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## Note

### **Meeting *Boumediene's* Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation**

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In October 2001, a Kuwaiti aviation engineer named Fouad Al Rabiah traveled to Afghanistan to investigate the country's refugee and medical infrastructure problems during the U.S. and United Kingdom bombardment.<sup>1</sup> Unable to cross Afghanistan's border with Iran, which had been sealed, Al Rabiah embarked on the lengthy overland journey through central Afghanistan to exit the country via Pakistan.<sup>2</sup> Meanwhile, in mid-November, Osama bin Laden marshaled his forces around Jalalabad, and moved into the Tora Bora Mountains to make a final stand against U.S. troops before the onset of winter.<sup>3</sup> Just days after the ensuing battle, villagers on the outskirts of Jalalabad captured Al Rabiah and turned him over to U.S. forces, which eventually transferred him to the military prison at Guantánamo Bay.<sup>4</sup> Interrogators abused Al Rabiah, and coerced him into making a series of false confessions.<sup>5</sup> He did so in hopes of winning release to his wife and four children in Kuwait.<sup>6</sup>

In September 2009, a federal judge in Washington, D.C. found this narrative more congruent with the evidence than the U.S. government's version, and granted Al Rabiah's petition for a writ of habeas corpus—a judicial determination that the Pres-

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1. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 20–21 (D.D.C. 2009).
2. *Id.* at 21.
3. *Id.* at 41.
4. *Id.* at 28–34.
5. *Id.*
6. *See id.* at 32.

ident has no legal basis to detain him.<sup>7</sup> Al Rabiah is one of thirty-eight detainees to have won their habeas cases since the Supreme Court held in June 2008 that Guantánamo Bay detainees can challenge their detention in federal court.<sup>8</sup> Although *Boumediene* opened the federal courthouse doors to Guantánamo detainees, it offered scant guidance as to how courts should adjudicate such cases.<sup>9</sup> Since that time, federal judges have decided some fifty-three of more than one hundred pending habeas petitions.<sup>10</sup> With minimal guidance from the Supreme Court and Congress, the federal courts in the District of Columbia have functioned, in effect, as a national security court, evaluating sensitive evidence and developing their own guidelines as to what constitutes lawful detention.

*Boumediene* has been the subject of fierce and wide-ranging criticism.<sup>11</sup> While many, perhaps most, legal commentators praise *Boumediene* as a victory for individual rights,<sup>12</sup> critics argue that the habeas process it approved raises grave

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7. *Id.* at 42.

8. *Boumediene v. Bush (Boumediene I)*, 553 U.S. 723, 732 (2008); *see also* *Guantanamo Bay Habeas Decision Scorecard*, CENTER CONST. RIGHTS, <http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard> (last visited Oct. 19, 2010) [hereinafter *Habeas Scorecard*] (listing decided Guantánamo cases); Andy Worthington, *Guantánamo Habeas Results: The Definitive List*, ANDY WORTHINGTON, <http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list> (last visited Oct. 19, 2010) [hereinafter *Habeas Results*] (same).

9. *See Boumediene I*, 553 U.S. at 780, 783–84, 786–87; *see also id.* at 801 (Roberts, C.J., dissenting) (arguing that the decision in *Boumediene* “merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date”).

10. *See supra* note 8.

11. *E.g.*, GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 130 (2009) (highlighting the increased expenditure of government resources *Boumediene* required); Editorial, *President Kennedy*, WALL ST. J., June 13, 2008, at A14 (predicting the extension of *Boumediene* to confer other constitutional rights on alleged terrorists); John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23 (“[J]udicial micromanagement will now intrude into the conduct of war.”). Principal among *Boumediene*’s critics were the four dissenting members of the Court. *E.g.*, *Boumediene I*, 553 U.S. at 801 (Roberts, C.J., dissenting); *id.* at 828 (Scalia, J., dissenting) (“[The Court’s decision] will almost certainly cause more Americans to be killed.”).

12. *See, e.g.*, David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay, 2007–2008* CATO SUP. CT. REV. 47, 47, 50–52; Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18, 20.

concerns about the maintenance of U.S. national security.<sup>13</sup> Others worry that the paucity of clear standards may disadvantage detainees.<sup>14</sup> In the wake of *Boumediene*, some legislators, judges, and academics have called on Congress to revisit Guantánamo detention policy, and pass legislation to provide uniform guidance to the courts.<sup>15</sup> After more than two years of lower-court wrangling with the implications of *Boumediene*, these criticisms need not be assessed in the abstract: this Note comprehensively reviews the habeas cases decided since *Boumediene* with a view to answering these questions and assessing the wisdom of further detention legislation.

The story is complex. In the first eighteen months of litigation, murky Supreme Court precedent gave rise to significant differences in the standards employed among district court judges adjudicating habeas cases. This state of affairs was bad for detainees because, in at least some cases, they were subject to different standards in different courtrooms. It was bad for the executive branch because the divergences had resulted, in part, from judges adopting less deferential stances on both substantive and procedural issues. It was bad for our justice system because it offended the bedrock principle of “uniform general treatment of similarly situated persons” that is “the essence of law itself.”<sup>16</sup> These early months of litigation suggested a dramatic, if commonsensical, solution: that the political

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13. See, e.g., SULMASY, *supra* note 11, at 133; Yoo, *supra* note 11; Jack Goldsmith, Long-Term Terrorist Detention and Our National Security Court 7–8 (Feb. 4, 2009), available at [http://www.brookings.edu/~media/Files/rc/papers/2009/0209\\_detention\\_goldsmith/0209\\_detention\\_goldsmith.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf). See generally Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1087–89, 1097–98 (2008) (detailing differences in procedural standards between criminal and military detention systems).

14. See Chisun Lee, Op-Ed., *Their Own Private Guantanamo*, N.Y. TIMES, July 23, 2009, at A31.

15. *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring); Transcript of Hearing at 5–6, *Anam v. Obama*, 696 F.Supp. 2d 1, (D.D.C. 2010) (No. 04-1194), cited in BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 6 (Brookings Inst. 2010) [hereinafter *HABEAS LAWMAKING*]; Benjamin Wittes & Jack Goldsmith, Editorial, *A Role Judges Should Not Have to Play*, WASH. POST, Dec. 22, 2009, at A19; Benjamin Wittes & Jack Goldsmith, Editorial, *Will Obama Follow Bush or FDR?*, WASH. POST, June 29, 2009, at A17 [hereinafter Wittes & Goldsmith, *Will Obama Follow Bush or FDR?*]; Josh Gerstein, *Lindsey Graham Quietly Files Habeas Bill*, POLITICO (Aug. 12, 2010, 7:58 AM), <http://www.politico.com/news/stories/0810/40968.html>.

16. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

branches pass new detention legislation designed to resolve the most serious of these problems and to ensure that every detainee is held to the same standard.

But the pragmatic case for new detention legislation will no longer write. The D.C. Circuit has stepped in to answer many of the lingering questions that plagued the early months of habeas litigation. Unequal application of the law is now significantly less likely. Moreover, the D.C. Circuit's opinions almost uniformly favor the government, and thus undermine the key motivation for Congress to pass new detention legislation—namely, the maintenance of national security. Still, detainees are the biggest beneficiaries of the habeas litigation: so far judges have sided with thirty-eight of fifty-three of them, a remarkable seventy-one percent success rate for detainees.<sup>17</sup> In short, more than two years after the Supreme Court handed the reins of executive detention to federal judges in Washington, D.C., it is increasingly clear that the habeas process appropriately balances U.S. national security and detainee liberty concerns. Through a critical examination of how the jurisprudence has unfolded, this Note tells the story of how and why habeas works. It concludes that new detention legislation would be unnecessary and counterproductive; rather, the most prudent approach is to allow the D.C. Circuit to continue to resolve disagreements among lower court judges as they arise.

Part I reviews the legislation and precedent leading up to the current process of habeas review. Part II analyzes the district court and D.C. Circuit opinions, paying particular attention to uniformity (or lack thereof) among district court judges and to their approaches to balancing national security and liberty concerns. While the early state of the law benefitted neither the government nor detainees as a whole, the jurisprudence has matured remarkably quickly. Most foundational disagreements among judges have now been resolved, and have been resolved in a manner that should allay congressional concerns about national security. Part III argues that while new detention legislation would have made sense during the first eighteen months of habeas litigation, the maturation of the jurisprudence has rendered this option unnecessary at best and

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17. *Habeas Results*, *supra* note 8; *see also Habeas Scorecard*, *supra* note 8. The success rate is somewhat lower if one controls for the seventeen Uigher detainees, whose cases were technically decided under the provision of the Detainee Treatment Act of 2005 that *Boumediene* struck down as constitutionally insufficient. *See Habeas Results*, *supra* note 8.

counterproductive at worst. Habeas works. Congress should stand back and allow the courts to proceed.

### I. THE ROAD TO HABEAS AND THE SCOPE OF EXECUTIVE DETENTION

The military prison at Guantánamo Bay has held approximately 779 alleged terrorists since the United States attacked Afghanistan in response to the attacks of September 11, 2001.<sup>18</sup> In the dragnet that followed 9/11, United States and allied forces captured scores of suspected terrorists—on the battlefield in Afghanistan and as far away as Bosnia, Morocco, and Chicago.<sup>19</sup> Viewing the very extension of judicial process to alleged terrorists as a national security threat, Bush Administration lawyers selected the military base at Guantánamo because, they thought, it was beyond the reach of the law.<sup>20</sup>

Publicly contending that Guantánamo housed the “worst of the worst,”<sup>21</sup> the Bush Administration’s initial position was that it could detain indefinitely without charge anyone it deemed an “enemy combatant” and subject him to trial by military commission.<sup>22</sup> In making this determination, Bush relied

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18. *Habeas Results*, *supra* note 8.

19. *Al Qaeda Arrests Worldwide*, FOXNEWS.COM, Nov. 22, 2002, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,64199,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,64199,00.html); *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 725–26 (2009) (arguing that the term “enemy combatant” encompasses a wide range of people).

20. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 142–43 (2006) (discussing the selection of Guantánamo to house alleged terrorists); *see also* U.S. DEP’T OF DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* 5 (2005), *available at* <http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf> (stating that the United States will be challenged “by those who employ a strategy of the weak using international fora, judicial processes, and terrorism”); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 706, 709–10 (2008) (describing administration attempts to limit or preclude judicial review of executive detention decisions). For an account of the views animating this policy, *see* JACK GOLDSMITH, *THE TERROR PRESIDENCY* 53–64 (2009).

21. Katharine Q. Seelye, *Threats and Responses: The Detainees*, N.Y. TIMES, Oct. 23, 2002, at A14, *available at* 2002 WL 4103459; *see also* JANE MAYER, *THE DARK SIDE* 183 (2008) (describing the difficulties of identifying and interviewing Guantánamo detainees).

22. Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004) (ordering that detainees be tried by military tribunal); *see also* Cole, *supra* note 19, at 726 (detailing the Administration’s expansive power at Guantánamo).

on his Article II powers as Commander in Chief<sup>23</sup> and the September 18, 2001, Authorization of the Use of Military Force (AUMF), which endorsed the President's use of "all necessary and appropriate force against the nations, organizations, or persons he determines planned, authorized, committed, or aided" the 9/11 attacks.<sup>24</sup> While all three branches weighed in on whether the detainees would have access to the courts, the Supreme Court had the final word in *Boumediene v. Bush*.<sup>25</sup> This Part situates the district court litigation in this context by examining the Court's limited approval of executive detention, the ensuing responses of the political branches, and the Court's decision in *Boumediene*.

