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A Circuit Supreme: How the D.C. Circuit Court is Using a Presumption of Regularity in Latif v. Obama to Make New Law and Ensure No Detainees Are Released from Guantanamo Bay

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A CIRCUIT SUPREME: HOW THE D.C. CIRCUIT COURT IS USING A PRESUMPTION OF REGULARITY IN *LATIF V. OBAMA* TO MAKE NEW LAW AND ENSURE NO DETAINEES ARE RELEASED FROM GUANTANAMO BAY

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I. INTRODUCTION

Enter Adnan Farhan Abdul Latif,[**] a detainee currently held at Guantanamo Bay and ordered released by the United States District Court, District of Columbia (District Court).[1] The Government charges "that Latif was a member of al Qaeda or Taliban forces."[2] Conversely, Latif maintains he was traveling for medical reasons and was never part of the Taliban.[3] The Government bases its opinion on a "heavily redacted" report titled [REDACTED] Report [REDACTED] (Report).[4] The Report and the accuracy of the facts therein are at the heart of Latif's case.[5] The District

[**] As this article went to press, Adnan Latif was found dead in his cell at Guantanamo Bay; his cause of death has not yet been identified. *See* Baher Azmy, *The Face of Indefinite Detention*, N.Y. TIMES (Sep. 14, 2012), http://www.nytimes.com/2012/09/14/opinion/life-and-death-at-guantanamo-bay.html. This development would not have changed the author's analysis, as intelligence reports will still qualify for a presumption of regularity in future cases involving Guantanamo Bay detainees.

1. *See* Abdah v. Obama, No. 04-1254, 2010 WL 3270761, at *10 (D.D.C. Aug. 16, 2010) (basing its order on conflicting testimony and the court's determination that the intelligence report was not sufficiently reliable to afford a presumption of regularity), *vacated and remanded sub nom.* Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

2. *See* Petition for a Writ of Certiorari at *2-3, Latif v. Obama, No. 11-1027, 2012 WL 549261 (Jan. 12, 2012) (seeking certiorari from the Supreme Court of the United States to reverse the D.C. Circuit Court and release Latif pursuant to the District Court's order).

3. *See Latif*, 677 F.3d at 1177 (characterizing this story as an "innocent explanation").

4. *See id.* (stating that this report details Latif's travels as the basis for the government's case).

5. *See generally id.* (finding, however, that the Report was sufficiently reliable to sustain Latif's detention when afforded a presumption of regularity).

Court held that it was unable to "credit that information because there is a serious question as to whether [Redacted] accurately reflects [Redacted] the incriminating facts [Redacted] are not corroborated, and Latif presented a plausible alternative story . . . ."[6] Nevertheless, the United States Court of Appeals, District of Columbia Circuit (D.C. Circuit) reversed the habeas order and found that the lower court should have afforded the Report a "presumption of regularity, requiring the court to presume that the information in the Report had been accurately recorded."[7]

This Recent Development argues that the D.C. Circuit manifestly denied Latif a meaningful review of his detention due to its application of a presumption of regularity to intelligence reports and its insistence on conducting new fact finding.[8] Part II examines pre-conviction habeas corpus claims for detainees held under the Authorization for Use of Military Force,[9] the different legal standards of a presumption of regularity and a presumption of authenticity,[10] and concludes with the facts and opinions issued by the D.C. Circuit in *Latif v. Obama*.[11] Part III argues that the D.C. Circuit erred by refusing to defer to the District Court's fact finding and insisting that the Report qualified for a presumption of regularity.[12] Part IV concludes that the Supreme Court should have granted certiorari in this case to resolve the cloud of outstanding legal issues in detainee cases.[13]

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6. *See Abdah*, 2010 WL 3270761, at *9 (ordering Latif's release based on the Report's unreliability).

7. *See Latif*, 677 F.3d at 1185 (noting that no other courts had expressly granted this level of presumption to intelligence reports in detainee cases).

8. *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008) (stating that detainees had the right to a meaningful review of their detainment); *infra* Part III (noting the disdain the D.C. Circuit has for the Court's decision in *Boumediene*).

9. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (granting broad powers to the President to fight future terrorism against the United States); *infra* Part II.A (explaining how the process for detainee habeas review began and subsequently developed).

10. *See infra* Part II.B (explaining that a presumption of regularity affords intelligence documents a presumption that, for instance, the interpreter correctly interpreted what the detainee said, while a presumption of authenticity would only afford the intelligence report a presumption that it was actually the correct report).

11. *See generally Latif*, 677 F.3d at 1175 (explaining the reasoning for continuing to detain Latif); *infra* Part II.C (explaining that the D.C. Circuit overruled the lower court on several issues, including the application of a presumption of authenticity to intelligence reports).

12. *See infra* Part III (arguing that the D.C. Circuit misapplied the law both with respect to the presumption afforded intelligence reports and the standard by which it reviewed the lower court's decision).

13. *See infra* Part IV (stating that the D.C. Circuit requires further guidance in order to effectuate a meaningful review of habeas status for detainees).

