The Eroding Preponderance Standard: The DC Circuit Strikes Back

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Abstract

The open-ended holding of the United States Supreme Court in *Boumediene v. Bush* has given the DC Circuit an enormous degree of discretion in its handling of Guantanamo detention cases. Combined with the monopoly review power over detention cases given to the DC Circuit, the result has been a diminishing and arguably meaningless standard of evidentiary review for detainees. This article examined recent decisions in *Al-Latif* and *Al-Adahi* to pierce the veil on the Circuit Court judges who hold the fate of detainees in their hands.

Introduction

The preponderance standard is disturbingly amorphous and, in practice, highly subjective. This has allowed the DC Circuit Court of Appeals the flexibility to erode the preponderance standard in Guantanamo detainee cases. The DC Circuit has applied the preponderance standard in a method that allows detention under flimsier and flimsier evidence. Additionally, certain judges on the D.C. Circuit Court of Appeals have intimated that even this highly subjective standard should be thrown out and replaced with a simple “some evidence” standard.

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Judicial review is practically hampered in detainee cases because the executive holds (or can hold) a near monopoly on information related to the detention. If a judge need only decide whether a detainee is "probably" connected to the Taliban or al-qaeda, based on the information the executive presents, the standard is already very low.

In practice, the difference between the total executive monopoly on detention determinations and the post Boumediene system are usually little different: the combination of the low preponderance standard with general deference to the evidence provided by executive agencies and sympathy for the security goals of the executive results in an almost total bar to significant investigation into claims of detainees. Only in cases where the executive appears to have no, or nearly no, credible evidence is the review useful. Certainly this is an improvement from indefinitely detaining individuals based on no evidence, but it does little to help those who are held on weak, incorrect, or flimsy evidence.

This paper is divided into three sections. The first section is develops a background on the preponderance standard as applied in detention cases and analyzes the weaknesses of system. This section also examines the government’s burden in detainee cases. The third and longest section examines how the DC circuit gained a monopoly on detainee cases and what that means in light of the DC Court of Appeals’ overt resistance to the holding of Boumediene. This section will also look at statements from some DC Court of Appeals judges that the preponderance standard should be abandoned for an even weaker standard and how the DC Court of Appeals has even intimated that it now applies the preponderance standard in name only. In particular, this discussion will focus on the case Al-Adahi and the subsequent writings by its author, Judge Randolph, which flush out the impetus of the DC Circuit’s criticism. Included in this section is a discussion of the recent DC Circuit case Al-Latif, which extended the presumption afford to
government evidence. The third and final section encourages the Supreme Court to take a case from the DC circuit to adopt the preponderance standard explicitly and give some indications as to what that actually means in a habeas Guantanamo detention case.

I. Why the Preponderance Standard and What it Means

Due to the nature of the evidence used in detention hearings, it is usually supplied by the government. This is because the detainees themselves, thousands of miles from the scene of their detention, are ill-equipped to conduct their own investigation of the actual scene of the crime. They are also likely unable to challenge the statements made by witnesses or sources in the theatre of war.

Indeed, unlike in the American Criminal justice system, detainees are even limited to access to exculpatory evidentiary materials due to their secretive and classified nature. This puts detainees at an enormous disadvantage to challenge any evidence the government might provide.

Once Boumediene was decided, the determination of what standard of proof would be required was left for lower courts to decide. The District Courts of the District of Columbia Federal Circuit accepted the preponderance standard uniformly. The Obama administration has not argued for a lower standard either. Therefore, the preponderance standard has been adopted

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2 MCA, §3 (to be codified at 10 U.S.C. §949j(r)).
4 Nathaniel Nesbitt, Note, Meeting Boumediene’s Challenge: The Emergence of An Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation, 95 MINN. L. REV. 244, 277 (2010).
5 Id.
basically by default with district courts and the government agreeing that the preponderance standard should be used.

What this presumption means in practice was stated by DC Circuit Chief Judge Hogan in *In re Guantanamo Bay Detainee Litigation*.⁶ The preponderance standard means that a judge must find that a detainee is “more likely than not” that the detainee is legally held.⁷ Included in that determination, however, is a possible rebuttable presumption of the “accuracy and/or authenticity” of the government’s evidence.⁸ The judge also has the ability to determine whether or not to allow the submission of hearsay evidence.⁹

The government, unequivocally, enjoys a rebuttable presumption of authenticity or regularity of any documents submitted as evidence. This is not unique to detainee habeas cases and is based in the Federal Rules of Evidence.¹⁰ What is especially unique, however, are the circumstances of a Guantanamo habeas case. The documents, or report, supplied by the military are very likely the only evidence available. Access to witnesses and other traditional forms of evidence halfway around the world is obviously limited. Therefore a presumption, even a rebuttable one, that the contents of the reports are authentic has profound meaning in these cases.

