

Justice and Leadership
in
Early Islamic Courts

Edited by Intisar A. Rabb and Abigail Krasner Balbale

PROOFS

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Chapter Three

The Curious Case of Bughaybigha, 661–883: Land and Leadership in Early Islamic Societies

Intisar Rabb*

Harvard Law School

Mūsā b. Ishāq b. ‘Ammāra said: We passed by Bughaybigha, which was flourishing, with Muḥammad b. ‘Abd Allāh b. al-Ḥasan. He remarked: Do you ever wonder at that? By God, you will continue to die until nothing green remains in it. You will [simply] live and die.¹

The calm that preceded Islam’s first Civil War in the seventh century found ‘Alī b. Abī Ṭālib—soon-to-be caliph—tending to his land on a fertile farm

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1 Abū ‘Ubayd al-Bakrī al-Andalusī (d. 487/1094), *Mu‘jam mā ‘stu‘jim min asmā’ al-bilād wa’l-mawāḍi‘*, ed. Jamāl Ṭulba (Beirut: Dār al-Kutub al-‘Ilmiyya, 1998), 2:253: *Marrnā bi’l-Bughaybigha ma’a Muḥammad b. ‘Abd Allāh b. Ḥasan, wa-hiya ‘āmira, fa-qāla: a-ta’jabūna lahā, wallāh la-tamūtunna ḥattā lā yabqā fihā khaḍrā’ thumma la-ta’ishunna thumma la-tamūtunna*. See also Muḥammad b. Muḥammad b. ‘Abd Allāh al-Ḥimyarī (d. ca. 9th/15th c.), *al-Rawḍ al-mi‘ṭār fī khabar al-aqtār*, ed. Iḥsān ‘Abbās (Beirut: Maktabat Lubnān, 1975), 112. Bakrī and Ḥimyarī are quoting a report from the leader of an ‘Alid rebellion who intended to reclaim the land and leadership of the young Muslim community, on whom see Amikam Elad, *The Rebellion of Muḥammad al-Nafs al-Zakiyya in 145/762: Ṭālibids and Early ‘Abbāsids in Conflict* (Leiden: Brill, 2015).

called Yanbu‘ to the west and slightly north of Medina.² Curiously, a spring emerged—curious as no one had expected a rushing spring to bubble up on the farm. Curious, too, was the name he gave to the spring: “Bughaybigha”—an onomatopoeia meant to mimic the *bagh-bagh* sound of gurgling water. ‘Alī immediately turned the spring and its surrounding land into a charitable endowment to serve the poor, travelers, and members of his family in need, and he placed the endowment in the charge of his sons Ḥasan and Ḥusayn.

What happened next is even curiouiser than the name or origins of Bughaybigha. ‘Alī had moved to Kūfa, but retained the land at Yanbu‘. Not long after his death in 661 and right at the start of Islam’s expansion, a generations-long battle over Bughaybigha ensued. The battle began after Ḥasan’s death in 670 with a series of attempts by the first Umayyad caliph to take the land from ‘Alī’s remaining son, Ḥusayn. The battle for control over Bughaybigha continued in a series of takings and “givings” by subsequent caliphs over the course of some one and a half centuries.³ Having started off in ‘Alid hands, by the mid-eighth century, control over Bughaybigha had shifted to Umayyad hands.⁴ But the ‘Alids continued to assert rights to the land, which made the Umayyad caliph Walīd II keen to put an end to the dispute when he assumed the caliphate in 743. He appointed one of his agents to represent his interests—in court if need be. So it was that, almost a century after ‘Alī first discovered the spring, the struggle over Bughaybigha landed in court.



² Aḥmad b. Yaḥyā al-Balādhurī (d. 279/896), *Jumal min Ansāb al-ashraf*, ed. Suhayl Zakkār and Riyād al-Ziriklī (Beirut: Dār al-Fikr, 1996), 3:7, reporting on the location of the estate as four *farsakhs* north of Medina.

³ I borrow this term from the concept developed in American law to describe government distributions of property, rather than seizures of it as defined by common notions of takings. See Abraham Bell and Gideon Parchomovsky, “Givings,” *The Yale Law Journal* 111, no. 3 (2001): 547–618.

⁴ The caliph Yazīd b. ‘Abd al-Mālik (Yazīd II) had seized the land as soon as he assumed the caliphate in 720. See Ibn Sa‘d (d. 230/844-5), *al-Ṭabaqāt al-kubrā*, ed. ‘Alī Muḥammad ‘Umar (Cairo: Maktabat al-Khānjī, 2001), 6:414–15.

THE CASE OF BUGHAYBIGHA⁵

The Case

‘Alī’s great-grandson ‘Abd Allāh b. al-Ḥasan was tending to Bughaybigha, “cultivating a reed bed fed by a spring of his in the farmlands of Yanbu’.” Claiming the land for the caliph, Walīd II’s agent tried to stop ‘Abd Allāh, but to no avail. The agent then entered a claim in court presumably asserting that the caliph had rights to the entire valley of Yanbu’.

The court was in Medina, which had jurisdiction over nearby Bughaybigha, and the presiding judge was Sa’d b. Ibrāhīm (d. 127/745-6).⁶ The agent made an appearance in court on behalf of the caliph, as the petitioner, lodging a claim against ‘Abd Allāh, as the respondent. Judge Sa’d b. Ibrāhīm asked the agent to produce evidence of his claim—namely, that the caliph owned the land that ‘Abd Allāh was working. But the agent failed to do so before the requisite time expired. The judge then turned to ‘Abd Allāh, and the following dialogue ensued:

Judge: Do you agree to having me [resolve the matter and to the idea that I may] authorize you to work only the land that you have cultivated? If I find that you have worked land to which you are entitled, then you may continue to work that land as you have been doing. But if I find that you have worked land to which you are not entitled, then you

⁵ This narrative is a stylized account of the case reported in Muḥammad b. Khalaf Wakī’ (d. 306/917), *Akhbār al-quḍāt*, ed. Sa’īd Muḥammad al-Laḥḥām (Beirut: ‘Ālam al-Kutub, 2001), 102–03. The first paragraph, giving background, draws from the account in Ibn Sa’d, *al-Ṭabaqāt al-kubrā*, 6:414–15. On the early history of the case—beginning with Mu’āwiya’s initial seizure of Bughaybigha—see ‘Umar Ibn Shabba (d. 262/876), *Ta’rīkh al-Madīna al-Munawwara*, ed. Fahīm Muḥammad Shaltūt (Beirut: Dār al-Turāth, 1990), 1:222; and ‘Alī b. ‘Abd Allāh al-Samhūdī (d. 911/1506), *Wafā’ al-wafā bi-akhbār dār al-Muṣṭafā*, ed. Qāsim al-Sāmmarā’ī (London: Mu’assasat al-Furqān, 2001), 4:164–66.

⁶ Sa’d b. Ibrāhīm b. ‘Abd al-Raḥmān b. ‘Awf al-Zuhrī (d. 127/745-6) was appointed by ‘Abd al-Wāḥid b. ‘Abd Allāh b. Qanī’ al-Naḍrī, governor of the Hijāz district that encompassed Medina, Mecca, and Ṭā’if, who himself was appointed by the caliph Yazīd b. ‘Abd al-Mālik (Yazīd II) during his reign (102–105/720–724). Typically, judicial appointments run with the nomination or confirmation by a new governor, but it is not clear when Sa’d b. Ibrāhīm was first appointed as there is a blank in the edition of Wakī’⁵’s *Akhbār al-quḍāt* where the appointment year of the governor would be (p. 102). Although Wakī’⁵’s narrator suggests that it may have been the judge immediately before Sa’d b. Ibrāhīm who heard the case (see Wakī’⁵, *Akhbār al-quḍāt*, 103), the timing accords with the judge being Sa’d himself. That is, if the case occurred during Walīd II’s reign (125–126/743–744), which lasted only two years, it would have occurred toward the end of Sa’d’s judgeship and at least a year before his death in 127/745-6—that is, in 743 or 744.

must enter a contract [with the owner governing the future use of the land].⁷

‘Abd Allāh: Agreed.

Judge: I authorize you to continue to cultivate only the reed bed.⁸

At this point, the caliph’s agent stormed out of court, shouting to anyone who would listen that he was *not* in fact representing the caliph:

Agent: To all the people gathered here, I hereby swear by God and to all of you: I am neither the representative, nor the petitioner! The petitioner is the caliph, al-Walīd b. Yazīd (Walīd II).

This comment was a move to render the judge’s decision invalid, on a common procedural rule governing the courts—namely, that a judge could not enter a decision against a petitioner who was not present in person or by representation.⁹ The judge dismissed this move as without merit, and explained that the case could have gone another way had he used a different procedure: judging on the basis of his knowledge rather than the evidence, which was lacking. He responded as follows:

Judge: You already testified that you are indeed the caliph’s representative and agent. But when faced with the decision going against him, you *now* say that you are neither the representative nor the petitioner. By God, had I judged by my own knowledge about Bughaybigha, I would have judged differently.

7 Wakī, *Akhbār al-quḍāt*, 103: *A-tarḍā an nukhallī baynak wa-bayna ‘amalik? Fa-in kunta ‘amilta fī ḥaqqik [fa-]kamā ‘amilta; wa-in kunta ‘amilta fī ghayr ḥaqqik, ‘uqida ‘alayk.* This exchange suggests that the judge would not give the land to ‘Abd Allāh outright and without condition, such that if it proved to be under the caliph’s actual authority, ‘Abd Allāh would have to enter a contract with him to gain permission to work the land and remit to the owner some portion of the proceeds from it.

8 See *ibid.*, 103–04, mentioning the reed bed that ‘Abd Allāh had been cultivating.

9 The rule was not universal, but common enough to have borne mention in reports about early judges. Following it, for example, the Kūfan and Baṣran Judge Shurayḥ b. al-Ḥārith al-Kindī—who was first appointed by ‘Umar and confirmed by ‘Uthmān, ‘Alī, and Mu‘āwiya—did not rule against absent litigants. See *ibid.*, 357–472, esp. 414. On this judge, who judged for several decades and occupies the longest entry in Wakī’s collection, see Etan Kohlberg, “Shurayḥ,” *EtI*, 9:508–09.

