

# CLEANING UP “THE MESS”: THE D.C. CIRCUIT COURT OF APPEALS AND THE BURDEN OF PROOF IN THE GUANTANAMO HABEAS CASES

## INTRODUCTION

Since *Boumediene v. Bush*,<sup>1</sup> the United States District Court and Court of Appeals for the District of Columbia Circuit have been thrust into an extraordinary lawmaking exercise with broad national security implications as they adjudicate the habeas petitions of the detainees held at the Guantanamo Bay detention facility. These courts have been tasked not only with applying the law to the facts of each individual detainee’s case, but also with developing the substantive and procedural rules governing military detention with little guidance from either the Supreme Court or Congress. Numerous scholars have criticized the court of appeals, accusing the court—and some judges in particular—of attempting to undermine the right to judicial review recognized in *Boumediene* and suggesting that the court of appeals is unwilling to rule in favor any detainee.<sup>2</sup>

This Note examines the development of the burden of proof in the Guantanamo habeas cases, beginning with an examination of the guidance provided by the Supreme Court and Congress and continuing with an analysis of the case law developed thus far by the D.C. Circuit on the issue. What emerges is a very different view of the court of appeals’s jurisprudence than the prevailing

---

1. 553 U.S. 723 (2008).

2. See, e.g., Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99, 129 (2011) (“The D.C. Circuit has deviated from [*Boumediene*’s] requirement by effectively depriving the courts of authority to order a prisoner’s release from Guantánamo.”); Gary Thompson, *Guantánamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195, 1212 (2011) (“In the Kafkaesque world of G[uantanamo], the standards continue to change, especially as the D.C. Circuit Court addresses any case where the writ was granted.”); Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1488 (2011) (“[O]n the ‘merits’ of the detainee cases, the analysis and the holdings reflect a profound tension with both *Boumediene* and *Hamdi*, and a fundamental unwillingness by the D.C. Circuit—especially Judges Brown, Kavanaugh, Randolph, and Silberman—to take seriously the implications of the Supreme Court’s analysis in either case.”).

critical view. Throughout this lawmaking process, the Supreme Court and Congress have wrongly avoided addressing the burden of proof (and other procedural issues) head-on, instead deferring to the D.C. Circuit. Furthermore, the Obama Administration's litigation strategy on the issue has proved remarkably irresponsible, unwisely encouraging the adoption of a high burden of proof with unforeseen negative consequences, barely avoiding sacrificing an important legal means of incapacitating detainees by sheer luck, and inappropriately shifting its institutional responsibility to the D.C. Circuit. Saddled with the undue burden of developing the standard, the court of appeals's jurisprudence on the matter manages to accommodate both maximum deference to the government in wartime and the protections for the detainees required by the Supreme Court, illustrating admirable efforts to clean up part of what one of its judges has referred to as the "Guantanamo Mess."<sup>3</sup>

I. CREATING THE PROBLEM: THE SUPREME COURT  
OPENS THE D.C. CIRCUIT TO HABEAS ACTIONS BY  
GUANTANAMO DETAINEES BUT PROVIDES  
NO HELPFUL GUIDANCE

The Supreme Court first grappled with the substantive law of military detention in *Hamdi v. Rumsfeld*,<sup>4</sup> its first detainee habeas case after the September 11, 2001, terrorist attacks. In *Hamdi*, the Supreme Court sanctioned the government's authority to hold enemy combatants in military detention.<sup>5</sup> In response to the petitioner's due process claims,<sup>6</sup> Justice O'Connor, writing for the controlling plurality,<sup>7</sup> determined

---

3. Hon. A. Raymond Randolph, Joseph Story Distinguished Lecture to the Heritage Foundation: "The Guantanamo Mess," (Oct. 20, 2010), available at <http://www.heritage.org/events/2010/10/guantanamo-mess>.

4. 542 U.S. 507 (2004). *Hamdi* was accompanied by a companion case, *Rasul v. Bush*, 542 U.S. 466 (2004), which addressed the jurisdictional issue in the Guantanamo habeas actions. See *infra* note 14 and accompanying text.

5. *Hamdi*, 542 U.S. at 519 (plurality opinion).

6. *Id.* at 528.

7. Justice O'Connor wrote on behalf of herself, Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. *Id.* at 509. Justice Thomas dissented, asserting that the petitioner's detention was clearly within the government's war powers and disputing the plurality's requirement of procedural protections beyond the showing approved by the Fourth Circuit below. See *id.* at 579 (Thomas, J., dissenting); see also *infra* notes 11 and 12.

that the detainee petitioner "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."<sup>8</sup> The plurality opinion also noted, though, that the "exigencies of the circumstances" allowed for "proceedings [to] be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."<sup>9</sup> In addition to approving procedural modifications such as the admission of hearsay evidence,<sup>10</sup> the opinion specifically contemplated a "burden-shifting scheme," under which "once the Government puts forth credible evidence . . . the onus could shift to the petitioner to rebut that evidence with more persuasive evidence."<sup>11</sup> The plurality allowed such procedural modifications to standard habeas proceedings because "process of this sort would sufficiently address the 'risk of an erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government."<sup>12</sup> In devising specific rules, the Court

---

8. *Id.* at 533 (plurality opinion).

9. *Id.*

10. *Id.* at 533–34.

11. *Id.* at 534. It is important to note that in *Hamdi*, the Supreme Court reversed the Fourth Circuit's embrace of something akin to the "some evidence" standard in which the government was able to establish the basis for detention with a factual affidavit from a Department of Defense official, which the detainee was offered no opportunity to rebut. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003) ("Hamdi is not entitled to challenge the facts presented in the [government's] declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an [sic] zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention."), *rev'd*, 542 U.S. 507 (2004).

12. *Hamdi*, 542 U.S. at 534 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In adapting the standard to the circumstances at hand, Justice O'Connor's plurality envisioned process that "would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." *Id.* This balancing approach, based on a Social Security disability benefits case, was criticized from opposite perspectives by both Justice Scalia, who declared the government's military detention authority here to be unlawful, and Justice Thomas, who decried the lack of deference to the Executive Branch in wartime. See *id.* at 575–76 (Scalia, J., dissenting) ("It claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there

commanded lower courts to adhere to the same balancing philosophy, to “pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”<sup>13</sup>

Questions of the substantive and procedural bounds of the government’s detention authority over the Guantanamo detainees became relevant in the federal courts only after the Supreme Court extended habeas jurisdiction to Guantanamo. In *Rasul v. Bush*,<sup>14</sup> the Supreme Court construed the federal habeas statute<sup>15</sup> to grant the federal courts of the D.C. Circuit jurisdiction over Guantanamo detainees’ habeas actions.<sup>16</sup> Congress subsequently amended the statute to strip the jurisdiction of federal courts over Guantanamo detainees’ habeas actions as part of the Detainee Treatment Act (DTA) of 2005.<sup>17</sup> In a subsequent habeas action challenging the military commission process in *Hamdan v. Rumsfeld*, the Supreme Court held that Congress’s modification did not apply to suits pending before the passage of the DTA.<sup>18</sup> Congress chose to respond with another legislative adjustment to the habeas statute aimed at overriding the Court’s holding on the jurisdictional issue.<sup>19</sup> The Supreme

---

they are questionable), it has no place where the Constitution and the common law already supply an answer.”) (internal citations omitted); *id.* at 579 (Thomas, J., dissenting) (“This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners’ habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*. I do not think that the Federal Government’s war powers can be balanced away by this Court.”) (internal citations omitted). The plurality’s approach has also met with significant academic criticism. See, e.g., J. Harvie Wilkinson, III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1976, 1995 (2006) (criticizing the plurality opinion in *Hamdi* as “the very embodiment of split-the-difference reasoning” and “lament[ing] the demotion of textual fidelity, structural analysis, and historical perspective within the constitutional hierarchy”).

13. *Hamdi*, 542 U.S. at 539 (plurality opinion).

14. 542 U.S. 466 (2004).

15. 28 U.S.C. § 2241 (2000).

16. See *Rasul*, 542 U.S. at 473.

17. See Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-43.

18. See 548 U.S. 557, 574-84 (2006).

19. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36.

Court reacted by recognizing constitutional jurisdiction over the Guantanamo habeas claims in *Boumediene v. Bush*.<sup>20</sup> In each of these engagements with a Congress intent on stripping civilian courts' jurisdiction over the Guantanamo habeas suits, the Supreme Court overturned the decision below of the D.C. Circuit Court of Appeals.<sup>21</sup>

While *Boumediene* generated significant criticism,<sup>22</sup> particularly of the quality of its legal and historical reasoning<sup>23</sup> and of

---

20. See 553 U.S. 723, 735–36, 798 (2008).

21. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); *Al-Odah v. Bush*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). Intriguingly, all of the appellate opinions below were authored by Judge Randolph.

22. Perhaps the most devastating criticism of *Boumediene* has come from Judge Randolph, who has offered several particularly devastating criticisms of the Supreme Court's opinion. See, e.g., A. Raymond Randolph, *Originalism and History: The Case of Boumediene v. Bush*, 34 HARV. J.L. & PUB. POL'Y 89, 92 (2011) ("[D]espite dozens of amicus briefs from the leading lights of academia, all in favor of the detainees in *Boumediene*, no one was able to cite a single case or any contemporary commentary indicating that habeas reached beyond the nation's sovereign territory in 1789."); A. Raymond Randolph, Remarks at the Twenty-Ninth Annual Federalist Society Student Symposium, *Originalism and Construction: Does Originalism Always Provide the Answer?* (Feb. 27, 2010), available at <http://www.fed-soc.org/publications/detail/originalism-and-construction-does-originalism-always-provide-the-answer-event-audiovideo> ("In his book, Professor Fisher lists 112 common logical fallacies in historical scholarship. By my count, the majority opinion in *Boumediene* manages to commit forty-seven of them." (citing DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970))). He has leveled versions of his critique in a variety of different fora. See A. Raymond Randolph, *The Guantanamo Mess*, in *CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY* 241 (Dean Reuter and John Yoo eds., 2011); A. Raymond Randolph, *The Guantanamo Mess*, NAT'L REV. ONLINE, Sept. 6, 2011, <http://www.nationalreview.com/articles/275279/guantanamo-mess-raymond-randolph>; Randolph, *supra* note 3.

23. See, e.g., *Boumediene*, 553 U.S. at 801–26 (Roberts, C.J., dissenting) (noting flaws in the reasoning supporting the majority's holding that the existing Combatant Status Review Tribunal (CSRT) process and subsequent judicial review of that process guaranteed by the DTA did not serve as an adequate substitute for habeas); *id.* at 831–49 (Scalia, J., dissenting) (exposing flaws in the reasoning behind the majority's jurisdictional holding); Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1886–88 (2009) (illustrating a major error of the majority in itself ascribing error to an opinion of Lord Chief Justice Mansfield, which was key to the understanding of pre-ratification precedents of the Suspension Clause); Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011) (demonstrating the majority's reliance on an erroneous reading of key Supreme Court precedents); Richard Klinger, *The Court, the Culture Wars, and Real Wars*, A.B.A. NAT'L SECURITY L. REP., June 2008, at 1 (criticizing the majority's reasoning and identifying the

the potential for negative unintended consequences of its holding,<sup>24</sup> the decision—for better or, more likely, for worse—provided a final answer to the jurisdictional question by opening the federal courts of the D.C. Circuit to the Guantanamo detainees' habeas suits. Even as it opened up the lower courts to this inundation of habeas actions, the majority opinion declined to establish much of anything in the way of substantive or procedural review standards for the lower courts to employ, instead leaving "these and the other remaining questions [to] the expertise and competence of the District Court to address in the first instance."<sup>25</sup> The clues the opinion did offer as to what sort of burden of proof would be constitutional seem to contradict themselves: In explaining that "the extent of the showing required of the government in these cases is a matter to be determined,"<sup>26</sup> the Court "seemed to embrace, without much explanation, the notion that the government, rather than the petitioner, would bear the initial burden,"<sup>27</sup> whereas the Court's review of the minimum standards required by the writ<sup>28</sup> concludes that "[t]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of rele-

---

"culture wars" and notions of judicial supremacy as causes of motivated reasoning by the Court).

