Seton Hall University School of Law
Center for Policy & Research

NO HEARING HABEAS:
D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW

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EXECUTIVE SUMMARY

It is an open secret that *Boumediene v. Bush*'s promise of robust review of the legality of the Guantanamo detainees' detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with *Al-Adahi v. Obama*. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and "a meaningful review" of the evidence having been established in 2008 by the Supreme Court in *Boumediene*.

There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government's factual allegations rather than reject them.[1] The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in *Al-Adahi*.

Detainees won 59% of the first 34 habeas petitions.

Detainees lost 92% of the last 12.

The sole grant post-*Al-Adahi* in *Latif v. Obama* has since been vacated and remanded by the D.C. Circuit.

The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government's factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.

The effect of *Al-Adahi* on the habeas corpus litigation promised in *Boumediene* is clear. After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.

Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court's radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied *Boumediene*. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

[1] Sixty-three detainees have had cases resulting in opinions, some of which were consolidated opinions. The Uighers are excluded from this analysis because the government conceded their case so the district court did not have to make factual findings. This report thus examines 46 of the 63 cases.

I. Introduction

This Report examines the outcomes of habeas review for Guantanamo detainees, the right to which was established by the Supreme Court in *Boumediene v. Bush*.[2] It documents the reality that such review has been rendered essentially meaningless by the rulings of the United States Court of Appeals for the District of Columbia Circuit. At this point, an unmistakable pattern has emerged in decisions. On July 13, 2010, the D.C. Circuit reversed a habeas grant of relief in *Al-Adahi v. Obama*,[3] and the law established in that case triggered a wave of denied petitions in habeas litigation in the United States District Court for the District of Columbia, the court hearing all Guantanamo habeas petitions in the first instance. Before *Al-Adahi*, detainees were more likely than not to have their habeas petitions granted by the district court. Since *Al-Adahi*, district courts have decided twelve petitions, eleven of which were denied. *Latif v. Obama*,[4] the sole grant, has since been reversed and remanded by the D.C. Circuit.

Beyond the stark response of the district court, the D.C. Circuit has remained active since *Al-Adahi*, reversing two grants[5] (*Uthman*, *Almerfedi*), vacating and remanding three grants (*Salahi*, *Hatim*, *Latif*), affirming eight denials (*Al-Bihani*, *Ali*, *Esmail*, *Madhwani*, *al Alwi*, *Khan*, *Kandari*, *Sulayman*), and reversing and remanding one denial (*Warafi*). Though it was unclear at the time of Al-Adahi's certiorari petition, a clear pattern has now emerged: almost no detainees will prevail at the district court level, and if any do, the D.C. Circuit will likely reverse the decision to grant them relief.

As this Report explains, the key element in the post-*Adahi* shift in evaluation of Guantanamo detainee habeas petitions is the decline of the district courts' independent fact-finding powers. Part II of this Report outlines the Center's methodology. Part III presents a brief overview of the requirements set forth by the Supreme Court in *Boumediene*. Finally, Part IV analyzes common government factual allegations in habeas cases, noting how district courts accorded more deference to government allegations after *Al-Adahi*.

II. Methodology

This Report, the first in a series evaluating the factual allegations in each habeas corpus opinion, relies on the published district court opinions for forty-six detainees.[6] The Fellows for the Seton Hall Law Center for Policy and Research extracted recurring factual assertions raised by both the government and the petitioners.[7] Then each factual allegation was classified as to whether the district court accepted, rejected, or was silent as to each allegation. That data was compiled and analyzed to discover what patterns the data revealed. This Report focuses on what the research identified as the most significant factual allegations appearing in court

[2] 553 U.S. 723 (2008).
[3] 613 F.3d 1102 (D.C. Cir. 2010).
[4] 666 F.3d 746 (D.C. Cir. 2011).
[5] The five grants mentioned in this sentence had already been decided at the district court level when the D.C. Circuit decided *Al Adahi*.
[6] Sixty-three detainees have had cases resulting in opinions, some of which were consolidated opinions. The Uighers are excluded from this analysis because the government conceded their case so the district court did not have to make factual findings.
[7] The Center used only district court opinions to develop this Report; as a result, the only allegations reflected in it are those contained in the opinions.

opinions. These allegations include whether a detainee: committed a hostile act; stayed in a guest house; attended a military training camp; and took a suspect travel route. This Report also considers whether intelligence or interrogation reports were mentioned in the opinion.