At this stage, the narrator, a Baṣran man named Juwayriya b. Asmā' (d. 173/789-90) (who originally narrated the case to one of Ibn Sa'd's informants), sought to place the judge's final statement in context. He asked someone who had also witnessed the episode: "What does he know? What is this knowledge?" The fellow attendee explained that *everyone knew* that Bughaybigħa was a charitable endowment established by 'Alī b. Abī Ṭālib and entrusted to his children and their descendants, but that it was seized by Yazīd b. Mu'āwiya (r. 60–64/680–683) and contested by the Umayyads ever since. He then narrated the rest of the story of Bughaybigħa that he and everyone else in that early community—including the judge—*knew*, even generations later. This narrative suggested that 'Alī and his descendants were the proper stewards of the land, but that no evidence was available to prove it.¹⁰



This case vividly displays the extent to which discretionary use of judicial procedure drove substantive outcomes in ways little-recognized by conventional accounts of early Islamic law. The implication of the judge's final statement was that, had he ruled according to his own knowledge, the caliph would have lost control over even more land. But instead of resolving the major issues in the case by appealing to judicial knowledge, or to other procedural tools available when evidence was lacking on both sides, the judge chose to avoid a full resolution that might entail a total win for one side or the other. The outcome was thus a compromise-settlement of sorts: a partial win for the caliph, who would keep most of the contested valley, and a partial win for the 'Alids, who retained the land of the smaller tract within it called Bughaybigħa. Likely in view of the lack of evidence, the judge found himself unable or unwilling to fully resolve the case.

At one level, this case presents a competition between procedures for addressing major disputes in court. The judge here was conflicted. He had to choose between the prevailing procedural rule requiring petitioners to produce clear and convincing evidence, usually in the form of witness testimony (the "evidence canon": *al-bayyina 'alā al-mudda'ī*), and another disfavored rule permitting a judge to decide cases according to his own knowledge (the "judicial knowledge" norm: *'ilm al-qāḍī*). The first canon

¹⁰ Wakī', *Akhbār al-quḍāt*, 103–04.

followed the famous statement—attributed to the Prophet Muḥammad in a *ḥadīth*—that “the petitioner bears the burden of proof.” This rule was the more widespread and robust norm, as a popular procedural rule known to bind judicial (but not caliphal) courts.¹¹ The second rule is often attributed to practices of the Prophet and leaders of his early community. However, by the time of this case in the eighth century, although judicial knowledge was acceptable in the caliphal courts, it was controversial in judicial courts.

There was a third rule, in the shadow of which the judge orchestrated his settlement.¹² Another legal canon stipulated that *continuous land possession and use gives a presumption of authorized use, if not ownership* (the “possession canon”: *qāʿidat al-yad* or *istiṣḥāb al-yad*). This canon was once a presumption commonly used to establish land entitlements in the absence of evidence. Had the judge applied it to the ‘Alid cultivation of the reed bed to demonstrate the respondent’s rights to the entire valley—on the notion that the valley represented a single, indivisible land tract—the caliph also would have lost, just as he would have lost if the judge had appealed to his own knowledge about who had rights to the valley. On either notion, the judge could have given the entire farmland to ‘Abd Allāh b. al-Ḥasan outright. But that conclusion would have been politically very tricky and therefore potentially unenforceable. Apparently, in the judge’s estimation, resolution of the larger question was not necessary. The scope of the present case allowed him to safely punt that larger question by resolving the narrower matter at hand.¹³

At a deeper level, I argue that the dispute over Bughaybigha, together with the dueling canons attached to it, demonstrates how *procedure* came

11 Caliphal courts were not bound by this rule. Consider the early case in which the ‘Abbāsīd caliph Hārūn al-Rashīd (r. 170-93/786-809) felt obliged to rely on his knowledge that his son, the prince, was guilty of sexual misconduct and must be punished. He was relieved when the soon-to-be-chief judge Abū Yūsuf (d. 182/798) invoked the *doubt canon*—requiring judges to avoid criminal punishments in cases of doubt—to sidestep punishment, on the grounds that a judge’s knowledge was insufficient to prove the crime. For a discussion of this case, see my *Doubt in Islamic Law* (Cambridge: Cambridge University Press, 2015), 90–92, which cites medieval literary and historical reports of this episode from Qāḍī al-Tanūkhī’s (d. 384/994) *Nishwār al-muḥāḍara*; Ibn Khallikān’s (d. 681/1282) *Wafayāt al-a’yān*; Ibn al-Wardī’s (d. 749/1349) *Ta’rikh*; and Abū ‘Abd Allāh al-Yāfi’ī’s (d. 768/1366-7) *Mir’āt al-jinān*. See also Maribel Fierro, “*Idra’ū al-Ḥudūd bi-al-Shubuhāt*: When Lawful Violence Meets Doubt,” *Hawwa* 5, nos. 2–3 (2007): 208–38; and Christian Lange, *Justice, Punishment and the Medieval Muslim Imagination* (Cambridge: Cambridge University Press, 2008), 192.

12 This concept draws on the idea of settlements as bargains devised “in the shadow of the law.” See Robert Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce,” *Yale Law Journal* 88, no. 5 (1979): 950–97.

13 Indeed, the larger question involved stakes so high that it became a matter not just of political or religious conflict, but of armed conflict, with ‘Abd Allāh b. al-Ḥasan eventually encouraging people to swear allegiance to his son, Muḥammad al-Nafs al-Zakiyya, who staged a rebellion against the caliph (see above, note 1). See Abū al-Faraj al-Iṣbahānī, *Maqātil al-Ṭālibiyyin* ([Najaf]: Maktabat al-Ḥaydariyya, 1423/[2002-3]), 224–25.

to play a critical role in the development of early Islamic law. Procedure also intervened in questions of legitimacy on disputes of land and leadership in that period. Conventional accounts of Islamic law tend to discount the role of procedure and inflate the importance of a symbiotic relationship between caliphs and jurists. However, the relationship between caliphs and jurists was often mediated through courts—courts laden with procedure. No account of early Islamic law so far shows the centrality of procedure to producing this symbiosis; and no account charts how and why judges may have helped mediate the jurist-caliph relationship or what significance it had for questions of legitimacy, land, and leadership.

I use this case as an example with which to begin filling that gap. The dispute over Bughaybigha highlights how conflicting theories of religious authority and political legitimacy could be litigated in courts; it indicates the legitimacy-conferring dominance of procedure—later encapsulated in the form of legal canons—in those courts; and it shows how both courts and judicial procedure could be used politically—precisely because of the legal legitimacy that the courts and procedure together conferred. To understand the dispute over Bughaybigha is to better understand the development and role of judicial procedure in resolving major questions at the core of Islamic law during its “founding period,” from the seventh to eleventh centuries.¹⁴

This essay explores the history and procedures of this case. Following this basic recitation of the case, the next section traces the making and taking of Bughaybigha, and the third part assesses the procedures relied on to resolve the dispute in court. In the end, the judge decided the case without explicit *citation* of procedures or legal canons. Yet it is clear that both were very much in play, as signaled by the judge’s own final comments quoted above to explain his choice to pursue a narrow course of action. The perception and use of procedure in the *Case of Bughaybigha* illustrate how ordinary disputes over land reflected extraordinary dynamics of political leadership, judicial independence, and questions related to legitimacy that accompany each. More specifically, this case is important because it shows how judges—even when a political authority attempts to place him in the service of politics—could use legal canons to thread the needle of power, here as between ‘Alid claims of right and Umayyad might.¹⁵

¹⁴ For more on my use of this term for periodization in Islamic legal history, see my *Doubt in Islamic law*, 8–9.

¹⁵ While the fuller operation and development of legal canons require further study, my treatment of the legal canons involved in this case methodologically draws on Roy Mottahedeh’s ascription of verisimilitude to various anecdotes from early Islamic sources to analyze prevalent attitudes that buoyed leadership networks under Būyid rule. In my treatment, I similarly take judicial references to various legal canons in anecdotal cases (even where they are not historical court records) to have verisimilitude to the social-legal workings of courts sufficient to reflect prevalent understandings of and attitudes toward judicial procedures as they intersected with

THE MAKING AND TAKING OF BUGHAYBIGHA

The struggle for Bughaybigha was no ordinary dispute. More than a bountiful spring or mere tract of land, Bughaybigha was located both geographically and symbolically at the center of political and religious contestations for power and legitimacy from the time of Islam's very beginnings. The spring that 'Alī discovered fed fertile land that was geographically close to the seat of the early empire and that lay along the trade- and expansion-route from Medina to Syria. Producing dates in abundance, Bughaybigha was a source of sustenance and wealth for 'Alī and his descendants. Moreover, it was the only portion of inheritance or legacy, according to some accounts, that 'Alī managed to retain from the Prophet for his sons and grandsons. These features made Bughaybigha extraordinarily important, both strategically and religiously, and they explain why the land was the locus of so much controversy for such an extended period.

The Origins of Bughaybigha

Bughaybigha refers to the most prized and hotly contested part of the larger tract of farmlands in the valley called Yanbu', just outside of Medina.¹⁶ With its early history now somewhat obscured, the spring is often referred to by different names that conflate the actual spring both with others nearby and with the entire expanse of land at Yanbu'. Perhaps counterintuitively, this conflation actually confirms the early importance of Bughaybigha itself. Often confused in the literature,¹⁷ a careful reading of the sources sheds

political realities of the time. See Roy Mottahedeh, *Loyalty and Leadership in an Early Islamic Society*, 2nd ed. (London: I.B. Tauris, 2001).

