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## The National Security Court We Already Have

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### INTRODUCTION

In the summer of 2007, two law professors made a splash by proposing the creation of a “national security court.” Professors Jack Goldsmith and Neal Katyal, the former having served in the Bush Administration’s Office of Legal Counsel, and the latter now serving in the Solicitor General’s Office of the Obama Administration, proposed a “Congressionally sanctioned system of preventive detention.”<sup>1</sup> Article III judges would determine whether the government had a valid rationale for detention in each case brought before them. Congress would define who counts as an “enemy,” and it would create rules for the handling of classified evidence and other procedural details. The system would be “comprehensive.”<sup>2</sup> Goldsmith and Katyal’s proposal garnered considerable criticism from civil libertarians, who worried that the creation of a parallel justice system was unnecessary and potentially dangerous.<sup>3</sup>

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\* Yale Law School, J.D. expected 2011; Yale University, B.A. 2007. I would like to thank Sara Solow, Grant Martinez, and Bruce Ackerman for their valuable comments and insights. I also would like to thank the journalists at *Pro Publica* for maintaining an excellent and timely database on all of the Guantánamo habeas decisions.

1. Jack Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.
2. *Id.*; see also BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 162-66 (2008) (arguing that Congress should create national security courts through an explicit statutory scheme); Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a National Security Court* 1 (Am. Enter. Inst., Working Paper No. 156, 2009), available at <http://www.aei.org/docLib/20090820-Chapter6.pdf> (same).
3. See, e.g., Jameel Jaffer & Ben Wizner, *Don’t Replace the Old Guantánamo with a New One*, SALON, Dec. 9, 2008, <http://www.salon.com/news/opinion/feature/2008/12/09/guantanamo/print.html>; Michael Ratner, Letter to the Editor, N.Y. TIMES, July 16, 2007, at A12 (“The idea of making this [preventive detention] system permanent and more acceptable by adding some bells and whistles—a special national security court—is going in the wrong direction.”).

Of course, Congress has passed no such law, and the Obama Administration indicated last fall that it would not seek new legislation to this effect.<sup>4</sup> Instead, the Department of Justice released a statement that, in continuing to detain individuals held at Guantánamo Bay, it would rely on “authority already provided by Congress” in the 2001 Authorization for Use of Military Force (AUMF), passed in the immediate wake of the September 11, 2001 attacks.<sup>5</sup> While the AUMF does not mention detention specifically, the Supreme Court held in 2004 that it includes the power to detain certain types of combatants in *Hamdi v. Rumsfeld*.<sup>6</sup> Four years later, in *Boumediene v. Bush*, the Court held that all detainees in Guantánamo Bay have a constitutional right to petition for writs of habeas corpus.<sup>7</sup>

*Hamdi* and *Boumediene* have spawned an entirely new area of federal common law: the common law of preventive detention. In articulating the broad outlines of a government power (detention) and a process of review (habeas proceedings), the Supreme Court specifically gave trial courts discretion to determine the exact contours of detention authority on a case-by-case basis. Dozens of such habeas cases now have been channeled to the D.C. district court, and since the fall of 2008, the judges on that court have released a flurry of rulings accepting or rejecting detainees’ petitions. Although many civil libertarians have found comfort in the fact that a majority of these petitions were granted, they have missed the forest for the trees. The D.C. district court is performing essentially the same “national security court” task that Goldsmith and others proposed as a pipe dream for new legislation.<sup>8</sup> That is, the district court judges are operating under a framework that allows the government to detain individuals indefinitely, without trial, and subject to review under relaxed evidentiary and procedural standards.

This Comment argues that, less than two years after *Boumediene*, the D.C. district court’s habeas jurisprudence has, through a common law process, constructed the national security court that was so controversial as a policy proposal. This jurisprudence recently was crystallized and substantially sharpened

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4. Peter Baker, *Obama To Use Current Law To Support Detentions*, N.Y. TIMES, Sept. 24, 2009, at A23.

5. *Id.*

6. 542 U.S. 507, 519 (2004).

7. 128 S. Ct. 2229 (2008).