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⁷ Id.
⁸ Nesbitt, supra note 2 at 255 (Citing *In re Guantanamo* at *3).
¹⁰ [FED. R. EVID 803 (6):](https://www.law.cornell.edu/uscode/text/6/509)

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
To rebut this presumption requires the petitioner to supply evidence that the reports were not maintained in the ordinary course of business. The presumption is far greater than that given to the police under domestic detention rules, because “matters observed by police officers and other law enforcement personnel” are not admissible under the public records hearsay exception. This marks an important turn in determining the difference between Guantanamo cases and other habeas cases: hearsay.

The Supreme Court in Hamdi left open the door for hearsay evidence when it acquiesced to the reality that hearsay might be the only evidence available: “[hearsay] may need to be accepted as the most reliable available evidence from the government.” The Supreme Court then appeared to be stating that in certain cases hearsay evidence would likely be the only evidence and excluding it would not be practical. The DC Circuit strengthened the government’s position significantly, however, when it concluded in Al-Bihani v. Obama that hearsay is “always admissible.”

The impact is significant: the government can submit reports of hearsay that formed the basis of detention as evidence and those reports are presumed to be authentic. There is, however, no presumption of accuracy. That is, there is no presumption that the things stated in the reports are true. The problem is that while a detainee can contest the second or third degree hearsay,

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14 Ahmed at 54-55:

[T]here is absolutely no reason for this Court to presume that the facts contained in the Government's exhibits are accurate. Given the extensive briefing and oral argument presented by counsel during the discovery phase of this case, as well the exhibits submitted at the merits trial, it is clear that the
they are likely unable to actually challenge any of the witnesses themselves. This leaves detainees in a very weak position in their attempts to contradict the evidence provided against them.

The Court of Appeals set out a list of relevant factors to determine the accuracy or truthfulness of hearsay evidence: “consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of the declarant about the matters testified to, levels of hearsay, recantations, etc.”

This cocktail of potential factors to attack hearsay provide a glimpse into the difficult task detainees face. For detainees, the ideal case will always involve the government putting forth evidence that is inconsistent. Yet if the hearsay evidence is all the government puts forth, it easily sidesteps this potential pitfall. Whether the translation is accurate presents its own problems and questions. Did the government preserve the original statement in its original language? This is probably very difficult to do in a place like Afghanistan where only a small minority of the population can read and write. That is, there likely is no original statement, only the record of the statement or the record of the translation.

The other factors, how the information was obtained and knowledge of the declarant, can weaken the evidence, but still can leave a powerful statement or statements deemed adequate to continue a detention.

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accuracy of much of the factual material contained in those exhibits is hotly contested for a host of different reasons ranging from the fact that it contains second- and third-hand hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said.

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16 Id. at 55.
There may even be a *general* rebuttable presumption for the government’s evidence. This has been articulated not just by the DC Circuit, but by the Supreme Court itself:

>[T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the onus *could* shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.¹⁷

There are certainly questions to be answered here (What constitutes “credible” evidence? What’s a fair opportunity for rebuttal?), but the opening is clear: the Government’s evidence can get a general favorable presumption. It is up to the petitioner to offer something better. The government, by providing *any* evidence, appears to meet its burden under this formulation as long as the petitioner does have superior evidence that rebuts the Government’s. This sounds like it could be a “some evidence” standard as so long as the petitioner does not have substantial evidence of their own to supply. In the event that they do, it may morph into a preponderance standard. While it may have been adopted to offer pragmatic flexibility, it may have assisted in leaving courts with unclear and amorphous guidelines.

These factors all add up to significant burdens for detainees and results in a deck weighted towards giving the government a winning hand. Even this system, which operates supposedly on a preponderance standard, has come under attack by the District of Columbia Circuit Court of Appeals, who have pushed to move the line even further towards the Government’s side (even further than the Government appears currently interesting in going).