II. BACKGROUND

A. The Life of a Pre-conviction Detainee Habeas Corpus Claim

One week after the devastating attack on the World Trade Center on September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), which authorizes the President to use whatever force deemed necessary to prevent future attacks against the United States from the people who "planned, authorized, committed, or aided the terrorist attacks."[14] Since Congress passed the AUMF, litigants have bombarded the courts with challenges to the Government's power to detain individuals pursuant to the AUMF.[15] The Supreme Court has settled two of these issues, but the D.C. Circuit has never allowed a detainee to be released from Guantanamo Bay.[16]

In *Hamdi v. Rumsfeld*, the Supreme Court declared that the Government could lawfully detain enemy combatants pursuant to the AUMF.[17] Following that ruling, the Government established Combatant Status Review Tribunals, which evaluated whether individuals held at Guantanamo Bay qualified as enemy combatants.[18] Several of these combatants filed suit challenging their detention in the United States District Court for the District of Columbia, and the Supreme Court eventually ruled that statutory habeas corpus claims applied to Guantanamo Bay in *Rasul v. Bush*.[19] Congress then passed the Detainee Treatment Act (DTA), stripping jurisdiction from the courts in Guantanamo cases alleging habeas corpus claims.[20] Following the passage of the DTA, the Supreme

14. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to also use force against those who harbored these individuals or organizations); Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (stating that the AUMF authorized the detention of enemy combatants at Guantanamo Bay).

15. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 779 (2008) (granting detainees the right to challenge their detention in habeas proceedings); *Hamdi*, 542 U.S. at 510 (establishing that the government may detain enemy combatants pursuant to the AUMF, but that certain judicial procedures must also be in place); *Latif*, 677 F.3d at 1199 (stating that Latif's detention was lawful despite questions about the validity of the report the government used to justify his detention).

16. *See, e.g.*, Lyle Denniston, *D.C. Circuit: Last Stop for Detainees?*, SCOTUSBLOG (Mar. 9, 2012, 3:48 PM), http://www.scotusblog.com/?p=140439 (questioning whether the Supreme Court would grant certiorari in eight new detainee cases to stop the D.C. Circuit Court from overturning every release order the District Court has ordered to date).

17. *See* 542 U.S. at 518 (stating that the power to detain these individuals was necessary and appropriate force as an incident to war).

18. *See Boumediene*, 553 U.S. at 733 (noting that the term "enemy combatants" was defined by the Department of Defense for the purpose of these tribunals).

19. *See* 542 U.S. 466, 473 (2004) (stating that 28 U.S.C. § 2241 had extended the jurisdiction to Guantanamo Bay, but declining to decide whether there was also a constitutional right to habeas corpus in Guantanamo Bay).

20. *See Boumediene*, 553 U.S. at 735 (explaining that the statute also gave the D.C.

Court in *Hamdan v. Rumsfeld* held that the DTA could not remove the Court's jurisdiction in cases that were pending when Congress passed the DTA.[21] In response to this move by the Court, Congress passed the Military Commissions Act (MCA), once again attempting to remove the detainee cases from the jurisdiction of Article III courts.[22]

The most important case addressing detainee rights in this area is *Boumediene v. Bush*.[23] The Court in *Boumediene* found that the detainees in Guantanamo Bay have a constitutional right to habeas corpus review, and that the detainees do not have to exhaust all other remedies before seeking this relief.[24] Additionally, the Court required that this habeas review must be "meaningful" in order to pass constitutional muster.[25] *Boumediene* explicitly found that meaningful habeas review must include the ability to order the release of any individual that the court deems has been detained unlawfully.[26] *Boumediene* also stated that, because these detainees were being held pursuant to an executive order rather than through a formal trial in a court, the reviewing court did not have to give the same level of deference.[27] Rather, the reviewing court must consider both "the cause for detention and the Executive's power to detain."[28]

B. Presumption of Regularity

In many cases, courts will grant a presumption of regularity to official acts by public officials.[29] This presumption allows the court to assume that

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Circuit exclusive jurisdiction to review tribunal claims (citing 119 Stat. 2742)).

21. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (finding that the statute was not sufficiently specific to remove the Court's jurisdiction in cases already pending).

22. *See* 10 U.S.C.A. § 948d (Supp. 2007) (attempting, once again, to prevent Article III courts from hearing Guantanamo Detainee cases, including habeas corpus petitions).

23. *See generally* 553 U.S. 723 (2008) (addressing, for the first time, the detainee's constitutional rights to habeas review in Article III courts, outside of statutory grants of habeas review).

24. *See id.* at 733-36 (providing a detailed history of the writ of habeas corpus in order to inform the decision).

25. *See id.* at 778 (qualifying this requirement by saying that "meaningful" review does not mean that the review must be as rigorous as normal court proceedings).

26. *See id.* at 779 (referring to the common law habeas corpus claim, as opposed to various habeas claims that were established by statute).

27. *See id.* at 783 (contrasting the circumstances of a detainee in Guantanamo Bay with a criminal who was tried and convicted in a court of law).

28. *See id.* (stating that the habeas proceedings do not need to resemble a criminal trial, but that habeas must still be an effective means to ensure the detainee retains his or her rights).

29. *See* Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007) (noting this presumption is to apply unless there is clear evidence why it should not (citing United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926))).

the public official conducted their affairs properly and accurately.[30] This presumption applies to both government-produced documents and official acts,[31] and it is not meant to afford the document an assumption of accuracy—that is, the court may find that the facts contained therein are inaccurate even if the presumption of regularity applies.[32] Courts generally confer the presumption of regularity to documents such as official tax receipts, court documents, mail delivery methods, and agency actions.[33] The presumption also relies on common sense: the court can readily trust these types of documents because they are made or maintained in sufficiently reliable and familiar practices.[34] In detainee cases, however, courts traditionally apply a presumption of authenticity to intelligence reports.[35] A presumption of authenticity affords the document less credit than a presumption of regularity, finding only that the document was what it claimed to be, but disregarding the factual content therein.[36] Recently, in *Latif v. Obama*, the D.C. Circuit Court ruled that the Government's intelligence reports should be afforded a presumption of regularity, rather than a presumption of authenticity.[37]

C. Latif v. Obama

At the District Court, the Government relied primarily on the Report, a heavily redacted intelligence report that was prepared as the result of an

30. *See id.* (noting that once the defendant has shown clear evidence why this presumption should not be afforded, the burden shifts to the government to prove the document deserves the presumption).

