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Guantánamo and Habeas Corpus: Wins and Losses, Part Two

by Andy Worthington

Last week, in [the first part](#) of this two-part series, I began looking at how the conservative-dominated D.C. Circuit Court has responded to the rulings in the District Court regarding the habeas petitions of the prisoners held at Guantánamo Bay, where, to date, [38 out of 53 cases](#) have been won by the prisoners. In my article, I examined the first three appeals considered by the Circuit Court, and noted that, although none were contentious, to the extent that they were appeals against habeas petitions that had been denied, in each case the Circuit Court, while upholding the men’s detention, made a point of trying to expand the government’s powers.

In January this year, the Court attempted (against the government’s wishes) to argue that the international laws of war were irrelevant to the detention of men at Guantánamo and the legislation underpinning it (the [Authorization for Use of Military Force](#), passed the week after the 9/11 attacks), and in two cases in June, the Court took exception to the prevailing requirement for detention accepted in the District Court — that the men be part of the “command structure” of al-Qaeda or the Taliban — arguing that merely being “part of” either organization was enough.

As I have maintained for the last year and half, the problems with the AUMF — which the District Court judges are not empowered to discuss, even if they wanted — is that it fails to distinguish between al-Qaeda (a terrorist organization) and the Taliban (the government of Afghanistan at the time of the U.S.-led invasion in October 2001). The result of this confusion that the majority of the men who have lost their habeas petitions (and whose detention is being robustly upheld by the Circuit Court) were, at best, minor players in a military conflict that had nothing to do with al-Qaeda’s international terrorist operations, and therefore the Circuit Court, with its enthusiasm for endorsing detention, is taking us further away from the kind of discussion we should be having about the purpose of Guantánamo and the ongoing detention of the men held there.

A rare victory: The case of Belkacem Bensayah

Despite the Circuit Court's prevailing enthusiasm for endorsing ongoing detention, there was a surprise on June 28, when a panel led by Judge Douglas Ginsburg actually ruled in favor of a prisoner, ordering the lower court to reconsider whether Belkacem Bensayah, an Algerian, and one of six men kidnapped in Bosnia-Herzegovina in January 2002 and rendered to Guantánamo, was involved in any way with al-Qaeda.

In November 2008, Judge Richard Leon had [granted the habeas petitions](#) of five men seized with Bensayah, but had ruled that the government had provided "credible and reliable evidence," from a number of sources, "linking Mr. Bensayah to al-Qaeda and, more specifically, to a senior al-Qaeda facilitator," and had denied his petition.

In dismissing Judge Leon's conclusion on June 28 ([PDF](#)), Judge Ginsburg said "the evidence upon which the district court relied in concluding Bensayah 'supported' al-Qaeda is insufficient ... to show he was part of that organization." He added, "The government presented no direct evidence of actual communication between Bensayah and any al-Qaeda member," and also noted that, after Judge Leon had delivered his ruling, the Obama administration stepped back from a claim that a "senior al-Qaeda operative and facilitator" was a witness against Bensayah.

That man, it is clear from analyses of the case over many years, was [Abu Zubaydah](#), the supposed "high-value detainee," for whom [the CIA's torture program was initially introduced](#), and who, it turned out, was not a member of al-Qaeda at all, and had no knowledge of any international terrorist plots, including 9/11. In a case appealed in the Circuit Court the week before Bensayah's — that of Sufyian Barhoumi, an Algerian seized with Zubaydah — the judges [failed to recognize](#) that the government had backed down from most of its claims about Zubaydah, and, shamefully, relied on long-discredited statements made by Ahmed Ressam, the failed "Millennium Bomber," who is now serving a 22-year sentence in a U.S. prison, as part of its justification for upholding Barhoumi's detention. The collapse of the case against Zubaydah — primarily because torture encourages its victims to make up a pack of lies to get it to stop — has been so significant that allegations made by him or about him have stealthily disappeared from the charge sheets in numerous cases — not only at Guantánamo, but also in other countries. In Bensayah's case, however, the discussions regarding his significance — or lack of it — have surfaced over the years, and in an article in the [New York Times](#) in March this year, Charlie Savage explained how Bensayah's case had also provided a test for the Obama administration regarding the perceived scope of its detention powers.

