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Putting the Meaningful Back in Meaningful Review: Detainee Litigation in a Post Latif World

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PUTTING THE MEANINGFUL BACK IN MEANINGFUL REVIEW: DETAINEE LITIGATION IN A POST *LATIF* WORLD

*Tony Scardino**

> *"It is my life but who is going to leave me alone? Who is going to rescue me from what I am going through?"*
>
> -Adnan Farhan Abd Al Latif,
> writing to his attorney, David Remes[1]

> *"The critical question here is why the Supreme Court continues to deny cert. And of course the answer is, Guantanamo detainees have no constituency. Nobody except Covington and other great lawyers are up there fighting for them. But it begs the question that is really at the bottom of this whole gathering today: [w]hat is the fate of these people?"*
>
> -Retired Federal Judge James Robertson[2]

I. INTRODUCTION

The United States faces considerable pressure, both domestically and internationally, to reevaluate its administration of detainees captured in the "Global War On Terrorism." The events of September 11, 2001 forced nations to question basic assumptions of wartime operations—particularly procedures regarding detainees originating from areas outside of declared battlefields.[3] As of Adnan Al Latif's death on September 10, 2012, there

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1. Andy Worthington, *A Cry for Help from Guantánamo. Adnan Latif Asks, "Who Is Going to Rescue Me From the Injustice and the Torture I Am Enduring?"* (Oct. 2, 2011), http://www.andyworthington.co.uk/2011/02/10/a-cry-for-help-from-guantanamo-adnan-latif-asks-who-is-going-to-rescue-me-from-the-injustice-and-the-torture-i-am-enduring/.

2. Panel Discussion on Boumediene's Legacy and the Fate of Guantanamo Detainees at Covington & Burling, LLP (July 17, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/07/Transcript-from-Panel-Discussion_Boumediene.pdf. Judge Robertson retired from the District Court of the District of Columbia in 2010.

3. To be fair, there are serious international implications that the United States government must consider. No political party wishes to be responsible for releasing a detainee who then later carries out a terrorist attack. *See generally* Thomas Joscelyn, *Return to Jihad*, THE LONG WAR JOURNAL (Jan. 25, 2009), http://www.longwarjournal.org/archives/2009/01/return_to_jihad.php.

are currently 167 "enemy combatants" housed in Guantanamo Bay, Cuba.[4] Congress, the Executive Branch, and the Supreme Court have publicly squabbled over the rights of detainees in the United States judicial system, and no simple answer is readily available. Since the landmark case of *Boumediene v. Bush*,[5] detainees are guaranteed a "meaningful review" of their detention through federal habeas corpus petitions.[6]

Habeas petitions are essential judicial counterbalances to the largely unrestricted power of the Executive Branch to detain foreign citizens accused of terrorist acts. However, the right to a habeas hearing does not guarantee justice for detainees, and it certainly does not ensure federal courts will apply generally accepted rules of procedure. The battlefields of Iraq and Afghanistan are volatile areas. The flow of intelligence collection often results in detention of individuals under circumstances abhorrent to the sensibilities of legal scholars.[7] The question therein lies, if courts must apply a "meaningful review"[8] standard for habeas petitions, what will that actually mean in practice for detainee litigation?

In *Latif v. Obama*,[9] the D.C. Circuit Court of Appeals seems to answer this question by establishing peculiar evidentiary and procedural principles. The D.C. Circuit reversed the district court's order to release Adnan Al Latif and ruled the district court did not give proper deference to a classified Government intelligence report in its findings of fact.[10] The court concluded that the uncorroborated intelligence report must be given a "presumption of regularity" and that "in the absence of other clear evidence a detainee's self-serving account must be credible—not just plausible—to overcome presumptively reliable government evidence."[11]

To understand "meaningful review" and its rapidly developing body of federal common law, this Note will first explore the history of habeas petitions in detainee litigation and general trends of case resolution. Next, this Note will argue the D.C. Court of Appeals erred and essentially ignored the concept of "meaningful review" when it established a "presumption of regularity"[12] in the instant case. Further, the Note will argue the court of

4. Charlie Savage, *Military Identifies Guantanamo Detainee Who Died*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html.

5. Boumediene v. Bush, 553 U.S. 723 (2008).

6. *Id.* at 783.

7. There is a saying throughout the United States military that intelligence gathering is more of an "art" than a science. This is of course little comfort to detainees who are arrested by sources of questionable value and truthfulness.

8. *Boumediene*, 553 U.S. at 783.

9. Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2011).

10. *Id.* at 1176. Latif's intelligence file has not been declassified, and the court's opinion is redacted in several areas. Wikileaks released what is purported to be a Detainee Assessment file on Latif, and that file has been widely circulated in the mainstream media. Though this author believes that Latif's file should not remain classified, and likely should have never been classified in the first place, the fact remains that its use and dissemination violates federal law. The author will not be party to such violations, and will only cite unclassified information from the court's opinion or other scholarly sources.

11. *Id.* at 1199.

12. *Id.* at 1198.

appeals erred by evaluating the district court's findings of fact essentially *de novo* and without proper "clear error" deference.[13] Lastly, this Note will recommend a workable solution for evidentiary standards that not only considers the proper use of Government intelligence reports, but also recognizes the difficulties faced by United States prosecutors in detainee litigation.

II. Facts And Procedural History

In 2001, Pakistani forces detained Adnan Farhan Abd Al Latif, a Yemeni citizen, on the Pakistani side of the Pakistan-Afghanistan border.[14] Latif did not have a passport or other means of identification.[15] Latif was subsequently relocated to Guantanamo Bay, Cuba in January of 2002.[16] The United States Government maintained that "Ibrahim Al-Alawai" recruited Latif for the purposes of joining the Taliban and fighting the Northern Alliance.[17] The Government's sole piece of evidence introduced at trial was an Intelligence Report ("Report"), which had been deeply censored.[18] The Report stated that Ibrahim first spoke to Latif sometime in the year 2000.[19] Ibrahim encouraged Latif to join the fight against the Northern Alliance and convinced him to meet at the Grand Mosque in Kandahar, Afghanistan.[20] Latif left Yemen in August 2001 and visited Ibrahim for three days in Kandahar.[21] Ibrahim then brought Latif to a Taliban camp where he received introductory training before assignment to Abu Fazl, a Taliban commander in the Kabul area.[22] According to the Report, Latif did not engage in any direct combat while in Kabul, but did "[see] a lot of people killed during the bombings."[23] Latif left Kabul sometime during the fighting and went to Pakistan through the city of Jalalabad.[24] Latif was eventually captured by the Pakistani military and handed over to United States forces.[25]

Latif denied the United States' characterization of his travels.[26] Latif stated he first met Ibrahim at a "charitable organization" while in Yemen.[27] Latif further stated that in 1994 he was involved in a car wreck that left him with severe head injuries.[28] Because of his injuries, he traveled to Pakistan

13. *Id.* at 1216.
14. *Id.* at 1177.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

to find Ibrahim.[29] Upon arriving in Pakistan, Latif discovered that Ibrahim was in Kabul.[30] He then went to Kabul and found Ibrahim at an Islamic school.[31] Shortly thereafter, Ibrahim left and told Latif to stay in Kabul until Ibrahim could return.[32] Latif waited in Kabul for a few weeks before fleeing the approaching American forces.[33] Latif did not contend that he was forced to speak to Government interrogators or that he did not make statements to any officials.[34] Latif instead claimed that he was either "misunderstood" or "misattributed" and that the Report "bears no relation to what he actually said."[35]

Latif challenged his detention through a habeas petition to the District Court of the District of Columbia.[36] At trial, the Government could not, or would not, produce the original notes upon which the Report was based.[37] The district court, in granting Latif's petition, ruled that the court "could not 'credit [the Report] because there is serious question as to whether [the Report] accurately reflects Latif's words, the incriminating facts [in the Report] are not corroborated, and Latif has presented a plausible alternative story to explain his travel.' "[38]