31. *See* Latif v. Obama, 677 F.3d 1175, 1182 (D.C. Cir. 2011) (allowing a presumption of regularity to apply to a foreign tax receipt (citing Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002))), *cert. denied*, 132 S. Ct. 2741 (2012).

32. *See id.* at 1180 (noting that the lower courts seemed to be confused on this point).

33. *See id.* at 1207 (Tatel, J., dissenting) (stating that these are familiar, accessible actions and documents that do not require much scrutiny (citing *Riggs Nat'l Corp.*, 295 F.3d at 21; Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir. 1985); Legille v. Dann, 544 F.2d 1, 7 (D.C. Cir. 1976); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971))).

34. *See id.* (noting that these documents are produced in the ordinary course of business).

35. *See id.* at 1213 (stating these cases refused to afford the presumption of regularity in favor of a presumption of authenticity, over the government's objection (citing Ahmed v. Obama, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C July 29, 2009))).

36. *See id.* (stating that the District Court has been applying this standard without direction from the Circuit Court (citing *Ahmed*, 613 F. Supp. 2d at 54-55; *Al Mutairi*, 644 F. Supp. 2d at 78)).

37. *See id.* at 1187 (majority opinion) (finding that the uncertainty around which the Report was made did not mean that it should not be afforded a presumption of regularity based on, among other reasons, comity with the other branches of government).

interview with Latif.[38] The facts in the Report are largely disputed on either side.[39] According to the Report, Latif was recruited by the Taliban and traveled to Afghanistan "via Sana'a, Yemen; Karachi, Pakistan; and Quetta, Pakistan," meeting Ibrahim Al-Alawi in Kandahar, Afghanistan.[40] Al-Alawi then took Latif to the Taliban, who trained him to use weapons and "stationed him on the front line against the Northern Alliance."[41] Latif then fled back to Pakistan with other "fleeing Arabs" and was subsequently captured near the Afghan border of Pakistan in 2001, before being transferred to Guantanamo Bay in 2002.[42] The District Court applied a presumption of authenticity to the Report, but declined to afford it a presumption of regularity[43] because of the significant questions about the reliability of the Report.[44]

Latif insisted that he only traveled to Afghanistan to seek medical treatment.[45] He also stated that the Government's version of events was based on a Report that contained statements that were so inaccurate, they must have been misattributed to him, or his statements must have been misunderstood.[46] Latif maintained that he had never been part of the Taliban.[47] As Latif presented "a plausible alternative story," the District Court found that the Government had not proved that his detention was lawful by a preponderance of the evidence, and subsequently ordered the Government to release him from Guantanamo.[48]

The Government appealed the District Court's ruling to the Circuit Court, arguing that the District Court erroneously applied a presumption of

38. *See* Abdah v. Obama, No. 04-1254, 2010 WL 3270761, at *6 (D.D.C. Aug. 16, 2010) (noting that the Report is not corroborated by other evidence), *vacated and remanded sub nom.* Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

39. *See* Latif v. Obama, 677 F.3d 1175, 1178 (noting that if both sides agreed on the facts in the intelligence report, Latif's detention would be indisputably lawful).

40. *See id.* at 1177, 1194-95 (noting later that this route was a strange way to get from Pakistan to Afghanistan).

41. *See id.* at 1177 (stating that Latif "saw a lot of people killed during the bombings, but never fired a shot [sic]").

42. *See id.* (noting that the government relied upon a heavily redacted report for its version of Latif's movements to and from Afghanistan).

43. *See Abdah*, 2010 WL 3270761, at *9 (stating that the Report was not sufficiently reliable to warrant a presumption of regularity).

44. *See id.* at *8 (noting that, considering the contents, the court could not take the Report lightly).

45. *See Latif*, 677 F.3d at 1177 (characterizing this story as a "quest" for medical treatment for head injuries he sustained in a 1994 car accident).

46. *See id.* (excluding some redacted information).

47. *See id.* (characterizing this as an "innocent explanation").

48. *See id.* (finding that other potentially inconsistent comments by Latif were unconvincing and did not rise to the level of proof required in this case).

authenticity to the Report.[49] The Circuit Court found that subjecting the Report to a presumption of authenticity also subjected it "to the he-said/she-said balancing of ordinary evidence."[50] Conversely, Latif argued that the conditions under which the Report was made were not sufficiently reliable to afford it a presumption of regularity.[51] The court, however, disagreed and found that the Report contained too many incriminating facts to be the result of simple translation error.[52] The court next considered whether the "clerical errors" contained in the Report were sufficient to rebut the presumption of regularity in this case.[53] While the court acknowledged that the Report did contain some errors, it found that "the internal flaws Latif identifies in the Report and the other evidence he uses to attack its reliability fail to meet this burden."[54] The lengthy dissenting opinion found that the majority should have applied the clear error standard when reviewing the District Court's fact findings, and that the presumption of authenticity was correctly applied to the intelligence report.[55]

III. ANALYSIS

A. The D.C. Circuit Court Should Not Have Applied a Presumption of Regularity to the Government's Intelligence Reports Because These Reports Are Not Like Tax Records.

The D.C. Circuit Court erred when it applied a presumption of regularity to the Report in *Latif* because intelligence reports are not prepared under sufficiently reliable conditions.[56] The presumption of regularity has traditionally been applied to documents, such as tax records, that are "produced within a process that is generally reliable because it is, for

49. *See id.* at 1178 (declining to review the District Court's fact finding for clear error based on this claim).