#### A. THE PRESIDENT, CONGRESS, AND THE COURT ON EXECUTIVE DETENTION

The Supreme Court first tested the Bush Administration's expansive claims of detention authority in *Hamdi v. Rumsfeld*.<sup>26</sup> Captured on the battlefield in Afghanistan, Yaser Hamdi spent three years imprisoned as an "enemy combatant" before the Court heard his habeas corpus petition, which argued that there was no legal authority for his continued detention.<sup>27</sup> Five members of the Court disagreed.<sup>28</sup> The plurality interpreted the AUMF's blanket authorization of "necessary and appropriate force" to "clearly and unmistakably" authorize detention of "enemy combatants" in certain circumstances.<sup>29</sup> Adopting "for

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23. Brief for Respondents at 22, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); Brief for Petitioner at 27, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027). See generally Barron & Lederman, *supra* note 20, at 706, 709–10 (describing the Administration's reliance on Article II).

24. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (conferring such authorization "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons").

25. 553 U.S. 723, 798 (2008).

26. 542 U.S. 507, 509 (2004) (plurality opinion).

27. *Id.* at 510–11. Hamdi also raised constitutional and statutory objections to his detention. *Id.* at 511.

28. *Id.* at 519–20 (plurality opinion); *id.* at 589 (Thomas, J., dissenting) (stating that Hamdi's detention falls "squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision"). *But see id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting).

29. *Id.* at 519–20. See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2078–133 (2005) (extrapolating from *Hamdi* a general framework for interpreting the AUMF in the context of the war on terror).

purposes of th[e] case” the government’s proposed definition of “enemy combatant,” the Court held simply that this category encompassed those individuals “part of or supporting forces hostile to the United States . . . and who engaged in an armed conflict against the United States [in Afghanistan].”<sup>30</sup> The Court further observed that the purpose of wartime detention is not punitive, but rather to prevent captured enemies from returning to the fight against the United States.<sup>31</sup> *Hamdi* thus established that the President has explicit statutory authority to detain “enemy combatants” for this purpose.

Yet *Hamdi* rejected the view that the government’s endorsement is sufficient to justify detention.<sup>32</sup> Balancing the value of requiring procedural protections against their impact on military effectiveness,<sup>33</sup> the plurality held that a citizen detainee “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>34</sup> Four members of the Court, however, observed that the proceedings could be tailored to accommodate the “uncommon potential to burden the Executive at a time of ongoing military conflict,” through, for example, the admission of hearsay evidence and a rebuttable presumption in favor of the government’s evidence.<sup>35</sup> Neither the plurality nor Justice Souter’s concurrence attempted to clarify the outer bounds of the “enemy combatant” concept.<sup>36</sup> On the same day that it rooted the President’s detention authority in the AUMF, the Court held in *Rasul v. Bush* that the

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30. *Hamdi*, 542 U.S. at 516, 526; see also Bradley & Goldsmith, *supra* note 29, at 2107–16.

31. *Hamdi*, 542 U.S. at 518.

32. *Id.* at 533.

33. *Id.* at 528–35 (applying the procedural due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

34. *Id.* at 524–25, 533. For criticism of the Court’s approach, see John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 587–88 (2006).

35. *Hamdi*, 542 U.S. at 533–34. In joining the plurality “to produce a judgment,” Justice Souter explicitly disclaimed his assent on these points. *Id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). See generally Richard H. Fallon, Jr. & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2091–93 (2007) (discussing the ambiguities as to proof that *Hamdi*’s discussion of procedure introduced).

36. See *Hamdi*, 542 U.S. at 522 n.1. The term is ill-defined in domestic law and unknown to international law. *E.g.*, Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT’L L.J. 1, 2–7 (2007); Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 991 n.144 (2009).

detainees could challenge their detention through the habeas statute.<sup>37</sup> Detainees soon flooded the courts with habeas petitions.<sup>38</sup>

The political branches responded to the rebukes of *Hamdi* and *Rasul* in several ways. First, the Bush Administration established Combatant Status Review Tribunals (CSRTs)—ostensibly designed to comply with the procedural dictates of *Hamdi*—to review detainees’ challenges to their designation as enemy combatants.<sup>39</sup> Second, Congress passed the Detainee Treatment Act of 2005, which sought to nullify *Rasul* by stripping federal courts of jurisdiction to hear habeas petitions of Guantánamo detainees.<sup>40</sup> Without statutory access to the courts, the petitions languished until June 2008, when the Supreme Court decided *Boumediene v. Bush*.

*Boumediene* held that noncitizen detainees can invoke the Constitution to challenge their detention by seeking a writ of habeas corpus.<sup>41</sup> The Court also held that the procedures of the CSRT system fell short of an adequate substitute for habeas, and thus amounted to an unconstitutional suspension of the writ.<sup>42</sup> While the Court expressly declined to clarify the bounds of executive detention under the AUMF,<sup>43</sup> it made several ob-

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37. *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004); see also 28 U.S.C. § 2241 (2006).

38. See *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 37 (D.D.C. 2009), *aff’d*, 590 F.3d 866 (D.C. Cir. 2010).

39. See Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., Dep’t of Def., to the Sec’y of the Navy (July 7, 2004) [hereinafter CSRT Memo], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. The memo provided detainees with a “personal representative,” allowed access to “reasonably available” information, and permitted the detainee to call witnesses “if reasonably available.” *Id.*; see also Fallon & Meltzer, *supra* note 35, at 2100 & n.286. See generally Chesney & Goldsmith, *supra* note 13, at 1110–12 (contrasting procedural safeguards of CSRT process with criminal procedures).

40. Detainee Treatment Act, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741–42 (2005). In *Hamdan v. Rumsfeld*, the Supreme Court held that the Detainee Treatment Act (DTA) did not apply retroactively so as to deprive the courts of jurisdiction over suits pending at the time of its passage. 548 U.S. 557, 575–76 (2006). Congress responded in the Military Commissions Act of 2006 by expressly stripping the courts of jurisdiction to hear petitions pending at the time of the DTA’s passage. Military Commissions Act, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006).

41. *Boumediene I*, 553 U.S. 723, 732 (2008).

42. *Id.* at 732, 767 (enumerating deficiencies in the CSRT process).

43. *Id.* at 732, 779–80, 787. For one framework that clarifies the bounds of executive detention, derived from the law of war, see Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1369–1402 (2008).



servations on which the lower courts have relied heavily in adjudicating Guantánamo habeas cases.

The Court held that a habeas petitioner must have a “meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.”<sup>44</sup> The majority also emphasized that habeas is an “adaptable remedy,” the precise application of which varies over time and depends, in part, on the rigor of earlier proceedings.<sup>45</sup> Habeas, therefore, can be tailored to accommodate the government’s “legitimate interest in protecting sources and methods of intelligence gathering.”<sup>46</sup> Furthermore, the purpose and intended duration of detention bear on the scope of habeas review, rendering detention of potentially indefinite duration especially amenable to judicial scrutiny.<sup>47</sup>

Moreover, habeas proceedings must be more than a rubber stamp; they must be “effective” and “meaningful.”<sup>48</sup> The Court paid particular attention to the prospect of errors in the CSRT fact-finding process, which the majority found required that habeas courts have “some authority to assess the sufficiency of the Government’s evidence”<sup>49</sup> and “to admit and consider relevant exculpatory evidence” not introduced in the earlier proceeding.<sup>50</sup> The Court, however, declined to clarify just how much evidence the government must present.<sup>51</sup> Lastly, *Boumediene* emphasized the urgency of the habeas proceedings.<sup>52</sup> Noting that some detainees had been held for more than six years without judicial oversight, Justice Kennedy intoned for the majority that “the costs of delay can no longer be borne by those who are held in custody.”<sup>53</sup> The lower courts were thus charged with putting these vague principles into practice in short order.

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44. *Boumediene I*, 553 U.S. at 779 (internal quotation marks and citation omitted).

45. *Id.* at 779–87.

46. *Id.* at 796.

47. *See id.* at 783.

48. *Id.* The D.C. Circuit has since declared “meaningfulness” to be “the touchstone” of the Guantánamo habeas proceedings, the practical result of which is to vest district court judges with heightened flexibility. *See Al-Bihani v. Obama*, 590 F.3d 866, 880 (D.C. Cir. 2010) (making this point in the evidentiary context).

49. *Boumediene I*, 553 U.S. at 786.

50. *Id.* at 729.

51. *Id.* at 787, 795–96.

52. *Id.* at 795 (“The detainees in these cases are entitled to a prompt habeas corpus hearing.”).

53. *Id.*

## B. PRECEDENT FRAMING THE HABEAS LITIGATION

After *Boumediene*, but before the D.C. Circuit began handing down habeas decisions on the merits in January 2010, two circuit courts addressed some substantive and procedural issues *Boumediene* left unresolved.<sup>54</sup> Eight days after *Boumediene*, in a case arising under the CSRT process, the D.C. Circuit addressed the kind of evidence upon which the government can rely in seeking to detain an individual as an enemy combatant.<sup>55</sup> In *Parhat v. Gates*, the court rejected the government's attempt to justify detention solely on the basis of hearsay evidence and held that the government must provide enough information for the court to assess the credibility of its sources and the reliability of the information on which it bases its case for detention.<sup>56</sup> In *Al-Marri v. Pucciarelli*, the Fourth Circuit addressed the scope of the President's detention authority under the AUMF, holding that Al-Marri, a legal U.S. resident, could be detained as an enemy combatant, but that the process used to determine his status as a combatant was constitutionally insufficient.<sup>57</sup> In seven separate opinions running more than two hundred pages, the fourth circuit judges offered differing views as to the scope of the President's detention authority under the AUMF and *Hamdi*.<sup>58</sup> District court judges would later draw on these cases in adjudicating habeas petitions.

And the D.C. district courts were soon flooded with them.<sup>59</sup> In order to address the cases "as expeditiously as possible per the Supreme Court's decision in *Boumediene*," the D.C. district court designated Chief Judge Thomas Hogan "to coordinate and

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54. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam), *vacated*, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.); *Parhat v. Gates*, 532 F.3d 834 *passim* (D.C. Cir. 2008). The D.C. Circuit's rulings on the merits in habeas cases are discussed below.

55. *Parhat*, 532 F.3d at 834, 842–46.

56. *Id.* at 846–47, 850.

57. *Al-Marri*, 534 F.3d at 216. After the Supreme Court granted certiorari, President Obama transferred Al-Marri to civilian custody and the Supreme Court vacated the appeal as moot. *Al-Marri*, 129 S. Ct. at 1545.

58. *Al-Marri*, 534 F.3d at 216–352. The D.C. Circuit has distinguished Al-Marri from Guantánamo habeas petitioners to the extent the latter are non-citizens seized in a foreign country. *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010).

59. When *Boumediene* was decided, there were about 200 habeas petitions pending before the federal courts in Washington, D.C., where all Guantánamo habeas petitions are now heard. Josh White & Del Quentin Wilber, *Guantanamo Detainee to File Habeas Petition*, WASH. POST, June 26, 2008, at A14; Goldsmith, *supra* note 13, at 18 n.20 (explaining the organic process by which all habeas cases came before the D.C. district courts).

manage” the Guantánamo litigation.<sup>60</sup> After consolidated briefing and oral arguments on procedural issues common to all the habeas cases, Judge Hogan issued a Case Management Order (CMO) setting forth the procedural framework for the litigation.<sup>61</sup> The CMO addresses the range of procedural issues common to the pending habeas petitions, including discovery, burden of proof, and access to classified evidence.<sup>62</sup> Significantly, it requires the government to disclose any exculpatory evidence in its possession to detainees.<sup>63</sup> Beyond this measure, the judges may allow only “limited” discovery for “good cause.”<sup>64</sup> The government must prove the lawfulness of the petitioner’s detention by a preponderance of the evidence; it must be “more likely than not” that the detainee satisfies the legal standard.<sup>65</sup> Critically, each judge retains the option to accord a “rebuttable presumption” of accuracy and/or authenticity to the government’s evidence and to decide whether to admit hearsay evidence.<sup>66</sup> Equally important to the district courts’ adjudication of the habeas cases is the executive branch’s legal position.<sup>67</sup> The next section reviews President Obama’s shift in Guantánamo

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60. *In re* Petitioners Seeking Relief at Guantánamo Bay, 567 F. Supp. 2d 83, 83 (2008).

