established rules of evidence.”).

<sup>107</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 22 (D.C. Cir. Jan. 5, 2010).

test entails in practical terms.<sup>108</sup>

### **The Contested Nature of the Reliability Test—And Why It Matters**

While the judges appear to agree across the board that reliability matters a great deal to the hearsay analysis, they disagreed prior to the Circuit’s ruling in *Al Bihani* as to whether it is a necessary condition for the admissibility of hearsay or instead merely an aspect of the factfinder’s analysis of the probative value of such evidence once admitted. This debate may have appeared academic, but as *Al Bihani* itself illustrated, something significant turned on it.

Several district judges expressly described the reliability test in terms of admissibility prior to *Al Bihani*. The Case Management Order crafted by Judge Hogan in November 2008 and meant to govern the majority of the habeas cases, for example, did so quite explicitly.<sup>109</sup> According to that CMO, hearsay may be admitted at the merits stage only upon motion in advance of any merits hearing, with the judge determining whether it is “reliable” as well as whether “the provision of nonhearsay evidence would unduly burden the movant or interfere with government efforts to protect national security.”<sup>110</sup> In a subsequent bench ruling dealing with the reliability of certain detainee interrogation statements, moreover, Judge Hogan expressly observed that his determination regarding reliability does not also constitute a determination regarding the weight to be afforded such statements if admitted.<sup>111</sup> Echoing this perspective, Judge Walton 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.”<sup>112</sup> Judge Bates appeared to concur in this approach as well.<sup>113</sup>

While other judges also focus on reliability as a key consideration in the hearsay analysis, it is not clear that they all also viewed it as an element of admissibility. Judge Kollar-Kotelly, most notably, has 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.”<sup>114</sup> This language highlights the fact that the judges in these bench trials

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<sup>108</sup> See *id.* at 22-24 (referring to the reliability standard).

<sup>109</sup> *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, CMO §II.C (November 6, 2008).

<sup>110</sup> *Id.*

<sup>111</sup> *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. Sep. 14, 2009).

<sup>112</sup> *Bostan v. Obama*, No. 05-833, slip op. at 7 (D.D.C. Aug. 19, 2009).

<sup>113</sup> See *Khan v. Obama*, No. 08-1101, slip op. (D.D.C. Feb. 20, 2009) (Case Management Order).

<sup>114</sup> *Al Rabiah*, No. 02-828, slip op. at 5 (D.D.C. Sept. 17, 2009) (D.D.C. Sep. 17, 2009) (citing *Parhat*). See also *Al Odah v. United States*, 684 F. Supp.2d 1, 5 (D.D.C. Aug. 24, 2009) (Kollar-Kotelly, J.) (same); *Al Mutairi v. United States*, 644 F. Supp.2d 78, 83 (D.D.C. July 29, 2009) (Kollar-Kotelly, J.) (same); *Boumediene*, 579 F. Supp.2d 191, 197 (D.D.C. 2008) (Leon, J.) (admitting hearsay and stating that the judge will consider its reliability later); *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



are serving 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. The Circuit's decision in *Al Bihani*, resolving this debate in favor of a weight rather than an admissibility test, takes the same approach as Judge Kollar-Kotelly for that very reason.<sup>115</sup>

At first blush the distinction between admissibility and weight may appear academic. Indeed, Judge Walton suggests as much in *Bostan*:

Whether the assessment of a piece of hearsay's evidentiary worth is made at a preliminary hearing on the admissibility of proffered 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.<sup>116</sup>

In most of these proceedings, Judge Walton's assessment is undoubtedly correct. But for the cases that become the subject of appeals, the distinction may prove significant. A decision to exclude evidence altogether involves a conclusion of law subject to *de novo* review, thus expanding the prospects for reversal. Treating the reliability inquiry in terms of the factfinder's assessment of the weight of evidence, rather, presumably warrants a more deferential standard, thus potentially narrowing the prospects for reversal. Arguably we see precisely this occurring in *Al Bihani* itself. After describing reliability as a weight, rather than admissibility, test, the Circuit observes that Judge Leon had "ample contextual information ...to determine what weight" to give that evidence, and shows no inclination whatsoever to second-guess that assessment.<sup>117</sup>

### ***Adequate Information Regarding the Source of the Statement as a Necessary Condition to Assess Reliability***

However significant the admissibility vs. weight debate may have been (or may yet prove to be), there are a host of further issues concerning its practical application that the Circuit does not address in *Al Bihani*. For Judges Bates and Walton, for example, the existence of the reliability test means in practical terms that the judge must first make a threshold determination as to whether the

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weight of the admitted evidence"); *Hatim v. Obama*, No. 05-1429, slip op. at 13 (D.D.C. Dec. 16, 2009) (Urbina, J.) (noting that hearsay was admitted, with reliability objections to be taken into account in the course of weighing the evidence).

<sup>115</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 22-23 (D.C. Cir. Jan. 5, 2010) (noting that judges are "experienced and sophisticated fact finders" whose "eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries").

<sup>116</sup> *Bostan v. Obama*, No. 05-833, slip op. at 9-10 (D.D.C. Aug. 19, 2009). Judge Walton goes on to suggest that it is petitioners, not the government, who advocate the bifurcated process of determining the admissibility of hearsay in advance of evidentiary hearings. *See id.*

<sup>117</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 24 (D.C. Cir. Jan. 5, 2010).

government has given enough information about the underlying source of the statement for the court to conduct such an analysis. As Judge Bates explains: “if courts cannot assess reliability, then the evidence in question is inherently unreliable and may not be relied upon to justify detention.”<sup>118</sup> Whether one views this point in terms of the admissibility of hearsay or merely the weight to afford it, it proves to be highly consequential.

This approach has proven fatal on several occasions to government efforts to rely upon intelligence reports containing allegations from unidentified or loosely-identified sources. In *Khan*, for example, Judge Bates individually assesses a dozen such reports, finding in each instance that he cannot make a reliability determination because the government has either not identified the original source of the relevant assertions or merely described the source as a senior Afghan tribal leader.<sup>119</sup> Even where the government makes the identity of the source known, this will not necessarily suffice to permit the requisite reliability analysis. Judge Bates notes that the intelligence community itself espouses certain criteria for assessing source credibility, and he takes the view that the courts should adopt them in making hearsay reliability determinations.<sup>120</sup> It follows that judges must have information sufficient to actually apply those criteria. The public version of Judge Bates’ opinion on this point does not clearly identify what these considerations are, but an unredacted passage in it does state that the reliability assessment should encompass such factors as how the source obtained the 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.”<sup>121</sup> Absent information permitting such an analysis, under this framework, the report will be excluded or, if admitted under *Al Bihani*, given no weight.

Whether other judges will adopt this threshold adequacy-of-information test remains to be determined. In at least one instance, a judge has taken a *more stringent* approach. In a bench ruling on an unopposed motion to suppress detainee statements in *Bacha*, Judge Huvelle expressed intense frustration with the government’s reliance on intelligence reports at all – particularly those containing assertions from unspecified sources. After suppressing the detainee’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 made clear that the new evidence would have 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 deposition should the person be unavailable to the court.<sup>122</sup>

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<sup>118</sup> *Khan v. Obama*, No. 08-1101, slip op. at 6 (D.D.C. Feb. 20, 2009) (Case Management Order). Judge Walton takes a similar view in *Bostan v. Obama*, No. 05-833, slip op. at 11 (D.D.C. Aug. 19, 2009).

<sup>119</sup> See *Khan v. Obama*, No. 08-1101, slip op. 10-16 (D.D.C. Feb. 20, 2009) (Case Management Order).

<sup>120</sup> See *id.* at 10.

<sup>121</sup> *Id.*

<sup>122</sup> 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,

That aspect of *Bacha* may well be an idiosyncratic consequence of the unusual facts at issue in that case – facts which had Judge Huvelle particularly displeased with the government. Then again, it might be a harbinger of things to come. Either way, the fact that at least some of the judges are plainly hostile to the use of intelligence reports with unsourced or poorly-contextualized statements should have a significant impact on the government officials responsible for determining whether and to what extent information about an intelligence source should be disclosed in support of habeas litigation. Such officials at times will no doubt perceive tension between their interest in succeeding in particular cases and their interest in protecting sources and methods of intelligence collection. How they choose to mediate that tension in future cases – whether they choose to litigate at all or whether they simply transfer or release a detainee, and how they seek to defend a detention when they do attempt to do so – presumably will be influenced by their expectations regarding the judicial reception of hearsay statements that contain limited contextual information.

At this point, it would be unwise for the government to expect a court to admit or give weight to any statement in an intelligence report when the source is entirely anonymous – or at least where the government does not share the source’s identity at a minimum with the *court*. Judge Walton, notably, has flagged the possibility of *ex parte* disclosure of source identity, with the judge then employing special procedures modeled on the Classified Information Procedures Act (CIPA) to determine whether in the circumstances it is appropriate for the judge to consider the evidence.<sup>123</sup> Whether this option proves viable remains unclear.

### ***Detainee Statements and Possible Corroboration Requirements***

Assuming that a court possesses information adequate to assess reliability, a host of other difficult issues then arise. Arguably the most significant of these involves the use of detainee statements obtained in interrogation.

The use of such statements raises two clusters of concerns from a reliability perspective. First, detainees frequently allege that their own inculpatory statements – or those of other detainees – were the product of torture or coercion and hence cannot withstand a reliability analysis. In that setting, the hearsay analysis becomes inextricably intertwined with coercion concerns. This is an exceedingly important scenario, and we treat it in detail below under the heading of voluntariness. For now, we concentrate on the second major issue raised by the use of detainee statements: Must detainee statements be corroborated by other evidence in order to withstand the reliability test?

This issue arises with respect both to a habeas petitioner’s own prior statements and with respect to inculpatory statements previously made by other

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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.”).

<sup>123</sup> *Bostan v. Obama*, No. 05-883, slip op. (D.D.C. Oct. 23, 2009).

detainees. The former, notably, do not constitute hearsay in the first place under the Federal Rules of Evidence.<sup>124</sup> Perhaps as a result, most of the judges have not required corroboration as a condition for crediting a petitioner's own statements as inculpatory evidence — assuming that coercion issues do not present a separate obstacle.

The issue is difficult to pin down because in some such cases, the petitioner may not contest the underlying facts contained in his own prior statements, such as patterns of travel or concessions that the petitioner performed certain actions, so much as he challenges the inferences that should be drawn from them. In those cases, we should not expect and do not actually see judges insisting upon corroboration.

Judge Leon, for example, readily accepts uncorroborated prior statements by the petitioner in *Al Bihani*.<sup>125</sup> In that case, the government's evidence consists of, as Judge Leon describes it, a "combination of certain statements of the petitioner that the court finds credible and certain classified documents that help establish the most likely explanation for, and significance of, [the] petitioner's conduct."<sup>126</sup> That is to say, the case appears to rest on the petitioner's own inculpatory statements, combined not with factual corroboration but rather with what amounts to expert evidence interpreting the significance of those inculpatory statements. Judge Leon is willing to accept the petitioner's statement as the basis for his factfinding in that circumstance.

More significantly, however, Judge Leon employs the same approach in *Sliti*, a case in which the underlying facts were subject to greater disagreement than in *Al Bihani*. In *Sliti*, the government put forth an elaborate list of allegations.<sup>127</sup> *Sliti*, by contrast, acknowledged only going to Afghanistan to get free of drugs and a brief stay in a guesthouse. He denied taking military training or having an address book on him when detained by Pakistani authorities with the names of extremists in it. While he admitted to living in a mosque the government claimed was run by an Al

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<sup>124</sup> FED. R. EVID. 801(d)(2)(A).

<sup>125</sup> Specifically, the government claimed 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 55<sup>th</sup> Arab Brigade." *Al Bihani v. Obama*, 594 F. Supp.2d 35, 38 (D.D.C. 2009).

<sup>126</sup> *Id.*

<sup>127</sup> The government contended that the petitioner:

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. In addition, the Government contends that petitioner *Sliti* was instrumental, along with others associated with the Tunisian guesthouse, in starting a terrorist . . . organization with close ties to al Qaeda.

*Sliti v. Bush*, 592 F.Supp.2d 46, 49-50 (D.D.C. 2008).

Qaeda operative, he denied that anything nefarious occurred there. And he disclaimed any role in an alleged terrorist group the government claimed he helped to found.<sup>128</sup> Once again, Judge Leon describes the evidence as “a combination of certain statements by petitioner Sliti which the Court found credible and certain supporting classified documents that elaborate in greater detail the most likely explanation for, and significance of, petitioner’s conduct.”<sup>129</sup> And once again Judge Leon both relies heavily on Sliti’s own statements and admissions en route to finding that the government carried its burden of proof. With respect to the allegation that Sliti took training, for example, Judge Leon writes that “Mr. Sliti, by his own admission, knew where the local military camp was located, what it looked like, and what code words were used by those attending it.”<sup>130</sup> And while Judge Leon does not take a position on whether Sliti helped found the Al Qaeda-linked terrorist group, he describes “little doubt that he had ties with many of those in the guesthouse who the Government established were members of this terrorist group.”<sup>131</sup>

Similarly, in *Al Alwi*, Judge Leon once again refers to the case as resting on “a combination of certain statements of the petitioner which the Court found credible and certain supporting classified documents that establish in greater detail the most likely explanation for, and significance or, petitioner’s conduct.”<sup>132</sup> With some specific allegations – for example, that the detainee took training and stayed with his Taliban unit after September 11 – the judge relies on the detainee’s own statements.<sup>133</sup> And having concluded that the petitioner is lawfully detained, Judge Leon does not even evaluate the evidence of more serious allegations against him, allegations based principally on statements by other Guantánamo detainees, ruling that “assessing their reliability under these circumstances is, for obvious reasons, a delicate task.”<sup>134</sup>

Other judges dealing with a detainee’s own prior statements – again, in circumstances where coercion is not directly in issue – for the most part have followed this approach. Judge Hogan certainly does so in *Anam*,<sup>135</sup> for example, resting the decision entirely on statements the detainee, Al Madwhani, made before CSRT and ARB panels. Judge Kollar-Kotelly arguably also does so in *Al Odah*.<sup>136</sup>

On the other hand, Judge Kollar-Kotelly does require corroboration for a detainee’s own statements in *Al Rabiah*, and refuses to credit those statements when corroboration is not forthcoming. There she confronts a case in which the

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<sup>128</sup> *Id.* at 59.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 51.

<sup>132</sup> *Al Alwi v. Bush*, 593 F. Supp.2d 24, 28 (D.D.C. 2008).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 29.

<sup>135</sup> See *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. Sep. 14, 2009) (affirming detention based on detainee’s own statements before CSRT and ARB panels).

<sup>136</sup> See *Al Odah v. Obama*, 648 F. Supp.2d, 8-14 (D.D.C. 2009) (affirming a detention where the detainee’s own statements form the bulk of the case against him, and treating those statements in a non-skeptical fashion).

government relies “almost exclusively on . . . ‘confessions’ to certain conduct” — confessions in which, unlike other self-incriminatory statements by detainees, she has grave doubts. Al Rabiah’s interrogators, she writes, “repeatedly conclude[d] that these confessions were not believable.” The detainee “confessed to information that his interrogators obtained from either alleged eyewitnesses who are not credible and as to whom the Government has now largely withdrawn any reliance, or from sources that never even existed.” And Al Rabiah makes claims, “some of which [are] supported by the record,” that his false self-inculcating statements came as a result of “abuse and coercion.”<sup>137</sup> As a consequence, Judge Kollar-Kotelly looks for corroboration for Al Rabiah’s own statements, and finding none, she “concludes that Al Rabiah’s uncorroborated confessions are not credible or reliable” and that the government has consequently failed to prove its case.<sup>138</sup>

It is not clear that *Al Rabiah* should be read as inconsistent with *Al Bihani*, *Sliti*, *Al Alwi*, *Anam*, and *Al Odah*. Quite possibly, the judges in those cases too would have imposed a corroboration requirement had there been comparable red flags. It may be most accurate to say that the judges do not require corroboration for a detainee’s own statements, except where there are particularly strong reasons to suspect unreliability.

Even with that caveat, however, it is plain that the judges are far more skeptical when the statement is not the petitioner’s own but comes from another detainee — or, for that matter, some other third party whose assertions might appear in an intelligence report. This is so, moreover, even where coercion is not directly in issue. In the circumstances of third-party statements, the judges all require corroboration, though they do not necessarily agree regarding the quantity or quality of corroboration that will suffice.