Through a series of objective queries, this Report thus reveals the actual standard which has emerged for determining who is an enemy combatant, and, consequently, who may justifiably remain in detention.

III. The Supreme Court's Initial Requirements in *Boumediene*

Before the Supreme Court decided *Boumediene v. Bush*,[8] the Department of Defense (DOD) established the Combatant Status Review Tribunals (CSRTs) as the forum for detainees to contest their classification as "enemy combatants."[9] In 2005, Congress passed the Detainee Treatment Act (DTA) which stripped the courts of their jurisdiction to hear habeas petitions from Guantanamo detainees, approved the CSRTs, and vested exclusive review of CSRT decisions in the United States Court of Appeals for the D.C. Circuit.[10] A year later, Congress passed the Military Commissions Act of 2006 (MCA), amending the DTA to strip the courts of jurisdiction in any action against the United States relating to any aspect of detention, effective immediately and applicable to all cases pending without exception.[11]

In *Boumediene v. Bush*,[12] the U.S. Supreme Court held that detainees in Guantanamo Bay have the right under the U.S. Constitution to file petitions for the writ of habeas corpus.[13] The Court was then left with the question of whether the DTA offered an adequate and effective substitute for habeas corpus.[14] Ultimately, the Supreme Court concluded the DTA failed to provide an adequate and effective substitute for habeas corpus because it fostered flawed fact-finding in the initial CSRTs while restricting review in the Court of Appeals.[15]

By rejecting the DTA's substitute system, the Court in *Boumediene* seemed to hold out promise that there would be meaningful review of Guantanamo detentions for any detainee filing a habeas petition. Importantly, the Supreme Court noted that "the writ must be effective" and that the judge "must have sufficient authority to conduct a ***meaningful review of both the cause for detention and the Executive's power to detain.***"[16] The Supreme Court envisioned habeas review in the Guantanamo context not only as a means to challenge the legality of the detainees'

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[8] 553 U.S. 723 (2008).
[9] *See* DEP'T OF DEFENSE, COMBATANT STATUS REVIEW TRIBUNAL ORDER (2004), *available at* http://www.defense.gov/releases/release.aspx?releaseid=7530.
[10] *See* Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, 119 Stat. 2739, § 1005(e).
[11] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in 28 U.S.C. § 2241(e)(1)–(2)).
[12] 553 U.S. 723 (2008).
[13] *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (rejecting the government's argument that the detainees could not have access to the writ because of their status as enemy combatants or because of their location in Guantanamo Bay).
[14] *See id.* at 771–72.
[15] *See id.* at 791 (noting detainee's ability to request a new CSRT be convened in light of new evidence is "insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus.").
[16] *Id.* at 783.

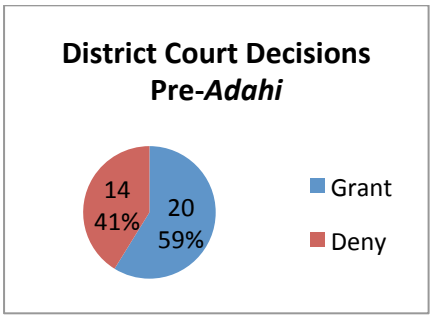
confinement, but also as a means to allow careful judicial scrutiny of the facts used to support their detention.

IV. Restricting Meaningful Review: the D.C. Circuit's Decision in *Al-Adahi*

After the Supreme Court invalidated the congressionally approved scheme of review, district courts began to carefully scrutinize government allegations in order to provide the meaningful review now required. Two years after the Supreme Court decided *Boumediene*, the D.C. Circuit issued its first grant reversal.[17] In *Al-Adahi v. Obama*,[18] a CSRT initially determined the petitioner, Mohammed Al-Adahi was part of al Qaeda and thus subject to indefinite detention under the AUMF.[19] Al-Adahi had filed a petition for habeas relief, and the district court had held he was not part of al Qaeda, ordering his release.[20] The D.C. Circuit's decision reversed that ruling.[21]

The D.C. Circuit's *Al-Adahi* opinion is important not only for being the first grant reversal, but also because district court judges have denied eleven out of twelve petitions since. The sole grant, *Latif v. Obama*,[22] was subsequently vacated and remanded by the D.C. Circuit supporting a conclusion that the D.C. Circuit meant to send a message to the lower courts when it reversed *Al-Adahi* and wanted to resend that message in *Latif*. This Report contends that the D.C. Circuit's message to the district courts was to stop scrutinizing the government's factual allegations so closely. This message reached a new extreme in *Latif* where the D.C. Circuit not only prevented district judges from closely evaluating the government's evidence but mandated that they give a presumption of accuracy to certain evidence (interrogation reports) submitted by the government, even though district courts had previously found that evidence unreliable.

