


**SPARKS FLY
BETWEEN THE
SUPREME COURT
AND THE
D.C. CIRCUIT AS
INDEFINITE
GUANTANAMO
DETENTIONS
CONTINUE**

By Charles R. Church

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The recent capture and killing of Osama bin Laden brought stark reminders of the most controversial years in our nation's dealings with aliens captured during what the Bush administration labeled the War against Terror¹ and detained at Guantanamo Naval Base. No sooner had the news broken than a debate erupted over whether torture had provided the information that led us to bin Laden. Former Attorney General Mukasey and Senator John McCain sparred over whether the intelligence that led to bin Laden began with a disclosure by Khalid Sheikh Mohammed, who "broke like a dam under harsh interrogation techniques that included waterboarding,"² or, as McCain had been reassured by a letter from CIA Director Leon Panetta, the key intelligence came from a detainee held in another country.³ Mukasey rejoined that McCain was wrong.⁴ Others, who will be left unmentioned, joined the fray, sometimes ridiculously.

This debate reminded us not only of our harsh interrogations and even torture, but also of CIA-operated black sites, extraordinary renditions to countries less concerned with whether captives were tortured,⁵ and prisoners held without charge and without access to counsel.⁶

While most of these strategies have been put behind us,⁷ Guantanamo and other detainees continue to be held indefinitely, with the clear prospect that they may spend their remaining lives at those facilities.⁸ And these potentially lifetime detentions without charge or conviction of any crime may rest on what, for trial lawyers, are very unfamiliar evidentiary and procedural footings. No live testimony.⁹ Hearsay or multiple hearsay.¹⁰ Credibility judgments made on statements in interrogation reports and the like.¹¹ Preponderance of the evidence, if that.¹²

The Supreme Court Takes Charge

Four decisions by the Supreme Court establish the broad ground rules for habeas cases initiated by Guantanamo detainees.

In June 2004, *Rasul v. Bush*¹³ rejected the government's fervent plea that our statute on habeas corpus conferred no rights on aliens being detained at Guantanamo Bay Naval station, a facility not located within the sovereign territory of the United States. Because of our government's complete jurisdiction and control over the naval base, which it may continue to exercise permanently, aliens held there no less than citizens are entitled to invoke federal judicial authority under the habeas statute. Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas protested:

Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed wartime detainees.¹⁴

The consequence of the Court's holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in

a foreign theater of active combat to bring a habeas petition against the Secretary of Defense.¹⁵ "For this Court to create such a monstrous scheme in time of war...is judicial adventurism of the worst sort."¹⁶

The same day, in *Hamdi v. Rumsfeld*,¹⁷ the Court dealt with the power to detain, and the broad strokes of due process. One week after 9/11, Congress had passed a resolution authorizing the president to "use all necessary and appropriate force" against those nations, organizations, and persons involved in the attacks, or those who harbored them. Under this Authorization for the Use of Military Force (AUMF),¹⁸ the president ordered troops to Afghanistan to subdue al Qaeda and quell the Taliban regime that supported it. Though the AUMF failed to mention the power to detain, a plurality of the Court found it to be "so fundamental and accepted an incident to war" as to be implied.¹⁹

The plurality agreed with *Hamdi* that indefinite detention for the purpose of interrogation is not authorized by the AUMF.

Further, it understood, based on longstanding law-of-war principles, that Congress' grant of authority to detain would last only for the duration of the relevant conflict. If the circumstances of a given conflict are entirely unlike those of conflicts that informed the development of the law of war, that understanding may unravel.²⁰ However—and this caveat provides the basis for much of the detainee habeas litigation—legislative authority to detain under the AUMF exists only when it is sufficiently clear that the individual is, in fact, an enemy combatant.²¹

As to what process is constitutionally due to a citizen (for Hamdi was a U.S. citizen), a citizen-detainee must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker.²² Enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the executive at a time of ongoing military conflict. Hearsay may need to be accepted as the most reliable available evidence from the government. Likewise, the Constitution may 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 was provided.²³

A rarely seen dissent—one written by Justice Scalia and joined by Justice Stevens—argued that, where the government accuses a citizen of waging war against it, the citizen may not be detained, absent a criminal charge or exercise by Congress of the (habeas corpus) Suspension Clause.²⁴ Justice Thomas dissented separately,²⁵ arguing that the executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. And due process requires nothing more than a good-faith executive determination.

