

## The D.C. Circuit After *Boumediene*

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I doubt any of my colleagues will vote to grant a [habeas] petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.<sup>1</sup>

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.<sup>2</sup>

“They were careless people,” he read. “They smashed things up . . . and let other people clean up the mess they had made.”<sup>3</sup>

In retrospect, one of the most important decisions by the United States Supreme Court in the terrorism detention litigation of the past decade may well have been an all-but unnoticed “GVR” order (granting certiorari, vacating, and remanding) issued by the Justices two days after they decided *Hamdi v. Rumsfeld*,<sup>4</sup> *Rasul v. Bush*,<sup>5</sup> and

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\* Professor of Law, American University Washington College of Law. Thanks to Bobby Chesney, Amanda Frost, Jon Hafetz, Marty Lederman, and Ben Wittes for incredibly useful discussions and comments; to Kristin Makar and the editors of the *Seton Hall Law Review* for the invitation to participate in this Symposium and for their patience; and to Jason Thelen for research assistance. For full disclosure, I note that I served at some point as co-counsel to either the detainee or to *amici curiae* in support of the detainee in a number of the cases discussed herein, including *Al-Bihani*, *Boumediene*, *Hamdan*, *Kiyemba II*, and (Farhi) *Mohammed*.

<sup>1</sup> *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

<sup>2</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>3</sup> Editorial, *A Right Without a Remedy*, N.Y. TIMES, Mar. 1, 2011, at A26 (quoting Hon. A. Raymond Randolph, *Joseph Story Distinguished Lecture: The Guantanamo Mess*, Address Delivered to the Heritage Found. (Oct. 20, 2010), available at <http://www.heritage.org/Events/2010/10/Guantanamo-Mess> (comparing the Justices in the *Boumediene* majority to characters in F. Scott Fitzgerald’s *The Great Gatsby*).

<sup>4</sup> 542 U.S. 507 (2004).

<sup>5</sup> 542 U.S. 466 (2004).

*Rumsfeld v. Padilla*<sup>6</sup> in June 2004. In *Bush v. Gherebi*,<sup>7</sup> the Court vacated a 2003 Ninth Circuit decision that had concluded, contrary to the D.C. Circuit,<sup>8</sup> that the federal courts *did* have statutory jurisdiction over habeas petitions brought by non-citizens detained at Guantánamo.<sup>9</sup> Indeed, Judge Reinhardt's opinion in *Gherebi* had anticipated many of the arguments adopted by the Court in *Rasul*.<sup>10</sup> Nevertheless, the Justices sent the case back to the Ninth Circuit, with instructions to reconsider its decision—not in light of *Rasul*,<sup>11</sup> but in light of *Padilla*, in which the Justices had held that the U.S. District Court for the Southern District of New York was not the appropriate forum to consider a habeas petition brought by a U.S. citizen detained at a South Carolina navy brig.<sup>12</sup>

By remanding for reconsideration in light of *Padilla* rather than *Rasul*, the *Gherebi* GVR order implicitly hinted that, even though the federal courts in general had jurisdiction over the Guantánamo habeas cases, the Supreme Court believed that there was only one appropriate venue for such suits—the federal courts in and for the District of Columbia. The Ninth Circuit got the hint, transferring *Gherebi* to the D.C. District Court.<sup>13</sup> As a result, and ever since the summer of 2004, the D.C. District Court and D.C. Circuit have exercised a de facto form of exclusive jurisdiction over any and all claims arising out of Guantánamo.<sup>14</sup>

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<sup>6</sup> 542 U.S. 426 (2004).

<sup>7</sup> 542 U.S. 952 (2004) (mem.).

<sup>8</sup> See *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (holding that the habeas statute did not confer jurisdiction over the Guantánamo detainees and relying heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

<sup>9</sup> *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *vacated*, 542 U.S. 952 (2004).

<sup>10</sup> Compare, e.g., *id.* at 1284–99, with *Rasul*, 542 U.S. at 475–80, and *Rasul*, 542 U.S. at 485–88 (Kennedy, J., concurring in the judgment).

<sup>11</sup> *Gherebi*, 542 U.S. at 952.

<sup>12</sup> *Padilla*, 542 U.S. at 442–47.

<sup>13</sup> *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004). Based on *Gherebi*, the federal district court in Seattle also transferred the initial petition for habeas or mandamus relief filed by Salim Hamdan in which he sought to challenge his trial by military commission. See Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295, 322 n.155 (2010).

<sup>14</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 795–96 (2008) (suggesting that venue is only appropriate in the D.C. courts). Of course, it does not follow from *Padilla* that all Guantánamo cases must be brought in the District of Columbia, since, unlike in *Padilla*, the detainees are not held within the territorial jurisdiction of any particular court. See *Rumsfeld v. Padilla*, 542 U.S. 426, 453 (2004) (Kennedy, J., concurring) (distinguishing *Rasul*). Instead, the *Gherebi* GVR order simply reflects the longstanding—but never analytically explained—norm that the District of Columbia is the

There things stood in June 2008, when the Supreme Court in *Boumediene v. Bush* held that the Guantánamo detainees are constitutionally entitled to pursue habeas relief in the federal courts.<sup>15</sup> In the ensuing three years, the focus has been on how the D.C. courts would implement *Boumediene's* mandate that these cases go forward in the absence of any statutory authority, especially given the Supreme Court's express delegation to the lower courts of the power to fashion procedural, evidentiary, and even substantive rules to govern the detainees' claims.<sup>16</sup> The result has been, by any account, a remarkably interesting and complex body of case law.<sup>17</sup> Increasingly in recent months, these cases have also come to inform a heated debate over the relationship between the D.C. Circuit and the Supreme Court's decision in *Boumediene*.

In particular, a number of scholars, civil liberties groups, and detainee lawyers (not to mention the editorial pages of various major newspapers) have accused the D.C. Circuit in general—and some of its judges in particular—of actively subverting *Boumediene* by adopting holdings and reaching results that have both the intent and the effect of vitiating the Supreme Court's 2008 decision.<sup>18</sup> These critiques usually play up both the deep-seated disagreements between the D.C. Circuit and the D.C. District Court in some of these cases (as manifested, for example, by the D.C. Circuit's refusal thus far to affirm a single district court holding that granted habeas relief on the merits—reversing or vacating six such decisions),<sup>19</sup> and the fact that pro-government rulings by the court of appeals have been reversed by the Supreme Court in each of the Guantánamo cases that the Court has

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proper venue for *any* individual held in U.S. custody outside the territorial United States. See, e.g., *Ex parte Hayes*, 414 U.S. 1327, 1328–29 (1973) (Douglas, J.); see also PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 n.52 (2d ed. 1973).

<sup>15</sup> 553 U.S. at 798.

<sup>16</sup> See, e.g., *id.* (“[O]ur opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”).

<sup>17</sup> See, e.g., BENJAMIN WITTES ET AL., BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2d ed. 2011); Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

<sup>18</sup> See, e.g., *A Right Without a Remedy*, *supra* note 3; see also David G. Savage, *Little Headway Made at Guantanamo*, L.A. TIMES, Apr. 3, 2011, at A14.

<sup>19</sup> See *Latif v. Obama*, No. 10-5319 (D.C. Cir. Oct. 14, 2011) (mem.); *Almerfed v. Obama*, No. 10-5291, 2011 WL 2277607 (D.C. Cir. June 10, 2011); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 700 (D.C. Cir. 2010) (per curiam); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

taken—decisions that, in turn, have been criticized publicly by at least some of the D.C. Circuit’s judges.<sup>20</sup>

As such, these critics have all but suggested that the D.C. Circuit has an inappropriate agenda, one in which the Supreme Court’s holdings in these cases should be given as narrow a compass as is remotely defensible.<sup>21</sup> In contrast, defenders of the work of the court of appeals have stressed both the extent to which *Boumediene* necessarily left these issues open to judicial resolution and the near-unanimity of the D.C. Circuit in virtually all of the post-*Boumediene* cases—especially in its decisions on the “merits.”<sup>22</sup> Indeed, even if some of the D.C. Circuit’s judges have been outspoken in their criticisms of the Supreme Court, the fact remains that very few of the court’s post-*Boumediene* opinions have elicited published dissents,<sup>23</sup> and none have successfully been taken en banc. And with one equivocal exception, the Supreme Court has denied certiorari in every post-*Boumediene* Guantánamo case it has thus far been asked to hear.<sup>24</sup>

In the following Symposium Essay, I aim to look more carefully at the parameters of this debate, and the charge that the D.C. Circuit has spent the better part of the past three years subverting *Boumediene*. In particular, I contrast the analyses and holdings of the court of appeals in some of its key decisions with the Supreme Court’s instructions—such as they were—in *Boumediene v. Bush*, *Hamdi*, and, to a lesser degree, *Hamdan v. Rumsfeld*.<sup>25</sup> As I hope to show (and as may

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<sup>20</sup> For a more comprehensive summary of the Supreme Court’s post-9/11 efforts, see Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

<sup>21</sup> See, e.g., *A Right Without a Remedy*, *supra* note 3.

<sup>22</sup> See, e.g., Benjamin Wittes, *We Have Seen the Enemy*, LAWFARE (Mar. 2, 2011, 5:17 PM), <http://www.lawfareblog.com/2011/03/we-have-seen-the-enemy>.

<sup>23</sup> Even disagreements among panel members have usually provoked only concurrences—disputes over the rationale or the scope of the holding but not the underlying judgment. See, e.g., *Almerjedi*, 2011 WL 2277607, at \*6–8 (Rogers, J., concurring in the judgment); *Al-Bihani v. Obama*, 590 F.3d 866, 883–86 (D.C. Cir. 2010) (Williams, J., concurring in the judgment). Judge Tatel has apparently authored a forty-five-page dissent in the *Latif* case, but the opinion has not yet been declassified. See *Latif v. Obama*, No. 10-5319 (D.C. Cir. Oct. 14, 2011) (mem.). Such an opinion would be the first such dissent authored in a post-*Boumediene* “merits” case, as opposed to cases raising other questions.

<sup>24</sup> The exception is *Kiyemba v. Obama* (*Kiyemba I*), 555 F.3d 1022 (D.C. Cir. 2009), in which the Court granted certiorari and issued a short per curiam opinion remanding the case to the D.C. Circuit for consideration of changed factual circumstances. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

<sup>25</sup> 548 U.S. 557 (2006).

seem unsurprising), the answer to this charge lies somewhere in the middle.

Although there are no holdings in Guantánamo cases to which one can point as “proof” that the D.C. Circuit has refused to take the Supreme Court seriously, the court’s analysis as to evidentiary issues and the burden of proof, in particular, reveals some judges who read the Supreme Court’s work in this field for as little as it is worth—if not less. So too, Judge Brett Kavanaugh’s assessment of whether a provision of the REAL ID Act of 2005<sup>26</sup> might violate the Suspension Clause by depriving individuals facing transfer to another country of a chance to contest the legality of that transfer.<sup>27</sup> Although *Omar* did not arise out of Guantánamo, it may represent the most frontal assault on the logic of Justice Kennedy’s majority opinion for the *Boumediene* Court. And in public speeches and concurrences, senior D.C. Circuit Judges A. Raymond Randolph and Laurence Silberman have gone even further, belittling the Supreme Court for what Judge Randolph referred to as the “mess” they made and what Judge Silberman described as a “charade,” prompted by the Court’s “defiant—if only theoretical—assertion of judicial supremacy” in *Boumediene*.<sup>28</sup>

At the same time, some of the court’s holdings in its more outwardly controversial decisions, especially those involving the transfer or release of the Uighurs, can be criticized, if at all, as failures of imagination or misreadings of Supreme Court precedent (for example, as controlling the resolution of issues that may still be open). So too, one could quibble with the D.C. Circuit’s refusal in *Al Maqaleh v. Gates* to extend the protections of the Suspension Clause to non-citizens detained in Afghanistan.<sup>29</sup> But whatever one’s view of the merits of these outcomes, it seems unfair to claim that, in these contexts, the D.C. Circuit is subverting Supreme Court rules that simply do not exist.