As the chart below demonstrates, petitioners were more likely to win than lose as district courts granted 59% of habeas petitions before the D.C. Circuit's decision in *Al-Adahi*.



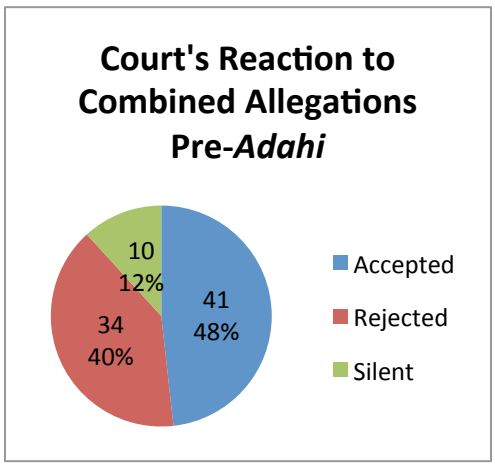
Since *Al-Adahi*, however, an unmistakable pattern of denial has emerged in decisions—the district court has decided twelve petitions, eleven of which were denied. *Latif*, the sole grant, has since been reversed and remanded by the D.C. Circuit. The chart below illustrates the pattern:

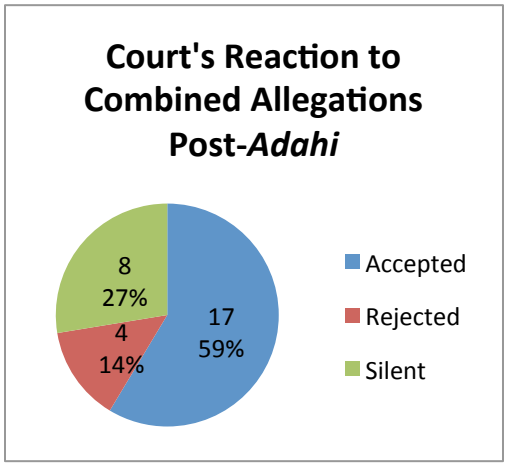
[17] Up to this point, the D.C. Circuit had only remanded one denial and affirmed four denials.
[18] 613 F.3d 1102 (D.C. Cir. 2010).
[19] *See* Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010).
[20] *See id.*
[21] *See id.*
[22] 666 F.3d 746 (D.C. Cir. 2011).

Petitioner's Name	Decision	Date	D.C. Cir. Grant Reversed or Remanded (Post-Adahi)
Belkacem Bensayah	Deny	11/20/2008	
Saber Lahmar	Grant	11/20/2008	
Mohamed Nechla	Grant	11/20/2008	
Mustafa Ait Idir	Grant	11/20/2008	
Lakhdar Boumediene	Grant	11/20/2008	
Hadj Boudella	Grant	11/20/2008	
Hisham Sliti	Deny	12/30/2008	
Mohammed el Gharani	Grant	1/14/2009	
Ghaleb Nasser al Bihani	Deny	1/28/2009	
Yasim Muhammed Basardah	Grant	3/31/2009	
Hedi Hammamy/Abdul Haddi Bin Hadiddi	Deny	4/2/2009	
Alla Ali Bin Ali Ahmed	Grant	5/4/2009	
Abd al Rahim Abdul Rassak Janko	Grant	6/22/2009	
Khalid Abdullah Mishal Al Mutairi	Grant	7/29/2009	
Saki Bacha (aka Mohammed Jawad)	Grant	7/30/2009	
Waqas Mohammed Ali Awad	Deny	8/12/2009	
Mohammed Al-Adahi	Grant	8/17/2009	
Fawzi Khalid Abdullah Fahad Al Odah	Deny	8/24/2009	
Sufyian Barhoumi	Deny	9/3/2009	
Fouad Mahmoud Al Rabiah	Grant	9/17/2009	
Farhi Saeed Bin Mohammed	Grant	11/19/2009	
Musa'ab al Madhwani	Deny	12/14/2009	
Saeed Hatim	Grant	12/15/2009	Remanded 2/15/11
Moath Hamza Ahmed al Alwi	Deny	12/30/2009	
Uthman Abdul Rahim Mohammed Uthman	Grant	2/21/2010	Reversed 3/29/11
Suleiman Awadh Bin Agil Al-Nahdi	Deny	3/10/2010	
Fahmi Salem Al-Assani	Deny	3/10/2010	
Mohammedou Ould Salahi	Grant	3/22/2010	Remanded 11/15/10
Mukhtar al Warafi	Deny	3/24/2010	
Yasein Khasem Mohammed Esmail	Deny	4/8/2010	
Ravil Mingazov	Grant	5/13/2010	
Mohamed Mohamed Hassan Odaini	Grant	5/26/2010	
Omar Mohammed Khalifh	Deny	5/28/2010	
Hussein Salem Mohammad Almerfedi	Grant	7/8/2010	Reversed 6/10/11
Al-Adahi Reversal		**7/13/2010**	
Abd al Rathman Abu Ghayth Sulayman	Deny	7/20/2010	
Adnan Farhan Abd Al Latif	Grant	8/16/2010	Remanded 10/14/11
Shawali Khan	Deny	9/3/2010	
Fayiz Al Kandari	Deny	9/15/2010	
Toffiq Nasser Awad Al-Bihani	Deny	10/7/2010	
Obaydullah	Deny	10/15/2010	
Abdul Razak Ali	Deny	1/11/2011	
Mashour Abdullah Muqbel Alsabri	Deny	2/3/2011	
Khair Ulla Said Wali Khairkhwa	Deny	5/27/2011	
Fadhel Hussein Saleh Hentif	Deny	8/1/2011	
Abdul Qader Ahmed Hussein	Deny	10/12/2011	
Karim Bostan	Deny	10/12/2011	