Congress enacted the Detainee Treatment Act of 2005 (DTA) to prohibit American personnel—including members of the CIA—from engaging in torture and other forms of cruel, inhuman, and degrading treatment of prisoners held anywhere in the world.²⁶ Another provision responded to *Rasul*, stripping the courts of jurisdiction to hear petitions for habeas corpus filed by aliens detained at Guantanamo. Relying on this provision, the government moved to

dismiss in *Hamdan v. Rumsfeld*, a habeas case brought by a Yemeni national to challenge a conspiracy charge in a military commission. Justice Stevens wrote for the Court in holding²⁷ that the jurisdiction-stripping provision of the DTA applied only to habeas petitions filed after its effective date and denied the motion. Further, the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate the Uniform Code of Military Justice and the Geneva Conventions.

The decision that, as will be seen, has drawn so much wrath from D.C. Circuit Court of Appeals judges followed two years later. In the meantime, Congress had sought to cure the limitation on the jurisdiction-stripping of the DTA imposed in *Hamdan* by enacting the Military Commissions Act of 2006 (MCA).²⁸ The MCA made plain that courts would have no jurisdiction to entertain habeas petitions filed by Guantanamo detainees, whether pending or filed after its enactment. The Court in *Boumediene v. Bush*²⁹ responded by finding that the MCA violated the Suspension Clause of the Constitution.³⁰ If the privilege of habeas corpus is to be denied to petitioners, Congress must act in accordance with the requirements of that Clause. This it failed to do.

The privilege of habeas corpus entitles a prisoner to a meaningful opportunity to demonstrate that he is being held contrary to law. The Court noted: "Our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined."³¹

The dissent of Chief Justice Roberts,³² with Justices Scalia, Thomas, and Alito joining, would have found the system constructed by the political branches in the DTA adequate to protect any constitutional rights of aliens captured abroad and detained as enemy combatants may enjoy. The Court should have required petitioners to exhaust those remedies before assessing the nature and validity of the congressionally mandated proceedings in a given detainee's case.³³

Justice Scalia fulminated mightily in his dissent, which was joined by the Chief Justice and Justices Thomas and Alito. "The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause has no application, and the Court's

intervention in this military matter is entirely *ultra vires*."³⁴ Thinking "it appropriate to begin with a description of the disastrous consequences of what the Court has done today," Scalia described various terrorist attacks on our nation, then continued:

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.³⁵

The president's Office of Legal Counsel advised that, under the great weight of legal authority, a federal district court could not properly exercise habeas jurisdiction over an alien detained at Guantanamo Bay. Had the law been otherwise, the military surely would not have transported prisoners there.³⁶ "The Nation will live to regret what the Court has done today. I dissent."³⁷

But a mere memorandum decision by the Court to vacate and remand the Ninth Circuit's decision in *Gherebi v. Bush*³⁸ has been revealed as one of its most important actions in the terrorism detention litigation of the past decade. The remand order implicitly hinted that, even though the federal courts in general had jurisdiction over the Guantanamo cases, the Court believed that there was only one appropriate venue for such suits—the federal courts in and for the District of Columbia. Since then, the D.C. District and Circuit Courts have exercised a de facto form of exclusive jurisdiction over any and all claims arising out of Guantanamo.³⁹

Certiorari Petitions by Detainees

In late January 2011, eight certiorari petitions by Guantanamo detainees were pending at the Court.⁴⁰ As envisioned by *Boumediene*, the D.C. district and circuit judges had provided their thinking on just how detainee habeas cases should be handled. The petitions presented a host of important questions:

1. Do the procedural rules adopted by the Circuit—in which all evidence, including hearsay, is admitted without precondition, witnesses are not required (and thus cannot be confronted) and preponderance of the evidence is the applicable standard of proof—provide individuals who were not engaged in armed conflict when captured with the "meaningful opportunity" required by *Boumediene* to challenge their indefinite

detentions? *Ali Awad v. Obama*, Docket No. 10-736.

2. Whether a U.S. judge, having jurisdiction over the habeas petition of an alien transported by the executive to an offshore prison and held there without lawful basis, has any judicial power to direct the prisoner's release? *Kiyemba v. Obama*, Docket No. 10-775.

3. Whether:

(a) the Circuit's holding that International Law does not limit AUMF detention authority conflicts with Supreme Court precedents?

(b) Sec. 5 of the MCA, providing that no person may invoke the Geneva Conventions or their protocols, precludes petitioner's argument that the law of war limits AUMF detention authority?