The article was fascinating for the revelations that, last spring, career lawyers at the Justice Department resisted narrowing the definition of who could legally be held at Guantánamo, after Judge John D. Bates asked for a current definition, fearing that "rolling back the Bush position might make it harder to win," but that White House Counsel Greg Craig [shepherded President Obama](#) to a position in which "only people who were part of al-Qaeda or its affiliates, or their

‘substantial’ supporters” could be detained — the definition that Judge Bates later refined by proposing that the “key inquiry” for determining whether an individual has become “part of” one or more of these organizations is “whether the individual functions or participates within or under the command structure of the organization — i.e., whether he receives and executes orders or directions.”

Last summer, after Craig had [already been sidelined](#) for his fearless approach to dismantling the Bush administration’s policies, the case of Belkacem Bensayah arose as a test for the administration, given that he had been seized “far from the active combat zone” and had, essentially, only been accused of “facilitating the travel of people who wanted to go to Afghanistan to join al-Qaeda.”

Savage reported that Harold Koh, who became the State Department’s senior lawyer in June, “produced a lengthy, secret memo contending that there was no support in the laws of war for the United States’ position in the Bensayah case.” Koh was up against Jeh Johnson at the Pentagon, who also produced a secret memo arguing for “a more flexible interpretation of who could be detained under the laws of war.”

In September, according to Savage, Koh and Johnson debated the issues in a packed room in the Justice Department’s Office of Legal Counsel (which advises the executive branch on what is legally permissible), with David Barron, the OLC’s acting head, called upon to “decide who was right.” Instead, however, Barron refused to decide, circulating a memo in which he stated that the OLC “had found no precedents justifying the detention of mere supporters of al-Qaeda who were picked up far from enemy forces” and “was not prepared to state any definite conclusion.”

As Savage explained, the upshot was a mess, a “tactical approach” that involved lawyers trying to avoid the question “as long as possible.” He added, “They changed the subject by instead asking courts to agree that people like Mr. Bensayah, looked at from another angle, had performed functions that made them effectively part of the terrorist organization — and so were clearly detainable.”

In the end, however, the Circuit Court concluded that there was no evidence that Bensayah had “performed” any “functions” for al-Qaeda at all. The key allegation, which apparently involved phone calls that Bensayah had allegedly made to Abu Zubaydah, disappeared like a will o’ the wisp, and perhaps hinged on a solitary document marked, “Information Report: Not Finally Evaluated Intelligence.” In its place, as Judge Ginsburg noted, there was little more than a claim that Bensayah had “experience in obtaining and traveling in and out of numerous countries on fraudulent passports,” and, as Bensayah himself admitted, he had “used multiple travel documents, ‘some of which were in an assumed name,’ but [only] in order to avoid being sent back to Algeria, “where he reasonably feared prosecution.” As Judge Ginsburg added:

He presented “unrebutted declarations” that “mere possession and use of false travel documents is neither proof of involvement with terrorism nor evidence of facilitation of travel by others.” We agree.

While Bensayah waits to see if his case will indeed be reconsidered by Judge Leon, or whether, as his Bosnian wife [told a Balkan website](#), he “will be released soon,” he is probably fortunate that, even with no evidence against him, his appeal came up before a panel led by Judge Ginsburg, rather than, for example, Judge A. Randolph, whose record on Guantánamo is notoriously inflexible, and is discussed below.