24. See, e.g., *Boumediene*, 553 U.S. at 827–31 (Scalia, J., dissenting) (identifying likely negative consequences including increased pressure to release detainees even in the face of a significant recidivism rate, further demands on the military ranging from "rigorous evidence collection" to "appear[ances] before civilian courts," declassification of important national security secrets, and, paradoxically, even "reduc[ti]on in] the well-being of enemy combatants that the Court ostensibly seeks to protect"); GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR 130 (2009) (discussing the required allocation of scarce financial resources to comply with *Boumediene*); John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, <http://online.wsj.com/article/SB121366596327979497.html> (highlighting a multitude of negative national security consequences of the decision).

25. *Boumediene*, 553 U.S. at 796 (majority opinion); see also *id.* at 798 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

26. *Id.* at 787.

27. BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 13 (2011), [http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05\\_guantanamo\\_wittes.pdf](http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf).

28. "[T]he Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." *Boumediene*, 553 U.S. at 746 (quoting *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001)).

vant law,"<sup>29</sup> "suggest[ing] that adequate habeas review might even permit the burden to be placed on the petitioner."<sup>30</sup>

The *Boumediene* Court also may have provided some modicum of elucidation of the procedural requirements for the Guantanamo habeas actions in its criticism of the Combatant Status Review Tribunal (CSRT) process as an inadequate substitute for habeas. The Court held that

[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. . . . includ[ing] some authority to assess the sufficiency of the Government's evidence against the detainee . . . [and] the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.<sup>31</sup>

Even the identification of these two basic requirements did little to offer guidance to the D.C. Circuit (or Congress) as to what minimum burden of proof would satisfy the demands of "meaningful review" required by the Court; moreover, this language did not clearly preclude any standard as long as it allowed the admission of exculpatory evidence and the independent examination of the weight of the evidence.

The comparative factual predicates of *Hamdi* and the post-*Boumediene* Guantanamo cases also undermine the usefulness of *Hamdi* in prescribing minimum constitutionally acceptable protections in the Guantanamo context. In *Hamdi*, the petitioner was an American citizen detained in a naval brig in South Carolina.<sup>32</sup> These twin factors—citizenship and geography—were indisputably central to the reasoning of the Court in applying due process guarantees to the petitioner in *Hamdi*.<sup>33</sup> Furthermore, *Boumediene*'s framework for determining the reach of the Suspension Clause also heavily emphasized these two factors,<sup>34</sup> further suggesting that the weight of these two factors in

---

29. *Id.* at 779 (quoting *St. Cyr*, 533 U.S. at 302).

30. WITTES ET AL., *supra* note 27, at 13.

31. *Boumediene*, 553 U.S. at 786.

32. 542 U.S. 507, 510 (2004).

33. *See, e.g., id.* at 509.

34. *See Boumediene*, 553 U.S. at 727 ("[A]t least three factors are relevant in determining the Suspension Clause's reach: (1) the detainees' citizenship and status . . . (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's

determining the reach of the writ could be similarly influential in determining the strength of the procedural standards demanded of the resultant habeas proceedings. Given longstanding baseline notions that citizenship and presence within the United States itself increase the chance of attachment of constitutional protections,<sup>35</sup> the emphasis on these two factors in *Hamdi* and *Boumediene* strongly suggests that procedural standards even more favorable to the government would be acceptable in reviewing the military detention of non-citizens captured and held abroad, as in the cases of the Guantanamo detainees.<sup>36</sup>

Some uncertainty remains as to the applicability of *Hamdi* to the Guantanamo context because of the different legal bases of the various courts' inquiries. *Hamdi* involved the application of the Due Process Clause of the Fifth Amendment and the federal habeas statute,<sup>37</sup> whereas *Boumediene* instead applied only the Suspension Clause.<sup>38</sup> In response to criticism in the Chief Justice's dissent that the court was backtracking on procedures sanctioned in *Hamdi*,<sup>39</sup> the *Boumediene* majority engaged in a particularly contorted analysis of the relevant law in an attempt to distinguish *Hamdi*. The Court suggested that *Hamdi's* sanction of

---

entitlement to the writ." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)); cf. *Hamburger*, *supra* note 23, at 1829–31 (emphasizing how "[t]he current approach to these problems relies almost exclusively on geography to understand when aliens have rights").

35. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens enjoy constitutional rights by virtue of their presence within the United States).

36. Subsequently, the D.C. Circuit Court of Appeals embraced this conception of the relationship between *Hamdi* and the post-*Boumediene* Guantanamo habeas litigation, emphasizing the same concerns about military exigencies that Justice O'Connor highlighted in the *Hamdi* plurality. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010) ("Unlike . . . *Hamdi* . . . *Al-Bihani* is a non-citizen who was seized in a foreign country. Requiring highly protective procedures at the tail end of the detention process for detainees like *Al-Bihani* would have systemic effects on the military's entire approach to war. From the moment a shot is fired, to battlefield capture, up to a detainee's day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation."), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

37. See 542 U.S. at 525 (citing U.S. CONST. amend. V; 28 U.S.C. § 2241 (2000)).

38. See 553 U.S. at 784.

39. See 553 U.S. at 808–13 (Roberts, C.J., dissenting).



certain procedures did not constitute a holding<sup>40</sup> and did not amount to binding precedent because of the application of a different constitutional basis for the decision.<sup>41</sup> Despite the illogical implication of the *Boumediene* majority to the contrary, the protections of the Due Process Clause and domestic habeas proceedings must exceed any protections the Suspension Clause alone may guarantee Guantanamo detainees,<sup>42</sup> as the Chief Justice's *Boumediene* dissent persuasively explains.<sup>43</sup>

---

40. *Id.* at 784 (majority opinion). By suggesting that the plurality nature of Justice O'Connor's opinion meant that the opinion did not constitute a holding, the Court not only implicated disagreement with the longstanding rule that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted) (internal quotation marks omitted), but also failed to invoke an exception on a case that presented the typical grounds for disagreement with that rule. *See, e.g., King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."). For a discussion of the general rule, see Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261 (2000). It is again worth emphasizing that none of the aforementioned procedural modifications contemplated by the *Hamdi* plurality and cast into question by the *Boumediene* majority specifically implicate the burden of proof directly.

41. "[T]here are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's Due Process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes . . ." *Boumediene*, 553 U.S. at 784.

42. The D.C. Circuit Court of Appeals has at least partially confirmed this view by holding that the Due Process Clause of the Fifth Amendment does not apply to Guantanamo. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009), *cert. granted*, 130 S. Ct. 458 (2010), *vacated on other grounds*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010); *see also Almerfedí v. Obama*, 654 F.3d 1, 5–6 (D.C. Cir. 2011) ("In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court—to be sure considering due process limitations—suggested the appropriate framework for a court's determination of the ultimate legal question whether an individual could be detained" (citing 542 U.S. at 534)) (emphasis added), *cert. denied*, 132 S. Ct. 2739 (2012). Scholars have provided detailed examinations of the relationship between the Suspension Clause and the Due Process Clause in the wake of the Supreme Court's recent detention jurisprudence supportive of this conception of the Suspension Clause, the Due Process Clause of the Fifth Amendment, and the history of habeas corpus. *See, e.g., Brandon L. Garrett, Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47 (2012) (offering an analysis of the distinctions between the two concepts in the context of military detention since the September 11, 2001, terrorist attacks); Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due*

II. NO HELP FROM CONGRESS: THE LACK  
OF RELEVANT POST-*BOUMEDIENE V. BUSH*  
LEGISLATIVE ACTION

Congress has not pursued legislative means to address the burden of proof issue. *Boumediene* did not foreclose the possibility of the political branches regulating the substantive and procedural contours of the Guantanamo habeas proceedings through legislation.<sup>44</sup> Although the Bush Administration urged broad legislative action to limit the impact of *Boumediene*,<sup>45</sup> Congress chose not to legislate on these issues in the final annual National Defense Authorization Act during the Bush Administration, which was nearing passage just as the Court's decision was announced.<sup>46</sup> The incoming Obama Administration declined to pursue new legislation governing the habeas proceedings, resisting even a bipartisan effort by the Senate Armed Services Committee to update the government's statutory authority under the 2001 Authorization for Use of Military Force (AUMF).<sup>47</sup> Eventually, the Obama Administration grudgingly accepted a reauthorization of the AUMF<sup>48</sup> in the Fiscal Year (FY) 2012 NDAA,

---

*Process*, 14 U. PA. J. CONST. L. 719 (2012) (discussing the ambiguities in the relationship between the clauses in light of *Boumediene*).

43. See 553 U.S. at 811–15 (Roberts, C.J., dissenting).

44. See *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (“[I]t is important to note that the Supreme Court has not foreclosed Congress from establishing new habeas standards in line with its *Boumediene* opinion.”), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

45. See *Implications of the Supreme Court's Boumediene Decision for Detainees at Guantanamo Bay: Administrative Perspectives Before the H. Armed Services Comm.*, 110th Cong. (2008) (opening statement of Daniel J. Dell'Orto, Acting General Counsel, Dep't of Defense).

46. See Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).

47. See OFFICE OF MGMT & BUDGET, STATEMENT OF ADMINISTRATION POLICY, S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 1–2 (Nov. 17, 2011) (“Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.”).

48. See Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 14, 2011, [http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html?\\_r=0](http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html?_r=0).

which remains the only post-*Boumediene* legislation directly affecting the Guantanamo habeas cases to date.<sup>49</sup>

The resulting legislation, though, offered only minor substantive changes affecting the habeas proceedings for the Guantanamo detainees and provided no procedural clarification for the district court and court of appeals; it instead focused mostly on hot-button political issues like detainee transfer authority<sup>50</sup> and mandatory military custody.<sup>51</sup> Even in the substantive arena, the only elements of the D.C. Circuit's substantive habeas standards potentially touched by the legislation are the role of international law in informing detention authority under the AUMF<sup>52</sup> and the test for what connection to al-Qaeda or the Taliban is necessary to establish detainability.<sup>53</sup>

---

49. Pub. L. No. 112-81, 125 Stat. 1298 (2011). The FY 2013 NDAA also contains a counterterrorism subtitle focused largely on detainee transfer and recidivism, but the final version of the bill did not contain language that affected the Guantanamo habeas cases. See Pub. L. No. 112-239, 126 Stat. 1632 (2013).

50. See FY 2012 NDAA § 1028.

51. See *id.* §§ 1021–1022.

52. See *id.* § 1021(a), (c) (“Congress affirms . . . the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition *under the law of war* . . . . The disposition of a person *under the law of war* . . . may include . . . [d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.”) (citations omitted) (emphasis added); *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (“[T]he premise [of the detainee’s argument] that the war powers granted by the AUMF and other statutes are limited by the international laws of war . . . is mistaken.”), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); see also Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE, (Dec. 19, 2011, 3:31 PM), <http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/> (“[T]he D.C. Circuit famously flirted in one case [*Al-Bihani*] with the notion that international law does not inform or limit detention authority under the AUMF—a position that the explicit references to the ‘law of war’ in the NDAA seems to reject.”). Ironically, this conclusion of the *Al-Bihani* panel—one of such a very few areas of the D.C. Circuit’s jurisprudence potentially revised by the FY 2012 NDAA—was treated as dicta that likely did not command the support of a majority of the court’s active judges when the en banc court denied rehearing. See *Al-Bihani*, 619 F.3d at 1 (D.C. Cir. 2010) (Sentelle, C.J., joined by Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc); see also *id.* at 9 (Kavanaugh, J., concurring in the denial of rehearing en banc) (developing the panel opinion’s argument in much greater detail).

53. See FY 2012 NDAA § 1021(b)(2) (defining detainable individuals to include any “person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces”); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011) (per curiam) (“The district court ruled

While these issues are certainly important and far more glamorous than procedural detail, Congress's focus on them crowded out any attention to the procedural issues so relevant to the day-to-day work of the courts of the D.C. Circuit on these habeas cases.