(c) petitioner must be released because the international conflict between the U.S. and Afghanistan governments is long over?

(d) the Circuit misinterpreted the scope of statutory detention authority?

Al Bihani v. Obama, Docket No. 10-7814.

4. Whether the district court must give conclusive effect to the Government's assertion that an individual is unlikely to be tortured if transferred to a particular country, so the individual is disabled from challenging such transfer? *Khadr v. Obama*, Docket No. 10-751⁴¹ and *Mohammed v. Obama*, Docket No. 10-746.

5. Whether, in a civil case in which different inferences can be drawn from a trial record containing live testimony, the Court of Appeals improperly revised the clearly erroneous standard of review by imposing a mathematical concept—"conditional probability"—as an amorphous legal standard? *Al-Adahi v. Obama*, Docket No. 10-487.

6. Whether:

(a) the Federal Rules of Evidence and 28 U.S.C. 2246 limit the admissibility of hearsay in a habeas case challenging indefinite imprisonment, potentially for life?

(b) a preponderance of the evidence standard, rather than a clear and convincing evidence test, insufficient to support a ruling in favor of such a detention?

Al-Odah v. United States, Docket No. 10-439.

The petition in *Ameziane v. Obama*, Docket No. 10-447, was filed under seal, and no information is available.⁴²

All of these petitions have been denied, save that of petitioner Mohammed, who was transferred over his protest to Algeria while his was pending. Of the eight cases, Justice Kagan recused herself in six on account of her prior activities as Solicitor General.⁴³

Tensions and More, between the Supreme Court and the D.C. Circuit

A number of scholars, civil liberties groups, and detainee lawyers (not to mention editorial pages of various major newspapers) have accused the D.C. Circuit in general—and some of the judges in particular—of actively subverting *Boumediene* with decisions that have both the intent and effect of vitiating that ruling. These critics have all-but-suggested that the Circuit has an agenda in which the Supreme Court's holdings in these cases should be given as narrow a compass as is remotely defensible.⁴⁴ Defenders of the Circuit's work have stressed both the extent to which *Boumediene* necessarily left these issues open to judicial resolution, and the near-unanimity on virtually all post-*Boumediene* cases. Few of these opinions have elicited dissents, and none successfully has been taken *en banc*. And the Supreme Court, with but one equivocal exception, has denied certiorari in every post-*Boumediene* Guantanamo case it has

thus far been asked to hear.⁴⁵

Professor Stephen I. Vladeck, who has served as co-counsel or *amici curiae* in a number of the most significant detainee habeas cases, sees no holdings to which one can point as "proof" that the D.C. Circuit has refused to take the Supreme Court seriously, though the court's analysis on evidentiary issues and the burden of proof, in particular, reveals some judges who read the Supreme Court's work in this field with little regard for its value. And D.C. Circuit Judges A. Raymond Randolph and Laurence Silberman have gone even further.⁴⁶

Judge Randolph, who wrote the Circuit's decisions reversed by the Supreme Court in *Boumediene*,⁴⁷ *Rasul*,⁴⁸ and *Hamdan*⁴⁹ gave a speech before the Heritage Foundation in October 2010 titled "The Guantanamo Mess." In these remarks, he ridiculed the Court's decision in *Boumediene* and the majority that endorsed it. In doing so, he quoted as follows from a well-known passage from F. Scott Fitzgerald's *The Great Gatsby*:

They were careless people, Tom and Daisy; they smashed up things and creatures...and let other people clean up the mess they had made.

He went on for over an hour in that vein.⁵⁰

Counsel for petitioner in *Al-Adahi*, one of the cases before the Court described above, thought these remarks so striking that in

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their Reply of Petitioner they claimed that Judge Randolph—who had penned the Circuit’s decision in that case as well—had “all but announced a public agenda” to reverse the effect of *Boumediene*. “Unless the lower courts follow this Court’s decisions...the Court is reduced to writing law review articles.”⁵¹

Judge Silberman belittled the Court in a recent concurrence. He doubted that any of his colleagues would:

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 evidence standard (which it is unlikely to do—**taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene*...**)⁵²

He described the habeas process as a “charade prompted by the Supreme Court’s defiant—if only theoretical—assertion of judicial supremacy.”⁵³