Denying the appeal of Fawzi al-Odah

Two days after the Bensayah ruling, on June 30, a different Circuit Court panel dismissed the appeal of Fawzi al-Odah, a Kuwaiti who lost his habeas petition last August, when, as [I explained at the time](#):

[T]he government secured another shallow victory when Judge Colleen Kollar-Kotelly denied the habeas petition of Fawzi al-Odah, a Kuwaiti prisoner, agreeing with the government that it was “more likely than not” that he “became part of Taliban and al-Qaeda forces in Afghanistan.” Judge Kollar-Kotelly’s ruling was based on a dubious assemblage of information that relied more on inconsistencies in al-Odah’s account of his activities than it did on anything resembling concrete evidence, as she herself admitted, when she wrote that there were “significant reasons why the Government’s proffered evidence may not be accurate or authentic.”

Al-Odah has always claimed that he took a break from work and traveled to Afghanistan in August 2001 to teach the Koran and provide humanitarian aid (which he had done previously in other countries), and has also admitted that he established contact with the Taliban, as they were the government at the time, and spent one day at a Taliban-controlled training camp. He has also stated that, after the U.S.-led invasion, he was sent by a Taliban representative to a safer location outside Kabul, and, from there, traveled to Jalalabad, where he stayed with another family, who gave him an AK-47 assault rifle to protect himself. He then joined other people crossing the mountains to Pakistan, where he handed himself in to the border guards, and was subsequently handed over — or sold — to U.S. forces.

While Judge Kollar-Kotelly was undoubtedly justified in finding numerous holes in al-Odah’s account of his activities, including asking why he did not flee Afghanistan before traveling

to Jalalabad, and why he allowed himself to travel with other armed men through the Tora Bora mountains, the result of her ruling, as I explained at the time, was that:

[N]early eight years after the 9/11 attacks, the United States is still asserting that it has the right to hold a young man who spent just one day at a training camp, who did not flee Afghanistan after the 9/11 attacks (perhaps because he feared reprisals if he was found escaping), who traveled with other men to Kabul, and then to Logar and then to Tora Bora and his eventual capture, with no evidence that he ever used the weapon he was given, and no evidence that his training involved anything more than firing a few rounds from an AK-47 in a practice session.

In al-Odah's appeal, the Circuit Court panel, led by Chief Judge David B. Sentelle, [dismissed challenges](#) regarding the "preponderance of evidence" standard for detention, and the use of hearsay evidence, dismissing the first "under binding precedent in this circuit," and the second because the Supreme Court in [Hamdi v. Rumsfeld](#), the 2004 case that approved the detention of prisoners under the AUMF] stated that "[h]earsay ... may need to be accepted as the most reliable available evidence from the Government" in the prisoners' habeas petitions, and because of the precedent established by the Circuit Court in the cases of Adham Ali Awad and Sufyian Barhoumi, discussed in the first part of this article.

When it came to examining the basis of the evidence against al-Odah, the court began by noting that he "has a heavy burden to meet to have this court reverse the district court's factual findings that are the underpinnings of its determination," and then, predictably, dismissed all of his challenges, leaving unanswered the question I asked last year — about whether it ought to be justifiable to hold indefinitely a young man who attended a training camp for one day, and does not appear to have ever raised arms against U.S. forces.

The dismissal of Mohammed al-Adahi's successful habeas petition

A final blow for the prisoners came on July 13, when the Circuit Court, for the first time, reversed a successful habeas petition ([PDF](#)). The prisoner in question is Mohammed al-Adahi, a Yemeni who had accompanied his sister to Afghanistan to marry a man who was undoubtedly connected to al-Qaeda. Nevertheless, last August, Judge Gladys Kessler had ruled that, despite this, al-Adahi himself had no connection to al-Qaeda, and [granted his habeas petition](#).

There was abundant evidence to suggest that she was correct — primarily that he had never previously left Yemen, where he had a respectable job, that he was obliged to accompany his sister, who was not allowed to travel alone, and that he was kicked out of a training camp during his stay because he broke the rules by smoking — but when the government's appeal came before a panel including Judge Randolph (notorious for endorsing every piece of Guantánamo-

related legislation that was subsequently overturned by the Supreme Court), the Court reversed Judge Kessler's ruling, with Judge Randolph describing it as "manifestly incorrect — indeed startling."