Judge Leon’s decision in *El Gharani* provides an illustration. In contrast to his approach to the detainee’s own statement in *Al Bihani*, *Sliti*, and *Al Alwi*, Judge Leon in *El Gharani* emphasizes the need for corroboration for co-detainee statements, albeit in a setting in which he had some reason to believe that the government itself doubted the credibility of the individuals and where their statements to some extent conflicted with one another. In *El Gharani*, the government alleged that, the petitioner:

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.<sup>139</sup>

To substantiate these claims, the government presented evidence consisting

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<sup>137</sup> *Al Rabiah*, No. 02-828, slip op. at 1 (D.D.C. Sept. 17, 2009).

<sup>138</sup> *Id.* at 2.

<sup>139</sup> *El Gharani v. Bush*, 593 F. Supp.2d 144, 147 (D.D.C. 2009).

“principally of... statements made by two other detainees while incarcerated at Guantánamo Bay. . . . Indeed, these statements are either exclusively, or jointly, the only evidence offered by the Government to substantiate the majority of their allegations.”<sup>140</sup> In addition, Judge Leon notes, “the credibility and reliability of the detainees ... has either been directly called into question by Government personnel or has been characterized by Government personnel as undetermined.”<sup>141</sup>

With respect to two of these allegations, both of which rested on statements by just one of these two detainees, Judge Leon concludes that in the absence of corroborating evidence, he simply cannot rely on the statements.<sup>142</sup> Statements from both Guantamo detainees, in contrast, support the government’s allegation that the petitioner attended an Al Qaeda training camp, and Judge Leon acknowledges this to be a form of corroboration. But the statements don’t, in his judgment, turn out to corroborate one another: “the detainees’ stories, when viewed together, are not factually compatible, each placing the petitioner at the camp at different points in time, multiple months apart...”<sup>143</sup> So again, Judge Leon concludes that “[b]ased on the internal inconsistencies in their accounts and the lack of independent corroboration, the Court is not able to [satisfy itself on the reliability of their allegation], and, accordingly, will not accredit [the] allegation.”<sup>144</sup>

In conceptual terms, Judge Kessler’s hearsay jurisprudence tracks Judge Leon’s, although she seems to display considerably more skepticism. As with Judge Leon, third-party hearsay material – statements by other detainees inculcating the petitioner – bears consideration only when corroborated, but Judge Kessler’s sense of appropriate corroboration appears more demanding than Judge Leon’s.

For instance, in *Ahmed*, the government alleged the following facts: “the Petitioner fought in Afghanistan, trained in Afghanistan, used the kunya [redaction] traveled in Afghanistan with al-Qaida and/or Taliban members, [and] stayed at [redaction] with al-Qaida and/or Taliban member.”<sup>145</sup> As with the cases in which third-party hearsay evidence failed to move Judge Leon, the government’s “chief pieces of evidence” in support of these allegations were statements by other detainees, not self-incriminatory statements by the petitioner himself or strong documentary evidence.<sup>146</sup> Unfortunately for the government, one of these detainees is one of the same people whose testimony Judge Leon rejects in *El Gharani* – and Judge Kessler agrees with Judge Leon’s skeptical assessment of him.<sup>147</sup> A second witness, she rules, gave statements that were “equivocal and lacking in detail or description” and “riddled...with equivocation and speculation,”

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 148-9.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Ahmed v. Obama*, 613 F. Supp.2d 51, 59 (D.D.C. 2009).

<sup>146</sup> *Id.* at 56.

<sup>147</sup> *Id.*

while a third gave inconsistent statements, had a history of mental health problems, and may have faced torture. The fourth also apparently had credibility problems, though redactions in the opinion make it impossible to discern what they were.<sup>148</sup>

Ultimately, Judge Kessler rejects almost all of the allegations – because of weakness, because the hearsay is not corroborated, and some simply because they were given at Bagram amidst the alleged torture and abuse of others.<sup>149</sup> The one significant fact that Judge Kessler is willing to find against Ahmed is that he spent a considerable period of time at a guesthouse in Faisalabad in the company of Al Qaeda terrorists. This fact was not based on hearsay, however. It was, rather, undisputed. And Judge Kessler finds this fact unimportant in the absence of evidence of terrorist activity on Ahmed’s part while staying there: “the problem with this charge is that there is no solid evidence that... [the petitioner] engaged in, or planned, any future wrongdoing.... There is no evidence that he was arrested with any weapons or other terrorist paraphernalia.... Though others at the House admitted their affiliation with al-Qaida, they did not implicate... [the petitioner] in any terrorist activity,” she writes. While Judge Kessler allows that the government proved that the petitioner stayed at the guest house, she writes that it had “utterly failed to present evidence that he was a substantial supporter of al-Qaida and/or the Taliban while he did stay there.”<sup>150</sup> In short, in *Ahmed*, Judge Kessler allows no fact to be proven based on uncorroborated hearsay from other detainees. In fact, she allows no fact to be proven that the detainee does not concede.

She takes a similar approach in *Al Adahi* and in doing so raises, if only implicitly, the question of what quantity or quality of extrinsic evidence is necessary in order to satisfy the corroboration requirement. She describes the government’s evidence in this case as “classified intelligence and interview reports” which “contain the statements of Petitioner, as well as statements made by other detainees. . . .”<sup>151</sup> And in general, she accepts these reports to the extent they are not contested or to the extent they find corroboration in the detainee’s own statements. Yet where the government relies more completely on third-party hearsay that the detainee either contests or has supported with his own statements, she consistently balks. So while she accepts, for example, that the detainee stayed in a guest house for one night, a fact he admitted repeatedly, she writes that she “cannot rely” on another detainee’s “vague and uncorroborated statement about his meeting with Al-Adahi at an unnamed Kandahar guesthouse.”<sup>152</sup> And while she accepts that Al-Adahi was present at the Al Farouq camp, which he admits, she rejects a statement by another detainee, even when corroborated by “several pieces of circumstantial evidence,” that he was an instructor there.<sup>153</sup> She likewise

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<sup>148</sup> *Id.* at 57-58.

<sup>149</sup> *Id.* at 58, 66.

<sup>150</sup> *Id.* at 66.

<sup>151</sup> *Al Adahi*, No. 05-0280, slip op. at 7 (D.D.C. Aug. 17, 2009).

<sup>152</sup> *Id.* at 20.

<sup>153</sup> *Id.* at 25.



rejects a detainee's statement that Al Adahi served as a bodyguard for Bin Laden, even though Al Adahi's statements reflect a great deal of familiarity with Bin Laden's other bodyguards.<sup>154</sup> In these latter two instances, Judge Kessler seems to be applying standards of corroboration more rigorous than Judge Leon's. At a minimum, however, she makes clear not only that corroboration is required in actual practice for hearsay statements by other detainees, but also that minimal corroboration will not suffice. Judge Kessler demands a high level of confidence that hearsay allegations are accurate.

Judge Kessler in *Mohammed* gives a sense of what it takes for the government to reach her comfort zone with hearsay. She accepts a certain amount of contested hearsay evidence, including intelligence reports, but she does so only in the context of a particularly strong corroborative record in which the petitioner does not contest the key underlying facts. For example, Judge Kessler accepts some intelligence reporting that the petitioner used a fake name, but then goes on to note that he disputes only "the inferences . . . to draw from the facts" of his having traveled extensively on false papers.<sup>155</sup> She accepts intelligence reporting about the two radical London mosques he attended, but there was no dispute either about his attendance at the mosques or about Al Qaeda's penetration of them—only about what he was doing at them.<sup>156</sup> She accepts intelligence reporting about his recruitment and travel to Afghanistan, but again, he contests only his motivation for travel, not the route or means.<sup>157</sup> In any event, she makes clear that the government has proven these and other facts "by far more than a preponderance of the evidence."<sup>158</sup> The record on these matters isn't a close question, in her view. The hearsay she credits, in other words, acts more as filler than as core evidence of the government's case.

Judge Kessler's approach of looking for particularly strong corroboration also finds support in the cases decided by Judge Kollar-Kotelly. As noted above, Judge Kollar-Kotelly appears to part company with some of the other judges by declining to treat the reliability of hearsay as a threshold question of admissibility, as opposed to an integral part of the factfinding process—even before the Circuit's decision in *Al Bihani*. Perhaps as a result of this stance, she displays a rhetorical comfort level with the use of hearsay unlike that of any of the other judges. In a series of cases, she declares up front that "The Court finds that allowing the use of hearsay by both parties balances the need to prevent the substantial diversion of military and intelligence resources during a time of hostilities, while at the same time providing [the detainee] with a meaningful opportunity to contest the basis of his detention."<sup>159</sup>

Rhetoric aside, however, her conceptual approach to hearsay seems largely

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<sup>154</sup> *Id.* at 31-35.

<sup>155</sup> *Mohammed v. Obama*, No. 05-1437, slip op. at 17-18 (D.D.C. Nov. 19, 2009).

<sup>156</sup> *Id.* at 20-23.

<sup>157</sup> *Id.* at 23-28.

<sup>158</sup> *Id.* at 75.

<sup>159</sup> *Al Rabiah*, No. 02-828, slip op. at 5 (D.D.C. Sept. 17, 2009).

consistent with that of Judges Leon and Kessler. In *Al Mutairi*, for example, where there are significant admissions by the petitioner – as, for example, with respect to the detainee’s travel path and timing and his loss of his passport<sup>160</sup> – she accepts the government’s evidence. On the other hand, she looks for corroboration where third-party statements in intelligence reports are offered, and tends to reject evidence where she cannot find that corroboration.<sup>161</sup> The government’s allegation that Al Mutairi took training was based on hearsay in an intelligence report, for example. There was, however, no corroboration of this allegation; the source was not credible, in her judgment; and the report offered no context for an allegation that was less than clear. She rejects the evidence.<sup>162</sup>

Similarly, the government presented a purported Al Qaeda list of captured fighters, and a list of seized passports – both of which contained the detainee’s name. The circumstances under which the captured-fighters list came into being, however, undermined its integrity, in her view. And while the passport list presented a more complicated case, she ultimately assigned it only “little probative value” because of a lack of corroborating material.<sup>163</sup> Claims that the detainee fought alongside Osama Bin Laden against the Russians she dismisses in the absence of corroboration as implausible.<sup>164</sup> And a single interrogation report suggesting that the detainee attended as Lashkar-E-Taiba meeting offered with a “wholesale lack of corroborating evidence” she similarly discounts.<sup>165</sup>

This brings us to Judge Robertson, whose approach to hearsay in *Awad* is somewhat difficult to locate in relation to the practice of Judges Leon, Kessler, and Kollar-Kotelly. Judge Robertson in that case accepts evidence he describes as “gossamer thin” and “of a kind fit only for these unique proceedings.” Yet he affirms a detention based upon it. Although the extensive redactions in this case make his evaluation of the evidence difficult to discern, he thus appears to set a lower threshold for evidentiary quality than do his colleagues. That said, Judge Robertson too follows the basic conceptual pattern of rejecting third-party hearsay that is not at least somewhat corroborated by other evidence.

In Judge Robertson’s summary, the government alleged in *Awad* that the petitioner:

volunteered or was recruited for Jihad soon after September 11, 2001 and traveled from his home in [redaction] to Afghanistan; that he trained at the Al Qaida “Tarnak Farms” camp outside Kandahar; that... [the petitioner] 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 and

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<sup>160</sup> *Al Mutairi v. United States*, 644 F. Supp.2d 78, 88-90 (D.D.C. 2009).

<sup>161</sup> *See, e.g., id.* at 91 n. 12.

<sup>162</sup> *Id.* at 35-37.

<sup>163</sup> *Id.* at 46-47.

<sup>164</sup> *Id.* at 47.

<sup>165</sup> *Id.* at 51-52.

that U.S. and associated forces laid siege to the hospital; that... [the petitioner's] comrades gave him up because they could not care for his severely injured [redaction] and that, after... [the petitioner's] capture, his al Qaida comrades fought to the death.<sup>166</sup>

Judge Robertson categorizes the government's evidence in support of these alleged facts into several groups:

- (1) Intelligence reports of... [the petitioner's] statements to interrogators;
- (2) statements of a former Guantánamo detainee... who was inside Mirwais Hospital during the siege and who gave a list of names and description of the al Qaida fighters, including a man with an [redaction] who went by the name [redaction] – a kunya allegedly associated with... [the petitioner];
- (3)... a list found at... [an al Qaeda training camp] bearing the name [redaction] and several of the names that appear [redaction] on [redaction] list of names; and... [(4)] newspaper articles published in American newspapers about the siege at Mirwais Hospital.<sup>167</sup>

Much of the evidence is hearsay.

Regarding several of the allegations, Judge Robertson's approach seems similar to that of his colleagues. Faced with documentary hearsay concerning the detainee's alleged training at an Al Qaeda camp, for example, he looks for corroboration, and finding none, concludes that the government has not adequately supported its allegation.<sup>168</sup>

After surveying most of the evidence, Judge Robertson describes there being "(a) a reasonable inference that... [the petitioner] went to Kandahar to fight, (b) no reliable evidence that he actually trained there, (c) undisputed evidence that he was in Mirwais Hospital during part of the siege and (d) inconsistent evidence about how and when he arrived there."<sup>169</sup> He then turns to the government's final piece of evidence.

And here his approach seems at least somewhat more forgiving than that of his colleagues – though none of them confronts precisely the same evidentiary question as he does. A Guantánamo detainee who claimed "to have been inside the hospital and to have spoken with al Qaida fighters" had provided the government with a list of "names and descriptions for the surviving eight members of the al

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<sup>166</sup> Awad v. Obama, 646 F. Supp.2d 20, 22 (D.D.C. 2009).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 24-25. Similarly, while Awad had conceded his presence and capture at the siege of Mirwais Hospital, he denied having fought there. On this point, the government's evidence came from a former Guantánamo detainee, who, the judge writes, "claimed to have been inside the hospital and to have spoken with al Qaida fighters." Judge Robertson does not say what weight he gives this evidence. He does, however, comment on the only first-hand evidence the government offered regarding the petitioner's capture: an interview with an individual "who claimed that he led the group that had taken... [the petitioner] into custody." This he describes as "internally inconsistent, completely unreliable" and entitled to "no weight." *Id.* at 25-27.

<sup>169</sup> *Id.* at 26.

Qaida group.” Four of the names on this list “were identical to or transliterations of names listed near” the petitioner’s alleged kunya on the training camp list. Judge Robertson then refers to another list – extensive redactions make it difficult to understand its significance – that has five names that also match the list from the Guantánamo detainee and three names that match the training camp list. Judge Robertson describes the correlation among these names as “too great to be mere coincidence.” And its existence, he ultimately concludes, “tip[s] the scale finally in the government’s favor.” He offers no further explanation.<sup>170</sup>

While Judge Robertson’s approach seems more permissive than the other judges, it is significant that the correlation among the lists involves a measure of documentary corroboration of the detainee witness’ list. In other words, he too seems to be rejecting third-party hearsay when uncorroborated by something else. The differences among the judges on this point thus appear to lie largely in the strength of the corroboration they require before relying on such statements.

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<sup>170</sup> *Id.* at 27.

## 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 simply are not admissible as a matter of due process, and custodial interrogation is regarded as so inherently coercive that the Supreme Court has generally required judges to exclude unwarned statements. What approach judges in the military detention habeas review context take towards allegedly involuntary statements is a pressing question given the significant weight the government places on detainee statements in these cases and the frequency with which allegations of coercion have arisen. To frame the question simply, when is an interrogation sufficiently coercive as to require either a statement's exclusion from evidence or a significant diminution of the weight accorded it?