Judge Janice Rogers Brown, writing for the panel of the Circuit Court of the District of Columbia, reversed and remanded the district court's order.[39] Judge Brown required the district court to reevaluate Latif's petition "in light of the totality of the evidence, including newly available evidence as appropriate."[40] Judge Karen Henderson wrote a concurrence agreeing with Judge Brown's findings, but would have instead simply rendered continued detention without further proceedings.[41] Judge David Tatel wrote a dissenting opinion in support of the district court's grant of release.[42] Judge Tatel would have upheld the district court's finding that the Report was inherently unreliable, and further applied a "highly deferential clear error review."[43] Latif then appealed to the United States Supreme Court, which denied a Writ of Certiorari on April 27, 2012.[44] Latif died while still in United States custody on September 10, 2012.[45]

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29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 1178.
37. *Id.* at 1177.
38. *Id.* at 1178. At the time of the circuit court's review the Government claimed to be able to produce the notes, but did not do so before the ruling. *Id.* at 1177.
39. *Id.* at 1176.
40. *Id.*
41. *Id.* at 1200 (Henderson, J., concurring).
42. *Id.* at 1206 (Tatel, J., dissenting).
43. *Id.*
44. Latif v. Obama, 132 S. Ct. 2741, 2741 (2012).
45. Savage, *supra* note 4.

III. Background and History of the Law

A. Habeas Corpus Rights of Detainees

"Enemy combatant" habeas corpus petitions were first granted to American citizens detained on United States soil in the 2004 case of *Hamdi v. Rumsfeld*.[46] Justice O'Connor, writing for a plurality of the Court, ruled that if the Executive chooses to detain citizens of the United States, the "enemy combatant [must] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[47] For the purposes of the Court's review, the Government defined "enemy combatant status" as an "individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners'" and who "'engaged in armed conflict with the United States.'"[48]

The Northern Alliance captured Yaser Esam Hamdi, a naturalized American citizen, and subsequently transferred him to United States custody.[49] Hamdi, through his father as a next friend petitioner, argued his detention without trial violated his fifth and fourteenth amendment rights under the United States Constitution.[50] The Fourth Circuit Court of Appeals reversed a district court order appointing counsel for Hamdi, and Hamdi subsequently filed for writ of habeas corpus to the United States Supreme Court.[51] During remand at the district court, the Government produced a signed affidavit by a Defense Department official that outlined the Government's allegations and acted as the "sole evidentiary support" for Hamdi's continued detention.[52]

In review of Hamdi's petition, Justice O'Connor first examined the legality of detaining citizens as "enemy combatants," ruling that "Congress has in fact authorized Hamdi's detention, through the [Authorization for Use of Military Force].[53] However, detention is limited to "the duration of the particular conflict in which [detainees] were captured."[54] Further, "absent suspension, the writ of habeas corpus remains available to every individual detained within the United States."[55]

Balancing the detainees' liberty against the Government's interest in protecting its citizens requires careful consideration, but the detainee is inherently afforded a "fair opportunity to rebut the Government's factual

46. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
47. *Id.*
48. *Id.* at 516.
49. *Id.* at 510.
50. *Id.* at 511.
51. *Id.* at 516.
52. *Id.* at 512.
53. *Id.* at 517. Congress "passed [this resolution] authorizing the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.' *Id.* at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001)).
54. *Id.* at 518.
55. *Id.* at 525.

assertions before a neutral decisionmaker."[56] This fair opportunity does not necessarily negate the use of hearsay or even a "presumption in favor of the Government's evidence" if the evidence is "credible evidence that the habeas petitioner meets the enemy-combatant criteria."[57] Justice O'Connor wrote "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[58] As to the weight of evidence in habeas petition review, Justice O'Connor ruled that the Government's "proposed 'some evidence' standard is inadequate."[59] Evidence such as affidavits may be introduced "so long as [the court] also permits the alleged combatant to present his own factual case to rebut the Government's return."[60]

The Supreme Court reaffirmed the right of habeas relief to non-citizens in the 2008 case of *Boumediene v. Bush*.[61] The opinion, written by Justice Kennedy, ruled that the Detainee Treatment Act of 2005 (DTA)[62] was an insufficient safeguard for providing appropriate review of detainee's "enemy combatant" status.[63] Congress attempted to deny habeas rights under the DTA by providing that "'no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.'"[64] Congress passed the DTA in direct response to the Supreme Court's ruling in *Rasul v. Bush*,[65] which granted detainees habeas review in civilian courts.[66] Justice Kennedy first explored the history of the writ, noting "[t]he Framers foresaw that the United States would expand and acquire new territories," and that the "Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[67] Further, it would be illogical "[t]o hold the political branches have the power to switch the Constitution on or off."[68] Though Justice Kennedy conceded that some types of "procedural safeguards" could be instituted to "eliminate the need for habeas corpus review," the DTA provisions "fell short."[69] The Combat Status Review Tribunals

56. *Id.* at 533.

57. *Id.* at 534.

58. *Id.* at 535.

59. *Id.* at 537.

60. *Id.* at 538.

61. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

62. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

63. *Boumediene*, 553 U.S. at 733.

64. *Id.* at 735 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001)).

65. Rasul v. Bush, 542 U.S. 466, 473 (2004).

66. *Boumediene*, 553 U.S. at 734.

67. *Id.* at 755, 765.

68. *Id.* at 765.

69. *Id.* at 767.

(CSRT's) did not provide actual counsel to detainees, only "Personal Representatives" who were not even considered "advocates."[70] The limited review provided by the DTA in the D.C. Circuit Court of Appeals allowed the court "only to assess whether the CSRT complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful."[71] But "[e]ven if [the court] were to assume that the CSRTs satisfy due process standards" Justice Kennedy wrote, "there is considerable risk of error in the tribunal's findings of fact."[72] As such, "the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings."[73] Lastly, Justice Kennedy concluded that the District Court of the District of Columbia is capable of balancing the needs of protecting national security and the liberty of detainees, and that the court "will use its discretion to accommodate this interest to the greatest extent possible."[74]

B. "Presumption of Regularity"

Hamdi, *Boumediene*, and *Rasul* collectively establish the right to habeas proceedings for enemy combatant detainees; however, these cases fail to establish concrete procedure for district courts to follow.[75] Wartime operations create unique challenges for collecting and producing evidence at trial, particularly in the case of Government intelligence reports. Justice O'Connor suggested in *Hamdi* that a "presumption" in favor of the government's evidence might be appropriate if the evidence is "credible."[76] Historically, the United States Supreme Court has presumed Government "good faith" and "regularity" of Government actions: "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties."[77]

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70. *Id.*

71. *Id.* at 729 (quoting Detainee Treatment Act § 1005(e)(2)(C), 28 U.S.C.A § 2241 (2005)).

72. *Id.* at 785.

73. *Id.* at 786.

74. *Id.* at 796.

75. The true failure of *Boumediene*, as will be argued throughout this Note, is the lack of specified structural controls to ensure fair habeas proceedings. The district courts are certainly capable of sitting as expert factfinders. In most instances they can be trusted to create judicially sound and fundamentally fair common law. But in detainee litigation the stakes are so high that firm and structured leadership of the Supreme Court becomes essential. Evidentiary standards are not mundane details—they are essentially the most important question courts must answer. The reliability of Government intelligence reports, often translated or interpreted by non United States citizens or based on purely hearsay evidence, strikes at the heart of whether the United States detained a true terrorist or an innocent bystander. American jurisprudence typically errs on the side of caution, allowing criminals to walk free for protection of those that might be innocent. Detainee litigation, for better or worse, operates to the inverse of that philosophy.

76. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004).

77. United States v. Chem. Found. Inc., 272 U.S. 1, 14-15 (1926).

In the case of *Sussman v. United States Marshall Service*,[78] the Court of Appeals for the District of Columbia addressed the actions of public officials and the "presumption" that they act in good-faith.[79] The court, in determining the sufficiency of disclosures by the United States Marshall Service to freedom of information act requests, ruled that "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material."[80] However, "[t]he quantum of evidence required to overcome that presumption is not clear."[81] In the instant case, Judge Brown uses this "presumption" of Government "good faith" to credit intelligence reports with a "presumption of regularity."[82]

C. Clear Error Review in Federal Courts

As evidentiary standards and findings of facts are key components in detainee litigation, evaluation of those findings on appeal becomes even more significant. The limited role of appellate review is an accepted principle demonstrated throughout American jurisprudence, and this concept should apply to habeas proceedings no less then any other civil or criminal claim. The Supreme Court plainly ruled that findings of fact should "be overturned [on appeal] only if they are . . . 'clearly erroneous.'"[83] The "clearly erroneous" standard operates most forcefully in the context of witness credibility; the district court uniquely views such testimony firsthand.[84]

The Court addressed clear error review thoroughly in the case of *Anderson v. City of Bessemer City*,[85] a civil rights action in which the Fourth Circuit ruled that the Western District Court of North Carolina erred in its determination that the plaintiff suffered gender-based discrimination.[86] The district court adopted the plaintiff's findings of fact in its ruling, and the Fourth Circuit stated in reversal that this adoption was improper, and would therefore invalidate the standard deference of clear error review.[87] The Supreme Court held that though it discouraged such behavior, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."[88] The appellate court cannot "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[89] Further, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[90]

78. Sussman v. U.S. Marshals Serv., 494 F.3d 1106 (D.C. Cir. 2007).
79. *Id.* at 1117 (citing Boyd v. Crim. Div. U.S. D.O.J., 475 F.3d 381, 391 (D.C. Cir. 2007)).
80. *Id.*
81. *Id.*
82. Latif v. Obama, 677 F.3d 1175, 1179 (D.C. Cir. 2011).
83. Pullman-Standard v. Swint, 456 U.S. 273, 295 (1982) (Marshall, J., dissenting).
84. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499-501 (1984).
85. Anderson v. City of Bessemer City, 470 U.S. 564 (1985).
86. *Id.* at 566.
87. *Id.* at 571.
88. *Id.* at 572.
89. *Id.* at 573.
90. *Id.* at 574. (citing United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949)).

D. Application of Evidentiary Standards in Detainee Litigation

Review of the forgoing principles in detainee litigation reflects a strained effort by the court of appeals to create a "common law" of rules and procedure in habeas proceedings.[91] One of the first cases to reach the court post *Boumediene*, *Al-Bihani v. Obama*,[92] questioned not only the legality of Al-Bihani's detention, but also the use of hearsay evidence to meet the "preponderance of the evidence" burden imposed on the Government.[93] Al-Bihani admitted to membership with the 55th Arab Brigade, an affiliate of the Taliban fighting the Northern Alliance.[94] Judge Janice Brown, writing for the panel, first noted that "[h]abeas review for Guantanamo detainees need not match procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions."[95] The Supreme Court in *Boumediene* instead encouraged "'innovation' of habeas procedure by lower courts, granting leeway for '[c]ertain accommodations [to] be made to reduce the burden habeas corpus proceedings will place on the military.'"[96] Furthermore, "had the district court imposed stringent standards of evidence in the first instance, the government may well have been obligated to go beyond Al-Bihani's interrogation records and into the battlefield to present a case that met its burden."[97]

As for hearsay evidence, its use is condoned despite the requirements of the Confrontation Clause, because "the Confrontation Clause applies only in criminal prosecutions," while Al-Bihani's petition instead required review of his status as an enemy combatant.[98] Judge Brown concluded that "the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits."[99] Judge Brown observed that district courts are "experienced and sophisticated fact finders," and therefore it would be appropriate to let the presiding judge determine the proper weight of the hearsay in combination with all of the circumstances surrounding the detainees' petition.[100] In Al-Bihani's case, he "did not contest the truth of the majority of his admissions upon which the district court relied, enhancing the reliability of those reports."[101]

The circuit court further explored the appropriate reliance on hearsay evidence in the case of *Barhoumi v. Obama*,[102] decided shortly after *Al-Bihani*. Barhoumi, an Algerian born fighter, was captured in Afghanistan

91. Al-Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. 2010).
92. *Id* at 869.
93. *Id.* at 875-76.
94. *Id.* at 869.
95. *Id.* at 876.
96. *Id.* (quoting Boumediene v. Bush, 553 U.S. 723, 795 (2008)).
97. *Id.* at 877-78.
98. *Id.* at 879.
99. *Id.*
100. *Id.* at 880.
101. *Id.*
102. Barhoumi v. Obama, 609 F.3d 416, 416 (D.C. Cir. 2010).

and subsequently transferred to Guantanamo Bay.[103] The district court denied Barhoumi's habeas petition based not only on his own admissions, but also the writings of an associate who was determined to be a material supporter of enemy fighters.[104] Judge David Tatel, writing for the panel, first rejected Barhoumi's argument that the district court erred when it admitted hearsay evidence outside of the seven day time frame required under the district court's CMO (court management order).[105] Judge Tatel ruled that the court itself is not bound by the CMO, and that based on the difficulties faced by the Government in detainee litigation, the hearsay evidence was proper and necessary for appropriately determining the sufficiency of Barhoumi's petition.[106]

Further, Judge Tatel cited *Al-Bihani* in ruling that the district court was within its rights to admit hearsay evidence, but must determine what weight to accord the hearsay in ruling to grant or deny the habeas petition.[107] Lastly, Judge Tatel analyzed whether the district court erred in its determination that the hearsay was sufficiently reliable to deny Barhoumi's petition.[108] Judge Tatel found ample evidence to conclude that Barhoumi was part of the militia referenced in the hearsay writings because "the al-Suri diary—a veritable membership list—expressly states that Barhoumi (referred to by his alias Ubaydah al-Jaza'iri) was a 'Permanent' member of Zubaydah's militia and that he was providing explosives training to other members intending to fight U.S. forces in Afghanistan."[109] Judge Tatel extensively examined the hearsay documents themselves, concluding "the al-Suri diary contains sufficient indicia of reliability to justify the district court's reliance on it."[110]

Though the court made clear in *Al-Bihani* and *Barhoumi* that hearsay evidence would bolster the Government's ability to meet its evidentiary burden, the Government is still required to show that the detainee was actually affiliated with a terrorist organization to justify continued detention. Decided within days of *Barhoumi*, *Bensayah v. Obama*[111] exemplifies the appropriate judicial review standard for weighing Government evidence. Bensayah was captured in Bosnia and accused of planning to bomb the United States Embassy in Sarajevo.[112] Bosnia eventually turned Bensayah over to American officials after failing to produce adequate evidence to charge him for the alleged conspiracy.[113]

The district court, in review of Bensayah's petition, ruled that the Government "'met its burden by providing additional evidence that sufficiently