61. *In re* Guantanamo Bay Detainee Litig. (CMO), No. 08-0442, 2008 WL 4858241, at \*1–3 (D.D.C. Nov. 6, 2008). See generally Falkoff, *supra* note 36, at 1019–21 (discussing the CMO). Most judges have adopted some form of Judge Hogan’s CMO, which contemplates that individual judges “may alter the framework based on the particular facts and circumstances of [the cases].” CMO, 2008 WL 4858241, at \*1 n.1.

62. CMO, 2008 WL 4858241, at \*1–5.

63. *Id.* at \*1–2 (citing *Boumediene I*, 553 U.S. 723, 786 (2008)).

64. *Id.* at \*2.

65. *Id.* at \*3. For criticism of this standard, see Falkoff, *supra* note 36, at 1021. See also Waxman, *supra* note 43, at 1402–03, 1408–12 (proposing, in part, an escalating certainty standard: the longer a detainee remains in custody, the higher the burden to justify detention). The D.C. Circuit has since repeatedly held that the preponderance standard is constitutional. See, e.g., *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) (citing *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010)). It has also repeatedly stated in dicta, however, that while constitutionally permissible, the preponderance standard may not be constitutionally required. *Id.* at 10 n.2; *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 (D.C. Cir. 2010) (“For years, in habeas proceedings . . . the government had to produce only ‘some evidence to support the order.’” (citation omitted)).

66. CMO, 2008 WL 4858241, at \*3. As discussed below, however, the admissibility of hearsay evidence is no longer discretionary. “[T]he 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.” *Al-Bihani*, 590 F.3d at 879; see also *Al Odah v. United States*, 611 F.3d 8, 12–14 (D.C. Cir. 2010) (citing relevant cases).

67. See, e.g., *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52 (D.D.C. 2009).

policy and situates the habeas litigation in the broader context of the administrative detention debate.

### C. THE OBAMA ADMINISTRATION AND THE DETENTION DEBATE

In January 2009, less than an hour after President Obama's inauguration, the government requested a stay of the pending detainee proceedings to "reassess its position on the scope of the President's authority to detain the petitioners as so-called 'enemy combatants.'"<sup>68</sup> Following this reassessment, the Obama Administration dropped the term "enemy combatant" and now presses a more limited position as to the scope of its detention authority under the AUMF, arguing that it has the authority to detain "persons who were part of, or *substantially* supported" the Taliban or al Qaeda.<sup>69</sup> After a comprehensive review of all 196 detainees then held at Guantánamo, the Obama Administration concluded that approximately thirty-five should be tried in federal or military courts, 110 should be released, and nearly fifty must be detained indefinitely without trial.<sup>70</sup> While the habeas litigation may be most pressing for the latter group, the courts have likely adjudicated only about one-third to one-half of all pending cases.<sup>71</sup> In short, notwithstanding *Boumediene's* call for urgency, the habeas litigation will continue for years to come.

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68. *Id.* at 52–53. Two days after his inauguration, Obama issued an executive order calling for the immediate review of the status of all remaining Guantánamo detainees and committed to close the prison within one year. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

69. Respondents Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantánamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Mar. 13, 2009) [hereinafter Obama Brief]. That filing was quoted by other courts. *E.g.*, *Anam v. Obama*, 653 F. Supp. 2d 62, 63 (D.D.C. 2009). For more background, see Ved P. Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror,"* 37 DENV. J. INT'L L. & POLY 513, 519–20 (2009). Significantly, President Obama dropped the Article II argument, pressed by the Bush Administration, that the President has the inherent authority under the Commander in Chief Clause to detain suspected terrorists. *E.g.*, *Gherebi*, 609 F. Supp. 2d at 53 & n.4.

70. Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, WASH. POST, Jan. 22, 2010, at A1; see also GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

71. Robert Chesney, *The Emerging Law of Detention: The Guantánamo Habeas Cases As Lawmaking*, Address at the U.S. Naval War College International Law Conference (June 22–24, 2006), available at <http://www.usnwc.edu/Events/International-Law-Conference-2010.aspx> (scroll to "Luncheon Address"; then click on image at left to play video).

The implications of the Guantánamo litigation, moreover, extend well beyond the approximately 175 remaining detainees<sup>72</sup>: the national debate about Guantánamo often serves as a proxy for the larger debate about “administrative,”<sup>73</sup> “preventive,”<sup>74</sup> or “non-criminal”<sup>75</sup> detention in the “war on terror.”<sup>76</sup> Some argue, for example, that the United States should adopt a more formalized system of detention, in which some combination of federal judges and military personnel would preside over detention decisions in the first instance.<sup>77</sup> The current system of habeas review is, in many respects, strikingly similar to some such proposals. In effect, *Hamdi* and *Boumediene* have already created a system of noncriminal detention.<sup>78</sup> The rulings analyzed in Part II, therefore, affect not just the remaining Guantánamo detainees, but all future noncitizen detainees to whom the courts extend habeas rights.<sup>79</sup> The habeas litigation

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72. *Habeas Scorecard*, *supra* note 8.

73. *E.g.*, William Glaberson, *Obama Detention Plan Poses Fundamental Test*, N.Y. TIMES, May 23, 2009, at A1, available at 2009 WL 9829007.

74. *See, e.g.*, Lindsey Graham & John McCain, Op-Ed., *How to Handle the Guantanamo Detainees*, WALL ST. J., May 6, 2009, at A15.

75. *E.g.*, Wittes & Goldsmith, *supra* note 15.

76. *E.g.*, Editorial, *An Obama-Bush Victory*, WALL ST. J., May 24, 2010, at A16.

77. *See, e.g.*, SULMASY, *supra* note 11, at 157–58, 173–93; BENJAMIN WITTES, LAW AND THE LONG WAR 174–78 (2008) (discussing the debate); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT’L L.J. 87, 94 (2008); Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19, available at 2007 WL 13087601. *But see* STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR 181–90 (2008); Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 523–25 (2009).

78. *See, e.g.*, Goldsmith, *supra* note 13, at 2 (arguing that “the national security court debate . . . is largely a canard,” because “we have had a centralized and thinly institutionalized national security court for years in the federal courts of the District of Columbia, which have been supervising Guantánamo Bay military detentions”).

79. In May 2010, a panel of the D.C. Circuit held that habeas rights do not extend to detainees held in Afghanistan. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010). Request for en banc review is pending, but the issue will not be definitively settled even if the full court declines review or upholds the panel’s decision. The highly fact-bound opinion left room for individual detainees to press the issue: while the court has since refused to reconsider the ruling, it did so without evaluating the detainees’ new claim, and stated that its denial of rehearing was “without prejudice” to the detainees’ opportunity to offer their evidence to a district judge “in the first instance.” *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. July 23, 2010) (per curiam) (order denying petition for rehearing).

is thus intimately bound up with broader detention policy.<sup>80</sup> It is also sure to affect military decisionmaking outside of the detention context.<sup>81</sup> The following Part analyzes the district court litigation, highlighting early cleavages among judges on a number of substantive and procedural issues. It then shows how the D.C. Circuit has resolved these divisions and developed an increasingly coherent body of jurisprudence that militates against new detention legislation.

## II. TOWARD A NATIONAL SECURITY COURT

Since *Boumediene* announced that habeas is a constitutional right for Guantánamo detainees, the federal district courts in Washington, D.C. have addressed a host of novel legal questions. It is useful to break down the applicable rulings along substantive and procedural axes.<sup>82</sup> Substantive rulings relate to the scope of the President's detention authority under the AUMF. Procedural issues deal with the degree and nature of the process to which detainees are entitled under the limited guidance of *Boumediene* and *Hamdi*. This Part examines the district courts' rulings on both substantive and procedural issues, paying close attention to uniformity among different judges and their various approaches to balancing the government's national security concerns and detainees' liberty interests. It argues that in the first eighteen months of litigation, while the district courts were largely deferential to the government, certain judges narrowed detention authority in important ways, creating splits on both substantive and procedural issues that may have led to different outcomes for similarly situated detainees. It then demonstrates that the D.C. Circuit has resolved the most salient disagreements, leading to a convergence of detention standards.

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80. See, e.g., WITTES, *supra* note 77, at 152–53; Stuart Taylor, Jr., *Lessons of the Christmas Bombing Plot*, NAT'L J., Jan. 9, 2010, at 2 (discussing novel detention issues raised by the attempt to which no policy response exists).

81. *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010) (“Requiring highly protective procedures at the tail end of the detention process . . . would have systemic effects on the military’s entire approach to war.”); Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1, available at 2010 WL 6494620. See generally Waxman, *supra* note 43, at 1385–1402 (analogizing detention and targeting standards).

82. See, e.g., Fallon & Meltzer, *supra* note 35, at 2037–39 (describing habeas actions as presenting at least three kinds of questions—jurisdictional, substantive, and procedural).

A. SUBSTANTIVE DETENTION STANDARDS: SHADES OF DEFERENCE

*Hamdi* held that the AUMF authorizes the President to detain “enemy combatants,” but left the precise scope of this authority undefined.<sup>83</sup> *Boumediene* effectively delegated this thorny task to the district courts.<sup>84</sup> While federal judges generally have declined to craft standards of their own, they have displayed varying degrees of deference to the government’s proposed standards. Moreover, judges have displayed strikingly different views about the nature of the inquiry: at least one judge read *Hamdi* to require an assessment of detainee dangerousness,<sup>85</sup> whereas other judges rejected this approach.<sup>86</sup> But even if district court judges cannot agree, recent decisions by the D.C. Circuit have harmonized standards that may otherwise have resulted in an increasingly fragmented jurisprudence.<sup>87</sup> The common-law process mandated by *Boumediene* is, in short, working.

1. Deferential Approaches

Some judges have largely deferred to the Executive—both President Bush and President Obama—as to the scope of executive detention authority. In light of the Supreme Court’s approval of the detention of “enemy combatants” under the AUMF in *Hamdi*, the critical issues for the Bush Administration after *Boumediene* were what constituted an “enemy combatant,” and whether the detainee met this definition.<sup>88</sup> Judge Richard Leon took the lead in adjudicating Guantánamo habeas petitions, deciding six cases from November 2008 to early April 2009.<sup>89</sup> Judge Leon was therefore the first to opine on the

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83. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–22 (2004) (plurality opinion).

84. *Boumediene I*, 553 U.S. 723, 787, 795–96 (2008).

85. *Basardh v. Obama*, 612 F. Supp. 2d 30, 30–35 (D.D.C. 2009).

86. *See, e.g.*, *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009).

87. For a lengthier and purely descriptive treatment of some judges’ positions, see *HABEAS LAWMAKING*, *supra* note 15, at 16–31.

88. *See, e.g.*, *Boumediene v. Bush (Boumediene II)*, 579 F. Supp. 2d 191, 196 (D.D.C. 2008).