Ultimately, my thesis is that, while it smacks of hyperbole to refer to the D.C. Circuit as being engaged in a collective effort to subvert *Boumediene*, it is equally unconvincing to assert that the entire court of appeals has faithfully administered the Supreme Court’s commands

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<sup>26</sup> 8 U.S.C. § 1252(a) (4) (2006).

<sup>27</sup> *Omar v. McHugh*, 646 F.3d 13, 19–21 (D.C. Cir. 2011).

<sup>28</sup> *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

<sup>29</sup> 605 F.3d 84 (D.C. Cir. 2010).

in these cases.<sup>30</sup> Instead, as I hope to show in the pages that follow, the most troubling aspects of the court's post-*Boumediene* jurisprudence can all be traced to some combination of four jurists, in particular: the aforementioned Judges Kavanaugh, Randolph and Silberman, along with Judge Janice Rogers Brown. Whether the rest of the D.C. Circuit is reaching the *correct* results in other cases is beyond the ambit of this Essay; for present purposes, my central conclusion is that, in their opinions and their rhetoric, these four jurists are effectively fighting a rear-guard action while their colleagues coalesce around substantive and procedural rules that are materially consistent with what little guidance the Supreme Court has provided in these cases—and, as importantly, that have the general endorsement of virtually all of the district judges and the executive branch. That is by no means to commend these decisions, but rather to suggest that, if nothing else, fealty to precedent is not one of their shortcomings.

#### I. SCOPE OF DETENTION AUTHORITY

One of the most significant substantive questions at issue in the post-*Boumediene* habeas cases is the scope of the government's detention authority. It is also the issue on which the Supreme Court has arguably provided the *least* amount of illumination, whether in *Boumediene* or any other terrorism-related case. The touchstone, all (now) agree,<sup>31</sup> is the September 18, 2001 Authorization for Use of Military Force (AUMF), which provides that

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<sup>30</sup> To take one obvious—but less significant—example, the Supreme Court in *Boumediene* expressly left intact the review process under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in scattered sections of 10, 28 and 42 U.S.C. (2006)), even though it had held it to be an inadequate substitute for habeas. The Court thereby suggested that appeals to the D.C. Circuit of decisions by Combatant Status Review Tribunals (CSRTs) might provide the first avenue of review for most detainees, *followed by habeas*. See *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (“[B]oth the DTA and the CSRT process remain intact. . . . Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant’s habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.”). Nevertheless, in *Bismillah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009), the D.C. Circuit held that *Boumediene* necessarily abnegated the DTA process on its face, because, in the court of appeals’ view, Congress would not have wanted the two processes to exist in parallel. *Id.* at 1072–74.

<sup>31</sup> At various points, the Bush administration argued that it had power to detain under both the Authorization for Use Military Force (AUMF) and the President’s inherent constitutional authority as commander-in-chief. The Obama administration has refused to defend that position and has instead rested its detention arguments entirely on the AUMF. See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009). See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Au-*

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>32</sup>

Whereas the AUMF does not speak specifically to detention authority, the Supreme Court in *Hamdi* recognized that “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here,”<sup>33</sup> (i.e., of “individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States’”).<sup>34</sup> Tellingly, though, Justice O’Connor sounded a note of caution against reading the AUMF too broadly. As she wrote:

[W]e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.<sup>35</sup>

Other than these statements, nothing in *Hamdi*, *Rasul*, *Hamdan*, or *Boumediene* speaks with any further clarity as to the sweep of the AUMF vis-à-vis detention.<sup>36</sup>

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*thorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (arguing that the AUMF provides authority for most of the counterterrorism initiatives that the Bush administration had pegged to the President’s Article II powers).

<sup>32</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note (2006)).

<sup>33</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

<sup>34</sup> *Id.* at 521.

<sup>35</sup> *Id.*

<sup>36</sup> The various opinions produced by the en banc Fourth Circuit in the *al-Marri* case devote substantial attention to the proper scope of the AUMF. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). In that case, though, the issue went to the scope of the AUMF as applied to a non-citizen lawfully present within the United States at the time of his initial arrest. Although it would follow *a fortiori* that the authority recognized in *al-Marri* would apply at Guantánamo, it does not necessarily follow that the constraints on the AUMF identified there would apply to non-citizens initially arrested and detained outside the territorial United States.

In *Gherebi v. Obama*, the D.C. District Court conducted an exhaustive analysis of *Hamdi*, the AUMF, and the laws of war, and concluded that

the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms “substantially supported” and “part of” are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.<sup>37</sup>

Thus, the relevant question was whether the detainee was “part of or substantially supported” the Taliban or al Qaeda, so long as *either* of those criteria necessarily established that the detainee was in fact a member of either organization’s armed forces when arrested. Without that latter qualification, *Gherebi* suggested that detention would be inconsistent with the laws of war, at least insofar as principles governing international armed conflict (IAC) might apply to the *non*-international armed conflict (NIAC) with al Qaeda.<sup>38</sup> Because *Hamdi* and *Hamdan* had both instructed that the AUMF should be read in concert with the laws of war (indeed, in *Hamdi*, that had been the basis for the plurality’s conclusion that the AUMF *authorized* detention),<sup>39</sup> *Gherebi* thereby effectively limited the scope of the AUMF to detention generally in conformity with law-of-war principles governing IAC.

Although some D.C. district judges reached divergent conclusions concerning the precise scope of the government’s detention

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<sup>37</sup> 609 F. Supp. 2d 43, 71 (D.D.C. 2009).

<sup>38</sup> To be sure, it is hardly settled that IAC detention principles necessarily apply in the context of NIAC. Indeed, a number of prominent international humanitarian law scholars argue that NIAC provides *no* detention authority whatsoever—that, in the case of NIAC, detention authority must come, if at all, from domestic law. See, e.g., Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 Y.B. INT’L HUMANITARIAN L. 232, 278 (2009); see also Azmy, *supra* note 17, at 501 n.290 (collecting sources). But see Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009) (arguing that detention that is legal during IAC should also be legal during NIAC). I do not mean to delve into this important and intricate debate here other than to note that, for better or worse, both the D.C. District Court and the Obama administration have generally proceeded on this assumption—that, where an individual can be detained under IAC rules, it should follow that he can be detained in a NIAC regime, as well.

<sup>39</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006); *Hamdi*, 542 U.S. at 519–21 (plurality opinion).



power,<sup>40</sup> Judge Walton's analysis in *Gherebi* provided a useful framework within which to situate the analysis, at least in the short term.<sup>41</sup> That changed with the D.C. Circuit's first merits decision in a post-*Boumediene* Guantánamo habeas case, *Al-Bihani v. Obama*.<sup>42</sup>

For this discussion, two of *Al-Bihani*'s holdings are key. *First*, writing for herself and Judge Kavanaugh, Judge Brown expressly rejected the notion that the laws of war had any bearing on the scope of the government's detention authority.<sup>43</sup> Offering the generally uncontroversial suggestion that "Congress had the power to authorize the President in the AUMF and other later statutes to exceed [the bounds of international law],"<sup>44</sup> Judge Brown did not address whether Congress in the AUMF had *in fact* expressly departed from international law. Instead, she simply asserted that,

while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.<sup>45</sup>

In other words, Judge Brown appeared to suggest that because the laws of war are not precise when it comes to delineating the scope of detention authority, Congress must not have intended to incorporate law-of-war principles, despite both (1) the canon of statutory interpretation pursuant to which statutes are presumed to be *consistent* with international law; and (2) the specific language of *Hamdi* reading the AUMF in exactly that manner.<sup>46</sup>

*Second*, without international law to inform the scope of the AUMF, Judge Brown turned to domestic law—and to *other* statutes that might bear on the scope of the government's detention power. In particular, the *Al-Bihani* panel seized on the Military Commissions

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<sup>40</sup> See, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 73–77 (D.D.C. 2009). See generally Robert M. Chesney, *Who May Be Held?: Military Detention Through the Habeas Lens*, 52 B.C.L. REV. 769 (2011).

<sup>41</sup> See, e.g., Chesney, *supra* note 40, at 831–36.

<sup>42</sup> 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>43</sup> *Id.* at 868–81.

<sup>44</sup> *Id.* at 871.

<sup>45</sup> *Id.* In her concurring opinion, Judge Brown elaborated upon her critique of the utility of international law. *Id.* at 882 (Brown, J., concurring).

<sup>46</sup> See *supra* notes 33–35 and accompanying text.

Act of 2006 (MCA),<sup>47</sup> and its definition of who may be tried before a military commission.<sup>48</sup> As Judge Brown explained,

Congress, in the 2006 MCA, provided guidance on the class of persons subject to detention under the AUMF by defining “unlawful enemy combatants” who can be tried by military commission. The 2006 MCA authorized the trial of an individual who “engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” . . . The provisions of the 2006 and 2009 MCAs are illuminating in this case because the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority. . . . [I]t is enough to recognize that any person subject to a military commission trial is also subject to detention, and that category of persons includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.<sup>49</sup>

The above-quoted passage is telling in three equally important—yet distinct—respects. *First*, it hardly follows that those who can lawfully be tried by a military commission are a proper subset of those who can be detained without trial. After all, under the laws of war, those held without charges and military commission defendants are two very different categories of detainees whose status presents two distinct sets of questions.

*Second*, even if the panel’s conclusion could follow in the abstract, the MCA’s legislative history is quite clear that Congress in no way intended to impact the substantive scope of the AUMF in defining who could be tried by a military commission. For example, the House Armed Services Committee Report that accompanied the 2006 MCA expressly noted that the divergence between the AUMF and MCA definitions reflected the committee’s *disagreement* that “the United States must be engaged in armed conflict to try an alien unlawful enemy combatant engaged in hostilities against the United States,”<sup>50</sup> even though *Hamdi* appeared to require an armed conflict

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<sup>47</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>48</sup> See 10 U.S.C. § 948a(7) (2006).

<sup>49</sup> *Al-Bihani*, 590 F.3d at 872 (citations omitted).