Analyzing the government's most frequently made factual allegations, three patterns emerge decisions before and after *Al-Adahi* that confirm the D.C. Circuit's message has been heard loud and clear by the district judges. First, district judges have become less likely to reject a government allegation. Second, there is an overall rise in the frequency with which the court accepts the government's allegations about the detainee. Finally, there is also a general increase in the district court's propensity for remaining silent on the weight it assigns to a piece of evidence.

Combining the four main allegations (Hostile Acts, Guesthouse, Training Camps, and Travel), this trend can be seen in the charts below:

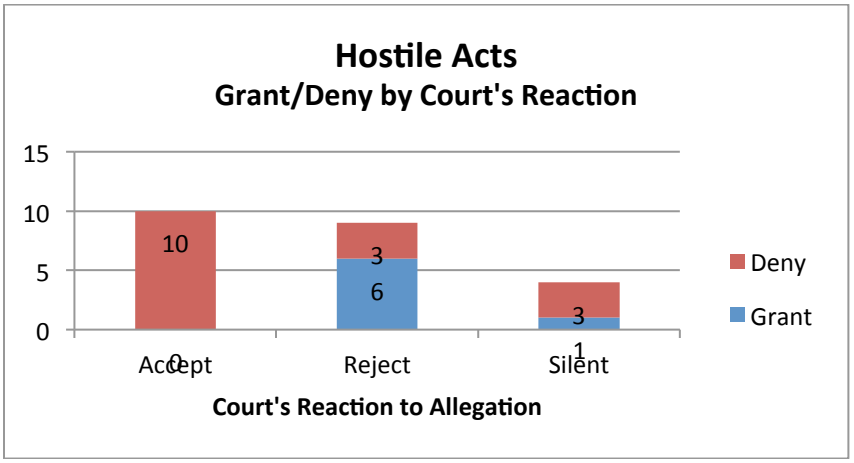




As the charts demonstrate, district courts rejected government allegations 40% of the time before *Al-Adahi*, but after the pivotal decision, rejected allegation only 14% of the time. In addition, the courts' acceptance rate of government allegations increased from 48% to 59%. Finally, the silence rate also increased substantially from 12% to 27%