8. Goldsmith, in fact, now considers the question of whether we should have a national security court to be essentially moot. Instead, he confines his latest arguments to urging that Congress settle some of the finer details. Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 6-8 (Feb. 4, 2009) (unpublished manuscript, on file with the Yale Law & Policy Review). Goldsmith argues that a *de facto* national security court has essentially existed in the District of Columbia ever since federal courts moved to consolidate habeas cases there in the wake of the Supreme Court’s decision in *Rasul v. Bush*, 542 U.S. 466 (2004). See Goldsmith, *supra*, at 6-8.

in the first appellate ruling on post-*Boumediene* habeas cases: the D.C. Circuit's *Al-Bihani v. Obama* decision.<sup>9</sup> Though much has been written about the general legal problems regarding preventive detention,<sup>10</sup> few have addressed the contours of the detention system that now exists in our courts.<sup>11</sup> Because much of this important new policymaking has occurred through trial courts, one aim of this Comment is simply to elucidate some of the key holdings of the federal district judges, in the hope that greater transparency will facilitate more fruitful dialogue. Part I thus examines the substance of the D.C. district court's rulings on habeas petitions and detention authority and the recent ruling issued by the D.C. Circuit in *Al-Bihani*. Part II discusses why civil libertarians' apparent satisfaction with many of the rulings so far is misplaced, in that it ignores the courts' underlying expansion of the President's detention authority.<sup>12</sup> Part III argues that a common law route is particularly problematic in the detention context, drawing current policy implications from the D.C. district court habeas rulings and concluding that the D.C. Circuit should have taken a far more minimalist approach in its recent *Al-Bihani* decision.

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9. 590 F.3d 866 (D.C. Cir. 2010).
  10. Some of the most recent influential scholarship includes Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811 (2008); Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669 (2009); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403 (2009); and Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).
  11. One important exception is a comprehensive review of the habeas rulings recently written by Benjamin Wittes, Robert Chesney, and Rabea Benhalim from the Brookings Institution. Their study closely surveys the terrain of the D.C. habeas decisions, but it focuses more on the specific issues that have divided the judges than on their broader areas of consensus within the context of public debate. See BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* (2010), available at [http://www.brookings.edu/~media/Files/rc/papers/2010/0122\\_guantanamo\\_wittes\\_chesney/0122\\_guantanamo\\_wittes\\_chesney.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf).
  12. This Comment does not argue for any particular interpretation of the AUMF and does not tackle the broader legality and constitutionality of preventive detention. Rather, it addresses the second-order topic of *how* these decisions actually have been made and what they have said, sketching potential policy ramifications and concerns.

## I. THE RULINGS SO FAR

Between the Supreme Court's decision in *Boumediene*, which held that Guantánamo detainees are entitled to petition for writs of habeas corpus, up until the D.C. Circuit's ruling in *Al-Bihani*, the D.C. district court issued sixteen publicly available rulings granting or denying such petitioners' cases on the merits, and three additional decisions setting standards as to whom the government may detain.<sup>13</sup> These decisions contain both colorful disagreements and crucial points of convergence, and their key holdings are discussed in Section I.A below. Section I.B then discusses the D.C. Circuit's recent *Al-Bihani* opinion, which crystallized and substantially sharpened some of the district court's holdings. The common law path from the district court rulings through the recent appellate ruling shows a growing acceptance and normalization of preventive detention authority—even in cases where the courts have ordered the release of detainees.

### A. June 12, 2008 - January 5, 2010

The district court decisions have addressed a complex range of issues, from the definition of an "enemy combatant" and the criteria for detention to the types of evidence the government may use and the degree of deference to such evidence that will be afforded by the courts. While this Comment explores some of the points of contention in the D.C. district court opinions, it also demonstrates an important point of convergence. Namely, each judge to have decided

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13. Some of these cases have involved multiple detainees, while others have not been cited because the substantive opinions are still undergoing declassification review. See *Hatim v. Obama*, No. 05-1429, 2009 WL 5191429 (D.D.C. Dec. 15, 2009); *Al Rabiah v. United States*, 658 F. Supp. 2d 11 (D.D.C. 2009); *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009); *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009); *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009); *Al Gincio v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. 2009); *Hamliily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009); *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); *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); *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008), *rev'd sub nom.* *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert granted*, 130 S. Ct. 458 (2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). For additional and updated sources on Guantánamo habeas cases, see also Pro Publica, Dig into the Gitmo Detainee Lawsuits, <http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722> (last visited July 1, 2010); and Center for Constitutional Rights, Guantanamo Habeas Decision Scorecard, <http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard> (last visited July 1, 2010).

