Chapter 5 – Evidentiary Presumptions

As noted above, the plurality opinion in *Hamdi* recognized that difficult evidentiary issues may arise when courts conduct habeas review in the military-detention setting.[242] Indeed, in doing so, the plurality seemed to be authorizing a departure from the Federal Rules of Evidence ("Federal Rules"): "[T]he exigencies of the circumstances may demand," the plurality explained, "that . . . enemy combatant proceedings . . . be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[243] The plurality gave the example of permitting the use of hearsay, and, as we have explained, even went so far as to suggest that the burden of proof might lie with the defendant once the government came forward with a "credible" evidentiary showing to support a detention.[244] The justices were making this point in relation to the military detention of a U.S. citizen whose right to assert the protections of the Fifth Amendment's Due Process Clause the government did not contest. With little else on the subject in the *Boumediene* opinion, it is unsurprising that in subsequent habeas litigation the government requested several concessions of this type from the district court in cases of *non- U.S. citizens* with arguably a lesser array of rights. The government has, for example, repeatedly urged the judges to adopt both presumptions of authenticity and accuracy as to the government's evidence.[245]

The meaning of authenticity in this setting is relatively clear. It has to do with whether an item of evidence is what its proponent claims it to be. As we explain below, the D.C. Circuit has largely avoided weighing in on the question of whether there ought to be a presumption of authenticity, while the district judges have disagreed on the point.

Things are more complicated with respect to the idea of a presumption of accuracy. The problem arises because the notion of accuracy in this setting is ambiguous, encompassing at least two possible meanings. First, it could refer to the idea that a factual proposition contained in or otherwise supported by a given item of evidence is, in fact, true. Second, it might instead refer to the idea that a factual proposition contained in a document or other medium was recorded from a third source without error, separate and apart from whether the proposition itself is true. All of which has come to matter because the D.C. Circuit in *Latif*[246] endorsed the presumption of accuracy, appearing to reference

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[242] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[243] *Id.*

[244] *Id.* at 533–34.

[245] The government enjoyed both presumptions in proceedings taking place under the CSRT procedure. *See* Parhat v. Gates, 532 F.3d 834, 841 (D.C. Cir. June 20, 2008) (quoting GORDON R. ENGLAND, SEC. OF THE NAVY, IMPLEMENTATION OF COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES 2 (2004)).

[246] Latif v. Obama, 666 F.3d 746 (D.C. Cir. Oct. 14, 2011).

the second meaning but prompting a dissent suggesting that the majority in that case instead had the first in mind—or at least that this would be the practical effect of adopting the presumption.[247]

It is tempting to conflate the two concepts of a presumption of authenticity and a presumption of accuracy. Both, after all, connote deference; the government seeks to justify both presumptions on grounds of practical exigency, and courts and litigants often discuss both presumptions in the same breath in motions and opinions in these proceedings. They are conceptually distinct, however, and should be analyzed and addressed separately and in relation to the Federal Rules.

We begin with the question of evidentiary authenticity. Under the Federal Rules, the proffer of any evidence that is not in-court testimony might lead to questions about its authenticity.[248] That is, is the evidence in question what its proponent claims it to be? This question has nothing to do with the weight the fact finder ought to give this piece of evidence, but rather relates simply to the question of whether it should be admissible in the first instance. To give a pedestrian example, a defendant in a negligence suit involving a car accident might object on authenticity grounds to a plaintiff's attempt to introduce as evidence a piece of tire tread that purportedly comes from the defendant's vehicle. In that case, the proponent of the evidence has the burden of proving by the preponderance of the evidence that the tire tread did indeed come from the defendant's vehicle, with the judge serving as fact finder for purposes of this threshold question of admissibility. Should the proponent carry this burden, the objection is overcome and the tire tread will be admitted, if it is relevant and no other objections arise. Whether it then proves to have any weight with the jury, however, or how much weight the jury might give it, is an altogether different question.