II. The DC Circuit, *Al-Adahi, Al-Latif*, and the Push Back Against the Preponderance Standard

Two days after the Supreme Court decided *Hamdi v. Rumsfeld*,\(^{18}\) *Rasul v. Bush*,\(^{19}\) and *Rumsfeld v. Padilla*,\(^{20}\) the Court decided a far less well-known case, *Bush v. Gherebi*.\(^{21}\) It has been suggested that *Gherebi* is one of the most significant cases decided in the Supreme Court’s detainee habeas literature.\(^{22}\)

In *Gherebi* the Supreme Court remanded a case back to the 9th Circuit to reconsider a detainee habeas case in light of *Padilla*.\(^{23}\) In *Padilla* the Court concluded that the Southern District of New York did not have jurisdiction over the detention of a detainee in South Carolina and therefore could not entertain the habeas action.\(^{24}\) The message and effect was clear: only the District of Columbia district courts and Court of Appeals have jurisdiction to hear habeas claims against the federal government based out of Guantanamo. The 9th circuit got the message and transferred the case to the DC circuit.\(^{25}\)

This remained the case when the Court decided *Boumediene* and opened up the flood gates to detainee habeas actions.\(^{26}\) The analogy of a “flood” is not much of an exaggeration and it should be stressed that the DC Circuit really did have a very substantial number of cases redirected their way when the Supreme Court made its jurisdictional decision.

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\(^{18}\) *Id.* at 507.


\(^{23}\) *Gherebi* at 952.

\(^{24}\) *Padilla* at 442.

\(^{25}\) *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004).

\(^{26}\) Vladek, supra note 6, at 1453.
became responsible for so many habeas cases, that Chief Judge Thomas Hogan had to be assigned the responsibility to “coordinate and manage” the Guantanamo caseload.\textsuperscript{27} The result has been the DC Circuit taking near total control of a quickly developing area of caselaw.\textsuperscript{28} The DC Circuit’s monopoly has acted, in effect, as a softening of the actual holding in \textit{Boumediene}. The DC Circuit has made little secret of its contempt for the holdings from the Supreme Court’s detainee cases and has been steadily lowering the burden placed on the government.

In \textit{Al-Adahi v. Obama} the D.C. Court of Appeals made its first clear indication that it doubts that the preponderance standard is required in habeas detention cases.\textsuperscript{29} The Court assumed \textit{arguendo} that it was required, but did not address the issue directly: “Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case.”\textsuperscript{30}

The first doubt the Court of Appeals expressed was whether the common law at the time of the drafting of the Constitution required the use of the preponderance standard in habeas cases. In \textit{Al-Adahi} the Court responded to \textit{Boumediene}’s assessment that in habeas determinations “the analysis may begin with precedents as of 1789, for the Court has said that ‘at the absolute minimum the [suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.”\textsuperscript{31} The DC Circuit in \textit{Al-Adahi} quotes the above in full and

\begin{itemize}
\item \textsuperscript{27} Nathaniel Nesbitt, Note, \textit{Meeting Boumediene’s Challenge: The Emergence of An Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation}, 95 \textit{MINN. L. REV.} 244, 255 (2010) (quoting \textit{In Re Petitioners Seeking Relief at Guantanamo Bay}, 567 F. Supp. 2d 83 (2008)).
\item \textsuperscript{28} See Benjamin Wittes et al., Brookings Inst., \textit{THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING} (2d ed. 2011).
\item \textsuperscript{29} 613 F.3d 1102, 1105 (2010).
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Boumediene v. Bush}, 553 U.S. 723, 746 (2008).
\end{itemize}
even sneaks in an attempt to question the clarity of *Boumediene* by inserting “[must?]” after the word may in the above quotation.\(^{32}\)

That inserted quotation indicates that the DC Court of Appeals is formulating at least one of two alternative criticisms (if not both). It may attempt to suggest that *surely* Justice Kennedy, in *Boumediene*, intended to state that Constitutional assessment should begin by examining the meaning of the text when it was adopted. That would be a textualist position and a textualist would certainly have reason to be concerned by *Boumediene* and the other detainee cases.\(^{33}\) The other alternative is that the DC Circuit is criticizing the Supreme Court for a lack of clarity in its *Boumediene* opinion.

Reading the opinion from the perspective of frustrated confusion, one can almost hear the lower court demanding “Is that where I start or isn’t it? What is the body of law I am supposed to depend on?” The problem is very real: the Supreme Court opened the flood gates and directed the flood towards the Federal Circuit of the District of Columbia. The case law to deal with the impending detainee cases was, at best, anemic.\(^ {34}\)

Judge Raymond, who authored *Al-Adahi*, has written two articles that illuminate his perspective and more fully develop his criticism of *Boumediene*. In an article for the Harvard Journal of Law and Public Policy, aptly titled *Originalism and History: The Case of Boumediene*

\(^{32}\) *Al-Adahi* at 1104.