16 See al-Ṣāhib Ibn 'Abbād (d. 385/995), *al-Muḥīṭ fī al-lughā*, ed. Muḥammad Ḥasan Āl Yāsīn (Beirut: 'Ālam al-Kutub, 1994), 4:520, defining Bughaybigha as an estate in [read: near] Medina. For additional descriptions of Bughaybigha, see 'Alī Khān b. Aḥmad al-Madanī al-Shīrāzī, *al-Ṭīrāz al-awwal wa'l-kināz li-mā 'alayh min lughat al-'Arab al-mu'awwal* (Mashhad: Mu'assasat Āl al-Bayt li-l-ḥyā' al-Turāth, 2006), 7:325, noting that local mountains were sometimes ascribed to a Bughaybigha located in Yanbu', near, not "in Medina." See also Muḥammad b. Muḥammad al-Murtaḍā al-Zabīdī (d. 1206/1791), *Tāj al-'arūs min jawāhir al-Qāmūs*, ed. 'Alī Shīrī (Beirut: Dār al-Fikr, 1994), 6:306; and Muḥammad b. Muḥammad Ḥasan Shurrāb, *al-Ma'ālim al-athīra fī al-sunna wa'l-sīra* (Damascus: Dār al-Qalam, 1991), 50, 301—both noting the same. Also compare Khalīl (d. between 160/776 and 175/791), *Kitāb al-'Ayn* (Qum: Hijrat, 1989), 4:350, saying that Bughaybigha was assigned to Ja'far Dhū al-Janāḥayn—that is, to 'Alī's brother Ja'far b. Abī Ṭālib; and Ibn Manẓūr (d. 711/1311), *Lisān al-'Arab* (Beirut: Dār Ṣādir, 1997), 1:231, calling Bughaybigha an estate in Medina belonging either to the "Family of Ja'far" or to the Family of the Prophet.

17 The word is often vowelled Bughaybagha. See, for example, Ḥamad al-Jāsir, *Bilād Yanbu': Lamaḥāt ta'rīkhiyya juḥrāfiyya wa-intībā'āt khāṣṣa* (Riyadh: Dār al-Yamāma, 1967). It sometimes appears as Buqaybaqa, a simple substitution of gh for q, as in 'Abd al-Karīm Maḥmūd al-Khaṭīb, *Yanbu'* (Riyadh: Jāmi'at al-Malik Sa'ūd, [1993]). Other renderings include al-Bughaybigḥ / al-Bughaybagḥ, al-Bughaybi' / al-Bughayba', al-Baqṭ'a, al-Mu'ayni'a / al-Mu'ina'a, and al-Mughaybigḥa / al-Mughībigḥa / al-Mughībagḥa. See Yāqūt b. 'Abd Allāh al-Ḥamawī (d. 626/1229), *Mu'jam al-buldān*, ed. Muḥammad Amin al-Khānjī ([Cairo]: Maṭba'at al-Sa'āda, 1323/1906);

light on the term and its history.

The proper name of the spring is Bughaybigħa, “as in the diminutive form of *bagħbagħa*.”¹⁸ As previously noted, the onomatopoeic word refers to a rushing, gurgling sound,¹⁹ or it may also refer to a well where water is close to the surface and easy to draw up.²⁰ Occasional reference in the sources to its plural form, Bughaybigħāt, refers to the fact that the area actually encompassed a network of springs.²¹ Both the singular and the plural also seem to refer, interchangeably, to a nearby spring otherwise called ‘Ayn Abī Nayzar²²—named after an alleged African prince and brother-like figure to ‘Alī, formally his client (or servant), who took care of Bughaybigħa proper and the surrounding springs.²³ All of these springs together were

2:248; Yāqūt, *Mu‘jam al-buldān* (Beirut: Dār Ṣādir, 1374/1955), 1:479; and the editor’s note in Kulaynī (d. 329/940-1), *Kāfi*, 4th ed. (Tehran: Dār al-Kutub al-Islāmiyya, [1999]), 4:22 n. 3. The 1950 Cairo edition of Wakī’s *Akhbār al-quḍāt* renders it Nu‘ayni‘a, a straight-forward corruption of Bughaybigħa by simple transposition of the underdot of the b to an overdot to render the letter n. Asad Ahmed notes this rendering with some uncertainty about its meaning in his *The Religious Elite of the Early Islamic Hijāz: Five Prosopographical Case Studies* (Oxford: Unit for Prosopographical Research, 2011), 130 n. 707. To determine which variant Wakī or his copyists or editors used, one would need to examine the relevant manuscript directly.

18 Bakrī, *Mu‘jam mā ‘stu‘jim*, 1:241: ‘alā lafẓ taṣghīr; and Yāqūt, *Mu‘jam al-buldān* (Beirut), 1:469–70. See also Yāqūt, *Kitāb al-Mushtarak waḍ‘an wa’l-muftaraq suq‘an*, published as *Jacut’s Moschtarik, das ist: Lexicon geographischer Homonyme* (Bremen, Germany: Druck und Verlag der Dieterichschen Buchhandlung, 1846), 319; Yāqūt, *Marāṣid al-iṭṭilā‘ fi ma‘rifat asmā’ al-amkina wa’l-biqā’*, ed. Muḥammad al-Bajāwī ([Cairo]: Dār Ihyā’ al-Kutub al-‘Arabiyya, 1954), 1:210; Ibn Manzūr, *Lisān al-‘Arab*, 1:231; and Samhūdī, *Wafā’ al-wafā*, 4:164–65.

19 Bakrī, *Mu‘jam mā ‘stu‘jim*, 1:241: as in the saying *al-bi‘r bagħbagħ*; and Yāqūt, *Marāṣid al-iṭṭilā‘*, 1:210.

20 Bakrī, *Mu‘jam mā ‘stu‘jim*, 1:241: *mā’ bughaybagħ ayy qarīb al-rishā’*; Yāqūt, *Mu‘jam al-buldān* (Beirut), 1:469: *al-bi‘r al-qaribat al-rishā’*; Yāqūt, *Marāṣid al-iṭṭilā‘*, 1:210; and Shurrāb, *al-Ma‘ālim al-athīra*, 50.

21 Ibn Shabba, *Ta’rikh al-Madīna*, 1:222, naming three springs collectively referred to as Bughaybigħāt: Khayf al-Arāk, Khayf Laylā, and Khayf Baṣṭās; and Samhūdī, *Wafā’ al-wafā*, 4:165, quoting Ibn Shabba. For notes on the total number of springs surrounding Bughaybigħa, see below, note 29.

22 See Mubarrad (d. 286/900), *al-Kāmil fi al-luġha wa’l-adab*, Muḥammad Abū al-Faḍl Ibrāhīm, 3rd ed. (Cairo: Dār al-Fikr al-‘Arabī, 1417/1997), 3:153, mentioning this spring along with Bughaybigħa; ‘Abd al-Raḥmān b. ‘Abd Allāh al-Suhaylī (d. 581/1185), *al-Rawḍ al-unuf fi sharḥ al-Sīra al-Nabawiyya li-Ibn Hishām*, ed. ‘Abd al-Raḥmān al-Wakī ([Cairo]: Dār al-Kutub al-Ḥadītha, [1967-1970]), 1:368, noting that ‘Ayn Abī Nayzar is sometimes referred to as Bughaybigħa; and Samhūdī, *Wafā’ al-wafā*, 4:166, copying from Mubarrad. See also Ahmed, *Religious Elite*, 129, noting the frequent mention of the two springs together in the historical, biographical, and geographical literature.

23 Abū Nayzar—exceptionally pronounced Abū Nīzar—was called a “foreign prince,” and reportedly was the son of the Negus, the Abyssinian Christian ruler who offered Muslims sanctuary when they fled persecution by Meccan leaders in response to Muḥammad’s early message during the first migration (*hijra*). Abū Nayzar is said to have converted while young and—giving up future kingship—to have gone to live with the Prophet as a client (*mawlā*) under his protection in Medina, where ‘Alī was also being raised, and then to live with ‘Alī and Fātima upon the Prophet’s death. See Ibn Ishāq (d. 151/767), *al-Sīra al-Nabawiyya*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-‘Ilmiyya, 2004), 254; Mubarrad, *Kāmil*, 3:153; Bakrī, *Mu‘jam mā ‘stu‘jim*, 2:252; Abū

subsequently also simply called “‘Alī’s springs.”²⁴ The report of the *Case of Bughaybigha* similarly simply refers to it as “a spring belonging to [an ‘Alid] in Yansu[‘] [sic = Yanbu[‘]].”²⁵ Even more generally, the springs and the land surrounding them were sometimes called “the springs of Yanbu[‘],” “the land in Yanbu[‘],” or simply “Yanbu[‘].”²⁶

As for Yanbu[‘] itself, this term names a vast expanse of land, covering some 150 square kilometers, located between Medina and Syria on the trade route between those two cities, for which reason it bore some mention even in pre-Islamic and early Islamic works of local history and geography.²⁷ It got its name from the abundance of underground springs there—*yanbū[‘]* or *manba[‘]* being synonyms for the usual Arabic word for “well” or “spring.”²⁸ One source mentions that there were over 170 springs in that region alone.²⁹

Available records diverge as to how ‘Alī acquired the land that was to become Bughaybigha. According to one report, the Prophet himself had given a portion of the land in Yanbu[‘] to ‘Alī as part of an initial land allocation.³⁰ According to another report, ‘Alī had bought land from Kushd

al-Qāsim al-Zamakhsharī (d. 538/1144), *Rabī[‘] al-abrār wa-nuṣūṣ al-akhyār* ([Baghdad?]: Wizārat al-Awqāf, [1976–1982?]), 5:346; and Yāqūt, *Mu‘jam al-buldān* (Beirut), 1:469–70. Some sources further report that Abū Nayzar served ‘Alī as a slave-servant who was later freed, as ‘Alī refers to him in his last will and testament as one of three former slaves (*raqīq*) living at Yanbu[‘] who had become freedmen. See Muḥammad Bāqir al-Majlisī (d. 1110/1698), *Biḥār al-anwār*, ed. Jawād al-‘Alawī (Tehran: Dār al-Kutub al-Islāmiyya, 1376–1392/[1957–1973]), 42:72: ‘*utaqā*’; and Ibn Shabba, *Ta’rikh al-Madīna*, 225–26: *a‘taqnāhum*.