a habeas appeal has done so within a general framework that authorizes long-term preventive detention, as long as the government can show by a preponderance of the evidence that an individual is (or was) a member of al-Qaeda, the Taliban, or associated forces. Moreover, the district court judges have more or less uniformly followed a set of unique, judicially crafted procedures tailored to the habeas cases.<sup>14</sup>

Once *Boumediene* was handed down, the most central issue that the D.C. district court judges had to decide is whom, exactly, the government is allowed to detain. The Court had stated in *Hamdi* that the “permissible bounds” of the category would be “defined by the lower courts as subsequent cases are presented to them”<sup>15</sup>—a sentiment reiterated in *Boumediene*.<sup>16</sup> Prior to the D.C. Circuit’s January 5 ruling in *Al-Bihani*, seven judges on the D.C. district court had opined on this question and had in part or in whole agreed with the Obama Administration’s position. The Obama Administration maintains that the AUMF permits the President to detain: (1) individuals who had involvement in the 9/11 terrorist attacks (with language almost identical to the AUMF); and (2) “persons who were part of, or substantially supported, Taliban or [al-Qaeda] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>17</sup> By the time of the D.C. Circuit ruling, three of the D.C. district court judges had adopted this reading wholesale, while four had eliminated the “substantially supported” prong.<sup>18</sup>

Every judge who has considered the matter has agreed that the AUMF authorizes the President to detain those who are (or were) part of the Taliban, al-Qaeda, or associated forces. The first judge to discuss the issue at length was

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14. See *infra* note 30 and accompanying text.

15. *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004).

16. Though not touching directly upon the question of who is detainable, the Court in *Boumediene* left the habeas courts free to make procedural “innovation[s] in the field of habeas corpus.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008).

17. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008) (Misc. No. 08-0442 (TFH)) [hereinafter Government Memorandum]. The Obama Administration has dropped the term “enemy combatant” but argues that essentially the same set of persons defined by the Bush Administration are detainable. See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52-53 (D.D.C. 2009).

18. Compare *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (Judge Kessler), *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009) (Judge Walton), and *Al Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009) (Judge Leon, accepting the Bush Administration’s earlier definition of an “enemy combatant”), with *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (Judge Robertson), *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009) (Judge Kollar-Kotelly), *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. 2009) (Judge Lamberth), and *Hamilily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (Judge Bates).

Judge Reggie Walton, in *Gherebi v. Obama*.<sup>19</sup> In a lengthy opinion that drew extensively on sources ranging from the Supreme Court's ruling in *Hamdi* to the Geneva Conventions, Judge Walton concluded that the AUMF and the laws of war support the President's authority to detain enemy forces during an armed conflict. He agreed with the government that an armed conflict against the Taliban, al-Qaeda, and their associated forces is ongoing and that members of these forces therefore are detainable. He also adopted the "substantially supported" prong of the government's argument.<sup>20</sup> Judge Walton's analysis was adopted by Judge Gladys Kessler<sup>21</sup> and more or less endorsed by Judge Richard Leon in an earlier ruling.<sup>22</sup> Judge John Bates, on the other hand, rejected the "substantially supported" clause of the government's definition in *Hamlily v. Obama*, holding that the court could find "no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of 'support' as a valid ground for detention"<sup>23</sup>—a conclusion signed on to by three additional district judges.<sup>24</sup>

Another salient issue among the D.C. judges was whether the government must show that a petitioner *now* meets the AUMF detention criteria, or only that he once did. In *Basardh v. Obama*, Judge Ellen Huvelle, citing the AUMF's stated purpose of preventing future attacks, concluded that the statute "does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle" and, therefore, that the question at hand is whether the petitioner continues to pose a threat to the United States.<sup>25</sup> Judge Leon reached a similar conclusion in *Al Ginco v. Obama*, a case in which the petitioner actually was "imprisoned [and] tortured" by al-Qaeda and the Taliban before being taken into U.S. custody.<sup>26</sup> Concluding that the government's position "defie[d] common sense," Judge Leon stated that a prior relationship with enemy forces clearly can be "vitiating by the passage of time, intervening events, or both."<sup>27</sup> The opposite conclusion, however, was reached by Judge James Robertson in *Awad v. Obama*,<sup>28</sup> in which he acknowledged Judge Huvelle's argument in *Basardh* but declined to follow it. Instead,

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19. 609 F. Supp. 2d 43 (D.D.C. 2009).