50. *See id.* at 1179 (characterizing the District Court's presumption of authenticity as a rule that Latif proposed, as opposed to the general practice that the District Court had employed until then).

51. *But see id.* at 1186 (finding that the Report was sufficiently reliable despite "clerical errors").

52. *See id.* at 1188 (refraining from assuming that the Report was made in bad faith absent a showing of such facts).

53. *See id.* at 1187 (stating that the clerical errors were inconsequential in this case, when the Report was considered as a whole).

54. *See id.* at 1186-89 (involving a detailed analysis of the facts alleged in the case).

55. *See id.* at 1215 (Tatel, J., dissenting) (accusing the majority of "moving the goal posts" by putting the burden of proof on the defense to show that the Report is not reliable enough for the presumption of regularity).

56. *See id.* at 1208 (noting that the Report "was produced in the fog of war by a clandestine method that we know almost nothing about").

example, transparent, accessible, and often familiar."[57] The Supreme Court itself has applied this presumption to tax records, even when produced by foreign governments, "because we have no reason to question or be concerned with the reliability of such records."[58] As such, documents that qualify for this type of presumption are not usually questioned regarding their accuracy.[59]

In Latif's case, the Report's reliability is at the heart of the matter.[60] The Report was produced largely in secret for national security purposes.[61] As such, these procedures cannot be "familiar, transparent, generally understood as reliable, or accessible . . . ."[62] Further, this Report is not a mundane record, but one that was made by a translator and a transcriber, prepared in stressful conditions, and subsequently redacted to ensure no information that could be harmful to national security would be released.[63] The only instance the majority cites for its contention that it may apply a presumption of regularity to "processes that are anything but 'transparent,' 'accessible,' and 'familiar'" is a case where the Supreme Court applied the presumption of regularity to foreign tax records.[64] As the Supreme Court itself cited the reliability of such documents as the rationale for deciding to apply the presumption of regularity to foreign tax documents, the Circuit Court should have also considered the Report's reliability before affording it a presumption of regularity.[65]

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57. *See id.* at 1207 (finding that "every case applying the presumption of regularity" has adhered to this description).

58. *See id.* at 1208 (noting this was the only case that the majority cited to support their reasoning for applying a presumption of regularity to the Report (citing Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 20 (D.C. Cir. 2002) (citing Supreme Court cases))).

59. *See id.* at 1207 (absent evidence of error, courts do not need to question these types of documents because of their transparency, accessibility, and familiarity).

60. *See id.* at 1179 (majority opinion), 1208 (Tatel, J., dissenting) (questioning the reliability of the Report by stating that it was "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes").

61. *See id.* at 1208 (Tatel, J., dissenting) (implying this alone could be enough to question its reliability for the purposes of applying a presumption of regularity).

62. *See id.* (contrasting the Report with more traditional documents, such as tax records, with which the court can be sufficiently familiar such that the government does not have to prove their reliability).

63. *See id.* ("Needless to say, this is quite different from assuming the mail is delivered or that a court employee has accurately jotted down minutes from a meeting.").

64. *See id.* (claiming that the court had no reason to question whether these records were reliable (citing Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16 (D.C. Cir. 2002))).

65. *See id.* (noting that the Report is not familiar, transparent, reliable, or accessible).

1. The Intelligence Reports Are Not Sufficiently Reliable to Qualify for a Presumption of Regularity.

Because the Government has not shown that the procedures for creating these intelligence reports are sufficiently regular, familiar, or transparent, the Circuit Court should have applied a presumption of authenticity, not regularity.[66] A presumption of authenticity does not require the same level of reliability that a presumption of regularity does.[67] In the context of intelligence reports, a presumption of regularity includes a presumption that the information in the report is recorded accurately, whether or not the information itself is factually true.[68] In cases like *Latif*, this creates a burden on the detainee to produce more evidence to rebut a document that does not have the traditional indicia of reliability that other presumptively regular documents have.[69] The District Court has repeatedly applied a presumption of authenticity, rather than regularity, because of this lack of reliability associated with intelligence reports.[70]

The process of preparing intelligence reports such as the Report is not sufficiently regular to qualify for a presumption of regularity.[71] These reports are based on multiple levels of hearsay, which makes them inherently unreliable.[72] They are based on interrogations which may involve a detainee, an interrogator, a translator, and a transcriber; sometimes several translators, interrogators, or transcribers are involved.[73] The detainee may make a statement in response to an interrogator's question that is then relayed through a translator.[74] The statement is then

66. *See id.* at 1209-10 (stating that he would have allowed these decisions to be made on a case by case basis, rather than applying a blanket rule).

67. *See id.* at 1213 (noting that the Government requested an even more stringent presumption of accuracy (citing Ahmed v. Obama, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. 2009))).

68. *See id.* at 1213 (stating the majority has not cited any cases where the District Court expresses confusion about the difference between a presumption of truth or accuracy).

69. *See id.* at 1215 (stating that this shift has "called the game in the government's favor" by not only requiring Latif to rebut the presumption of regularity, but also finding that the facts on the record did not rebut the presumption).

70. *See generally id.* at 1212 (stating that this standard gives the Report some weight, but less than what the Government and the circuit court prefer (citing Alsabri v. Obama, 764 F. Supp. 2d 60 (D.D.C. 2011); Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. 2009); *Ahmed*, 613 F. Supp. 2d 51)).

71. *See generally id.* at 1209; *Al Mutairi*, 644 F. Supp. 2d at 84 (considering issues regarding translation and transcription accuracy).