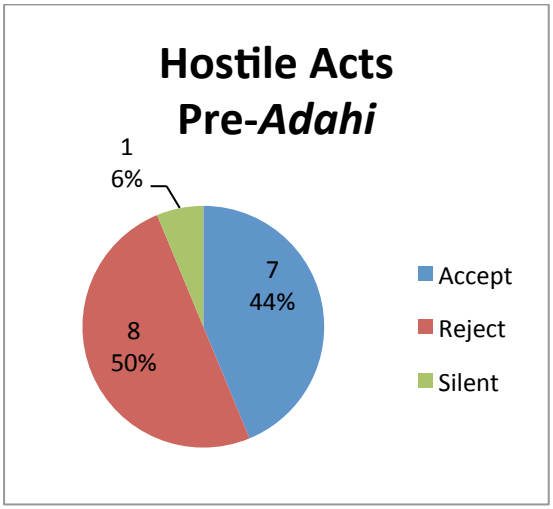
A. Hostile Acts

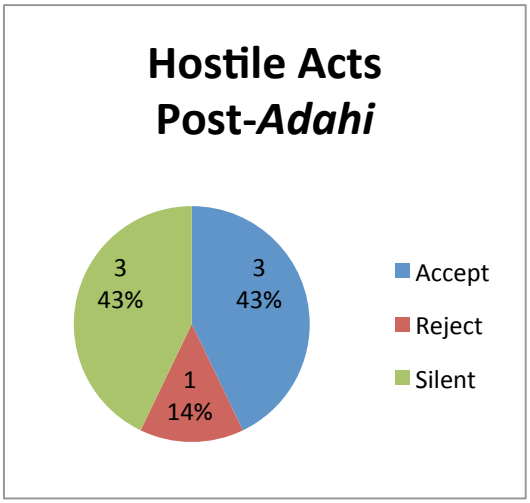
The government alleged detainees committed hostile acts in 23 out of the 46 cases. This proved to be a very significant factor in a judge's decision because, when a judge accepted the allegation as true, the petition was denied in every case:



Hostile Acts Alleged in 23 out of 46 cases (7 grant, 16 deny)			
	Pre-*Adahi* 16 out of 23	Post-*Adahi* 7 out of 23	Total
Accepted	7 Deny all 7	3 Deny 3	10 Deny 10
Rejected	8 Grant 6/Deny 2	1 Deny 1	9 Grant 6/Deny 3
Silent	1 Deny 1	3 Grant 1 (*Latif*) /Deny 2	4 Grant 1/Deny 3

In the 16 cases before *Al-Adahi* where the government alleged a detainee committed hostile acts, the district courts rejected the allegation 8 times or 50%. After *Al-Adahi*, the courts considered hostile act allegations 7 times and rejected the allegation only once, or 14%. Courts accepted this allegation, however, with almost equal frequency before and after *Al-Adahi*.[23] Finally, before *Al-Adahi*, the district courts remained silent about the weight of the allegation only 6% of the time (1 out of 16). After *Al-Adahi*, the district courts remained silent 43% of the time (3 out of 7).