103. *Id.* at 418.
104. *Id.* at 420.
105. *Id.* at 420-21.
106. *Id.* at 421-22.
107. *Id.* at 422.
108. *Id.* at 423.
109. *Id.* at 426-27.
110. *Id.* at 428.
111. Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010).
112. *Id.* at 720.
113. *Id.*

corroborates its allegations from this unnamed source that Bensayah is an al-Qaida facilitator.'"[114] However, subsequent to the district court's ruling, the Government changed its position, arguing instead that Bensayah was actually a member of Al-Qaeda and that his alleged Al-Qaeda contact may not have been a senior facilitator within the organization.[115] Judge Douglas Ginsburg, writing for the three-judge panel, noted that the district court relied primarily on a redacted government intelligence report to determine that Bensayah was an Al-Qaeda facilitator.[116] The district court concluded that the report by itself was not reliable, but taken with the information linking Bensayah to the alleged senior Al-Qaeda facilitator, the information was corroborated and therefore met the preponderance of the evidence standard.[117] Nevertheless, because the Government abandoned its position concerning the alleged facilitator, the report must be read separately to prove that Bensayah was truly a member of Al-Qaeda.[118] Therefore, Judge Ginsburg reversed the district court's ruling and remanded the case back for further fact-finding.[119]

Conversely, the court of appeals will overturn district court rulings granting habeas relief when it finds sufficient evidence to determine actual membership in terrorist organizations. In the cases of *Al-Adahi v. Obama*[120] and *Almerfedi v. Obama*,[121] the circuit court found petitioners were, by a preponderance of the evidence, actual members of Al-Qaeda. Judge A. Raymond Randolph, writing for the three-judge panel in *Al-Adahi*, rejected the district court's contention that by itself, each piece of evidence advanced by the Government was insufficient for continued detention.[122] Taken as a whole, the weight of the evidence indicated "Al-Adahi was—at the very least—more likely than not a part of al-Qaida."[123] Similarly, Judge Silberman, writing for the three-judge panel in *Almerfedi*, ruled that the petitioner's implausible exculpatory statements, taken with the other evidence of membership, combined to prove affiliation by the preponderance standard.[124] Judge Silberman held on appeal, "[the district 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*."[125]

Intelligence reports are in many cases the sole evidence offered by the Government to prove membership in terrorist organizations. The court of appeals upheld their use in *Kahn v. Obama* if the evidence "'contain[s]

114. *Id.* at 721-22.
115. *Id.* at 722.
116. *Id.* at 725.
117. *Id* at 725-26.
118. *Id.* at 726.
119. *Id.*
120. Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).
121. Almerfedi v. Obama, 654 F.3d 1, 2 (D.C. Cir. 2011).
122. *Al-Adahi*, 613 F.3d at 1105.
123. *Id.* at 1106.
124. *Almerfedi*, 654 F.3d at 7.
125. *Id.* at 5 (citing Barhoumi v. Obama, 609 F.3d 416, 423 (D.C. Cir. 2010)).

sufficient indicia' of reliability, and . . . the government's declaration . . . accurately represents the information contained in the reports."[126] Kahn was accused of membership in Hezb I Islami Gulbuddin (HIG), a terrorist organization that materially supported Al-Qaeda in Afghanistan.[127] The district court requested, and received before ruling, unredacted versions of the intelligence reports and statements by Army intelligence officers who interrogated Kahn.[128] The district court ruled that the unredacted version of the reports and the statements by Army officials corroborated otherwise unreliable declarations by Government informants, and taken as a whole, met the preponderance of the evidence standard necessary for continued detention.[129] Judge Merrick Garland, writing for the panel, affirmed this ruling, citing the detail of the reports, the Army officials' corroboration of the informant hearsay, and Kahn's own statements of past affiliation in HIG.[130]

IV. INSTANT CASE

A. Judge Brown's Majority Opinion

Circuit Judge Janice Rogers Brown issued the majority opinion for the three Judge panel of the D.C. Circuit Court of Appeals.[131] Judge Brown outlined three errors assigned to the district court's ruling.[132] First, the Report must be given a "presumption of regularity."[133] Second, the district court should have weighed Latif's "credibility" against the Report's version of his travels in Afghanistan.[134] Finally, the district court should not have "atomized" the government's evidence during its findings of fact.[135]

1. Intelligence Reports and the "Presumptions of Regularity"

In review of the district court's fact-finding function, Judge Brown stated "specific factual determinations" are evaluated under a standard of clear error.[136] Therefore Judge Brown "assume[d], without deciding, that the district court was correct to hold the Government to the preponderance-of-the-evidence standard."[137]

However, Judge Brown ruled that the district court "expressly refused to accord a presumption of regularity to the Government's evidence" and

126. Kahn v. Obama, 655 F.3d 20, 31 (D.C. Cir. 2011) (quoting Kahn v. Obama, 741 F. Supp. 2d 1, 17 (D.D.C. 2010)).
127. *Id.* at 21.
128. *Id.* at 24-25.
129. *Id.* at 25.
130. *Id.* at 30.
131. Latif v. Obama, 677 F.3d 1175, 1176 (D.C. Cir. 2011). President George W. Bush appointed Judge Brown to the circuit court in 2005.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1178 (quoting Almerfedi v. Obama, 654 F.3d 1, 5 (D.C. Cir. 2011)).
137. *Id.* (citing *Almerfedi*, 654 F.3d at 5).

as such, would not be afforded deference in its conclusions.[138] Judge Brown compared government documents to "official acts of public officers," which, unless there is "clear evidence to the contrary," are presumed to "have properly discharged their official duties."[139] Judge Brown observed that because documents like the Report are created in essentially imperfect circumstances, the standard "he-said/she-said balancing of ordinary evidence" would be improper in detainee litigation.[140] Though the court had not previously ruled on evidentiary presumptions in detainee litigation, Judge Brown found parallel authority in *Hamdi v. Rumsfeld*:

> [T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.[141]

Further, Judge Brown noted that the Supreme Court allows lower courts to determine the specifics of "workable habeas remed[ies]."[142] As such, Judge Brown felt a presumption of regularity would create a practical method of addressing habeas petitions while maintaining a "modest judicial role."[143] Judge Brown wrote that in essence, documents like the Report contain "two distinct actors—the non-government source and the government official who summarizes (or transcribes) the source's statement."[144] It is to this second actor, the government official, that Judge Brown applied the "presumption of regularity."[145] Moreover, this presumption "does not compel a determination that the [document] establishes what it is offered to prove."[146]

Judge Brown took the Supreme Court's "implicit invitation to innovate" as sufficient authority to create a presumption of regularity for government intelligence reports.[147] Judge Brown ruled that "courts have no special expertise in evaluating the nature and reliability of the Executive branch's wartime records," and as such, "judicial modesty" is paramount.[148] "Familiar[ity]" with the intelligence cycle and collection methods were not necessary, and it is correct to assume proper decision-making

138. *Id.*
139. *Id.* (quoting Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007)).
140. *Id.* at 1179.
141. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004)).
142. *Id.*
143. *Id.*
144. *Id.* at 1180.
145. *Id.*
146. *Id.* at 1181.
147. *Id.* (citing Boumediene v. Bush, 553 U.S. 723, 795 (2008)).
148. *Id.* at 1182.

by Executive branch actors.[149] If the court required further examination of such methods, "the government may well have been obligated to go beyond . . . interrogation records and into the battlefield to present a case that met its burden."[150]

In review of recent cases in which the court did not apply a presumption of regularity, Judge Brown stated that the court either applied the presumption or the appeal did not address the issue.[151] According to Judge Brown, the instant case was the first in which the detainee "force[d] the issue" by questioning the accuracy of the Report and the Government "persists in its request for a presumption of regularity on appeal."[152] Judge Brown ruled that any alleged inaccuracies by Latif were not sufficient to rebut the presumption of regularity by the report, and that "[t]he quantum of incriminating detail in the Report could hardly be produced by good-faith mistake, and [the court] will not infer bad-faith fabrication absent any evidence to that effect."[153] Any "inconsistencies in the Report may suggest a document produced on the field by imperfect translators or transcribers, but they do not prove the Report's description of Latif's incriminating statements [are] fundamentally unreliable."[154]

2. Witness "Credibility" versus Witness "Plausibility"

Concerning Latif's credibility as a witness, Judge Brown wrote that Latif's case was decided a week after the court held in a separate habeas petition that "'[o]ne of the oddest things' about [the] case was that . . . the district court never made any findings about whether [the detainee] was generally a credible witness or whether his particular explanations for his actions were worthy of belief.'"[155] To overcome the presumption, the district court was "obligated to consider [Latif's] credibility" and "[o]nly a credible story could overcome the presumption of regularity to which the Report was entitled."[156] Judge Brown rejected Latif's argument that by failing to address his "credibility" directly, the district court essentially ruled that he rebutted any presumption created by the Report.[157] Further, the mere "plausibility" of Latif's version of events is not enough to "rebut the presumption of regularity," and "[i]t is when a detainee tells a plausible story that an evaluation of his credibility is most needed."[158] Lastly, Judge Brown ruled that there was not enough information in the district court's

149. *Id.*

150. *Id.* at 1183 (quoting Al-Bihani v. Obama, 590 F.3d at 877-78 (D.C. Cir. 2010)).