\(^{33}\) *See Boumediene* at 2293 (Scalia, J., dissenting).

\(^{34}\) *See* Stephen I. Vladeck, *Book Review: The New Habeas Revisionism*, 124 Harv. L. Rev. 941 (2011) (in reviewing a book on habeas revisionism, Vladeck examines how English common law habeas has had a rising importance in the past 15 years) (reviewing PAUL D. HALLIDAY, THE NEW HABEAS REVISIONISM (2010)). One of the primary reasons for the reliance on the historic arguments and forms of originalism is the simple lack of case law available to reiterate and interpret. The novelty of the war on terror, the indefinite nature of the detentions of detainees in this war has required legal scholars return to square one. The DC Circuit might be right in voicing frustration when the Supreme Court turned such an amorphous field of law with ambiguous instructions to the DC Circuit to unravel.
v. Bush, Raymond makes an interesting critique of Boumediene based on a form of legal originalism, which he appears to distinguish from an historical originalism practiced by both the majority and the dissent in Boumediene.35

In Originalism and History, Randolph, in addition to criticizing the Supreme Court’s instruction[?] on where to begin Habeas analysis, opines on the method the Supreme Court used to evaluate what the state of the common law was in 1789.36 This is an expansion on the argument made by Randolph in Al-Adahi, where Randolph asserts that the DC Court of Appeals is “aware of no precedents in which eighteenth century English courts adopted a preponderance standard.”37 And thus the DC Circuit drew first blood in unraveling the uneasy consensus that the preponderance standard would govern in detainee cases. This one paragraph in Al-Adahi may represent one of the single most important turning points in the developing common law on military habeas detentions, so it is elucidating to read Randolph’s entire argument:

Even in later statutory habeas cases in this country, that standard was not the norm. For years, in habeas proceedings contesting orders of deportation, the government had to produce only “some evidence to support the order.” In such cases courts did not otherwise “review factual determinations made by the Executive.” In habeas petitions challenging selective service decisions, the government also had the minimal burden of providing “some evidence” to support the decision. Habeas petitions contesting courts martial required the government to show only that the military prisoner had received, in the military tribunal, “full and fair consideration” of the allegations in his habeas petition. And in response to habeas petitions brought after an individual’s arrest, the government had to show only that it had probable cause for the arrest.38

36 Id.
37 Al-Adahi at 1104 (D.C. Cir. 2010) (citations omitted).
38 Id. (internal citations omitted).
Judge Randolph, though writing an opinion that accepted the preponderance standard *arguendo* wanted to ensure that *Al-Adahi* did not come to support the preponderance standard in habeas cases. His wish has been fulfilled. While many would be aghast at the proposition that a standard as low as “some evidence” might be used in detentions, Randolph has given critics of a light evidentiary standard further fuel for outrage: some evidence may in fact be more than necessary and probable cause, which does not even require evidence, could even be applicable.

That is, it could be applicable if DC Circuit were to look at the common law when the Constitution was ratified. Randolph, however, does not believe that the Court properly evaluated the actual British Common Law at the time and therefore used a method of originalism which the Court should not have hung its hat on. Relying on legalistic Originalism, Randolph defends his use of English writings from the decades preceding the ratification of the Constitution. He relies on these sources because there appears to be little, if anything, else. In nothing else that was submitted to the *Boumediene* Court or written by the *Boumediene* Court was a case presented that both preceded 1789 and discussed the issue of the territorial limits of habeas corpus.

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39 Probable cause is “A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime.” *BLACK’S LAW DICTIONARY* (9th ed. 2009).

40 Probable Cause here is, of course, referred to only in the context of a criminal case after an arrest and would appear to be clearly distinguishable. Of course, if Randolph did not believe it was relevant to detainee cases, he probably would not have bothered including it.

41 Randolph, supra note 17, at 91-92.

42 *Id.*

43 *Id.* at 92.
What is remarkable about all this is it reveals the decision-making of Judge Randolph in *Al-Adahi*. The push-back against the preponderance standard appears to have been based largely on Judge Randolph’s reading of a small number of English writings that even Randolph admits were not published in the United States until 1986 and may or may not have been read by any of the founders.\(^{44}\)

Randolph’s second article on Guantanamo detention, *The Guantanamo Mess*, more generally expresses his contempt for the Supreme Court’s ruling in *Boumediene*.\(^{45}\) He referred to the holding of *Boumediene* as “unprecedented . . . in the entire ancient history of habeas corpus jurisprudence” and that the jurisprudence “ripped up centuries of settled law, leaving in its wake . . . a legal mess.”\(^{46}\) Here we see Randolph’s frustration at the lack of clarity in the Supreme Court’s decision and frustration at what he believes to be the baseless Constitutional holding of *Boumediene*.