The D.C. Circuit has not yet addressed this issue, but the district courts have done so repeatedly. And they appear to agree on one overarching point: None has shown any inclination to discredit a statement merely because it was given in a custodial context without access to counsel or the benefit of a *Miranda*-style statement of rights. On the contrary, they readily accept at least some such statements; indeed, some rulings denying habeas relief even hinge on them.<sup>171</sup>

Beyond this point of common ground, however, the judges vary widely in their approach to the voluntariness issue. Two sets of issues stand out. First, it is entirely unclear what substantive test the judges are employing in distinguishing between interrogation statements that can be admitted and credited and those that cannot, still less clear whether the judges agree regarding the content or source of that test. At this stage, we know only that the mere fact of being in long-term military custody without access to counsel does not without more suffice to make the resulting statements inadmissible. The judges have not expressly addressed where the line instead should be drawn when determining which methods or combination of methods give rise to evidentiary problems. In theory, the courts 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 level of coercion inherent in long-term detention at Guantanamo. Alternatively, the courts might draw it according to some more objective measure, such as the list of interrogation approaches specifically authorized in the Army Field manual on interrogation. For the most part, however, the judges have simply not addressed the issue beyond disparaging references to some forms of treatment as torture or abuse. As a result, the government's capacity to carry its burden in cases turning on interrogation statements appears to vary from courtroom to courtroom. And that raises the

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<sup>171</sup> See, e.g., *Al Odah v. Obama*, 648 F. Supp.2d 1, 8-14 (D.D.C. 2009); *Al Bihani v. Obama*, 594 F. Supp.2d 35, 39-40 (D.D.C. 2009); *Sliti v. Bush*, 592 F. Supp.2d 46, 50 (D.D.C. 2008).

possibility that the legal uncertainty is filtering back into the ongoing process of interrogating current detainees in locations such as Afghanistan, where the prospect of eventual habeas review looms large – in which case it may create incentives for interrogation planners to err on the cautious side, even at the expense of their intelligence utility, in order to bolster the evidentiary viability of the resulting statements.

Second, the judges appear to disagree with respect to the circumstances in which prior abuse taints subsequent interrogation statements. All seem to accept that taint can indeed require exclusion or discounting of statements not directly derived from abusive methods, and they further seem to agree that the test for determining whether the taint has been eliminated is the totality of the circumstances inquiry employed in the criminal prosecution context. They appear to differ sharply, however, with respect to what this standard requires in actual practice.

### *Judge Robertson's Approach to Involuntary Statements*

If one were to map the judges' opinions on voluntariness in terms of the degree of skepticism they appear to embody with respect to interrogation-based evidence, one end arguably would be held down by Judge Robertson's opinion in *Awad*. In that case, Judge Robertson appears quite dismissive of the petitioner's claim that, as the judge put it, "any incriminating statements he made were made 'as a result of torture, the threat of torture or coercion and are therefore unreliable.'" He deals with the claim only in a footnote (at least in the redacted version of the opinion), and spends very few words evaluating it beyond noting that only one allegation of coercion is "specific." That allegation, Judge Robertson notes, is "that interrogators threatened to withhold medical treatment until... [the petitioner] provided them information. The government retorts that interrogators' notes reveal that... [the petitioner] was provided care and that he used his medical condition as an excuse to avoid answering difficult questions."<sup>172</sup>

Judge Robertson does not address the issue further, a fact that presumably reflects his acceptance of the government's explanation and his willingness to give weight to these allegedly coerced statements, and as a result he has no occasion to address where the line might lie between interrogation methods that are and are not appropriate for generating evidence. Because of the scope of redactions in the opinion, however, it is difficult to discern to what extent the opinion – which denies *Awad's* petition in the end – actually relies on these statements or otherwise addresses the rules applicable to such claims.

In striking contrast to Judge Robertson's relatively casual treatment in *Awad*, Judges Kollar-Kotelly, Huvelle, Hogan, and, particularly, Urbina and Kessler, all express considerable concern about the issue of coercion. They each refuse to give any weight to evidence that may have been gained by – or tainted by – coercive

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<sup>172</sup> *Awad v. Obama*, 646 F. Supp.2d 20, 24 n.2 (D.D.C. 2009).

methods, and seem far readier than Judge Robertson to credit claims of coercion.

### ***The More Restrictive Approach of Judges Huvelle, Hogan and Kollar-Kotelly***

Judges Huvelle, Hogan, and Kollar-Kotelly take a strict approach to statements they believe involuntary. How different this approach is from Judge Robertson's is not entirely clear. These judges each confront cases in which the record evidence of abuse is relatively strong, whereas Judge Robertson confronts an allegation of abuse which arrives with relatively little support and a credible government response. Further complicating any effort to assess the parameters of the gap is the fact that Judge Robertson offers so little evaluation of the coercion claim in his ruling. That said, it is clear that there exists some gap and that these judges all take allegations of coercion very seriously. All of them, moreover, and possibly Judge Robertson as well, are prepared to suppress or discredit otherwise-probative statements when they find that they cross some particular line. They do not necessarily agree on where that line lies, nor do they necessarily agree with respect to the issue of taint that follows in the wake of detainee abuse.

In some cases, the government has not opposed the detainee's efforts to suppress evidence on taint grounds, thus depriving the judge of the occasion to opine on the issue in any detail. In the case of Mohammed Jawad, for example, Judge Huvelle issues an unopposed order that "the Court will suppress every statement made by petitioner since his arrest as a product of torture."<sup>173</sup> The petitioner, who was an early teenager at the time of his capture, alleged that any inculpatory statements he made while in Afghan and then U.S. custody were the fruits of "repeated torture and other mistreatment."<sup>174</sup>

The precise details of this alleged abuse are not clear because of redactions to the unclassified version of Jawad's suppression motion, but the unredacted portion of the motion describes a litany of abuse, including threats by Afghan officials to kill the petitioner and his family if he did not confess, an interrogation approach by a U.S. official who led the petitioner to believe he was holding a bomb that would kill him if he were to let go of it, beatings, death threats, use of stress positions, and the use of the "frequent flyer" sleep deprivation program at Guantánamo (involving 112 transfers from one cell to another during a 14 day period in order to prevent sleep).<sup>175</sup> Similar allegations previously had persuaded a judge presiding over a military commission proceeding against the petitioner to exclude his inculpatory custodial statements,<sup>176</sup> and the government ultimately chose—

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<sup>173</sup> *Bacha v. Obama*, No. 05-2385 (D.D.C. Jul. 17, 2009) (order granting petitioner's motion to suppress his out-of-court statements).

<sup>174</sup> *Al-Hamdandy v. Obama*, No. 05-2385, slip op. at 1 (D.D.C. Jul. 21, 2009) (Huvelle, J.) (Petitioner Mohammed Jawad's Motion to Suppress His Out-of-Court Statements) (on file with authors).

<sup>175</sup> *See id.* at 2-18.

<sup>176</sup> *See United States v. Jawad* (Mil. Com. Oct. 28, 2008) ("Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities"); *United States v. Jawad* (Mil. Com. Sep. 24, 2008) ("Ruling on Defense Motion to Dismiss—Torture of the Detainee").

without comment – simply not to oppose the petitioner’s suppression motion in the habeas proceedings.<sup>177</sup> At a subsequent hearing, Judge Huvelle expressed her frustration in strong terms, giving every indication she would have been receptive to the petitioner’s motion even if the government had opposed it. As things stood, however, she had no need to discuss the precise grounds upon which she might have ruled.<sup>178</sup> As these statements constituted the vast bulk of the government’s evidence against Jawad, Judge Huvelle soon thereafter granted the writ.

In contrast to Jawad’s case, the government in many other cases has disputed detainee claims of abuse or taint in hopes of carrying its burden of proof in whole or in part through interrogation statements. As a result, several judges have had occasion not only to join Judge Huvelle in expressing grave concern over abusive interrogations, but also to address doctrinal questions such as the nature of the substantive test for admissibility of statements whose voluntariness comes under attack and the circumstances in which prior abuse may taint subsequent statements. While the judges have addressed these questions to some degree, many questions remain.

In *Anam*, for example, Judge Hogan concludes that 23 statements given by the petitioner, Musa’ab Omar Al Madhwani, were “tainted by coercive interrogation techniques [and] therefore ... lack sufficient indicia of reliability.”<sup>179</sup> He does not offer a definition of undue coercion, but does identify the conditions that in his judgment crossed the line in this particular instance: Al Madhwani’s original confessions for example, were given at “what [the petitioner] called a prison of darkness, aptly named, I believe,” where he was “suspended in his cell by his left hand where he could not sit or stand fully for many, many days.” The guards there “blasted his cell with music 24 hours a day in extremely high decibels.” Such mistreatment continued at another site in Afghanistan before his transfer to Guantánamo. The government did not contest Al Madhwani’s claims regarding his treatment to that point, and Judge Hogan notes in any event that the claims were corroborated. Consequently, he contends, “it is clear from the records that any statements the petitioner provided in Afghanistan or Pakistan were coerced and should not be admitted against the petitioner in any fashion in any court.” Instead, the government sought to rely on statements Al Madhwani subsequently gave under less problematic conditions at Guantánamo. Judge Hogan rules, however, that those statements were tainted by the prior abuse and thus could not be considered.

Judge Hogan’s ruling illustrates the emerging jurisprudence of interrogation taint in several respects. First, like other judges confronting this issue, he adopts a

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<sup>177</sup> See *Al Halmandy v. Obama*, No. 05-2385 at 1 (D.D.C. July 15, 2009) (“Respondents’ Response to Petitioner Mohammed Jawad’s Motion to Suppress His Out-of-Court Statements”) (stating simply that “Respondents do not oppose Petitioner’s motion”).

<sup>178</sup> Judge Huvelle described the case as an “outrage,” and observed that “for seven years, the guy sat down there, being subjected to the conditions that the United States Government has subjected him to since the day they picked him up in Afghanistan.” See Transcript of Oral Argument at 13, 15, *Al Halmandy v. Obama*, No. 05-2385 (D.D.C. July 16, 2009).

<sup>179</sup> Transcript of Hearing at 18, 19, 29, *Anam v. Obama*, No. 04-1194 (D.D.C. Dec. 14, 2009).



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. This standard emphasizes factors such as the passage of time between confessions and whether the circumstances of interrogation have changed in a meaningful way in the interim.<sup>180</sup> Second, Judge Hogan expressly allocates to the government the burden to disprove taint under this test. The government in this instance had emphasized that the prior abuse 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. Judge Hogan concludes, however, that the taint carried over nonetheless. Among other things, he finds that the United States had at least some control over the detainee's earlier conditions of confinement and thus that Al Madhwani would not necessarily perceive his move to Guantánamo as an occasion to expect different treatment. He also contends that the government had failed to rebut Al Madhwani's claim of continued threats while at Guantánamo – apparently because the government had failed to offer contrary testimony from the interrogators with firsthand knowledge of the matter, despite having at least one available.<sup>181</sup>

The most notable aspect of Judge Hogan's taint ruling arguably has to do with his explanation as to why precisely he thinks the taint of prior abuse carried over to interrogations at Guantanamo. It is not simply that Al Madhwani might have perceived this as nothing more than a change in geography. Judge Hogan also emphasizes a critical objective 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.<sup>182</sup> 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 that seeks to insulate the current interrogators from the fruits of the harsh earlier interrogations – an approach it has attempted in various iterations.

Notwithstanding his taint analysis, Judge Hogan ultimately does admit some of Al Madhwani's post-abuse statements – specifically, statements made in the context of three CSRT and ARB proceedings. He explains that in those settings the lingering taint of prior abuse was overcome by the fact that Al Madhwani's interlocutors there were not interrogators, 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 speaking his mind. Unfortunately for Al Madhwani, his

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<sup>180</sup> *See id.* at 21.

<sup>181</sup> *See id.* at 21-23 (concluding that "from the petitioner's perspective, the interrogators and the custodians did not change in any material way").

<sup>182</sup> *See id.* at 23 ("So not being insulated then from his coerced confessions, the confessions at Guantanamo are derived from the original coerced [statements]."). *See also id.* at 29 (restating "that the Guantanamo interrogators had access to and relied upon his coerced confessions from Afghanistan," and commenting that the fact that "the government continued to drink from the same poison well does not make the water clean").

CSRT and ARB admissions satisfied Judge Hogan that he was lawfully detained.

In *Al Rabiah*, Judge Kollar-Kotelly takes a similar approach to Judge Hogan, devoting the bulk of her opinion to evaluating claims of coercion and ultimately disregarding self-incriminatory statements. Unlike Judge Hogan, however, she speaks at least to some degree to the question of just where the line lies between interrogation methods that spoil the resulting statements and those that do not. Specifically, she suggests that the key may be compliance with the Army Field Manual and the Geneva Conventions. Because interrogators violated those standards in that case, she concludes, all the resulting testimony was unreliable. First, she writes, the interrogators told the petitioner “that he had to confess to something in order to be sent back to Kuwait [his home], and they described to... [the petitioner] the allegations that had been made against him.” His other interrogators would then tell him that failure to cooperate would result in his permanent detention at Guantánamo. The petitioner would then

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.<sup>183</sup>

Judge Kollar-Kotelly then explains 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.”<sup>184</sup>

The government in response argued that the “taint of any [past] abuse or coercion would have dissipated by the time” the petitioner gave later confessions. And Judge Kollar-Kotelly recognizes that “it is certainly true in the criminal context that coerced confessions do not necessarily render subsequent confessions inadmissible because the coercion can be found to have dissipated.”<sup>185</sup> However, like Judge Hogan, she determines that the Court must look to the “totality of the circumstances” and determine whether a clean break occurred between the coercion and later confessions. The government’s failure to establish such a “clean break” causes Judge Kollar-Kotelly to find that none of the petitioner’s confessions are reliable or credible.<sup>186</sup>

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<sup>183</sup> *Al Rabiah*, No. 02-828, slip op. at 58 (D.D.C. Sept. 17, 2009).

<sup>184</sup> *Id.* at 45.

<sup>185</sup> *Id.* at 51 (citing *United States v. Bayer*, 331 U.S. 532, 541 (1941)).

<sup>186</sup> *Id.* at 59.

### ***The Still More Restrictive Approach of Judge Urbina***

If his *Hatim* ruling is any indication, Judge Urbina takes an even-more-skeptical view than the aforementioned judges when it comes to the evidentiary use of statements obtained through or in the wake of unduly coercive interrogations.

As relayed in his merits opinion, the government's case against Hatim rested primarily on the claim that he 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, he sought to recant his Al Farouq admissions, 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."<sup>187</sup> Judge Urbina noted that the government did not contest the torture allegation, thus compelling a taint analysis for both the interrogation and CSRT statements.<sup>188</sup>

The situation, in other words, closely resembled the one Judge Hogan faced in Al Madhwani's case. In both cases, detainees argued that torture in Afghanistan tainted confessions given later in Guantanamo. And just as Judge Hogan does in Al Madhwani's case, Judge Urbina in *Hatim* places the burden on the government to disprove the detainee's claim of taint and finds that the mere change of location to Guantanamo and the passage of time did not suffice to vitiate the taint. In important contrast to Judge Hogan, however, Judge Urbina does not carve out an exception for CSRT statements, but rather treats them as equally tainted and thus unworthy of consideration.

Judge Urbina goes on to note a variety of reasons to question 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. That said, their disagreement might well make the difference in these cases, and may yet do so in some subsequent proceeding.

### ***Judge Kessler's Approach to Involuntary Statements***

In *Mohammed*, Judge Kessler's approach seems quite close to that of Judge Urbina's. For a key government allegation—that the petitioner took training from Al Qaeda—the government had relied on statements given by a former detainee named Binyam Mohamed to an FBI agent. The government did not contest the detainee's claims that he had been badly abused over a long period of time by other governments to whom the United States had rendered him before his return

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<sup>187</sup> *Hatim v. Obama*, No. 05-1429, slip op. at 18 (D.D.C. Dec. 16, 2009).

<sup>188</sup> *See id.* at 18-19.

to U.S. custody and his transfer to Guantánamo. It did, however, claim that the rapport the FBI agent built with him vitiated the taint of his prior abuse and that his statements implicating the petitioner should therefore be credited. The case, in other words, parallels relatively neatly the dispute between Judges Hogan and Urbina over whether the added formality of the CSRT and ARB process suffice to relieve taint of prior abuse. And Judge Kessler, like Judge Urbina, finds that the fact that the bureau treated the detainee with courtesy and respect and no threats or abuse – given the short passage of time since his abuse and given the length and severity of it – does not suffice. She spends 23 pages cataloguing and discussing Mohammed’s mistreatment and concludes his “will was overborne by his lengthy prior torture, and therefore his confessions to Agent [redacted] do not represent reliable evidence to detain Petitioner.”<sup>189</sup>

In a different context, Judge Kessler seems to go one step further than Judge Urbina, going so far as to discount evidence the government *may* have gained through the use or threat of coercive methods. At times, she seems willing to suppress statements even in the absence of clear evidence of abuse or that did not specifically result from maltreatment.