151. *Id.* at 1183-85 (citing Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011); Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010); Kahn v. Obama, 655 F.3d 20 (D.C. Cir. 2011)).

152. *Id.* at 1185.

153. *Id.* at 1188.

154. *Id.*

155. *Id.* at 1190 (quoting Al-Adahi v. Obama, 613 F.3d 1102, 1110 (D.C. Cir. 2010)).

156. *Id.* at 1190.

157. *Id.*

158. *Id.* at 1191-92.

decision to determine whether, even if a presumption of regularity was applied, that the court would have granted Latif's release.[159]

3. Evidentiary "Atomization"

As to the third assigned error, Judge Brown held that the district court failed to "view the evidence collectively rather in isolation."[160] Though clear error review typically applies to findings of fact,[161] Judge Brown wrote that this failure was actually a misapplication of law.[162] A detainee "is not entitled to habeas just because no single piece of evidence is sufficient by itself to justify his detention."[163] In essence, the district court "atomized" the available evidence.[164] Further, "[w]hat makes Latif's current story so hard to swallow is not its intrinsic implausibility but its correspondence in so many respects with the Report he now repudiates."[165] Consequently, Judge Brown ruled that the district court ignored aspects of the report improperly and should have placed less weight on Latif's own statements.[166] Because of these errors, Judge Brown remanded the instant case back to the district court with instructions to give proper deference to the Report, weigh all evidence in the light of the presumption, and determine the credibility of Latif's statements.[167]

B. Judge Henderson's Concurring Opinion

Judge Karen Henderson wrote a concurring opinion that agreed in part to Judge Brown's conclusions, but would have simply reversed the district court's release of Latif and rendered continued detention.[168] Judge Henderson disagreed with the dissent's contention that the court mistakenly found clear error in the district court's opinion.[169] She wrote that the court must "assure ourselves that the district court's finding is 'permissible' or 'plausible in light of the record viewed in its entirety.'"[170] Therefore, "the clear error standard requires us, as the reviewing court, to assess the comparative weight of the evidence both for and against the district court's finding."[171] Judge Henderson stated that under this "clear error framework" the district court should have given higher deference to the Report

159. *Id* at 1191.

160. *Id.* at 1193.

161. Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985).

162. *Latif*, 677 F.3d at 1193.

163. *Id.* (citing Al-Adahi v. Obama, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010)).

164. *Id.*at 1194.

165. *Id* at 1193.

166. *Id.*

167. *Id.* at 1199.

168. *Id.* (Henderson, J., concurring). President H.W. Bush appointed Judge Henderson to the circuit court in 1990.

169. *Id.* at 1200.

170. *Id.* (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

171. *Id.* at 1201.

and less deference to any inconsistencies it may have contained.[172] Because the Report is accorded a "presumption of regularity," Judge Henderson wrote that remand "w[ould] be a waste of time and judicial resources."[173]

C. Judge Tatel's Dissenting Opinion

Judge David Tatel authored the dissenting opinion, arguing that the district court's grant of habeas relief should be upheld, and that the court properly weighed the evidence in its ruling for Latif.[174] Judge Tatel wrote that in the instant case, a ruling to reverse the district court would be a "first among Guantanamo habeas appeals in this circuit: never before have we reviewed a habeas grant to a Guantanamo detainee where all concede that if the district court's fact findings are sustained, then detention is unlawful."[175] Essentially, the court "move[d] the goal posts" by disregarding the district court's decision to find the Report "unreliable."[176] Further, Judge Tatel stated that the court never actually "conclud[ed] that the district court's particular take on the evidence was clearly erroneous."[177] Judge Tatel sectioned his dissent into two areas of discussion: first, the district court did not err in discounting the Report without a "presumption of regularity," and second, proper application of clear error review would result in affirming the district court's findings.[178]

1. "Regularity" or "Reliability?"

Judge Tatel began his dissent by reviewing the majority's parallel analysis between actions of public officials and the documents they generate.[179] He wrote that cases in this line of analysis "have something in common: actions taken or documents produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar."[180] Conversely, "the Report at issue here was produced in the fog of war by a clandestine method that we know almost nothing about."[181] Judge Tatel perceived these conditions as highly distinguishable from the regularity assumed in standard government documents, precisely because of the issues noted by the majority: documents "prepared in stressful and

172. *Id.*

173. *Id.* at 1204-05.

174. *Id.* at 1227 (Tatel, J., dissenting). President William Clinton appointed Judge Tatel to the circuit in 2004.

175. *Id.* at 1206.

176. *Id.* at 1206.

177. *Id.* at 1207.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1208.

chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes."[182] In essence, it is not "regularity" that is of concern, but "reliability."[183]

While the Executive Branch likely acts in "good faith," detainees must be afforded a "'meaningful opportunity' to subject the Executive's detention decisions to scrutiny by an independent Article III court.'"[184] Judge Tatel did not assert that all government documents like the Report are unreliable, only that "we should refrain from categorically affording it presumptions one way or the other."[185] Further, Judge Tatel noted numerous habeas proceedings avoided applying a "presumption of regularity," and that by analyzing the evidence carefully and thoroughly against the backdrop of the circumstances in which the evidence was presented, the court essentially rejected inherent presumptions.[186] Additionally, in *Kahn v. Obama*, Judge Tatel cited extensive discussion in the court's opinion reviewing the sufficiency of the Government's evidence.[187]

Judge Tatel admitted that the court must conduct "a careful and conscious balancing of the important interests at stake," especially in the context of hearsay evidence.[188] But the presumption of regularity "disturbs this careful balance, substituting a presumption in place of careful district court 'review and assess[ment of] all evidence from both sides.'"[189] As such, requiring district courts to presume the reliability of Government evidence encroaches on their fundamental fact-finding role.[190] Judge Tatel also disagreed with the majority's reading of *Hamdi v. Rumsfeld*, concluding that a presumption should only apply to "credible" evidence, which therefore inherently envisions a role for the court to weigh and determine first if the evidence is actually "credible" and worthy of the presumption.[191] He feared that by taking all documents the Government produces as true, the Supreme Court's "meaningful review" standard would no longer be truly "meaningful" in application.[192]

182. *Id.* (quoting *Id.* at 1179 (majority opinion)).

183. *Id.*

184. *Id.* at 1209 (quoting Boumediene v. Bush, 553 U.S. 723, 729 (2008)).

185. *Id.*

186. *Id.* at 1210 (citing Barhoumi v. Obama, 609 F.3d 416, 420 (D.C. Cir. 2010)).

187. *Id.* at 1211 (citing Kahn v. Obama, 655 F.3d 20, 27-32 (D.C. Cir. 2011)).

188. *Id.*

189. *Id.* at 1212 (quoting Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010)).