Randolph draws attention to the flood of cases mentioned above: “The Guantanamo habeas cases march on, hundreds of them, case by case.”\(^{47}\) Randolph then explains the problems of creating law that must be applied under the hardest of circumstances: on the other side of the planet in a war zone. Evidentiary standards are perhaps the area that best reflects the Supreme Court’s failure to provide guidance and clarity, despite directing hundreds of cases with serious implications to the DC Circuit.

\(^{44}\) *Id.* at 91-92. Randolph’s argument appears to be that since they existed at the time, they were part of the common law that the United States imported from England, whether or not anyone in the United States was actually familiar with them at the time of the founding.


\(^{46}\) *Id*.

\(^{47}\) *Id*.
The burden of proof, or who carries it, is totally unclear in Boumediene: “Who bears the burden of proof? Must the government show that it is properly holding the detainee? Or is it up to the detainee to show that he is being held improperly? Boumediene contains language that seems to support both positions.” Reading Boumediene, it is hard to disagree with Randolph’s assessment that the decision was unclear. Boumediene did not provide any groundwork on how habeas rights for Guantanamo cases would work. There should be little surprise, then, that the question of which minimum evidentiary standard is required remains up in the air.

In advocating for the greatest individual rights for individuals Randolph’s positions may seem offensive because they contain the rationale for undermining the practical rights of detainees by placing unreasonable burdens on them (or unreasonably light burdens on the government). Yet the precedent they received from the Supreme Court made clear that, at least for now, the Supreme Court has punted on the issue. Perhaps the Supreme Court simply wanted the issue to “cook” a little in the District and Court of Appeals courts to develop case law and corresponding research before they address a case themselves. While that would still be punting,

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48 Id. To support this argument, Randolph quotes two portions of Boumediene. The first states that the habeas right “entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” Boumediene at 728-29. For Randolph this implies that the “ball is in the detainee’s court.” Later in Boumediene the Court ambiguously noted that the “extent of the showing required of the government is a matter to be determined.” Id. at 787. This clearly implies that the government will probably be required to hold some burden, but also obviously evades the question of the degree of the burden, which is at the core of the heart of the current question.

49 This is perhaps the dissent in Boumediene’s most salient criticism:

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has exhausted the procedures under the law.

Boumediene at 801 (Roberts, J., dissenting) (emphasis added).
it would at least serve the purpose of cultivating rationales and arguments to make a final decision.

The wishy-washy nature of the opinion is possibly just a common result from Supreme Court conferencing.\(^5\) The swing Justice, Justice Kennedy, may have only been able to be brought over to the “liberal” side of the Court if the liberal block agreed to 1) allow Justice Kennedy to write the opinion and 2) agreed to not include language or direction that would go “too far” towards setting rules in stone that might have negative impacts on the military. Basically, Boumediene may in many ways be a wish-washy opinion (even if the most important piece of the holding is clear) because Justice Kennedy is a wishy-washy Justice.

The evidentiary standard, or methodology, Randolph proposes in Al-Adahi, however, is perhaps the most confusing piece of Al-Adahi. Instead of simply adopting a “some evidence” standard or even a clear probable cause standard, Randolph devolves into suggesting the use of a “conditional probability” test.\(^5\) This is followed by a fairly bewildering digression into the lack of public comprehension of probability and mathematics.\(^5\) In this section Randolph quotes two books by John Allen Paulos entitled Beyond Numeracy: Ruminations of a Numbers Man and Innumeracy: Mathematical Illiteracy and Its Consequences. Indeed, this section, which quotes heavily on books regarding statistics, appears to answer his prior lamentation. Any legal test that requires citing a self-proclaimed “numbers man” is probably not a clear enough test to gamble a person’s freedom on.

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\(^5\) Al-Adahi at 1105.

\(^5\) Id.
What Randolph appears to be proposing is simply a form of evidentiary “mosaic theory” that looks at the totality of the evidence instead compartmentalizing individual pieces that might have more meaning placed together than separately. Why he addresses is in such a bizarre fashion is unclear.

The unfortunate effect of Judge Randolph’s strong criticism of the use of the preponderance standard and confusing suggestion of the use of conditional probability is that *Al-Adahi* has come to represent, in subsequent cases, merely the proposition that the preponderance standard is not required. The result may have been that instead of a form of mosaic theory or conditional probability, which is arguably just a form of preponderance, the DC Circuit has slowly moved towards a “some evidence” standard.