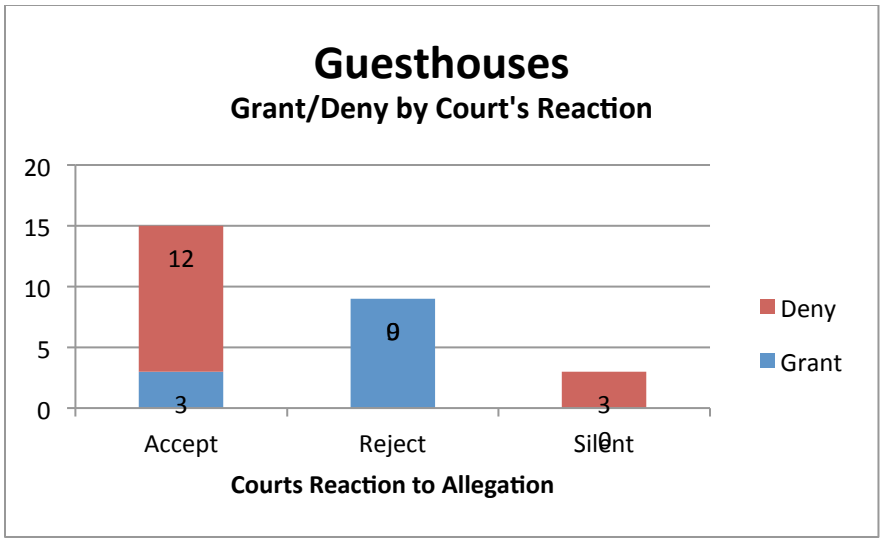




B. Guesthouses

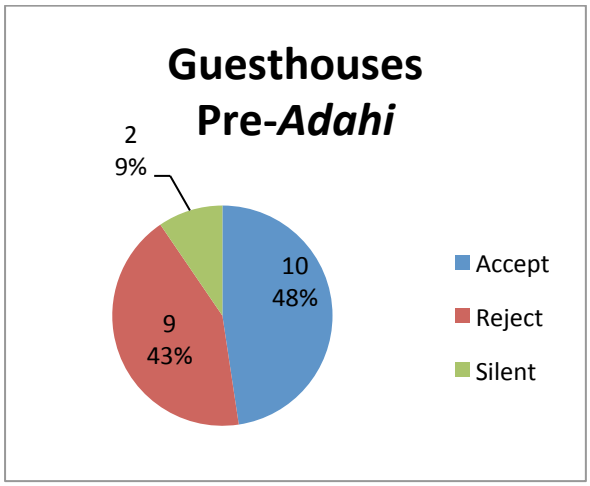
The government alleged that detainees stayed in guesthouses in 27 of the 46 cases. This proved to be another significant factor in a judge's decision because, when a judge accepted the allegation as true, the petition was denied in almost every case:

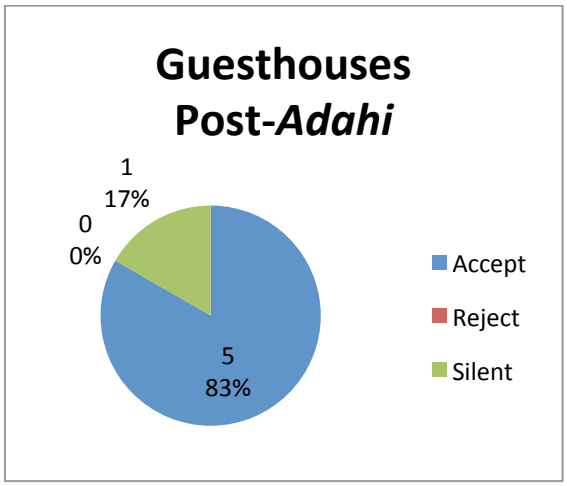
[23] Before *Al-Adahi*, the courts accepted 7 of 16 allegations or 44%. After, the courts accepted 3 of 7 allegations or 43%.



Guesthouses Alleged in 27 out of 46 cases (12 grant, 15 deny)			
	Pre-*Adahi* 21 out of 27	Post-*Adahi* 6 out of 27	Total
Accepted	10 Grant 3/Deny 7	5 Deny 5	15 Grant 3/Deny 12
Rejected	9 Grant 9	0	9 Deny 9
Silent	2 Deny 2	1 Deny 1	3 Deny 3

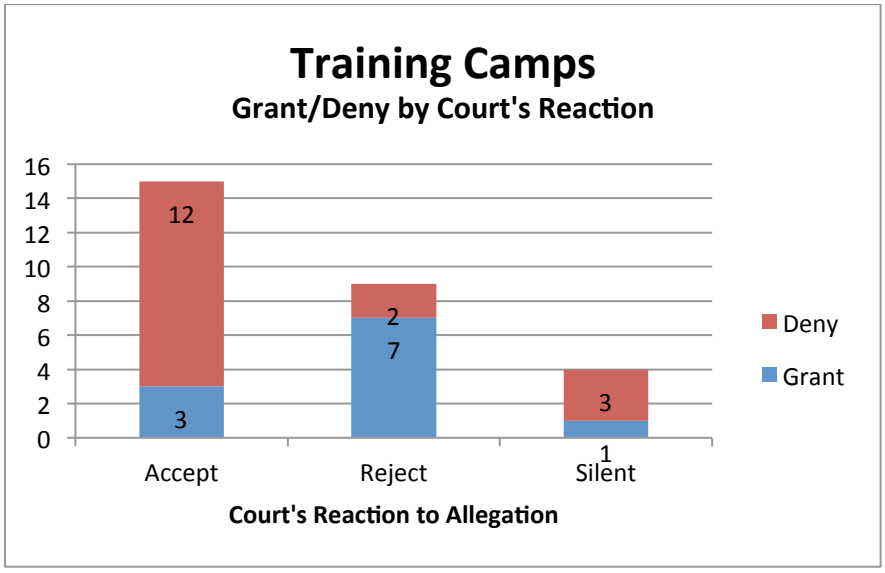
In the 21 cases before *Al-Adahi* where the government alleged that a detainee stayed at a guesthouse, the district courts rejected the allegation 9 times or 43%. All 9 of the petitions were granted. After *Al-Adahi*, the courts considered the allegation 6 times and never rejected it. In pre-*Al-Adahi* cases, the district courts accepted the allegation as bearing on its ultimate decision in 10 of the 21 instances or 48% of the time. This figure rose to 83% (5 out of 6 times) in the cases after *Al-Adahi*. Finally, district courts remained silent 10% of the time (2 out of 21) before *Al-Adahi*, and 17% of the time (1 out of 6) after.