### III. THE (QUESTIONABLE) INITIAL DISTRICT COURT CONSENSUS ON THE BURDEN OF PROOF

Lacking materially useful guidance from either the Supreme Court or Congress, detention lawmaking has, after the imposition of jurisdiction by *Boumediene*, been left in the hands of the lower federal courts of the D.C. Circuit under a common law approach.<sup>54</sup> With the exception of some ambiguous language in *Hamdi* and *Boumediene*, the question of the distribution and standardization of the burden of proof remained remarkably unsettled when the lower courts began to move beyond the ju-

---

that the military could detain only individuals who were 'part of' al-Qaida or the Taliban; and that Hatim did not fit that description. That ruling is directly contrary to *Al-Bihani v. Obama*, which held that 'those who purposefully and materially support' al-Qaida or the Taliban could also be detained.' (quoting 590 F.3d at 872)). Whether the difference between the language of the FY 2012 NDAA and *Hatim* is even material remains contested. Compare Steve Vladeck, *Judge Randolph Pulls Another Fast One--But Will Anyone Notice?*, PRAWFSBLAWG, (Feb. 19, 2011, 4:03 PM), <http://prawfsblawg.blogspot.com/2011/02/judge-randolph-pulls-another-fast-one-but-will-anyone-notice.html> ("[T]he key [in *Hatim*] is the notion that anyone who 'purposefully and materially support[s]' al Qaeda or the Taliban can be detained indefinitely, whether or not they're in any way affiliated with either group, and whether or not they come anywhere near the definition of a 'belligerent' under international humanitarian law.") (second alteration in original) (citations omitted), with Wittes & Chesney, *supra* note 52 ("[T]he difference between the D.C. Circuit's embrace of the 'purposefully and materially support' standard and the [FY 2012 NDAA] language seems pretty slight . . ."), and Benjamin Wittes, *Steve Vladeck on Hatim*, LAWFARE, (Feb. 19, 2011, 9:18 PM), <http://www.lawfareblog.com/2011/02/steve-vladeck-on-hatim/> ("[Professor Vladeck] is very likely over-reading what seems to me a passing reference to a prior case in the course of a list of several intervening circuit court decisions that necessitated a remand of the district court judgment in *Hatim*.").

54. See WITTES ET AL., *supra* note 27, at 1, 2 (describing the process as "a law-making exercise with broad implications for the future" and noting "a raft of questions [lacking] clear answers emanating from either Congress or the Supreme Court."); see also Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POL'Y REV. 525, 526 (2010) ("[A]fter *Boumediene*, the D.C. . . . court[s'] habeas jurisprudence has, through a common law process, constructed the national security court that was so controversial as a policy proposal." (citing Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>)).

risdictional question. The judges of the district court were thus delegated this issue as essentially a matter of first impression.

In these first stages of the post-*Boumediene* litigation in the district court,<sup>55</sup> the Bush Administration proposed, based on *Hamdi*, that it should bear the initial burden to produce "credible evidence," after which the burden would shift to the petitioner to overcome the government's showing.<sup>56</sup> The detainees, meanwhile, initially argued for a clear and convincing standard and, in some cases, even a beyond a reasonable doubt standard for the government.<sup>57</sup> Displaying a remarkable degree of unanimity, the district court judges all agreed that the burden of proof should be allocated to the government and required a preponderance of the evidence showing, citing in support of this conclusion only the language in *Boumediene* stating: "The extent of the showing required of the government in these cases is a matter to be determined."<sup>58</sup> Although the quality of this reasoning easily can be

---

55. See WITTES ET AL., *supra* note 27, at 14 (describing *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008), as "meant to govern the bulk of cases following *Boumediene*.").

56. See Government's Brief Regarding Preliminary and Procedural Framework Issues at 15, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008). The government proposed this scheme in light of "the special circumstances of these cases," noting that the framework "differs from typical habeas actions, where the petitioner alone generally bears the burden of proof. *Id.* at 14–15 (citing *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 314 (1946); *Williams v. Kaiser*, 323 U.S. 471, 472, 474 (1945); *Walker v. Johnson*, 312 U.S. 275, 286 (1941); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). Especially in light of the government's description of the *Hamdi*-based scheme as "a *fortiori* constitutionally sufficient for habeas procedures involving aliens detained as enemy combatants outside the United States," *id.* at 14, the government's brief seems to implicitly acknowledge that its proposed standard may, in its own view, exceed the procedural guarantees required by the Constitution.

57. See, e.g., Petitioners' Joint Memorandum of Law Addressing Procedural Framework Issues at 9–14, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008); Brief for the Respondents-Appellees at 55, *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051).

58. See *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241, at \*3 (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." (citing *Boumediene v. Bush*, 553 U.S. 723, 787 (2008))). This framework was adopted by a number of other district judges. See, e.g., *Abdah v. Obama*, 708 F. Supp. 2d 9, 13 (D.D.C. 2010) (Kennedy, J.), *rev'd on other grounds sub nom.* *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Hatim v. Obama*, 677 F. Supp. 2d 1, 4 (D.D.C. 2009) (Urbina, J.), *vacated on other grounds and remanded sub nom.* *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011) (per curiam); *Al Odah v. United States*, 648 F. Supp. 2d 1, 7–8 (D.D.C. 2009) (Kollar-Kotelly, J.), *aff'd sub nom.* *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011).

chalked up to the hectic circumstances of their docket in the latter half of 2008, when the already-busy judges of the district court addressed this and a plethora of other difficult new issues on a rather short timetable, the paucity of authority invoked and the sheer irrelevance of the *Boumediene* citation certainly invited skepticism from the court of appeals as to whether saddling the government with such a burden was legally justified.

#### IV. THE COURT OF APPEALS SCRUTINIZES THE PREPONDERANCE STANDARD

Despite the notable agreement below, the consensus on the appropriateness of the preponderance standard disintegrated at the appellate level as the court of appeals contemplated the potential for a lower standard. On appeal in *Al-Bihani v. Obama*,<sup>59</sup> a detainee petitioner contested the district court's preponderance standard, arguing instead for a beyond a reasonable doubt or, in the alternative, a clear and convincing evidence standard.<sup>60</sup> The Obama Administration urged the court of appeals to embrace the preponderance standard adopted by the district court, identifying the preponderance standard as identical to the burden-shifting "credible evidence" scheme embraced by the *Hamdi* plurality and proposed in the government's briefing on the issue before the district court.<sup>61</sup> Noting the lack of controlling Supreme Court precedent,<sup>62</sup> the court of appeals embraced not only the

---

Other judges arrived at essentially identical conclusions independently, citing the case management order. *See, e.g., Khan v. Obama*, 646 F. Supp. 2d 6, 10 (D.D.C. 2009) (Bates, J.); *Boumediene v. Bush*, 579 F. Supp. 2d 191, 195–96 (D.D.C. 2008) (Leon, J.), *rev'd on other grounds and remanded sub nom. Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

59. 590 F.3d 866 (D.C. Cir. 2010), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

60. Brief for the Petitioner-Appellant at 55, *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), at 55.

61. Brief for the Respondents-Appellees, *supra* note 57, at 19 ("While al-Bihani challenges the district court's use of a preponderance-of-the-evidence standard, the Supreme Court has explicitly endorsed the use of a 'credible evidence' or 'preponderance of evidence' standard in reviewing wartime detention." (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 534, 538, 590 (2004))).

62. *Al-Bihani*, 590 F.3d at 878 ("The question of what standard of proof is due in a habeas proceeding like Al-Bihani's has not been answered by the Supreme Court." (citing *Boumediene*, 553 U.S. at 787)).

constitutionality of the preponderance standard,<sup>63</sup> but also the government's definition of the standard as identical to the burden-shifting scheme approved of in *Hamdi*.<sup>64</sup>

Even after completely vindicating the government's position, the court went still further, emphasizing that their "opinion d[id] not endeavor to identify what standard would represent the minimum required by the Constitution."<sup>65</sup> The court mentioned some evidence, reasonable suspicion, and probable cause as possible lower standards of proof, and offered citations to several precedents supporting the constitutionality of such a lower standard.<sup>66</sup> The use of this language strongly suggests that the court was signaling to the government that it would accept the constitutionality of a lower burden of proof.

Subsequently, the court of appeals repeated the strong suggestion that a lower standard would be found constitutionally permissible,<sup>67</sup> and the court made the invitation to the government explicit in *Al-Adahi v. Obama*.<sup>68</sup> After the district court below applied the preponderance standard and granted the writ,<sup>69</sup> the government's initial brief did not contest the selection of the preponderance standard,<sup>70</sup> and the detainee petitioner's only mention of the matter expressed agreement with

---

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

64. *Id.* (asserting that the *Hamdi* scheme "mirrors a preponderance standard").

65. *Id.*

66. *Id.* at 878 n.4 (citing *Zadvydas v. Davis*, 533 U.S. 688, 696 (2001); Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 21, 23 (Eng.)).

67. *See, e.g.,* *Awad v. Obama*, 608 F.3d 1, 10–11 (D.C. Cir. 2010) (noting that "[t]he *Al-Bihani* holding follows the Supreme Court's guidance to lower courts in the *Hamdi* plurality . . . . Let us be absolutely clear. A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF," and noting that the analysis "does not establish that preponderance of the evidence is the constitutionally-required minimum evidentiary standard"), *cert. denied*, 131 S. Ct. 1814 (2011).

68. 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

69. *See* *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at \*2 (D.D.C. Aug. 21, 2009) ("The Government bears the burden of establishing that detention is justified. . . . It must do so by a preponderance of the evidence.") (citations omitted).

70. Brief for the Respondents-Appellants at 33, *Al-Adahi*, 613 F.3d 1102 (Nos. 09-5333, 09-5339) ("We submit, however, that a review of the record and the undisputed facts shows that the government more than met its burden to demonstrate by a preponderance that *Al-Adahi* was part of al-Qaida. Thus, this Court should reverse and instruct the district court to deny the writ.")

the district court's embrace of the standard.<sup>71</sup> Despite the lack of controversy between the parties on the matter, the court of appeals focused significant attention on the issue. Judge Randolph's opinion for the court challenged the consensus in favor of the preponderance standard among the district court judges, chiding the district court for extrapolating too much out of *Boumediene* and for lacking sufficient justification for the choice of the preponderance standard.<sup>72</sup> After noting the language in *Boumediene* that "seemed to put the burden on the detainee,"<sup>73</sup> the court, focusing on *Boumediene*'s dictate "that in determining the scope of the writ, 'analysis may [must?] begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified,"<sup>74</sup> emphasized that the court of appeals was "aware of no precedents in which eighteenth century English courts adopted a preponderance standard,"<sup>75</sup> and that "[e]ven in later statutory habeas cases in this country, that standard was not the norm."<sup>76</sup> In support of this proposition, the court cited an extensive series of precedent supporting a variety of lower standards, including "some evidence" without review of executive factual determinations, "full and fair consideration," and "probable cause."<sup>77</sup>

---

71. Brief for the Petitioner-Appellee at 8–9, *Al-Adahi*, 613 F.3d 1102 (Nos. 09-5333, 09-5339) ("The District Court applied the preponderance of the evidence standard to Appellants' case, and did so over the objections of Appellee. Nevertheless, Appellants were unable to satisfy the burden they advocated . . . . This Court should recognize this case for what it is: an attack on the District Court's finding that Appellants failed to satisfy their burden of proof.").

72. *Al-Adahi*, 613 F.3d at 1104 ("In support, the Order cited *Boumediene*. But *Boumediene* held only that the 'extent of the showing required of the Government in these cases is a matter to be determined.'" (citing *Boumediene*, 553 U.S. 723)); *id.* ("The district judge in this case adopted the preponderance standard. Other district judges in our circuit have done the same. Their rationale is unstated." (citing *Awad*, 608 F.3d at 3; *Al-Adahi*, 2009 WL 2584685, at \*1)).

73. *Id.* at 1104 n.1 ("[T]he [*Boumediene*] Court stated that 'the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law.'" (quoting *Boumediene*, 553 U.S. at 779)).

74. *Id.* at 1104 (quoting *Boumediene*, 553 U.S. at 746) (alteration in original).

75. *Id.*

76. *Id.*

77. *Id.* ("For years, in habeas proceedings contesting orders of deportation, the government had to produce only 'some evidence to support the order.' In such cases courts did not otherwise review factual determinations made by the Executive. In habeas petitions challenging selective service decisions, the



The court of appeals ordered supplemental briefing by the parties as to what burden of proof was required of the government to detain the petitioner,<sup>78</sup> the response to which the court characterized as "not exactly illuminating."<sup>79</sup> Finding the preponderance standard "appropriate" in this context, the government's brief for the first time urged the court *not* to "prescribe a burden of proof that would govern the review of other military detention in other case or contexts, where it may be appropriate for courts to accord deference to the Executive's overall assessment of the evidence or its ultimate determination that an individual is lawfully detained."<sup>80</sup> Having dodged the metaphorical bullet of adversarial briefing by the government, the detainee petitioner's brief, in the words of the opinion, "readily agreed with the government that the preponderance standard should govern his case."<sup>81</sup> Despite the apparent invitation offered to the government by the court of appeals to uphold a lower standard as constitutionally permissible and apply it in this case, the court was left "with no adversary presentation" on what it called "an important question affecting many pending cases." Although "doubt[ing] that the Suspension Clause requires the use of the preponderance standard," the court refrained from deciding that question, instead explicitly "assum[ing] *arguendo*" a preponderance burden for the government.<sup>82</sup>

---

government also had the minimal burden of providing 'some evidence' to support the decision. Habeas petitions contesting courts martial required the government to show only that the military prisoner had received, in the military tribunal, 'full and fair consideration' of the allegations in his habeas petition. And in response to habeas petitions brought after an individual's arrest, the government had to show only that it had probable cause for the arrest.") (citations omitted) (internal quotation marks omitted).