In a concurring opinion for the DC Circuit, Judge Silberman has more recently invoked the above passage from *Al-Adahi* to even more overtly criticize *Boumediene*. In his opinion, Judge Silberman may have best encapsulated the DC Court of Appeals’ contempt for the higher Court in one of the most striking condemnations of a Supreme Court precedent written by a lower federal court:

[T]here are powerful reasons for the government to rely on our opinion in *Al-Adahi v. Obama*, which persuasively explains that in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary—and moreover, unrealistic. I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even “some evidence.”

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54 *Id.*
There are two very remarkable pieces to Judge Silberman’s strong statement. The first is obviously the open scolding of the Supreme Court for failing to take responsibility for *Boumediene*. As argued above and below, that scolding, while remarkably insubordinate for a lower court, is the less important piece legally. What is more interesting is that Silberman is laying bare a practical reality: whether or not courts claim to be using the preponderance standard, Judges are not going to find for habeas petitioners who are “somewhat likely” to be members of Al-Qaeda.55

Such concerns are understandable. No Judge or Justice wants to set in motion the release of a prisoner who might attack the United States and kill soldiers abroad or civilians at home. Such concerns must weigh heavily on the shoulders of the Judges who hear these habeas cases. Imagining such a burden makes complaints that they should never have heard the cases in the first place even more palpable. Some Judges, like Silberman, simply do not like that they have been made responsible for making habeas determinations of enemy combatants. Yet they hold the responsibility anyway.

Judges must make hard decisions and sometimes upholding the law results in outcomes that can make judges uncomfortable.56 In the long run the greater danger to our government is

55*Id.*

56 H. Thomas Wells, *A Lawyers Letter to His Daughter*, LITIGATION, Winter 2000 (“Remember that judges must make hard decisions; do not stand idly by while they are attacked for them”). Taking Mr. Wells point to heart, it should be recognized that in the District of Columbia District Court Judge Kennedy was willing to actually apply a high evidentiary standard in *Al-Latif* and he should be acknowledged for making the hard determination in keeping with the values of the right to habeas despite the potential repercussions.
caused when our elected officials shirk their duties and avoid hard decisions that might be considered “unpopular.”

The old adage “bad facts make bad law” existed long before Guantanamo detainees gained the right to habeas proceedings. Yet here we see some judges on the DC Circuit not only proving the adage, but apparently willing to adopt it as a principle. Yes, opening the writ of habeas corpus for Guantanamo detainees has increased the danger that Guantanamo detainees will be released and potentially resumes (or perhaps begins after a detention-based genesis for terrorism) a career in a terror. This is also true when due process rights are protected in murder cases. Yet no one would seriously suggest that no one convicted of murder should receive their full due process and habeas rights simply because they may be “somewhat likely” to commit another crime in the future.

Judges have always had to make hard decisions. It is not only Judge Silberman and the DC Circuit that must accept their responsibilities and make hard decisions. The Supreme Court has a responsibility to settle the law and to protect Constitutional rights. The DC Circuit may wish to

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58 See *Haig v. Agee*, 453 U.S. 280 (1981) (Brennan, J., dissenting) (“I suspect that this case is a prime example of the adage ‘bad facts make bad law’) (discussing the less than admirable nature of the defendant); *See, e.g.,* Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*, 31 WM. MITCHELL L. REV. 1331, 1364 n.181 (2005) (noting that a particular case was not appealed because the convicted defendant’s crime was a ‘crime of violence.’).

59 There are of course dissimilarities in this analogy. Perhaps most important is that due process in murder cases generally have impacts across the criminal justice system. *See, e.g.,* *Strickland v. Washington*, 467 U.S. 1267 (1984) (The “Strickland factors,” the high bar for determining whether ineffective assistance of Counsel exists for habeas grounds, were likely not assisted by the accused crimes of the defendant. The defendant was sentenced to death for multiple murders and torture.). However, this should be no excuse. Bad law should be considered bad law no matter the impact on other crimes. Even if this is a consideration, however, it should be noted that the Guantanamo habeas cases may end up having a large impact on habeas determinations in general if rulings on evidentiary requirements and due process become regular.
punt on the issue and rule in a manner that upholds as much as possible of the pre-*Boumediene*
status quo, but the Supreme Court has given them the leeway to do so.

