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## D.C. CIRCUIT OFFERS KEY GUIDANCE WHILE REJECTING HABEAS CORPUS FOR TERRORISM DETAINEE

by

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In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of a habeas petition brought by Ghaleb Nassar Al-Bihani, a Guantanamo detainee. Perhaps more significant than the holding of the decision is the court's concerted effort to provide guidance on two important questions left open by the Supreme Court: (1) "whom [may] the President . . . lawfully detain pursuant to statutes passed by Congress" and (2) "what procedure is due to detainees challenging their detention in habeas corpus proceedings." *Id.* at 870. In considering these two questions, Judge Janis Rogers Brown's majority opinion emphasized that international law does *not* limit the President's detention authority and that the Suspension Clause guarantees detainees who petition for habeas review only a limited procedural entitlement.

Notably, there also were two separate opinions. In his concurrence, Senior Judge Stephen Williams agreed that Al-Bihani's detention was lawful, but argued that the majority's discussions of international law and the lawfulness of the district court's habeas procedures were unnecessary. Judge Brown, the author of the majority opinion, also issued her own separate opinion asking Congress to take up the task of crafting proper procedures for habeas review that account for the special circumstances of wartime detention. These separate opinions signal a renewed debate over the President's detention authority and the proper procedures for habeas review of wartime detention.

***The Background and Facts of Al-Bihani v. Obama.*** Al-Bihani is a Yemeni citizen and native Saudi Arabian who has been held since 2002 at the U.S. Navy detention facility in Guantanamo Bay. He "left home" for Afghanistan in the Spring of 2001 "in response to a fatwa (a religious decree) issued by a local Sheikh to fight jihad in support of the Taliban against the Northern Alliance." *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 36 (D.D.C. 2009). Along his way to Afghanistan, Al-Bihani stayed at "what the government alleges were Al Qaeda-affiliated guesthouses," although Al-Bihani concedes only that they were "affiliated with the Taliban."<sup>1</sup> In Afghanistan, Al-Bihani "accompanied and served a paramilitary group allied with the Taliban, known as the 55th Arab Brigade, which included Al Qaeda members within its command structure and which fought on the front lines against the Northern Alliance." *Al-Bihani*, 590 F.3d at 869. During his time with the 55th, Al-Bihani carried a Taliban-issued Kalashnikov rifle and served as the brigade's cook. In November 2001—after the U.S.-led Coalition invaded Afghanistan—Al-Bihani and the 55th retreated from the front lines to a house near the

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<sup>1</sup>*Al-Bihani*, 590 F.3d at 869. Al-Bihani may have attended and received instruction at two Al Qaeda-affiliated terrorist training camps during this time. Although he made several detailed and consistent admissions about having received such military training, he later recanted. *Id.*

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Pakistani border, where his commander decided to surrender to the Northern Alliance. Al-Bihani was detained at a series of different facilities until Northern Alliance forces turned him over to U.S. Coalition forces in early 2002. Thereafter, Al-Bihani was sent to Guantanamo for detention and interrogation.

In June 2005, after the Supreme Court decided that the statutory habeas jurisdiction of federal courts extended to Guantanamo Bay,<sup>2</sup> Al-Bihani filed a habeas petition with the U.S. District Court for the District of Columbia, challenging the lawfulness of his detention. Following the passage of the Military Commissions Act of 2006, which withdrew federal-court jurisdiction over Guantanamo detainee habeas petitions, the district court stayed Al-Bihani's petition. But thereafter, the Supreme Court held in *Boumediene v. Bush* that the Military Commissions Act was an "unconstitutional suspension of the writ." *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008), and instructed that detainees were entitled to maintain habeas challenges under procedures to be crafted by the district court to account for the special circumstances of wartime detention. *Id.* at 2276.

Following *Boumediene*, the district court took up Al-Bihani's habeas petition. Heeding the guidance of the *Boumediene* Court, the district court outlined a common process for handling all Guantanamo habeas petitions before it. That process required the government to file a "return" setting out the "factual basis for detention and a brief statement setting forth the Government's legal basis for detaining the petitioner," including any "definition of enemy combatant upon which it relies." The court authorized the habeas petitioner to file a "traverse" in response to the government's return, to introduce evidence, and to seek limited discovery. In addition, the court imposed a duty upon the Government to turn over to the petitioner any exculpatory evidence. The district court adopted a rebuttable presumption in favor of accuracy and/or authenticity of the government's evidence and allowed the admission of relevant and material hearsay evidence, the credibility and weight of which the opposing party could challenge. The Government bore the ultimate burden of proving the lawfulness of a petitioner's detention by a preponderance of the evidence. *Al-Bihani v. Bush*, 588 F. Supp. 2d 19 (D.D.C. 2008).