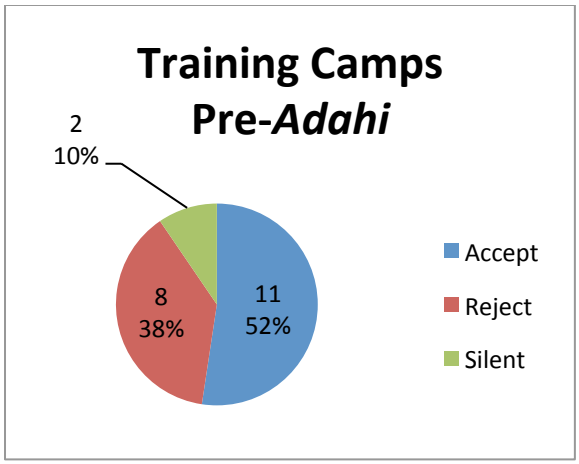
C. Training Camps

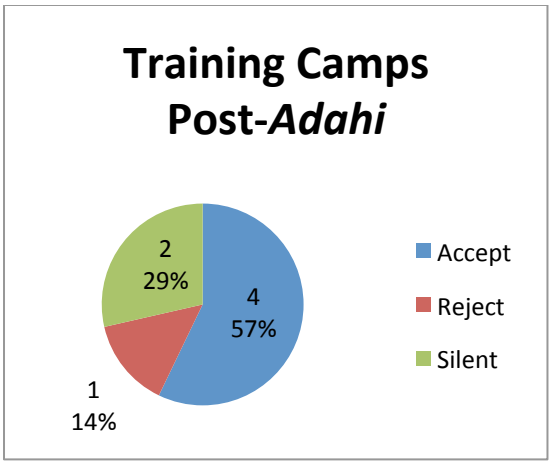
A third important allegation was whether the detainee attended a training camp. The government alleged training camp attendance in 28 of the 46 cases and when courts accepted the allegation, the petition was usually denied:



Training Camps Alleged in 28 out of 46 cases (11 grant, 17 deny)			
	Pre-*Adahi* 21 out of 28	Post-*Adahi* 7 out of 28	Total
Accepted	11 Grant 3/Deny 8	4 Deny 4	15 Grant 3/Deny12
Rejected	8 Grant 7/Deny 1	1 Deny 1	9 Grant 7/Deny 2
Silent	2 Deny 2	2 Grant 1(*Latif*)/ Deny 1	4 Grant 1(*Latif*)/Deny 3

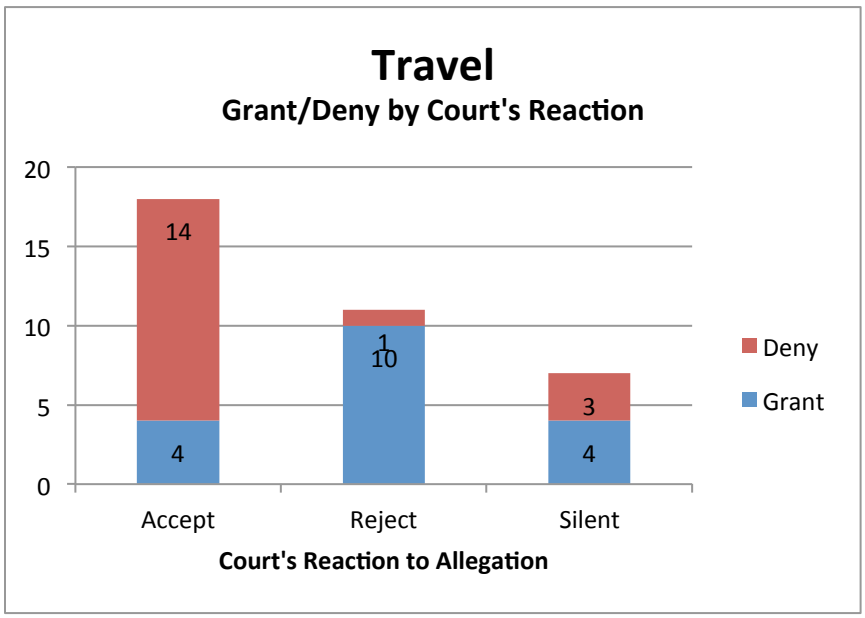
In the 21 cases before *Al-Adahi* where the government alleged a detainee attended a training camp, the district court rejected the allegation 8 times or 38%, 7 of which were granted. After *Al-Adahi*, the courts considered the allegation 7 times and rejected it only once or 14% of the time. The district courts accepted the allegation 11 out of 21 times or 52% of the time it was alleged before *Al-Adahi*, and this figure rose to 57% of the time after, or 4 acceptances out of 7. Finally, before *Al-Adahi*, district courts were silent on the significance of this allegation 10% of the time (2 out of 21), and remained silent on this issue 29% of the time (2 out of 7) after.