Apart from the evidentiary and burden of proof cases, Professor Vladeck believes that some of the Circuit’s holdings in its more controversial decisions can be criticized as failures of imagination or misreadings of Supreme Court precedent, as though that precedent controlled issues that may still be open. But it seems unfair to claim that, in these decisions, the D.C. Circuit “is subverting Supreme Court rules that simply don’t exist.”⁵⁴

Ultimately, his thesis holds that, while it smacks of hyperbole to refer to the D.C. Circuit as being engaged in a collective effort to subvert *Boumediene*, it is equally unconvincing to assert that the entire Court of Appeals has faithfully administered the Supreme Court’s commands. Instead, the most troubling aspects of the Circuit’s post-*Boumediene* jurisprudence can all be traced to some combination of four jurists—Judges Randolph and Silberman and two others. These four are effectively fighting a rear-guard action while their colleagues coalesce around substantive and procedural rules that are materially consistent with what little guidance the Supreme Court has provided, and—just as important—that have the general endorsement of virtually all the district

judges and the executive branch.⁵⁵

The result is that the post-*Boumediene* jurisprudence yields a landscape in which petitioners have limited prospects for success on the merits. But it also bears noting that the Justices may well be acquiescing. Thus, the Supreme Court denied certiorari in *Al-Adahi*, *Al-Bihani*, *Al Odah*, and *Awad*, each time without a registered dissent.⁵⁶ And, because Justice Kagan was **not** recused in *Al Odah* and *Awad*, these denials cannot be explained simply as an attempt to avoid the 4-4 split on the merits that may otherwise have resulted. Instead, they either suggest that there aren’t five Justices who disagree with the Circuit’s decisions, or that the Court is suffering from a form of what Linda Greenhouse described as “Gitmo fatigue.”⁵⁷

Whatever the reason for the Court’s certiorari denials, they already have indelibly stamped the habeas landscape. Two Guantanamo detainees on June 1 moved in the D.C. Circuit to dismiss their habeas appeals. Their counsel explained:

Once cert was denied in all of the relevant cases coming out of the D.C. Circuit it became clear that the appeals were futile....(It) is (also) clear that the courts provide no hope for the men remaining at Guantanamo.

Benjamin Wittes, another recognized authority on habeas, found the motions to dismiss remarkable. “They gave up their appeals *entirely*—thus acknowledging not merely that the law as developed by the D.C. Circuit makes their cases “hopeless” but that that there is insufficient prospect of getting that law altered from on high to even *ask* the Supreme Court to consider the matter.”⁵⁸

Habeas attorney David Remes concurs. The D.C. Circuit appears to be dead-set against letting Guantanamo detainees prevail. “It has not affirmed a grant in any habeas case, and it has remanded any denial that it did not affirm. Moreover, the Supreme Court, having declared in *Boumediene* that detainees have a constitutional right to seek habeas relief, appears to have washed its hands of the matter.”⁵⁹

What the Future Holds

A new petition for certiorari was filed on May 11, 2011, in another case titled *Al-*

Bihani v. Obama,⁶⁰ this one by the brother of the first petitioner.⁶¹ The District Court relied on Circuit Court precedent in holding that, under the AUMF, the executive is not required to show that petitioner engaged in armed action against the United States in order indefinitely to detain him. Being part of Al Qaeda suffices, regardless of whether the petitioner ever personally engaged in hostilities.⁶²

The new petition may not be acted upon until next term, and Justice Kagan is expected to recuse. She did not take part when the Court denied review of the same Circuit decision challenged in this new petition.⁶³

As of April 1, 2011, 172 prisoners remained at Guantanamo, of which 87 had been approved for transfer.⁶⁴ Hence, notwithstanding the two recent motions to dismiss appeals, more habeas petitions by Guantanamo detainees can be expected to reach the D.C. Circuit and certiorari by the Supreme Court no doubt will be sought for a number of those. Moreover, as shown by the four consolidated cases in *Maqaleh v. Gates*,⁶⁵ detainees at Bagram Air Base are pursuing habeas rights. These petitioners recently claimed that the movement to and retention of detainees in Afghanistan reflects executive branch efforts to avoid judicial scrutiny of detention practices and policies.⁶⁶ One of the most significant questions that *Boumediene* left unanswered was whether its conclusion that the Suspension Clause “has full effect at Guantanamo Bay” was based on analysis unique to Guantanamo, or whether comparable reasoning would also support extending the Suspension Clause to other extraterritorial U.S. detention sites, especially Bagram.⁶⁷