In what I can only characterize as a vile assault on Judge Kessler's integrity, Judge Randolph, as [Law.com explained](#), wrote that Kessler's "consideration of each piece of evidence on its own merits, instead of as part of a whole, was a 'fundamental mistake that infected the court's entire analysis.'" He then chastised Kessler for having "failed to consider 'conditional probability analysis' in weighing the government's evidence, which he explain[ed] as a theory that the occurrence of one event makes another event either more or less likely."

Judge Randolph also stated that the District Court "erred in its treatment of the evidence" and "reached [its] conclusion through a series of legal errors," adding, "When the evidence is properly considered, it becomes clear that Al-Adahi was — at the very least — more likely than not a part of al-Qaeda. And that is all the government had to show in order to satisfy the preponderance standard."

One of al-Adahi's lawyers, John A. Chandler, said he was "utterly stunned" by the ruling, telling the [New York Times](#), "Mr. al-Adahi is not and has never been a member of al-Qaeda or a terrorist." Law.com reported that his team would either ask for an *en banc* rehearing or petition the Supreme Court to hear the case, and stated that Chandler "criticized the appeals court for reassessing the evidence being used to hold al-Adahi instead of assessing the trial court's ruling for errors of law." As Chandler explained, "The appellate court pretty clearly wanted to find he was al-Qaeda and substituted their judgment on the facts for the judgment of the trial court, when the trial court is supposed to make decisions of fact."

However, what was more worrying than Judge Randolph's dismissal of Judge Kessler's reasoning was his additional assault on the "preponderance of the evidence" standard established by Senior District Judge Thomas F. Hogan in the Case Management Order governing the habeas petitions in November 2008, which, of course, is already considerably lower than what is required in federal court trials.

After a hearing in February in al-Adahi's case, Judge Randolph had ordered the government and al-Adahi's lawyers to file new briefs "suggesting what factual proof — 'if any' — the government needed to support continued detention," as [SCOTUSblog explained](#), and had found that the results "were not exactly illuminating." Fudging — as was to be expected from the analysis of backroom maneuvering described above — the government defended the "preponderance" standard as "appropriate," but added that "a different and more deferential standard" might be appropriate in other, unexplained situations.

Seemingly out of nowhere, Judge Randolph stated in the ruling on al-Adahi that "we doubt" that the Constitution "requires the use of the preponderance standard." He added that the District Court judges "had not said why they were using that approach, but that Judge Hogan had

indicated it was based on the Supreme Court's *Boumediene* decision" in June 2008, which [granted the prisoners habeas rights](#).

"But," Judge Randolph wrote, "*Boumediene* held only that the 'extent of the showing required of the Government in these cases is a matter to be determined,'" and then proposed that it "should equal the scope of habeas rights as they existed in 1789, when the Constitution was written" (as SCOTUSblog described it), and when, as Randolph obviously delighted in pointing out, there appeared to be "no precedent in which 18th Century English courts adopted a preponderance standard."

To understand quite how depressing this proposal is, it should be noted that, the last time anyone argued in a court that "some evidence" should be sufficient to justify detentions in wartime — or, to be more accurate, in the "war on terror" — was during the Bush administration, before the Supreme Court intervened to try to ensure that the men in Guantánamo were held for some reason other than the kind of inadequate evidence that Judge Randolph finds appropriate.

And yet, eight and a half years after Guantánamo opened, Judge Randolph has shifted the clock back to the intolerably poor detention standards of those years, which the District Court has been doing so much to challenge in the two years since *Boumediene*. The result, as SCOTUSblog explained, is that "even if the Justice Department did not now take the Circuit Court's hint to propose a 'some evidence' standard for use in the remaining Guantánamo cases, the way the panel interpreted the preponderance standard would seem to ease the government's burden of proof significantly."

If al-Adahi's case is anything to go by, that is nothing short of a disaster.

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