After proceeding in accordance with these guidelines, the district court denied Al-Bihani's petition. Notably, the district court did not resolve the factual dispute about whether Al-Bihani received instruction at Al Qaeda military training camps, finding it "unnecessary in light of [Al-Bihani's] overwhelming and consistent testimony" that he "supported the Taliban in its fight against the Northern Alliance and U.S. forces as a member of the 55th Arab Brigade." *Id.* at 39, 38. Although Al-Bihani characterized his role with the 55th as one of a cook who never fired his weapon, the district court concluded that "faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient 'support' to meet this Court's definition [of an enemy combatant]." *Id.* at 40.

***The D.C. Circuit Decision in Al-Bihani v. Obama.*** Al-Bihani challenged "the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war" and argued that "the habeas process afforded him by the district court fell short of the requirements of the Suspension Clause." *Al-Bihani*, 590 F.3d at 870, 875. The majority explained that Al-Bihani's various arguments placed before the Court two overarching questions regarding Guantanamo detainees: (1) "whom [may] the President . . . lawfully detain pursuant to statutes passed by Congress" and (2) "what procedure is due to detainees challenging their detention in habeas corpus proceedings." *Id.* at 870. Emphasizing that the Supreme Court had left these issues unresolved in *Hamdi* and *Boumediene*, the majority felt compelled to "narrow the legal uncertainty that clouds military detention." *Id.* at 870.

Al-Bihani advanced several arguments rooted in international law. Before addressing these arguments, however, the majority emphasized that they rested on the mistaken premise that "the war powers granted by the Authorization for the Use of Military Force (AUMF) and other statutes are limited by the international laws of war." *Id.* at 871. In the court's view, none of the relevant statutes—the AUMF, the Detainee Treatment Act, or the Military Commissions Acts—gave any indication "that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF." *Id.* The majority further explained that the international laws of war had not been wholly implemented as domestic law by Congress and, in any event, would be subject to displacement by the AUMF. The majority then emphasized that, because "the international laws of war are not a fixed code," this body of law could at most help to inform the court generally about the war powers contained in the AUMF; since international law lacks "controlling legal force and firm definition," it could not limit the President's war powers. *Id.* at 871. The majority stressed that "the sources we

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<sup>2</sup>*Rasul v. Bush*, 542 U.S. 466, 483-84 (2004).

look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw." *Id.* at 871-72.

Analyzing the relevant statutes and decisional law, the majority easily concluded that Al-Bihani was lawfully detained. Under *Hamdi*, the AUMF's authorization 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," includes the power to detain combatants subject to such force. *Hamdi*, 542 U.S. at 573. It was undisputed that Al Qaeda was responsible for the September 11 attacks, that it had been harbored by the Taliban, and that the 55th defended the Taliban against the Northern Alliance. Accordingly, the majority found the 55th properly "subject to U.S. military force and its members and supporters—including Al-Bihani—eligible for detention." *Al-Bihani*, 590 F.3d at 873. The court found further support in the 2006 and 2009 Military Commission Acts, which authorized the trial of individuals who "purposefully and materially supported hostilities against the United States" or its co-belligerents, reasoning that "the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority." *Id.* at 872. In light of the district court's findings of facts, the majority had no doubt that Al-Bihani "falls squarely within the scope of the President's statutory detention powers." *Id.* at 873.

The majority then addressed Al-Bihani's international law arguments. It rejected the argument that, under the international laws of co-belligerency, the 55th "should have been allowed the opportunity to remain neutral upon notice of a conflict between the United States and the Taliban." *Id.* After reiterating that international law does not limit the President's detention power, the court explained that the relevant laws of co-belligerency affording notice of war and the choice to remain neutral apply only to nation states, not "an irregular fighting force" like the 55th. Next, the court rejected the argument that Al-Bihani must be released "because the conflict with the Taliban has allegedly ended." *Id.* at 874. As the court explained, active hostilities are still ongoing, and the political branches have made no determination that hostilities in Afghanistan have ceased. *Id.* at 875. In addition, the court rejected Al-Bihani's argument that he should be released because the Government failed to accord him POW status, explaining that no controlling authority supported this novel and unpersuasive theory. *Id.*

Turning to Al-Bihani's procedural challenges, the court stressed that, under *Boumediene*, detainees are entitled to the "fundamental procedural protections of habeas corpus," which amount to only a "limited procedural entitlement." "The Suspension Clause protects only the fundamental character of habeas proceedings," which amounted to a "cursory review of the legitimacy of a court's jurisdiction." *Id.* at 876. The court emphasized, however, that *Boumediene* lowered this bar by instructing that "[c]ertain accommodations [could] be made to reduce the burden habeas corpus proceedings will place on the military." *Id.* (quoting *Boumediene* at 2276). The court then analyzed only the procedural arguments "warranting serious consideration." Specifically, the court rejected Al-Bihani's argument that the preponderance standard was insufficient, explaining that the *Hamdi* Court implicitly authorized this standard by endorsing a "burden-shifting scheme" in which the government need only present "credible evidence that the habeas petitioner meets the enemy-combatant criteria" before "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* at 878 (quoting *Hamdi*, 542 U.S. at 533-34). The court then queried whether a lower burden of proof might even suffice for "preventative detention of non-citizens seized abroad who are suspected of being terrorist threats to the United States." *Id.*