78. *Id.*

79. *Id.*

80. Supplemental Brief for the Respondents-Appellants at 14, *Al-Adahi*, 613 F.3d 1102 (Nos. 09-5333, 09-5339).

81. *Al-Adahi*, 613 F.3d at 1105 (citing Supplemental Brief for the Petitioner-Appellee at 2-3, *Al-Adahi*, 613 F.3d 1102 (Nos. 09-5333, 09-5339)).

82. *Id.* It is indeed intriguing that, unlike *Al-Bihani*, *Al-Adahi* "in its discussion of the appropriate burden of proof, . . . nowhere discusses, cites, or even alludes to *Hamdi*." Vladeck, *supra* note 2, at 1471. As discussed *supra*, though *Hamdi* involved a citizen detainee held in the United States whose rights were guaranteed by the Due Process Clause of the Fifth Amendment, and the Due Process Clause does not apply to Guantanamo. See *supra* notes 37-43 and accompanying text.

V. FURTHER ILLUMINATION BY THE COURT  
OF APPEALS AFTER *AL-ADAH* V. *OBAMA*

To date, the government has not chosen to advocate for a lower standard than preponderance of the evidence in the Guantanamo habeas cases; *Al-Adahi* remains the most definitive statement of law on this question. Two sets of observations have illuminated the state of the law since *Al-Adahi*: (1) the application of the preponderance standard (and whether it is being applied at all); and (2) the interaction of the burden of proof with other legal doctrines in the D.C. Circuit's post-*Boumediene* habeas jurisprudence. Unfolding trends in these areas reinforce just how serious the court of appeals was in its doubts as to the constitutional necessity and appropriateness of the preponderance standard from the outset.

A. *How—and Whether—the Preponderance  
Standard Has Been Applied*

An examination of the statistics at the most abstract level—the government's win-loss record—can provide at least some illustration of how the court of appeals has applied the preponderance standard.<sup>83</sup> Several figures stands out as particularly illustrative of the court's general approach. Not a single grant of the writ of habeas corpus by the district court has ever been affirmed by the court of appeals.<sup>84</sup> All but one denial of

---

83. Some observers have questioned usefulness of scoring in this context. See Benjamin Wittes, *Why I Don't Like the "Scorecard"*, LAWFARE, (Sept. 8, 2010, 2:06 AM), <http://www.lawfareblog.com/2010/09/why-i-dont-like-the-scorecard/> ("I don't think there's a good way to do a simple scorecard. This is not baseball or, for that matter, criminal prosecution, where the rules are clear and both sides are merely playing to win. This is a multi-level game. At one level is a series of fact questions about a bunch of individuals. Yet to keep score only on that level is to ignore the much more important game being played one level up—the game of defining the rules of the lower-level game. There's even a game being played a level above that one, game [sic] of defining the rules by which one then defines the rules of the lowest-level game."). For a criticism of popular methods of scoring, see *id.*; Benjamin Wittes, *An Alternative to the Scorecard*, LAWFARE, (Oct. 21, 2010, 4:31 PM), <http://www.lawfareblog.com/2010/10/an-alternative-to-the-scorecard/>. Though it may be a blunt instrument that misses many of the important dynamics at work in the jurisprudence, the raw data of "wins" and "losses" remains probative in the context of this inquiry.

84. Of the six grants of the writ by the district court reviewed by the court of appeals, three resulted in outright reversal of grant. See *Almerfed* v. Obama, 654 F.3d 1, 2 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Uthman* v. Obama, 637 F.3d 400, 402 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Adahi*, 613

the writ by the district court has been affirmed by the court of appeals.<sup>85</sup> The government's one "loss" before the court of appeals resulted only in a remand to the district court where the government had the opportunity to produce more evidence to meet the preponderance standard on a second try.<sup>86</sup> After the intervention of the court of appeals, the government's win percentage at the district court level soared.<sup>87</sup> Although these sta-

---

F.3d at 1103. The three others resulted in reversal and remand. See *Latif v. Obama*, 666 F.3d 746, 747 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011) (per curiam); *Salahi v. Obama*, 625 F.3d 745, 747 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011)).

85. In twelve cases, the court of appeals affirmed a district court denial of the writ. See *Khairkhwa v. Obama*, No. 11-5180, 2012 WL 6216239, at \*3-4 (D.C. Cir. Dec. 14, 2012); *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012); *Alsabri v. Obama*, 684 F.3d 1298, 1299 (D.C. Cir. 2012); *Suleiman v. Obama*, 670 F.3d 1311, 1312 (D.C. Cir. 2012) *cert. denied*, 133 S. Ct. 353 (2012); *Kandari v. United States*, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *Khan v. Obama*, 655 F.3d 20, 21 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11, 13 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1072 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Esmail v. Obama*, 639 F.3d 1075, 1075 (D.C. Cir. 2011) (per curiam); *Bihani v. Obama*, No. 10-5352, 2011 WL 611708, at \*1 (D.C. Cir. Feb. 10, 2011) (per curiam), *cert. denied*, 132 S. Ct. 2739 (2012); *Odah v. United States*, 611 F.3d 8, 9 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011); *Barhoumi v. Obama*, 609 F.3d 416, 418 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 3 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). In one case, the court of appeals partially affirmed a district court denial of the writ but partially remanded to the district court. See *Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011). On remand, the district court again denied the writ. See *Al Warafi v. Obama*, 821 F. Supp. 2d 47 (D.D.C. 2011). The exception is *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

86. See *Bensayah*, 610 F.3d at 727 ("Because the evidence, viewed in isolation or together, is insufficiently corroborative of [redacted], the district court on remand may not, in the absence of additional corroborative evidence not already considered, rely upon that exhibit in determining whether Bensayah was part of al Qaeda. . . . Accordingly, we reverse the judgment of the district court and remand the case for the district court to hear such evidence as the parties may submit and to decide in the first instance whether Bensayah was functionally part of al Qaeda."). The petitioner remains detained at Guantanamo as of this writing. See *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/10001-bensayah-belkacem> (last visited Feb. 25, 2013).

87. See Mark Denbeaux et al., *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review* 1 (Seton Hall Public Law Research Paper No. 2145554, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2145554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554) ("There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government's factual allegations rather than reject them. The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in *Al-Adahi*. Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12.

tistics on their own hardly can constitute a meaningful argument that the court of appeals has abdicated the “meaningful review” requirement of *Boumediene*,<sup>88</sup> as some of the less thoughtful critics of the court of appeals’s jurisprudence have alleged,<sup>89</sup> they do lend support to the notion that the court meant to be taken seriously its “admonitions” in *Al-Adahi* and elsewhere that the government’s burden, however defined, is not nearly as steep of a climb as the district court and the detainee bar once thought.<sup>90</sup>

A different statistic illustrates another crucial aspect of developments in this area of the law: The Supreme Court has so far denied every post-*Boumediene* petition for a writ of certiorari.<sup>91</sup> Much of the commentary on the certiorari denials has lamented the Supreme Court’s unwillingness to rein in the court of appeals and its supposed “gutting” of *Boumediene*.<sup>92</sup>

---

The sole grant post-*Al-Adahi* in *Latif v. Obama* has since been vacated and remanded by the D.C. Circuit. The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.”)

88. See Benjamin Wittes, *Thoughts on the Cert Denials*, LAWFARE, (June 12, 2012, 4:42 AM), <http://www.lawfareblog.com/2012/06/thoughts-on-the-cert-denials/> (“I cannot say that the system the D.C. Circuit has created, warts and all, is inconsistent with a district court’s conducting a meaningful review of the evidence—though it certainly requires a relatively deferential review both on the law and on the facts. The result is that I don’t think it’s a particular abdication on the part of the justices for them to see the circuit court’s work here as broadly within—rather than outside of—the ambit of what the high court demanded when it wrote *Boumediene* four years ago.”).

89. See, e.g., Editorial, *The Court Retreats on Habeas*, N.Y. TIMES, June 13, 2012, [http://www.nytimes.com/2012/06/14/opinion/the-supreme-court-retreats-on-habeas.html?\\_r=1](http://www.nytimes.com/2012/06/14/opinion/the-supreme-court-retreats-on-habeas.html?_r=1).

90. Vladeck, *supra* note 2, at 1471 (“[M]ost of the merits cases since *Al-Adahi* have focused on whether the district court took *Al-Adahi*’s admonitions to heart.”).

91. The petitions, in chronological order of their denial, are: *Al-Adahi v. Obama*, 131 S. Ct. 1001 (2011); *Odah v. United States*, 131 S. Ct. 1812 (2011); *Awad v. Obama*, 131 S. Ct. 1814 (2011); *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011); *Al-Bihani v. Obama*, 132 S. Ct. 2739 (2012); *Uthman v. Obama*, 132 S. Ct. 2739 (2012); *Almerfed v. Obama*, 132 S. Ct. 2739 (2012); *Al-Kandari v. United States*, 132 S. Ct. 2741 (2012); *Al-Madhwani*, 132 S. Ct. 2739 (2012); *Al-Alwi v. Obama*, 132 S. Ct. 2739 (2012); and *Latif v. Obama*, 132 S. Ct. 2741 (2012).

92. See, e.g., Adam Serwer, *Did the Supreme Court Just Gut Habeas Rights?*, MOTHER JONES, June 11, 2012, <http://www.motherjones.com/mojo/2012/06/did-supreme-court-just-gut-habeas/>; Hon. James Robertson, Remarks at the Constitution Project: *Boumediene*’s Legacy and the Fate of Guantanamo Detainees (July 17, 2012), available at <http://www.constitutionproject.org/pdf/>

Although observers debate this allegation,<sup>93</sup> the certiorari denials unequivocally emphasize the definitive nature of *Al-Adahi's* statements on the burden of proof and lend further authority to the body of law established by the court of appeals by giving it a sense of finality.<sup>94</sup>

A more focused examination of how the court of appeals has weighed the evidence in specific cases breathes meaning into the court's adoption of the preponderance standard.<sup>95</sup> As the

---

Transcript%20from%20Panel%20Discussion\_Boumediene.pdf ("I mean, when a petitioner is stuck in Guantanamo and told that he's got to rebut any presumptions that arise against him, and he's got to challenge a presumption of regularity for intelligence reports, he's had it . . . . [I]f the government wants to keep him there, the government will keep him there with intelligence reports that cannot be meaningfully challenged. To me that guts the meaning of *Boumediene*, and at least, it seems to me, the Supreme Court ought to be looking at that presumption."); Lyle Denniston, *Court bypasses all new detainee cases (FINAL UPDATE)*, SCOTUSBLOG, (June 11, 2012, 11:39 AM), ("In a string of decisions, not one of which the Supreme Court has been willing to review, the D.C. Circuit fashioned its own legal rules for Guantanamo cases, including at least two review methods that strongly favored the government's evidence . . . . The Supreme Court, turning its judicial cheek, has never responded to any of those criticisms, other than to leave the D.C. Circuit with virtually sole control of continuing litigation by Guantanamo prisoners and their volunteer lawyers."). Nearly every court of appeals critic invokes the same terminology ("gutting *Boumediene*") with remarkable consistency.

93. Compare note 92 with Wittes, *supra* note 88 ("[T]he idea that the D.C. Circuit gutted *Boumediene* assumes that the Supreme Court's decision in that case had fixed, meaningful, defined content and that the D.C. Circuit judges denuded it of that content. I don't think this is really true. *Boumediene* required meaningful review of a detention. The term 'meaningful' can cover a lot of ground, and I know that people in the defense bar and many liberals find it inconceivable that meaningful review could encompass some of the procedural and substantive steps the appeals court has taken. Speaking personally, I would certainly have preferred a different outcome in *Latif*. But that said, I cannot say that the system the D.C. Circuit has created, warts and all, is inconsistent with a district court's conducting a meaningful review of the evidence—though it certainly requires a relatively deferential review both on the law and on the facts. The result is that I don't think it's a particular abdication on the part of the justices for them to see the circuit court's work here as broadly within—rather than outside of—the ambit of what the high court demanded when it wrote *Boumediene* four years ago. We need not see the justices's disinclination to interfere, in other words, as a betrayal. It might simply reflect that the justices' understanding of the word 'meaningful' is less fulsome both substantively and in procedural terms than are those of the many lawyers and commentators whose expectations they have now disappointed.").