89. *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009); *Boumediene II*, 579 F. Supp. 2d 191 (D.D.C. 2008); *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008).

scope of detention authority after *Boumediene*<sup>90</sup> and the only judge to rule on the Bush Administration's proposed definition of "enemy combatant."<sup>91</sup> Declining to "engage in the judicial craftsmanship" of *Al-Marri v. Pucciarelli*, Judge Leon opted for an approach more deferential to the political branches.<sup>92</sup> He adopted, ironically, the Department of Defense's definition created for use in the CSRT process<sup>93</sup>—the process *Boumediene* struck down as constitutionally inadequate.<sup>94</sup> The Department of Defense defined the term "enemy combatant" as "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," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces."<sup>95</sup> Judge Leon thought that Congress had "blessed" this definition because the 2006 Military Commissions Act (MCA) defined "unlawful enemy combatant" to include those so determined by the CSRT.<sup>96</sup> Applying the Department of Defense's standard, Judge Leon found it more likely than not that five of eleven petitioners were "part of or supporting" al Qaeda or the Taliban.<sup>97</sup>

On March 13, 2009, roughly five weeks after the Obama Administration altered the government's legal position, Judge Reggie Walton adopted the President's new framework wholesale in *Gherebi v. Obama*.<sup>98</sup> Judge Walton rejected the detainees' argument that only individuals who directly participated in

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90. *Boumediene v. Bush (Boumediene III)*, 583 F. Supp. 2d 133, 133 (D.D.C. 2009) (adjudicating the original *Boumediene* litigation on remand from the Supreme Court and D.C. Circuit). While Judge Ricardo Urbina was the first to decide a habeas petition in the wake of *Boumediene*, he did not rule on the scope of detention authority under the AUMF. See *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008), *vacated*, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010).

91. *USA: Judge Orders Release of Detainee Held in Guantánamo as Child 'Enemy Combatant,'* AMNESTY INT'L n.4 (Jan. 15, 2009), <http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR510062009>. The Obama Administration soon dropped the term "enemy combatant" and altered its position as to who is detainable under the AUMF. See *Obama Brief*, *supra* note 69, at 2.

92. *Boumediene III*, 583 F. Supp. 2d at 134.

93. *Id.* at 134–35.

94. *Boumediene I*, 553 U.S. 723, 767 (2008).

95. CSRT Memo, *supra* note 39, at 1.

96. *Boumediene III*, 583 F. Supp. 2d at 134; see also 10 U.S.C. § 948a(1) (2006).

97. See *supra* note 89 (listing cases decided by Judge Leon).

98. 609 F. Supp. 2d 43 (D.D.C. 2009).



hostilities against the United States were subject to detention under *Hamdi*'s construction of the AUMF,<sup>99</sup> and found that the government's "substantial support" standard comported with the law of war as long as it is restricted to those individuals that are effectively part of the armed forces of an enemy organization at the time of their capture.<sup>100</sup> In short, Judge Walton accepted both the government's standard for detention and its suggested framework for interpreting that standard under the law of war.<sup>101</sup>

Moreover, to address a detainee's challenge to the conditions of his confinement each of the judges has construed *Boumediene* narrowly, to the great benefit of the government.<sup>102</sup> Specifically, the courts have held that even in striking down the jurisdiction-stripping provision of the MCA, *Boumediene* left intact the following subsection, which stripped the courts of jurisdiction to hear claims relating to conditions of confinement.<sup>103</sup> While the courts characterize this holding as an exercise in statutory interpretation, one senses a measure of deference to the government in the admissions that "the issue is not absolutely clear-cut" and that *Boumediene* did not distinguish between the two subsections at issue.<sup>104</sup>

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99. *Id.* at 53, 69–70; *see also id.* at 64 n.15.

100. *Id.* at 69–70. Under Walton's standard, the President can detain those who are connected to the command structure of the organization, but not "[s]ympathizers, propagandists, and financiers," unless they take direct part in hostilities. *Id.* at 68–69.

101. The D.C. Circuit has since rejected the law of war as a framework for interpreting detention authority under the AUMF. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (stating that many of Al-Bihani's arguments "rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken."). This position is more expansive than the standard put forward by the Obama Administration. *See* Obama Brief, *supra* note 69, at 2. In denying en banc review, however, every active member of the D.C. Circuit not on the three-judge *Al-Bihani* panel joined in a statement characterizing the panel's discussion of the law of war as dicta. *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 3398392, at \*1 (D.C. Cir. Aug. 31, 2010). Notwithstanding more categorical language in various concurring opinions, the precise role of the Geneva Conventions in the Guantánamo litigation thus remains, as a formal matter, unsettled.

102. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 108–09 (D.C.C. 2009); *Tumani v. Obama*, 598 F. Supp. 2d 67, 69 (D.D.C. 2009); *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 118 (D.D.C. 2009); *Khadr v. Bush*, 587 F. Supp. 2d 225, 233–36 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 312, 313 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 570 F. Supp. 2d 13, 17–19 (D.D.C. 2008).

103. *E.g.*, *Al-Adahi*, 596 F. Supp. 2d at 118.

104. *Id.*; *see also In re Guantanamo Bay Detainee Litig.*, 570 F. Supp. 2d at 18.

## 2. Less Deferential Approaches

Less than a month after *Gherebi*, Judge John D. Bates came to a different conclusion about the President's detention authority.<sup>105</sup> After acknowledging that some measure of deference is due to the executive,<sup>106</sup> Judge Bates rejected the government's theory of "substantial support" as a concept improperly imported from the criminal law and without basis in domestic or international law.<sup>107</sup> Rather, Judge Bates limited the President's detention authority to those individuals who are "part of Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed (*i.e.*, directly participated in) a belligerent act in aid of such enemy armed forces."<sup>108</sup> The gravamen of the "part of" inquiry is whether the individual functions as part of the command structure of an organization; the key question is whether the individual "receives and executes orders."<sup>109</sup> Judge Bates thus adopted a narrower view of the President's detention authority than did Judge Walton.<sup>110</sup>

Judge Bates minimized the importance of the distinction between his approach and Judge Walton's,<sup>111</sup> and, on the one hand, he may be right. The concept of "support" is often probative of who is "part of" the covered organizations.<sup>112</sup> Moreover, Judge Walton overlaid the "substantial support" concept with such interpretive caveats as to arguably eviscerate the plain meaning of the term "support."<sup>113</sup> As a practical matter, then,

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105. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009).

106. *Id.* at 68–69.

107. *Id.* at 69, 76.

108. *Id.* at 77–78.

109. *Id.* at 75 (citing Bradley & Goldsmith, *supra* note 29, at 2114–15).

110. There is language in *Gherebi v. Obama* that can be read to undermine this distinction. While nominally accepting the "substantial support" standard, Judge Walton would exclude "individuals outside the military command structure of an enemy organization, as that term is understood in view of [law of war principles]." 609 F. Supp. 2d 43, 70 (D.D.C. 2009).

111. *Hamlily*, 616 F. Supp. 2d at 76 (arguing that this difference "should not be great," given the "functional" nature of the inquiry). Other judges agree. See *Anam v. Obama*, 653 F. Supp. 2d 62, 64 & n.2 (D.D.C. 2009) (Judge Hogan) (describing the two approaches as "not inconsistent" and the difference as "largely one of form rather than substance"); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at \*3 n.2 (D.D.C. Aug. 21, 2009) (Judge Kessler), *rev'd on other grounds*, 613 F.3d 1102 (D.C. Cir. 2010).

112. *Hamlily*, 616 F. Supp. 2d at 76–77.

113. *Gherebi*, 609 F. Supp. 2d at 70.

many of those individuals that “substantially support” al Qaeda are also, as far as the courts are concerned, “part of” that group.

On the other hand, if the term “support” is to retain any meaning independent of the “part of” prong, it is not difficult to imagine an individual who would be detainable in Judge Walton’s courtroom but not in Judge Bates’s.<sup>114</sup> Both judges, for instance, give the example of someone “tasked with housing, feeding or transporting al-Qaeda fighters” as someone detainable under both the “substantial support” and “part of” prongs.<sup>115</sup> By Judge Bates’s reasoning, however, if the individual were not “tasked” with such duties, but rather undertook them of his or her own volition—that is, outside of the command structure—he would not be “part of” al Qaeda and, consequently, would not be detainable. Given that such conduct almost certainly qualifies as “substantial support,” however, the opposite result would likely obtain under that standard.<sup>116</sup>

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114. Indeed, the D.C. Circuit implicitly recognized the functional difference between the “support” and “membership” prongs in its only ruling to date on the merits favoring a detainee. In *Bensayah v. Obama*, the court reversed the district court’s denial of the writ on the ground that “the evidence on which the district court relied in concluding [the petitioner] ‘supported’ al Qaeda was insufficient . . . to show that he was ‘part of’ that organization.” 610 F.3d 718, 727 (D.C. Cir. 2010).

115. *Hamlily*, 616 F. Supp. 2d at 75 (applying the “tasked with” criteria to the “part of” prong (quoting *Gherebi*, 609 F. Supp. 2d at 69)); *Gherebi*, 609 F. Supp. 2d at 69 (applying the “tasked with” criteria to the “substantial support” prong).

116. This result would turn on whether Judge Walton would consider “housing, feeding, or transporting al Qaeda fighters” to qualify as “direct participation in hostilities.” See *Gherebi*, 609 F. Supp. 2d at 64–70. Because these tasks go well beyond “sympathiz[ing], propagand[izing], and financ[ing],” *id.* at 68, the answer seems to be “yes.” Until the D.C. Circuit addressed the issue, Judge Bates’s approach enjoyed more widespread adherence among district court judges than Judge Walton’s acceptance of the government’s standard; at least four other judges had adopted Judge Bates’s approach, whereas only Judge Kessler had opted for Judge Walton’s formulation. In other words, judges were trending toward a narrower view of executive detention authority. See, e.g., *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (Judge Hogan) (adopting *Hamlily*); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (Judge Robertson) (same); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009) (Judge Kollar-Kotelly) (same); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (Judge Lamberth) (same). *But see* *Al Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at \*3, (D.D.C. Aug. 21, 2009) (Judge Kessler) (adopting *Gherebi*).

### 3. A Pragmatic Resolution

But this crucial disagreement is now moot. In early 2010 the D.C. Circuit made clear that both the membership and “support” prongs are valid—and independently sufficient—bases for detention under the AUMF.<sup>117</sup> Moreover, the court has also opined that membership in the “command structure” of al Qaeda or the Taliban is not necessary to justify detention, though it is sufficient.<sup>118</sup> In other words, persons not integrated into the “command structure” of al Qaeda or the Taliban can be “part of” those organizations for purposes of detention under the AUMF. Specifically, the court reasoned that the President’s detention authority sweeps at least as broadly as the class of persons subject to trial by military commission under the 2006 and 2009 Military Commissions Acts, which categorically include persons that have “purposefully and materially supported hostilities against the United States or its coalition partners.”<sup>119</sup> That is, if Congress has authorized the trial of such persons by military commission, it has necessarily authorized the President to detain them.<sup>120</sup>

While one might question the court’s approach,<sup>121</sup> this holding makes sense as a matter of policy and is a creative solution to a potentially intractable problem. The AUMF empowered the President “to prevent any future acts of international

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117. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

118. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (“[Petitioner] argues that there must be a specific factual finding that he was part of the ‘command structure’ of al Qaeda. There is no such requirement under the AUMF.”); *see also* *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010).

119. *Al-Bihani*, 590 F.3d at 872 (citing the Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, § 1802, 123 Stat. 2190, 2575–76) (codified at 10 U.S.C. §§ 948a(7), 948b(a), 948c); *see also id.* (noting that an unlawful enemy combatant includes “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States and its co-belligerents who is not a lawful enemy combatant” (quoting the Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(1)(A)(i), 120 Stat. 2600, 2601)).