20. *Id.* at 69.

21. *Al-Adahi*, 2009 WL 2584685, at \*3.

22. See *Al-Bihani*, 594 F. Supp. 2d at 40 (observing that "helping to prepare the meals of [an] entire [al-Qaeda] fighting force is more than sufficient 'support' to meet this Court's definition").

23. 616 F. Supp. 2d 63, 69 (D.D.C. 2009).

24. See sources cited *supra* note 18 (*Awad*; *Al Mutairi*; and *Mattan*).

25. *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009).

26. 626 F. Supp. 2d 123, 127 (D.D.C. 2009).

27. *Id.* at 128.

28. 646 F. Supp. 2d 20 (D.D.C. 2009).

he commented: “It seems ludicrous to believe that [Awad] poses a security threat now, but that is not for me to decide.”<sup>29</sup>

Perhaps equally important to deciding the issue of who is detainable, the D.C. district judges also have created their own architecture for habeas proceedings. Nearly every decision references a Case Management Order (CMO) issued by Judge Thomas Hogan, under whom many of the habeas petitions were consolidated for procedural guidance. In the course of just six pages, Judge Hogan’s CMO set the ground rules for issues such as the government’s disclosure obligations (all exculpatory evidence plus material generally relating to the government’s factual return); the handling of classified information (the government must provide petitioners with adequate substitutes); the government’s burden of proof (preponderance of the evidence); the use of hearsay evidence (acceptable if relevant and reliable and where providing a substitute poses an undue burden); and the general framework under which evidentiary hearings would proceed.<sup>30</sup> The CMO is referenced throughout the D.C. district judges’ habeas decisions the way one might cite the Federal Rules of Civil Procedure.<sup>31</sup>

### B. *Al-Bihani v. Obama*

In *Al-Bihani*, a three-judge panel of the D.C. Circuit reviewed the case of Ghaleb Nassar Al-Bihani, a Yemeni national who was captured in Afghanistan by the Northern Alliance and handed over to U.S. coalition forces in early 2002.<sup>32</sup> The government contended during Al-Bihani’s initial habeas proceeding that he was “part of or supporting Taliban or al-Qaeda forces” primarily on the grounds that, as a member of the Fifty-Fifth Arab Brigade—a military unit that fought alongside the Taliban—he supported both the Taliban and al-Qaeda in their fight against Northern Alliance and U.S. forces.<sup>33</sup> Al-Bihani admitted to traveling to Afghanistan to join the Taliban against the Northern Alliance, but he claimed that he was simply a cook for the Fifty-Fifth Brigade (and thus more like a “civilian contractor” than a fighting member) and that he never took up

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29. *Id.* at 24.

30. See Case Management Order, *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008) (Misc. No. 08-0442 (TFH)) [hereinafter CMO].

31. See, e.g., *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 38 (D.D.C. 2009) (“Under the CMO, the Government bears the burden of proving, ‘by a preponderance of the evidence, the lawfulness of the petitioner’s detention.’”) (quoting CMO, *supra* note 30, ¶ II.A).

32. *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010).

33. *Al Bihani*, 594 F. Supp. 2d at 38 (D.D.C. 2009) (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008) (mem.)). Al-Bihani conceded that the Fifty-Fifth Arab Brigade fought with the Taliban, but he denied that it was commanded by al-Qaeda personnel. See *Al-Bihani*, 590 F.3d at 885 n.1 (Williams, J., concurring).

arms against U.S. forces.<sup>34</sup> His unit came under attack from the Northern Alliance, and, after retreating alongside Taliban forces, he eventually was captured and turned over to U.S. authorities.<sup>35</sup> Judge Leon, writing for the district court, deemed this conduct sufficient to conclude that, more probably than not, Al-Bihani was “part of or supporting” Taliban or al-Qaeda forces and denied his habeas petition.<sup>36</sup>