24 Somewhat circularly, in the historical literature these springs (‘*ayūn ‘Alī*) could refer to ‘Ayn Abī Nayzar, ‘Ayn al-Buḥayr, ‘Ayn Nawlā or Bawlā (also called ‘Ayn al-‘Ushayra), and ‘Ayn ‘Alī (probably Bughaybigha, another name for ‘Ayn Abī Nayzar, and/or the spring referred to as Nawlā). See Jāsir, *Bilād Yanbu[‘]*, 19.

25 Wakī[‘], *Akhbār al-quḍāt*, 103.

26 Jāsir, *Bilād Yanbu[‘]*, 28–29, reporting on fourth-, sixth-, and seventh-century descriptions by travelers and geographers. Some also referred to Yanbu[‘] as Jabal Juhayna, named for the tribe that first populated the area and the mountain under whose shadow the valley lay. See Iṣbahānī, *Maqātil al-Ṭālibiyyīn*, 337. While later descriptions divide Yanbu[‘] into Yanbu[‘] al-Nakhl, for the date palm orchards, and Yanbu[‘] al-Baḥr, for the port city, the historical Yanbu[‘] corresponds to Yanbu[‘] al-Nakhl. See Jāsir, *Bilād Yanbu[‘]*, 28–29; Shurrāb, *Ma‘ālim al-athīra*, 301. See further E. van Donzel, “Yanbu[‘],” *Et[‘]*, 11:281, who also observes that Sharm Yanbu[‘] is another name for the modern port city.

27 Jāsir, *Bilād Yanbu[‘]*, 7–9, 11.

28 *Ibid.*, 11.

29 The larger surrounding area in Yanbu[‘] contained perhaps well over 100 springs, many of which were said to be discovered and endowed by ‘Alī. See Ibn Shahrāshūb (d. 588/1192), *Manāqib Āl Abī Ṭālib* (Qum: n.p., 1379/[1959]), 2:122: putting the number of springs at 100; Bakrī, *Mu‘jam mā ‘s-tu‘jīm*, 2:251, putting the number of springs at 99, according to Muḥammad b. ‘Abd al-Majīd b. al-Ṣabāh; Muḥammad b. Ya‘qūb al-Firūzābādī (d. 823/1415), *al-Maghānim al-Muṭāba fī ma‘ālim Ṭāba*, ed. Ḥamad al-Jāsir (Riyadh: Dār al-Yamāma, 1969), 440, putting the number of springs at 170, according to al-Sharīf Ibn Salama b. ‘Ayyāsh al-Yanbu‘ī.

30 Ibn Shabba, *Ta’rikh al-Madīna*, 1:220.

for some unspecified price.³¹ According to a third, it was ‘Umar who, upon assuming the caliphate, gave land from Yanbu‘ to ‘Alī at his request.³²

Combining all three of these reports, “‘Ammār b. Yasār explained that the Prophet gave ‘Ushayra [a tract in Yanbu‘] to ‘Alī, ‘Umar then gave him a portion of Yanbu‘ after he assumed the caliphate, and ‘Alī purchased a portion.”³³ Without resolving exactly how ‘Alī acquired land at Yanbu‘, the upshot of these reports is that they confirm his acquisition of land there. They underscore that some portion of Yanbu‘ may have been conferred on him by the Prophet himself, and that, even if not, ‘Alī’s rights over this land at Yanbu‘ was completely beyond dispute.

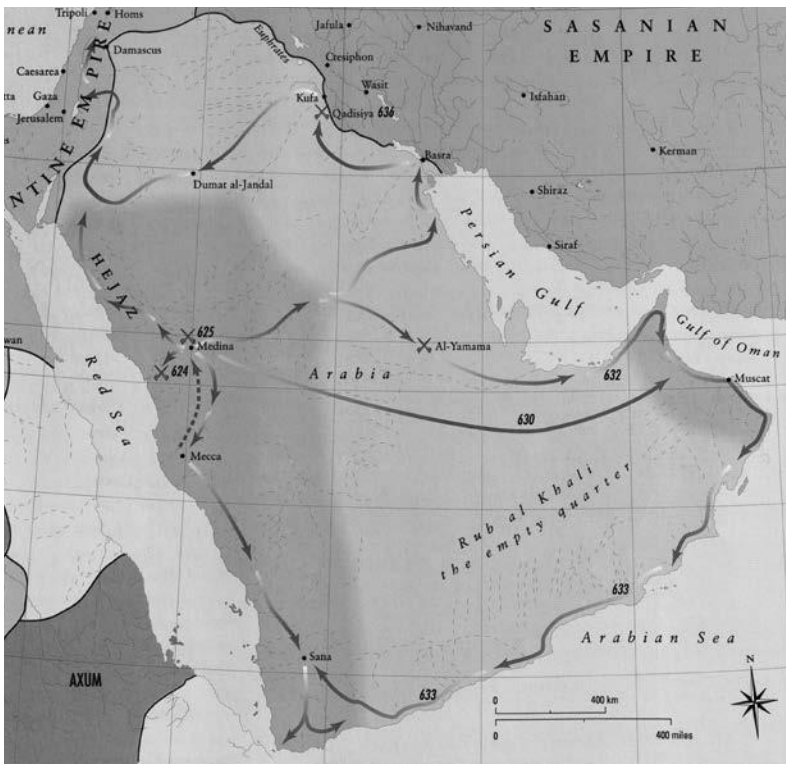


Figure 1. “Muhammad’s Missions and Campaigns to 632.” Source: Malise Ruthven, *Historical Atlas of Islam* (Cambridge: Harvard University Press, 2004), 27.³⁴

31 Ibid., 1:219, noting that ‘Alī bought it *bi’l-thaman*.

32 Yaḥyā b. Ādam al-Qurashī (d. 203/818), *Kitāb al-Kharāj*, ed. Aḥmad Muḥammad Shākir (Cairo: al-Maṭba‘a al-Salafiyya, 1347/[1929]), 78; and Ibn Shabba, *Ta’rīkh al-Madīna*, 1:220.

33 Ibn Shabba, *Ta’rīkh al-Madīna*, 1:220.

34 For a modern-day map depicting the location of historical Yanbu‘ (now called Yanbu‘ al-Nakhli) and its sister-city Yanbu‘ al-Baḥr (now called Yanbu‘), see Khaṭīb, *Yanbu‘*, 24. Modifications are based on the location of Yanbu‘ in present-day Saudi Arabia. See the German-produced Map of the World, available at http://www.posterwissen.de/maps/map.php?Saudi_Arabia&id=196&ln=en (last accessed 15 April 2016).

It was immediately after his arrival at his newly acquired land at Yanbu' that 'Alī discovered the spring that he then named Bughaybigħa.³⁵ He recognized its value immediately, exclaiming with elation: "Give my heirs the good news!"³⁶ He then promptly turned Bughaybigħa and its surrounding lands into an endowment-trust designated for his sons Ḥasan and Ḥusayn (and their descendants).³⁷

The Significance of the Contests over Bughaybigħa

It is clear from the sources that Bughaybigħa was extraordinarily important. But exactly *why* was it so significant? Why was control over it so contested?³⁸ Bughaybigħa was so significant and contested because it symbolized, I argue, the last *tangible* holding by which the 'Alids might make a claim to the prophetic legacy.³⁹ To be sure, their claim was less a matter of landed property than it was of religious and political leadership. Yet Bughaybigħa was significant with respect to both because claims upon it invoked critical questions of leadership and legitimacy that were sometimes debated over land and that continued long after 'Alī's death. In this case, Bughaybigħa served as the site on which an Umayyad-appointed judge resolved an 'Alid-related dispute in ways that drew upon and gave insight into early Islamic judicial procedure. Tellingly, the case went to the procedure-laden

35 Ibn Shabba, *Ta'rikh al-Madīna*, 1:220; and Mubarrad, *Kāmil*, 3:154.

36 Ibn Shabba, *Ta'rikh al-Madīna*, 1:220: *bashshara 'Alī bi'l-Bughaybigħāt ḥīna zaharat fa-qāla tasurr al-wārith*; and Samhūdī, *Wafā' al-wafā*, 4:165: same.

37 See Ibn Shabba, *Ta'rikh al-Madīna*, 1:220–24, listing versions of the endowment. See also Mubarrad, *Kāmil*, 3:154, noting that 'Alī asked Abū Nayzar to bring him ink and a writing instrument to write down the bequest himself on the spot; and Samhūdī, *Wafā' al-wafā*, 4:165, reporting on a different version of the endowment.

38 For a review of the endowment documents, see Ibn Shabba, *Ta'rikh al-Madīna*, 1:220–21, 225–27; and Mubarrad, *Kāmil*, 2:172. For alternate versions in later records of them, see also Samhūdī, *Wafā' al-wafā*, 4:165; Abū Sa'd Manṣūr b. al-Ḥusayn al-Ābī (d. 421/1030), *Nathr al-durr fī al-muḥāḍarāt*, ed. Muḥammad 'Alī Qurna ([Cairo]: al-Hay'a al-Miṣriyya al-Āmma lil-Kitāb, [1980-]), 1:302; Bakrī, *Mu'jam mā 'stu'jīm*, 2:252–53; Zamakhsharī, *Rabī' al-abrār*, 5:346; 'Alī b. Muḥammad al-Khuzā'ī (d. 789/1387-8), *Takhrīj al-dalālat al-sam'iyya*, ed. Iḥsān 'Abbās, 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1999), 568; and Ḥimyarī, *al-Rawq al-mi'tār*, 112–13. Although space here does not permit analysis of endowment documents or laws here, I plan to take up that analysis in a future publication. See 'Alī Ḥājī Ābidī, *al-Waqf wa'l-mawqūfāt Amir al-Mu'minīn* (Mashhad: Majma' al-Buḥūth al-Islāmiyya, 1435), esp. 78–92: discussing the law of trust and 'Alī's endowment properties at Yanbu', including Bughaybigħa.