120. *See id.*

121. It is uncontroversial that individuals subject to trial by military commission will also be detained—at least for the period of the trial. In effect, however, the court *derives* substantive detention criteria from purely jurisdictional and procedural provisions. The provisions of the MCA cited by the court note the Act’s purpose as “establish[ing] procedures governing the use of military commissions to try alien unprivileged enemy belligerents,” define that category of persons, and state that such persons are subject to trial by military commission. 10 U.S.C. § 948b(a); *see also Al-Bihani*, 590 F. Supp. 2d at 872 (citing 10 U.S.C. §§ 948a(7), 948b(a), 948c).

terrorism against the United States by such nations, organizations or persons.”<sup>122</sup> To the extent a judge’s refusal to detain “substantial supporters” of al Qaeda (as opposed to members) would limit the President’s ability to prevent future attacks, it would undermine this central purpose of the AUMF.<sup>123</sup> The same might be said of decisions restricting detention authority to al Qaeda’s “command structure.” But such results are now foreclosed by D.C. Circuit precedent.

The AUMF—the undisputed basis of the President’s detention authority and the guiding light in the habeas litigation—is, of course, vague. It does not describe the category of persons subject to detention; in fact, it does not mention detention at all.<sup>124</sup> The D.C. Circuit’s holdings as to the President’s substantive detention authority represent a pragmatic resolution of this problem. Whatever else might be said of this resolution, it strongly militates against further legislative action for the sake of national security. Indeed, the court has already keyed the President’s detention authority to recent “war on terror” legislation. And if the D.C. Circuit has proved insufficiently protective of detainee rights,<sup>125</sup> there is no reason to think a Congress that repeatedly attempted to strip the courts of habeas jurisdiction would do any better by detainees. The following section describes the D.C. Circuit’s resolution of another early substantive division among district court judges that might also have resulted in unequal application of the law.

#### 4. Dangerousness Assessments

District court judges have also disagreed about the extent to which detainee dangerousness is relevant in defining the scope of the President’s detention authority. In *Basardh v. Obama*, Judge Huvelle ruled that the likelihood of a detainee’s return to the battlefield limits the scope of the President’s deten-

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122. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

123. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69–70 (D.D.C. 2009). Judge Bates conceded that the government’s position “may be attractive from a policy perspective, and indeed could be the basis for the development of future domestic legislation or international law.” *Id.* at 76.

124. As explained above, the Supreme Court in *Hamdi* interpreted the AUMF’s authorization of “all necessary and appropriate force” to include detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (quoting AUMF, § 2(a)).

125. See Andy Worthington, *Guantánamo and Habeas Corpus: Wins and Losses*, FUTURE FREEDOM FOUND. (July 19, 2010), <http://www.fff.org/comment/com1007f.asp> (critically reviewing the D.C. Circuit opinions).

tion authority.<sup>126</sup> In so holding, she emphasized that the AUMF authorized the use of force to prevent *future* acts of terrorism. Given that petitioner Muhammed Basardh had been exposed by name in the press as cooperating with U.S. authorities, Judge Huvelle found the prospect of his rejoining enemy forces to be “at best . . . remote,” which undermined the key rationale for his continued detention under *Hamdi*’s construction of the AUMF.<sup>127</sup> Judge Huvelle thus imported an assessment of dangerousness into the analysis of whether an individual is detainable under the AUMF.

Judge Leon adopted a similar position, though not explicitly. In *Al Ginco v. Obama*, Judge Leon addressed the novel question of “whether a prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both . . . .”<sup>128</sup> The answer resounded in the affirmative.<sup>129</sup> Judge Leon found that petitioner Janko’s<sup>130</sup> torture by al Qaeda into falsely confessing that he was spying for the United States along with his subsequent imprisonment by the Taliban “evinced a total evisceration of whatever relationship might have existed[.]”<sup>131</sup> While not framed in terms of “dangerousness,” the clear implication of this reasoning is that Janko’s torture rendered him highly unlikely to rejoin al Qaeda. Janko was, in short, no longer dangerous.<sup>132</sup> Therefore, the conclusion that a detainee’s status as “part of” al Qaeda may change over time functions as a similar limit on the President’s authority to detain.<sup>133</sup>

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126. Basardh v. Obama, 612 F. Supp. 2d 30, 33–35 (D.D.C. 2009).

127. *Id.* at 35.

128. Al Ginco v. Obama, 626 F. Supp. 2d 123, 128 (D.D.C. 2009).

129. *Id.*

130. *Id.* at 124 (noting that the petitioner preferred the surname Janko).

131. *Id.* at 129; *see also id.* at 128 (noting that the government’s position “defies common sense”).

132. *See id.* at 130.

133. It is notable that this limit was imposed by Judge Leon, who, in a previous case and in *Al Ginco*, adopted wholesale the Bush Defense Department’s definition of enemy combatant. *Id.* at 126–27 (adopting the same definition of enemy combatant as in *Boumediene III*, 583 F. Supp. 2d 133, 134–35 (D.D.C. 2008)). Indeed, in *Al Ginco*, Judge Leon was seemingly baffled by the Obama Administration’s abandonment of the “enemy combatant” label and decision to “go so far as to advocate that the Court adopt an even higher standard” as to the support component of the definition. *See Al Ginco*, 626 F. Supp. 2d at 127. Other judges have also recognized that detainees may sever their membership through extreme time lapse or affirmative acts of disassociation. *Khalifh v. Obama*, No. 05-CV-1189, 2010 WL 2382925, at \*2 (D.D.C. May 28, 2010) (Judge Robertson); *Hatim v. Obama*, 677 F. Supp. 2d 1, 12 (D.D.C. 2009) (Judge

Several judges, however, refused to read *Hamdi* as channeling the judicial inquiry toward an assessment of detainee dangerousness. Finding the case against petitioner Ali Awad to be “gossamer thin,”<sup>134</sup> and noting that “[i]t seems ludicrous to believe that he poses a security threat now,” Judge Robertson nonetheless denied Awad’s petition, reasoning that his dangerousness “is not for me to decide.”<sup>135</sup> In so holding, Judge Robertson expressly declined to adopt Judge Huvelle’s approach of making a more individualized judgment of dangerousness.<sup>136</sup> It seems inescapable, therefore, that—all else being equal—had Ali Awad appeared before Judge Huvelle instead of Judge Robertson, his petition would have been granted.<sup>137</sup>

Each of these approaches is defensible. Judge Huvelle’s conclusion that a terrorist-cum-U.S. informant is unlikely to rejoin the terrorist organization is eminently reasonable. And judges routinely assess detainee dangerousness for the purpose of pretrial detention in the criminal context.<sup>138</sup> But Judge Robertson’s conclusion that judges are not equipped to make these assessments where national security concerns are implicated is

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Urbina). That Judge Robertson—who refused to formally assess detainee dangerousness in *Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009)—has also taken this view suggests that the judges themselves may not see the membership abandonment inquiry as being animated by dangerousness concerns.

134. *Awad*, 646 F. Supp. 2d at 27.

135. *Id.* at 24; *see also id.* at 27 (concluding reluctantly—after noting that “[t]he evidence is of a kind fit only for these unique proceedings [redacted] and has very little weight”—that it appears more likely than not that Awad was “for some period of time” part of al Qaeda and hence detainable), *aff’d*, 608 F.3d 1 (D.C. Cir. 2010).

136. *Id.* at 24 (acknowledging “the power of Judge Huvelle’s argument” in *Basardh*, but stating without analysis “I decline to follow it in this case”). Judges Lamberth and Hogan also took this view. *Naji al Warafi v. Obama*, No. 09 Civ. 2368, 2010 WL 1404001, at \*11 (D.D.C. Mar. 24, 2010) (Judge Lamberth) (denying habeas petition, but doubting that the petitioner poses a threat to U.S. security and “hop[ing] that this Memorandum does not foreclose the government from continuing to review petitioner’s file”); *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (Judge Hogan).

137. This prediction, of course, assumes that Judge Huvelle would have agreed with Judge Robertson’s assessment of Ali Awad’s dangerousness. It would be too speculative to make a similar prediction about Judge Leon because he has not expressly opined as to *Hamdi*’s emphasis on the prevention of *future* attacks.

138. *See, e.g.*, Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 419–20 (1996) (discussing typical judicial considerations).

at least as sensible.<sup>139</sup> Neither approach is compelled by *Boumediene*, *Hamdi*, or the AUMF.

One may reasonably have concluded that this paradox illustrates the inadequacy of the legal foundation for executive detention and thus militates in favor of further congressional guidance. Yet again the D.C. Circuit has appropriately resolved the issue, holding that detainee dangerousness “is not at issue in [these] habeas corpus proceedings.”<sup>140</sup> This result is a clear loss for detainees, and unquestionably good for the government.<sup>141</sup> Indeed, by endorsing the detention of an individual in whom it is “ludicrous” to perceive a security threat, this approach is, if anything, overly protective of national security prerogatives at the expense of detainee liberty interests. But like the court’s holding as to “substantial support,” whatever else might be said of the ruling, it is difficult to suggest that Congress could craft a standard more protective of national security. The next section argues that initial divergences among judges along the procedural axis have given rise to similarly pro-government rulings from the D.C. Circuit. And again, the result is a jurisprudence that is, if anything, overly protective of national security concerns at the expense of detainees.

#### B. THE PROCEDURAL AXIS: ALLEVIATING THE “UNCOMMON POTENTIAL TO BURDEN THE EXECUTIVE”

Just as district court judges disagreed about the substantive scope of executive detention authority under the AUMF, a number of important divergences along the procedural axis

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139. See *Boumediene I*, 553 U.S. 723, 797 (2008) (“[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”).

140. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (citing *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010)). It is worth noting that the door remains ajar for judges to make *sub silentio* dangerousness assessments by finding that a petitioner has severed his membership in the proscribed group.

141. True, one might argue that prohibiting such assessments may be beneficial for detainees in that there is no principled reason under a dangerousness-responsive approach that would preclude a judge from considering dangerousness to deny an otherwise meritorious habeas petition. That is, in the absence of clear standards, if substantive detention authority were linked to detainee dangerousness “[e]ven the judges who strive conscientiously to apply the law [would] have little choice but to assess . . . dangerousness on the basis of whatever standards they deem appropriate,” *Schall v. Martin*, 467 U.S. 253, 308 (1984) (Marshall, J., dissenting), a result difficult to square with basic notions of fairness. Still, at the time of the D.C. Circuit’s opinion, district court judges had only considered detainee dangerousness as a mitigating, rather than an aggravating, factor.



emerged early in the habeas litigation. Again, one can usefully understand these differences through the prism of deference; in short, some judges are more deferential to the government than others. On the one hand, it is difficult (if not impossible) to draw clear conclusions as to the district courts' general level of deference to the government. While judges have taken steps to accommodate the government as contemplated in *Hamdi* and *Boumediene*,<sup>142</sup> they have also pushed back against attempts to erode the core procedural guarantees conferred by *Boumediene*.<sup>143</sup> On the other hand, it is clear that varying degrees of deference to the government gave rise to a fragmentation of procedural standards. Among other areas, judges disagreed about evidentiary issues and the procedural framework governing petitions. This section assesses these issues in turn, and demonstrates how D.C. Circuit rulings have narrowed these disagreements.

### 1. Evidentiary Divisions

At least two important disagreements have arisen about when and how courts should weigh the government's evidence. First, judges have disagreed about when determinations as to the admissibility of evidence should be made. Some judges consider all the evidence and then decide what to exclude at the end of the merits hearing.<sup>144</sup> The rationale behind this approach is that the relevance of any given piece of evidence may only become clear after other evidence provides the requisite context.<sup>145</sup> Other judges reject this approach and decide what to exclude when each piece of evidence is presented at a prelimi-

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142. For example, the courts have denied expansive discovery requests from detainees urging a broad reading of the CMO provision requiring disclosure of "all reasonably available evidence." *Al-Adahi v. Obama*, 597 F. Supp. 2d 38, 41 (D.D.C. 2009) (quoting *CMO*, No. 08-0442, 2008 WL 4858241, at \*1 (D.D.C. Nov. 6, 2008)). At least one judge has allowed the government to submit ex parte information over petitioners' objections. *Al Odah v. United States*, 608 F. Supp. 2d 42, 45 n.3 (D.D.C. 2009) (justifying the apparent departure from precedent on the ground that "proceedings involving detainees such as Petitioners are unprecedented").