On appeal, Judge Janice Rogers Brown of the D.C. Circuit took the opportunity to paint with some broader strokes. Judge Brown’s opinion for the court first issued a sweeping statement that any argument premised on the assumption that the AUMF was bounded by international laws of war was “mistaken.”<sup>37</sup> She then concluded that anyone subject to military commission under the Military Commissions Act—a statute pertaining to trial and punishment—was necessarily subject to indefinite detention without trial as well. Thus, anyone who has “purposefully and materially supported hostilities against the United States or its co-belligerents [and] is not a lawful enemy combatant” could be detained.<sup>38</sup> Additionally, Judge Brown noted that the government did not have to prove that a detainee remains a threat to the United States; having shown that an individual met the detention standards at the point of capture, it could continue to hold him until “the fighting stops.”<sup>39</sup> On procedural questions as well, Judge Brown was highly deferential to the government. She took the Supreme Court’s statement in *Boumediene*, that habeas proceedings “need not resemble a criminal trial,” to mean that they need not resemble even post-conviction review procedures.<sup>40</sup> And in ratifying the district court’s preponderance of the evidence standard, Judge Brown mused that the court “need not address” whether a lower standard of proof, such as “some evidence” or probable cause, also could suffice.<sup>41</sup>

While the D.C. Circuit opinion in *Al-Bihani* was, in many ways, a hardening or intensification of the district court’s holdings, it is important to note the broad cruxes of this common law body to which even the more liberal judges adhere: The executive branch may indefinitely detain anyone who is part of the

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34. *Al Bihani*, 594 F. Supp. 2d at 39.

35. *Id.* at 39-40.

36. Judge Leon did not explicitly say whether his finding was based on the “part of” prong or the “supported” prong, and did not make an overall assessment of the government’s claimed authority under the AUMF.

37. As pointed out in Judge Williams’s concurring opinion, this conclusion is quite at odds with the Supreme Court’s reasoning in *Hamdi*, i.e., that its understanding of the AUMF was “based on longstanding law-of-war principles.” *Al-Bihani*, 590 F.3d at 885 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)).

38. *Id.* at 872 (citing Military Commissions Act of 2009, 10 U.S.C. § 948a(1)(A)(i)).

39. *Id.* at 874.

40. *Id.* at 876.

41. *Id.* at 878 n.4.

Taliban, al-Qaeda, or associated forces without trial; the detainee need not have engaged in any armed conflict, and could, conceivably, have been apprehended anywhere in the world; and the procedures used to adjudicate the detainee's fate can be truncated along the lines of an administrative fact-finding. In short, the core of the Goldsmith-Katyal proposal already has been enacted through the judiciary.

## II. FROM THE AUMF TO A NATIONAL SECURITY COURT

This entire legal regime, with its broad consensus on detention authority and colorful disagreements on some of the details, relies almost singularly upon a joint congressional resolution enacted just one week after the 9/11 attacks. But the journey from the AUMF to this universe of preventive detention jurisprudence is riddled with uncertainties and conspicuously lacking in further legislative involvement.<sup>42</sup> Instead, it is a product of Congress's, both the Bush and Obama Administrations', and even the higher courts' de facto delegation (or abdication) of authority to common law decision-making by lower courts. Although the D.C. district court judges have dealt seriously and substantively with many difficult legal and policy issues, the system they have built—whether it actually is authorized under the AUMF or not—is a universe unto itself.

The AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . .”<sup>43</sup> The central action that it enabled, of course, was the invasion of Afghanistan, and it was during this invasion that individuals were captured and first brought to Guantánamo Bay.

The Supreme Court's 2004 holding in *Hamdi v. Rumsfeld*<sup>44</sup> defined the AUMF in two significant ways. First, it held as a general matter that an authorization for force includes “the authority to detain for the duration of the relevant conflict.”<sup>45</sup> Second, the ruling widened the AUMF's scope from the 9/11 attacks

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42. As noted above, the Military Commissions Act (MCA) speaks to the process for *trying and punishing* combatants for past offenses—not to their indefinite detention without trial. Thus, the argument that the MCA constitutes “guidance” on detention authority, *see id.* at 872, is somewhat of a stretch. The 2005 Detainee Treatment Act arguably could be read as a legislative ratification of the executive's practice of detention up to that point, but it contains no authorization for detention in itself, and neither the Obama Administration nor any of the habeas rulings has relied on it for advancing detention authority arguments.

43. Pub. L. No. 107-40, 115 Stat. 224 (2001). While the Bush Administration had also claimed to have inherent detention authority under Article II of the Constitution, *see, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004), the Obama Administration has not asserted this position.

44. 542 U.S. 507 (2004).

45. *Id.* at 521.