39 In my usage, "Alids" refers to the descendants of 'Alī and Fāṭima through their sons, Ḥasan and Ḥusayn, rather than to the Ṭālibids or the descendants of 'Alī's son by Khawla bt. Ja'far—that is, Muḥammad b. al-Ḥanafīyya and others, more than one of whom laid claim to some of the land and legacy of 'Alī. For accounts of Muḥammad b. al-Ḥanafīyya's claim, see Ahmed, *Religious Elite*, 129–30, commenting on Mu'āwiya's attempts to forcibly marry Umm Kulthūm—the daughter of 'Abd Allāh b. Ja'far b. Abī Ṭālib—to his son Yazīd, as evidence that the former was not interested in "restoring good relations," as he had claimed, but that the marriage proposal had "something to do with inheriting or acquiring Ṭālibid land in the Ḥijāz." See also generally Elad, *Rebellion of Muḥammad al-Nafs al-Zakiyya*.

judicial arena for resolution here because that arena was regarded as more objective and legitimate than the political realm.

The political and moral significance of Yanbu' and, later, Bughaybigha, may well have been inflated by the loss of another land tract called Fadak. As Wilferd Madelung describes in his appraisal of contestations over succession to the Prophet after his death, Fadak likewise highlighted conflicts of political and religious ambition. The caliphs immediately succeeding the Prophet determined that Fadak would *not* go to Prophet's family members, Fāṭima and 'Abbās, who claimed rights to it, on the notion that the Prophet had instructed Abū Bakr that: "We [prophets] do not have heirs [or: leave inheritance] (*lā nūrith*). Whatever we leave is alms (*ṣadaqa*)...."⁴⁰ Symbolically, the Fadak episode epitomized a physical transfer of inheritance from the Prophet away from his Family, and with it, the transfer of religious and political leadership away from his Family as well. He who controlled and disposed of Fadak and the Prophet's other landed property determined who would control and dispose of the Prophet's legacy, materially and figuratively. Was Bughaybigha for Ḥusayn the equivalent of what Fadak meant to 'Alī?

Having been forced to relinquish Fadak, 'Alī (as head of the Prophet's Family) likely held onto the land at Yanbu', and Bughaybigha within it, even more firmly.⁴¹ That is, perhaps the confusion over Fadak and similarly situated lands explains the reports that 'Alī immediately called for a scribe upon discovering Bughaybigha after acquiring the land at Yanbu'. By putting his intentions into writing, his idea was likely that there would be no doubt as to the intended disposition of that land as a charitable endowment placed under the charge of his sons Ḥasan and Ḥusayn. In short, Bughaybigha was not just a tract of land. It came to symbolize a familial and moral descent from the Prophet's legacy as a leader noted for a type of religious-charismatic legitimacy borne of perceptions of his piety and morality.

Despite his best efforts, 'Alī was not entirely successful in securing the land's status as in the charge of his descendants. He was certainly successful in securing the *moral claim* to the land, as far as the communal historical memory was concerned. This much was reflected in historical records of his endowment and, as noted above, in claims of judicial knowledge given the judge's comment in this case when the issue later went to court. But the *legal claim* to the land was, as told here, another story. Bughaybigha was quickly wrested from Ḥusayn by the first Umayyad

⁴⁰ Madelung, *Succession to Muḥammad*, 50–52, citing Ṭabarī and Ibn Shabba.

⁴¹ *Ibid.*, 277, noting that, upon assuming power, 'Alī let 'Uthmān's Fadak decision stand—that is, granting the land to Marwān—though 'Alī sought to create an equal distribution thereafter.

caliphs, and the ‘Alids struggled to regain the land in a back-and-forth contest that lasted almost two centuries. The law did not constrain the caliphs, who episodically took the land; and it conferred only a portion of Bughaybigha to the ‘Alid descendant ‘Abd Allāh b. al-Ḥasan when the matter finally went to court.

To be sure, Bughaybigha had enormous economic value accompanying its symbolic worth. The land produced hundreds of thousands of *dīnārs* worth of dates, conferring wealth on whoever controlled it⁴²—including the ‘Alid trustees.⁴³ ‘Alī sometimes sent dates from the abundant land to feed the needy.⁴⁴ Ḥusayn reportedly used money from the land’s proceeds to satisfy debts incurred by one family member and to avoid an Umayyad forced marriage to another family member. And more generally, the economic advantages of Bughaybigha fueled ‘Alid independence and no doubt partially inspired Umayyad attempts to divest them of the land. For example, the land funded more than one ‘Alid campaign staged in an attempt to reclaim their Prophet-conferred land and legacy, to which the Umayyads responded by razing or seizing the lands.⁴⁵ The land also housed the ‘Alids, and provided respite for their descendants in times of peace and otherwise.⁴⁶ In these ways, Bughaybigha provided enormous

42 See Samhūdī, *Wafā’ al-wafā’*, 4:165, citing Wāqidī’s report that the amount of date production had reached 1000 *awsāq* by the time of ‘Alī, where a single *wasq* is approximately 3 kilograms. The sources are unclear, but presumably this amount was the yearly output. To truly determine the value of the produce would require determining the value of a *wasq* of dates on the market at the time.

43 Although they would not own the land, they could freely use its proceeds, as the terms of ‘Alī’s trust designated use for members of the family, and otherwise the poor and the needy. See, e.g., Ibn Shabba, *Ta’rikh al-Madīna*, 1:225–27, recording a copy of the endowment designating “all of the water resources and the lands surrounding them that are known to be in my possession at Yanbu’ ... to be held in trust (*ṣadaqa*),” for Ḥasan and Ḥusayn, who were to use “what is customary and spend[] according to God’s guidance as to permissible acts, without restriction” and specifying that “no part of this land is to be sold, gifted, or inherited.” Compare, Mubarrad, *Kāmil*, 2:172, quoting the text of the endowment to include the stipulation that the lands be used “for the poor of Medina and for those who fight in the way of God” and that “these lands are not to be sold or inherited until God bequeaths them, for He is the best of those who bequeath, unless Ḥasan and Ḥusayn need them—in which case they are for their sole, unfettered use.”

44 See Kulaynī, *Kāfi*, 4:22–23, reporting on ‘Alī’s gift of some five *awsāq* of dates—approximately 15 kilograms—to a poor man whose custom was not to ask for handouts. See also Ibn Bābawayh (d. 381/991–2), *Kitāb Man lā yaḥduruh al-faḥīh*, 2nd ed. (Qum: Daftar-i Intishārāt-i Islāmī, 1413/[1992]), 2:72, no. 1762; and Fakhr al-Dīn al-Ṭurayhī (d. 1085/1674), *Majma’ al-baḥrayn* (Tehran: Murtaḍā, 1375/[1960]), 5:5—both reporting the same *ḥadīth*.

45 On the rebellions, see Elad, *Rebellion of Muḥammad al-Nafs al-Zakiyya*; and Jāsir, *Bilād Yanbu’*, 24–25, detailing, in addition to the rebellion led by al-Nafs al-Zakiyya, the rebellion of Muḥammad b. Šāliḥ b. ‘Abd Allāh b. Mūsā b. ‘Abd Allāh against al-Mutawakkil in 244/858.

46 On Yanbu’ as the dwelling place of the ‘Alids in the Ḥijāz, see Elad, *Rebellion of Muḥammad al-Nafs al-Zakiyya*, 22–23, who notes that the family of ‘Alī b. Abī Ṭālib lived on the ‘Alid estate of Suwayqa within Yanbu’. The sources further show that ‘Alī himself lived there. See Balādhurī, *Ansāb al-Ashraf*, ed. Shelomo Dov F. Goitein (Jerusalem: Azriel Press, 1936), 5:77, reporting that Usāma b. Zayd b. Ḥāritha counseled ‘Alī to move there out of fear that, if he remained in Medina,

economic benefits for the ‘Alids—economic benefits that met their material needs and that, in turn, provided a basis for them to assert claims on the land.⁴⁷

Furthermore, Bughaybigha was strategically located. It lay along the road connecting the old seat of the empire in Medina to its new seat, following the rise of the Umayyad caliphs, in Damascus. Bughaybigha and surrounding estates in Yanbu‘ were also important stops on the *hajj* route between these and other those cities. On one occasion, Walīd II traveled the route through Bughaybigha from Damascus to Medina—escorted by a large number of troops—in order to build a dome on top of the Prophet’s mosque. The troops and the mosque construction project were a clear challenge to the judge Sa‘d b. Ibrāhīm’s authority as a local leader, and they were a visual assertion of the caliph’s power over the region.⁴⁸ This episode reinforced the strategic significance and location of the land.

In addition, the land was of high monetary value given its economic and strategic importance. Mu‘āwiya and other Umayyad caliphs offered astounding sums of money for the purchase of Bughaybigha. On one occasion, Mu‘āwiya reportedly offered to buy the land for one million *dīnārs*—an enormous sum today, and much more so then.⁴⁹ When that failed, his son Yazīd seized the land after the massacre of Ḥusayn and his men at Karbalā’.

But ultimately—notwithstanding the ongoing economic benefits, strategic location, and lucrative offers of money—it stands to reason that Bughaybigha’s primary significance still lies in the moral and legal claims

he would be blamed and killed for ‘Uthmān’s surely eminent death, even if he had nothing to do with it. The sources also feature some of the mundane affairs of ‘Alid descendants showing their use of the estate, including an episode in which al-Ḥasan b. al-Ḥasan went to Bughaybigha from Medina for a three-day period of rest. See Abū al-Faraj al-Iṣbahānī (d. 356/967), *Kitāb al-Aghānī*, ed. Dār Iḥyā’ al-Turāth al-‘Arabī (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1994), 1:472–73; Shihāb al-Dīn al-Nuwayrī (d. 733/1333), *Nihāyat al-arab fī funūn al-adab* (Cairo: al-Mu’assasa al-Miṣriyya al-‘amma, [1923–97]), 4:281–82, recounting the story from Iṣbahānī.