Instead, judging from one of the DC Circuit’s newest opinions, the DC Circuit Court of
Appeals is moving, if anything, towards more deference for the government and abdicating even
more of its decision-making abilities. In *Al-Latif v. Obama*, the DC Circuit considered the
possibility that the government might enjoy a general presumption of accuracy in its evidence in
addition to the presumption of regularity.\(^60\) The DC Circuit answered the question with an
unequivocal “yes.”\(^61\)

This result was likely surprising to anyone following the case. The Government in its
original brief made a similar argument to the position adopted by the DC Circuit.\(^62\) That position
was contradicted by the respondent, as the DC Circuit mentioned.\(^63\) What the DC Circuit does
not mentioned was the remarkable turn the Government took in its reply brief, where it admitted
that the petitioner’s position was correct and that the Government’s statement on burden shifting
was an error that might require a remand.\(^64\)

*Al-Latif* is somewhat distinguishable because the court concluded this to be the case where
“the detainee’s challenge is to the evidence-gathering process itself.”\(^65\) The DC Circuit has
basically split accuracy into two additional categories. The focus for the Court is one of
truthfulness. The documents are presumed to be accurate, but the inherent truthfulness of the


\(^61\) Id.


\(^65\) Id.
content of the documents is not presumed. This is fairly similar to the previous distinction between accuracy and authenticity, except now the presumption of accuracy creates a presumption that the factors discussed above are accurate.\textsuperscript{66} The Al-Latif court also hints that this distinction may only be relevant when third parties are quoted in the documents. If the documents contain only the reporting of government officials without the use of third parties, the presumption may be total.

The other important holding in Al-Latif may be the redefined responsibility of the judiciary in habeas detainee cases. The DC Circuit Court’s purpose is clear. The court concludes that the Supreme Court in Boumediene imagined a “more modest” form of judicial involvement in Guantanamo habeas proceedings.\textsuperscript{67} The only role of the judiciary is to ensure that “minimal procedural safeguards” are observed in order “to preclude the Government acting as its own judge.”\textsuperscript{68} The Court relies on four excerpts from Boumediene to support this claims:

Specifically, the Supreme Court held that Guantanamo detainees must have “the means to supplement the record on review,” and that the court conducting habeas proceedings must have authority (1) “to assess the sufficiency of the Government's evidence against the detainee,”; (2) “to admit and consider relevant exculpatory evidence,”; (3) “to make a determination in light of the relevant law and facts,”; and (4) “to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.”\textsuperscript{69}

The excerpts from Boumediene appear to offers Courts the flexibility to handle difficult cases. These hard cases involve events that occurred across the globe with no traditional collection of evidence. Any rational system would require a minimal level of flexibility and recognition that the same procedures given to domestic criminals (where authorities can retain

\textsuperscript{66} See infra pp. 6.

\textsuperscript{67} Id. at *3.

\textsuperscript{68} Id.

\textsuperscript{69} Id. at *3.N1 (internal citations and quotations to Boumediene omitted).
total access to a crime scene for a substantial length of time) are not practically applicable to a war zone. This is especially true when reviewing detentions resulting from actions years passed and conducted long before anyone in the government conceived that the detentions would receive judicial review.

What the *Boumediene* court does not appear to be doing, however, in giving courts greater flexibility, is giving the judiciary a “more modest” role as envisioned by the DC Circuit Court. Indeed, the opposite conclusion can be drawn from the DC Circuit’s excerpts. Since the *Boumediene* court has given the judiciary more discretion and flexibility, the Court may have imagined a more robust judicial role in weighing the intricacies of habeas cases on a case-by-case basis.

**III. Conclusion: The Supreme Court Should Take a Case and Expressly Adopt the Preponderance Standard**

Upon looking at the Guantanamo cases closely it is difficult not to come to agree with Judge Silberman’s assessment of the Supreme Court in one regard: they seem truly unwilling to provide any specific guidance for detainee cases. The Court may simply desire to avoid difficult Guantanamo cases because they really do not want to set a burden which will be publicized as favoring the detainees. Also, they may simply not want to risk being the Court that, in effect, causes the release of likely members of al-Qaeda on the basis of adherence to legalism.

It may also be the case that the Justices are uncertain where the Swing Justice will lean on the next habeas case. Would the liberal block vote to grant a habeas case that deals with the burden of proof only to risk Justice Kennedy siding with the right and setting the minimum burden at “some evidence.” Probably not. Likewise the Conservative members of the Court
would probably prefer to keep the current de facto “some evidence” scheme employed by the DC Circuit in order to avoid the risk that Kennedy may once again side with the other side and help create another “clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees.”\textsuperscript{70}

While the Court may not be eager to take another case, the issues of due process and evidentiary burdens have had years now to percolate in the lower courts. The Supreme Court’s job, after all, is to decide hard cases, not easy ones. The Supreme Court should prepare to evaluate the methods of the District of Columbia Circuit and determine once and for all what protections the writ of habeas corpus offers for military detainees. They should do this if, for no other reason, to allow for the kind of predictability and stability that the American military and e American’s elected officials deserve in order to plan accordingly.