94. *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

95. *Cf. Wittes, supra* note 88 ("[T]he scorecard ignores—or, rather, downplays—the most important government wins in these cases. These are not numerical but qualitative in nature; that is, it matters *how the government wins and loses*. While the

litigation has progressed, “increasingly-bare fact patterns have been held sufficient to establish by a preponderance of evidence” detainability.<sup>96</sup> An example offered by Judge Silberman in *Almerfed v. Obama*<sup>97</sup> stands out as particularly illustrative:

As an example, if the only evidence the government offered in a particular case was that a petitioner had been apprehended with an AK-47 in rural Afghanistan—which would be at least probative—it would not be sufficient to establish a basis for detention. Possession of a rifle is commonplace in Afghanistan, and therefore does not meaningfully distinguish an al Qaeda associate from an innocent civilian. But the government could satisfy its burden by showing that an individual was captured carrying an AK-47 on a route typically used by al Qaeda fighters. And, of course, that a petitioner trained at an al Qaeda camp or stayed at an al Qaeda guesthouse “overwhelmingly” would carry the government’s burden.<sup>98</sup>

There exists perhaps no more obvious expression of the apparent willingness to interpret flexibly the preponderance standard to accommodate even relatively modest showings by the government. Indeed, though the AK-47 mention is the most attention-grabbing portion of this statement, the location of capture and the training camp and guesthouse stay are particu-

---

press focuses on the raw numbers, the government is racking up a series of big wins in the D.C. Circuit that are cumulatively writing a lot of law very favorable to the government and very unfavorable to detainees. Each of these decisions is far more important than whether any given low- or mid-level fighter (or alleged fighter) goes free or stays locked up. Yet each of these wins counts as one point in the scorecard. That’s just silly.”).

96. WITTES ET AL., *supra* note 27, at 24 (citing *Uthman v. Obama*, 637 F.3d 400, 404 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Almerfed v. Obama*, 654 F.3d 1, 6–7 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012)). As Judge Silberman noted, this trend does not illustrate unfaithfulness to the preponderance standard, but rather what the requirements of the preponderance standard are. See *Almerfed*, 654 F.3d at 4 (“[T]he government’s evidence may well have been stronger in previous cases than in this case. But that is irrelevant; all of those cases were not close. We listed all the evidence supporting the government in those cases without needing to consider the minimum amount of evidence that would establish a preponderance.” (citing *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011) (per curiam); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011))).

97. 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2739 (2012).

98. *Id.* at 6 n.7 (citing *Odah v. United States*, 611 F.3d 8, 11, 16 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011); *Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011)).

larly material to the application of the preponderance standard in other cases.<sup>99</sup>

Just as *Almerfed* provides a window into how the court of appeals has defined what the preponderance standard demands of the government, another opinion by Judge Silberman, *Esmail v. Obama*,<sup>100</sup> brings to light the question of whether the court of appeals is even applying the preponderance standard or, in fact, a lower standard of proof. In the other court of appeals opinion besides *Al-Adahi* that directly criticizes the preponderance standard, Judge Silberman writes while concurring with a per curiam denial of the writ:

My . . . point . . . goes to the unusual incentives and disincentives that bear on judges on the D.C. Circuit courts—particularly the Court of Appeals—charged with deciding these detainee habeas cases. In the typical criminal case, a good judge will vote to overturn a conviction if the prosecutor lacked sufficient evidence, even when the judge is virtually certain that the defendant committed the crime. That can mean that a thoroughly bad person is released onto our streets, but I need not explain why our criminal justice system treats that risk as one we all believe, or should believe, is justified. When we are dealing with detainees, candor obliges me to admit that one can not help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact. That means that there are powerful reasons for the government to rely on our opinion in *Al-Adahi v. Obama*, which persuasively explains that in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary—and moreover, unrealistic. I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evi-

---

99. See Jasmeet K. Ahuja & Andrew Tutt, Note, *Boumediene Without Bite*, 31 YALE L. & POL'Y REV. (forthcoming 2013) (manuscript at 36–40), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2011284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011284) (asserting that an “irrefutable presumption” of detainability has developed for a stay at an al-Qaeda-affiliated guesthouse or training camp).

100. 639 F.3d 1075 (D.C. Cir. 2011) (per curiam).

dence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even “some evidence.”<sup>101</sup>

This opinion has been cited by many—including, most notably, the detainees themselves in their certiorari petitions to the Supreme Court<sup>102</sup>—as illustrative of the attitude of at least some judges on the court of appeals as a whole toward the preponderance standard.<sup>103</sup> Though the *Esmail* court did not purport to adopt any standard lower than preponderance of the evidence,<sup>104</sup> and Judge Silberman’s concurrence specifically noted that “[t]he government’s evidence is easily sufficient to meet any evidentiary standard,”<sup>105</sup> the detainee bar has used Judge Silberman’s concurrence in *Esmail* as evidence that the D.C. Circuit has adopted the some evidence standard *sub silentio*.

#### B. *Parallel Developments in Related Questions in the Law of Detention*

The work of the court of appeals regarding the burden of proof in the Guantanamo habeas cases should not be viewed in a vacuum; a wide range of procedural and substantive issues of detention have been litigated in the wake of *Boumediene*. The resulting body of law is frequently described as a set of rules

101. *Id.* at 1077–78 (Silberman, J., concurring) (citations omitted).

102. See Petition for Writ of Certiorari at 2, 11–13, *Al-Kandari v. United States*, 132 S. Ct. 2741 (2012) (No. 11-1054), 2012 WL 598081; Petition for Writ of Certiorari at 22–23, *Latif v. Obama*, 132 S. Ct. 2739 (2012) (No. 11-102), 2012 WL 549261; Petition for Writ of Certiorari at 12, 14, *Al Alwi v. Obama*, 132 S. Ct. 2739 (2012) (No. 11-7700), 2011 WL 8002286; Petition for Writ of Certiorari at 9, 24, 25, *Almerfeddi v. Obama*, 132 S. Ct. 2739 (2012) (No. 11-683), 2011 WL 6257246; Petition for Writ of Certiorari at 10, 12, 17, 25, *Al-Madhwani v. Obama*, 132 S. Ct. 2739 (2012) (No. 11-7020), 2011 WL 8002285; Petition for Writ of Certiorari at 16–17, *Uthman v. Obama*, 132 S. Ct. 2739 (2012) (No. 11-413), 2011 WL 4543949.

103. See, e.g., Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1440 n.114 (2012); Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 776 n.267 (2011); Gary Thompson, *Guantanamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195, 1212–13 (2011). But see Vladeck, *supra* note 2, at 1472–75 (alleging that the statement only reflects the attitude of some of the judges on the court of appeals).

104. *Esmail*, 639 F.3d at 1077.

105. *Id.* (Silberman, J., concurring). Judge Silberman further noted that he “[f]ound the] petitioner’s ‘story’ phonier than a \$4 bill.” *Id.*



that establish "rules of the game" very favorable toward the government.<sup>106</sup> Examples of such rules abound: the "mosaic" theory of evidence, which states that "[m]erely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence 'may be tossed aside and the next [piece of evidence] may be evaluated as if the first did not exist'" and that "[t]he evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof";<sup>107</sup> the expansive scope of the government's detention authority, defining membership in a group covered by the AUMF functionally (and thus broadly) rather than formally (and thus narrowly), defined as participation in a covered group's chain of command;<sup>108</sup> and the admission of hearsay evidence, after the court of appeals decided that "the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits."<sup>109</sup>

Numerous scholars have documented the ways in which these doctrinal developments have supposedly "gutted" *Boumediene*.<sup>110</sup> Regardless of whether one views the court of appeals's body of work as an end run around *Boumediene* that wrongly undermines habeas or as completely consistent with *Boumediene* and an appropriate balance between detainees' right to "meaningful review" and the exigencies faced by the wartime Executive Branch, the nexus between these doctrines

---

106. See, e.g., Hafetz, *supra* note 2; Thompson, *supra* note 2; Vladeck, *supra* note 2; Ahuja & Tutt, *supra* note 99; Brill, *supra* note 54; Bonnie Lindemann, Recent Development, *A Circuit Supreme: How the D.C. Circuit Court Is Using A Presumption of Regularity in Latif v. Obama to Make New Law and Ensure No Detainees Are Released from Guantanamo Bay*, 21 AM. U. J. GENDER SOC. POL'Y & L. 187 (2012).

107. *Salahi v. Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010) (alteration in original) (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011)). For a general discussion of the theory, see WITTES ET AL., *supra* note 27, at 112–21.

108. See, e.g., *Awad v. Obama*, 608 F.3d 1, 10–12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). For an overview of the scope of the government's detention power, see WITTES ET AL., *supra* note 27, at 24–38.

109. *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). For a summary of the law on hearsay admissions in the detainee habeas context, see WITTES ET AL., *supra* note 27, at 63–89.

110. For the most coherent analyses of this sort, see Vladeck, *supra* note 2; Ahuja & Tutt, *supra* note 99.

has indeed produced a system of review favorable to the government. Though the trend in outcomes produced by the application of these doctrines together has garnered much attention, the relationship between them and the burden of proof should not be overlooked. Many of the most controversial issues that have defined the tenor of the post-*Boumediene* jurisprudence only arose because the burden of proof was set as high as it was; other such issues would have been relegated to ancillary status had the burden of proof been set lower.

#### VI. THE COURT OF APPEALS: ACTIVIST OR BUCK-PASSING VICTIM?

On the burden of proof issue, as well as others, the court of appeals as a whole—and some judges in particular—have been lambasted for their perceived activism, often based on the perception that the court is so unfair to the Guantanamo detainees that it will never let them win.<sup>111</sup> This criticism of the judges of the court of appeals is unwarranted. Rather, the court should instead be seen as the victim of buck-passing by every other relevant governmental actor: the Supreme Court, Congress, and the Obama Administration. Each of these institutions has consistently shirked the untidy and unglamorous duty of es-

---

111. See Vladeck, *supra* note 2 (criticizing Judges Silberman, Randolph, Brown, and Kavanaugh in particular); Ahuja & Tutt, *supra* note 99. Numerous counterexamples, though, of the court of appeals producing major victories for Guantanamo detainees. For example, before the Supreme Court decided *Boumediene*, the D.C. Circuit broadly interpreted its mandate under the DTA, Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2680, 2742–43 (2005), to provide some robust procedural protections for detainees seeking review of their Combatant Status Review Tribunal determinations. See *Bismullah v. Gates*, 503 F.3d 137, 139–40 (D.C. Cir. 2007); *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007). Although the level of review envisioned by the panel may very well have gone beyond what was actually mandated in the statute, see *Bismullah v. Gates*, 514 F.3d 1291, 1307 (D.C. Cir. 2008) (Brown, J., dissenting from denial of rehearing en banc), it certainly amounts to an excellent counterexample to this broad accusation. For further examples of the D.C. Circuit holdings embracing legal theories advanced by Guantanamo detainees, see *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (overturning a detainee’s conviction by a military commission on retroactivity grounds); *Al-Bihani*, 619 F.3d at 1 (D.C. Cir. 2010) (Sentelle, C.J., joined by Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) (converting into dicta the panel opinion’s holding that international law is not a judicially enforceable constraint on presidential war powers under the AUMF).

establishing a responsible burden of proof in the detainee habeas cases, leaving the court of appeals to clean up the "mess."<sup>112</sup>

A. *The Supreme Court Has Acted Negligently  
in Showing No Interest Beyond the Jurisdiction Issue*

In *Boumediene*, the Supreme Court explicitly refused to take responsibility for addressing the burden of proof or any other issue beyond jurisdiction. The *Boumediene* majority attributed its inattention to procedural and substantive inquiries to "the expertise and competence of the District Court."<sup>113</sup> Although this explanation at first glance comports with traditional judicial practice, the unprecedented circumstances of *Boumediene* counseled a more engaged approach by the Supreme Court in providing guidance on issues beyond jurisdiction to the lower courts of the D.C. Circuit.<sup>114</sup> Put another way, by holding that the Suspension Clause guaranteed alien enemy combatants in wartime captured abroad and held abroad the unprecedented right to employ the civilian federal courts to sue for their release even in the face of express statutory prohibition, the Supreme Court obligated itself to offer more guidance than the vague command of "meaningful review" if it really was interested in inventing such a right for the Guantanamo detainees.<sup>115</sup> Relatedly, the Court showed itself willing to go beyond its usual role by deciding whether D.C. Circuit review of the CRST process under the DTA offered a sufficient substitute for habeas, noting that the exceptional circumstances (including the lack of guidance available to the lower courts) counseled a resolution of this question immediately rather than remand to

---

112. Randolph, *supra* note 3. Though Judge Randolph focused his criticism on the Supreme Court's creation of the problem in *Boumediene*, *see id.*, his criticism equally applies to the Supreme Court as well as Congress and the Obama Administration have earned this criticism for their conduct since *Boumediene*.