143. *E.g.*, *Zaid v. Bush*, 596 F. Supp. 2d 11, 12 (D.D.C. 2009) (rejecting the government's claim that practical difficulties of producing certain evidence are so great as to endanger national security in light of *Boumediene's* mandate to provide "prompt[]" and "meaningful" review).

144. *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) (Judge Kollar-Kotelly).

145. *Id.*

nary hearing.<sup>146</sup> Indeed, one judge has criticized the former approach as “a direct inversion of what takes place in any other kind of adjudicative process, where factual findings are made on the basis of admissible evidence, not the other way around.”<sup>147</sup>

If the goal of the habeas hearing is to get at the truth of the detainee’s status and hence the lawfulness of his detention—to “cut through all forms and go to the very tissue” of the matter<sup>148</sup>—it is difficult to credit the idea that judges must make piecemeal admissibility determinations. Such rigid adherence to procedure would all but ensure that relevant information is lost, particularly in light of the atypical evidence collection that characterizes many of the detainee cases.<sup>149</sup> While it may be true that an ex post approach to admissibility determinations is a “direct inversion” of standard operating procedure in a jury trial, the Supreme Court has repeatedly underscored the novelty of the Guantánamo habeas proceedings, and the corresponding need to tailor procedures accordingly.<sup>150</sup>

Similarly, judges have disagreed about how a habeas court is to approach the weighing of evidence. Much of the evidence in the habeas cases was not collected with a view to its use in future court proceedings.<sup>151</sup> Accordingly, the government’s case is sometimes a patchwork or “mosaic” of allegations, which, when taken together, are claimed to show that the detainee satisfies either the “part of” or “support” standards.<sup>152</sup> At least one judge has rejected this “mosaic theory.”<sup>153</sup> Yet an approach

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146. *Bostan v. Obama*, 662 F. Supp. 2d 1, 8 (D.D.C. 2009) (Judge Walton).

147. *Id.* at 7–8 (citation omitted).

148. *Boumediene I*, 553 U.S. 723, 785 (2008) (citation and quotation marks omitted).

149. *See, e.g.*, *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 55–56 (D.D.C. 2009) (“One consequence of using intelligence reports and summaries [as evidence] . . . is that certain questions simply cannot be answered . . . . Sizeable gaps may appear in the record and may well remain unfilled . . . .”); *see also* Chesney & Goldsmith, *supra* note 13, at 1088 (explaining that the procedural and evidentiary standards in the military detention context are generally less demanding in part because “[s]oldiers on the battlefield are not law enforcement officers and in most instances lack the time, resources, or training to collect evidence with an eye toward eventual use in court proceedings”).

150. *Boumediene I*, 553 U.S. at 795–96; *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (plurality opinion).

151. *See, e.g.*, *Ali Ahmed*, 613 F. Supp. 2d at 55–56; Chesney & Goldsmith, *supra* note 13, at 1088.

152. *Ali Ahmed*, 613 F. Supp. 2d at 55–56.

153. *Id.* at 55–56 (Judge Kessler) (“The kind and amount of evidence which satisfies the intelligence community . . . certainly cannot govern the Court’s rul-

to admissibility that *first* considers all the evidence against a detainee and *then* decides what is admissible is the functional equivalent of such an approach.<sup>154</sup> While there are arguments to commend each method, there is little to commend a system that applies both standards unequally among detainees.

But the application of divergent standards is much less likely following the D.C. Circuit's opinion in *Al-Adahi v. Obama*.<sup>155</sup> In that case, holding that the district court "clearly erred in its treatment of the evidence and in its view of the law," the panel reversed Judge Kessler's grant of Al-Adahi's habeas petition with instructions for denial on remand.<sup>156</sup> The district court's analysis was "infected" by the "fundamental mistake" of considering each piece of evidence in isolation, rather than as part of a larger puzzle.<sup>157</sup> More specifically, the lower court erroneously reasoned that "if a particular fact does not itself prove the ultimate proposition (*e.g.*, whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist."<sup>158</sup> This approach led the court to the "manifestly incorrect—indeed startling—conclusion that 'there is no reliable evidence in the record that Petitioner was a member of al-Qaida.'"<sup>159</sup>

While the court did not directly address the timing of admissibility determinations or explicitly reference the "mosaic theory," its discussion is plainly relevant to these issues. The panel's holding suggests, in short, that judges are to consider each piece of evidence in the broader context of the government's case against the detainee. Similarly, the D.C. Circuit has also recognized "the reality that district judges are experienced and sophisticated fact finders" whose "eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable

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ing."); *see also, e.g., Boumediene II*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008).

154. *Cf., e.g., Al Mutairi v. United States*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) (making admissibility determinations after considering all the evidence "in . . . context").

155. 612 F.3d 1102 (D.C. Cir. 2010).

156. *Id.* at 1111.

157. *Id.* at 1105–06 (internal quotation marks and citation omitted).

158. *Id.* at 1105 (citation omitted).

159. *Id.* at 1106. The court explained these errors in terms of a failure to appreciate conditional probability analysis, the key insight of which is that the occurrence of some events may make the occurrence of other events more or less likely. *Id.* at 1105.

juries.”<sup>160</sup> These statements provide much needed guidance to the district courts. Moreover, to the extent the D.C. Circuit has erred, it has done so in favor of detention rather than erroneous release. Both of these points undermine any national security incentive that Congress might have to provide further guidance to the courts in the form of new detention legislation.

## 2. Framework Divisions

One may also worry that procedural differences among judges might lead to different results for similarly situated detainees. As contemplated in Judge Hogan’s CMO, judges can tailor the procedural framework to fit their cases.<sup>161</sup> Many such alterations are modest and unlikely to lead to variation in substantive outcomes.<sup>162</sup> Some differences, however, are more substantial and may, in theory, lead to the imposition of a more onerous burden on the government in some cases than in others. Judge Kessler, for example, is unwilling to consider according the government’s evidence a rebuttable presumption of accuracy,<sup>163</sup> whereas other judges have not formally foreclosed this option.<sup>164</sup> It is difficult to determine whether such frame-

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160. *Al-Bihani v. Obama*, 590 F.3d 866, 880 (D.C. Cir. 2010).

161. *CMO*, No. 08-0442, 2008 WL 4858241, at \*1 (D.D.C. Nov. 6, 2008). This approach is in line with the Supreme Court’s directive. *See Boumediene I*, 553 U.S. 723, 788–89 (2008) (leaving it to the district courts to craft appropriate procedures).

162. *Compare Boumediene I*, 553 U.S. at 788–89 (2008) (requiring the government to file “a succinct statement explaining its legal justification for detaining the petitioner”), *with Al-Adahi v. Bush*, 585 F. Supp. 2d 78, 79 (D.D.C. 2008) (requiring the government to file “a succinct (one or two paragraph) statement explaining the specific legal grounds upon which it relies for detaining each Petitioner”).

163. *See Al-Adahi*, 585 F. Supp. 2d at 81. Moreover, whereas the CMO requires the government to provide petitioner with “all reasonably available [exculpatory] evidence in its possession,” *CMO*, 2008 WL 4858241, at \*1, Judge Kessler requires the government to provide “all reasonably available [exculpatory] evidence in its possession or that the Government can obtain through reasonable diligence,” *Al-Adahi*, 585 F. Supp. 2d at 79 (emphasis added). Judge Kessler has also elaborated beyond the CMO that “[t]he Government bears a continuing obligation to update and supplement” the exculpatory evidence it presents to the detainee. *Id.* at 80.

164. *See Boumediene I*, 553 U.S. 723, 788–90 (2008) (leaving it to the district courts to craft appropriate procedures); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) (stating that a rebuttable presumption “in favor of the Government’s evidence” might be permissible but is not mandatory). In practice, however, district court judges have denied nearly all government requests for a presumption of accuracy. *E.g.*, *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at \*4 (D.D.C. Aug. 21, 2009) (“[T]he Court must . . . make the final judgment as to the reliability of these documents, the weight to be

work divisions lead to unfairness for either the government or detainees in part because much depends on how stringently judges enforce these standards. Critically, however, the D.C. Circuit has approved wide discretion for district court judges as to procedural matters.<sup>165</sup> Indeed, “appropriate habeas procedures cannot be conceived of as mere extensions of an existing doctrine. Rather, those procedures are a whole new branch of the tree.”<sup>166</sup> This result is as it should be. District court judges are well-suited to craft procedures that accommodate the government’s national security interests, while ensuring accurate fact-finding and hence a fair hearing for detainees.<sup>167</sup> It would be unwise to mandate more rigid procedures for this “unprecedented” process. While some variations between judges as to procedural matters will persist, it is far from clear that these differences are so great as to lead to differences in substantive outcomes.

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given to them, and their accuracy.”), *rev’d on other grounds*, *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010). *See generally* HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, HABEAS WORKS: FEDERAL COURTS’ PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES 21 (2010) [hereinafter HABEAS WORKS], available at <http://www.humanrightsfirst.org/pdf/Habeas-Works-final-web.pdf>. By contrast, judges have been much more likely to accord the government’s evidence a rebuttable presumption of authenticity. *E.g.*, *Ahmed v. Obama*, 613 F. Supp. 2d 51, 54–55 (D.D.C. 2009). *See generally Al-Adahi*, 2009 WL 2584685, at \*3; HABEAS WORKS, *supra*, at 22. *Hamdi* offers little guidance on the point. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) (stating that a rebuttable presumption “in favor of the Government’s evidence” might be permissible but is not mandatory).

165. *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010) (“[I]n the shadow of *Boumediene*, courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified.”); *see also Al-Adahi*, 613 F.3d at 1111 n.6 (declining to recognize the district court’s separate ruling on each item of hearsay as an abuse of discretion); *Bensayah v. Obama*, 610 F.3d 718, 724 (D.C. Cir. 2010) (declining to find that the district court abused its discretion and citing *Boumediene*’s recognition of the district court’s discretion to protect sources and intelligence gathering methods).

166. *Al-Bihani*, 590 F.3d at 877.

167. *See Boumediene I*, 553 U.S. at 796 (noting that such questions are within the “expertise and competence” of the district courts); *Hamdi*, 542 U.S. at 539 (anticipating that district courts will proceed with caution and “pay proper heed both to the matters of national security that might arise . . . and to the constitutional limitations safeguarding essential liberties”).

### III. HABEAS WORKS: THE PRAGMATIC CASE AGAINST NEW DETENTION LEGISLATION

In September 2009, President Obama declined to seek new detention legislation.<sup>168</sup> One may have doubted the wisdom of this decision in the early months of the habeas litigation. Perhaps an inevitable consequence of *Boumediene*,<sup>169</sup> the vagueness of the legal authority on which the government rests its ability to detain suspected terrorists initially gave rise to a deeply fractured jurisprudence in the district courts.<sup>170</sup> This state of affairs led some commentators, including judges and legislators, to call for Congress to intervene to provide guidance for the courts.<sup>171</sup> As an abstract policy matter, it may well be preferable to build detention standards from the top down, through legislation or administrative regulations, rather than from the ground up, through the common-law process mandated by *Boumediene*. Part II took this argument seriously, and showed that the first eighteen months of habeas litigation were indeed plagued by substantive and procedural divergences among judges that arguably threatened equal application of the law and, possibly, national security prerogatives. But time has vindicated President Obama's decision. Part II also showed that the D.C. Circuit has resolved the most salient of these divergences in less than seven months, and in a manner that almost uniformly favors the government and thus undermines the key motivation for congressional action. In short, further

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168. *E.g.*, Peter Baker, *Obama Says Current Law Will Support Detentions*, N.Y. TIMES, Sept. 24, 2009, at A23, available at 2009 WL 18790454.