<sup>50</sup> H.R. REP. No. 109-664, pt. 1, at 6 (2006).

to justify detention *without* trial.<sup>51</sup> So construed, the difference between the MCA and the AUMF reflected Congress's choice to incorporate the different standards and rules applicable to military trials as contrasted with noncriminal detention under the laws of war. Thus, it is not only a logical fallacy to read the MCA as expanding the scope of the AUMF's detention authority; it also runs directly counter to the intent of those who wrote the latter statute.<sup>52</sup>

Even if that point was only implicit with respect to the 2006 MCA, Congress made the point *explicit* in the wholesale 2009 amendments to the MCA.<sup>53</sup> Thus, the Conference Report accompanying the 2009 MCA provides that the definition of who may be tried by a military commission

is included for the purpose of establishing persons subject to trial by military commission in accordance with section 948c, of title 10, United States Code, and is *not* intended to address the scope of the authority of the United States to detain individuals in accordance with the laws of war or for any other purpose.<sup>54</sup>

Given this language, it is incredibly difficult to understand how Judge Brown could conclude that the MCA informed (and perhaps even expanded) the scope of the AUMF's detention authority.<sup>55</sup> One possible justification might be that Judge Walton's definition in *Gherebi* incorporated the idea of detainees "substantially supporting" al Qaeda or the Taliban. Thus, the argument goes, there is not much daylight between a definition that relies upon "substantial" support and one that instead requires the detainee to have been "purposefully and materially supporting" those groups. But the point in *Gherebi* was to recognize substantial support as a basis for detention to the extent

<sup>51</sup> See *supra* notes 33–34 and accompanying text.

<sup>52</sup> See Steve Vladeck, *Judge Randolph Pulls Another Fast One—But Will Anyone Notice?*, PRAWFSBLAWG (Feb. 19, 2011, 4:03 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/02/judge-randolph-pulls-another-fast-one-but-will-anyone-notice.html>.

<sup>53</sup> Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.).

<sup>54</sup> H.R. REP. No. 111-288, at 862–63 (2009) (emphasis added).

<sup>55</sup> In the district court's decision in the *Boumediene* case, Judge Leon held that the AUMF authorized detention of an "individual who was part of *or* supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008) (emphasis added). But there is a world of difference between "supporting . . . hostilities," which both the *Boumediene* and *Gherebi* definitions encompassed, and "providing material support," a statutory term of art that sweeps far more broadly than acts of belligerency during an international or non-international armed conflict.

it was *consistent* with what the laws of war authorized in the context of IAC.<sup>56</sup>

In light of Judge Brown's rejection of the laws of war as a constraint on the AUMF, "purposeful and material support" would presumably have the sweeping meaning that material support has under U.S. domestic criminal law.<sup>57</sup> The necessary implication would be that anyone who could be prosecuted for violating the federal material support statute<sup>58</sup> for services provided to al Qaeda or the Taliban could also be detained indefinitely at Guantánamo, regardless of whether he or she might be subject to detention under the laws of war. As Judge Williams pointed out in his narrower opinion concurring in the judgment, not even the executive branch defended such a limitless proposition.<sup>59</sup>

*Third*, and just as importantly, although the MCA's standard applied to non-citizens who engaged in hostilities *or* provided material support, the *Al-Bihani* panel included in the former category the proposition that being "part of" al Qaeda or the Taliban was sufficient to render an individual subject to detention, *regardless* of whether that individual had actually engaged in any acts of belligerency against the United States.<sup>60</sup> In so holding, *Al-Bihani* rejected the "command-structure" test that had been adopted by a number of district judges in giving content to the term "part of,"<sup>61</sup> under which the question was "whether [the detainee] receives and executes orders or directions"<sup>62</sup> from—and not just whether he was "part of"—al Qaeda or the Taliban.<sup>63</sup> To be sure, in many (if not most) cases, these two standards will dovetail. But when they do not (i.e., when a detainee

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<sup>56</sup> See *supra* notes 37–38 and accompanying text.

<sup>57</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718–31 (2010) (upholding against constitutional challenge 18 U.S.C. § 2339B, which makes it a crime to provide various forms of "material support," including "training," "personnel," "services," and "expert advice or assistance" to designated foreign terrorist organizations).

<sup>58</sup> See, e.g., 18 U.S.C. § 2339B (2006); see also 10 U.S.C. § 950t(25) (2006 & Supp. III 2010) (defining "providing material support to terrorism" as a crime triable before a military commission).

<sup>59</sup> See *Al-Bihani v. Obama*, 590 F.3d 866, 883–86 (D.C. Cir. 2010) (Williams, J., concurring in the judgment), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>60</sup> See *id.* at 872 (majority opinion).

<sup>61</sup> E.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009).

<sup>62</sup> *Id.*

<sup>63</sup> See e.g., *Awad v. Obama*, 608 F.3d 1, 11–12 (D.C. Cir. 2010) (noting *Al-Bihani's* implicit repudiation of the "command structure" test), *cert. denied*, 131 S. Ct. 1814 (2011).

does not receive and execute orders or directions from al Qaeda or the Taliban), it is difficult to see how the detainee could properly be a belligerent under the laws of war.

In light of these holdings, a concerted effort was made to ask the entire D.C. Circuit to rehear *Al-Bihani* en banc. Formally, the court of appeals disagreed.<sup>64</sup> But in a curious statement co-authored by the court's seven active judges *other* than Judges Brown and Kavanaugh (the two active judges on the *Al-Bihani* panel), the judges explained that

we decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.<sup>65</sup>

In other words, even while declining to rehear the case en banc, the rest of the D.C. Circuit effectively converted *Al-Bihani*'s controversial international law holding into dicta, a result that drew relatively sharp objections from Judge Brown (largely on process grounds)<sup>66</sup> and Judge Kavanaugh (on substance).<sup>67</sup> Perhaps as a result, in April 2011, the Supreme Court denied certiorari.<sup>68</sup>

The (non-)en banc maneuvering in *Al-Bihani* therefore left open the question of whether international law should bear on the scope of the AUMF, a point to which the court of appeals has not yet returned.<sup>69</sup> One might also have assumed that the panel's MCA-based

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<sup>64</sup> *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (mem.)

<sup>65</sup> *Id.* at 1 (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, & Griffith, JJ., concurring in the denial of rehearing en banc).

<sup>66</sup> *Id.* at 1–9 (Brown, J., concurring in the denial of rehearing en banc).

<sup>67</sup> *Id.* at 9–56 (Kavanaugh, J., concurring in the denial of rehearing en banc). In addition to providing the strongest defense of the panel's conclusion that the AUMF should not be interpreted in a manner consistent with the laws of war, Judge Kavanaugh's concurrence also offered the unorthodox (and, to my knowledge, unprecedented) argument that "war-authorizing statute[s]" in general are uniquely poor candidates for the "*Charming Betsy* canon" and should *never* be interpreted "to . . . conform with non-self-executing treaties and customary international law." *Id.* at 38. Whatever else may be said about this theory (which may well merit a paper unto itself), it suffices for present purposes to note the inconsistency between such analysis and the plurality opinion in *Hamdi v. Rumsfeld*.

<sup>68</sup> *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011) (mem.).

<sup>69</sup> In one curious unreported decision, Judges Ginsburg, Garland, and Williams remanded a case to the district court based on the detainee's claim that, as a medic, his detention was barred by Article 24 of the First Geneva Convention. *Al-Warafi v. Obama*, 409 F. App'x 360, 360–61 (D.C. Cir. 2011) (per curiam); *see also* *Al-Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010). Presumably, the remand order necessari-

analysis of the scope of detention power was also vitiated by the (non-)en banc order, since the panel might not have looked to domestic law if international law provided useful criteria. Nevertheless, a different three-judge panel (Judges Henderson, Williams, and Randolph) reaffirmed the MCA-grounded reading of the AUMF in February 2011 in their remand order in *Hatim v. Gates*.<sup>70</sup> As that panel wrote:

[T]he district court ruled that the military could detain only individuals who were “part of” al-Qaida or the Taliban . . . . 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.<sup>71</sup>

In other words, to whatever extent the rest of the D.C. Circuit had mooted the international law discussion in *Al-Bihani*, *Hatim* suggests that it remains enough in a habeas case for the government to show that a detainee, though not “part of” al-Qaeda or the Taliban, “purposefully and materially supported” them.<sup>72</sup>

To be sure, there has not yet been a single case in which detention authority ultimately rested solely on support, rather than membership. But given both (1) the open questions surrounding “material support” as a basis for the exercise of military jurisdiction<sup>73</sup> and (2) the extent to which the scope of the AUMF has relevance far afield of Guantánamo detention cases,<sup>74</sup> this distinction matters—and quite a bit, at that.

And as for *Boumediene*, it is certainly true that nothing in Justice Kennedy’s opinion for the Court spoke at all to the appropriate scope of the government’s detention authority. Nor did anything in that

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ly accepts that Article 24 *might* bar the petitioner’s detention if he can make the relevant factual showings—or, at least, that the AUMF would not authorize detention inconsistent with Article 24. See First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 24, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

<sup>70</sup> 632 F.3d 720 (D.C. Cir. 2011) (per curiam).

<sup>71</sup> *Id.* at 721 (emphasis added).

<sup>72</sup> *Id.* See also *Al-Madhwani v. Obama*, 642 F.3d 1071, 1073–74 (D.C. Cir. 2011) (quoting the *Al-Bihani* standard with approval). But see *Al-Alwi v. Obama*, No. 09-5125, 2011 WL 2937134, at \*2 (D.C. Cir. July 22, 2011) (citing with approval the government’s proffered standard, pursuant to which it may only detain an individual who was “part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners” (emphasis omitted)).

<sup>73</sup> See, e.g., Vladeck, *supra* note 13.

<sup>74</sup> See, e.g., Chesney, *supra* note 40.

case (or any other) undermine Judge Brown's reading of the MCA; the flaw in her analysis on that point derives wholly from her misreading of congressional intent.<sup>75</sup> But to the extent that the Supreme Court in *Hamdi* and *Hamdan* commanded that the AUMF be interpreted in a manner that conforms with the international law governing traditional IAC,<sup>76</sup> the argument that the reasoning in *Al-Bihani* is subverting the Supreme Court is on somewhat firmer footing. After all, if principles of IAC should inform the scope of the government's detention authority in the NIAC with al Qaeda, any reading of the government's detention authority that would allow detention based purely on support (or on membership without being part of the "command structure"), and without any showing of belligerency or direct participation in hostilities, may well contravene those principles.<sup>77</sup> Inasmuch as the seven-judge statement in *Al-Bihani* all but eliminated the holding that was directly irreconcilable with the Supreme Court's jurisprudence in that regard, then, the "purposeful and material support" standard adopted in *Al-Bihani* and reaffirmed in *Hatim* could quite easily authorize detention that is inconsistent with what the laws of war have traditionally contemplated—and, as such, what the Court's precedents (*Hamdi*, in particular) appear to allow.

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<sup>75</sup> See *supra* text accompanying notes 54–56.

<sup>76</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (describing the President's detention authority under the AUMF as "based on longstanding law-of-war principles"); *id.* at 548 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("[T]he military and its Commander in Chief are authorized to deal with enemy belligerents according to . . . the laws of war."); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006) (noting that the AUMF, among other statutes governing military commissions, must be interpreted by reference to the laws of war). It bears emphasizing that, in *Hamdi*, the conclusion that the laws of war informed the scope of the AUMF were crucial to the plurality's holding that the AUMF authorized *Hamdi*'s detention; without such a reading, the AUMF might not have satisfied the Non-Detention Act. *Hamdi*, 542 U.S. at 547–48 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); 18 U.S.C. § 4001(a) (2006). Thus, it is particularly ironic to conclude that *Hamdi* does *not* require reading the AUMF in light of international law principles, given that, *without* those principles, *Hamdi*'s detention may well have been barred.

<sup>77</sup> As my friend and colleague Bobby Chesney has pointed out, another possible detention model that could incorporate material support as a basis for detention is the security internment model provided by the Fourth Geneva Convention. Chesney, *supra* note 40. If that regime could apply in the context of a non-international armed conflict, then there very well might be authority to detain individuals based purely on non-belligerent acts of support to parties to the NIAC. The flip side, of course, is that such a detention regime would be necessarily limited by necessity and would require periodic review—and, in any event, is not what the U.S. government has ever pursued under the AUMF.