47 For a general overview of the land at Yanbu‘ and Fadak, the significance of the Ḥijāz to the ‘Alids and the ruling elites, and the associated rebellions through Fāṭimid times in the 6th/12th century, see Ella Landau-Tasseron, “Arabia,” in *The New Cambridge History of Islam*, ed. Chase F. Robinson (Cambridge: Cambridge University Press, 2010), 1:397–447, esp. 403–13.

48 Wakī’, *Akhbār al-quḍāt*, 108–09.

49 See Ibn Ishāq, *Sira*, 252; and Ibn Sa‘d, *al-Ṭabaqāt al-kubrā*, 6:414. In the latter account, Juwayriya b. Asmā’ (the same person who narrates the *Case of Bughaybigha* recorded in Wakī’ accounts), reportedly told Ibn Sa‘d’s informant, contradictorily, that Ḥusayn both suggested to ‘Abd Allāh that his debts could be paid by the revenue from Bughaybigha and that ‘Abd Allāh nevertheless attempted to sell the estate to Mu‘āwiya for this hefty sum (which Ḥusayn then blocked, saying “you know what your uncle did with this land,” namely, that he converted it into a trust). The first account seems more consistent with the weight and variation of reports establishing the land as part of ‘Alī’s endowments as against this single outlying report suggesting dissolution of the trust. In addition, the sale narrative only appears in some accounts that perhaps seek to establish Umayyad entitlement to the land when noting that Yazīd seized it upon Ḥusayn’s death, suggesting that it was an Umayyad interpolation to justify the takings.

attached to it. Bughaybigha had become Ḥusayn's Fadak.

Over time, the taking of Bughaybigha entailed multiple episodes, involving various Umayyad and 'Abbāsīd caliphs over the course of some one hundred and fifty years.⁵⁰ The sources are confused about who had control over Bughaybigha after Ḥusayn's death, but they agree that it was taken by the Umayyads at various points during their reign, and that the land ended up back in the hands of the 'Alids under the 'Abbāsīds. When discussing the Umayyad period, Ibn Shabba—and following him, Samhūdī—report that either the Umayyads or the Ṭālibīds more generally (that is, the descendants of 'Abd Allāh b. Ja'far b. Abī Ṭālib) held the land at the end of Umayyad rule, and the sources provide variant accounts of how and when control over it transferred hands thereafter.⁵¹

Namely, the sources describe the 'Abbāsīds as having subsequently confiscated and returned the endowment lands to the 'Alids as *ṣawāfī*,⁵² the legal status of which had long been contested among the 'Alid leaders and the mainstream political elite. Under the Umayyads, early Sunnī law and caliphal practices adopted a definition of *ṣawāfī* that “refer[ed] to lands which the *imām* selects from the conquered lands for the treasury, with the consent of the Muslims.”⁵³ As Hossein Modarressi further details for Sunnī law:

50 That is, from Ḥusayn's death in 61/680 through the 'Abbāsīd caliph Ma'mūn's reign that ended with his death in 218/833. For accounts of its subsequent history through the present, see Jāsir, *Bilād Yanbu'*, 27–43. Although mention of Bughaybigha disappears from the common 'Abbāsīd sources after the report on Ma'mūn, Jāsir's sources suggest that 'Alī's land in Yanbu' remained in his descendants' hands until the 'Abbāsīd caliph al-Mutawakkil's far-ranging response to the 'Alid rebellion against him in 244/858, when he completely razed the 'Alid stronghold there called Suwayqa. See Jāsir, *Bilād Yanbu'*, 24–25, citing Iṣbahānī, *Maqātil al-Ṭālibiyyīn*, 600; and Yāqūt, *Mu'jam al-buldān* (Beirut), 4:171. Subsequent sources report that the lands remained episodically important in the *hajj* route from the 4th/10th century until the 14th/20th century. See Jāsir, *Bilād Yanbu'*, 41–43. At that point, attention shifted from the historical Yanbu' [now: Yanbu' al-Nakh] to the nearby port city when it became the main port between the Ḥijāz and Egypt for trade. See Khaṭīb, *Yanbu'*, 33. Eventually, even the Port of Yanbu' lost its economic and geographic appeal for the *hajjīs* when the main port once again shifted to Jedda. See Jāsir, *Bilād Yanbu'*, 43.

51 For various accounts, see Mubarrad, *Kāmil*, 2:172: “This farmland remained in the hands of Banū 'Abd Allāh b. Ja'far from Umm Kulthūm's side, inheriting from her until al-Ma'mūn assumed the caliphate.” See also Samhūdī, *Wafā' al-wafā'*, 4:166; and Bakrī, *Mu'jam mā 'stu'jim*, 2:253.

52 The *ṣawāfī* public lands that Mu'āwiya had confiscated may have originally included the seven endowments of the Prophet in and around Medina. These lands were the reason for the 'Alid revolt against the Umayyads, fueled by the Medinans who viewed Mu'āwiya's claim to the land as unfounded and void. See M.J. Kister, “Land Property and Jihād,” *Journal of the Economic and Social History of the Orient* 34, no. 3 (1991): 270–311, esp. 308–09; M. J. Kister, “The Battle of the Ḥarra: Some Socio-Economic Aspects,” in *Studies in Memory of Gaston Wiet*, ed. Myriam Rosen Ayalon (Jerusalem: Hebrew University of Jerusalem, 1977), 33–49, 41–42, citing Frede Løkkegaard, *Islamic Taxation in the Classical Period* (Copenhagen: Branner and Korch, 1950), 49–51, and Saleh E. el-Ali, “Muslim Estates in the Hidjaz in the First Century AH,” *Journal of the Economic and Social History of the Orient* 2 (1959): 247–61, esp. 251.

53 Modarressi, *Kharāj*, 8.

The legal basis for this practice was laid by ‘Umar, the second caliph, who, after the defeat of the Sassanids, confiscated all lands belonging to the king, the royal family and the courtiers, including all public domain as well as all land without a known owner. These estates were, therefore, known as *ṣawāfi*: a term with a stem which means to select and later came to imply the idea of the confiscation of the land by the government.⁵⁴

By contrast, in early Shī‘ī law, *ṣawāfi* referred to “the crown property (movable and immovable) in the conquered countries... Such land, according to Shī‘ī law, belongs neither to the fighting men as does movable war booty, nor to all Muslims as do other conquered lands, but to the Imām and is considered as part of *anfāl* [war booty].”⁵⁵ Thus, Yazīd and perhaps subsequent early caliphs saw themselves as entitled to take the land under the mainstream Umayyad conception, but after the ‘Abbāsīd Revolution, many of the new caliphs saw themselves as unentitled to the land, under the ‘Alid-Shī‘ī conception. That is, the second set of caliphs saw restoring ‘Alid land, such as Bughaybigħa, to that part of the Family as helping to build the case for their own legitimacy in assuming leadership as an extension of the ‘Alid legacy, and thus returned the land.⁵⁶



In the long struggle over Bughaybigħa, not only did control over the land episodically change hands, but legitimacy of various sorts was also episodically at play. At various points, gaining the *moral legitimacy* that alliance with the Family of the Prophet could confer made giving back the land an attractive option in caliphal courts, as explored above. At one point, a particular conception of *legal legitimacy* made referral to judicial courts an attractive option for resolving the dispute, as explored below. To

⁵⁴ Ibid., 8–9 (citations omitted).

⁵⁵ Ibid., 9–11. Modarressi here also details a related term and contested property law concept in Shī‘ī law, which accorded with and helped underscore the view of *ṣawāfi* as a type of *anfāl* under the control of the Imām: *ṣāfi*. This type of property typically came from war booty rather than land, and was considered the “private property of the Prophet[, which] some Sunnī scholars held ... after his death should be handed over to the treasury and would belong to the Muslim community” but which Shī‘ī jurists held to be “an instance of *anfāl* and belonged to the leader of the Muslims by virtue of his position. Thus it should be transferred to the successors of the Prophet in the leadership of the community”—that is, the Imāms (and here: ‘Alī and his children).

⁵⁶ See Ibn Shabba, *Ta’rīkh al-Madīna*, 1:222 (*al-Bughaybigħāt ... qubīḍat ḥīna malaka Banū Hāshim al-ṣawāfi*) (whence Samhūdī, *Wafā’ al-wafā*, 4:165); and Mubarrad, *al-Kāmil*, 4:165: *fa-lam tazal ḥādhihi al-ḍay’a fī aydī Banī ‘Abd Allāh b. Ja’far min nāhiyat Umm Kulthūm yatawārathūnahā ḥattā malaka amīr al-mu’minīn al-Ma’mūn* (whence Samhūdī, *Wafā’ al-wafā*, 4:166). See also Elad, *The Rebellion of Muḥammad al-Nafs al-Zakiyya*, 103–04. According to this last source, the “phrase *ṣārat fī al-ṣawāfi* means that ‘a certain estate was confiscated and became included in the corpus of confiscated lands under a special *dīwān*,’ and typically refers to the beginning of ‘Abbāsīd rule.”

unpack the latter claim, we return to examining the *Case of Bughaybigha* more closely below.

THE CASE OF BUGHAYBIGHA, REVISITED

Returning to the case as it appeared in court, records of the case first arise in the biographical dictionaries—namely, in Ibn Sa’d’s account, which details the history of the case through the last Umayyad taking of Bughaybigha and ends with Walīd II’s referral of the matter to court. The narrative then picks up in the only judicial “record” of it that we have from the early courts: in a collection of biographies of judges from Islam’s founding period by the ninth-century judicial chronicler Waki’, who reports on cases, procedures, and appointments, in addition to basic biographical data of judges.⁵⁷ Conveniently, his report of this case picks up where the more generalist biographer Ibn Sa’d had left off. That is to say, while Ibn Sa’d ended his account of the matter by merely indicating that Walīd II had referred the case to court, Waki’ reports on the actual case as it appeared in court.⁵⁸

The judicial approach to the case is heavy on procedure—in contrast to the caliphal approach to the land dispute. In what follows, the aim is to give attention to key features of the judicial version of dispute resolution that point to the pull of procedure in early Islamic courts.