169. Chief Justice Roberts all but predicted as much in his dissent. *See Boumediene I*, 553 U.S. at 801–03 (Roberts, C.J., dissenting) (bemoaning the majority's preference for a "set of shapeless procedures to be defined by federal courts at some future date" over a "review system designed by the people's representatives").

170. *See supra* Part II.A–B (describing both substantive and procedural divergences among judges).

171. *See* Wittes & Goldsmith, *Will Obama Follow Bush or FDR?*, *supra* note 15; Goldsmith, *supra* note 13. The argument for detention legislation, of course, is not uniquely responsive to *Boumediene*. *See, e.g.*, WITTES, *supra* note 77, at 131–50. And yet the decision did seem to heighten the urgency of some calls for congressional action. Draft "war on terror" detention legislation, for example, became more prevalent. *See* BENJAMIN WITTES & COLLEEN A. PEPPARD, BROOKINGS INST., DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION 3–4 (2009), available at [http://www.brookings.edu/papers/2009/0626\\_detention\\_wittes.aspx](http://www.brookings.edu/papers/2009/0626_detention_wittes.aspx); Madeline Morris et al., *After Guantanamo: War, Crime, and Detention*, HARV. L. & POL'Y REV. ONLINE (July 14, 2009), [http://www.hlpronline.com/Morris\\_HLPR\\_071409.pdf](http://www.hlpronline.com/Morris_HLPR_071409.pdf) (appending draft of proposed legislation).

detention legislation is unnecessary because habeas works. The goal of this Part is to catalogue why new legislation is unnecessary, unwise, and indeed, unlikely. It argues that the most prudent course is also the most politically palatable: to allow the habeas litigation to continue to unfold.

A. NEW LEGISLATION IS NOT SUBSTANTIVELY NECESSARY

The problems with pressing for new detention legislation can be distilled to issues of necessity, motivation, and competence. Building on the above description of the habeas litigation, this section tackles the first of these issues and argues that further legislation is unnecessary to bolster either of the two primary issues at stake in the habeas litigation—national security and detainee welfare.

Many have urged further detention legislation, including D.C. judges presiding over the habeas litigation. Thomas Hogan, Chief Judge of the D.C. district courts and the author of the procedural order that governs the Guantánamo litigation, urged congressional action by highlighting the uniformity issues discussed above. “It is unfortunate,” said Judge Hogan, “that the Legislative Branch of our government, and the Executive Branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases.”<sup>172</sup> The differences among judges point to the “need for a national legislative solution with the assistance of the Executive so that these matters are handled promptly and uniformly and fairly for all concerned.”<sup>173</sup> Similarly, Judge Janice Rogers Brown of the D.C. Circuit suggested that a “court-driven process” is not best suited to “protect[] both the rights of petitioners and the safety of our nation.”<sup>174</sup> Rather, “the circumstances that frustrate the judicial process are the same ones that make this situation particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution.”<sup>175</sup> In short, “[w]ar is a challenge to law, and the law must adjust.”<sup>176</sup>

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172. See HABEAS LAWMAKING, *supra* note 15, at 252 (quoting Transcript of Hearing at 7, *Anam v. Obama*, 696 F. Supp. 2d 1 (D.D.C. 2009) (No. 04-1194)).

173. See *id.*

174. *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring).

175. *Id.* at 882.

176. *Id.*

Perhaps. And yet this Note has demonstrated that over the last two years, the law has done precisely that: adjust to meet the challenges of the Guantánamo litigation. Divergences among district court judges have narrowed as the jurisprudence has matured, and the D.C. Circuit has resolved most issues in favor of the government. Still, Judge Brown rightly points to the twin reasons that might conceivably animate further detention legislation: national security and detainee welfare. Neither presents a convincing rationale for congressional action.

First, the notion that Congress would better protect detainee welfare is simply not credible. The only lobbies concerned with detainee welfare—human rights and civil liberties groups—have long opposed further detention legislation because, they reason, it would further entrench an illegitimate system of detention.<sup>177</sup> But even assuming the legitimacy of

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177. *E.g.*, Press Release, ACLU, Obama Administration Will Not Seek Indefinite Detention Legislation (Sept. 24, 2009), available at <http://www.aclu.org/national-security/obama-administration-will-not-seek-indefinite-detention-legislation>. As a practical matter, however, given the logic of *Hamdi* (the President can detain some suspected terrorists) and *Boumediene* (some of them can challenge their detention in federal court), it is too late in the day to debate the merits of creating such a system. See Goldsmith, *supra* note 13, at 2 (arguing that the national security court debate “is largely a canard”).

It is worth pausing to consider the alternative to habeas that many such groups put forward—the trial of all remaining Guantánamo detainees (and all future terrorism suspects) in federal criminal court. *Id.* This position is deeply misguided. While the Guantánamo litigation demonstrates that the courts are, indeed, capable of fashioning flexible remedies to protect core government interests, it also shows that the government’s ability to detain even the most dangerous of suspects can be sharply circumscribed by evidentiary defects. See, e.g., *Bostan v. Obama*, 662 F. Supp. 2d 1, 5 (D.D.C. 2009) (stating that the habeas petition will proceed even if the government’s only evidence against petitioner is found to be inadmissible hearsay); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56 (D.D.C. 2009) (“The kind and amount of evidence which satisfies the intelligence community . . . certainly cannot govern the Court’s ruling.”). The burden on the government is even higher in the criminal context, where judges hew more rigorously to the rules of evidence and the government must prove its case “beyond a reasonable doubt,” rather than by a preponderance of the evidence. See Chesney & Goldsmith, *supra* note 13, at 1087–88. Indeed, mandating that *all* suspected terrorists face trial in federal court would undercut the government’s incentives to pursue legal remedies and would create perverse incentives, including making more attractive the option of killing suspected terrorists rather than risk a loss in federal court. *E.g.*, *Capture or Kill? Lawyers Eye Options For Terrorists* (NPR radio broadcast Oct. 8, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=113612058> (“Many national security experts interviewed for this story agree that it has become so hard for the U.S. to detain people that in many instances, the U.S. government is killing them instead.”). Having apparently internalized this



some form of executive detention, it would be naïve to suggest that the political branches mobilize for the benefit of Guantánamo detainees. To the extent members of Congress are incentivized to be “tough on terrorism,”<sup>178</sup> one cannot reasonably expect detention reform to enhance fairness to detainees. Indeed, the jurisdiction-stripping legislation struck down by *Boumediene* demonstrates that most members of Congress object to detainees’ access to the court system in the first instance.<sup>179</sup> True, even among opponents of further legislation, there are few vocal advocates of the current state of affairs.<sup>180</sup> From a pragmatic detainee-welfare perspective, however, as between new legislation and the current process of habeas review, the current process is the lesser of two evils.<sup>181</sup>

Although one cannot credibly urge congressional action to protect detainee rights, one may do so for national security reasons. An argument that the fractious lower court jurisprudence is in part the result of judges whittling away at the President’s detention authority may well have political bite.<sup>182</sup> The national security argument for further detention legislation is, in short, that the President’s continued ability to detain dangerous individuals depends on clearer standards from Congress. One might further bolster this argument by noting that there is more at stake than detainee liberty. The rules federal judges are crafting will affect more than detention at Guantánamo; indeed, they are likely to influence military policymaking for years to come.<sup>183</sup> The political branches have every incentive

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message, President Obama has increased the use of targeted killing far beyond its use in the Bush years. Shane Harris, *Are Drone Strikes Murder?*, NAT’L J., Jan. 9, 2010, at 23.

178. *E.g.*, Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 530–31 (2006).

179. *See supra* note 40 and accompanying text.

180. *See, e.g.*, Deborah Pearlstein, *Catching Up With the Critics*, *OPINIO JURIS* (Oct. 3, 2009, 10:06 AM), <http://opiniojuris.org/2009/10/03/catching-up-with-the-critics/>. A recent report by Human Rights First and The Constitution Project is a notable exception. *See* *HABEAS WORKS*, *supra* note 164, at 27–28.

181. One might challenge this statement in view of some panel opinions that can fairly be described as hostile to detainees. *E.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010) (criticizing the district court for “display[ing] little skepticism about [petitioner’s] explanations for his actions”). Still, it is difficult to imagine that, all things considered, Congress would be more protective of detainee rights.

182. *Cf.* Balkin & Levinson, *supra* note 178, at 530–31.

183. *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010); Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof*:

the argument goes to ensure that the habeas litigation does not impinge on the military's ability to prosecute the "war on terror" by targeting and detaining dangerous individuals.

But these security-oriented arguments ring hollow in the face of the overwhelmingly pro-government jurisprudence emerging from the D.C. Circuit. In the dim light cast by *Boumediene* and *Hamdi*, the D.C. Circuit has suggested that the vague mandate of the AUMF establishes, for example, that a petitioner's presence at an al Qaeda guesthouse is (almost certainly) independently sufficient to justify detention.<sup>184</sup> One panel intimated that district court judges should be particularly skeptical of detainees' evidence.<sup>185</sup> Moreover, the court has vigorously questioned the necessity of the preponderance standard—uniformly adopted by district court judges and accepted by the Obama Administration—and all but invited the government to press for the lower "some evidence" standard, which has not been seriously advanced since the Bush Administration.<sup>186</sup> The D.C. Circuit has also translated the nonbinding suggestion from four members of the *Hamdi* plurality that hearsay "may need to be accepted as the most reliable available evidence from the Government"<sup>187</sup> into the repeated holding that "hearsay . . . is always admissible."<sup>188</sup> And the court disap-

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*Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 263–65 (2009); Savage, *supra* note 81.

184. See *Al-Adahi*, 613 F.3d at 1108 ("Al-Adahi's voluntary decision to move to an al-Qaida guesthouse, a staging area for recruits heading for a military training camp, makes it more likely—indeed, very likely—that Al-Adahi was himself a recruit. There is no other sensible explanation for his actions. This is why we wrote in *Al-Bihani* that an individual's attendance at an al-Qaida guesthouse is powerful—indeed 'overwhelming[']—evidence that the individual was part of al-Qaida." (quoting *Al-Bihani*, 590 F.3d at 873 n.2)).

185. See *id.* at 1111 (criticizing the district court for "display[ing] little skepticism about [petitioner's] explanations for his actions").

186. See *id.* at 1104–05. This point stands as a counterargument to the thesis advanced here. Specifically, while the primary role of the D.C. Circuit has been to resolve disagreements among lower court judges, the court has also injected some uncertainty into the process. A formal acceptance of the "some evidence" standard would be very destabilizing to the Guantánamo jurisprudence.

187. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (plurality opinion). Justice Souter explicitly disclaimed his assent on these points. *Id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("I do not mean to imply agreement that the government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi . . . or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.").

188. *Al-Bihani*, 590 F.3d at 879. Although *Al-Bihani* was the first instance in which the D.C. Circuit made this leap from *Hamdi*'s observation, it has fre-

proves of judicial assessments of detainee dangerousness, even when this approach would lead to the continued detention of an individual in whom it is “ludicrous” to perceive a security threat.<sup>189</sup> In sum, it is difficult to characterize the D.C. Circuit case law as giving rise to serious national security concerns.