## II. EVIDENTIARY BURDENS AND PRESUMPTIONS

As noted above, although the current D.C. Circuit case law governing the scope of the government's detention power is troubling, the "material support" analysis has not yet had a meaningful impact on any individual cases.<sup>78</sup> In marked contrast is the D.C. Circuit's jurisprudence concerning the government's burden of proof in post-*Boumediene* habeas cases, and how that burden should affect district court assessments of the facts of individual detainees' claims. And once again, the fountainhead decision was *Al-Bihani*. There, the court (as it did with respect to the government's detention authority) reached two conclusions relevant here. First, the panel agreed with the government that "preponderance of the evidence" is the appropriate burden of proof.<sup>79</sup> Second, the panel also agreed that hearsay evidence should generally be admissible in these cases.<sup>80</sup>

Before turning to *Al-Bihani*'s analysis, it is worth pausing for a moment to reflect on how the issue was framed in light of *Boumediene*. As Judge Brown wrote for the *Al-Bihani* panel:

Habeas review for Guantanamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions. *Boumediene*'s holding explicitly stated that habeas procedures for detainees "need not resemble a criminal trial." It instead invited "innovation" of habeas procedure by lower courts, granting leeway for "[c]ertain accommodations [to] be made to reduce the burden habeas corpus proceedings will place on the military." *Boumediene*'s holding therefore places *Al-Bihani*'s procedural argument on shaky ground. The Suspension Clause protects only the fundamental character of habeas proceedings, and any argument equating that fundamental character with all the accoutrements of habeas for domestic criminal defendants is highly suspect.<sup>81</sup>

In the passage from which Judge Brown was quoting, though, *Boumediene* was referring to the procedural protections that attach to criminal trials *themselves*, and not to "habeas challenges to criminal convictions."<sup>82</sup> Nor is this a semantic distinction; it is hardly a controversial proposition that contemporary criminal defendants are en-

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<sup>78</sup> See *supra* text accompanying notes 72–73.

<sup>79</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 877–78 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>80</sup> *Id.* at 879.

<sup>81</sup> *Id.* at 876 (alterations in original) (citations omitted).

<sup>82</sup> See *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).



titled to far greater procedural protections in their trial and direct appeal than in any collateral challenges they mount thereto. Nevertheless, *Al-Bihani* conflated the procedural protections afforded in civilian criminal trials with those available in criminal (post-conviction) habeas, suggesting that, because *Boumediene* held that Guantánamo habeas petitions need not have the protections attendant to criminal trials, they also need not have the (far lesser) protections attendant to post-conviction habeas petitions.<sup>83</sup>

If anything, a closer read of *Boumediene* suggests that the opposite should be true—that the Guantánamo detainees should receive *more* process than those who seek to use habeas collaterally to attack state-court convictions since their detention does *not* result from convictions obtained in a court of record, in which “considerable deference is owed to the court that ordered confinement.”<sup>84</sup> Indeed, this idea is more than just a passing thought within the Court’s opinion in *Boumediene*. As Justice Kennedy underscored in explaining why the review provided by the Detainee Treatment Act was inadequate,

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures.<sup>85</sup> In this context the need for habeas corpus is more urgent.

From the start, then, *Al-Bihani* approached the issue of procedural protections from a flawed perspective, badly misreading *Boumediene* to suggest that Guantánamo detainees should receive *less* process, not more, than those seeking to attack convictions collaterally in civilian courts. Given Justice Kennedy’s repeated allusions in *Boumediene* to the distinct considerations governing judicial review of executive detention and collateral review of state and federal convictions,<sup>86</sup> it is

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<sup>83</sup> See Steve Vladeck, *Judge Brown’s Sleight-of-Hand in Al-Bihani—and Why It Matters*, PRAWFSBLAWG (May 14, 2010, 10:07 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/05/judge-browns-sleightofhand-in-albihaniand-why-it-matters.html>.

<sup>84</sup> *Boumediene*, 553 U.S. at 782.

<sup>85</sup> *Id.* at 783. In this respect, *Boumediene* has much in common with Justice Frankfurter’s important discussion of the different goals of collateral review in *Burns v. Wilson*, 346 U.S. 844, 845–52 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

<sup>86</sup> *Boumediene*, 553 U.S. at 783–87.

difficult to understand how this point could so easily have been missed.

Nonetheless, and in light of these observations, the *Al-Bihani* panel went on to conclude that “preponderance of the evidence” is the appropriate burden of proof in Guantánamo habeas cases, emphasizing that it was not deciding that the Constitution *required* such a standard,<sup>87</sup> but only that it seemed consistent with *Hamdi*—and was not unconstitutional—to so hold.<sup>88</sup> In addition, the panel concluded 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>89</sup>

As to both the burden of proof and the admissibility *vel non* of hearsay, much of *Al-Bihani*’s reasoning seems at least superficially compatible with *Hamdi* and *Boumediene*, on both of which the court of appeals (at least here) heavily relied.<sup>90</sup> Indeed, other than Judge Brown’s hint that the Constitution might not require a “preponderance” standard, it would not be until later cases that the D.C. Circuit would adopt views of these holdings that strained their jurisprudential foundations and further manifested the error in Judge Brown’s threshold framing of the procedural protections to which the detainees should be entitled.<sup>91</sup>

In particular, four merits decisions from the summer of 2010 stand out.<sup>92</sup> In a trio of decisions handed down in June, three different panels affirmed district court denials of habeas relief, reaffirming that (1) preponderance is the governing burden of proof; (2) hearsay is admissible; and (3) in determining the sufficiency of the evidence, the district court should not “weigh each piece of evidence in isola-

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<sup>87</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>88</sup> *Id.* at 878 & n.4.

<sup>89</sup> *Id.* at 879; *see also Khan v. Obama*, No. 10-5306, 2011 WL 3890843, at \*6–7 (D.C. Cir. Sept. 6, 2011) (articulating the approach to be followed in assessing the reliability of hearsay statements).

<sup>90</sup> *Al-Bihani*, 590 F.3d at 879–80.

<sup>91</sup> *Id.* at 878.

<sup>92</sup> *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (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).

tion, but consider all of the evidence taken as a whole.”<sup>93</sup> Given *Al-Bihani*’s legal conclusions, and that review of factual findings was only for clear error, these results may have seemed particularly unremarkable at the time and can probably be seen as the D.C. Circuit generally coalescing around a series of rules that neither the district court nor the executive branch contested. Instead, the real shift in approach came in the next decision on the merits, handed down by Judge Randolph in July 2010 in *Al-Adahi v. Obama*.<sup>94</sup> Writing for himself and Judges Henderson and Kavanaugh, Judge Randolph for the first time reversed a district court’s *grant* of habeas relief in a post-*Boumediene* detainee case.<sup>95</sup>

At the outset, Judge Randolph devoted several pages to harsh criticism of both the district court and the government for not taking up the hints that the D.C. Circuit had dropped in *Al-Bihani*—and, to a lesser degree, in the June trilogy—that preponderance need not be the governing burden of proof.<sup>96</sup> Suggesting that “we are aware of no precedents in which eighteenth century English courts adopted a preponderance standard,”<sup>97</sup> Judge Randolph went on to highlight other contexts in which detention is based on a showing *less* than preponderance, including detention pending deportation, challenges to selective service decisions, challenges to convictions by court-martial, and challenges to arrest prior to trial.<sup>98</sup> Yet, because the government maintained that preponderance was “appropriate”:

We are thus left with no adversary presentation on an important question affecting many pending cases in this court and in the district court. Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case. As we did in *Al-Bihani*, we will assume *arguendo* that the government must show by a preponderance of the evidence that Al-Adahi was part of al-Qaida.<sup>99</sup>

Notwithstanding the examples marshaled by Judge Randolph (none of which, it should be noted, remotely resemble the potentially indefinite detention without trial at issue in the Guantánamo cases),

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<sup>93</sup> *Awad*, 608 F.3d at 6–7, 10; *see also Al Odah*, 611 F.3d at 13–15; *Barhoumi*, 609 F.3d at 422–24.

<sup>94</sup> *Al-Adahi*, 613 F.3d 1102.

<sup>95</sup> *Id.* at 1111.

<sup>96</sup> *Id.* at 1104.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1105.

the *Al-Adahi* panel's frustration with the preponderance standard is, in many ways, frustration not with *Boumediene*, but with *Hamdi*.<sup>100</sup> After all, if *Hamdi* was clear about anything, it was that "some evidence," which the Fourth Circuit had held was a sufficient quantum of proof,<sup>101</sup> was a woefully inadequate basis on which to detain a U.S. citizen without charges. As Justice O'Connor wrote for the plurality,

Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.<sup>102</sup>

There is, of course, an obvious distinction between *Hamdi* and the Guantánamo cases, (i.e., the citizenship of the detainee). This distinction might help to explain Judge Silberman's cryptic suggestion in *Almerfedi* that *Hamdi's* articulation of the preponderance standard was "to be sure considering due process limitations,"<sup>103</sup> implying that such a standard might not be required in the absence of such limitations. But even if *Hamdi* does not settle that the Constitution requires at least a preponderance standard in all cases of noncriminal military detention, it at least offers compelling reasons why the lesser

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<sup>100</sup> *Al-Adahi*, 613 F.3d at 1104–05.

<sup>101</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003) ("Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an 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).

<sup>102</sup> *Hamdi*, 542 U.S. at 537 (plurality opinion) (citations omitted). Although Justice O'Connor was writing for a plurality, Justices Souter and Ginsburg concurred in this part of the Court's opinion notwithstanding their disagreement over whether the AUMF actually *did* authorize Hamdi's detention. *Id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>103</sup> *Almerfedi v. Obama*, No. 10-5291, 2011 WL 2277607, at \*4 (D.C. Cir. June 10, 2011).

standard of “some evidence” would be inadequate, whether or not the detainee is protected by the Fifth Amendment’s Due Process Clause.<sup>104</sup> And yet, in its discussion of the appropriate burden of proof, *Al-Adahi* nowhere discusses, cites, or even alludes to *Hamdi*.

Reluctantly accepting preponderance as the burden of proof, *Al-Adahi* then turned to the sufficiency of the evidence, beginning by chastising the district court for its “failure to appreciate conditional probability analysis”<sup>105</sup>—that “although some events are independent (coin flips, for example), other events are dependent.”<sup>106</sup> In short, the *Al-Adahi* panel castigated the district court for being far too skeptical of the government’s claims in these cases and for drawing far too many inferences in favor of the detainee’s view of the facts.<sup>107</sup> As with many of the Guantánamo cases, it is difficult to adequately review the court’s factual analysis, since some of the key evidence is classified.<sup>108</sup> But *Al-Adahi* made explicit what the June trilogy had hinted at: from the D.C. Circuit’s perspective, the government’s evidence should be looked at as an aggregated whole, regardless of the unreliability of individual aspects thereof, and whether or not preponderance or “some evidence” was formally the “appropriate” standard to apply.<sup>109</sup>

Thus, most of the merits cases since *Al-Adahi* have focused on whether the district court took *Al-Adahi*’s admonitions to heart. In *Salahi v. Obama*, for example, Judge Tatel, writing for himself, Chief Judge Sentelle, and Judge Brown, vacated a grant of habeas relief and remanded for further evidence, directly invoking *Al-Adahi*’s criticisms of the district court’s approach to the facts.<sup>110</sup> As Judge Tatel explained:

Merely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence “may be tossed aside and the next [piece of evidence]

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<sup>104</sup> See *Hamdi*, 316 F.3d 450. In that vein, consider that the Department of Defense established CSRTs at Guantánamo on July 7, 2004, just nine days after the Supreme Court decided *Hamdi*, and long before any court had suggested that non-citizens detained at Guantánamo might have the same constitutional rights as *Hamdi*. But see *Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) (holding that the Guantánamo detainees are *not* protected by the Due Process Clause), *vacated*, 130 S. Ct. 1235 (2010) (per curiam).