113. *Boumediene v. Bush*, 553 U.S. 723, 796 (2008).

114. The *Boumediene* majority's refusal to reach this question seems particularly inappropriate in light of the Court's willingness to reach the question before the administrative remedies were exhausted. *See id.* at 303–08 (Roberts, C.J., dissenting).

115. Judge Randolph's notable allusion to *THE GREAT GATSBY* made a similar criticism of the *Boumediene* Court. *See Randolph, supra* note 3 ("They were careless people, Tom and Daisy. They smashed up things and creatures and let other people clean up the mess they had made." (quoting F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925))).

the lower courts<sup>116</sup>; if the *Boumediene* majority was willing to reach the adequate substitute issue, then that approach should have guided its handling of the burden of proof issue.

Since *Boumediene*, the Supreme Court has also proved unwilling to review any of the detainee habeas cases. A diverse range of observers, including both those supportive of *Boumediene* and those critical of it, have criticized the Court's apparent interest in nothing but jurisdiction in this matter as a lack of needed follow-through.<sup>117</sup> Indeed, beyond the pure legal issues, the detainee habeas cases in which the Supreme Court has shown an interest—including one post-*Boumediene* D.C. Circuit case that won a grant or certiorari only to be later summarily vacated and remanded<sup>118</sup>—appear to be the legal equivalent of “low-hanging fruit.” That is, the Supreme Court appears to be

---

116. *Boumediene*, 553 U.S. at 772–73 (majority opinion) (attributing the decision to reach the adequacy issue to “[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years” and “the harms petitioners may endure from additional delay,” and, most ironically, the few precedents available to guide the court of appeals); see also *id.* at 803–08 (Roberts, C.J., dissenting) (criticizing the majority's decision to reach the DTA question).

117. Compare Steve Vladeck, *D.C. Circuit 1, Guantanamo Bar 0?*, LAWFARE, (June 11, 2012, 11:33 AM), <http://www.lawfareblog.com/2012/06/d-c-circuit-1-guantanamo-bar-0/> (“[O]ne of the only ways to understand the Supreme Court's approach to terrorism cases over the past decade is to view the underlying project as one driven almost entirely by the quest for judicial self-preservation—a mindset in which ‘the merits don't matter nearly as much as the protection of the ordinary functioning of the separation of powers (including the Supreme Court's prerogative) more generally.’ Whatever the (‘passive’) virtues of such self-preservation, it has vices as well, especially to the extent that it signals that the Court's only real interest in cases like *Boumediene* is its own jurisdiction, and not the plight of the Guantanamo detainees (or what the lower courts *do* with such jurisdiction). Ultimately, I fear that, while such jurisdiction-oriented decisionmaking appears to empower the courts in the short term, it may well lead to the formal and functional marginalization of individual rights in the long term by the judiciary—if not by the political branches and the public, as well.”), with *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (describing the detainee habeas litigation as “a charade prompted by the Supreme Court's defiant—if only theoretical—assertion of judicial supremacy”). For a discussion of the role of the judicial supremacy issue in the Supreme Court's detainee jurisprudence, see Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

118. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), cert. granted, 130 S. Ct. 458 (2009), vacated and remanded, 130 S. Ct. 1235 (2010) (per curiam), reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010).

fond of taking cases with fact patterns<sup>119</sup> and legal holdings<sup>120</sup> that (to some) evoke a sense of injustice regarding the D.C. Circuit's result. When faced with less sympathetic detainees and less glamorous legal issues—specifically, calibrating the exact burden of proof—the Court's interest appears to wane.

Even though, as Judge Silberman observed, "taking a case might obligate [the Supreme Court] to assume direct responsibility for the consequences of *Boumediene*,"<sup>121</sup> its current course of action has even worse implications. By choosing neither to ratify nor to revise the body of law constructed by the lower courts thus far, the Supreme Court has introduced an element of instability to the law through the continued prospect of possible intervention. Each passing denial of certiorari increases the cost of a future grant of certiorari to the lower courts as the body of law in the D.C. Circuit that would be displaced continues to grow and mature. Although continued abstention from involvement certainly seems preferable to unsettling the careful work of the court of appeals, the Supreme Court's actions do merit criticism for creating this "mess" and doing nothing to help clean it up.

---

119. The lead *Boumediene* petitioner was apprehended in Bosnia and Herzegovina, a country far away from the traditionally-conceived "hot" battlefield and in which he was a legal resident. See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193–94 (D.D.C. 2008). His alleged innocence of any terrorist involvement has been the subject of a well-publicized media campaign. See, e.g., Lakhdar Boumediene, Op-Ed., *My Guantánamo Nightmare*, N.Y. TIMES, Jan. 7, 2012, [http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html?\\_r=0](http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html?_r=0); Edward Cody, *Algerian Lakhdar Boumediene Tells of Struggle After 7 Years at Guantánamo Bay*, WASH. POST, May 26, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502263.html>. On remand, the district court granted his petition, and the government chose not to appeal. See *Boumediene*, 579 F. Supp. 2d. at 198–99; *US sets free test case detainee*, BBC, May 15, 2009, <http://news.bbc.co.uk/2/hi/americas/8052728.stm>.

The *Kiyemba* petitioners were ethnic Uighurs alleged to be members of a separatist group fighting the Chinese government that likely had only loose ties to al-Qaeda. *Kiyemba*, 555 F.3d at 1023–24. The government had conceded the unlawfulness of their detention. *Id.* at 1024.

120. As discussed *supra*, *Boumediene* involved a D.C. Circuit opinion holding that jurisdiction did not extend to Guantánamo. *Kiyemba* examined the complex issue of relief and held that the courts lacked the authority to grant the relief sought (entry into the United States). See *Kiyemba*, 555 F.3d at 1029. The Court reversed its certiorari grant when the government demonstrated that each of the detainees in question had rejected resettlement offers and remanded for further proceedings. See *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

121. *Esmail*, 639 F.3d at 1078 (Silberman, J., concurring).

B. *Congress Wrongly Shirked Its Responsibility to Craft Rules for the Habeas Cases*

Similarly, Congress's abdication of responsibility is reasonably straightforward, having refused to craft "any meaningful guidance"<sup>122</sup> in the form of procedural rules for the habeas cases brought by detainees in military custody not only in its three years of silence on the issue after *Boumediene*, but also in declining to act when reauthorizing the AUMF during the FY 2012 and FY 2013 NDAA legislative cycles. This inaction comes even in wake of pleas for legislative intervention,<sup>123</sup> most notably from Judge Brown in *Al-Bihani*.<sup>124</sup>

---

122. *Salahi v. Obama*, 625 F.3d 745, 751 (D.C. Cir. 2010).

123. See, e.g., LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM (Benjamin Wittes ed., 2009) (collecting scholarly proposals for reform legislation); Dell'Orto, *supra* note 45; cf. *Kiyemba v. Obama*, 561 F.3d 509, 517 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("Our disposition does not preclude Congress from further regulating the Executive's transfer of wartime detainees to the custody of other nations. Congress possesses express constitutional authority to make rules concerning wartime detainees."), *cert. denied*, 130 S. Ct. 1880 (2010).

124. Judge Brown said, in relevant portion:

[I]t is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. The common law 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. None of those factors exist in the Guantanamo context. The number of Guantanamo detainees is limited and the circumstances of their confinement are unique. The petitions they file, as the *Boumediene* Court counseled, are funneled through one federal district court and one appellate court. And, in the midst of an ongoing war, time to entertain a process of literal trial and error is not a luxury we have. While the common law process presents these difficulties, it is important to note that the Supreme Court has not foreclosed Congress from establishing new habeas standards in line with its *Boumediene* opinion. Having been repeatedly rebuffed, Congress may understandably be reluctant to return to this arena to craft appropriate habeas standards as it has done for other habeas contexts in the past. But 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. Judicial review, however, is just that: *re-view*, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war. The saying that generals always fight the last war is familiar, but familiarity does not dull the maxim's sober warning. In identifying the shape of the law in response to the challenge of the current war, it is incumbent on the President, Congress, and the courts to realize that the saying's principle applies to

Numerous factors counsel that Congress should be the institution to devise these substantive and procedural rules. Congress's responsiveness to preferred policies of the electorate would lend democratic legitimacy. Relatedly, Congress's democratic accountability would ensure that the electorate could hold the responsible decisionmakers accountable for unwise decisions, rather than judges whose function rightly requires application of the law without regard to popular pressure. Congress's investigative mandate<sup>125</sup> and resources enable more informed decisionmaking than federal courts bound by the Case or Controversy Clause<sup>126</sup> and the arguments presented by the parties before them. Congress can focus prospectively and employ creative thinking to formulate the best policy,<sup>127</sup> whereas courts, consistent with their best practices, turn to precedent.

Congress's inaction could be cast in a favorable light: Perhaps advocates of different substantive and procedural rules of detention have calculated that the common law process in the D.C. Circuit likely will produce sufficiently desirable rules and outcomes as not to merit the costs and risks of legislative intervention.<sup>128</sup> The more realistic view, though, instead suggests that Congress has chosen to focus on more headline-grabbing and often less important counterterrorism issues at the expense of examining the burden of proof and other procedural issues in the Guantanamo detainee habeas context, as evidenced by the amount of lawmakers' attention focused on issues like mandatory military custody. As such, Congress, like the Supreme Court, has used its discretionary power to choose what issues it will address to avoid taking responsibility for devising a set of rules for the D.C. Circuit to apply.

---

us as well. Both the rule of law and the nation's safety will benefit from an honest assessment of the new challenges we face, one that will produce an appropriately calibrated response.

See 590 F.3d 866, 881–82 (D.C. Cir. 2010) (Brown, J., concurring) (citations omitted), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011):

125. See *McGrain v. Daugherty*, 273 U.S. 135, 136 (1927).

126. U.S. CONST. art. III, § 2, cl. 1.

127. See *Al-Bihani*, 590 F.3d at 881–82.

128. See Nathaniel H. Nesbitt, Note, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244 (2010).

C. *The Obama Administration Acted Unwisely  
and Irresponsibly in Not Pursuing a Lower Burden of Proof*

With the notable exception of some judges on the court of appeals itself,<sup>129</sup> the government's litigation strategy regarding the burden of proof and most other Guantanamo habeas issues has generated little criticism for being insufficiently aggressive. Moreover, its strategy seems at first glance to have been vindicated by a so-far undefeated winning streak on the merits in every case it has appealed, as well as the Supreme Court's refusal to grant certiorari. However, the government's course of action is strikingly irresponsible; indeed, only the careful work of some of the judges on the court of appeals kept the government from creating a difficult and precedentially unmerited rule for itself.

The government's supplementary briefing on the burden of proof issue in *Al-Adahi* offered "three primary considerations [why] the district courts [did] not err[] in requiring the government to establish by preponderance of the evidence that the petitioner is lawfully detained":<sup>130</sup> (1) the consistency of the preponderance standard "with the historical origins of these habeas proceedings";<sup>131</sup> (2) the consistency of the preponderance standard with the *Boumediene* requirement of "meaningful review";<sup>132</sup> and (3) the concern that "the baseline preponderance

---

129. See, e.g., *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring); *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011).

130. Supplemental Brief for the Respondents-Appellants, *supra* note 80, at 10–11.

131. *Id.* at 11. *Boumediene* identified the scope of "the writ as it existed when the Constitution was drafted and ratified" as the touchstone for determining its reach in the Guantanamo context. 553 U.S. 723, 746 (2008).