(the specific subject addressed in the resolution) to the larger global conflict between the United States and terrorist groups. Specifically, the Court held that the government could detain a person who, for the purposes of the case, “was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan *and who ‘engaged in an armed conflict against the United States’ there.*”<sup>46</sup> In other words, the Court defined detention authority in terms of military opposition to the United States rather than in terms of direct involvement in the 9/11 attacks.

The Obama Administration’s current position is somewhat broader than the holding in *Hamdi*. The Administration maintains that the President may detain those involved with the 9/11 attacks and “persons *who were part of, or substantially supported, Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.*”<sup>47</sup> Thus, persons detainable by the government need not have been involved in the 9/11 attacks and need not have engaged in any sort of battlefield activity, in Afghanistan or elsewhere. In other words, the “and who engaged in an armed conflict against the United States [in Afghanistan]” clause has been stricken from the *Hamdi* definition. Now, the detainable category conceivably would include someone involved in a terror cell in India that loosely affiliates with al-Qaeda and plots solely against the Indian government.

The Obama Administration’s position has largely been ratified and entrenched by every habeas court to have heard it—even the ones that have granted petitions for release. Each habeas ruling from the D.C. district court accepted that the AUMF authorizes preventive detention in the manner proposed by the Obama Administration, with the only major disagreements involving the “substantially supported” prong. Many of the habeas decisions, in fact, do not contain government allegations that petitioners ever participated in armed conflict. Instead, the government argues that petitioners are (more likely than not) part of al-Qaeda or the Taliban, based on a host of claims that usually involve suspicious travel into Afghanistan and stays at suspect guesthouses.<sup>48</sup> The D.C.

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46. *Id.* at 516 (quoting Brief for the Respondents at 3, *Hamdi*, 542 U.S. 507 (2004) (No. 03-6696)) (emphasis added).

47. Government Memorandum, *supra* note 17, at 2 (emphasis added). This position is almost identical to that taken by the Bush Administration. *See, e.g., Boumediene v. Bush*, 583 F. Supp. 2d 133 (D.D.C. 2008) (stating and adopting the Bush Administration’s position).

48. For example, Judge Kessler’s opinion in *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009), which was widely hailed as a sharp rebuke to the government’s positions, nonetheless accepted the key premise of the government’s asserted detention authority and did not see armed engagement as a necessary premise for detention; after dismissing the allegation that the petitioner had engaged in battle, she went on to consider the various charges relating to his travels in Afghanistan. *Id.* at 54, 59–66. For sources praising the ruling as a victory against the government, *see, for example, Andy Worthington, Judge Gladys Kessler Releases Yemeni Detainee, Slams “Mosaic” of Guantanamo Intelligence and Unreliable Witnesses,*

district judges have rejected claims that truly are unsupported by the evidence, but the extensive framework stands. Al-Qaeda and Taliban members and their affiliates are detainable in Guantánamo Bay, possibly until they die there, whether or not they have engaged in armed conflict against the United States.

### III. THE PITFALLS OF A COMMON LAW PATH

It may indeed be wise as a matter of policy to detain al-Qaeda and Taliban members indefinitely without charges. Congress, however, has failed to act (either by codifying preventive detention or ending it), and the Supreme Court has been unwilling to articulate the scope of the AUMF's detention authority in *Hamdi* or any of its subsequent rulings. The President's stated position, meanwhile, has been articulated not as a matter of open policy, but rather as a legal opinion adopted by the Justice Department in a somewhat obscure court filing.<sup>49</sup>

Thus, the D.C. district court judges have been facing, case by case, petitioners who have been detained for several years and have been tasked with determining whether they are still detainable. They arguably have come up with reasonable answers to many difficult questions. But the most important question—whether we ought to (or constitutionally can) maintain preventive detention of persons who, unlike Mr. Hamdi, never were engaged in any battlefield hostilities—is no longer asked. It seemingly has been answered, not by legislation or even by a higher court ruling, but as a matter of common law jurisprudence in the months and years following *Boumediene*.<sup>50</sup>

Moreover, absolutely nothing in any of the D.C. habeas opinions suggests that the government must or should refrain from capturing *additional* detainees, who never will stand trial in criminal court, and transferring them to long-term preventive detention facilities. While the rulings at hand all deal with detainees captured abroad several years ago under President Bush and brought to a facility that President Obama intends to close, their scope has not been confined to the current Guantánamo population. To the contrary, the rulings may suggest that the government is free to capture and preventively detain any additional individuals who are part of (or who substantially support) Taliban or al-Qaeda forces, or any group that associates with them. It is no surprise, then, that many have called for Umar Farouk Abdulmutallab, the man who at-

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HUFFINGTON POST, May 14, 2009, [http://www.huffingtonpost.com/andy-worthington/judge-condemns-mosaic-of\\_b\\_203382.html](http://www.huffingtonpost.com/andy-worthington/judge-condemns-mosaic-of_b_203382.html).