In *Ahmed*, Judge Kessler writes, there is evidence that one of the main witnesses “underwent torture... and spent time at Bagram and the Dark Prison.” Judge Kessler states that this “may well have affected the accuracy of the information he supplied to interrogators.” The witness also recanted a portion of his testimony and claimed that “he made inculpatory statements... because he feared further torture.” The government, for its part, “presented no evidence to dispute the allegations of torture at Bagram or the Dark Prison... [n]or... any evidence that [redaction] claimed to be unaffected by past mistreatment.” Consequently, Judge Kessler states that “the Government asks the Court to assume that his alleged mistreatment at several detention centers was effectively erased from his memory... the Court cannot infer that past instances of torture did not impact the accuracy of later statements.”<sup>190</sup>

Under Judge Kessler’s determination, even a witnesses’ potential *fear of mistreatment* suffices to call a statement into question. At one point in the opinion, she suggests that merely making statements at a 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. Regarding evidence that the petitioner had received military training, she writes 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 concludes 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

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<sup>189</sup> Mohammed v. Obama, No. 05-1437, slip op. at 47-70 (D.D.C Nov. 19, 2009).

<sup>190</sup> Ahmed v. Obama, 613 F. Supp.2d 51, 58 (D.D.C. 2009).

as doubtful.”<sup>191</sup> Regarding another piece of evidence, she states that the witness’s testimony “has been cast into significant question, due to the fact that it was elicited at Bagram amidst actual torture or fear of it.”<sup>192</sup>

Judge Kessler seems to treat the mere fact of coercion’s taking place in the facility holding the detainee as presumptive grounds for discounting any statement by that detainee.

### **Open Questions for the Future**

The judges’ work on the voluntariness question leaves several important questions unresolved – questions future cases and future appeals will have to address.

First, while most of the judges clearly wish to suppress or discount statements given under undue coercion, it is unclear where they are drawing this line. In contrast to the norm in the criminal arena, they are not treating the baseline conditions of a custodial interrogation without counsel or warnings as inherently coercive. On the contrary, many are routinely using detainee statements – including inculpatory statements – that they would routinely suppress as involuntary in a criminal proceeding. In other words, they accept some degree of coercion in fact, if not in rhetoric. At the same time, it is equally clear that the judges are not willing to turn a blind eye to claims that statements were the product of abusive interrogation methods. Yet none of the judges, unfortunately, has adequately addressed where the coercion line lies. The closest has been Judge Kollar-Kotelly, who implies in *Al Rabiah* that compliance with the Army Field Manual and the Geneva Conventions offers a safe harbor for government conduct. None of the others go so far, however; they instead speak in general terms of torture or coercion, without further elaboration.<sup>193</sup> The emerging jurisprudence of interrogation evidence, accordingly, is quite unclear – save that one cannot threaten detainees, keep them in total darkness, or hang them by their hands and blast them with loud music and still expect to use the resulting statements, and perhaps any subsequent statements, against them.

Second, the apparent disparity between Judge Robertson’s treatment of a coercion allegation and the approach of the other judges raises the question of how readily judges should accept detainee allegations that their statements flowed from maltreatment. Is the burden on the government to prove them wrong? On the detainee to prove them correct? And is a facially valid government response to such an allegation entitled to deference in the absence of corroborating evidence of the detainee’s claims?


Third, though the judges appear uniform in requiring the government to disprove taint when it offers statements obtained after prior undue abuse, the

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<sup>191</sup> *Id.* at 61.

<sup>192</sup> *Id.* at 63.

<sup>193</sup> See, e.g., Mohammed at 58-59 (referring first to the Convention Against Torture’s definition of torture but also referring to “coercion” and even “voluntariness”).



difficulty of carrying that burden appears to vary from judge to judge. For Judge Hogan, a CSRT proceeding is sufficiently different in kind from an interrogation session so as to establish a clean break from the taint of prior interrogation abuse, but Judge Urbina appears to think otherwise. More generally, it is unclear at this point just how, if at all, the government can eliminate taint in the interrogation setting once abuse has occurred. Changing the identity of the interrogator, moving the detainee from Afghanistan to Guantanamo, and allowing for the passage of time – perhaps years – will not necessarily prove adequate. One might fairly ask, in light of this, whether interrogation statements in practical terms are categorically inadmissible going forward once abuse occurs.

Finally, Judge Kessler’s willingness to suppress statements based on a general ambiance of coercion raises the question of whether judges should presume statements involuntary when given at particular facilities. All of these questions, in the meantime, will hang over ongoing interrogations of U.S. military detainees at Bagram and elsewhere so long as there is some prospect that the fruits of the interrogation – or some subsequent interrogation – may be needed in a habeas proceeding.

## Mosaic Theory and the Totality of the Evidence

Another evidentiary issue that has been the source of confusion in the habeas litigation and that remains unaddressed by the D.C. Circuit concerns the proper role in these cases, if any, for what the intelligence community calls a “mosaic theory” of evidence.

At least three questions have arisen under this general heading. First, can items of evidence that fail to satisfy the burden of proof as to particular factual allegations – such as attendance at an Al Qaeda training camp, or staying at a Taliban safehouse – nonetheless collectively satisfy the government’s ultimate burden of proof? Second, 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? Third, what does it mean to criticize a proposed mosaic on the ground that its constituent evidentiary tiles are “flawed”?

The idea of a “mosaic theory” has long described a relatively straightforward strategy for intelligence analysis. As one scholar puts it, “[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.”<sup>194</sup> Stated in this fashion, the mosaic theory poses no special controversy; it merely describes the process of mining the latent probative value of seemingly innocuous or irrelevant information. It is a rough analogue for the use in courts of circumstantial evidence.

The mosaic theory became a subject of some public attention and controversy in the 1980s, however, when the Reagan Administration invoked it 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. Employed in this defensive capacity, the mosaic theory became central to arguments for resisting disclosures under the Freedom of Information Act and for invocations of the State Secrets Privilege. By extension, the theory became associated with the larger debate concerning excessive government secrecy, overclassification, and the like.<sup>195</sup>

Against this backdrop, the mosaic theory made its first significant appearance in the Guantánamo habeas litigation in Judge Leon’s opinion in *El Gharani*. There the government’s evidence amounted to what the judge 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 establish in greater detail the most likely explanation for, and significance of, petitioner’s

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<sup>194</sup> David Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L. J. 628, 630 (2005).

<sup>195</sup> See Pozen, *supra*.

conduct.”<sup>196</sup> Judge Leon makes clear that the allegations in question, “if proven, would be strong evidence of enemy combatancy,”<sup>197</sup> but he finds that the government’s evidence failed to establish by the preponderance standard that any of the allegations actually were true.<sup>198</sup> That in turn raised the question of whether the government might nonetheless satisfy its ultimate burden of proof by pointing to the cumulative impact of this otherwise-weak evidence. That is, might the government be able to prove by a preponderance of the evidence that El Gharani was part of or supporting Al Qaeda even if its evidence did not suffice to prove true some or all of the individual underlying allegations – such as claims that he had stayed at an Al Qaeda guesthouse, that he was present at the battle of Tora Bora, or that he attended an Al Qaeda training camp? It is commonplace for litigants to prove particular facts through combinations of evidence that would not carry the burden of proof if examined in isolation; the government suggested, in essence, that it might do the same at the level of the ultimate question to be determined in the habeas litigation.

Judge Leon in *El Gharani* does not take a clear position on whether it might *ever* be possible to rescue the government’s case in this manner. In his judgment, the evidence in any event is too weak in this instance to achieve such an outcome. “A mosaic of tiles bearing images this murky,” he explains, “reveals nothing about the petitioner with sufficient clarity, either individually *or collectively*, that can be relied upon by this Court” (emphasis added).<sup>199</sup>

Subsequent to the *El Gharani* decision, at least one judge in the habeas litigation has repeatedly questioned the general propriety of using a mosaic theory in this setting, suggesting that adoption of the mosaic approach would tend to confuse the standards of habeas review with the standards of intelligence analysis. In identical language in the *Ahmed*, *Al Adahi*, and *Mohammed* opinions,<sup>200</sup> Judge Kessler notes that it “may well be true” that the mosaic “approach is a common and well-established mode of analysis in the intelligence community.” Nonetheless, she observes, “at this point in this long, drawn-out litigation the 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 Petitioner is justifiably detained.”<sup>201</sup> She adds that 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.”<sup>202</sup>

One can read this language in one of three ways. First, Judge Kessler could

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<sup>196</sup> *El Gharani v. Obama*, 593 F.Supp.2d 144, 148 (D.D.C. 2009).

<sup>197</sup> *Id.* at 149.

<sup>198</sup> *See id.* at 148-49.

<sup>199</sup> *Id.* at 149.

<sup>200</sup> *Ahmed v. Obama*, 613 F. Supp.2d 51, 66 (D.D.C. 2009). Judge Kessler uses identical language to address the role of the mosaic theory in her subsequent decision in *Al Adahi* and *Mohammed*.

<sup>201</sup> *Ahmed*, 613 F. Supp.2d at 56.

<sup>202</sup> *Id.*



simply be asserting the uncontroversial proposition that an intelligence analyst may appropriately apply a less-demanding standard than a federal judge in a habeas case when engaged in the task of generating factual conclusions for inclusion in analytic reports. Seen from this perspective, Judge Kessler's statement is not truly about the mosaic theory at all, but rather is using the label "mosaic" as a loose proxy to describe the less rigorous nature of the intelligence community's analytical processes as compared to the habeas process.<sup>203</sup>

Alternatively, she could also intend to reject the mosaic insight itself – that is, to reject the proposition that facially-irrelevant or innocuous evidence may have latent probative value that emerges only when considered in a fuller context informed by other evidence. This is the core point of mosaic analysis, and Judge Kessler could be arguing that it has no place in a courtroom.

Third, Judge Kessler could also mean that the individual items of evidence – the mosaic's tiles – have to be analyzed in an atomized fashion regardless of whether their probative value is latent or manifest, with their weight determined only on an individual basis. Put another way, one could read these opinions as insisting that the government carry its burden of proof through individually-sufficient evidence rather than by using the totality of the evidence. This is the reading pressed – and strenuously objected to – by the government in its pending appeal in *Al Adahi*. In that case, as we discuss later, the government accuses Judge Kessler of having examined each individual item of evidence in artificial isolation, improperly refusing to review the items in the context of one another.<sup>204</sup> This is the same issue raised but not answered by Judge Leon in *El Gharani*.<sup>205</sup>

Judge Kessler's opinion in *Ahmed* also gives rise to a third mosaic issue. Like Judge Leon in *El Gharani*, Judge Kessler in *Ahmed* includes an alternative analysis, rejecting the possibility that the government's evidence would suffice to support detention even if she *were* willing to adopt the suggested mosaic approach.<sup>206</sup> Whereas Judge Leon describes the "tiles" at issue in *El Gharani* as too "murky" to support even a collective portrait of the petitioner's activities, Judge Kessler offers the view that "if the individual pieces of a mosaic are inherently flawed... the mosaic will split apart . . ." <sup>207</sup> That in turn raises an important question about what it means for a mosaic to have flawed tiles.

Judge Kessler presumably means by this phrase that the tile is unable to fulfill its role in the mosaic because it is broken or obscured – that the information it purportedly conveys is entirely untrustworthy or unreliable. Some pieces of "flawed" evidence, such as a coerced witness statement, may be irretrievably flawed and should therefore play no role in any mosaic meant to be useful as

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<sup>203</sup> Notably, it does not appear that the government has advanced the distinct argument that judges should give special weight to the factual judgments made by intelligence analysts based on comparative subject-matter expertise or other species of comparative institutional competence arguments.

<sup>204</sup> Brief of Appellant at 40-45, *Al Adahi v. Obama*, No. 09-5333, (D.C. Cir. Oct. 19, 2009).

<sup>205</sup> *El Gharani v. Obama*, 593 F.Supp.2d 144, 140 (D.D.C. 2009).

<sup>206</sup> *Ahmed v. Obama*, 613 F. Supp.2d 51, 56 (D.D.C. 2009).

<sup>207</sup> *Id.* See also *Mohammed v. Obama*, No. 05-1437, slip op. at 14-15 (D.D.C. Nov. 19, 2009).

evidence. It is not clear, however, that the same is true with respect to all items of flawed evidence—for example, those that are merely weak in terms of their probative value. A trustworthy witness statement that merely places a detainee at a particular location in Afghanistan at a particular point in time, for example, may do little on its own to prove anything, but it could very usefully contribute to an evocative and probative mosaic when combined with other weak but reliable tiles. This suggests that a line might be drawn between discredited evidence and merely weak evidence, with a mosaic theory applicable in relation to the latter, but not the former. Judge Kessler’s language in *Ahmed* does not make clear exactly what she is criticizing.

By the time she issues *Mohammed*, however, she has refined her critique of the mosaic theory and now appears to challenge the very notion that the government might prevail based on circumstantial evidence. In response to governmental pleas, as she puts it, “not to examine in isolation individual pieces of evidence . . . but rather to evaluate them ‘based on the evidence as a whole,’” she dismisses this “mosaic approach” and argues that the evidence must “be carefully analyzed—major-issue-in-dispute by major-issue-in-dispute—since the whole cannot stand if its supporting components cannot survive scrutiny.” She then proceeds to describe the government’s having proven “by far more than a preponderance of the evidence” that the petitioner had “traveled extensively in Europe, both before and after September 11, 2001, by using false names, passports, and other official documents”; that “while in London Petitioner attended mosques that were well known to have radical, fundamentalist clerics advocating jihad”; that at one of these mosques he “met a recruiter who then paid for and arranged his trip to Afghanistan along routes well-traveled by those wishing to fight with al-Qaida and/or the Taliban”; and that “he stayed at a guesthouse with direct ties to al-Qaida and its training camps.”<sup>208</sup> She even finds specifically that he had the intent to join the enemy.<sup>209</sup>

All this, however, proves not good enough, because the government had not proven that he had taken training or fought. And without that additional item of proof showing that he had actually submitted to the command structure of the organizations, Judge Kessler is unwilling to draw overall inferences about the likelihood of his membership from the lesser, probative facts she finds: “In short, at the point in his journey where the Government’s evidence fails, Petitioner had not yet acquired a role within the ‘military command structure’ of al-Qaida and/or the Taliban, nor acquired any membership in these enemy forces. One who merely follows a path, however well-trodden, from London to Afghanistan and ends up staying in an al-Qaida-affiliated guesthouse, cannot be said to occupy a “structured’ role in the ‘hierarchy’ of the enemy force.”<sup>210</sup>

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<sup>208</sup> *Mohammed v. Obama*, No. 05-1437, slip op. at 76 (D.D.C. Nov. 19, 2009).

<sup>209</sup> *Id.* at 78-79.

<sup>210</sup> *Id.* at 78.

## Would Different Judges Have Reached Different Results?

It is impossible to say with certainty that any given case would have come out differently had a judge heard it other than the one who did so. Still, the approaches of the district and appellate judges to the Guantánamo habeas cases differ so markedly on matters so fundamental that some are at least in grave tension with one another on the bottom-line question of whether to tolerate or forbid continued detention given similar sets of facts. There are at least four distinct fault-lines across which differences of opinion among the judges arguably impact their bottom line holdings. First, there are cases in which different notional scopes of detention authorities may produce different outcomes. Second, there are cases in which different approaches among the judges to supposed violation of a relationship cognizable under the laws of war or the AUMF may produce different answers. Third, there are cases in which different approaches to supposedly involuntary statements might produce different answers. Finally and most speculatively, there are cases in which the judges seem to display different attitudes towards the quantity of evidence needed for the government to meet its burden.

### **Class Differences**

The varying definitions of the detainable class have produced some degree of uncertainty as to whom the government may hold. Most notably, Judge Leon has decided two cases based at least mainly on the “support” prong of his definition of the detainable class—a prong now expressly endorsed by the D.C. Circuit but which many of the district judges reject. In *Boumediene*, for example, Judge Leon affirms the detention of Bensayah on the following grounds:

For all of those reasons and more, the Court concludes that the Government has established by a preponderance of the evidence that it is 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. *There can be no question that facilitating the travel of others to join . . . the fight against the United States in Afghanistan constitutes direct support to al-Qaida in furtherance of its objectives and that this amounts to “support” within the meaning of the “enemy combatant” definition governing this case.* The Court accordingly holds that Belkacem Bensayah is being lawfully detained by the Government as an enemy combatant. (emphasis added)<sup>211</sup>

Judge Leon makes no finding that Bensayah is “part of” Al Qaeda. Though he describes him as “an al-Qaida facilitator,” he does not describe him as a group member or as part of the organization’s command structure. And significantly, he leaves out the words “part of” when holding Bensayah’s conduct up against his

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<sup>211</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008).

definition of the detainable class of individuals. He relies exclusively on “support.”