The Evidence Canon

Recall that upon first hearing the case, the judge asked the caliph’s representative to present evidence of his claim of ownership or right to the land. In requesting proof, the judge referred directly to the *evidence canon* stipulating that the petitioner bears the burden of proof for what he claims: *al-bayyina ‘alā mā-’dda’ā* [sic].⁵⁹ The full canon, as recorded in later works of legal canons, states that “the petitioner bears the burden of proof, and the respondent may swear an oath of denial: *al-bayyina ‘alā al-mudda’ī, wa’l-yamīn ‘alā man ankar* (or: *‘alā al-mudda’ā ‘alayh*.)” This procedural rule means that a judge may rule in favor of the petitioner if the petitioner produces two reliable male witnesses to verify the claim and the respondent either refuses to swear an oath of denial to a colorable claim (thus confessing implicitly) or confesses explicitly by making a statement. This basic distribution of burdens of proof was straightforward, and became the consensus view among judges and jurists by the end of the founding

⁵⁷ On Waki’’s collection, see M. Khālid Masud, “A Study of Waki’-s (d. 306/917) *Akhbār al-quḍāt*,” in *The Law Applied: Contextualizing the Islamic Sharī’a*, ed. Wolfhart Heinrichs et al. (London: I.B. Tauris, 2008), 116–27.

⁵⁸ Waki’, *Akhbār al-quḍāt*, 104–05.

⁵⁹ *Ibid.*, 103–04.

period.⁶⁰ In fact, these procedures were so often invoked in the form of a legal canon that the rule became *the* central evidentiary canon governing Islamic courts.⁶¹

But if probative evidence required two witnesses or a denial oath (or else, a confession), in this case, who would attest to what? The Uma-yads had no evidence that they had purchased the land (despite some records in the historical sources noting attempts by Mu‘āwiya to purchase it). ‘Abd Allāh b. al-Ḥasan was not required to produce evidence nor to swear an oath, given that he was not the one who had brought the claim. And he did not confess to using the land without right, as he fully believed the land to be properly under his control. Yet, were he to attempt a counter-claim in order to assert his right to the full valley encompassing Bughaybigħa, he would have been hard-pressed to do so. The four witnesses who had attested to one version of ‘Alī’s written endowment document, if its historicity and authenticity are to be supposed, had long since passed away. Indeed, Wakī’s record of the case mentions no document at all.⁶² Where, as here, neither witness testimony nor a confession or oath is available, nor is there written documentation, the judge is forced to seek some other means of resolution.⁶³

60 Ibn Qudāma, *Mughnī*, 11:404: *wa-lā khilāf*.

61 There were more complicated instances in which it was difficult for a judge to determine who the petitioner was—that is, who had the greater *prima facie* entitlement and thus which opponent would bear the burden of proof when there were multiple petitioners with similar claims, or when only circumstantial evidence and other types of proof were available. To address these and other issues requires a systematic study of the literature on judging. Such a study would include, for example, Abū al-Ḥasan al-Māwardī (d. 450/1058), *Adab al-qāḍī*, ed. Muḥyi Hilāl al-Sarḥān (Baghdad: Maṭba‘at al-‘Ānī, 1972); and al-Ṣadr al-Shahīd Ibn Māzah (d. 536/1141), *Sharḥ Adab al-qāḍī* [by Aḥmad b. ‘Umar Khaṣṣāf (d. 261/ 874)], ed. Muḥyi Hilāl al-Sarḥān (Baghdad: Maṭba‘at al-Irshād, 1977).

62 Detailed discussion of ‘Alī’s endowment documents is beyond the scope of this paper, and should be taken up in future work. For sources on these early documents see Hossein Modarressi, *Tradition and Survival: A Bibliographical Survey of Early Shī‘ite Literature* (Oxford: Oneworld, 2003), 2–17, 25–32.

63 See Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223), *al-Mughnī ‘alā Mukhtaṣar Abī al-Qāsim al-Khiraqī*, ed. ‘Abd Allāh b. ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāḥ Muḥammad al-Ḥulw (Cairo: Hajar, 1986), 11:404. See also Abū al-Ḥusayn al-Qudūrī (d. 428/1037), *Tajrīd (al-Mawsū‘a al-fiqhiyya al-muqārana)*, ed. Muḥammad Aḥmad al-Sirāj and ‘Alī Jumū‘a Muḥammad (Cairo: Dār al-Salām, 2004); 12:6548; al-Sharīf al-Murtaḍā (d. 436/1044), *Intiṣār*, ed. Muḥammad Riḍā al-Sayyid Ḥasan al-Kharsān (Najaf: al-Maṭba‘a al-Ḥaydariyya, 1971), 236; Māwardī, *Adab al-qāḍī*, 2:370; ‘Alī b. Aḥmad Ibn Ḥazm (d. 456/1064), *al-Muḥallā bi’l-āthār*, ed. ‘Abd al-Ghaffār Sulaymān al-Bandārī (Beirut: Dār al-Kutub al-‘Ilmiyya, 1988), 9:427; Ibn Rushd II (d. 595/1198), *Bidāyat al-mujtahid*, ed. ‘Alī Muḥammad Mu‘awwaḍ and ‘Ādil Aḥmad ‘Abd al-Mawjūd (Beirut: Dār al-Kutub al-‘Ilmiyya, 2000), 2:689; Abū Bakr al-Kāsānī (d. 587/1191), *Badā‘i‘ al-ṣanā‘i‘ fi tartīb al-sharā‘i‘*, ed. Aḥmad Mukhtār ‘Uthmān [(Cairo): Zakariyyā ‘Alī Yūsuf, 1968), 9:4088.

The Judicial Knowledge Canon?

Recall that Judge Sa'd b. Ibrāhīm felt compelled to rule contrary to his own knowledge, which—like the caliphal and communal memory alike—would have led him, no doubt, to conclude that the 'Alids were entitled to all of the land in the Yanbu' valley surrounding Bughaybigha. In fact, as previously noted, he said as much: "By God, if I had issued a ruling according to my own knowledge as to Bughaybigha, I would have judged differently (lit.: other than what you observe)."⁶⁴ In explaining what the judge knew and how, an informant who had attended the trial recounted the part of the narrative on which the biographers and chroniclers had agreed: that "Bughaybigha was a trust of 'Alī b. Abī Ṭālib," which Mu'āwiya sought, unsuccessfully, to take through various machinations. The informant then referred to (without quoting) a longer version of those machinations and ended his narrative with accounts of the Umayyad takings recounted above.⁶⁵ But judicial knowledge was apparently not an acceptable procedure available to this judge.

The rules governing the use of judicial knowledge were more complicated and contested than the straightforward *evidence canon*. Whereas that canon was the universally accepted gold standard for judicial decisions, the use of judicial knowledge as a stand-in for testimonial or confessional evidence had become a contested *decision rule* among early Muslim jurists, whose conflicting views broke down into three camps: those generally against it, those generally for it (and who required it), and those who permitted it only with certain constraints. This latter camp, those who permitted it with constraints, was most prevalent.⁶⁶ They tended to allow

⁶⁴ Wakī', *Akhbār al-quḍāt*, 104.

⁶⁵ Ibid., 104: "[Following the failed marriage proposal, although] Bughaybigha remained under Ḥusayn's control (*lam tazal fī yad Ḥusayn*) until he died, Yazīd [b. Mu'āwiya] took control of it by force. Then it passed to the control of Ibn al-Zubayr; at which time, when Medina was under his control, the Family of 'Alī took control of it from him by force.... Then 'Abd al-Mālik returned control of it to the Family of Mu'āwiya until 'Umar b. 'Abd al-'Azīz ('Umar II) came to power and returned it to the Family of 'Alī. When Yazīd b. 'Abd al-Malik (Yazīd II) came to power, he returned it to the Family of Mu'āwiya. For similar wording from a source that was likely the source of Wakī's account, see Ibn Sa'd, *Ṭabaqāt al-kubrā*, 6:414. Wakī' seems unaware of the subsequent history, having reported the case and its Umayyad history from Juwayriya—who reported the events to Ibn Sa'd or his informant. The 'Abbāsīd events (reported by Ibn Shabba, from an unnamed source) would have occurred just prior to their times, as Ibn Sa'd died during the reign of al-Wāthiq (r. 227-232/842-847) and Wakī' during the reign of al-Muqtadir (r. 295-320/908-932).

⁶⁶ Ibn Qudāma, *Mughnī*, 11:401, noting that each of the Sunnī school "founders" or their close associates took positions against the absolute use of judicial knowledge: Mālik, Abū Ḥanīfa's close associate Muḥammad al-Shaybānī and, according to some, Shāfi'ī and Aḥmad b. Ḥanbal. The Sunnī rule stood in contrast to the 'Alid-Shī'ī rule, which almost unanimously *required* the use of judicial knowledge. For a discussion, see, e.g., al-Sharīf al-Murtaḍā, *Intisār*, 236; and 'Abd al-Karīm al-Mūsawī al-Ardabīlī, *Fiqh al-qaḍā'*, 2nd ed. (Qum: Mu'assasat al-Nashr li-Jāmi'at Muḥid, 1423/[2002-3]), 1:290-91.

the use of judicial knowledge in private or civil cases, but bar it in public or criminal cases. By and large, the use of judicial knowledge was generally disfavored as a less-constraining and more discretion-conferring tool in public law cases, which were to be approached with caution in this strand of early Islamic law.⁶⁷ The antipathy toward the use of judicial knowledge for public law matters was on display in this case, where endowment disputes were considered a matter of public law and where judicial discretion was to be minimal even for those who accepted this procedure in other cases. The antipathy toward judicial knowledge was so marked that it prompts consideration of whether it could be considered a canon at all by the eighth century (during which this case reportedly occurred) or the ninth century (at which time this case was recorded in the sources).