Much important work remains to be done, and how the D.C. Circuit and the Supreme Court will deal with these new cases will continue to command our attention. **CL**

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Notes

1. J. Mayer, *The Dark Side—The Inside Story of How the War on Terror Turned into a War on American Ideals*, (Doubleday 2008).
2. M. Mukasey, “The Waterboarding Trail to bin Laden, ...” *wsj/...* SB1000142405274870385... (May 6, 2001).
3. J. McCain, “Bin Laden’s death and the debate over torture,” [washingtonpost.com/...](http://washingtonpost.com/.../AF1mdsG_pri...) (May 11, 2011); G. Sargent, “Exclusive: Private letter from CIA chief undercuts claim torture was key to killing of Bin Laden,” [washingtonpost.com/...](http://washingtonpost.com/.../AFLFF04G_blog...) (May 16, 2011).
4. M. Thiessen, “Mukasey Responds to McCain Op-Ed,” [washingtonpost.com/...](http://washingtonpost.com/.../AFh-hVO1G_blo...) (May 12, 2011).
5. See generally J. Mayer, *The Dark Side...*, *supra* at n. 1.
6. See *Rasul v. Bush*, 542 U.S. 466, 483 at n. 15 (2004).
7. See Exec. Ord. 13491 (Jan. 22, 2009), by which Pres. Obama among other things revoked all prior and inconsistent executive orders on detentions and interrogation promulgated since Sept. 11, 2001, and declared the Geneva Conventions Common Article 3, the Convention Against Torture and other laws as a minimum baseline for persons detained in “any armed conflict” and in U.S. custody or within a facility it operates. Such detainees shall be treated humanely, and not be subjected to violence to life and person, including cruel treatment and torture, nor to outrages upon personal dignity (including humiliating and degrading treatment). The order further compelled the CIA to close “as expeditiously as possible” any detention facilities currently operated, and established a Special Interagency Task Force on Interrogation and Transfer Policies to study the practices of transferring individuals to other nations to ensure that such practices comply with law and do not result in transfers to face torture. On August 24, 2009, Attorney General Holder announced the completion of that study. The U.S. will continue to send individuals to other countries, but will seek “assurances from the receiving country” that the suspect will not be tortured. Monitoring mechanisms were recommended. See also, C. Leonnig, “U.S. Wants to Limit Guantanamo Detainees’ Access to Lawyers,” [washingtonpost.com/...](http://washingtonpost.com/.../AR2007042602...) (April 27, 2007).
8. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).
9. See, e.g., *Al-Odah v. Obama*, Sup. Ct. Docket No. 10-439, *Petit. for Writ of Cert.*, pg. 7.
10. See, e.g., *Ali Awad v. Obama*, Sup. Ct. Docket No.10-736; *Al-Adahi v. Obama*, Sup. Ct. Docket No. 10-487; *Al-Odah v. Obama*, Sup. Ct. Docket No. 10-439.
11. See, e.g., *Al-Adahi v. Obama*, Sup. Ct. Docket No. 10-487.
12. See, e.g., *Esmail v. Obama*, No. 1:04-cv-01254, slip opin. at 1-2 (D.C. Cir. 2011) (Silberman, J., concurring); *Al-Adahi v. Obama*, Sup.Ct. Docket No.10-487.
13. 542 U.S. 466 (2004).
14. *Id.* at 497-98.
15. *Id.* at 498.
16. *Id.* at 506.
17. 542 U.S. 507 (2004).
18. 115 Stat. 224 (2001).
19. 542 U.S. at 518.
20. *Id.* at 521.
21. *Id.* at 523.
22. *Id.* at 533.
23. *Id.* at 533-34. The parties agreed that initial captures on the battlefield need not receive the process described by the Court. Such process is due only when the determination is made to *continue* to hold those those who have been seized. *Id.* at 534; italics original.
24. 542 U.S. at 554.
25. 542 U.S. at 579.
26. 42 U.S.C. 2000dd, et seq. (2005). A signing statement inserted by David Addington—Vice President Cheney’s chief of staff—noted that the president would only enforce the new law “in a manner consistent with” his constitutional role as commander in chief. J. Mayer, *The Dark Side...*, *supra* at n. 1, pg. 321.