49. See Government Memorandum, *supra* note 17.

50. The D.C. judges have, in fact, all but begged Congress to act. See *Al-Bihani v. Obama*, 590 F.3d 866, 881-82 (D.C. Cir. 2010) (in which Judge Brown concurs in her own opinion to say that the “court-driven” process is problematic and that these questions are “best faced directly” by Congress); Chisun Lee, *Judges Urge Congress To Act on Indefinite Terrorism Detentions*, PRO PUBLICA, Jan. 22, 2010, <http://www.propublica.org/feature/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122> (three D.C. district judges calling on Congress to act).

tempted to detonate an explosive on a commercial plane on December 25, 2009, to be afforded the same treatment as the Guantánamo detainees. Despite the Obama Administration's principled intention to try him in a criminal court, it simultaneously has been engaged in crafting a common law that might well permit his indefinite detention under the AUMF—and almost certainly would if the plane had landed anywhere outside the United States.<sup>51</sup> In other words, the D.C. decisions, while perhaps reasonable as applied to a dwindling population of those already detained, have created and continue to create a “loaded weapon”<sup>52</sup> by laying the foundation for an entire preventive detention regime.

Unfortunately, the D.C. Circuit made this weapon somewhat stronger in its recent *Al-Bihani* ruling. Because Al-Bihani had conceded so many key facts, the court simply could have decided whether detaining someone who served as a cook for a military unit supporting the Taliban constituted the use of “necessary and appropriate force against those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>53</sup> Since Al-Bihani actually admitted to carrying a Taliban-issued weapon in the zone of conflict, his case could have been closely analogized to *Hamdi*, without the court having to evaluate the government's broader detention claims. Instead, the D.C. Circuit issued an opinion that: (1) broadly dismissed international law regarding detention authority; (2) endorsed the Obama Administration's general position on detention; (3) went further by importing language from the Military Commissions Act to cover all unlawful belligerents; and (4) sketched a broad framework of deference to truncated procedural rules.<sup>54</sup>

## CONCLUSION

Even if *Al-Bihani* remains good law, future panels of the D.C. Circuit (and potentially Supreme Court Justices) ought to take as minimalist an approach toward these habeas cases as possible. They should cabin them to include only

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51. The key difference in Abdulmutallab's case, of course, is that he was apprehended within the United States. Attorney General Holder has made much of this distinction, writing in a letter addressed to Senator Mitch McConnell that “law of war custody” for persons apprehended domestically has “raised serious statutory and constitutional questions.” See Letter from Attorney Gen. Eric Holder, to Senator Mitch McConnell 3 (Feb. 3, 2010), available at <http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf>. Nonetheless, the Obama Administration has maintained in its habeas filings that AUMF authority should not be limited to individuals captured in Afghanistan, and the Administration does not specifically except the territorial United States from its global claim. See Government Memorandum, *supra* note 17, at 7.

52. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

53. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 15 Stat. 224, 224 (2001).

54. See *supra* Section I.B.

the current Guantánamo population, or only persons captured abroad, or only persons captured by military as opposed to civilian forces. Whatever lines are drawn, a ruling that emphasizes the specific facts before the court and avoids sweeping declarations will head off a judicial endorsement of a more lasting “national security court.” The courts need not reverse earlier interpretations of the AUMF, but they should avoid ratifying them. Instead, they ought to take the Supreme Court’s cue in *Hamdi* and rule narrowly on the cases at hand—all of which are likely to involve people who were captured in Afghanistan or bordering conflict zones in Pakistan and who have been detained in Guantánamo for several years. This would, of course, prolong any firm resolution of the issue. But it likely would force the hand of the political branches to erect a democratically generated solution, while avoiding the creation of an unprecedented legal regime that may last long after Guantánamo has shut its doors.