The issue of authenticity is at least a theoretically significant one in these cases. In several of the cases, the government has sought to introduce documentary or physical evidence obtained overseas in contexts that make it relatively difficult to establish authenticity through traditional methods, such as asking witnesses to testify to the chain of custody. When the government in these proceedings asks for a presumption of *authenticity* on these grounds, it effectively is asking the judge to reverse the usual practice of requiring the proponent of evidence to prove its authenticity before it is admitted.[249]

A request of this type seems compatible with the practical concerns and

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[247] *Id.* at 779 (Tatel, J., dissenting).

[248] *See* FED. R. EVID. 901(a).

[249] *See* Al Adahi v. Obama, 692 F. Supp. 2d 85, 90 n.5 (D.D.C. March 10, 2010) (quoting 2 K. BROUN, MCCORMICK ON EVIDENCE § 221 (6th ed.) ("[T]he requirement of authentication requires that the proponent, who is offering a writing into evidence as an exhibit, produce evidence sufficient to support a finding that the writing is what the proponent claims it to be.")).

accommodations the Supreme Court plurality discussed in *Hamdi*.[250] Indeed, for that reason, the suitability of this presumption, which does away with the requirement to prove authenticity *as a prerequisite* to admission, had some resonance with the district judges. Judge Kessler, for example, granted a government request for such a presumption in *Ahmed*[251] and *Mohammed*,[252] and in the *Al Adahi* cases,[253] as did Judge Urbina in *Hatim*[254] and *Alsabri*[255] and Judge Friedman in *Almerfedi*.[256] And though Judge Robertson was particularly skeptical of the notion of an *accuracy* presumption, he also seemed to grant the authenticity presumption implicitly in *Awad*, *Salahi*, and *Khalifh* insofar as he admitted all proffered evidence and gave it the weight he "believe[d] it deserve[d]."[257]

But not all the judges have followed this approach. Judge Kollar-Kotelly, has rejected a request for a presumption of authenticity. In *Mutairi*, for example, she began by noting that the habeas proceedings are bench trials in the sense that the judge serves as fact finder, and that "[o]ne of the central functions of the Court in . . . [these] case[s] is 'to evaluate the raw evidence' proffered by the Government and to determine whether it is 'sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of clarity.'"[258] When she turned to address her reservations about the requests, Judge Kollar-Kotelly's analysis did not clearly differentiate between the requested authenticity presumption and the requested accuracy presumption. Nevertheless, she seemed to speak directly to authenticity concerns when she

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[250] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004).

[251] Ahmed v. Obama, 613 F. Supp.2d 51, 54–55 (D.D.C. May 11, 2009).

[252] Mohammed v. Obama, 704 F. Supp. 2d 1, 5–6 (D.D.C. Nov. 19, 2009).

[253] *Al Adahi*, 692 F. Supp. 2d at 90–91; Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 54 (D.D.C. Mar. 10, 2010), Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85, 90–91 (D.D.C. Mar. 10, 2010).

[254] Hatim v. Obama, 677 F. Supp. 2d 1, 8 (D.D.C. Dec. 15, 2009) (granting the government's motion for a presumption of authenticity of interview and intelligence reports by analogy to the FED. R. EVID. 803(6) business-records exception).

[255] Alsabri v. Obama, 764 F. Supp. 2d 60, 66 (D.D.C. Feb. 3, 2011) (mentioning that "the government's evidence would, in appropriate circumstances, be afforded a presumption of authenticity.").

[256] Almerfedi v. Obama, No. 05-1645 (D.D.C. Mar. 1, 2010) (in a pre-merits hearing proceeding, according any evidence that had been created and maintained in the ordinary course of business a rebuttable presumption of authenticity).

[257] Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009) (noting that he would not presume the accuracy of information, that he had "instead formally 'received' all the evidence offered by either side [and had] assessed it item-by-item"); Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010); Khalifh v. Obama, No. 05-1189, slip op. at 5 (D.D.C. May 28, 2010). *See also* Bostan v. Obama, 662 F. Supp. 2d 1, 6-7 (D.D.C. Aug. 19, 2009) (describing the government's interpretation of the admissibility holding in Khiali-Gul v. Obama, No. 05-877 (D.D.C. Apr. 22, 2009)).