27. 548 U.S. 557 (2006).
28. 10 U.S.C. Sec. 948a, et seq. (Supp. 2007).
29. 553 U.S. 723 (2008).
30. The Suspension Clause, Art. I, Sec. 9, cl. 2 of the Constitution, provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
31. 553 U.S. at 798.
32. *Id.* at 801.
33. That system consisted of a two-step collateral review procedure: a hearing before a Combatant Status Review Tribunal, followed by review in the D.C. Circuit. Congress in the DTA also authorized the Circuit Court to decide whether the tribunal proceedings are consistent with the Constitution and U.S. law. *Id.* at 803.
34. *Id.* at 827; italics original.
35. *Id.* at 827-28.
36. *Id.* at 828, citing a Memorandum of Patrick F. Philbin and John C. Yoo.
37. *Id.* at 850. Note the omission of “respectfully” before “dissent.”
38. 542 U.S. 952 (2004) (mem).
39. S. Vladeck, “The D.C. Circuit After Boumediene,” 42 Seton Hall L.Rev. _____ (2011), pgs. 1-2.
40. See L. Denniston, “Uighurs’ plea denied,” www.scotusblog.com (April 18, 2011).
41. The petition in *Khadr* also posed the question whether, in a habeas case, Sec. 242(a) (4) of the Immigration and Naturalization Act bars judicial review of a claim under the U.N. Convention Against Torture.
42. See L. Denniston, “Primer: The new detainee cases,” www.scotusblog.com/.../primer-the-new-det-..., (Dec. 7, 2010).
43. S. Vladeck, *The D.C. Circuit...*, *supra* at n. 39, pg. 20.
44. As will be seen, counsel for the petitioner in *Al-Adahi* with impressive subtlety seemed to make such a suggestion in a reply brief filed in the Supreme Court.
45. *Id.*, pg. 3.
46. *Id.*, pg. 4.
47. 476 F.3d 981 (D.C. Cir. 2007).
48. *Al Odah v. Bush*, 321 F.3d 1134 (D.C. Cir. 2003), rev’d sub. nom. *Rasul v. Bush*, 542 U.S. 466 (2004).
49. 415 F.3d 33 (D.C. Cir. 2005).
50. <http://www.heritage.org/Events/2010/10/Guantanamo-Mess> (Oct. 10, 2010).
51. Reply of Petitioner, pgs. 6-7, 10, *Al-Adahi v. Obama*, Docket No. 10-487.
52. *Esmail v. Obama*, No. 1:04-cv-01254, slip opin. at 1-2 (D.C. Cir. 2011) (Silberman, J., concurring) (emphasis supplied). *Id.*
53. *Id.*
54. S. Vladeck, *The D.C. Circuit...*, *supra* at n. 39, pg. 4.
55. *Id.*, pgs. 4-5.
56. As has been seen, since Professor Vladeck wrote his article the Court has denied three more certiorari petitions. A dissent appeared in *Khadr* and an explanatory statement was filed in *Kiyemba*,
57. *Id.*, pg. 20. See L. Greenhouse, “Gitmo Fatigue at the Supreme Court,” *New York Times* Opinionator, April 6, 2011, 8:45 p.m., <http://opinionator.blogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court/>.
58. B. Wittes, “Two Guantanamo Detainees Drop Appeals,” [lawfareblog.com/...](http://lawfareblog.com/.../two-guantanamo-d-...) (June 2, 2011).
59. B. Wittes, “David Remes on the D.C. Circuit,” [lawfareblog.com/...](http://lawfareblog.com/.../david-remes-on-th-...) (June 8, 2011).
60. Docket No. 10-1383.
61. L. Denniston, “New try on Guantanamo detention,” www.scotusblog.com (May 18, 2011).
62. See Cert. Pet., pgs. 2, 4, *Al-Bihani v. Obama*, Sup. Ct. Docket No. 10-1383.
63. L. Denniston, *New try...*, *supra* at n. 59.
64. *Population of Guantanamo as of April 1, 2011*, prepared by habeas attorney David Remes and privately distributed. Of the total group, 48 had been approved for continued detention, 33 had been referred for prosecution and 4 had been convicted of criminal offenses.
65. D.C. Dist. Ct. Docket No. 06-1669 and others.
66. *Id.*, Feb. 15, 2011 Order by Hon. John Bates, U.S.D.J. granting motion to amend habeas petitions.
67. S. Vladeck, “The Unreviewable Executive: Kiyemba, Maqelah, and the Obama Administration,” Wash. Coll. of Law Res. Paper No. 2010-11 (2010), pg. 11.