The court likewise rejected Al-Bihani's hearsay challenges, chiefly on the grounds that "the Confrontation Clause of the Sixth Amendment applies only in criminal prosecutions, and is not directly relevant to the habeas setting." *Id.* at 879. The court then highlighted *Hamdi*'s acknowledgement that hearsay "may need to be accepted as the most reliable available evidence" as long as the petitioner is given the opportunity to rebut that evidence. *Id.* (quoting *Hamdi*, 542 U.S. at 533-34). The court emphasized "that district judges are experienced and sophisticated fact finders" whose "eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries." *Id.* at 880. The court discarded Al-Bihani's remaining procedural claims "without extended discussion."

***A Brief Analysis of Al-Bihani v. Obama.*** *Al-Bihani v. Obama* is one of the first appeals of a Guantanamo detainee habeas petition. Thus, the D.C. Circuit's affirmance of the dismissal of Al-Bihani's petition has some

significance, especially considering that all three members of the panel agreed that Al-Bihani's detention at Guantanamo is lawful.<sup>3</sup>

Perhaps more important than the holding of the case is the guidance the court provided on the effect of international law on the President's detention authority and on the fundamental nature of habeas review. As to the first issue, the majority offered a powerful explanation as to why principles of international law cannot limit the President's detention authority. Note, however, that Senior Judge Williams did not join this portion of the court's opinion because, in his view, the majority's rejection of international law was "hard to square" with *Hamdi*, in which the plurality opinion understood the AUMF to include detention authority and noted that its "understanding is based on longstanding law-of-war principles."<sup>4</sup> That principles of international law might be helpful in understanding the interpretation of a congressional grant of authority to the President does not mean that international law can actually *cut back* on the President's authority. Indeed, the Constitution ensures that that international law cannot do so—by making federal law the "supreme law of the land." U.S. CONST., ART. VI, cl. 2. Judge Williams tried to blunt the effect of this portion of the majority opinion by characterizing it as dicta "unnecessary" to the resolution of the case.

As to the second issue, the majority emphasized that the "Suspension Clause protects only the fundamental character of habeas proceedings," and explained that this conferred upon military detainees only a "limited procedural entitlement." Although Senior Judge Williams argued that the court did not need to reach this issue, it cannot be disputed that the Suspension Clause guarantees only a limited form of habeas review even in the criminal context. As Chief Justice John Marshall explained, "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 28 U.S. 193, 202 (1830). Yet, despite highlighting the limited nature of the right guaranteed by the Suspension Clause, Judge Brown recognized that, as a policy matter, Congress could provide greater rights to detainees seeking habeas relief than guaranteed to them under the Constitution. Judge Brown noted that the Supreme Court had imposed upon the lower courts "the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools." Cognizant that more—and more difficult—cases would reach the court, she pointedly asked "whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation." Judge Brown stressed that, "in the midst of an ongoing war, time to entertain a process of literal trial and error is not a luxury we have." Accordingly, she called on the Congress, "pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution," to intervene by establishing new habeas standards for military detainees. *Al-Bihani*, 590 F.3d at 882.

**Conclusion.** The D.C. Circuit's decision in *Al-Bihani v. Obama* is noteworthy particularly because of the guidance the majority provided on the substantive and procedural standards for habeas review applicable to Guantanamo detainees. The majority correctly determined both that international law cannot limit the detention authority that Congress conferred upon the President and that the Constitution guarantees detainees only a limited habeas review.<sup>5</sup> However, the separate opinions in the case signal a renewed debate on these issues as the district and circuit courts continue to grapple with detainee habeas petitions. This debate will expand to the legislative arena if Congress takes on the task of formulating procedures for habeas review.

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<sup>3</sup>Judge Williams noted in his concurrence that "the petitioner has conceded facts that render his detention lawful." *Id.* at 882.

<sup>4</sup>*Al-Bihani*, 590 F.3d at 885. Senior Judge Williams did concede that, regardless of the effect of international law on the President's detention authority as a general matter, international law did not limit the President's "use of force in Afghanistan in the fall of 2001" and concomitant detention authority over the proper targets of that use of force (such as the 55th and Al-Bihani). *Id.* at 884.

<sup>5</sup>In opposing Al-Bihani's pending petition for rehearing, the Government filed a brief arguing that the panel decision was correct but noting its disagreement with the majority's conclusion that the international laws of war do not limit the President's detention authority. *See Resp. to Pet. For Reh'g & Reh'g En Banc, Al-Bihani v. Obama*, No. 09-5051, at 6-8 (D.C. Cir. filed May 13, 2010).