Bensayah is probably the most significant Al Qaeda-related detainee to have his case adjudicated – at least if one believes the government’s allegations – so the fact that Judge Leon’s affirmation of his detention relies on a portion of the definition that other judges reject seems particularly significant. On the face of it, Judge Leon’s findings of facts would not support a ruling in the government’s favor under either of the two competing definitions of the detainable class currently in circulation among his colleagues. Judge Bates, after all, rejects the use of support at all except to the extent it can contribute to a finding of constructive membership – restricting detention to those who operate “within or under the command structure of the organization.” And Judge Walton allows the use of support only to the extent that the support makes a detainee reasonably construable as a member of the enemy’s armed forces. On the surface, at least, Judge Leon has not found facts that would obviously justify either finding.

It is possible, of course, that either Judge Walton, Judge Bates, or both would read the facts in this case as placing Besayah within their definitions – that is, that they would see functional membership in what Leon treats as support. And for now, Judge Leon’s approach is safely backed by the the D.C. Circuit. That said, were either the en banc court or the Supreme Court to adopt a definition of the detainable class more restrictive than the Circuit’s *Al Bihani* definition, his opinion with respect to Bensayah – at least as written – would face a serious problem.

The same is probably not true of Judge Leon’s decision in *Al Bihani* itself. On the surface, this decision seems to have a similar problem. Judge Leon writes of Al Bihani that, “Simply stated, faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient ‘support’ to meet this Court’s definition. After all, as Napoleon himself was fond of pointing out: ‘an army marches on its stomach’” (emphasis added).<sup>212</sup> Yet Judge Leon seems less exposed in *Al Bihani* in than he is in *Boumediene*, as his holding states that the government has proven that the petitioner is more likely than not “part of or supporting” enemy forces. Indeed, while Al Bihani was, according to the government’s allegations, far less significant a figure than Bensayah, the facts in his case ironically make the leap to a narrower definition of the detainable class more easily than would Besayah’s. After all, to make Al Bihani “part of” enemy forces, a judge could simply focus on the fact of his faithful service in an Al Qaeda fighting unit – and the fact that, in that context, he presumably was subject to the organization’s command structure – rather than on the nature of the work he did in that unit.

That, in any event, is what the D.C. Circuit did. The panel majority had no trouble construing Al Bihani’s conduct as something more than independent support of enemy forces. The majority opinion states that “we think the facts of this case show Al-Bihani was both part of and substantially supported enemy

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<sup>212</sup> *Al Bihani v. Obama*, 594 F. Supp.2d 35, 40 (D.D.C. 2009).

forces....”<sup>213</sup> And Judge Williams, in his concurrence, agrees that “Al Bihani was effectively part of the 55th Brigade.”<sup>214</sup>

Theoretically, the converse problem could also arise. If the courts ultimately adopt a narrower definition of the detainable class, one can easily imagine some of the other judges rejecting a detention on the basis that the petitioner had merely supported, but not been part of, enemy forces. This situation has not yet arisen in any of the merits decisions. The very fact that some judges have articulated this distinction while others have not, however, clouds the picture for decision-makers faced with detention decisions in the field today, at least so long as eventual habeas review looms on the horizon. Perhaps more significantly, it may also cloud the picture for commanders making targeting decisions under the auspices of the AUMF, notwithstanding the ostensible irrelevance of habeas review to such determinations.

### **Vitiating Differences**

The possibility that cases would have come out differently had different judges decided them is clearer in the context of the judges’ competing approaches to the vitiating of relationships between a person and an enemy group.

For starters, there are several cases in which the application of Judge Robertson’s approach to these matters in lieu of the tests the judges in those cases applied would probably produce a different result – at least if one applies his test literally. Judge Robertson describes the basis for his decision in *Awad* as follows: “In the end, however, it appears more likely than not that Awad was, for some period of time, ‘part of’ al Qaeda.” While in the context of this case, the period of time coincides with the moment of his capture, Judge Robertson – at least in this formulation of his ruling – does not appear to require that. If one takes this sentence, which is the holding of the case, literally, he seems to be saying that if the government can prove someone was *ever* part of Al Qaeda, that’s good enough.

This maximalist reading of Judge Robertson’s opinion is in grave tension with several of the other judges’ opinions. After all, Judge Kessler in *Al Adahi*, Judge Huvelle in *Basardh*, and Judge Leon in *Al Ginco* all expressly rule that the government has to do more than prove that a relationship ever existed. In their rulings, the government has to prove that it existed at the time of capture or, in Judge Huvelle’s opinion, up to the present and into the future. Judge Leon, in *Al Ginco*, regards it as obvious that a relationship between an individual and group can cease:

the Government forces this Court to address an issue novel to these habeas proceedings: whether a prior relationship between a detainee and al Qaeda

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<sup>213</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 11 (D.C. Cir. Jan. 5, 2010).

<sup>214</sup> *Id.* at 5 (William, J., concurring).

(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.<sup>215</sup>

Judge Robertson, as we noted before, may well not have intended to take the categorical position that a relationship cannot under any circumstances be vitiated – a position that would, among other things, force him to take the position that former U.S. service personnel (including himself) are still ripe for enemy capture and detention. Even so, however, his approach is in frank and irreconcilable tension with Judge Huvelle's. She, after all, requires a showing not merely of a relationship at the time of capture but of *future* dangerousness. Robertson, by contrast, expressly disclaims any likelihood of future dangerousness in the case of Awad, who had lost a leg. He writes at one point that "it seems ludicrous to believe that he poses a security threat now."<sup>216</sup> And Judge Hogan in the case of Al Madhwani, explicitly follows his lead on this point.<sup>217</sup> At a minimum, Judges Robertson and Hogan appear likely to have decided *Basardh* quite differently from Judge Huvelle.

From the other end, Judge Huvelle's approach to vitiation would, if taken at face value, compel a different outcome in all cases in which other judges refused to issue the writ. Judge Huvelle contends that "this Court must conclude that Basardh's current likelihood of rejoining the enemy is relevant to whether his continued detention is authorized under the law." And she describes the government as bearing the "burden of establishing that Basardh's continued detention is authorized under the AUMF's directive that such force be used 'in order to prevent future acts of international terrorism.'" Among the cases in which the judges side with the government, none of the decisions could survive this future dangerousness inquiry. In no case did the government present evidence (at least not that the other judges discuss) of a detainee's likelihood of rejoining the enemy, nor did it attempt to describe his likelihood of rejoining the fight. There simply isn't material in the record in any of these cases that would support the finding Judge Huvelle appears to be describing.

Again, however, there exists some reason to wonder if Judge Huvelle means something quite as dramatic as her language demands on its face. Judge Huvelle does not address whether in a normal case she might be willing to presume that an enemy fighter will, if given the chance, return to the fight. Rather, her point appears to be that Basardh's case – in which he both became a cooperating witness and that fact became public – is not a normal one but is one in which there is substantial reason to believe the detainee has broken with his fellows and *will not* return to them. While Judge Huvelle's approach seems irreconcilably and explicitly in conflict with that of Judges Robertson and Hogan, either is

<sup>215</sup> *Al Gincio v. Obama*, 626 F. Supp.2d 123, 128 (D.D.C. 2009).

<sup>216</sup> *Awad v. Obama*, 646 F. Supp.2d 20, 24 (D.D.C. 2009).

<sup>217</sup> Transcript of Hearing at 52-53, *Anam v. Obama*, No. 04-1194 (D.D.C. Dec. 14, 2009).

conceivably reconcilable with the approaches of the other judges.

### **Differences Over Voluntariness**

It seems preponderantly likely that the difference between Judge Hogan and Judge Urbina regarding allegedly involuntary statements and their taint would have yielded different outcomes in both cases had the two judges swapped.

Judge Hogan determined in Al Madhwani's case that the taint of his prior coercion did not poison his statements in his CSRT and ARB hearings, where the more formal environment and added protections served to protect against his fears of renewed maltreatment. The detainee's statements in those settings provided the entirety of the case against him. Yet Judge Urbina, faced with a similar problem in *Hatim*, made no distinction between statements in the CSRT and statements to interrogators. Had Judge Hogan held similarly, he could not have denied Al Madhwani the writ.

By contrast, while Judge Urbina makes clear that the CSRT statements he excludes would not have swayed him had he admitted them, those same CSRT statements by Hatim may well have satisfied Judge Hogan – had he been hearing the case. They include admissions that the petitioner took training at Al Farouq and that he spent time riding in a car that shuttled food to the Taliban lines and, as Judge Urbina puts it, “surrounded by enemy armed forces.”<sup>218</sup> This combination of training and association is quite similar to the facts that lead Judge Hogan to consider Al Madhwani detainable and it is almost as hard to imagine him failing to reach the same conclusion about Hatim as it is to imagine Judge Urbina affirming Al Madhwani's detention. One also has to wonder how Judge Hogan would have reacted to the similar issue faced by Judge Kessler in *Mohammed*. Judge Kessler in that case suppresses as tainted what turn out to be – for her at least – pivotal evidence of terrorist training by the petitioner despite the fact that the FBI had conducted what she acknowledges to have been respectful and non-coercive interviews with a third-party detainee witness. If the added formality of a CSRT satisfies Judge Hogan that the taint of abuse has been removed, would he also be satisfied having found that an FBI agent “developed a relationship with [the witness] that was non-abusive, and, in fact, cordial and cooperative”?<sup>219</sup> If so, he might have been willing to accept precisely the evidence of training whose absence in *Mohammed* Judge Kessler found dispositive.

### **Quantity of the Evidence**

Finally, in some cases the judges appear to assess differently the patterns of evidence they deem the government to have proven, yielding situations in which

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<sup>218</sup> *Hatim v. Obama*, No. 05-1429, slip op. at 23 (D.D.C. 16, 2009).

<sup>219</sup> *Mohammed v. Obama*, No. 05-1437, slip op. at 43 (D.D.C. Nov. 19, 2009).

one judge affirms a detention based on evidence that seems weaker than the evidence on which another judge rejects a detention. The most pressing of these anomalies is the disparity between Judge Robertson's ruling in *Awad* on the one hand and Judge Kollar-Kotelly's ruling in *Al Mutairi* and, particularly, Judge Kessler's rulings in *Al Adahi* and *Mohammed* on the other.

Judge Robertson describes the proven facts, which he acknowledges to be "gossamer thin," in *Awad* as follows:

Up to this point, we have (a) a reasonable inference that Awad went to Kandahar to fight, (b) no reliable evidence that he was actually trained there, (c) undisputed evidence that he was in Mirwais Hospital during part of the siege, and (d) inconsistent evidence about how and when he arrived there. ...The correlation among the names on the al Joudi list, the Tarnak Farms list, [TEXT REDACTED BY THE COURT] is too great to be mere coincidence. The [TEXT REDACTED BY THE COURT] I believe, . . . tip the scale finally in the government's favor.<sup>220</sup>

And on this record, he affirms the detention. By contrast, Judge Kollar-Kotelly, in granting the writ to *Al Mutairi*, describes the proven facts as follows:

In summary, the Court has credited the Government's evidence that (1) *Al Mutairi*'s path of travel into Afghanistan was consistent with the route used by al Wafa to smuggle individuals into Afghanistan to engage in jihad; (2) that *Al Mutairi*'s travel from Kabul to a village near Khowst was consistent (in time and place) with the route of Taliban and al Qaida fighters fleeing toward the Tora Bora mountains along the Afghanistan-Pakistan border, and (3) *Al Mutairi*'s non-possession of his passport is consistent with an individual who has undergone al Qaida's standard operating procedures that require trainees to surrender their passports prior to beginning their training. The Court has also found minimally probative on this record the appearance of *Al Mutairi*'s name and reference to his passport [TEXT REDACTED IN ORIGINAL].<sup>221</sup>

She also finds that "Al Mutairi's described peregrinations within Afghanistan lack credibility." Yet faced with a detainee whose conduct is "consistent" with that of an Al Qaeda recruit and whose own account is incredible, she does not issue the writ. Rather, she finds that "[t]aking this evidence as a whole, the Government has at best shown that some of Al Mutairi's conduct is consistent with persons who may have become a part of al Wafa or al Qaida, but there is nothing in the record beyond speculation that Al Mutairi did, in fact, train or otherwise become a part of one or more of those organizations, where he would have done so, and with which organization." Because "the Government has not filled in these blanks nor

<sup>220</sup> *Awad v. Obama*, 646 F. Supp.2d 20, 27 (D.D.C. 2009).

<sup>221</sup> *Al Mutairi v. United States*, 644 F. Supp.2d 78, 96 (D.D.C. 2009).



supplanted Al Mutairi's version of his travels and activities with sufficiently credible and reliable evidence to meet its burden by a preponderance of the evidence," she rules, he is entitled to the writ.<sup>222</sup>

More strikingly, Judge Kessler in *Al Adahi* similarly rules for the detainee after describing the evidence as follows:

When all is said and done, this is the evidence we have in this case. Al-Adahi probably had several relatives who served as bodyguards for Usama Bin Laden and were deeply involved with and supportive of al-Qaida and its activities. One of those relatives became his brother-in-law by virtue of marriage to his sister, [TEXT REDACTED BY THE COURT] Al-Adahi accompanied his sister to Afghanistan so that she could be with her husband and [TEXT REDACTED BY THE COURT]. The wedding celebration was held in Bin Laden's compound and many of his associates attended. At that celebration, Petitioner was introduced to Bin Laden, with whom he had a very brief conversation. Several days later, the Petitioner had a five-to-ten-minute conversation with Bin Laden.

Thereafter, Petitioner stayed at an al-Qaida guesthouse for one night and attended the Al Farouq training camp for seven to ten days. He was expelled from Al Farouq for failure to obey the rules. . . . After his expulsion, Al-Adahi returned to the home of his sister and brother-in-law for several weeks and then traveled to other places in Afghanistan because he had no other obligations. Like many thousands of people, he sought to flee Afghanistan when it was bombed shortly after September 11, 2001.<sup>223</sup>

And she also finds for the petitioner in *Mohammed* after describing the facts in the following manner:

Here, the Government has clearly proven, by far more than a preponderance of the evidence, that Petitioner traveled extensively in Europe, both before and after September 11, 2001, by using false names, passports, and other official documents. It has also proven, by far more than a preponderance of the evidence, that while in London Petitioner attended mosques which were well known to have radical, fundamentalist clerics advocating jihad. At one of the mosques he met a recruiter who then paid for and arranged his trip to Afghanistan along routes well-traveled by those wishing to fight with al-Qaida and/or the Taliban against the United States and its allies. Finally, the Government has also proved, by far more than a preponderance of the evidence, that once Petitioner arrived in

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<sup>222</sup> *Id.*

<sup>223</sup> *Al Adahi*, No. 05-0280, slip op. at 41 (D.D.C. Aug. 17, 2009).

Afghanistan he stayed at a guesthouse with direct ties to al-Qaida and its training camps.<sup>224</sup>

Though the facts in *Awad* lack clarity because of more extensive redactions, the records in these cases both seem more compelling than the one on which Judge Robertson denied *Awad* habeas. At a minimum, it seems likely that Judge Robertson would have considered *Al Mutairi* a tougher case than Judge Kollar-Kotelly did and that he would have denied the writ in both *Al Adahi* and *Mohammed* altogether. Similarly, one has to imagine that neither Judge Kessler nor Judge Kollar-Kotelly would have denied the writ in *Awad*.

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<sup>224</sup> Mohammed v. Obama, No. 05-1437, slip op. at 76 (D.D.C Nov. 19, 2009).

## Issues on Appeal

Several of the merits cases discussed above are currently on appeal to the U.S. Court of Appeals for the D.C. Circuit and could easily head from there to the Supreme Court.<sup>225</sup> These appeals should collectively go a long way towards narrowing the range of possible answers to the questions with which the lower court judges are now struggling. The appeals are in various stages of development. As of this writing, a D.C. Circuit panel has completed one case, and only two others have both full briefing and sufficiently declassified records to offer the public a meaningful opportunity to evaluate the issues they pose. Even on their own, however, these three cases – *Al Adahi*, *Bensayah*, and *Al Bihani* – have put a considerable number of significant issues before the appeals court and potentially the justices as well. Were the appellate courts to treat many of these questions, rather than to rule narrowly in the pending cases, they could redirect the lower court in any number of different ways.