132. Supplemental Brief for Respondents-Appellants, *supra* note 80, at 11–12 (quoting *Boumediene*, 553 U.S. at 783). The government then explicitly invoked the risk of the Supreme Court overturning a writ denial based on a lower standard. *Id.* at 12–13 ("In light of these pronouncements, there is significant risk, with associated costs to the government and the lower courts, that the Supreme Court would not affirm denial of a writ in a case where the Executive does not come forward with a prior administrative or judicial adjudication of the matter, and fails to demonstrate that it is more likely than not that the petitioner meets the legal criteria for detention. Thus, the presumptive baseline for civil proceedings—that the party with the burden of persuasion must establish its case by a preponderance of the evidence—should apply . . . . Notably, the *Hamdi* plurality favorably cited U.S. military regulations implementing the requirements of the Geneva Conventions, which provide for adjudications of status to be made under a preponderance of the evidence standard." (citing *Boumediene*, 553 U.S. at 788;



standard used in most civil contexts appropriately reflects the competing interests at stake in the habeas proceedings as they are currently conducted in the district court."<sup>133</sup> Each rationale offered by the government withers upon close inspection.

Perhaps the least credible claim made by the government is the notion that habeas corpus review historically demanded a preponderance standard in similar contexts. Leaving aside the problem at the outset that such an inquiry would not have even taken place in 1789 because of a lack of jurisdiction,<sup>134</sup> the section of the government's supplemental brief making this historical claim only cites one source—a 1976 book by a Canadian judge on the general subject of the writ—and produces supposedly supportive quotations that are wholly irrelevant to any discussion of the historical minimum burden of proof.<sup>135</sup> As the court of appeals emphasized, neither the government nor the petitioner (nor, for that matter, the court of appeals's own research) could produce a single analogous Founding-era case employing a preponderance standard.<sup>136</sup>

The notion that *Boumediene* demanded the preponderance standard also elicits much doubt. The *Boumediene* Court employed contradictory language in the few glancing references it made to the burden of proof issue, including a reference that seemed to suggest that the petitioner bears the burden in the first place instead of the government.<sup>137</sup> In reality, *Boumediene* said so little on the issue that it cannot be construed to demand any specific burden of proof without great inferential leaps. The government correctly raises the specter of a certiorari grant (and

---

Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion); Army Regulation 190-8, ch. 1, § 1-6(e)(9)).

133. Supplemental Brief for the Respondents-Appellants, *supra* note 80, at 13.

134. See *supra* notes 22–23 and accompanying text.

135. See Supplemental Brief for the Respondents-Appellants, *supra* note 80, at 11 (“The preponderance standard . . . reflects the historical understandings in this context. See Sharpe, *HABEAS CORPUS*, at 87 (noting that ‘the legal burden, or the ultimate burden of satisfying the judge should rest with the respondent,’ and that ‘the legal burden only comes into play in a case where the facts are evenly balanced.’”).

136. *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 (D.C. Cir. 2010) (“[W]e are aware of no precedents in which eighteenth century English courts adopted a preponderance standard.”). The petitioner-appellee’s brief on the issue does not address on the minimum burden historically required, but rather focuses on the government’s unwillingness to contest the issue and the language employed by *Hamdi* and *Boumediene*. See Supplemental Brief for the Petitioner-Appellee, *supra* note 81.

137. See *supra* notes 25–31 and accompanying text.

its associated costs to the government and the D.C. Circuit) if too low of a burden is demanded of the government;<sup>138</sup> however, its concern is misplaced. By assenting to a preponderance standard, the government has been forced to advance legal arguments that seem just as likely to attract a certiorari grant.<sup>139</sup> Along with provocative language adopted by the court of appeals,<sup>140</sup> some of which almost seem to dare the Supreme Court to grant certiorari, the fact that there has been no certiorari grant yet shows that fear of such a grant does not merit the government encumbering itself with the preponderance burden.

The government's arguments about fairness and preponderance serving as the baseline for similar proceedings also merit skepticism. As the court of appeals noted, examples abound of habeas proceedings demanding far less of the government than a preponderance standard.<sup>141</sup> As the government itself demonstrated and then proceeded to ignore, the burden of proof is traditionally much lower for detainees who have previously received process in the form of judicial or even administrative hearings.<sup>142</sup> The Guantanamo detainees have received multiple forms of administrative process,<sup>143</sup> significantly more than in

---

138. See Benjamin Wittes *Thoughts on Judge Silberman's Opinion*, LAWFARE, (Apr. 8, 2011, 4:55 PM), <http://www.lawfareblog.com/2011/04/thoughts-on-judge-silbermans-opinion/> (asserting that any case adopting a some evidence standard "would be a cert magnet").

139. See, e.g., *infra* Part VI.D.

140. See, e.g., *Latif v. Obama*, 666 F.3d 746, 764 (D.C. Cir. 2011) (referring to "*Boumediene's* airy suppositions"), *cert. denied*, 132 S. Ct. 2741 (2012); *Almerfed v. Obama*, 654 F.3d 1, 6 n.2 (D.C. Cir. 2011) (establishing that the preponderance of the evidence burden could be satisfied by "showing an individual was captured carrying an AK-47 on a route typically used by al-Qaeda fighters"), *cert. denied*, 132 S. Ct. 2739 (2012); *Esmail v. Obama*, 639 F.3d 1075, 1075 (D.C. Cir. 2011) (Silberman, J., concurring) (asserting that the Supreme Court is "unlikely" to require a preponderance of the evidence standard because "taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene*").

141. See *supra* note 79.

142. See Supplemental Brief for the Respondents-Appellants, *supra* note 80, at 7.

143. See FY 2012 NDAA, Pub. L. No. 112-81, §§ 1023-1024, 125 Stat. 1298, 1564-65 (2011) (codifying the Periodic Review Board (PRB) process); DTA, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741-43 (2005) (instituting the CSRT process and establishing judicial review of the CSRT process in the D.C. Circuit); Exec. Order No. 13,567, 3 C.F.R. 227 (2012) (establishing PRB process); Memorandum from the Deputy Sec'y of Def. for the Sec'y of the Navy (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (establishing CSRT process); Deputy Sec'y of Def. Order OSD 06942-04 (May 11, 2004), available at <http://www.defense.gov/news/May2004/d20040518gtmoreview.pdf> (establishing Administrative Review Procedures).

the contexts cited by both the government and the court of appeals that require a much lower burden. Moreover, when considering the balancing of the detainees' and the government's interests, one might prefer, as Judge Silberman suggested,<sup>144</sup> a different balance of the competing interests involved placing greater emphasis on the security of the nation and less emphasis on the risk of erroneous deprivation of the liberties of suspected enemy combatants, especially in light of the detainee recidivism rate.<sup>145</sup>

The government acted most irresponsibly when it failed to preserve at the least the potential legality of a standard lower than a preponderance of the evidence. In its initial briefing before both the district court and the court of appeals, the government only sought to embrace the preponderance standard and made no effort to reserve the potential legality of a lower standard. The most likely consequence was observed in the district court's case management order, which agreed to the government's standard in language that would seem to foreclose a lower burden of proof. If it had taken the easiest route available to it, the court of appeals could have easily ratified the case management order's language on the burden of proof—as the government in fact urged the court of appeals to do—and, in so doing, would have foreclosed the availability of a lower standard with *de facto* permanency. Only by going out of its way numerous times did the court of appeals preserve the potential legality of a lower burden: by devising language that affirmed the constitutionality of the preponderance standard but did not foreclose a lower standard and by repeatedly employing that formulation; and, in *Al-Adahi*, making the reservation of a lower standard explicit. It was not until the supplemental briefing on the issue ordered by the *Al-Adahi* court that the government finally agreed that a lower standard potentially potentially pass constitutional muster.

---

144. *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).

145. See, e.g., H. COMM. ON ARMED SERVICES SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 112TH CONG., LEAVING GUANTANAMO: POLICIES, PRESSURES, AND DETAINEES RETURNING TO THE FIGHT (Comm. Print 2012) (documenting detainee transfer policy and the history of the recidivism problem); Mark Hosenball, *Recidivism rises among released Guantanamo detainees*, REUTERS, Mar. 5, 2012, <http://www.reuters.com/article/2012/03/06/us-usa-guantanamo-recidivism-idUSTRE82501120120306> (reporting a 27.9% recidivism rate).

With the government reticent to embrace even the possibility of a lower standard absent coaxing from the court of appeals, the judges on the *Al-Bihani* and *Al-Adahi* panels found themselves in an awkward position with regard to the judicial role and the separation of powers: They could either assent to the government's sacrifice of a potentially important legal tool that the court itself clearly thought stood on firm ground legally, or reach beyond the traditional judicial role as a neutral dispute arbiter.<sup>146</sup> Although the *Al-Adahi* court refrained from deciding the issue due to a lack of adversarial presentation by the government, it did find itself compelled to invite the government to pursue a lower standard. Thus, its actions on an issue in the vitally important realm of war and national defense forced the court of appeals to run up against the edges of its appropriate role as a neutral arbiter of the law.

The government should have needed no prompting to advocate for (or even preserve the possibility of) a lower burden of proof. The conflict with al-Qaeda, the Taliban, and associated forces has been repeatedly and correctly described as a new kind

---

146. In arguing that the court of appeals should not officially embrace a burden of proof below the preponderance standard, the petitioner-appellee in *Al-Adahi* provided a well-supported account of the limits of the judicial role and the separation of powers issues implicated:

*Al-Adahi*, the United States, and the district courts in this Circuit agree that the Government cannot justify detention on less than a preponderance. This Court therefore should not decide whether a more aggressive detention policy would be lawful if the Executive were to adopt it. The Circuit Courts are arbiters of legal questions presented and argued by the parties before them, not self-directed boards of legal inquiry and research. They do not, or should not, sally forth each day looking for wrongs to right. It would be particularly imprudent to sally forth here, as courts have an obligation to avoid constitutional questions if at all possible. [I]f it is not necessary to decide more, it is necessary not to decide more. Addressing a hypothetical detention policy would not only confront difficult constitutional questions unnecessarily—it would create them. [O]ur Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. The judiciary must be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. Article II empowers the President—not the judiciary—to take Care that the Laws be faithfully executed. It thus would be manifestly inappropriate for a court to second-guess the President's detention policy out of a perception that it adopts an insufficiently hard line.

Supplemental Brief for the Petitioner-Appellee, *supra* note 81, at 9–10 (alterations in original) (citations omitted) (internal quotation marks omitted).

of conflict, one that requires a creative and flexible approach by the government in its efforts to enhance the security of the nation. In an age of "lawfare," where legal arguments serve as weapons of war,<sup>147</sup> the preservation of the lowest acceptable standard is an important objective, for such a standard is an important tool for the government to have in its arsenal of means of incapacitating suspected terrorists. Indeed, given the relative scarcity of case law in the realm of national security and the leading role of the D.C. Circuit in that realm, the law made in the Guantanamo detention context stands poised to make an outsized contribution toward defining the government's war powers as exercised against individual enemies. In this context, the government's actions risk material consequences across a variety of policy areas, from future detention regimes to targeted killing.<sup>148</sup>

The Obama Administration's reluctance to embrace the minimum standard acceptable to the courts can easily be attributed to the association of expansive presidential war powers with what some perceive as the excesses of the Bush Administration;<sup>149</sup> however, the Obama Administration itself has employed this exact same argument about flexibility and preserving legal tools extensively when the circumstances fits its immediate policy agenda.<sup>150</sup> This juxtaposition simply demonstrates a regrettable lack of foresight in failing to preserve all such legal tools, attributable perhaps to inattention to preserving seemingly unneeded legal authorities or, more likely, to an active effort to lock in high procedural protections that limit the freedom of action of future administrations that might wish to employ a fairness calculus less favorable toward suspected terrorists. Troublingly, the litigation strategy for the burden of

---

147. See, e.g., Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009).

148. Cf. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

149. In fairness to the Obama Administration, some have argued that the Bush Administration's assertions of presidential power in some cases impeded the accomplishment of the Administration's preferred counterterrorism policies. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

150. The most notable example of this phenomenon is the Administration's arguments against detainee transfer restrictions. See STATEMENT OF ADMINISTRATION POLICY, *supra* note 47; Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 4 (Jan. 2, 2013).

proof emerges as just one example of the Obama Administration acting to limit permanently the counterterrorism tools available to the government, further examples of which include conceding the applicability and judicial enforceability of the law of armed conflict through the AUMF,<sup>151</sup> limiting targeted killing authority for future Presidents,<sup>152</sup> and possibly even vitiating existing detention authority by soon declaring victory over al-Qaeda.<sup>153</sup>

D. *Latif v. Obama Illustrates the Need for a Lower Burden of Proof and the Consequences of the Government's Strategy*

The government's brief on the burden of proof standard in *Al-Adahi* rightly envisioned a potential need for a lower standard. However, the tone of the argument suggests that the government did not envision the need for a lower burden of proof in the present set of cases filtering up through the district courts

---

151. After the *Al-Bihani* panel controversially concluded that the law of armed conflict did not apply through the AUMF, *see* 590 F.3d 866, 871 (D.C. Cir. 2010), the government refused to defend the panel's conclusion in its briefing before the en banc court. *See Al-Bihani v. Obama*, 619 F.3d 1, 3 (D.C. Cir. 2010) (Brown, J., concurring in the denial of rehearing en banc) (documenting the government's "eager concession" of the issue), *cert. denied*, 131 S. Ct. 1814 (2011).