<sup>105</sup> *Al-Adahi*, 613 F.3d at 1105.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 1111; *Barhoumi v. Obama*, 609 F.3d 416, 428 (D.C. Cir. 2010).

<sup>109</sup> *Al-Adahi*, 613 F.3d at 1111.

<sup>110</sup> 625 F.3d 745 (D.C. Cir. 2010).

may be evaluated as if the first did not exist.” The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof.<sup>111</sup>

This “mosaic” theory, as it has increasingly come to be known, may well be a problematic application of the preponderance standard.<sup>112</sup> What cannot be gainsaid is that, with Judge Tatel’s tempered—but important—endorsement in *Salahi*, it appears to have the backing of the entire D.C. Circuit.<sup>113</sup>

One good example of this trend is the *Hatim* case already noted above.<sup>114</sup> But taking things one step further, Judge Kavanaugh, writing for himself and Judges Garland and Griffith, reversed a grant of habeas relief in *Uthman v. Obama* and remanded with instructions to deny the petition,<sup>115</sup> concluding that the evidence was clearly sufficient—even though there were strong reasons to question whether the district court had adequately represented the countervailing evidence supporting the detainee’s claim.<sup>116</sup>

Perhaps the most telling reflection on *Al-Adahi*, though came in *Esmail v. Obama*, decided on April 8, 2011.<sup>117</sup> The per curiam opinion for a panel comprised of Judges Tatel, Brown, and Silberman simply applied *Al-Adahi* and the June trilogy to explain why the facts did not counsel in favor of relief.<sup>118</sup> What stands out, however, is the concurrence filed by Judge Silberman, in which he suggested that, in contrast to the occasional need in criminal cases to release defendants

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<sup>111</sup> *Id.* at 753 (quoting *Al-Adahi*, 613 F.3d at 1105).

<sup>112</sup> The problem with the “mosaic” theory is simple to describe, but hard to prove. If there are reasons why individual pieces of evidence are insufficient to satisfy a “preponderance” standard, including a lack of reliability, those reasons do not dissipate merely because there is additional evidence that suffers from comparable reliability concerns. Thus, whereas the whole may often be greater than the sum of its parts, it may just as easily represent the aggregation of unreliable evidence, which is no more reliable taken as a whole than the individual items were taken individually. And given that reliability determinations are invariably based on classified information in these cases, the public record is a poor starting point for assessment of the D.C. Circuit’s work in this field.

<sup>113</sup> *Salahi*, 625 F.3d at 746.

<sup>114</sup> See *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011) (per curiam).

<sup>115</sup> 637 F.3d 400 (D.C. Cir. 2011).

<sup>116</sup> See, e.g., Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality*, PROPUBLICA (Oct. 8, 2010, 8:34 AM), <http://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality> (contrasting the original opinion released by the district court in *Uthman* with an opinion released after the original was withdrawn and demonstrating the marked differences in the presentation of the facts).

<sup>117</sup> 639 F.3d 1075 (D.C. Cir. 2011) (per curiam).

<sup>118</sup> *Id.* at 1076–77.

2011]

D.C. CIRCUIT AFTER BOUMEDIENE

1473

the judge knows to be guilty, “candor obliges me to admit that one cannot 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.”<sup>119</sup> As he continued:

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 evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even “some evidence.”<sup>120</sup>

Judge Silberman’s statement is remarkable on several levels. First, one might fairly read it as suggesting that he—and at least some of his colleagues—are in fact reviewing the government’s case only for “some evidence,” rather than the “more evidence than not” requirement of the preponderance standard.<sup>121</sup> Although the review conducted by the judges in *Al-Adahi* and its progeny may already have implied as much, it seems something else altogether for a judge to give voice to such a reality. And, as noted above, the Supreme Court itself has provided strong reasons to doubt the sufficiency of “some evidence” in this context, whether a higher burden is constitutionally required or not.<sup>122</sup>

More fundamentally, though, Judge Silberman’s concurrence (which goes on to describe the post-*Boumediene* litigation as a “charade prompted by the Supreme Court’s defiant—if only theoretical—assertion of judicial supremacy”<sup>123</sup> in *Boumediene*) reveals deep-seated opposition both to *Boumediene* itself and to the litigation it spawned.<sup>124</sup>

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<sup>119</sup> *Id.* at 1077 (Silberman, J., concurring).

<sup>120</sup> *Id.* (emphasis added) (citations omitted).

<sup>121</sup> *Id.* at 1078.

<sup>122</sup> See *supra* note 102 and accompanying text.

<sup>123</sup> *Esmail*, 639 F.3d at 1078 (Silberman, J., concurring).

<sup>124</sup> For a variation on that theme, consider Judge Brown’s concurrence in *Al-Bihani*, in which she asked rhetorically “whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation.” *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring), *cert. denied*, 131 S. Ct. 1814 (2011).

Perhaps more so than any single analytical tension between the D.C. Circuit and the Supreme Court, such a frank concession gives the most substance to the charge that some of the D.C. Circuit's judges are subverting or otherwise vitiating the effect of the Supreme Court's 2008 decision. After all, once the *Boumediene* Court held that the Suspension Clause "has full effect" at Guantánamo, the remainder of its opinion was devoted to explaining why the CSRT process was procedurally inadequate as a substitute for habeas corpus.<sup>125</sup> It may be a bit of a stretch to compare the scope of post-*Boumediene* habeas to the review that the D.C. Circuit was empowered to conduct under the DTA, but whether or not the comparison is apt, the point remains that the D.C. Circuit's post-*Boumediene* jurisprudence yields a landscape in which petitioners have limited prospects for success on the merits. And if Judge Silberman is correct, only in cases in which there is virtually no evidence against the detainee, or at least no remotely credible evidence, would the D.C. Circuit's jurisprudence clearly provide that the petitioner is likely to prevail.<sup>126</sup> Presumably, the government would not even defend such cases—or, at the very least, would not appeal an adverse decision by the district court (as it has not with regard to twenty-nine of the thirty-eight detainees for whom the district court granted habeas relief).<sup>127</sup>

To be clear, this is not an indictment of the D.C. Circuit writ large. As noted above, the only judges who have openly criticized the preponderance standard in this manner are Judges Randolph and Silberman.<sup>128</sup> Other than citing *Al-Bihani*'s reservation of whether the Constitution *requires* preponderance as a minimum burden of proof, the rest of the D.C. Circuit has—with the government's encourage-

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<sup>125</sup> *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

<sup>126</sup> Thus, in *Almerfed v. Obama*, Judge Silberman reversed a grant of habeas relief at least in part based on his conclusion that the district court committed "clear error" in concluding that another Guantánamo detainee's statements were unreliable "jail-house gossip." No. 10-5291, 2011 WL 2277607, at \*5 (D.C. Cir. June 10, 2011).

<sup>127</sup> The twenty-nine grants came in nine decisions. See *Abdah (Odaini) v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010); *Al Rabiah v. United States*, 658 F. Supp. 2d 11 (D.D.C. 2009); *Al Halmandy v. Obama*, No. 05-2385 (D.D.C. July 30, 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009); *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009); *Gharani v Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (ordering release of five detainees); *In re Guantanamo Detainee Litig.*, 581 F.3d 33 (D.D.C. 2008) (ordering release of seventeen detainees). The government also dropped its appeals of two habeas grants while the appeals were pending. See *Mohammed v. Obama*, No. 05-5224 (D.C. Cir. Jan. 11, 2011) (mem.); *Basardh v. Gates*, No. 09-5200 (D.C. Cir. Dec. 14, 2010) (mem.).

<sup>128</sup> See *supra* notes 95–101, 118–21 and accompanying text.



ment—applied the preponderance standard without comment, and has effectively endorsed Judge Randolph’s “mosaic” approach articulated in *Al-Adahi*.<sup>129</sup>

As for Judges Randolph and Silberman’s position, it also bears noting that the Justices may well be acquiescing. Thus, the Supreme Court denied certiorari in *Al-Adahi*,<sup>130</sup> *Al-Bihani*,<sup>131</sup> *Al Odah*,<sup>132</sup> and *Awad*,<sup>133</sup> and each time without a registered dissent or a comment (other than to note Justice Kagan’s recusals in *Al-Adahi* and *Al-Bihani*). Indeed, because Justice Kagan was *not* recused in *Al Odah* and *Awad*, those denials cannot be explained simply as an attempt to avoid the four-four split on the merits that may otherwise have resulted.<sup>134</sup> Instead, these cases either suggest that there are not five Justices who disagree with the outcomes, or that the Court is suffering from a form of what Linda Greenhouse described as “Gitmo fatigue.”<sup>135</sup> Either way, the effect, at least with respect to the procedural and evidentiary issues discussed above, is to give the D.C. Circuit the last—rather skeptical—word. Certainly, the denials of certiorari hardly pass for proof of the Supreme Court’s *approval* of Judges Randolph and Silberman’s approach in this field. But given that no other court is in a position to disagree with the D.C. Circuit on these issues,<sup>136</sup> these denials are at least a tacit acquiescence in the status

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<sup>129</sup> See *supra* note 112 and accompanying text.

<sup>130</sup> *Al-Adahi v. Obama*, 131 S. Ct. 1001 (2011) (mem.).

<sup>131</sup> *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011) (mem.).

<sup>132</sup> *Al Odah v. United States*, 131 S. Ct. 1812 (2011) (mem.).

<sup>133</sup> *Awad v. Obama*, 131 S. Ct. 1814 (2011) (mem.).

<sup>134</sup> Steve Vladeck, *On Counting to Five (Without Justice Kagan) in the Guantanamo Cases*, PRAWFSBLAWG (Jan. 12, 2011, 6:22 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/01/on-counting-to-five-without-justice-kagan-in-the-guantanamo-cases.html>.

<sup>135</sup> Linda Greenhouse, *Gitmo Fatigue at the Supreme Court*, N.Y. TIMES OPINIONATOR (Apr. 6, 2011, 8:45 PM), <http://opinionator.blogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court>.

<sup>136</sup> Curiously, in *Al-Bihani*, Judge Brown invoked the exclusivity of the D.C. courts’ jurisdiction as a *shortcoming* of the post-*Boumediene* process, since there would not be “a significant number of cases brought before a large set of courts.” *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring), *cert. denied*, 131 S. Ct. 1814 (2011). Nevertheless, I think it is safe to conclude that her point was less that there *should* be additional courts with the power to hear these cases than that the whole post-*Boumediene* project is unwise.

quo,<sup>137</sup> until and unless, as in *Al-Bihani*, the rest of the D.C. Circuit is motivated to respond.