72. *See Al Mutairi*, 644 F. Supp. 2d at 84 (stating that multiple levels of hearsay was one reason not to afford the government's evidence a presumption of accuracy or authenticity).

73. *See Latif*, 677 F.3d at 1214 (Tatel, J., dissenting) (noting this process can cause errors in the transcript or report (citing Odah v. Obama, No. 06-cv-1668, slip op. at 3 (D.D.C. May 6, 2010))).

74. *See id.* (noting that these inaccuracies can be "impossible to detect" (quoting

relayed back through the translator to the transcriber and the interrogator.[75] This process can be incredibly stressful and prolonged.[76] In one case, "the Government believed for over three years that [a detainee] manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report."[77]

This type of error is not uncommon; in Latif's case, numerous reports about him contained discrepancies.[78] Additionally, a language expert examined the transcript of Latif's hearing in front of the Combatant Status Review Tribunal and concluded after reviewing a tape of the proceedings that it contains statements attributed to Latif that he never uttered.[79] When a translator "in the context of a quasi-judicial [proceeding]" can make such significant errors, a translator acting in a highly stressful interrogation environment cannot be considered regular enough to qualify for a presumption of regularity.[80]

These procedures are also not familiar or transparent enough to apply the presumption of regularity because the secrecy surrounding the circumstances of these reports makes it impossible for the court to adequately analyze the Report's reliability.[81] In the context of intelligence reports, these two factors go hand in hand: information about how the information in the reports is obtained and how the reports themselves are made is often highly redacted to protect national security.[82] This process is

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Odah, No. 06-cv-1668, slip op. at 3)).

75. *See id.* (recognizing yet another opportunity for an error in the Report to occur (citing *Odah*, No. 06-cv-1668, slip op. at 3)).

76. *See id.* at 1214 (quoting *Odah*, No. 06-cv-1668, slip op. at 3, that "the interpreter must understand the question posed and correctly translate it; the interviewee must understand the interpreter's recitation of the question; the interpreter must understand the interviewee's response and correctly interpret it; the interrogator must understand the interpreter's translation of the response; the interrogator must take accurate notes of what is said; and the interrogator must accurately summarize those notes when writing the interrogation summary at a later time").

77. *Al Mutairi*, 644 F. Supp. 2d at 84 (explaining that the person who was actually suspected of manning the aircraft had a similar identification number as Al Mutairi and that number was incorrectly cited as Al Mutairi's).

78. *See* Petition for a Writ of Certiorari, *supra* note 2, at *17 (stating that one report listed Latif as Yemeni, while another stated he was Bangladeshi but a member of a Yemeni tribe, and one report stated that he eventually graduated high school while another reported that he never graduated).

79. *See id.* at *18 (noting the expert reviewed the transcript in English).

80. *See id.* (stating these types of reports are not at all similar to documents like tax receipts, which usually are afforded a presumption of reliability).

81. *See generally Latif*, 677 F.3d at 1216 (Tatel, J., dissenting); Petition for a Writ of Certiorari, *supra* note 2, at *19 (arguing this is "significantly at odds" with the Court's ruling in *Boumediene*).

82. *See Latif*, 677 F.3d at 1216 (Tatel, J., dissenting) ("The Report's heavy redactions—portions of only [redactions] out of [redactions] pages are unredacted—make evaluating its reliability more difficult.").

"highly secretive," which makes it unfamiliar,[83] so the court has no meaningful way to decide whether the process of making these reports is generally reliable.[84] Without a meaningful way of evaluating how these reports are created, the reports cannot be familiar or transparent enough to warrant a presumption of regularity in their favor.[85]

2. The Circuit Court Should Have Afforded Intelligence Reports a Presumption of Authenticity.

While the Report is not sufficiently reliable to qualify for a presumption of regularity, the Report is reliable enough for a presumption of authenticity because neither side has challenged that the Report is the intelligence report prepared in Latif's case.[86] The District Court has regularly applied a presumption of authenticity for intelligence reports because they are sworn declarations by government officials.[87] A presumption of authenticity allows the court to accept a particular document into evidence without the same rigorous requirements that other documents might need, such as calling a witness to the stand to verify what the document is.[88] This assists the fact finder in a way that a presumption of regularity does not; a presumption of regularity effectively requires the fact finder to accept the report, and the facts therein, as true.[89] On the other hand, a presumption of authenticity allows the fact finder to avoid delay in the process by accepting the document as authentic, but still make findings as to the document's reliability and accuracy.[90] In this case, the District Court correctly afforded the Report a presumption of authenticity, and the

83. *See id.* at 1209 (stating this point is less expansive than the majority seems to think).

84. *See id.* (allowing the District Court to make reliability judgments on a case by case basis is more consistent than creating a presumption in either party's favor).

85. *See id.* (stating that whether the Report is accurate has an effect on whether the information contained within the Report is accurate).

86. *See id.*; Alsabri v. Obama, 764 F. Supp. 2d 60, 66-67 (D.D.C. 2011); Ahmed v. Obama, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 10 (D.D.C. 2009) (finding that a presumption of authenticity was appropriate to give the fact finder latitude to give an intelligence report weight depending on factual determinations).

87. *See Latif*, 677 F.3d at 1210 (Tatel, J., dissenting); *Alsabri*, 764 F. Supp. 2d at 66-67; *Ahmed*, 613 F. Supp. 2d at 54-55; *Hatim*, 677 F. Supp. 2d at 10 (stating that the sworn declaration does give the reports more reliability than other, unsworn documents).