[258] Al Mutairi v. United States, 644 F. Supp. 2d 78, 83–84 (D.D.C. July 29, 2009) (quoting Parhat v. Gates, 532 F.3d 834, 847 (D.C. Cir. 2008)). *See also Hatim*, 677 F. Supp. 2d at 10 (Urbina, J.) (discussing the same concern for the court's role as fact finder in discussing the presumption of accuracy).

turned the government's exigency and practicality justifications on their head: "Some of the evidence advanced by the Government has been 'buried under the rubble of war,'" she noted, "in circumstances that have not allowed the Government to ascertain its chain of custody, nor in many instances even to produce information about the origins of the evidence."[259] In her view, far from providing a basis for a presumption of authenticity, this fact created good grounds to doubt its appropriateness, and she even provided a salient example of how a typographical error led to a misidentification.[260] She used a similar approach, and often similar language, to respond to the requests for these presumptions in *Al Rabiah*, *Al Odah*, and *Al Kandari*.[261] Judge Rosemary Collyer also declined to allow an authenticity presumption in *Barhoumi*, though her rationale for that decision is not public.[262]

In any event, authenticity turns out not to be nearly as important an issue in practice as it is in theory. The cases to date turn overwhelmingly not on tangible evidence but on detainee statements—statements either by the petitioner himself or by other detainees or intelligence sources. So even when the government wins a presumption of authenticity, the presumption does not turn out to be worth much. In one case, for example, Judge Robertson went so far as to observe that authenticity concerns were inherently irresolvable: "The government's case relies on 'raw' intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps not knowable)."[263] He therefore took a holistic approach to admitting and weighing the evidence. In general, it seems that while petitioners have continued to raise authenticity objections, in no case has a judge actually disbelieved that the government's evidence was what the government said it was.

Requesting a presumption of *accuracy* (or "reliability" or "credibility") for the government's evidence is a different matter. Whereas authenticity speaks to a threshold question of admissibility, accuracy might or might not. If accuracy is understood to refer merely to whether a given document has accurately reported a factual proposition derived from some other source, then it too might be understood as a threshold question of admissibility. Indeed, on that understanding, accuracy is but another form of authenticity. But if accuracy instead is understood to refer to the weight the fact finder should attach to a

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[259] *Al Mutairi*, 644 F. Supp. 2d at 84 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004)).

[260] *Id.* (noting that the government had erroneously believed for over three years that Al Mutairi manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report).

[261] Al Rabiah v. United States, 658 F. Supp. 2d 11, 17 (D.D.C. Sept. 17, 2010); Al Odah v. United States, 648 F. Supp. 2d 1, 5 (D.D.C. Aug. 24, 2009); Al Kandari v. United States, 744 F. Supp. 2d 11, 19 (D.D.C. Sept. 15, 2010).

[262] Barhoumi v. Obama, No. 05-1056, slip op. at 1 (D.D.C. Sept. 3, 2009) ("[T]he documents are admitted with no presumptions of accuracy or authenticity.").

[263] Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009) (discussing a purported list of names of fighters trained at Tarnak Farms).

particular item of admitted evidence, matters stand differently. On that view, to presume the accuracy of evidence would be to presume that the evidence establishes that which it is offered to prove. Such a presumption, if given, would be consistent to some degree with the language in *Hamdi*, where the plurality expressly contemplated the possibility of a rebuttable presumption *in favor of* the government's evidence.[264] But as noted above, the judges in the post-*Boumediene* habeas cases have elected instead to place the burden of proof on the government. A presumption of accuracy for the individual items of evidence the government puts forward would be in considerable tension with that approach.[265]

Before the Circuit Court's opinion in *Latif*, judges in post-*Boumediene* habeas cases had treated requests for presumptions of accuracy as referring to the idea of factual truth, and had universally declined to afford a presumption of "accuracy" as a result. *Latif*, however, released in November 2011, has greatly complicated the issue. The majority granted a presumption of "regularity" for intelligence documents put forward by the government, reasoning that

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C.Cir.2007). The presumption applies to government-produced documents no less than to other official acts. See Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002) (holding that "an official tax receipt" of a foreign government "is entitled to a presumption of regularity.") Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. 2011).