### **Burden of Proof**

The consensus among the lower-court judges that the government bears the burden of proof by a preponderance of the evidence has faced a multi-faceted attack at the D.C. Circuit. In both of the detainee appeals – *Bensayah* and *Al Bihani* – the detainees have attacked the standard directly, arguing that the lower court should have adopted a more rigorous standard before authorizing their indefinite detentions. “No decision of the Supreme Court or this Court suggests that an individual may be permanently deprived of his most fundamental personal liberty based on anything less than clear and convincing evidence. Given the grave implications of being labeled and treated as an ‘enemy combatant,’ a reasonable-doubt standard would be in order,” write *Bensayah*’s attorneys.<sup>226</sup> Likewise, *Al Bihani*’s lawyers argued that “Indefinite detention requires proof beyond-a-reasonable-doubt” or, “At a minimum, clear-and-convincing evidence should apply.”<sup>227</sup> The D.C. Circuit in *Al Bihani* not only expressly rejects this argument, but also goes out of its way in a footnote to note that it remains an open question whether a still-lower calibration of the government’s burden might be constitutional as well. The issue thus seems likely to return at some point, perhaps in *Bensayah*. The D.C. Circuit panel also rejects *Al Bihani*’s argument that the

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<sup>225</sup> *Basardh v. Obama*, 612 F. Supp.2d 30 (D.D.C. 2009), *appealed*, No. 09-5200 (Jun. 6, 2009 D.C. Cir. 2009); *Al Adahi*, No. 05-0280, slip op. (D.D.C. Aug. 17, 2009), *appealed*, No. 05-0280 (D.C. Cir. Sept. 21, 2009); *Bensayah v. Obama*, 579 F. Supp.2d 191 (D.D.C. 2008), *appealed*, No. 08-5537 (D.C. Cir. Oct. 20, 2009); *Sliti v. Obama*, 592 F. Supp.2d 46 (D.D.C. 2009), *appealed*, No. 05-0429 (D.C. Cir. Mar. 27, 2009); *Alwi v. Obama*, 593 F. Supp.2d 24 (D.D.C. 2009), *appealed*, No. 09-5125 (D.C. Cir. Apr. 4, 2009); *Bihani v. Obama*, 594 F. Supp.2d 35 (D.D.C. 2009), *appealed*, No. 09-5051 (D.C. Cir. Feb. 13, 2009); *Hammamy v. Obama*, 604 F. Supp.2d 240 (D.D.C. 2009), *appealed*, No. 09-5163 (D.C. Cir. May 5, 2009); *Awad v. Obama*, 646 F. Supp.2d 20 (D.D.C. 2009), *appealed*, No. 09-5351 (D.C. Cir. 2009); *Al Odah v. Obama*, 648 F. Supp.2d 1 (D.D.C. 2009), *appealed*, No. 09-5331 (D.C. Cir. 2009); *Barhoumi v. Obama*, No. 09-5383 (D.D.C. 2009), *appealed*, No. 09-5383 (D.C. Cir. 2009).

<sup>226</sup> Brief of Appellant at 80-81, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Jun. 3, 2009).

<sup>227</sup> Brief of Appellant at 48, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 5, 2009).

preponderance standard in any event was misapplied and that Judge Leon had not adequately accepted that the burden lay with the government but had effectively “shift[ed] the burden” to the detainee by making him address government evidence and fill in gaps within it.<sup>228</sup> The detainees, in short, are asking the appeals courts to raise the standard or, failing that, at least to enforce it strictly and make the government prove every fact on which a decision can rely. So far, the one appeals panel to confront the issue has wondered only if the preponderance standard is too tough.

And sure enough, the government in *Al Adahi* is attacking the standard from the other side. While it does not challenge Judge Kessler’s contention that it bears the burden of proof by a preponderance of the evidence – and notably does not seek adoption of a *Hamdi*-style burden-shifting framework – it does contend that the standard she applies in fact is nothing like a true preponderance standard. Despite its powerful showing that Al-Adahi was “part of” Al Qaeda, the government argues, Judge Kessler “held that the government had failed to meet its evidentiary burden. . . . [She] did so only by holding the government to an almost impossibly high – and legally unjustified – standard of proof that almost no evidence could have satisfied.” While purporting to rely on a preponderance standard, it complains, she actually “required proof far beyond evidence showing it was more likely that Al-Adahi was part of al-Qaida than that he was not.”<sup>229</sup> Specifically, the government complains that she “mistakenly required parts of the government’s evidence to *compel* particular factual findings, and . . . faulted the government for failing to *disprove* beyond any doubt any innocent explanation for Al-Adahi’s actions.” This, it argues, is “manifestly wrong,” a standard “so exacting that almost no evidence in the context of al-Qaida membership could meet it. . . .”<sup>230</sup>

Furthermore, while the detainees complain that Judge Leon is shifting the burden of proof onto them, the government complains in *Al Adahi* almost the opposite regarding Judge Kessler: That she is *not* demanding enough of the petitioner or drawing appropriately adverse inferences when his story and evidence are incredible. It argues that she “reasoned that because the government had the burden of proving every fact, Al-Adahi need not provide answers to the government’s evidence. As a result, the court failed to determine whether Al-Adahi’s own account of his actions was even plausible.”<sup>231</sup> In short, while the detainees are asking the Court of Appeals to adopt a stricter standard of proof, the government is asking it to force the lower court judges to lighten up.

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<sup>228</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 24 (D.C. Cir. Jan. 5, 2010).

<sup>229</sup> Brief of Appellant at 49, *Al Adahi v. Obama*, No. 09-5333, 09-5339 (D.C. Cir. Nov. 3, 2009).

<sup>230</sup> *Id.* at 64.

<sup>231</sup> *Id.* at 42.

## **The Scope of Detention Authority**

As they do with the burden of proof, both the detainees and the government are also pushing the appeals courts to clarify the notional scope of the government's detention authority in a direction favorable to them. On one side, the government complains that just as Judge Kessler sets too high a burden of proof, she also construes the government's detention power too narrowly – thereby asking it both to prove too much and to prove it at too high a level of certainty. On the other side, the detainees have attacked several key aspects of Judge Leon's definition of enemy combatant – so far to no avail in the D.C. Circuit. The range between their respective positions is enormous, and the courts' ultimate disposition of this question thus could affect a significant number of detainees.

Once again, the government's attack is somewhat subtler than that of the detainees. The government does not in *Al Adahi* take on the question of whether "support" for an enemy organization, where the detainee is not also "part of" that organization, could alone justify a detention – a matter on which the D.C. Circuit has now spoken clearly; it does not have to. It contends, after all, that *Al Adahi* was "part of" *Al Qaeda*, so the case does not push the conceptual limits of military detention power to the pure support context. Nonetheless, the government does argue that Judge Kessler construed too narrowly what it means in practical terms to be "part of" an enemy group. In its view, its evidence that *Al Adahi* took training at the *Al Farouq* training camp should have been enough to establish that he joined enemy forces; and Judge Kessler was thus wrong both to fault it for not producing evidence that he actually fought and for insisting that it prove a continuing relationship after he joined up.<sup>232</sup> "Once an individual has taken up arms and trained with al-Qaida, the burden is on him to show that he is no longer part of al-Qaida if, during his military detention proceedings, he alleges a break," the government argues.<sup>233</sup> The government, in short, is urging the D.C. Circuit to take a broad view of what it means to be "part of" *Al Qaeda*.

By contrast, the detainees in both *Bensayah* and *Al Bihani* asked the court to restrict dramatically the working definitions of the detainable class most of the lower court judges employ. Both, for starters, attacked directly Judge Leon's reliance on "support," arguing – as *Bensayah*'s attorneys put it – that law-of-war principles "do not treat persons 'supporting' a hostile force as 'enemy combatants' subject to indefinite military detention."<sup>234</sup> They both argued that enemy combatancy should be limited to people who are, in *Al Bihani*'s formulation, "(1) members of a State armed force that is engaged in hostilities, or (2) civilians directly participating in hostilities as part of an organized armed force."<sup>235</sup> The D.C. Circuit decisively rejects this position, but it is likely to be renewed in one

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<sup>232</sup> *Id.* at 63.

<sup>233</sup> *Id.*

<sup>234</sup> Brief of Appellant at 66, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Jun. 3, 2009); see also Brief of Appellant at 36-37, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 5, 2009).

<sup>235</sup> Brief of Appellant at 36, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 5, 2009); see also Brief of Appellant at 66-67, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Jun. 3, 2009).

case or another before either the en banc court or the Supreme Court. In an argument that may have narrower impact on other cases if adopted by the D.C. Circuit, Bensayah's lawyers also argue that Judge Leon did not actually find that Besayah had "supported" Al Qaeda, merely that he had *intended* to do so – and that even if support qualifies someone for detention, intent to support does not.<sup>236</sup>

Al Bihani's lawyers went considerably further than Bensayah's. In their primary argument, they asked the D.C. Circuit to preclude their client's detention on grounds that the "particular conflict" in which he was detained is now over, so the laws of war no longer authorize the government to hold him – an argument which the court rejected swiftly.<sup>237</sup> What's more, they asked the court to require the government to prove that their client poses a future danger – much like Judge Huvelle's standard in *Basardh*. Because Judge Leon's definition of combatant "contains no requirement that an individual pose a present or future threat," they contended, "it yields a punitive, not [a] preventative, detention scheme, thereby exceeding the [law-of-war] constraints imposed by the AUMF."<sup>238</sup> The D.C. Circuit was unimpressed, but these arguments will probably reemerge at some point. And all of them, of course, have significant implications not just for habeas proceedings but also for ongoing detention and targeting decisions in Afghanistan and elsewhere.

### **Vitiating of a Relationship**

As suggested by the description above of the government's arguments concerning the scope of its detention authority, the government is also challenging in *Al Adahi* Judge Kessler's approach to the question of when a relationship between a detainee and an enemy group can be vitiated. The government does not argue that vitiation is impossible. It does, however, suggest that it should not be easy for a detainee to make the case that a relationship that would otherwise form the basis for a detention is really over. And pivotally, it insists that the *detainee* must prove vitiation, and that the government has no obligation to prove continuity in a relationship once it has shown that the detainee submitted to the command structure of the enemy organization. "Once Al-Adahi took up arms for al-Qaida at its training facility, he joined al-Qaida and became subject to its command structure," the government argues. "[T]he court was wrong to reason that if Al-Adahi was allegedly expelled from Al Farouq, his ties to al-Qaida would thereby necessarily be broken. . . . Even crediting Al-Adahi's testimony that he was asked to leave Al Farouq after a short period because of his smoking, the legal effect of his departure from the camp must be assessed in light of what followed. Once an individual has taken up arms and trained with al-Qaida, *the burden is on him to show that he is no longer part of al-Qaida if, during his military detention proceedings, he*

<sup>236</sup> Brief of Appellant at 79, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Jun. 3, 2009).

<sup>237</sup> Brief of Appellant at 22, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 5, 2009).

<sup>238</sup> *Id.* at 21.

*alleges a break*” (emphasis added).<sup>239</sup>

The standard the government urges probably would not aid it much in a case like *Al Gingo*—where the government does not contest the evidence of the detainee’s torture and detention by Al Qaeda and the Taliban and which the government did not appeal. But it would, if adopted, limit the lower courts’ latitude to assume that a detainee is no longer associated with the enemy because the government has evidence only of some period of training and only weak material concerning what a detainee did in the period between that training and his capture. The absence of an affirmative obligation on the government’s part to prove specifically that the detainee was *still* “part of” enemy forces at the time of his capture might affect a relatively large number of cases in which the government’s most powerful evidence concerns a detainee’s taking training.

### **Hearsay**

Both government and habeas counsel are also pushing the appeals courts to redirect the lower court concerning the use of hearsay evidence, with a particular focus on the admissibility of and weight to be accorded such evidence. Again, the potential range of possible approaches the parties urge is wide, and the universe of cases likely affected by the Court of Appeals’ ultimate standard is presumably large as well. In *Al Adahi*, the government argues that Judge Kessler flyspecked its evidence way too closely, looking at each piece of evidence individually and applying scrutiny to it that, “far from acknowledging the realities of the wartime military setting and the weight and sensitivity of the government’s interests. . . [applied a] heightened standard of proof for the government.”<sup>240</sup> In one instance, the government argues, Judge Kessler “searched for reasons, including mistaken reasons, to discredit the government’s witness, and refused on legally erroneous grounds to even consider the evidence that corroborated the witness’s statements.”<sup>241</sup> The proper approach, it urges the D.C. Circuit, “is to recognize the distinct nature of the intelligence information and other sources on which the military must rely, and to accord appropriate deference to the inferences that expert military personnel draw from such material based on the insights they derive from their military operations and experience.”<sup>242</sup>

This latter point is particularly important, as the notion of deference has not heretofore played a significant role in the habeas decisions. In other contexts relating to national security and military affairs, the government routinely urges judges to defer to its factual judgments, citing comparative institutional competence and legitimacy. Such claims, for example, frequently emphasize the executive branch’s presumed access to special expertise in the relevant subject-

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<sup>239</sup> Brief of Appellant at 58, *Al Adahi v. Obama*, No. 09-5333, 09-5339 (D.C. Cir. Nov. 3, 2009).

<sup>240</sup> *Id.* at 40.

<sup>241</sup> *Id.* at 50.

<sup>242</sup> *Id.* at 38-39.

matter.<sup>243</sup> The government’s hearsay-related arguments in *Al Adahi* appear to invoke a similar principle, insofar as the government criticizes Judge Kessler for failing to accord special weight to the factual conclusions drawn by executive branch experts. If adopted by the courts, this approach could have far-reaching implications for future habeas proceedings whether the evidentiary dispute concerns hearsay or not.

While the government complains that Judge Kessler gives insufficient weight to its hearsay material, the detainees have complained that Judge Leon shows too *much* solicitude for it – though the D.C. Circuit has not been receptive to this complaint to date. One of the central grounds of attack in *Bensayah* alleges that Judge Leon “credited unfinished, conclusory intelligence reports and uncorroborated assertions from anonymous sources in disregard of *Parhat v. Gates*.”<sup>244</sup> These “raw intelligence reports for which no reliability assessment was possible,” *Bensayah*’s lawyers argue, were corroborated only with other such reports which “were themselves raw, unfinished intelligence” whose “reliability is just as questionable” as the original. There is, they argue, “no indication in the record that the originating agencies rigorously analyzed them or concluded they were reliable.”<sup>245</sup> Likewise, Al Bihani’s lawyers objected to Judge Leon’s “wholesale admission of unreliable hearsay without balancing any purported need to proceed in that manner against Al-Bihani’s due process rights.”<sup>246</sup> The D.C. Circuit, as previously noted, rejected Al Bihani’s arguments on this point, but again, this is an interim, not a final step. Ultimately, the Supreme Court, and not the D.C. Circuit, is likely to determine what it meant when it suggested that hearsay had a role to play in these cases.

The consequences of appellate courts’ approach to this question seem particularly significant: If it adopts the government’s view of hearsay, the district court judges will be obliged to find a great deal more facts in the government’s favor than if it adopts a more closely-scrutinizing approach.

### **Mosaic**

The government is also pushing the D.C. Circuit hard to give it more latitude to use the sort of mosaic of evidence that some of the district court judges have rejected. One of its central arguments in *Al Adahi* is that Judge Kessler “expressly refused to consider the government’s evidence as a whole. Instead, [she] considered each piece of evidence in isolation, without regard to the overall factual context or the relationships between the elements of the government’s case.” As a consequence, she “mistakenly excluded as irrelevant evidence that was both relevant and crucial to the government’s case,” particularly evidence concerning

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<sup>243</sup> See, e.g., Robert Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

<sup>244</sup> Brief of Appellant at 1, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Jun. 3, 2009).

<sup>245</sup> *Id.* at 29.