### III. REMEDIES

Perhaps the greatest public outcry concerning the D.C. Circuit's post-*Boumediene* jurisprudence, though, has come in the context of remedies for those detainees who have been cleared (whether by the executive branch or a federal court) for release.<sup>138</sup> Indeed, in *Boumediene* itself, one of the signal defects in the CSRT process that led Justice Kennedy to conclude that it was an inadequate substitute for habeas corpus was the inability of the CSRT or the D.C. Circuit on appeal to effectuate a prevailing detainee's release.<sup>139</sup> If critics of the D.C. Circuit's jurisprudence in this area are any guide, however, habeas might not be any more effective.

At the heart of the D.C. Circuit's jurisprudence concerning remedies for those detainees cleared for release are two cases, both of which involved Uighurs—ethnically Turkic Chinese Muslims—detained at Guantánamo who could not be returned to China.<sup>140</sup> In the D.C. Circuit's only merits decision in a CSRT appeal, Judge Garland, writing eight days after *Boumediene* (and joined by Chief Judge Sentelle and Judge Griffith), held that the government no longer had the authority to detain the Uighurs, and ordered their release “without prejudice to [their] right to seek release immediately through a writ of habeas corpus in the district court, pursuant to the Supreme Court's decision in *Boumediene*.”<sup>141</sup>

Following that suggestion, the Uighurs sought habeas relief.<sup>142</sup> The question that was thus raised in *Kiyemba I* was whether the detainees had a right to be released into the United States if there was no other country to which they could be sent.<sup>143</sup> Although the district court initially answered that question in the affirmative,<sup>144</sup> the D.C.

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<sup>137</sup> See Lyle Denniston, *D.C. Circuit in Control on Detainees*, SCOTUSBLOG (Apr. 4, 2011, 9:36 AM), <http://www.scotusblog.com/2011/04/dc-circuit-in-control-on-detainees>.

<sup>138</sup> See *supra* note 127 and accompanying text.

<sup>139</sup> *Boumediene v. Bush*, 553 U.S. 723, 787–88 (2008).

<sup>140</sup> See *infra* note 143 and accompanying text.

<sup>141</sup> *Parhat v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008).

<sup>142</sup> *Id.* at 858.

<sup>143</sup> 555 F.3d 1022, 1026 (D.C. Cir. 2009).

<sup>144</sup> *In re Guantanamo Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008), *rev'd sub nom. Kiyemba I*, 555 F.3d 1022, *vacated*, 130 S. Ct. 1235 (2010) (per curiam).

Circuit, in a harshly-worded opinion by Judge Randolph (joined by Judge Henderson, and with a partial concurrence by Judge Rogers), reversed.<sup>145</sup>

Specifically, Judge Randolph's analysis hinged on two distinct but related conclusions. First, the federal courts in general lack the power to order the political branches to admit non-citizens into the territorial United States.<sup>146</sup> And second, to whatever extent the Due Process Clause of the Fifth Amendment might otherwise bar the potentially indefinite detention that could result, it did not apply to non-citizens detained at Guantánamo, and therefore provided no basis for a right to release into the United States.<sup>147</sup>

I have written elsewhere in some detail about Judge Randolph's analysis, especially his rather crabbed understanding of the remedial powers of the habeas court.<sup>148</sup> What is telling for present purposes about *Kiyemba I* is not the court's debatable reliance on the Supreme Court's 1950s-era immigration jurisprudence,<sup>149</sup> but rather its due process analysis. In particular, Judge Randolph explained that "[d]ecisions of the Supreme Court and of this court—decisions the district court did not acknowledge—hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."<sup>150</sup> What is striking about this passage is that, even as the opinion criticized the district court for failing to take heed of certain precedents, Judge Randolph himself failed to pay any attention to *Boumediene*, which, though not about the Due Process Clause, may well recalibrate the Court's approach to whether *all* individual constitutional rights apply extraterritorially, including whether the Guantánamo detainees are entitled to due process protections.<sup>151</sup> Thus, *Kiyemba I* reached its due process hold-

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<sup>145</sup> *Kiyemba I*, 555 F.3d 1022.

<sup>146</sup> *Id.* at 1027–29.

<sup>147</sup> *Id.* at 1026–27.

<sup>148</sup> See Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 971–72 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010)).

<sup>149</sup> *Kiyemba I*, 555 F.3d at 1027–28 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)).

<sup>150</sup> *Id.* at 1026.

<sup>151</sup> See e.g., Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009).

ing by effectively ignoring *Boumediene*, and by relying on prior decisions each of which *Boumediene* may have called into question.<sup>152</sup>

The Supreme Court granted certiorari in *Kiyemba I* and vacated and remanded in light of a suggestion by the Obama administration that the detainees *had* received a resettlement offer, which might thereby moot the controversy.<sup>153</sup> On remand, the D.C. Circuit, in a per curiam opinion that was almost certainly written by Judge Randolph, effectively reinstated its original opinion, concluding that “[t]he posture of the case now is not materially different than it was when the case was first before us.”<sup>154</sup> The second time around, the Supreme Court—with Justice Kagan recused—denied certiorari.<sup>155</sup> Writing for himself and Justices Kennedy, Ginsburg, and Sotomayor, Justice Breyer concurred in the denial of certiorari, explaining that “[u]nder present circumstances, I see no Government-imposed obstacle to petitioners’ timely release and appropriate resettlement.”<sup>156</sup> The necessary assumption undergirding this statement is that a bona fide resettlement offer to *any* third-party country, or at least one in which the detainee does not fear abuse, is the only “release” that *Boumediene* requires. Even if that is true, that leaves open the question of the appropriate remedy in a case “where no other remedy is available.”<sup>157</sup>

In contrast to the unique nature of the issue in *Kiyemba I*, the D.C. Circuit’s decision in *Kiyemba v. Obama (Kiyemba II)*<sup>158</sup> is far more significant in its sweep, especially in light of subsequent developments. There, the question before the court was whether the federal courts have the power to require notice and a hearing before the government seeks to transfer a detainee to a third-party country.<sup>159</sup> In effect, the detainees claimed that they should have an opportunity to contest such a transfer on the ground that they might be mistreated or simply subjected to proxy detention on behalf of the U.S. govern-

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<sup>152</sup> See *Kiyemba I*, 555 F.3d at 1027–28 (citing *Mezei*, 345 U.S. 206; *Knauff*, 338 U.S. 537).

<sup>153</sup> *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

<sup>154</sup> *Kiyemba v. Obama (Kiyemba III)*, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

<sup>155</sup> *Kiyemba*, 131 S. Ct. at 1631 (Breyer, J., respecting the denial of certiorari).

<sup>156</sup> *Kiyemba v. Obama*, 130 S. Ct. 1235 (per curiam).

<sup>157</sup> *Kiyemba*, 131 S. Ct. at 1631 (Breyer, J., respecting the denial of certiorari) (noting that this question had been the basis for the original grant of certiorari in *Kiyemba I*).

<sup>158</sup> 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

<sup>159</sup> *Id.* at 511.

ment once they are transferred to that third-party country.<sup>160</sup> Joined by Judge Kavanaugh, Judge Ginsburg rejected that view, reading the Supreme Court's 2008 decision in *Munaf v. Geren*<sup>161</sup> as standing for the proposition that, so long as the government avers that it does not transfer to torture, there is nothing for a federal habeas court to review on the merits, and, as such, no need for notice or a hearing prior to the detainee's removal.<sup>162</sup> As he explained:

The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood.<sup>163</sup>

Judge Kavanaugh concurred separately,<sup>164</sup> largely in response to Judge Griffith's dissent—which argued both that the Suspension Clause unquestionably protected a detainee's ability to object to his transfer or removal to another country in appropriate cases, and that the majority's conclusion to the contrary was based on several fundamental misreadings of *Munaf*, which raised far more specific facts.<sup>165</sup> As I have suggested in some detail elsewhere, there is much to commend Judge Griffith's analysis on both points.<sup>166</sup> In particular,

Unlike in *Munaf*, where the detainees [who were being held in Iraq] specifically sought to block their transfer to Iraqi custody on the merits, the petitioners in *Kiyemba II* sought an injunction only requiring notice and a hearing prior to their transfer to any country, to allow them to litigate the merits. Nevertheless, the D.C.

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<sup>160</sup> *Id.*

<sup>161</sup> 553 U.S. 674 (2008).

<sup>162</sup> Tellingly, Judge Ginsburg specifically declined to rest on *Kiyemba I*'s holding that the detainees lack due process rights, even though that would have bolstered his analysis. Instead, the *Kiyemba II* panel concluded that

[e]ven assuming that the Guantanamo detainees, like the U.S. citizens in *Munaf*, possess constitutionally based due process rights with respect to transfers and that the *Mathews/Hamdi* balancing test applies, *Munaf* and other precedents preclude judicial second-guessing of the Executive's considered judgment that a transfer is unlikely to result in torture.

*Kiyemba II*, 561 F.3d at 518 n.4.

<sup>163</sup> *Id.* at 516.

<sup>164</sup> *Id.* at 516–22 (Kavanaugh, J., concurring).

<sup>165</sup> *Id.* at 522–26 (Griffith, J., concurring in the judgment in part and dissenting in part).

<sup>166</sup> Vladeck, *supra* note 148, at 973–76.

Circuit majority concluded that “[u]nder *Munaf* . . . the district court may not question the Government’s determination that a potential recipient country is not likely to torture a detainee.” And although Judge Ginsburg’s opinion appeared to rest on the merits, rather than on the district court’s jurisdiction, that distinction effectively collapses in the face of the government’s blanket assertion that it does not ever transfer or otherwise repatriate detainees to countries in which they are “more likely than not” to be tortured.<sup>167</sup>

In effect, then, *Kiyemba II* turns the Supreme Court’s extradition-centric analysis in *Munaf* into a categorical bar on review of *any* transfer claim, including cases in which the detainee will face no criminal charges in the receiving country. And even *Munaf* reserved the possibility of judicial review in a case where the detainee could prove that the government’s assertions about conditions in the receiving country were incorrect.<sup>168</sup> Thus, it is not that *Kiyemba II* is inconsistent with, or a subversion of, the Supreme Court’s jurisprudence in any of the terrorism cases. If anything, *Kiyemba II* is a wholly unwarranted (and constitutionally problematic) *expansion* of the Court’s jurisprudence—*Munaf*, in particular.<sup>169</sup>

To that end, although the Supreme Court denied certiorari in *Kiyemba II*,<sup>170</sup> detainees have continued to attempt to challenge its reasoning within the D.C. Circuit. In *Mohammed v. Obama*, for example, an Algerian detainee claimed that *Kiyemba II* should not apply in his case because he feared mistreatment at the hands of a non-state actor, a possibility not covered by the State Department’s general averments with respect to the country conditions in Algeria.<sup>171</sup> Judges Griffith and Kavanaugh rejected that distinction, even though Judge Tatel, in dissent, thought it to be potentially dispositive.<sup>172</sup> And Jus-

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<sup>167</sup> *Id.* at 974 (second alteration in original) (footnotes omitted).

<sup>168</sup> *Munaf v. Geren*, 553 U.S. 674, 703 & n.6 (2008); *see also id.* at 706–07 (Souter, J., concurring) (noting the limits of the Court’s holding and the eight distinct factual conditions on which it rests).

<sup>169</sup> For an important counterexample, consider the Third Circuit’s decision in *Khouzam v. Attorney General*, which held that it violated due process to deny to a non-citizen facing removal a meaningful opportunity to contest diplomatic assurances that he would not face torture if deported. 549 F.3d 235, 259 (3d Cir. 2008).