At any rate, unable to use the evidence canon and unwilling to use judicial knowledge, Judge Sa'd b. Ibrāhīm was left to appeal to some other recognized procedure of law. He turned, implicitly, to a presumption encapsulated in the possession canon.

The Possession Canon

Finally, recall that 'Abd Allāh seemed to have continuously worked the land at issue, but that the caliph's representative apparently did not contemplate this fact as leading to his continued ability to do. Instead, the agent likely thought that he would prevail in taking the entire valley, with the benefit of the anticipated judgment adding legal legitimacy to the caliph's wishes to take the land. If this is a fair interpretation of the agent's line of thought, we might conclude that the possession canon was not as well-known a feature of the courts as was the evidence canon, and that, as a result, litigants such as this agent may not have known precisely how it operated.

Deprived of the normal procedures, the judge had cleverly avoided unnecessarily deciding the major question of who had the rightful claim over the entire valley.⁶⁸ It was, in fact, the possession canon that gave him

67 For and overview of the Islamic laws of judicial knowledge and circumstantial evidence, see Hossein Modarressi, "Circumstantial Evidence in the Administration of Justice" (Chapter 2, this volume).

68 In doing so, he pursued a strategy very similar to the modern U.S. constitutional avoidance rule of statutory interpretation, also known as the constitutional doubt canon, whereby judges are to interpret statutes "in a way that avoids placing its constitutionality in doubt." See Antonin Scalia and Bryan A. Garner, *Reading Law* (St. Paul: Thompson/West, 2012), 247–51. See also William N. Eskridge, Jr., *Interpreting Law* (St. Paul: Foundation Press, 2016), 425, defining the "constitutional avoidance rule" as requiring judges to "avoid interpretations that would render a statute unconstitutional (classic avoidance) or that would raise serious constitutional difficulties (modern avoidance)." For recent cases, see *Bond v. United States*, 134 S. Ct. 2077 (2014); and *Brown v. Plata*, 131 S. Ct. 1910, 1928–29, 1937 (2011). For a critique of the rule, see Richard A. Posner, "Statutory Interpretation—In the Classroom and in the Courtroom," *University of Chicago Law Review* 50 (1983), 800–22, esp. 815–16, questioning the rule that "[s]tatutes should

the means by which to narrow the inquiry to only the issue of whether ‘Abd Allāh could continue farming a portion of the land.⁶⁹ The possession canon gave a presumption of ownership to the party with land under his or her control, which a counter-claimant could rebut only with presentation of evidence of ownership or entitlement otherwise. Here, ‘Abd Allāh’s cultivation of the land amounted to a presumption of his right to it. To rebut that presumption and claim ownership over the whole valley (including that land tract), the caliph or his representative would have had to present evidence that they lacked.⁷⁰ Balancing these competing claims, the judge issued a decision apparently so unexpected that it surprised the Umayyad caliph’s representative into suddenly disclaiming the authority of the court over him and the case. But when the operation of the evidence, judicial knowledge, and possession canons are put into play, the decision makes sense to the observer well-versed in this latter procedural rule of early Islamic law—which, apparently, the caliph’s representative was not.

CONCLUSION: THE RETURN OF BUGHAYBIGHA

When the *Case of Bughaybigha* arose in the Medinan court in 733 or 734, everyone *knew* that the land in question was properly under ‘Alid control—a fact that remained constant in the community’s early historical memory.⁷¹ The Umayyads knew it, which is why they tried to purchase the land or obtain it through various schemes before taking it outright. The ‘Abbāsids knew it too, which is why caliphs such as Saffāh and Ma’mūn gave the land back. But Bughaybigha was too important to be allowed to remain in ‘Alid hands whenever the power of the caliphs was threatened or their legitimacy seemed to be waning, and whenever taking (or, for that matter, giving) the land could symbolically or materially affect those dynamics.

It is significant that each ‘Abbāsīd caliph who was favorable to ‘Alid claims to Bughaybigha drew on his own knowledge of this land as a trust, if we presume them to have been aware of the wider mainstream

be construed not only to save them from being invalidated but to avoid even raising serious constitutional questions” on the grounds that it “leaves everything ... vague” but enlarges the reach of judicial power “to create a judge-made ‘penumbra.’” While comparable, the different structural reasons for and remedies intended by “constitutional” (or major-issue) avoidance tendencies in these two different systems would be ripe for future study.

69 Wakī, *Akhbār al-quḍāt*, 103–04. See discussion above, note 10 and accompanying text.

70 On the operation of and conflicts between the possession and evidence canons, see, e.g., Muḥammad Ṣidqī b. Aḥmad al-Būrnū, *Mawsū‘at al-qawā‘id al-fiqhiyya*, 3rd ed. (Beirut: Dār al-Risāla al-‘Ālamiyya, 2015), 3:130–33; Muḥammad Ḥasan al-Bujnūrdī, *al-Qawā‘id al-fiqhiyya*, ed. Mahdī al-Mihrīzī and Muḥammad Ḥusayn al-Dirāyatī, 1424/2003-4), 3:11–14.

71 On questions of historical memory in early Islam, see Hossein Modarressi, “Facts or Fables: Muslims’ Evaluation of Historical Memory” (forthcoming).

view of the land as an “endowment created by ‘Alī for the children of Fātima.”⁷² By all accounts, for caliphs or their deputies to draw on their own knowledge was a regular and quite acceptable practice, including in *mazālim* courts and their own tribunals otherwise. In this way, the *caliphal courts* unapologetically exhibited a practice for which early Islamic *judicial courts* rather sensationally gained the infamous Weberian reputation of being arbitrary and capricious, thanks to being confused or conflated in nineteenth- and twentieth-century Islamic law scholarship.⁷³

But certain rules of evidence and procedure—typically embodied in legal canons—were to bind judges, even if they did not apply to caliphs. Thus, for judges to draw on their own knowledge was an issue of great controversy and generally frowned upon in public law cases in mainstream (later, Sunnī) Islamic law of the time.⁷⁴ Judges were bound by rules of evidence and procedure, which were usually encapsulated in Islam’s legal canons, which conferred a high degree of legitimacy extending from a perception of moral-religious authority to judge on the basis of certain known procedures. It was this perception of procedure-derived legal legitimacy that led to the caliph Walīd II’s attempt to end the long controversy over Bughaybigha by deploying a judicial rather than caliphal court to resolve it. He may have estimated that doing so would bolster his claims to proprietary (and, more pointedly, legal) legitimacy over Bughaybigha and the ‘Alid legacy attached to it through association with the procedure-bound legitimacy conferred by the court. He resorted to seizing the land once again, like Mu‘āwiya’s descendants, only when the legal avenues failed.

The prehistory of the *Case of Bughaybigha* suggests that certain procedural rules prevailed in judicial courts where, by the ninth century, historical events and political influences helped regularize procedures that were both shaped by and gave shape to historical events. The unfolding of this case gives texture to my overarching claim that procedure bound judges in ways that they did not bind political authorities, regardless of

⁷² Yāqūt, *Marāṣid al-iṭṭilāʿ*, 1:210.

⁷³ See Max Weber, *Economy and Society*, eds. Guenther Roth and Claus Wittich, trans. Ephraim Fischoh et al. (New York: Bedminster Press, 1968), 806 n. 40, defining *kadijustiz* as “the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law.” But see David S. Powers, “*Kadijustiz* or *Qādī* Justice? A Paternity Suit from Fourteenth-Century Morocco,” *Islamic Law and Society* 1 (1994): 332–66, esp. 365–66, contrasting Weber’s imagined notion of *kadijustiz* with notions of judicial practices and procedures drawn from historical sources). For an analysis of the origins and effects of this notion on comparative law and in U.S. courts, see my “Against *Kadijustiz*: On the Negative Citation of Foreign Law,” *Suffolk University Law Review* 48 (2015): 343–78.

⁷⁴ See Māwardī, *Adab al-qāḍī*, 2:368–77, noting diverse positions among early Muslim jurists on the use of judicial knowledge in judicial courts, and particularly with respect to *ḥuqūq Allāh* (public law claims)—a category under which *waqf*-endowment law would fall.

the communal memory of historical facts. It also shows that procedural constraints on judges were not absolute. That is to say, judges still exercised considerable discretion when, in the absence of evidentiary proof, they were required to choose gap-filling presumptions like the possession canon and other procedures to deploy. All told, these events powerfully illustrate how integral procedure was to the very formation and meaning of Islamic law. Procedure could serve as a check on caliphal power when judges exercised the independence that procedure could confer. Or, alternatively, procedure could legitimate raw power when used to bolster political claims. And, of course, procedure could be used to stake out a neutral position between these two options, neither checking nor legitimating political power, as unfolded in this case. Here, appeals to procedure served to mediate delicate political contests in the fraught contexts of early Islamic societies, while still reinforcing the integrity and independence of the courts themselves. It is this third option that best describes the role of procedure as navigated by the judge in the *Case of Bughaybigha*. Through procedure, he offered a portion of land and legitimacy to both sides.

POSTSCRIPT

It was not long after the events described here that the endowment of Bughaybigha was functionally dissolved. By the time the historian Samhūdī wrote in the sixteenth century, the lands were “known simply as Yanbu‘, and in possession of people who claim[ed] ownership of them.” But the *Case of Bughaybigha* reveals the colorful history of the land in the early period—its discovery, endowment, and historical memory now available only in traces, almost hidden from view, yet there beneath the surface as the many springs of Yanbu‘ used to be.⁷⁵

⁷⁵ See Samhūdī, *Wafā’ al-wafā’*, 4:166. Modern-day Yanbu‘ is a district in Saudi Arabia where mostly dates are manufactured, having revived from the 1970s, when most of the springs had dried up and the residents had moved away from the farmlands to the city. The government began to restore the land in the 1980s, spurring on a renewal of date production on the farms there. See Khaṭīb, *Yanbu’*, 34; and Ilhām Sirāj ‘Umar Akbar, *Bilād Yanbu’: Dirāsa ta’rīkhiyya ḥidāriyya (363-923/973-1517)* (Medina: al-Ḥumaydi, 2015).