190. *Id.*

191. *Id.* at 1214 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004)).

192. *Id.* at 1215.

2. Clear Error Review in Detainee Litigation

By utilizing the proper standard of clear error review, Judge Tatel wrote that he would have affirmed the lower court's opinion.[193] The Report was heavily redacted, did not show whether multiple parties contributed to its contents, and could not be corroborated by the Government.[194] The district court rightly questioned the lack of corroboration and that "[n]o other detainee told interrogators that he fled from Afghanistan to Pakistan, from Tora Bora or any other location, with Latif."[195] As the Report admittedly contained factual inconsistencies, it was not clear error to question its accuracy.[196]

Lastly, Judge Tatel agreed with the district court's ruling that the Government's other evidence was insufficient for continued detention.[197] Latif's return from Afghanistan through the border of Pakistan was a common route for evacuees during his capture; it would be appropriate for the district court to discount such evidence.[198] Additionally, it was within the district court's discretion to disbelieve that Ibrahim Alawi, the man Latif sought out in Afghanistan, was actually an Al Qaeda or Taliban recruiter.[199] All of these pieces of circumstantial evidence could point to Latif's association with terrorist groups, but it would not be clear error for the district court to conclude otherwise.[200]

V. ANALYSIS

Judge Brown's majority opinion signaled a new and somewhat disturbing divergence in detainee litigation that will significantly alter the future of habeas corpus review. *Latif* reflects a growing movement by the D.C. Circuit to uphold indefinite detention despite obvious deficiencies in Government intelligence reports.[201] Prior to the 2010 decision of *Al-Adahi v Obama*, the district court granted relief in 56% of petitions.[202] Of the

193. *Id.* at 1216.

194. *Id. See supra* note 38 and accompanying text. The Government claimed to have the underlying notes used to produce the Report, but failed to provide them before the ruling in the instant case. One must wonder, how much did the Government's failure to provide notes or unredacted corroborating evidence subjectively influence the district court? Further, why was the Government unable to provide such information? The author is not implying any bad faith on the part of the Government, but merely suggesting that "meaningful review" is frustrated by the lack of cooperation from the Executive Branch in the instant case. There is no doubt in this author's mind that in 2001, when Latif was captured, the battlefield environment was chaotic. But the Government should have been able to produce at least some firsthand evidence outside of the Report to corroborate its case against Latif.

195. *Id.* (quoting Abdah v. Obama, No. 04-1254(HHK), 2010 WL 3270761 (D.D.C. Aug. 16, 2010)).

196. *Id.* at 1218.

197. *Id.* at 1221-22.

198. *Id.*

199. *Id.* at 1223-24.

200. *Id.*

201. Mark Deanbeaux, *No Hearing Habeas. D.C. Circuit Restricts Meaningful Review*, Seton Hall University School of Law, 1 (May 1, 2012), http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf

202. *Id.* at 2.

twelve cases post *Al-Adahi*, the district court granted Latif's petition and denied the other eleven.[203] Reversing *Latif* through evidentiary presumptions clearly compels increased judicial deference unlike any other decision post *Boumediene*.[204] *Latif* is not merely the latest denial of habeas relief; the instant case signifies a blanket contradiction of "meaningful review" by the circuit court.

Scholars may question whether current cases are simply less viable. Statistical deviations between the thirty-four cases pre *Al-Adahi* and the twelve cases post *Al-Adahi* suggest otherwise.[205] Before *Al-Adahi*, the district court rejected 40% of Government factual allegations.[206] Of the twelve most recent cases, including *Latif*, the district court rejected only 14%.[207] Further—and most significantly—the frequency in which the district court avoided addressing evidentiary weight as to an individual allegation rose from 12% pre *Al-Adahi* to 27% post *Al-Adahi*.[208] This data points not to weaker detainee petitions, but fluctuating priorities by the district court.[209]

A "presumption of regularity" is not inherently offensive to habeas corpus litigation if applied judiciously and with proper regard to national security interests. However, the presumption should be employed in a manner that respects common sense application to each individual petition. Unfortunately, the legal issues discussed here are not philosophical. Asymmetrical warfare is a natural byproduct of increased interconnectivity between the United States and developing nations. Detainee litigation is a reality of this new age of conflict. Whether detainees are held in Guantanamo Bay or some distant battlefield, the common law courts create today will affect habeas proceedings far into the future.

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203. *Id.*

204. *Id.*

205. *Id.* at 3.

206. *Id.*

207. *Id.* at 2-3. In Professor Denbeaux's data, factual allegations are divided into four categories: hostile acts, stays in terrorist guesthouses, terrorist training camp attendance, and route travel. *Id.* Combined, these categories result in 85 Government allegations pre *Al-Adahi*, with the district court rejecting 34. *Id.* The same categories result in 29 allegations post *Al-Adahi*, with the district court rejecting only 4. Therefore, the rate of rejection decreases by over 65%.

208. *Id.* This statistic is troublesome for several reasons. First, it leaves practitioners with no information as to which piece of evidence was most significant in swaying the court's decision. Second, it may suggest that the district court is reacting to the circuit court's clear signal that detainees should be granted release less frequently under the *Al-Adahi* framework. *Id.* at 11. Third, and of special interest to this Note, scholars must wonder if by failing to address evidentiary weight, the district court is simply avoiding the ambiguity created by *Boumediene* as to what will be considered "meaningful review." If the district court has no solid guidepost for proper review of detainee petitions, then the easiest way to avoid reversal is to simply deny the petition without giving extensive analysis of each individual allegation. But how can this ambiguity actually result in "meaningful review?" And practically speaking, does the failure to address factual allegations hamper the detainee and his attorney's ability to properly structure the detainee's legal argument against further detention?

209. *See supra* note 207 and accompanying text. Some decrease would be expected if current cases are factually weaker, but a 65% decrease implies the district court has changed its level of scrutiny when reviewing Government evidence.

A. Proper Deference: The Use of Uncorroborated Sources in Detainee Litigation

The Supreme Court's decision in *Hamdi v. Rumsfeld* invited courts to presume reliability of government evidence, but *Hamdi* did not retract a trial court's inherent fact-finding role.[210] The plurality ruled that the "Constitution would not be offended by a presumption in favor of the Government's evidence" if the evidence is "credible evidence that the habeas petitioner meets the enemy-combatant criteria."[211] This passage, combined with the presumption that government documents are reliable on their face,[212] would seem to endorse Judge Brown's ruling. However, Judge Brown's error is not the presumption itself, but the presumption's application in the instant case. The above language requires the trial court to first conclude whether the Government's evidence is "credible." As the fact-finder, the district court sits in the best position to make such determinations. Therefore, the correct question to ask is not whether a "presumption of regularity" is proper in detainee litigation, but whether the Government produced sufficient "credible" evidence to establish the presumption against Latif. The initial burden rests with the Government, not the petitioner. In practice, the district court must establish the evidentiary standard for "credibility." If the bar is too high, the presumption is negated. If the bar is too low, the court ignores "meaningful review."

A bright line "credibility" test is unnecessary in detainee litigation; in fact, such a test would naturally, and unfairly, favor one party over the other. Instead, a sliding-scale formula, accounting for individual variations in each petition, would best ensure "meaningful review" and appropriate judicial deference. The circuit court's ruling in *Kahn v. Obama* exemplifies a suitable blue print for applying the sliding-scale formula. Prosecutors provided the district court with unredacted copies of government intelligence reports and statements by Army interrogators.[213] This evidence neutralizes what Judge Tatel questioned in *Latif*: the ambiguity of documents produced on the battlefield through non-governmental actors.[214] It would be foolhardy to assume that such evidence will be available in every detainee proceeding, but it would also be illogical for its absence to be ignored in determining "credibility" for presumption purposes. Redactions in *Latif* make factual errors in the Report difficult to thoroughly analyze, but we do know that the district court found multiple inconsistencies, one of which was apparently an "obvious mistake."[215] These errors, combined with the lack of corroboration by the Government[216] (particularly in the

210. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004).