<sup>170</sup> *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010) (mem.).

<sup>171</sup> *Mohammed v. Obama*, No. 10-5218, 2010 U.S. App. LEXIS 16023 (D.C. Cir. July 8, 2010) (mem.).

<sup>172</sup> *Id.* at \*6 (Tatel, J., concurring in part and dissenting in part) (“[W]hile I agree with my colleagues that *Kiyemba II* compels us to reverse the district court with respect to Mohammed’s allegations of torture by the Algerian government and the court’s intention to interrogate Ambassador Fried, I would remand to allow the gov-

tice Ginsburg, joined by Justices Breyer and Sotomayor, dissented from the Court's denial of a stay in Mohammed's case, suggesting that she "would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*."<sup>173</sup> Nevertheless, Mohammed was involuntarily repatriated to Algeria.<sup>174</sup>

And in *Abdah v. Obama*, the petitioner sought to have his case heard en banc as an initial matter, in an attempt to have the entire D.C. Circuit reconsider *Kiyemba II*.<sup>175</sup> That maneuver failed, though, as the D.C. Circuit voted six-three not to hear the case en banc, with Judge Griffith, joined by Judges Rogers and Tatel, dissenting.<sup>176</sup> For the time being, then, it seems as if *Kiyemba II*—and its troubling misreading of *Munaf*—will remain settled precedent,<sup>177</sup> so much so that citations thereto can now be found in ordinary immigration and extradition cases.<sup>178</sup>

The real damage wrought by *Kiyemba II*, though, is best understood in light of a subsequent decision by the same three judges: *Omar v. McHugh*.<sup>179</sup> *Omar* (in which the detainee was one of the petitioners in *Munaf*) raised the constitutional question that *Munaf* and *Kiyemba II* had both left open: whether the Suspension Clause protected a detainee's right to claim that his transfer from the United States to foreign custody violated the U.N. Convention Against Torture, and, as such, the federal statute implementing that treaty, the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).<sup>180</sup> Although the is-

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ernment an opportunity to submit supplemental declarations as to whether, in deciding it was safe to send Mohammed to Algeria, it considered potential threats posed by non-governmental entities.").

<sup>173</sup> Mohammed v. Obama, 131 S. Ct. 32 (2010) (Ginsburg, J., dissenting from the denial of stay) (citation omitted).

<sup>174</sup> Mohammed v. Obama, 131 S. Ct. 2091 (2011).

<sup>175</sup> Abdah v. Obama, 630 F.3d 1047 (D.C. Cir. 2011) (mem.).

<sup>176</sup> *Id.* at 1054 (Griffith, J., dissenting from the denial of initial en banc hearing) ("The question we face today is whether Guantanamo detainees are entitled to notice of a transfer beyond the reach of the writ. If it seems odd that detainees in the War on Terror should enjoy such a right, they do so only because *Boumediene* extended habeas corpus to Guantanamo. We are bound to accept the consequences of that decision.").

<sup>177</sup> See, e.g., Khadr v. Obama, 131 S. Ct. 2900 (2011) (denying certiorari, over two dissents, in another case seeking to overturn *Kiyemba II*).

<sup>178</sup> See, e.g., Trinidad y Garcia v. Benov, 395 F. App'x 329 (9th Cir. 2010); *In re Extradition of Zhenly Ye Gon*, 613 F. Supp. 2d 92 (D.D.C. 2009).

<sup>179</sup> 646 F.3d 13 (D.C. Cir. 2011).

<sup>180</sup> Pub. L. No. 105-277, div. G, 112 Stat. 2681, 2681-761. FARRA implements Article 3 of the U.N. Convention Against Torture, under which "[n]o State Party shall

sue had been raised in both *Munaf* and *Kiyemba II*, neither the Supreme Court nor the *Kiyemba II* panel had reached it. In *Omar*, then, the D.C. Circuit finally had to consider whether the REAL ID Act of 2005, which takes away habeas jurisdiction over FARRA claims,<sup>181</sup> might violate the Suspension Clause in light of *Boumediene*.

Writing for himself and Judge Ginsburg, Judge Kavanaugh answered that question in the negative. Although his argument proceeded on a number of fronts, its core reduced to one of three propositions: either (1) FARRA was never meant to apply outside the context of immigration removal proceedings, and so there was no “right” to invoke in a habeas petition;<sup>182</sup> (2) FARRA *did* confer such a right, but the REAL ID Act of 2005 repealed it;<sup>183</sup> or (3) FARRA *did* confer such a right, but the REAL ID Act validly withdrew federal habeas jurisdiction even as it left the statutory right intact.<sup>184</sup>

As Judge Griffith explained in his concurrence,<sup>185</sup> none of those analytical strands is convincing. Virtually every circuit court to consider the question had held, prior to the REAL ID Act, that FARRA *could* be invoked in habeas petitions, at least partly in light of the Sus-

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expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

<sup>181</sup> Specifically, the REAL ID Act created 8 U.S.C. § 1252(a)(4), which provides that:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

8 U.S.C. § 1252(a)(4) (2006).

<sup>182</sup> *Omar*, 646 F.3d at 17–18.

<sup>183</sup> *Id.* at 22–23.

<sup>184</sup> *Id.* at 24.

<sup>185</sup> Although Judge Griffith sharply disagreed with the majority’s jurisdictional analysis, he concurred in the judgment based on the belief that Omar lost on the merits because FARRA does not confer a substantive right upon individuals who were already detained by the United States *in* the country the transfer to which they sought to enjoin. *See id.* at 29 (Griffith, J., concurring in the judgment); *see also* *Munaf v. Geren*, 553 U.S. 674, 703 n.6 (2008) (suggesting this argument). Whatever the merits of this view, it should be clear that it would affect a vanishingly small class of cases.



pension Clause concerns that might otherwise arise.<sup>186</sup> Moreover, there is no support whatsoever in the REAL ID Act's text or legislative history for the proposition that Congress meant to repeal the substantive right that FARRA had conferred.<sup>187</sup>

But *Omar's* true violence to precedent is the third holding—that the Suspension Clause does not prevent Congress from taking away habeas jurisdiction over statutory rights since Congress never had to create such a right in the first place (and could at any time repeal it). As Judge Kavanaugh put it, “Congress could constitutionally achieve the same result simply by declaring that the transfer policy itself applies only to immigration transferees. The Constitution does not turn on such arcane and empty semantics.”<sup>188</sup> The view that the Suspension Clause does not protect statutory rights is belied by the historical record and is flatly inconsistent with *Boumediene* and its progeny—in which the bulk of the detainees' claims were that their detention was inconsistent with the AUMF.<sup>189</sup> As Judge Griffith concluded,

Congress can always repeal statutory rights or create new authority for detention, thereby limiting the range of habeas claims that federal prisoners may bring. But that is not what Congress has done here. It has not repealed section 2242(a), the ground for Omar's claim, but has instead sought to limit his ability to bring his claim in federal court. The majority counters that there is no real difference between expressly repealing a right and accomplishing the same end by stripping habeas jurisdiction. I disagree. A core premise of the Suspension Clause is that the form of legislative action can make a great deal of difference in terms of political accountability: repealing a right tends to focus the public's attention in a way that the lawyerly maneuver of jurisdiction

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<sup>186</sup> See *Omar*, 646 F.3d at 25–26 (Griffith, J., concurring in the judgment). See generally Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004) (explaining why the Suspension Clause affected the courts' analysis of FARRA).

<sup>187</sup> See H.R. REP. NO. 109-72, at 176 (2005) (Conf. Rep.); see also Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 137 n.17 (2006–2007) (“The Conference Report describes this provision as granting, rather than barring, a remedy.”).

<sup>188</sup> *Omar*, 646 F.3d at 22; see also *id.* (“Because Omar has no constitutional right at stake here . . . Congress has no obligation to provide judicial review for the extra-constitutional responsibilities the FARR Act imposes on the Executive Branch.”).

<sup>189</sup> Indeed, Justice Kennedy in *Boumediene* specifically avoided holding that the detainees had any constitutional rights. See Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2111–12, 2112 nn.30–32 (2009).

stripping does not. In fact, the Suspension Clause was inspired by Parliament's use of jurisdiction stripping to prevent American prisoners from asserting their statutory and common law rights, and Alexander Hamilton thought that the Suspension Clause's limits on jurisdiction stripping so enhanced the democratic check on wrongful detentions that it rendered a bill of rights unnecessary. The Constitution vests in Congress the power to deprive prisoners of judicially enforceable rights, but "requires that it be made to say so unmistakably" by either suspending the writ or repealing the right "so that the people will understand and the political check can operate."<sup>190</sup>

The majority's response was to suggest that the Suspension Clause distinguished between challenges to the "positive legal authority" for the detention and statutory rights against detention.<sup>191</sup> But again, as Judge Griffith pointed out, such a distinction is unpersuasive on its face,<sup>192</sup> and is in any event inconsistent with a host of Supreme Court decisions treating the two classes of challenges identically for Suspension Clause purposes, including *Boumediene* and *INS v. St. Cyr*.<sup>193</sup> Thus, to the extent that *Omar* turned on this constitutional holding, it seems utterly inconsistent with the Supreme Court's guidance in the field.

Practically, the upshot of these cases is fairly straightforward. Release from custody for Guantánamo detainees will basically be a matter of executive discretion in two directions: discretion under *Kiyemba I* to offer resettlement to only one or a small handful of countries to detainees who cannot be returned to their homes, and discretion under *Kiyemba II* to involuntarily repatriate those who can. These developments prompted the *New York Times* in March to view these cases as standing for the proposition that "[t]he appellate court has all but nullified that view of judicial power and responsibility backed by Justice Kennedy and the court majority" in *Boumediene*.<sup>194</sup>

In my view, the *Times*' assertion is a bit of an overstatement as applied to *Kiyemba I* and *Kiyemba II*, but not to the subsequent decision in *Omar*. Yes, *Kiyemba I*'s cursory due process analysis is blatantly

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<sup>190</sup> *Omar*, 646 F.3d at 29 (Griffith, J., concurring in the judgment) (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1399 (1953)) (citations omitted).

<sup>191</sup> *Id.* at 24 (majority opinion).

<sup>192</sup> *Id.* at 28 (Griffith, J., concurring in the judgment) ("[T]he difference seems to me no more than 'empty semantics.'").

<sup>193</sup> *Id.* at 28–29 (citing *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001)).