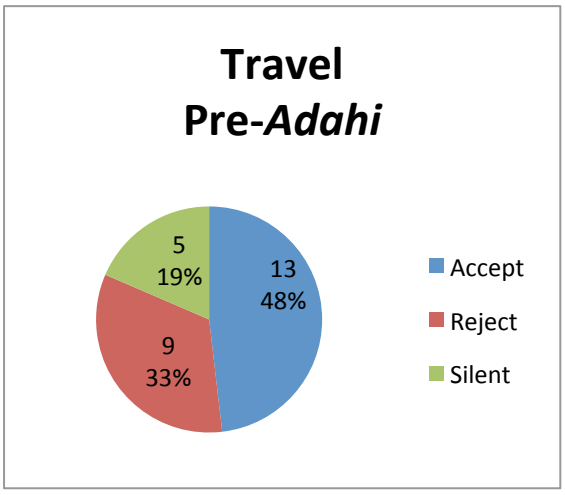
D. Travel

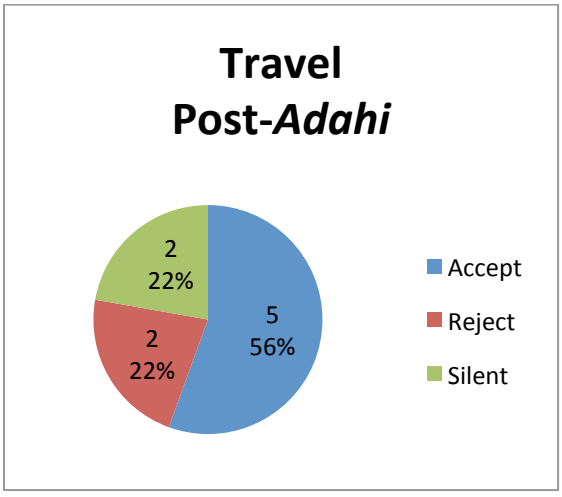
The next notable allegation was whether a detainee traveled on a particular route. The government alleged travel route in 36 of the 46 cases, and when courts accepted the allegation, the petition was usually denied.



Travel Alleged in 36 out of 46 cases (18 grant, 18 deny)			
	Pre-*Adahi* 27 out of 36	Post-*Adahi* 9 out of 36	Total
Accepted	13 Grant 4/Deny 9	5 Deny 5	18 Grant 4/Deny14
Rejected	9 Grant 9	2 Grant 1 (*Latif*)/Deny 1	11 Grant 10/Deny 1
Silent	5 Grant 4/Deny 1	2 Deny 2	7 Grant 4/Deny 3

In the 27 cases before *Al-Adahi* where the government alleged the detainee traveled on a particular route, the court rejected the allegation 9 times or 33%, granting all 9 petitions. After *Al-Adahi*, the courts considered the allegation 9 times and rejected the allegation twice or 22% of the time. As for acceptance, before *Al-Adahi* district courts accepted the allegation 13 out of 27 times or 48% of the time. After Al-Adahi, the courts accepted the allegation 5 out of 9 times or 56% of the time. Finally, before *Al-Adahi*, district courts were silent 19% of the time (5 out of 27) and were silent 22% of the time (2 out of 9) after.





V. Conclusion

Despite the Supreme Court's recognition of a right to habeas and meaningful review for Guantanamo detainees, this Report reveals the current trend of district court deferential fact finding after the D.C. Circuit's decision in *Al-Adahi*. The observation that detainees went from being more likely than not to succeed in their petition to losing every time should be enough to confirm this trend, and yet there is more data to back up this assertion. A thorough analysis of the government's factual allegations and the district courts' reactions show judicial deference to the government is the new norm. Whether this trend will continue remains to be seen, but the D.C. Circuit's opinion in *Latif* may have served as the confirmation that meaningful review is out, and deference to the government's evidence is here to stay.