The Supreme Court has a duty to uphold its previous ruling in \textit{Boumediene}. The flexibility the Court offered is being perverted by the DC Circuit as grounds not for flexibility to consider and weigh various evidence, but instead as a Constitutional mandate to give as much deference to the Government as possible. Without overturning \textit{Boumediene}, it is difficult to see how the current scheme could give more deference to the government.

For these reasons the Supreme Court should grant certiorari in \textit{Al-Latif}. \textit{Al-Latif} clearly articulates the purposes of the DC Circuit in their recent decisions and provides the Supreme Court an opportunity to respond and clarify what the role of the judiciary is in Guantanamo habeas cases. \textit{Al-Latif} also provides an excellent vehicle to decide issues of evidence. The Court would have the opportunity to address the burdens held by the government and petitioners in

\textsuperscript{70} \textit{Rasul} at 506 (Scalia, J, dissenting).
habeas cases, the presumptions afforded to either, and set the evidentiary standard of proof. The Court has an excellent opportunity to settle the law or at least re-articulate some formula or factors that need be considered in a Guantanamo habeas case.

I would advocate that the single most important feature of an opinion from the Court should be clarity. It is important for detainees, the government, attorneys, and even soldiers on the ground to know what their role is and what is needed to detain enemies in the war on terror (or any other war, for that matter). If there are no lines drawn then the job becomes more difficult for everyone involved.

As far as substance, I would advocate preserving the preponderance standard to require a certain degree of proof be presented by the government. However, I would also advocate that the Court preserve the presumption of accuracy for government materials. While such a presumption carries significant dangers, we must acquiesce to the reality that government documents may simply be all that is available. If they are not given a general presumption in law, then they will still almost certainly be given one in actual practice.

Judge Silberman’s style of cynicism aside, it is still unlikely that Federal Judges will release detainees simply on the basis that they deny the truthfulness of the government’s claims. If the government does not enjoy a presumption, then the government has a burden to demonstrate the truthfulness of such documents. This is reasonable in a criminal court where the government has the capacity to conduct investigations, but in detainee cases, stemming from chaotic war zones, it simply makes little practical sense. It gives great deference to the government, this is true, but under the circumstances of war some deference must be given to the military in its conduct of a war abroad.
The important control would a clear preponderance standard. The government would enjoy a rebuttable presumption that its documents are authentic and accurate, but would still have to supply enough evidence to satisfy a “more likely than not” standard. That is, the government would have to submit enough evidence, or strong enough evidence, to reach the preponderance threshold. While hearsay can be submitted, hearsay would reasonably be considered less reliable than an actual witness. Increasing degrees of hearsay would also diminish the value of the evidence. The presumption that would accompany a report of third-degree hearsay evidence would not make that evidence sufficient on its own.

If the government is forced to submit more evidence, then the petitioner has a much greater chance of proving their innocence. While a detainee is unlikely to be able to launch a fruitful investigation to prove their innocence years later, they can make efforts by demonstrating inconsistencies in evidence supplied by the government. Therefore, by making the government compelled to provide more evidence, the likelihood of exonerating detainees might actually increase.71 This is certainly true as opposed to the use of a “some evidence” requirement.

Balancing between these interests presents the problem of attempting to balance a desire to uphold the entirety of our procedural rights and safeguards with the practical realities of detaining enemies abroad. The peculiar nature of a war that has often appeared open-ended (though, at present, there are reasons to hope that the ground wars abroad may be drawn to a close in coming years) has created serious problems for a field of law that has not been tested by such extremes.

The need to balance such objectives, however, does not signify a surrender of values by either side. The balance still gives deference to the government, even as it expects more of it. While it gives deference, it gives a possible path out of detention for detainees. Of course this balance invites criticisms from all sides. Many such criticisms would be well-reasoned and not altogether wrong. We are, after all, balancing. For every procedural step we take to protect detainees and Constitutional due process, we risk releasing grave enemies and serious threats against our people and our nation. But for every step we take to diminish review of indefinite government detention we subvert the values that form the basis of our common identity. Any balance must trade against these two unappealing alternatives. But judges are not always tasked with easy decisions.