88. *See Ahmed*, 613 F. Supp. 2d at 55 (stating that the "exigencies of the circumstances" will allow hearsay testimony into the record (citing Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004))).

89. *See id.* (stating that there is no reason to presume the facts contained in a report are accurate, especially when many of those facts are contested).

90. *See id.* (stating that the Government does not even necessarily have to offer foundation for each exhibit's admissibility).

Circuit Court should not have demanded a presumption of regularity for intelligence reports because a sworn statement authenticating the document is only sufficient for a presumption of authenticity.[91]

B. The Circuit Court's Insistence on Labeling the District Court's Failure to Apply a Presumption of Regularity as a Legal Error Is a Pretext for Conducting New Fact Findings to Avoid Applying the Clear Error Test.

The Circuit Court had no cause to conduct fact finding at the appellate level; the District Court did not commit clear error when it credited more weight to Latif's version of the events than to the events contained in the Report because it considered all the facts in this case and made a reasonable decision to credit Latif's version of events over the Government's.[92] Because the trial court has the opportunity to view live testimony and witnesses, appellate courts must give deference to the fact findings of the trial court and review these findings for clear error.[93] As appellate courts review findings of law de novo, the court is not required to give any deference to the lower court's ruling.[94] Because of the District Court's reasonable decision to believe Latif in light of all the evidence, the Circuit Court in *Latif* should have reviewed the District Court's findings for clear error and upheld Latif's release.[95] Instead, the Circuit Court instituted a new standard of presumption in order to avoid applying the clear error test in favor of the more flexible de novo standard.[96] By reviewing the District Court's decision de novo, the Circuit Court also made improper findings of fact in its reasoning when it reviewed the facts to determine if Latif rebutted the presumption of regularity.[97]

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91. *See Latif*, 677 F.3d at 1210 (Tatel, J., dissenting) (finding it completely inadequate for the majority to rely "on the bare fact that government officials have incentives to maintain careful intelligence reports" as authority to grant a presumption of regularity).

92. *See id.* at 1215 (stating that the clearly erroneous standard is generally applied in detainee cases at the appellate level).

93. *See* Awad v. Obama, 608 F.3d 1, 6-7 (D.C. Cir. 2010) (stating that the standard is not different for live testimony or documentary evidence).

94. *See* Almerfedi v. Obama, 654 F.3d 1, 5 (D.C. Cir. 2011) ("The court's specific factual determinations are reviewed for clear error, whereas its ultimate determination—whether a detainee's conduct justifies detention—is a question of law reviewed *de novo*.").

95. *See Latif*, 677 F.3d at 1209 (Tatel, J., dissenting) (finding the Report unreliable, reliance on Latif's account reasonable, and all the evidence adequately addressed).

96. *See id.* at 1185-87 (majority opinion) (characterizing their analysis as whether Latif adequately rebuffed the Report).

97. *See id.* at 1189 (finding, for instance, that everything Latif said corroborated portions of the Report, bolstering the Report's credibility).

1. Applying the Clear Error Test in Latif Would Require the Circuit Court to Affirm Latif's Release.

The District Court did not commit any clear error in its fact finding, thereby requiring the Circuit Court to affirm Latif's release.[98] Fact findings at the district court level must be given "full deference under the clearly erroneous standard or they must be vacated."[99] In this case, the Circuit Court reviewed the presumption of authenticity de novo in order to then review the reliability of the Report.[100] By reviewing the reliability of the Report, the Circuit Court took the opportunity to make new findings of fact without first evaluating the District Court's findings for clear error.[101] The Circuit Court could not have found clear error in order to conduct new fact findings because the District Court was reasonable when it found that the Government's version of the events was not credible enough to hold Latif.[102]

2. Believing Latif's Explanation for His Presence in Afghanistan Was Not Clearly Erroneous.

The District Court was not clearly erroneous when it believed Latif's explanation that he was in Afghanistan for medical reasons more than the Government's explanation that he was in Afghanistan to join the Taliban because this was a reasonable interpretation of the evidence.[103] While weighing the evidence and possible inconsistencies, the District Court reasonably concluded that Latif's explanation was plausible.[104] This determination is a declaration of Latif's credibility—a factual determination that may be set aside by the reviewing court only if it is clearly erroneous.[105] Latif's story did not contain meaningful

98. *See id.* at 1224 (Tatel, J., dissenting) (finding Latif's story plausible and supported by the evidence in the record).

99. *See* United States v. Microsoft, 253 F.3d 34, 117 (D.C. Cir. 2001) (en banc) (confirming that there is no middle ground between clear error and de novo, even if the Circuit Court disagrees with the factual findings).

100. *See Latif*, 677 F.3d at 1185-86 (stating that Latif must show more convincing evidence, superseding that of the Government, in order to rebut the Report).

101. *See id.* at 1207 (Tatel, J., dissenting) (stating that "[a]ll agree that this case turns on whether the district court correctly found that the government's key piece of evidence . . . was unreliable" and that this is to be reviewed under a clear error test (citing Al Alwi v. Obama, 653 F.3d 11, 19 (D.C. Cir. 2011))).

102. *See id.* at 1216 (citing Awad v. Obama, 608 F.3d 1, 7 (D.C. Cir. 2010) (stating that when the lower court hears "two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous").

103. *See id.* at 1222 (finding that even if Latif's explanation was not complete, it was a reasonable explanation that the District Court did not clearly err in crediting).

104. *See id.* at 1222-24 (considering each of the majority's objections to the District Court's findings and stating that each fails to rise to clearly erroneous).