The majority suggested that the presumption merely went to the question whether such documents correctly record factual propositions derived from other sources, not the truth of those propositions themselves. The dissent warned, however, that such a distinction might not be maintained. While *Latif*'s ultimate implications remain unclear, the presumption it adopts creates considerable tension and could be viewed as a sharp departure from earlier approaches.

The Lay of the Land Before *Latif*

Given the burden of proof in these cases, it is perhaps unsurprising that none of the publicly available rulings on the presumption of accuracy prior to *Latif* had

[264] *Hamdi*, 542 U.S. at 534.

[265] *See, e.g., Awad*, 646 F. Supp. 2d at 23 ("The suggestion of a presumption of reliability and credibility goes too far because it would seem to place the burden of rebuttal on the petitioner."). Interestingly, placing the "burden of rebuttal on the petitioner" is expressly what the Supreme Court condoned in *Hamdi*.

favored the government—even as the government continued to request just that presumption.[266] Even when judges declined to grant the accuracy presumption, though, they did so with some eye toward alleviating the practical hardship on the government. Judge Kessler, for example, was careful to note that "[d]enial of the Government's request for a rebuttable presumption of accuracy does not mean, however, that the Government must present direct testimony from every source, or that it must offer a preliminary document-by-document foundation for admissibility of each exhibit."[267] The judges, for the most part, insisted on making a credibility determination on each piece of evidence the government put forward, but they assessed the credibility in the "context of the evidence as a whole."[268]

The D.C. Circuit, for its part, remained relatively quiet about these two evidentiary presumptions before handing down its decision in *Latif*. In *Al Bihani*, the D.C. Circuit reviewed a district-court opinion that had, in the case management order, expressly reserved the court's *right* to allow presumptions of accuracy and authenticity in favor of the government's evidence, but had not expressly adopted either one—at least as evidenced in its merits opinion.[269] The district court found for the government, and on appeal the petitioner's challenges included an attack on what the petitioner argued was the district court's adoption of a presumption of the accuracy of the government's evidence.[270] The D.C. Circuit wrote that this challenge was, along with his other procedural attacks, on "shaky ground"; according to the court, *Boumediene* had expressly granted leeway for "[c]ertain accommodations . . . to reduce the burden habeas corpus proceedings will place on the military."[271] The panel did not make a separate finding about the presumption argument itself, however, but rather discussed the claim in the context of its ruling on the hearsay challenge.[272] The panel noted that "the district court clearly reserved that authority [to independently assess the executive's actions] in its process and assessed the

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[266] 252 Motion to Admit Hearsay Evidence with a Presumption of Accuracy and Authenticity, Al Zarnuki v. Obama, No. 06-1767 (D.D.C. Feb. 2, 2011), ECF No. 293.

[267] Al Adahi v. Obama, 692 F. Supp. 2d 85, 91 (D.D.C. March 10, 2010); Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 54 (D.D.C. Mar. 10, 2010) (assessing the evidence against Al Assani and stating "there is absolutely no reason for this Court to presume that the facts contained in the Government's exhibits are accurate").

[268] *See, e.g.,* Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. Mar. 24, 2010) (Leon, J.) (writing that the court must assess the "'accuracy, reliability, and the credibility" of each piece of evidence in the context of the evidence as a whole."); Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 54–55 (D.D.C. May 11, 2009); Hatim v. Obama, 677 F. Supp. 2d 1, 18 (D.D.C. Dec. 15, 2009) (Urbina, J.) (writing that the government's "justification for detention fares no better when the court views all of the evidence as a whole").

[269] G. Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010).

[270] *G. Al Bihani*, 590 F.3d at 875.

[271] *Id.* at 876 (quoting Boumediene v. Bush, 553 U.S. 723, 795 (2008)).