<sup>246</sup> Brief of Appellant at 22, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 5, 2009).



the petitioner's family ties to the Al Qaeda leadership.<sup>247</sup> The government disclaims reliance on a "mosaic theory," saying that Judge Kessler had "mistakenly attributed to the government [this] theory of intelligence evidence."<sup>248</sup> But its approach seems very close to that theory – albeit described in the language of circumstantial evidence, not evidentiary tiles:

It is well-established that a party's evidence in litigation must be considered as a whole. "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in culmination prove it," because the "sum of an evidentiary presentation may well be greater than its constituent parts." . . . Effective probative evidence accordingly is the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person" to establish the truth of the question to be proved. . . . The district court here ignored this "simple fact[] of evidentiary life," . . . when it explicitly refused to consider the totality of the government's evidence for detaining Al-Adahi (internal citations omitted).<sup>249</sup>

This position would be unremarkable except that government also explicitly disclaims the obligation to prove each of the facts on which it relies to the standard of evidence the court requires. The government complains that Judge Kessler, instead of looking at the evidence as a whole, "disaggregated the evidence" and then "required the separate pieces to satisfy heightened standards of proof."<sup>250</sup> But it also makes clear that it does not believe itself obliged to prove to any particular standard of evidence any of the constituent facts making up the overall allegation of being "part of" or "substantially supporting" enemy forces. In the oral argument in *Al Bihani*, for example, Judge Kavanaugh asked government counsel whether "each historical fact that the District Court relies on and that's necessary to the ultimate determination have to be proved by a preponderance, as well?" Responds government counsel, "I don't believe so, your Honor." Judge Kavanaugh asks skeptically in return: "So you can string together several historical facts, none of which is proved by a preponderance, and conclude by a preponderance that the overall definition's met?" Responds the government, "like in every case, you look at the volume of evidence to decide whether a party has proved its case by a preponderance of the evidence."<sup>251</sup>

The government, in short, notwithstanding its disclaimer of the term, is asking the D.C. Circuit to adopt an approach very similar to that of an intelligence mosaic theory. It wants the courts to evaluate a habeas claim based on a matrix of data, whose components may not individually satisfy whatever standard of proof the court adopts but which collectively paint a portrait that does satisfy that standard.

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<sup>247</sup> Brief of Appellant at 30, *Al Adahi v. Obama*, No. 09-5333, 09-5339 (D.C. Cir. Nov. 3, 2009).

<sup>248</sup> *Id.* at 41.

<sup>249</sup> *Id.* at 40.

<sup>250</sup> *Id.* at 38.

<sup>251</sup> Transcript of Oral Argument at 35-36, *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir. Oct. 2, 2009).



The detainees, by contrast, want – as Judge Kessler requires in *Al Adahi* and *Mohammed* and as Judge Kollar-Kotelly likewise demands in *Al Mutairi* – the government to prove every fact on which it seeks to rely. Failing that, they want, the courts to disregard that fact entirely, and they want a far more limited consideration of the composite portrait painted by facts that may be individually innocuous.

Judge Kessler’s resistance to the mosaic theory will also presumably play a key role in the incipient appeal of *Mohammed*, the case in which she most dramatically rejects it. While the government has filed a notice of this appeal, however, it has not yet filed any briefs.

## Conclusion

This preceding discussion highlights the remarkable range of possible directions the law of detention could take across an equally remarkable range of contested legal questions. We emphasize, however, that it encompasses only *some* of the open questions, the ones we regard as most important. A great many other questions remain open as well, some of them probably almost as fateful as the ones we consider here. For example, how should the courts treat certain patterns of evidence that recur in a great many of these cases, such as staying at guest-houses or training at Al Qaeda camps? And how broadly should they construe the government's discovery obligations? The broad point is that the judicial energy to date has resolved virtually none of the central legislative matters at the heart of the future of American detention policy. And as a result, the only certainty is uncertainty.

This lack of clarity is dangerous – and has implications far beyond the courtroom in the limited (and declining) number of Guantánamo habeas cases. Because it remains unclear how far the courts' jurisdiction extends, nobody knows at this stage precisely how many cases these rules will ultimately govern or under what circumstances and where else in the world they will directly impact detention litigation. More fundamentally, as we have described, because the courts in these cases are defining not merely the rules for habeas review but also *the substantive law of detention itself*, they have implications far beyond the cases that will ever make it to court. The rules they craft – particularly those related to the scope of the government's detention power, the vitiating of relationships with enemy organizations, and the escalating substantive burden on the government over time – could have profound implications for decisions in the field concerning whether to initially detain, or even target, a given person or whether to maintain a detention after an initial screening. The lack of clarity concerning the most fundamental questions about our detention system creates uncertainty for forces in operational settings concerning what they can and cannot do, whom they can and cannot hold, and what actions will and will not survive subsequent scrutiny and review both by the courts themselves and by executive branch higher-ups.

Yet having no coherent rules for detention does not diminish the need for forces in the field to neutralize enemy fighters. The uncertainty, therefore, creates perverse incentives that serve neither American national security interests nor the cause of human rights. Instead of engaging in detention operations themselves, for example, American forces have increasingly relied on foreign proxies and their ill-developed criminal justice systems – to the detriment of the detainee insofar as the conditions of confinement are likely to be far worse in foreign custody, and to the detriment of our security insofar as this may produce premature release from custody or limitations on our ability to obtain intelligence directly from an individual. More disturbingly still, unclear detention rules may also in some instances incentivize the use of lethal force, again to the potential detriment of both the suspect and our capacity to obtain intelligence. One can make a compelling

case for more or less restrictive detention rules, and it is likely the military and intelligence communities could learn to operate in a more restrictive detention environment than they have come to expect when operating overseas. There is no good argument, however, for incoherent, ill-defined, and constantly-in-flux rules, to which the military cannot easily train soldiers and which offer no safe harbor for executive conduct.

No more does such an environment serve detainees who claim either innocence of terrorist ties or who acknowledge only ties that they regard as insufficient to justify their long-term detentions. No detainee, detainee lawyer, or citizen concerned about civil liberties and human rights should be sanguine about a legal environment in which habeas corpus is granted or denied depending less on evidence than on the attitudes and proclivities of the individual judges who hear a given detainee's case. If our analysis is correct and certain detainees have had their detentions affirmed based on conduct less threatening than that for which other detainees have walked free, this fact should disquiet those concerned primarily with fairness to detainees at least as much as it troubles those primarily concerned with American security interests. It means, after all, that different judges are making different fundamental judgments about the legislative question at the molten core of detention policy: How convincing does the government have to be that a given person is scary – and how scary does he have to be and as a consequence of what sort of connection to the enemy – for a judge to be willing to tolerate his indefinite detention? Having no consistency on this bedrock question undermines the notion of impartial justice in these cases.

The obvious answer to this problem would be the intervention of the political branches to define at least the high-altitude rules of the road. Two of the judges hearing these cases have explicitly called for such intervention. Judge Hogan, in announcing his decision in *Al Madhwani's* case, said from the bench that “It is unfortunate, in my view, that the Legislative Branch of our government, and the Executive Branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases” and called for a “national legislative solution with the assistance of the Executive so that these matters are handled promptly and uniformly and fairly for all concerned.”<sup>252</sup> And in a concurrence to her D.C. Circuit opinion in *Al Bihani*, Judge Brown likewise wrote that “the circumstances that frustrate the judicial process are the same ones that make this situation particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution. These cases present hard questions and hard choices, ones best faced directly.”<sup>253</sup> Two of the present authors have made similar calls.<sup>254</sup> Legislative guidance remains the

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<sup>252</sup> Transcript of Hearing at 7, *Anam v. Obama*, No. 04-1194 (D.D.C. Dec. 14, 2009).

<sup>253</sup> *Al Bihani v. Obama*, No. 09-5051, slip op. at 2 (D.C. Cir. Jan. 5, 2010) (Brown, J., concurring).

<sup>254</sup> See BENJAMIN WITTES, *LAW AND THE LONG WAR* (Penguin Books, 2008); Benjamin Wittes, *Congress's Guantanamo Burden*, WASH. POST, Jun. 13, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/12/AR2008061203475.html>; see also Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1132 (2008).

most appropriate means of giving shape to a detention system that will otherwise continue to develop spasmodically, unpredictably, and very likely in undesirable directions.

The trouble is that the prospects of legislative intervention are, at this stage anyway, exceedingly remote. Congress has shown no particular inclination to legislate seriously on detention matters in the absence of presidential leadership, and the Obama administration, like the Bush administration before it, has decided not to push the legislature into action.

For this reason, the courts themselves are likely to remain the principal legislative actor in this arena. Under normal circumstances, it would defy common notions of judicial restraint to place a laundry list of questions for decision before the appellate courts and suggest that they demand quick resolution – even if not strictly necessary to resolve immediate cases. The current environment considerably stresses that norm, however. The lower courts, as we have shown, have already splintered concerning the proper handling of these cases, and both they and the litigants before them desperately need guidance from some actor as to how to proceed. If the appellate courts – and particularly the Supreme Court – do not provide that guidance shortly, the result will not be deference to the political branches so much as a slow-motion back-and-forth with the district court and an ultimate necessity of providing guidance anyway. In this instance, therefore, there may be a compelling argument for the appellate courts’ ruling more aggressively and broadly than would otherwise be proper.

Whether they take on the matter quickly or in slow-motion, the courts in their role as the key legislative body in this area will not give texture to the parameters of our emerging national security detention system until they address, at a minimum, six key issues. While these are far from the only important questions, they emerge in our analysis as especially acute and foundational to the basic architecture of any detention system. Without solid, stable answers to them, no detention system can take shape:


- Is the D.C. Circuit correct that “support” for enemy forces can provide a basis for detention under the AUMF, and that the AUMF’s authorization for detention operates independently of the laws of war? Or, by contrast, are the district court judges who either see detention as limited to people who are “part of” enemy forces or who see the AUMF’s grant of detention authority as informed by international law correct? What precisely does it mean to be “part” of such diffuse organizations, in any event? If support alone can justify a detention, does it have to be “substantial,” as the Obama administration contends, or is any support good enough? And is future dangerousness in any way a component of the definition of the detainable class of individuals?
- When can a relationship with an enemy group be vitiated such that detention is no longer a lawful option? Most critically, can a relationship

adequate to support a detention at the time of capture be vitiated through cooperation with the government while the detainee is in custody, as Judge Huvelle describes?

- Does the government's evidentiary burden escalate over time and, if so, how? Nearly all of the judges have applied a degree of scrutiny on habeas review that far exceeds that which any review mechanism would apply in the field or in theater internment facilities. At the same time, none has explained at what point the bar moves, why, or how far. The courts need to explain when the judgments of traditional military mechanisms of detainee screening become inadequate for judicial purposes and how can the government protect itself against a moving goal post.
- What role is hearsay evidence to play in these proceedings? While the judges all agree that it may be admitted and assessed for reliability, their visions both of the mechanisms of its consideration and of what constitutes reliability differ sharply. What counts as an adequate indicator of reliability for habeas purposes, and how closely should the judges scrutinize material collected for purposes other than presentation in federal court?
- How should district judges treat statements allegedly extracted under coercion? What conditions are coercive enough to require evidence's exclusion? And if such conditions ever existed, how long does the taint last and who bears the burden of showing that subsequent statements either are or are not tainted by the prior abuse? In particular, are statements given in formal settings such as CSRT or ARB hearings to be treated differently from statements given in interrogation sessions? Are they presumptively tainted by prior abuse, as several judges suggest, or presumptively insulated from such taint, as Judge Hogan holds?
- How should district judges assess "mosaic" evidence – that is, constellations of facts and circumstances that do not individually justify detention but may do so cumulatively? Should they, as the government suggests, examine the weight of a composite portrait made up of individual facts not necessarily each proven to the court's standard of evidence? Or, by contrast, should they examine every alleged fact in detail and relative isolation, as Judge Kessler does? Or is there some plausible middle ground?

Addressing these questions will by no means end the legislative process associated with judicial review of non-criminal terrorism detentions. A great many other questions will keep the courts busy for years to come. Guidance on these basic issues would, however, significantly narrow the field of dispute and give shape to a system whose contours today remain dangerously ill-defined.

Eight years after detainees began arriving at Guantánamo, the public debate over detention continues its unrelenting focus on marginalia: Where should America hold detainees? Should it really shutter Guantánamo and how badly will President Obama miss his original deadline for doing so? Interesting as such questions may be politically, they have little bearing on the truly important



questions of American detention policy. What rules should govern non-criminal counter-terrorism detentions procedurally and substantively? When, if ever, should detention take place, and under what standards and what sort of judicial supervision? After *Boumediene*, the courts can no longer avoid these questions – even if the public and members of Congress still insist on doing so. One way or another, a law of detention must emerge.

## Appendix I: Table of Decisions

(Listed Alphabetically by Detainee Last Name)

Caption	Judge	Decision	Appeal status
<a href="#">Ahmed v. Obama</a>	Kessler	Habeas granted	None – Petitioner transferred
<a href="#">Al Adahi v. Obama</a>	Kessler	Habeas granted	Appealed
<a href="#">Al Alwi v. Bush</a>	Leon	Habeas denied	Appealed
<a href="#">Al Bihani v. Obama</a>	Leon	Habeas denied	Appealed – <a href="#">Affirmed</a>
<a href="#">Anam v. Obama</a> (Petitioner’s name: Al Madhwani )	Hogan	Habeas denied	No Decision Announced
<a href="#">Al Mutairi v. U.S.</a>	Kollar-Kotelly	Habeas granted	None – Petitioner transferred
<a href="#">Al Odah v. U.S.</a>	Kollar-Kotelly	Habeas denied	Appealed
<a href="#">Al Rabiah v. U.S.</a>	Kollar-Kotelly	Habeas granted	None – Petitioner transferred
<a href="#">Awad v. Obama</a>	Robertson	Habeas denied	Appealed
<a href="#">Barhoumi v. Obama*</a>	Colleyer	Habeas denied	Appealed
<a href="#">Basardh v. Obama</a>	Huvelle	Habeas granted	Appealed
<a href="#">Boumediene v. Bush</a> (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



<a href="#">El Gharani v. Bush</a>	Leon	Habeas granted	None - Petitioner transferred
<a href="#">Al Ginco v. Obama</a>	Leon	Habeas granted	None - Petitioner transferred
<a href="#">Hammamy v. Obama</a>	Leon	Habeas denied	Appealed
<a href="#">Hatim v. Obama</a>	Urbina	Habeas granted	No Decision Announced
<a href="#">Bacha v. Obama*</a> (Petitioner's name: Jawad)	Huvelle	Habeas granted	None - Petitioner transferred
<a href="#">Mohammed v. Obama</a>	Kessler	Habeas granted	Appealed
<a href="#">Sliti v. Bush</a>	Leon	Habeas denied	Appealed
<b>TOTAL GRANTED (Not including Uighurs)</b>	11 cases; 15 detainees		
<b>TOTAL GRANTED (Including Uighurs)</b>	32 detainees (includes the 17 Uighur detainees the government no longer considers enemy combatants. The two main decisions in the Uighur cases are <a href="#">Kiyemba v. Obama</a> and <a href="#">Parhat v. Gates.</a> )		
<b>TOTAL DENIED</b>	9 detainees		

\*Full opinion not available

## Appendix II: Summary of District Court Decisions on the Merits

(Cases Listed Alphabetically by Detainee Last Name)

**Case:** Ahmed v. Obama (05-cv-1678)

**Detainee:** Alla Ali Bin Ali Ahmed

**Judge:** Gladys Kessler

**Date:** May 11, 2009

**Decision:** Habeas granted

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

**Petitioner response:** The petitioner denies all allegations. He claims to have gone to Pakistan before September 11, 2001 to study the Koran and admits to staying in a guest house for Yemenis in Pakistan, where he was arrested in March 2002.

**Court findings:** The court finds that the government's evidence is based entirely on unreliable witnesses whose testimony is of little or no weight. As a consequence, the government is unable to rebut the petitioner's denials of the allegations against him.

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

**Detainee:** Mohammed Al-Adahi

**Judge:** Gladys Kessler

**Date:** August 21, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges that the petitioner: (1) had close familial ties to prominent jihadist figures in Afghanistan; (2) met personally with Osama Bin Laden, (3) stayed at an Al Qaeda guest house; (4) trained at the Al Farouq training camp; (5) served as an instructor at Al Farouq ; and (6) served as a bodyguard for Osama Bin Laden.

**Petitioner response:** The petitioner contends that he traveled to Afghanistan to escort his sister to unite her with her recently wedded husband and to attend a celebration of the marriage. He stayed at a house during the celebration, but this house was a separate structure from any Al Qaeda guesthouse. He met Bin Laden, who hosted the celebration, briefly at the wedding and met him again a few days later. He also met several of Bin Laden's bodyguards and briefly attended training at Al Farouq to satisfy his curiosity about jihad. He was, however, expelled from Al Farouq for failure to take orders, and he denies ever serving as an instructor at Al Farouq or as a bodyguard to Bin Laden.