211. *Id.*

212. Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007); Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D. C. Cir. 2002).

213. Kahn v. Obama, 655 F.3d 20, 27, 31 (D.C. Cir. 2011).

214. Latif v. Obama, 677 F.3d 1175, 1208 (D.C. Cir. 2011).

215. *Id.* at 1216-17.

216. *Id.*

light of its corroboration in *Kahn*) are sufficient to negate clear "credibility" as envisioned under *Hamdi*. Like *Kahn*, the sliding-scale formula should not turn on one single factor—the fact-finder must weigh each piece of evidence together against the specific circumstances surrounding the detainees' capture.

B. Evidentiary Presumptions and Clear Error Review

Regardless of whether evidentiary presumptions are applied in detainee litigation, Judge Brown's opinion effectively bypasses clear error review. The facts in *Latif* do not justify continued detention under the newly created "presumption of regularity" or under the previous "indicia of reliability" standard.[217] By reversing the district court's order and applying the presumption, Judge Brown evaluated the district court's findings of fact *de novo*.

As stated, the Government must first put forth "credible" evidence to establish the presumption.[218] The Government did not meet this burden in *Latif*—applying the presumption therefore substitutes the district court's findings with the circuit court's own factual analysis. The district court implicitly rejected the initial "credibility" of the Report through careful and thorough assessment of the Report's allegations.[219] Nothing in the district court's opinion suggests that applying the "presumption of regularity" would result in continued detention. Even if the district court had assumed accuracy in each of the Report's allegations, Judge Brown's "presumption" "does not compel a determination that the [document] establishes what it is offered to prove."[220] The American judicial system places great responsibility on district courts to act as expert fact-finders. Justice Kennedy stated as much in *Boumediene*: the "Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."[221]

Detainee litigation, like the rest of American jurisprudence, requires appropriate deference to the district court's findings of fact. Applying this logic to *Latif* highlights two areas of evidentiary concern. First, witness "plausibility" or "credibility" is an important distinction: the detainee's only defense may be his denial of the Government's accusations and his own characterizations of the incidents leading to his detention. Secondly, how should the district court view evidence that, on its own, fails to meet the burden of continued detention?

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217. Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010).

218. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004).

219. *Latif*, 677 F.3d at 1216. The district court's opinion does not explicitly mention evidentiary presumptions.

220. *Id.* at 1181.

221. Boumediene v. Bush, 553 U.S. 723, 796 (2008).

1. Detainee "Credibility" With or Without Presumptions

Judge Brown's opinion requires the district court to determine not whether the detainee's statements are merely "plausible," but actually "credible" in the light of the evidence presented.[222] The first deficiency in such logic derives from the systematic failure by the D.C. Circuit to specify what will be deemed "credible."[223] What must the detainee present in rebuttal to overcome the Government's allegations? Judge Brown cited multiple inconsistencies in the Government's Report and apparent discrepancies between the Report and other evidence presented during the district court's hearing.[224] Latif explained those inconsistencies with a story that, though not necessarily the most convincing in the history of detainee litigation, certainly raised serious doubts about the otherwise uncorroborated Report.

The second failure inherent in Judge Brown's "credibility" requirement couples with her use of the "presumption of regularity" in the instant case. Judge Brown held "[o]nly a credible story could overcome the presumption of regularity to which the Report was entitled."[225] Therefore, once the Government brings "credible" evidence forward that the detainee is an actual "enemy combatant," his rebuttal as a witness must meet the same "credibility" standard. But the Report itself—without further corroboration—can hardly be considered "credible." Demanding "credible" evidence from the detainee when the Government cannot meet its own burden lacks even the basic spirit of fairness. Until the district court sufficiently establishes the "credibility" bar, detainees are left with yet another ambiguous evidentiary constraint.[226]

2. Evidentiary "Atomization" or Common Sense Evaluation?

Judge Brown ruled that the district court erred when it viewed the evidence against Latif in isolation and not within a larger framework, and that this error was a mistake of law, not fact.[227] Yet Judge Brown relied on the Report itself as the starting point for each isolated allegation.[228] Thus,

222. *Latif*, 677 F.3d at 1190.

223. *See supra* note 75 and accompanying text. The circuit court seems to struggle with creating exceptions to accommodate the difficulties inherent in detainee litigation. This is understandable, as no easy answer exists for how to conduct habeas proceedings without encroaching on either the detainee's liberty or the nation's security. But that is precisely why a reviewing court, if it is to make a new requirement in detainee litigation common law, must do as much as possible to give lower courts concrete examples of what it intends for future proceedings. In review of the district court's findings in *Latif*, it becomes difficult to see how Latif's statements were not "credible" in light of the court's opinion. Would this case actually be different if the district court had simply used the word "credible" instead of "plausible?" Judge Brown's opinion certainly states so, but the circuit court's open rejection of Latif's statements leaves this author unconvinced.

224. *Latif*, 677 F.3d at 1186.

225. *Id.* at 1190.

226. Even if the district court applies a lower bar for meeting the "credibility" requirement, there is no guarantee that the detainees' "credibility" requirement will, in practice, match the Government's burden.

227. *Latif*, 677 F.3d at 1193.

228. *Id.* at 1194.

Judge Brown required the district court to place greater emphasis on the sections of the Report that implicated Latif, and less on the sections that matched his statements.[229] This supposed evidentiary balancing is no different than the district court's hypothetical "atomization." In reality, the district court simply weighed the evidence of Latif's statements against an uncorroborated, deeply censored, and questionable Government intelligence report, within the backdrop of the Government's failure to provide notes or other information about the Report.

District courts must view all of the evidence together before determining a detainee's enemy combatant status, and this principle is sensible given the use of hearsay evidence. Each thread of the overall story becomes tremendously important, particularly because of the risk involved with releasing persons who may one day return to the battlefield.[230] Courts accept the proposition that some pieces of evidence will either contain factual errors or outright misstatements by persons accusing the detainee. This is precisely why the district court should be given latitude to discount evidence it considers untrustworthy. The district court did not "atomize" the evidence, but merely chose to accept the facts differently than Judge Brown or Judge Henderson. The appellate court cannot "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[231]

C. Workable Solutions in Detainee Litigation: The Spirit of Justice in 21st Century Warfare

Thorough analysis reveals gaps in the D.C. Circuit's approach to detainee habeas petitions from both procedural and evidentiary viewpoints. However, problems require solutions, and it is imperative that legal scholars strive now to create workable remedies in detainee litigation. The Global War on Terrorism stands as a wake-up call to democratic nations in the 21st Century. Some detainees will indefinitely pose risk to the United States' national security. The careful balance between American interests and democratic ideals cannot be overstated. Judge Brown was simply incorrect when she stated in *Latif* that detainee litigation is a "shrinking category of cases" and that "the benefit of intelligence that might be gained—even from high-value detainees—is outweighed by the systemic cost of defending detention decisions."[232] Detainees may not be sent to Guantanamo Bay, but that does not mean alleged terrorist members will no longer be captured in combat operations. Further, as shown in *Hamdi*, the United States must be prepared to conduct habeas proceedings when one of its own citizens affiliates with designated terror groups.

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229. *Id.*

230. *See supra* note 3 and accompanying text.

231. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

232. *Latif*, 677 F.3d at 1199 (citing Boumediene v. Bush, 533 U.S. 723, 828 (2008) (Scalia, J., dissenting)). But even if Judge Brown is correct, would that fact matter from the standpoint of justice? In other words, do current detainees deserve less judicial review because the issue of detainee litigation may one day become moot?