<sup>194</sup> *A Right Without a Remedy*, *supra* note 3.

inconsistent with *Boumediene*. But, it may still be the case that, properly understood, the Guantánamo detainees' due process rights do (and would) not include a right to be released into the United States. Instead, the true shortcoming in *Kiyemba I* is a failure of imagination—the categorical unwillingness of Judge Randolph to consider other permissible means by which federal courts might use their powers to effectuate a detainee's immediate release, including the route embraced by the Second Circuit in *Padilla v. Rumsfeld* (i.e., an order demanding that the detainee be released or indicted on criminal charges within thirty days).<sup>195</sup> The flaw in *Kiyemba I*, then, is not in subverting the letter of *Boumediene* or other Supreme Court decisions, but the spirit thereof.<sup>196</sup>

And the case for *Kiyemba II* as a subversion of the Court is even trickier. Yes, the D.C. Circuit erroneously extended *Munaf* into a context in which it was never meant to apply.<sup>197</sup> This is an egregious—and, as noted above, deeply problematic—error. But the only way in which *Kiyemba II* flies in the face of Supreme Court precedent is in the extent to which the panel refused to take seriously *Boumediene's* endorsement of analyzing the substantive scope of the Suspension Clause in light of what was true in English practice at the time of the Founding (the focus of Judge Griffith's dissents from both the panel opinion and the decision not to hear *Abdah* en banc). Nothing in *Boumediene* itself directly implies that *Kiyemba II* is wrong; only a proper understanding of English history does.<sup>198</sup> Thus, unlike in *Al-Bihani*, where the D.C. Circuit ultimately voted seven-two to limit the scope of the original panel's holding, the attempt to accomplish the same result vis-à-vis *Kiyemba II* failed six-three in *Abdah*.<sup>199</sup>

But the same cannot be said for *Omar*. Although I elsewhere devote far more detail to the decision, its background, and its implications,<sup>200</sup> the relevant point for present purposes is that unlike *Kiyemba II*, *Omar* does actively undermine *Boumediene* by holding that Congress has the power to deprive federal courts of habeas jurisdiction over certain types of statutory claims even as it leaves those rights intact. It

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<sup>195</sup> *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004).

<sup>196</sup> See Vladeck, *supra* note 148, at 971–72.

<sup>197</sup> See *supra* note 162–63 and accompanying text.

<sup>198</sup> See Vladeck, *supra* note 148, at 973–75.

<sup>199</sup> See *supra* notes 167–16868 and accompanying text.

<sup>200</sup> Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. (forthcoming 2011).

may be ironic that the most violence that the D.C. Circuit has done to *Boumediene* has been in a non-Guantánamo case, but that may only increase—rather than mitigate—the reach of *Omar*'s misreading.

Finally, I would be remiss if I did not also mention two additional categories of “remedies” cases—those in which former Guantánamo detainees have sought damages arising out of allegedly abusive treatment while at Guantánamo and those in which former detainees have sought to conclusively establish the legality of their detention (or lack thereof) after they have been released.

With regard to damages claims, initially, the D.C. Circuit affirmed the district court's dismissal of such suits in light of its then-extant holding that the Guantánamo detainees have no constitutional rights whatsoever,<sup>201</sup> and therefore no rights that could give rise to a viable damages claim.<sup>202</sup> Shortly after *Boumediene*, though, the Supreme Court granted certiorari, vacated that decision, and remanded with instructions to reconsider in light of *Boumediene*.<sup>203</sup>

On remand, a D.C. Circuit panel consisting of Judges Henderson, Brown, and Randolph once again held that the detainees could not state a viable claim, concluding that “the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”<sup>204</sup> Thus, the court rested on the alternative holdings that (1) the defendant officers were all entitled to qualified immunity,<sup>205</sup> or (2) “special factors” counseled against inferring a *Bivens* cause of action.<sup>206</sup> As I have explained elsewhere,<sup>207</sup> this second holding is part of a problematic larger pattern, endorsed (at least implicitly) by the Supreme Court, in which lower courts have taken an unjustifiably narrow view of the availability of *Bivens* remedies in national security cases, even where other issues, such as qualified immunity or the state

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<sup>201</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008).

<sup>202</sup> *Rasul v. Myers (Rasul I)*, 512 F.3d 644 (D.C. Cir.), *vacated*, 129 S. Ct. 763 (2008).

<sup>203</sup> *Rasul*, 129 S. Ct. at 763.

<sup>204</sup> *Rasul v. Myers (Rasul II)*, 563 F.3d 527, 529 (D.C. Cir.) (per curiam), *cert. denied*, 130 S. Ct. 1013 (2009).

<sup>205</sup> *Id.* at 530 (“No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights.”).

<sup>206</sup> *Id.* at 532 n.5.

<sup>207</sup> See Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010) (criticizing the reliance on amorphous national security considerations in decisions like *Rasul* to justify *not* inferring a *Bivens* remedy).

secrets privilege, would likely stand in the way of relief.<sup>208</sup> In light of that pattern, it hardly seems surprising that, this time around, the Supreme Court denied certiorari.<sup>209</sup> To similar effect, the D.C. Circuit in *Ali v. Rumsfeld* affirmed the district court's dismissal of a series of damages suits brought by individuals detained by the United States in either Iraq or Afghanistan who claimed that they, too, were mistreated while in custody.<sup>210</sup> Although the panel (Chief Judge Sentelle and Judges Henderson and Edwards) divided on the plaintiffs' claims under the Alien Tort Statute,<sup>211</sup> the judges unanimously agreed that the plaintiffs' *Bivens* and declaratory relief claims were barred by either of the two holdings in *Rasul II*.<sup>212</sup>

The unlikelihood of damages relief for former detainees provides a helpful segue to the final category of "remedies" cases—those in which individuals seek to obtain final adjudication of their habeas petition even after they have been released, if for no other reason than because of the potential collateral consequences that might otherwise result from their detention. In *Gul v. Obama*, however, Judge Ginsburg (writing for himself and Judges Tatel and Brown) concluded that the detainees' release had in fact mooted their claims, at least largely because the collateral consequences the detainees sought to mitigate were either too speculative or unlikely to be redressed by a favorable decision on the merits.<sup>213</sup> The combined effect of *Rasul II* and *Gul* is certainly frustrating, since it means that those detainees who are released without a court order to that effect will almost never be able to obtain adjudication of whether their detention had ever been lawful. As Judge Ginsburg explained, though, the Supreme Court has consistently narrowed the scope of the collateral conse-

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<sup>208</sup> For perhaps the most distressing example of this trend, see *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).

<sup>209</sup> Indeed, I think it is safe to conclude that the entire purpose of footnote five in *Rasul II* was to insulate the court's qualified immunity discussion from Supreme Court review. Given the court's suggestion that "Plaintiffs' *Bivens* claims are therefore foreclosed on this alternative basis, which is also unaffected by the Supreme Court's *Boumediene* decision," 563 F.3d at 532 n.5, there would have been little reason for the Justices to second-guess the panel's first holding.

<sup>210</sup> No. 07-5178, 2011 WL 2462851 (D.C. Cir. June 21, 2011).

<sup>211</sup> Compare *id.* at \*7-9, with *id.* at \*10-26 (Edwards, J., dissenting).

<sup>212</sup> *Id.* at \*5-7 (majority opinion); *id.* at \*10 (Edwards, J., dissenting) ("I do not disagree with the court's judgment dismissing appellants' *Bivens* claims and their claims for declaratory relief.").

<sup>213</sup> No. 10-51117, 2011 WL 2937166, at \*8 (D.C. Cir. July 22, 2011).

quences doctrine in recent years<sup>214</sup>—including in cases where the consequences were far more concrete and immediate.

And so, yet again, it is difficult to see in the result in *Rasul II*, *Ali*, or *Gul* any outright defiance of the Supreme Court.<sup>215</sup> True, the D.C. Circuit in the damages cases again seemed unwilling to take seriously *Boumediene*'s effect on the proper analysis as to whether individual constitutional protections apply to non-citizens outside the territorial United States. But it is hardly inconsistent with *Boumediene* or other Supreme Court decisions to (1) conclude that the defendant officers are entitled to qualified immunity in an area where the law was not well-settled, or (2) decline to recognize a *Bivens* remedy in a context in which one has not previously been recognized. And nothing in *Boumediene* says anything about a detainee's right to obtain adjudication of his detention after he is released.

#### IV. CONCLUSION

Most of the commentary regarding the D.C. Circuit-subverting-*Boumediene* meme has focused on the transfer and release cases, and for good reason. Digging down to the nuts and bolts of those cases that turn on the facts is a time-consuming—and, given the amount of classified information in some of the opinions, often futile—task. Nevertheless, if the above analysis suggests any one conclusion in particular, it is that, other than *Omar*, cases like *Al-Bihani* and *Al-Adahi* reflect a far greater degree of hostility to the Supreme Court's jurisprudence in this field than cases like *Kiyemba I*, *Kiyemba II*, and *Rasul*. Reasonable minds will surely disagree about whether the court of appeals is reaching the "right" results in the latter cases, but if there are flaws in the specific holdings, my own view is that comparable shortcomings can also be found in much of the non-Guantánamo, non-D.C. Circuit case law as well. In contrast, on 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. Between them, *Hamdi* and *Boumediene*

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<sup>214</sup> *Id.* at \*2–4.

<sup>215</sup> To be sure, the court in *Gul* "assum[ed] without deciding" that the collateral consequences doctrine *applies* to the Guantánamo detainees. *See id.* at \*3. A case can certainly be made that the collateral consequences doctrine is compelled by the Suspension Clause itself (and not just the federal habeas statute), and, as such, that its application follows from *Boumediene*. But refusing to expressly so hold can hardly be criticized as subverting *Boumediene*.

do not just require *some* judicial review of the government's evidence; rather, they compel a "meaningful" opportunity on the detainee's part to challenge the factual and legal basis for his detention. If every inference is being drawn against the detainee, or if the use of the "mosaic" theory is having the effect of watering down the burden of proof, it is difficult to conclude how such review satisfies that command.

More generally, though, perhaps the larger point to take away is how the more troubling analyses vis-à-vis *Hamdi* and *Boumediene* invariably originate with some combination of the same four jurists. Sometimes, they have been joined by others; sometimes, they have concurred separately. But the decisions that have raised the sharpest tensions with the Supreme Court's jurisprudence have tended to come in cases in which the panel included two members of this quartet. In marked contrast, the rest of the D.C. Circuit has tended toward more moderate holdings, embracing the growing consensus in both the district court and the executive branch as to (1) the relevance of the laws of war vis-à-vis the scope of detention authority; (2) the extent to which the AUMF should *not* be interpreted by reference to the MCA; (3) the appropriateness of preponderance as the relevant burden of proof; and (4) the requirement that detainees who have been cleared for release be afforded at least *some* remedy, even if that remedy is suboptimal. That is not to commend the work of the rest of the D.C. Circuit as such, but merely to suggest that, where those cases have reached what some see as incorrect outcomes, there is nowhere near the same degree of tension between the work of the court of appeals and the guidance provided by the Supreme Court.

Moreover, even as the number of Guantánamo detention cases inexorably winds down, it is hardly obvious that the D.C. Circuit will be done with the Guantánamo detainees anytime soon. After all, under the 2006 MCA, as amended in 2009, the D.C. Circuit hears appeals as of right from decisions by the intermediate Court of Military Commission Review,<sup>216</sup> which has finally handed down its first decisions on the merits in post-conviction appeals under the MCA.<sup>217</sup> Given the Obama administration's decision to proceed with military commission trials for the 9/11 defendants, it seems inevitable that comparable issues will return to the D.C. Circuit before long, whether or not additional post-*Boumediene* detention cases raise them. In light

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<sup>216</sup> 10 U.S.C. § 950g (2006 & Supp. III 2010).

<sup>217</sup> See *United States v. Al-Bahlul*, No. 09-001 (Ct. Mil. Comm'n Rev. Sept. 9, 2011); *United States v. Hamdan*, No. 09-002 (Ct. Mil. Comm'n Rev. June 24, 2011).

of the cases surveyed above, it is entirely reasonable to suspect that Judges Brown, Kavanaugh, Randolph, and Silberman will show comparable skepticism toward the claims advanced by the defendants in those cases, whether or not such skepticism is warranted. The question then will be whether, as was true in *Al-Bihani*, their colleagues will see the need to intervene.