105. *See* Almerfedi v. Obama, 654 F.3d 1, 5 (D.C. Cir. 2011) (stating that the court

inconsistencies that would prevent the District Court from relying on his explanation; in fact, the inconsistencies the Government alleged were either inconsequential or not inconsistent.[106] Given its inaccuracies and inconsistencies, the Report was not sufficiently reliable.[107] This was a factual determination of the Report's credibility and the Circuit Court could only review it for clear error, which it could not find because this determination was reasonable.[108] The Report contained several inconsistencies that damaged its credibility in the eyes of the District Court.[109] Unlike the supposed inconsistencies in Latif's story, the problems with the Report were more substantial and resulted in discrediting the Report.[110] Each of these conclusions was supported by evidence in the record.[111] As such, the District Court was not clearly erroneous when it made factual determinations based on evidence in the record because its conclusions were reasonable, based on all of the facts.[112]

IV. POLICY

A. The Circuit Court Denied Latif Meaningful Review of His Detention by Affording a Presumption of Regularity and Issuing New Fact Findings.

Latif never received meaningful review of his detention in Guantanamo Bay because the Circuit Court erroneously gave the Report a presumption of regularity and made new fact findings outside of the clear error test.[113] If a detainee seeks review under habeas corpus, the detainee must have "meaningful review" of their detention in Article III courts to justify that

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must judge the persuasiveness of the evidence before deciding whether the detainee should be released).

106. *See Latif*, 677 F.3d at 1221 (Tatel, J., dissenting) (arguing that, after arduous translations, minor inconsistencies in the story were unsurprising); Abdah v. Obama, No. 04-1254, 2010 WL 3270761, at *9 (D.D.C. Aug. 16, 2010) (finding that the Government had not put forth sufficient evidence, and that Latif had plausibly explained why he was in Afghanistan), *vacated and remanded sub nom.* Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

107. *See Latif*, 677 F.3d at 1217 (Tatel, J., dissenting) (noting that the District Court looked at the effect of the evidence contained in the record cumulatively).

108. *See id.* (including issues like inconsistencies in the name of the supposed Taliban contact).

109. *See id.* at 1207 (stating the majority found these errors to be minor).

110. *See Abdah*, 2010 WL 3270761, at *10 (finding that the inconsistencies the Government points out could have been caused by translation errors).

111. *See Latif*, 677 F.3d at 1216 (Tatel, J., dissenting) (stating that there were factual errors in the Report); *Latif*, 2010 WL 3270761, at *10 (finding that medical professionals corroborated Latif's story).

112. *See Latif*, 677 F.3d at 1216 (Tatel, J., dissenting) (finding that the District Court reviewed all the evidence when issuing its decision).

113. *See id.* at 1206-07 (majority opinion) (stating this in part because the majority found that Latif did not rebut the Report's presumption of regularity).

detention.[114] While the Supreme Court has not since discussed what "meaningful review" means for detainees, this review must be in a court that has the power to release the detainees, and the court must consider the evidence establishing why the detainee is held, and whether the Executive has the power to hold the detainee.[115]

In this case, the Circuit Court has failed to meet the standard of "meaningful" review because the Circuit Court gave the Report a presumption of regularity and then made factual findings without applying a clear error test.[116] Because the presumption of regularity essentially mandated that the District Court accept the facts contained in the Report as accurately recorded, these issues denied Latif meaningful review of his detention giving the Government's case more weight than the District Court felt it deserved.[117] Latif was also denied meaningful review in that the Circuit Court ignored appellate practices and conducted fact finding at the appellate level without applying a clear error test.[118]

1. Affording Intelligence Reports a Presumption of Regularity Improperly Shifts the Burden of Proof from the Government to the Detainee.

The Circuit Court has shifted the burden of proof from the Government to Latif by finding that the Report should be afforded a presumption of regularity that the detainee must then rebut.[119] While the majority states the lower courts do not have to accept that the facts contained in the Report are accurate, the District Court does have to accept that the statements were accurately recorded.[120] That is, the courts in future detainee cases will have to find that "in doing the interview, [the translator] correctly heard, translated, recorded, and summarized the content embodied in the report."[121] However, in cases like Latif's, where the defense that a detainee wishes to present in habeas proceedings is different than the information

114. *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008) (characterizing this right as "uncontroversial").

115. *See id.* at 783 (finding that this is especially important when the person is held by executive order rather than pursuant to a conviction in court).

116. *See Latif,* 677 F.3d at 1206-07 (Tatel, J., dissenting) (charging the majority opinion with making significant fact findings contrary to the District Court).

117. *See id.* at 1226 ("If we take seriously the notion that district courts are better at finding facts and determining credibility, then we should be all the more eager to defer to their expertise when the stakes are high and when the case . . . rests entirely on credibility and how one interprets the facts.").

118. *See id.* at 1207 ("Finding of facts, whether based on oral or other evidence, must not be set aside unless clearly erroneous." (citing Fed. R. Civ. P. 52(a)(6))).

119. *See id.* at 1206 (characterizing this as moving the goal posts on the defendant).

120. *See id.* at 1210 (finding that the circumstances under which the Report was created cast doubt on its reliability).