1. Can Civilian Courts Properly Determine "Enemy Combatant" Status?

It may seem redundant to ponder whether civilian courts are capable of balancing the great need of national security against detainee liberty. Certainly the D.C. Circuit continues to do so on a daily basis, and *Latif* is but one of over sixty-three cases decided post *Boumediene*.[233] Nevertheless, our analysis looks not to current affairs, but the future of detainee litigation—whether or not detainees are held in Guantanamo Bay, the United States, or Afghanistan's Parwan Detention Facility.[234] In reality, civilian judges likely have no less expertise in deciding enemy combatant status than military judges. Whether a uniformed officer or experienced jurist, the reviewing judge must wade through highly classified intelligence reports to decipher if the detainee in fact meets the "enemy combatant" criteria. Of course, military judges may have more familiarity with military language and war-fighting procedures. But that does not mean civilian judges are incapable of learning such information.

The simplest solution is to allow civilian judges full and unfettered access to unredacted copies of Government intelligence reports.[235] The Government allowed such access in *Kahn*,[236] proving that it is possible for both branches of government to work together for judicially sound habeas review. "Meaningful review" of enemy detention does not just require any type of judicial review; it requires the Government to conduct proceedings that assure the American people that liberty has not been squashed in the name of national security. The United States must also consider its place as the global leader for democracy. If Americans expect other countries to protect human rights, they must be prepared to do so even when it is most inconvenient. Civilian review signals deep commitment to the ideals of liberty and justice that make the United States Constitution an example for the rest of the international community.

2. How Should Civilian Courts Conduct Habeas Proceedings?

The current system of habeas review can serve as a proper means for evaluating detainee enemy combatant status; however, concrete examples of practical safeguards must be determined so that courts will uniformly apply basic protections. The Supreme Court could have used *Boumedine*, *Hamdi*, or *Rasul* to hand down guidance for district courts to operate

233. Deanbeaux, *supra* note 201, at 4-5.

234. The United States turned over the Parwan Detention Facility at Bagram Air Base, Afghanistan to the Afghan government on September 10, 2012. Richard Leiby, U.S. Transfers Control of Bagram Prison to Afghan Officials, WASHINGTON POST (Sept. 10, 2012), http://articles.washingtonpost.com/2012-09-10/world/35494546_1_prison-handover-afghan-control-afghan-troops.

235. Allocations could be made for protecting sources and methods. The exact name of the foreign source might not be necessary, or code names for American clandestine officers could be substituted. The point is primarily that the Executive Branch persuades the reviewing judge that the information presented is both reliable and accurate. Surely the Executive Branch cannot argue that Article III judges are untrustworthy with confidential information.

236. Kahn v. Obama, 655 F.3d 20, 31 (D.C. Cir. 2011).

under. Instead, district courts are left with the ambiguous "invitation to innovate" that Judge Brown uses for her "presumption of regularity."[237] As argued above, the most important reason to keep detainee litigation in civilian courts is to preserve the fundamental fairness associated with American jurisprudence. Highly restrictive controls would encroach on such fairness, but the absence of controls leaves district courts without much needed supervision.

Logically, absent precedent otherwise, courts should follow a familiar and proven evidentiary rule set: standard federal criminal procedure. From that baseline, accepted deviances can then be justified through careful analysis.[238] Judge Kennedy wrote in *Boumediene* "[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective."[239] Just because detainee litigation must not "resemble" criminal trial does not mean that important safeguards should not be borrowed from federal criminal law. Wholesale adoption of the more formalistic aspects of federal criminal procedure would clearly overburden the district court; the point is not that detainees actually receive criminal trials, only that courts avoid haphazardly applying evidentiary exceptions.

It is from the federal criminal procedure baseline that judges can then begin to justify evidentiary standards such as the "presumption of regularity" or witness "credibility" requirements. If judges do not compare their deviations to some type of accepted proceeding, detainee litigation begins to resemble what Judge Tatel feared in *Latif*: courts "mov[ing] the goal posts"[240] when the Government otherwise fails to meet its burden for continued detention. That fear is even more pronounced in the light of Judge Brown's refusal to accept the district court's findings of fact in *Latif*. Whether or not a "presumption of regularity" applied to the Report, Judge Brown's opinion abandoned a bedrock principle of jurisprudence.[241] In federal criminal law this error would create grounds for reversal at the Supreme Court, but post *Boumediene* the Court has avoided granting review of detainee petitions.[242] *Latif* therefore stands as principle example of why courts must replace "innovation" with "standardization."

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237. *Latif*, 677 F.3d at 1181.

238. These deviations will then of course be subject to review by the circuit court and the Supreme Court. The Supreme Court may then either accept the deviance or hand down a more appropriate rule. At first glance, that seems to be what *Boumediene* intended, but *Boumediene's* inherent ambiguity under the "invitation to innovate" goes too far to the other extreme. The most promising method would be for the Supreme Court itself to create model procedures through appropriate consultation with the Executive Branch.

239. Boumediene v. Bush, 553 U.S. 723, 783 (2008).

240. *Latif*, 677 F.3d at 1206 (Tatel, J., dissenting).

241. *See supra* note 90.

242. Lyle Denniston, Court Bypasses All New Detainee Cases, SCOTUSBLOG (June 11, 2012, 11:39 AM), http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/.

3. Looking Past Guantanamo Bay: Detainee Litigation at Home and Abroad

The Supreme Court could solve "standardization" and alleviate many of the questions plaguing current detainee litigation in the D.C. Circuit. The Court is capable of providing strong leadership without micromanaging habeas proceedings, particularly in the procedural sphere of evidentiary standards. Critics might counter with Judge Brown's statement that detainee litigation is a "shrinking category of cases."[243] But scholars and practitioners must remember that the precedents set now will directly affect the way in which the United States approaches detainee litigation in the future. The detainees left in Guantanamo Bay will not be the last prisoners apprehended by the United States and held without trial as "enemy combatants."

If the United States can develop workable habeas review procedures, it might discourage Executive Branch actors from purposely avoiding civilian oversight. Most worrisome is the incentive for the Executive Branch to detain alleged terrorists in foreign jails or battlefields. This incentive strikes to the very core of what the American judicial system seeks to prevent: deprivation of liberty without oversight, review, or accountability. The stakes are high for all three branches of government, and no decision in this area of law results in perfect outcomes. But if Americans wish to preserve liberty, *Latif* cannot be the ending point for detainee habeas proceedings.

VI. CONCLUSION

Ignoring procedural and evidentiary issues discussed in this Note may result in consequences unintended by the Supreme Court and the Executive Branch. These consequences do not only affect current detainees like Latif. Future conflicts, on or off declared battlefields, will result in captured terrorist suspects who deserve some type of civilian judicial review. Executive Branch officials represent an honorable competing interest—securing American citizens from future terrorist attacks. If the judiciary fails in its competing interest—the creation of fair and open procedural safeguards—then the Executive Branch cannot be blamed for overzealous actions. If detainee litigation taught legal scholars anything over the past eleven years of conflict, it is that preparation now avoids haphazard application of just principles later. The Supreme Court must accept detainee appeals in its next term and provide leadership in concrete language that affords the D.C. Circuit guideposts for conducting proper habeas review. The stakes are too high for continued inaction. Detainees live, and in the case of Latif, die in United States custody absent true "meaningful review" of their "enemy combatant" status. This precedent extends not only to foreign citizens, but American citizens as well. Though witness "plausibility"

243. *Latif*, 677 F.3d at 1199.

versus "credibility" and document "presumptions" are worthy topics of discussion, they are but part of a larger framework of injustice. If the United States expects to be a true leader of global democracy, it cannot afford to continue the ambiguous habeas corpus policy found in *Latif v. Obama*.