**Court findings:** The court finds the petitioner's narration of the facts is most likely true. While he stayed in a guest house and took brief training, there is no reliable evidence that the petitioner acted as a trainer, fought for Al Qaeda, or provided any actual support to Al Qaeda. The petitioner's relationship with members of Al Qaeda alone is insufficient to justify continue his detention.

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

**Detainee:** Moath Hamza Ahmed Al Alwi

**Judge:** Richard Leon

**Date:** December 30, 2008

**Decision:** Habeas denied

**Government allegations:** The government alleges, in the court's summary, that the petitioner: (1) "stayed at guesthouses closely associated with the Taliban and al Qaeda" and (2) at one of these guest houses "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; (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 contends 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 denies ever having been a bodyguard for Osama Bin Laden.

**Court findings:** The court determines that the government established by a preponderance of the evidence that the petitioner (1) stayed in a guest house closely associated with Al Qaeda; (2) surrendered his passport upon arrival at the guest house; (3) received training at one particular Taliban-related camp; (4) traveled to two different fronts over the following year to support Taliban fighting forces; and (5) stayed with his unit until well after September 11, 2001. The court determines that it has no need to determine whether Petitioner served as a bodyguard to Osama Bin Laden or received training at the Al Farouq camp as the other facts it had found adequately supported the government's detention decision.

**Case:** Al Bihani v. Obama (05-cv-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, in the court's summary, alleges 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 admits to traveling to Afghanistan to fight on behalf of the Taliban against the Northern Alliance. He denies intending to take up arms against U.S. forces, membership in either the Taliban or Al Qaeda, and ever having received military training. He claims that his role with the 55<sup>th</sup> Arab Brigade was limited to cooking for the forces.

**Court findings:** The court finds that serving as a cook for an Al Qaeda-affiliated fighting unit that is directly supporting the Taliban is 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 denies habeas.

**Case:** Anam v. Obama (04-cv-1194)

**Detainee:** Musa'ab Omar Al Madhwani

**Judge:** Thomas Hogan

**Date:** January 6, 2010

**Decision:** Habeas denied

**Government allegations:** The government alleges, as the court summarizes, 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 contends that he traveled to Afghanistan with no intention of fighting and characterizes "himself as a hapless individual" who got caught up in circumstances beyond his control. He admits to traveling with Al Qaeda members and attending weapons training. Additionally, he contends that many of the self-incriminatory statements he gave were extracted through harsh treatment and coercion while he was in prison on Afghanistan or out of fear on renewed abuse at Guantánamo.

**Court findings:** The court finds that although some of the statements the government relies on consist of statements the petitioner under the taint of prior torture, the petitioner's later statements at his CSRT and ARB hearings were not the product of coercion and these statements alone are sufficient to justify continued detention of the petitioner. Relying on these statements, the court finds that Al Madhwani "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."

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

**Detainee:** Khalid Abdullah Mishal Al Mutairi

**Judge:** Colleen Kollar-Kotelly


**Date:** July 29, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges that the petitioner: (1) “trained with and became part of the Al-Wafa al-Igatha al-Islamia (“Al Wafa”) organization, which the Government argues is an associated force for Al Qaeda”; (2) “trained and joined the forces of Al Qaeda”; (3) followed a path consistent with that of individuals traveling to Afghanistan to join in jihad; (4) relinquished his passport as part of standard operating procedure of joining Al Qaeda; and (5) fought with Osama bin Laden in Afghanistan in 1991.

**Petitioner response:** The petitioner claims that he traveled to Afghanistan within days of the September 11, 2001 attacks in a coincidence of timing. He went there with \$15,000 that he anticipated spending on building a mosque, and he left the return date for his flight open because he was unsure of how long it would take to finish his business in Afghanistan. He was met upon arrival and taken to another person’s house. He was told, however, that building the mosque would only require \$9,000. He therefore traveled to Kabul to visit an Al Wafa office, where he could donate the remaining funds to charitable projects; he donated \$1,000 there and traveled to a nearby village, where he donated another \$2,000 to help refugees. He then attempted to go home by crossing the border into Pakistan, but the border was sealed, so after staying with a friend an additional three weeks, he traveled to a village near Khowst. At some point after leaving Kabul, he had his bag stolen, and this bag contained both his remaining funds and his passport. He hired a guide to take him to the Pakistan border but was apprehended by Pakistani guards there, who transferred him to American custody.

**Court findings:** The court finds numerous problems with the petitioner’s versions of events, but finds that the government was nonetheless unable to meet its burden of proof. The court finds that government did establish 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; (3) the petitioner’s lack of a passport is consistent with the behavior of an individual who has joined Al Qaeda. The court acknowledges that this evidence demonstrates that the petitioner’s conduct is consistent with an individual who may have joined Al Qaeda, but clarifies that nothing in the record goes beyond speculation that the



petitioner actually did so. As the government did not establish that the petitioner became part of a terrorist organization, the court grants habeas.



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

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

**Judge:** Colleen Kollar-Kotelly

**Date:** August 24, 2009

**Decision:** Habeas denied

**Government Allegations:** The government alleges that the petitioner: (1) “sought to contact a Taliban official upon reaching Afghanistan” and “subsequently traveled around the country at the direction of this official”; (2) relinquished his passport to a Taliban official; (3) admitted visiting a training camp, which more likely than not was Al Farouq, and (4) was captured near the Tora Bora mountains with an AK-47.

**Petitioner response:** The petitioner contends that he traveled to Afghanistan to teach the Koran with money his grandmother gave him because he thought the “people ‘would be receptive to his teachings’”. He requested the help of a Taliban member to travel to places to teach. He traveled to a Taliban supervised camp for children and relinquished his documents to avoid detection as an Arab. He wanted to leave Afghanistan after September 11, 2001 but could not figure out how to get out of the country.

**Court findings:** The court finds that “some individuals traveled to Afghanistan using the same route as Al Odah and that they were traveling to Al Farouq; that AK-47 training was an early part of the Al Farouq training program; that Al Farouq was evacuated shortly after September 11, 2001, when trainees were sent north toward Kabul, Jalalabad, or the Tora Bora mountains; and that the individual who transported Al Odah from the Afghanistan-Pakistan border to a camp outside of Kandahar was likely a trainer at Al Farouq.” The court also finds that “Al Odah was brought to a camp outside of Kandahar (where Al Farouq was located) on or around September 10, 2001; that he received one day of training on an AK-47; that he was shortly thereafter evacuated and directed to travel north to Logar (a province just south of Kabul); and that he eventually traveled to Jalalabad and the Tora Bora mountains.” Based on these factors, the court finds “that it is more likely than not that Al Odah became part of the forces of the Taliban and al Qaeda.”

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

**Detainee:** Fouad Mahmoud Al Rabiah

**Judge:** Colleen Kollar-Kotelly

**Date:** September 17, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges 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) “that Al Rabiah fought at Tora Bora and took a leadership position by distributing supplies and managing resource disputes”; (3) “that Al Rabiah is 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 “has a history of traveling to impoverished and/or war-torn countries” to do charitable work. He contends that he traveled to Afghanistan for this purpose, 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 get out and wrote a letter to his family explaining that he had spent ten days helping refugees and that he now found himself unable to leave Afghanistan via the route he had used to enter. He contends that self-incriminatory statements he gave that appear to support the government’s allegations were obtained through coercion and threats.

**Court findings:** The court finds that government’s claims rely primarily on testimony from other detainees and from statements the petitioner made while detained. For various reasons, the court finds that the government’s evidence lacks reliability and credibility. Specifically, it finds 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 concludes that the petitioner probably traveled to Afghanistan for charitable purposes, as he claims, and that the government has therefore failed to meet its burden of proof.

**Case:** Awad v. Obama (05-cv-2379)

**Detainee:** Adham Mohammed Ali Awad

**Judge:** James Robertson

**Date:** August 19, 2009

**Decision:** Habeas denied

**Government allegations:** The government alleges, as the court summarizes, 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 [leg] and that, after Awad’s capture, his al Qaida comrades fought to the death.”

**Petitioner response:** The petitioner claims he traveled “to Afghanistan to visit another Muslim country for a few months.” He was “knocked unconscious during an air raid” that occurred while he was walking through a market and woke up in Mirwais Hospital. He was heavily drugged and slipped “in and out of consciousness” until the time of his capture.

**Court findings:** The court finds that although the evidence against the petitioner is “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 make it more likely than not that he was at least briefly part of Al Qaeda.

**Case:** Basardh v. Obama (05-cv-889)

**Detainee:** Yasin Muhammed Basardh

**Judge:** Ellen Segal Huvelle

**Date:** April 15, 2009

**Decision:** Habeas granted

**Government allegations:** No allegations are listed in the opinion because the detainee does not dispute that he was part of Al Qaeda at the time of his capture and argues only that the relationship was severed by his cooperation while in custody.

**Petitioner response:** The petitioner does not contest that he was part of Al Qaeda at the time of his capture. But he fully cooperated with the government during his detention. His cooperation has become public knowledge both inside and outside of Guantánamo and has been the subject of international news coverage. His exposure has resulted in beatings and threats to his life from other detainees, as well as threats to his family.

**Court findings:** The court finds that given the petitioner's cooperation and the widespread knowledge of that cooperation, the petitioner no longer poses a threat to the United States. As he no longer poses a threat, the government does not have the authority to continue detaining him.

**Case:** Boumediene v. Bush (04-cv-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; Habeas denied for 1 petitioner

**Government allegations:** As the court summarizes, “as to all six petitioners, the Government contends that they planned to travel to Afghanistan in late 2001 and take up arms against U.S. and allied forces. . . . Additionally, as to Belkacem Bensayah alone, the Government contends that he is an al-Qaida member and facilitator.”

**Petitioner response:** Petitioners’ deny the government’s allegations but any detail they offer of their own conduct is not summarized in the public opinion.

**Court findings:** The court finds the government’s evidence supporting the allegation against the five petitioners that they planned to travel to Afghanistan to take up arms against the United States is insufficient to support even that such a plot existed. Specifically, the government relies solely on uncorroborated testimony from another detainee whose reliability and credibility has been called into question. The court declines to address whether, even if established, proof of such a plan would be sufficient to justify continued detention. Regarding Bensayah alone, the court finds that the government presented sufficient corroborating evidence to link the petitioner to Al Qaeda as a facilitator and to prove the petitioner’s ability to travel between and among countries using false passports. The court also finds that the government created sufficient doubt as to the plausibility of the petitioner’s own explanations. Therefore, the court rules that the government has carried its burden as to Bensayah.

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

**Detainee:** Mohammed El Gharani

**Judge:** Richard Leon

**Date:** January 14, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges, as the court summarizes, 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 contends that he traveled to Pakistan to escape discrimination, study computers and English, and improve his life and remained there until his arrest in 2001. He denies all allegations that he went to Afghanistan or that he associated with enemy forces there.

**Court findings:** The court finds that the government failed to meet its burden because its evidence against the petitioner consisted of statements made by detainees whose credibility and reliability were called into question.

**Case:** Hammamy v. Obama (05-cv-429)

**Detainee:** Hedi Hammamy

**Judge:** Richard Leon

**Date:** April 2, 2009

**Decision:** Habeas denied

**Government allegations:** The government alleges, as the court summarizes, 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 alleges that Hammamy left Italy, in part, to avoid being arrested by Italian authorities for his involvement in this particular terrorist cell. . . . The Government additionally contends that petitioner Hammamy 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 denies all of these allegations.

**Court findings:** The court finds that the government has 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 describes “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 Petitioner 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.” Because these facts alone satisfy the government’s burden, the court declines to consider the evidence of terrorist training or involvement in the Pakistani group.

**Case:** Hatim v. Obama (05-cv-1429)

**Detainee:** Saeed Mohammed Saleh Hatim

**Judge:** Ricardo Urbina

**Date:** December 15, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges, as the court summarizes, that the petitioner: “trained at an al-Qaida terrorist camp”; “stayed at al-Qaida and Taliban-affiliated safehouses”; “operated under the command of al-Qaida and the Taliban at the battlefield against the Northern Alliance”; and “was identified by a witness as having fought in the battle of Tora Bora against the United States and its coalition partners.” In addition, the government makes other allegations that are redacted from the public opinion.

**Petitioner response:** The petitioner acknowledges that he was in the Afghanistan when hostilities began in the fall of 2001. He claims that he “fled to Pakistan out of fear” and that he never was part of Al Qaeda, the Taliban, or any force engaged in activities against the United States or its allies. He contends he was held for six months in Afghanistan, where he was beaten, permanently injured, and threatened with rape and that he gave the inculpatory statements on which the government relies out of fear of further abuse.

**Court findings:** The court finds that much of the government’s evidence lacks credibility and reliability, having been obtained either by means of torture or under the taint of prior torture. The court rules that while the government has established that the petitioner was captured in Pakistan without his passport, this is insufficient to justify his detention.



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

**Detainee:** Abdulrahim Abdul Razak Al Janko

**Judge:** Richard Leon

**Date:** June 22, 2009

**Decision:** Habeas granted

**Government allegations:** The government alleges, in the court's summary, 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." However, the government concedes that Al Qaeda then suspected the petitioner of being an American spy, imprisoned and brutally tortured him. The Taliban then imprisoned him for more than 18 months. The government contends that notwithstanding these events the petitioner was still a part of either Al Qaeda or the Taliban or both when taken into custody.

**Petitioner response:** The petitioner denies going to Afghanistan to participate in jihad. He admits that he stayed at a Taliban guest house, but claims that he did so against his will and likewise was taken to the Al Farouq training camp against his will. He claims that while at the training camp he only received small arms training and was asked to leave after 18 days. After this, Al Qaeda leaders accused him of being a spy and tortured and imprisoned him.

**Court findings:** The court finds that given the petitioner's limited and brief relationship with Al Qaeda and that Al Qaeda expelled the petitioner from training and subsequently tortured and imprisoned him, no remnant of the preexisting relationship between the petitioner and Al Qaeda existed at the time of his capture. Therefore, the court holds that the government may no longer lawfully detain the petitioner.

**Case:** Mohammed v. Obama (05-cv-1347)

**Detainee:** Farhi Saeed Bin Mohammed

**Judge:** Gladys Kessler

**Date:** November 19, 2009

**Decision:** Habeas denied

**Government allegations:** The government alleges that the petitioner: (1) used an alias both before and after his detention; (2) used false travel documentation; (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 that was linked to Al Qaeda training; (6) trained at a terrorist training camp; and (7) participated in battle on behalf of the Taliban or Al Qaeda or both.

**Petitioner Response:** The petitioner denies any connection to terrorism though acknowledges that he used fake names and false identification, that he worshipped at the mosques, and that a man there paid for his travel to Afghanistan, where he stayed at a guest house. He contends that he left Algeria because of family problems and looking for work in Europe. He traveled to Afghanistan, he says, because a man at the London mosques told him he could find a Swedish woman there whom he could marry and thereby obtain lawful European residency.

**Court Findings:** The court finds the petitioner’s story totally incredible. It finds that the government has proven all of its allegations save that the detainee took training or actually fought. In the absence of such evidence, the court determines that the government has not proven that the detainee actually joined the command structure of either Al Qaeda or the Taliban and thus has not carried its burden of proof.

**Case:** Sliti v. Bush (05-cv-429)

**Detainee:** Hisham Sliti

**Judge:** Richard Leon

**Date:** December 30, 2008

**Decision:** Habeas denied

**Government allegations:** The government alleges, as the court summarizes, 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. In addition, the Government contends that petitioner 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 acknowledges having traveled to Afghanistan with the financial assistance, but he claims to have gone there only to get off drugs and find a wife. He acknowledges briefly visiting a guest house but says he did not get along with the other residents. He denies attending any military training or having an address book on him when first detained by Pakistani authorities. While he admits to living in the mosque, he claims he only lived there because he was otherwise homeless. He denies any involvement with and any role in founding the terrorist organization.

**Court findings:** The court finds that the petitioner: (1) traveled to Afghanistan on a false passport and with “considerable financial support provided to him by 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 determines that a reasonable inference may be drawn that the petitioner traveled to Afghanistan as an Al Qaeda recruit and that there is a fair and reasonable inference that the petitioner more likely than not attended the local military training camp while living in Jalalabad.

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**Governance Studies**

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