121. *See id.* at 1213 (arguing that this is especially pertinent when the central issue in Latif's case was precisely whether the Report reflected what he said).

contained in the intelligence report, the court will consequently have to find that he is unreliable.[122] As the court will have to find that he did in fact say the statements contained in the intelligence report if that report is afforded a presumption of regularity, any defense that is contrary to that report will be considered an inconsistent statement.[123] Meaningful review cannot require a detainee to either rebut a presumption of regularity or call himself a liar if he wishes to contradict the information contained in these intelligence reports as part of his defense.[124]

However, the Circuit Court reduces this possibility by failing to clearly articulate what standard the detainee would have to overcome.[125] The Court never states the standard by which the presumption of regularity can be rebutted, whether by clear and convincing evidence, or merely a preponderance of the evidence.[126] Had the District Court erred on the side of caution and required the detainee to present clear and convincing evidence to rebut the presumption, the Circuit Court could have reviewed the District Court's finding de novo as it did in this case.[127] Reviewing this de novo would allow the Circuit Court to supplant its views over the findings of the District Court.[128]

2. The Circuit Court Conducted New Fact Findings to Reiterate the Government's Case and Prevent the District Court from Releasing Latif.

The Circuit Court made new fact findings in order to reinforce the Government's case to keep Latif detained at Guantanamo Bay.[129] Even if the Circuit Court correctly concluded that the Report warranted a presumption of regularity, the Circuit Court should have refrained from reviewing the District Court's fact findings and simply remanded the case

122. *But see id.* at 1180 (majority opinion) (arguing that a presumption of regularity does not require the court to find the facts contained in the Report are true).

123. *See id.* (stating this presumption assumes that the translator "accurately identified the source and accurately summarized his statement").

124. *See id.* at 1186 (finding that the flaws in the Report were not enough to rebut the presumption of regularity because the incriminating statements were "separate statements").

125. *See id.* at 1185 n.5 (stating that courts have required differing standards of proof to rebut a presumption of regularity).

126. *See id.* (declining to decide what standard of proof is necessary to rebut such a presumption since Latif could not meet either standard).

127. *See id.* at 1185 (declining to explicitly refer to the standard of review as de novo but treating the District Court's refusal to grant a presumption of regularity as a legal question rather than a factual one).

128. *See id.* at 1221 (Tatel, J., dissenting) (highlighting that the majority itself does not find that Latif's story is implausible).

129. *See id.* at 1207 (pointing out several areas where the majority made new fact findings aligned with the government's arguments).

back to the lower court for reconsideration.[130] Instead, the Circuit Court reviewed whether the evidence was sufficient to rebut the presumption of regularity, found that it was not sufficient, and remanded the case back to the District Court with a mandate that the District Court review the facts in this case once more.[131] By giving the District Court this reminder, the Circuit Court is essentially ordering the District Court to follow its fact findings.[132] As the Circuit Court has already reviewed the Report and found that Latif's evidence was insufficient to rebut the Report's presumption of regularity, the District Court will be unable to make any other finding than to deny Latif's habeas corpus claims.[133] Both sides agree that if the facts contained in the Report are accurate, Latif's detention is lawful.[134] By conducting its own fact finding to show the Report's presumption of regularity is not rebuttable under the current record, the Circuit Court has dictated how the District Court must rule on remand.[135] The Circuit Court has essentially buttressed the Government's case and made releasing Latif under these facts impossible.[136]

V. CONCLUSION

The Supreme Court had the opportunity to grant certiorari and consider the issues raised by this case.[137] Instead, the Supreme Court denied certiorari and allowed the Circuit Court opinion to stand, leaving questions about improper fact finding and the standards of evidence in detainee cases uncertain for the future.[138] The current state of detainee law is at a

130. *See id.* at 1215 (charging the majority with "engag[ing] in an essentially *de novo* review of the factual record, providing its own interpretations, its own narratives, even its own arguments").

131. *See id.* at 1199 (majority opinion) (characterizing Latif's account of the events as "self-serving").

132. *See id.* (reminding the District Court that "even details insufficiently probative by themselves may tip the balance of probability . . . and that in the absence of other clear evidence a detainee's self-serving account must be credible—not just plausible").

133. *Compare id.* at 1221 (Tatel, J., dissenting) (stating that the majority's decision to conclude that the presumption of regularity has not been rebutted leaves little reason to remand back to the lower court), *with id.* at 1199 (majority opinion) (finding that the District Court should have the "opportunity to apply the controlling precedent" when deciding the merits of this case).

134. *See id.* at 1178 (majority opinion) (noting that because of this, Latif's case depends entirely on the reliability of the Report).

135. *See id.* at 1206 (Henderson, J., dissenting) ("Latif could only dig himself deeper into a hole on remand.").

136. *But see id.* (stating that the only outcome the record supported was to allow Latif's continued detention).

137. *See* Petition for a Writ of Certiorari, *supra* note 2, at *12 (stating that the Supreme Court should resolve what "meaningful review" means in light of *Boumediene*).

138. *See Latif*, 677 F.3d at 1221 (Tatel, J., dissenting) (opining that, even with an answer to what the standard of evidence in this case is, the presumption "comes

standstill.[139] The Circuit Court refuses to allow the District Court to release any detainees.[140] The Supreme Court should have granted certiorari to resolve these questions and decide what the standard in *Boumediene* means in present detainee cases.[141]

perilously close to suggesting that whatever the government says must be treated as true" (quoting Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. 2008))).

139. *See, e.g.*, Lyle Denniston, *Ex-Judge: Boumediene Is Being "Gutted*," SCOTUSBLOG (Jul. 17, 2012, 3:54 PM), http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted/#.UAXXb86ZlhQ.twitter (quoting one panelist as saying the detainees are "'stuck in Guantanamo' under a legal regime that gives their captors every advantage").

140. *See id.* ("The Circuit Court 'has taken the capital 'M' off of the word 'meaningful' and has taken the 'full' off the word, and deprived it of meaning. To me, that means it's gutted.").

141. *See id.* (stating that the Supreme Court should be monitoring the Circuit Court, but seems unwilling to do so).