152. News reports indicate that the Obama Administration rushed to formalize legal and procedural standards for targeted killing ahead of the 2012 presidential election, only to see the matter lose its urgency once President Obama won reelection. *See* Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 24, 2012, <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>. Even after the President won reelection, though, the Administration continued to contemplate establishing "independent review" of individual targeted killing operations, possibly by a judicial body modeled after the Foreign Intelligence Surveillance Court. *See* Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. TIMES, Feb. 8, 2013, [http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?\\_r=0](http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?_r=0).

153. The Administration has begun publicly discussing what the end of the conflict with al-Qaeda would involve, laying the groundwork for the eventual vitiation of the government's authority to detain. *See* Jeh C. Johnson, Gen. Counsel, U.S. Dep't of Def., *Address at the Oxford Union: The Conflict Against Al-Qaeda and its Affiliates: How Will It End?* (Nov. 30, 2012) (identifying "a tipping point at which so many of the leaders and operatives of al-Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States" after which the authorities that accompany the current armed conflict will cease to exist); *see also* Elisabeth Bumiller, *Panetta Says Defeat of Al-Qaeda Is 'Within Reach'*, N.Y. TIMES, July 9, 2011, <http://www.nytimes.com/2011/07/10/world/asia/10military.html> (discussing the "strategic defeat" of al-Qaeda upon the removal from the battlefield of a few more individuals).

and instead saw it as an abstract need for a hypothetical future circumstance. One recent case, though, demonstrates that the need for such a standard has been present in the current round of litigation and puts the flaws in the government's strategy on full display: *Latif v. Obama*.<sup>154</sup>

*Latif* involved a unique confluence of circumstances that are particularly illustrative of the problems caused by the government's litigation strategy. Of particular importance is the detainee's nationality: He was Yemeni.<sup>155</sup> Since January 2010, the Obama Administration has suspended detainee transfers to Yemen based on the Yemeni government's inability to control the unstable security situation in the country, an active base for al-Qaeda-aligned militants.<sup>156</sup> Since then, only one detainee, who was granted a writ of habeas corpus by the district court in a case the government chose not to appeal, has been transferred from Guantanamo to Yemen,<sup>157</sup> while Congress has imposed heavy statutory restrictions on transfers to Yemen and other troubled nations.<sup>158</sup> Although numerous individual Yemeni detainees have been cleared for release, they remain detained not necessarily "because of any judgment that they individually pose some great menace but because the situation of Yemen itself makes repatriations so difficult; to release detainees there is really to lose any possibility of control over their later activity."<sup>159</sup> Indeed, *Latif* himself had been repeatedly cleared for release,<sup>160</sup> along with nu-

---

154. 666 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

155. *Id.* at 747.

156. See Robert M. Chesney et al., *Transfers of Guantanamo Detainees to Yemen: Policy Continuity between Administrations* (The Brookings Inst., 2011), available at <http://www.brookings.edu/research/papers/2011/06/15-yemen-wittes>; Peter Finn, *Return of Yemeni detainees at Guantanamo Bay is suspended*, WASH. POST, Jan. 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/05/AR2010010502850.html>.

157. See *Abdah v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010); Chesney et al., *supra* note 156; Charlie Savage, *Rulings Raise Doubts on Policy on Transfer of Yemenis*, N.Y. TIMES, July 8, 2010, <http://www.nytimes.com/2010/07/09/us/09gitmo.html>.

158. See, e.g., FY 2012 NDAA, Pub. L. No. 112-81, §§ 1027–1028; 125 Stat. 1298, 1566–69 (2011).

159. Benjamin Wittes, *Thoughts on Adnan Latif*, LAWFARE, (Sept. 12, 2012, 10:42 PM), <http://www.lawfareblog.com/2012/09/thoughts-on-adnan-latif/>.

160. Zachary Katznelson, *The Ultimate Injustice at Guantanamo: The Death of Adnan Latif*, ACLU NATIONAL SECURITY PROJECT, (Sept. 12, 2012, 12:13 PM), <http://www.aclu.org/blog/national-security/ultimate-injustice-guantanamo-death-adnan-latif>.

merous other Yemeni detainees.<sup>161</sup> Given the estimated 27% recidivism rate amongst released and transferred detainees,<sup>162</sup> the government is certainly able to offer credible arguments for the continued detention of Yemenis like Latif.<sup>163</sup>

The case turns on the reliability of a single intelligence report that forms the basis of the government's case against the petitioner.<sup>164</sup> The main dispute between the majority and the dissent concerned the majority's adoption of a "presumption of regularity" attaching to the government intelligence report and whether attaching such a presumption to the intelligence report in question satisfies the preponderance standard as well as the *Boumediene* requirement for meaningful review. This presumption has proven bitterly controversial, with Judge Tatel's dissent breaking the unanimity of merits votes in favor of the government.<sup>165</sup> Though it is difficult to evaluate fully the arguments presented in both Judge Brown's majority opinion and Judge Tatel's dissent given the extensive redactions, which the *New York Times* Supreme Court reporter went so far as to characterize as "Mad Libs, Gitmo edition,"<sup>166</sup> what does remain abundantly clear is that this controversy would have been avoided had the government taken the court of appeals up on its offer to adopt a lower burden of proof. The intelligence report that the majority decided met the preponderance burden when accorded a presumption of regular-

---

161. Carol J. Williams, *Names of Guantanamo Detainees set for Transfer are Revealed*, L.A. TIMES, Sept. 21, 2012, <http://articles.latimes.com/2012/sep/21/nation/la-na-nn-gitmo-detainees-named-20120921>.

162. See Hosenball, *supra* note 145. Latif himself died on September 8, 2012, bringing the question of his continued detention to a grisly and bizarre end. See Charlie Savage, *Investigators Said to Question How Detainee Died of Overdose*, N.Y. TIMES, Nov. 28, 2012, [http://www.nytimes.com/2012/11/29/us/yemeni-detainee-at-guantanamo-died-of-overdose.html?\\_r=2&](http://www.nytimes.com/2012/11/29/us/yemeni-detainee-at-guantanamo-died-of-overdose.html?_r=2&); Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. TIMES, Sept. 11, 2012, [http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html?\\_r=2](http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html?_r=2).

163. Cf. Thomas Joscelyn, *34 'high risk' Guantanamo detainees approved for transfer*, THE LONG WAR JOURNAL, (Sept. 24, 2012), [http://www.longwarjournal.org/archives/2012/09/34\\_high\\_risk\\_guantan.php](http://www.longwarjournal.org/archives/2012/09/34_high_risk_guantan.php).

164. See *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *id.* at 770 (Tatel, J., dissenting).

165. See Benjamin Wittes, *Thoughts on Latif #5—Of En Bancs and Cert Grants*, LAWFARE, (Nov. 13, 2011, 12:19 PM), <http://www.lawfareblog.com/2011/11/thoughts-on-latif-5-of-en-bancs-and-cert-grants/>.

166. Adam Liptak, *The 'Fill in the Blanks' Court Game of Indefinite Detention*, N.Y. TIMES, Dec. 12, 2011, [http://www.nytimes.com/2011/12/13/us/the-fill-in-the-blanks-court-game-of-indefinite-detention.html?\\_r=1](http://www.nytimes.com/2011/12/13/us/the-fill-in-the-blanks-court-game-of-indefinite-detention.html?_r=1).



ity would surely satisfy, for example, the some evidence standard proposed in Judge Silberman's *Esmail* concurrence.

The adoption of the presumption of regularity and the accompanying sense among critics that *Boumediene's* "meaningful review" requirement had been undermined constituted, essentially, just as much of a source of controversy and just as much of a potential "certiorari magnet" as a lower burden of proof.<sup>167</sup> Indeed, attaching such a powerful presumption in favor of the government's evidence suggests a conflict with an expansive interpretation of *Boumediene's* "meaningful review" requirement just as significant as a lower burden of proof would. Moreover, it creates the perception among some that the court changed the "rules of the game" in favor of the government, thereby further implicating the fundamental fairness concerns that attracted past certiorari grants. By assenting to the preponderance standard and then choosing to appeal the detainee petitioner's win in the district court, a move almost certainly made with the instability in Yemen in mind, the government bears responsibility for the majority's resort to the controversial presumption. When examining the context of the burden of proof issue, the *Latif* court is thus more appropriately viewed as the victim of the government's irresponsible litigation strategy, under which it proved unwilling to take responsibility for advocating for a lower burden of proof in *Al-Adahi* but was compelled by the needs of national security and foreign policy to appeal the district court's grant of the writ in *Latif*. Responding to the government's desire to "have its cake and eat it, too," the *Latif* court was faced with a choice: employ what the majority thought was a supported if controversial procedural rule, or affirm the grant of the writ to a detainee whose claims of innocence seem as fantastic to the majority as Dorothy's adventures in *The Wizard of Oz*.<sup>168</sup> The result-

---

167. See, e.g., Note, *Constitutional Law—Guantanamo Habeas—D.C. Circuit Holds That Government Intelligence Reports Are Entitled to A Presumption of Regularity—Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), 125 HARV. L. REV. 2193, 2199 (2012); Lindemann, *supra* note 106; Benjamin Wittes, *Thoughts on Latif #6—The Decision (Partially) Unmasked*, LAWFARE, (Apr. 29, 2012, 1:09 PM), <http://www.lawfareblog.com/2012/04/thoughts-on-latif-6-the-decision-partially-unmasked/>.

168. See, e.g., *Latif v. Obama*, No. 10-5319, reissued slip op. at 40 (D.C. Cir. Oct. 14, 2011) ("Just as the Gales' farmhands were transformed by Dorothy's imagination into the Scarecrow, Tin Man, and Cowardly Lion, it is at least plausible that Latif, when his liberty was at stake, transformed his jihadi recruiter into a charity worker, his Taliban commander into an imam, his comrades-in-arms into roommates, and his military training camp into a center for religious study . . . . Really, how likely is

ing decision of the court, though unpopular in some quarters, was the only responsible outcome given the situation in which the court was placed.

#### CONCLUSION

The Guantanamo detainees' habeas actions have resulted in an incredible amount of buck-passing and shirking of responsibility to address difficult issues and preserve the war powers of the government, while complying with the recognized rights of detainees. This irresponsibility is illustrated particularly clearly in the burden of proof issue. Although the court of appeals's jurisprudence may not please—as a policy matter—those who rhapsodize about the sensitivity and poetic skill of mentally disturbed al-Qaeda affiliates,<sup>169</sup> it has proven itself to be the responsible actor of last resort, tasked with cleaning up what was rightfully called “the Guantanamo mess.”

*William R. Payne*

---

it that Latif's charity worker and imam just happened to have names virtually identical to those of a known Taliban recruiter and commander?”).

169. See, e.g., Peter Jan Honigsberg, *In Memory of Adnan Latif: 'Timmy' and a Hospital Corpsman in Guantanamo*, AMERICAN CONSTITUTION SOCIETY BLOG, (Oct. 4, 2012), <http://www.acslaw.org/acsblog/in-memory-of-adnan-latif-%E2%80%98timmy%E2%80%99-and-a-hospital-corpsman-in-guantanamo>; Zeke Johnson, *Why Close Guantánamo? A Dead Man's Poem Speaks*, AMNESTY INTERNATIONAL HUMAN RIGHTS NOW BLOG, (Sept. 12, 2012, 4:46 PM), <http://blog.amnestyusa.org/americas/why-close-guantanamo-a-dead-mans-poem-speaks/>.