#### B. MOTIVATION AND COMPETENCE

Apart from the point that new legislation is not substantively necessary, perhaps the most obvious—if unremarkable—argument against further detention legislation is that it is unlikely. Passing detention legislation would require President Obama to expend political capital at a time when other issues dominate the national agenda, something the President is no doubt even more reluctant to do now than when he first declined to do so in September 2009.<sup>190</sup> The same is true of most legislators; it is well recognized that politicians “have a strong incentive to avoid taking up a question that has been provisionally settled by a court.”<sup>191</sup> In short, even assuming new legislation to be the ideal course of action, it is far from clear that Congress could actually pass it. And most legislators may not even be tempted to try given Congress’s ill-fated history in this area.<sup>192</sup>

Still, one might argue that the courts are not institutionally competent to resolve the policy questions embedded in refining the vague detention criteria of the AUMF.<sup>193</sup> The habeas lit-

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quently relied on this holding. *E.g.*, *Al Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010).

189. *See Awad*, 608 F.3d at 11 (citing *Al-Bihani*, 590 F.3d at 874).

190. *See, e.g.*, Baker, *supra* note 168 (“Given the opposition in Congress to Mr. Obama’s plan to close Guantánamo, especially if it means transferring detainees to prisons on American soil, the prospect of writing legislation that would pass both houses appears daunting at best.”). That Lindsey Graham’s negotiations with the White House over detention issues have been unproductive seems to confirm the President’s lack of interest. *See Gerstein, supra* note 15.

191. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995).

192. Senator Lindsey Graham is an important exception. Ben Wittes, an early advocate of new detention legislation and drafter of an August 2010 habeas reform bill introduced by Lindsey Graham, has called the Senator “the only voice for something that really should be a matter of political consensus.” Gerstein, *supra* note 15. As for the lack of institutional motivation, both Congress and President Bush were repeatedly rebuffed by a rights-protective Supreme Court. *See supra* notes 32–42 and accompanying text.

193. Some insist that the courts are merely “interpreting and applying” substantive detention criteria, while others argue that the courts are making substantive law, and hence detention policy. *Compare* HABEAS WORKS, *supra*

igation has disproven this thesis. The animating concern here is, again, national security. While the courts have taken steps to protect detainee rights—and some district court judges have been more aggressive in this respect than others—the standards emerging from the D.C. Circuit do not protect detainee rights at the expense of national security concerns. Indeed, to the extent that court has erred, it has done so in favor of the government. For example, one panel went so far as to hint that district court judges should be particularly skeptical of detainees' explanations, given that al Qaeda members are trained "to make up a story and lie."<sup>194</sup> One might observe that such skepticism would seem to put the cart before the horse by assuming detainees to be members of al Qaeda, whereas the whole point of a habeas proceeding is to determine whether each petitioner in fact meets that standard. Regardless, the limited point here is that the D.C. Circuit seems to favor resolving "close calls" in favor of the government.

Furthermore, even if, from an abstracted institutional perspective, Congress is better suited to the task, there is good reason to doubt that Congress would, in fact, produce reasoned, sensible detention legislation. New legislation is likely to be less the result of reasonable deliberation and more a function of interest group politics.<sup>195</sup> A habeas reform bill introduced by Lindsey Graham in early August 2010 illustrates this point.<sup>196</sup> The bill would require the D.C. district courts to give "utmost deference" to the executive's determination as to whether a particular organization is associated with al Qaeda or the Tali-

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note 164, at 27 (interpreting and applying), *with* HABEAS LAWMAKING, *supra* note 15 (lawmaking). At a minimum, Part II demonstrates that policy judgments unquestionably animate at least some judges' interpretation of detention standards—an observation that should be generally unremarkable. *See* RICHARD A. POSNER, *HOW JUDGES THINK* 47 (2008) ("Attitudinalists and legalists disagree about the extent of political judging rather than about its existence."). Still, putting aside any potential non-delegation issues, it is not inconsistent to recognize the profound policy implications of the habeas litigation, and maintain that the courts are competent to adjudicate habeas petitions.

194. *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010) (criticizing the district court for "display[ing] little skepticism about [petitioner's] explanations for his actions" and for failing to make any formal finding as to credibility).

195. This public choice insight has a robust scholarly pedigree. *E.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–25 (1991); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983); *see also* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250 (1992) (collecting sources).

196. *See* Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (2010).

ban.<sup>197</sup> In essence, this provision would take from Congress its constitutional power to determine the entities with which the United States is at war.<sup>198</sup> The criticism, then, is that even if institutionally competent, Congress may not be politically competent to pass detention legislation that would be any more effective than the habeas litigation has proven to be.<sup>199</sup> And, like the Graham bill, resulting legislation may well raise serious constitutional concerns, the resolution of which would only further delay the habeas proceedings. In any case, new legislation would also be subject to interpretation by courts, and so—rather than clarifying the law—may only destabilize the increasingly coherent jurisprudence.<sup>200</sup>

It bears emphasizing that the political branches *could* pass new detention legislation that appropriately reckoned with the implications of *Boumediene*, ensuring that detainees have a prompt, meaningful chance to contest their status, to assess the evidence against them, and so on.<sup>201</sup> The suggestion here, however, is that the game would not be worth the candle: the federal courts in Washington, D.C. have already done this work for them.

### C. CONGRESSIONAL INACTION

The best option is, in the end, the simplest one. The political branches should allow the courts to continue to adjudicate habeas petitions on the basis of the AUMF as construed in *Hamdi* and in light of the Court's guidance in *Boumediene*. As has happened over the last two years, remaining differences among judges will likely narrow over time as the jurisprudence matures.<sup>202</sup> True, as Judge Brown pointed out in urging con-

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197. *Id.* § 2256(d)(2).

198. *See* U.S. CONST. art I, § 8.

199. Still, one might persist that the interest group argument tends to have less bite in the context of national security emergencies. *See* Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 761 (1992); *see also* Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method to Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365, 382 (2008). But nearly ten years after 9/11 and after two years of habeas litigation, the unifying impetus to protect the nation from attack is likely to have given way to the traditional incentive of elected officials—reelection. *Cf. id.*

200. *See, e.g.*, HABEAS WORKS, *supra* note 164, at 28.

201. *See supra* text accompanying notes 44–53.

202. *See generally* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240–41 (1999) (describing the common-law process).

gressional action, the common-law process depends on incrementalism and eventual correction, and may be most effective where there are a significant number of cases brought before a large number of courts; by contrast, the number of Guantánamo detainees is limited, the circumstances of their confinement are unique, and all cases are heard before the D.C. courts.<sup>203</sup> Yet, as Part II demonstrated, even as district court judges have rejected the alternative approaches of their colleagues on both substantive and procedural issues,<sup>204</sup> the common-law process has already worked to resolve many of these disagreements. And that all habeas cases are heard before the federal courts in Washington, D.C. is a virtue rather than a vice, as it allows the D.C. judges to rapidly accumulate expertise.<sup>205</sup>

A central purpose of the habeas litigation is to allow each detainee a fair and equal chance to challenge his confinement. The early months of litigation gave reasons to doubt whether that was happening. But times have changed. Detainees need not wait for the law to cohere on some future date; it is already beginning to do so. While detainees do not benefit from all aspects of the jurisprudence emerging from the D.C. Circuit, the law is at least becoming coherent and consistent enough to provide every detainee the same, genuine opportunity to challenge his detention.

The D.C. Circuit has not resolved every divergence, nor could it. Some disagreements, rooted in different conceptions of the appropriate amount of deference to accord the government in light of *Boumediene*, will persist.<sup>206</sup> Given the convergence of

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203. See *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring).

204. *E.g.*, *Bostan v. Obama*, 662 F. Supp. 2d 1, 3 (D.D.C. 2009) (procedure); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (substance).

205. See *HABEAS WORKS*, *supra* note 164, at 5.

206. Another critical issue, for example, is the government's ability to protect sensitive information from public scrutiny for national security reasons. The district courts have ordered the disclosure of such information over the government's objection in certain circumstances. See, *e.g.*, *In re Guantánamo Bay Detainee Litig.*, 634 F. Supp. 2d 17, 22–23 (D.D.C. 2009) (“No one is better positioned to challenge the government's reliance on a petitioner's statements than the petitioner himself.”); see also *In re Guantánamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009) (denying a motion to seal all unclassified factual returns). Still another crucial—and in some cases dispositive—issue is the extent to which judges will rely on detainees' statements thought to be “tainted” by improper interrogation methods. See Chisun Lee, *Judges Reject Evidence in Gitmo Cases*, NAT'L L.J., Aug. 16, 2010, <http://www.law.com/jsp/nlj/index.jsp> (search “National Law Journal” for “Chisun Lee”; then follow “Judges reject evidence in Gitmo cases” hyperlink) (last visited Oct. 19, 2010).

substantive detention standards discussed above, such disagreements may increasingly be about procedural matters. From a uniformity standpoint this result is less of a problem. Procedure is an area of unique judicial expertise; district court judges are well suited to develop procedures that ensure accurate fact-finding and a fair—or at least reasoned and public—resolution of each habeas case.<sup>207</sup> It would be unwise to mandate a one-size-fits-all procedural framework for cases that are widely recognized to be “unique” and “unprecedented.”<sup>208</sup>

### CONCLUSION

The Guantánamo habeas cases have challenged our court system. With little guidance from Congress or the Supreme Court, federal judges have been muddling through the habeas cases for over two years. But while district court judges have disagreed about both substantive and procedural issues, the D.C. Circuit has resolved the most salient of these disagreements. As a result, the habeas jurisprudence is increasingly coherent, and effectively provides each detainee with the same, meaningful chance to challenge his detention. Moreover, the many detainee wins have not come at the expense of laying precedent that threatens U.S. national security. Indeed, the standards emerging from the D.C. Circuit are, if anything, overly protective of national security prerogatives at the expense of detainee liberty. For detainees as well as for the government, then, habeas works.

Many eight-or-more-year denizens of Guantánamo never belonged there, and the story of their detention will no doubt long stain the reputation of the United States as a champion of individual liberty and human rights. But the story recounted

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For a lengthier descriptive treatment of other procedural issues, see HABEAS LAWMAKING, *supra* note 15, at 32–64.

207. See *Boumediene I*, 553 U.S. 723, 730, 795–96 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion). Indeed, the evidentiary standards emerging from the federal courts mirror one early proposal for legislative reform. See Goldsmith, *supra* note 13, at 12 (urging evidentiary procedures akin to those used in international criminal tribunals, which typically permit all relevant, probative, and reliable evidence).

208. See *Awad v. Obama*, 608 F.3d 1, 12 (D.C. Cir. 2010) (“Because of the unique nature of the conflict in which the United States is now involved, the Supreme Court has recognized that we may need to alter or amend our normal procedures . . . .”); *Al Odah v. United States*, 608 F. Supp. 2d 42, 45 & n.3 (D.D.C. 2009) (justifying an apparent departure from precedent on the ground that “proceedings involving detainees such as Petitioners are unprecedented”); see also *Boumediene I*, 553 U.S. at 792–93; *Hamdi*, 542 U.S. at 533–34.

here is not an unmitigated failure of these principles. *Boumediene* gave detainees access to a process that has led many to freedom; Fouad Al-Rabiah, the aviation engineer discussed in the Introduction, is now at home in Kuwait.<sup>209</sup> In sum, the habeas cases decided so far suggest that the wisest course of action is also the simplest and most politically attractive. Congress should stand back and allow the habeas litigation to proceed.

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209. See, e.g., *The Guantánamo Docket: Fouad Mahmoud Al Rabiah*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/551-fouad-mahoud-hasan-al-rabia> (last visited Oct. 19, 2010). Of course, Al Rabiah's release should not obscure the fact that he lost eight years of his life in Guantánamo Bay, Cuba.