[272] *Id.* at 881 (finding that Al Bihani's claim that the district court's denial of an evidentiary hearing violated his right to a hearing was "groundless").

hearsay evidence's reliability as required by the Supreme Court."[273] The court then went on to quote the district court's case management order, in which Judge Leon had stated he would "determine, as to any evidence introduced by the Government, whether a presumption of accuracy and/or authenticity should be accorded."[274] Because the district court had considered the "ample contextual information" and "what weight to give various pieces of evidence," and had given Al Bihani the opportunity "to rebut the evidence and to attack its credibility," the panel concluded that the district court had not erred.[275]

Despite the varied treatment of these questions from the district courts, no actual rulings before *Latif* turned on evidentiary presumptions. Indeed, the government prevailed in several cases in which courts had denied its requests for evidentiary presumptions.[276] One such case was *Al Odah*, in which the district court denied both of the government's requests but found in favor of the government nonetheless. The D.C. Circuit affirmed this decision.[277] What's more, in a number of district court cases, petitioners prevailed on the merits even where courts *did* grant the government's request for an authenticity presumption.[278] This was true in *Al Adahi*,[279] and in that case the government did not even appeal the denial of the accuracy presumption but won on the appeals court by arguing other issues.[280] In the one case in which the petitioner on appeal claimed that the district court had impermissibly granted a presumption of accuracy—*Al Bihani*[281]—the D.C. Circuit found otherwise.[282]

Latif Changes Things

These evidentiary standards may have shifted in the wake of the D.C. Circuit's *Latif* opinion, which granted a presumption of "regularity" to government

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[273] *Id.* at 880.
[274] *Id.* (citations omitted).
[275] *Id.*
[276] *See, e.g.,* Al Odah v. Obama, 648 F. Supp. 2d 1 (D.D.C. Aug. 24, 2009) (disallowing the government's requests for evidentiary presumptions and denying the detainee's petition); Al Kandari v. Obama, 744 F. Supp. 2d 11 (D.D.C. Sept. 15, 2010).
[277] Al Odah v. United States, 611 F.3d 8 (D.C. Cir. June 30, 2010).
[278] Al Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. March 10, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 18 (D.D.C. Dec. 15, 2009).
[279] *Al Adahi*, 692 F. Supp. 2d 85 (granting the detainee's petition where the government's evidence was permitted a presumption of authenticity).
[280] Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Brief for Appellants, *Al Adahi*, 613 F.3d 1102 (outlining arguments on appeal but not discussing authenticity ruling).
[281] *See* Brief for Petitioner at 52, G. Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010) (No. 09-5091).
[282] 268 *See G. Al Bihani*, 590 F.3d at 880–881 (finding, implicitly, that the district court had not adopted such a presumption).

evidence including, most strikingly, to intelligence reports of the type commonly used in habeas proceedings.

While the number and scope of redactions makes the opinion difficult to confidently assess, *Latif* clearly turns on the reliability of a single government intelligence report, which District Court Judge Kennedy found to be unreliable. Nearly all details concerning this report — its author, its subject, and its flaws – are redacted. But the centrality of the report and the fact that it would apparently alone justify Latif's detention were it reliable raises the question of what presumptions, if any, Judge Kennedy should have made concerning its reliability. Specifically, was he right to make no presumption as to the integrity of the document and merely assess its reliability? And if not, would a presumption of reliability in the case of the report be overcome by its flaws?

Judges Brown and Henderson hold that Judge Kennedy was wrong not to afford a presumption of regularity to the preparation of the document. Judge Brown's opinion starts with the assumption that a presumption of regularity supports official acts of public officers in the absence of reason to doubt their regularity.[283] This is true of publicly-produced documents no less than other actions, she argues.[284] So just as a tax document is presumed to accurately report a tax filing, and just as in a normal habeas case, the courts presume regularity in the underlying criminal proceedings, the courts here should presume regularity in the preparation of the intelligence report at issue. The Supreme Court in *Hamdi*, Judge Brown notes, explicitly invited such an approach, writing that the "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."[285] Judge Brown makes clear that she is not suggesting that there should be any "presumption of *truth*. But the presumption of regularity does not require a court to accept the truth of a non-government source's statement."[286] Rather, she writes:

> [I]ntelligence reports involve two distinct actors – the non-government source and the government official who summarizes (or transcribes) the source's statement. The presumption of regularity pertains only to the second: it presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement. There are many conceivable reasons why a government document might accurately record a statement that is itself incredible. A source may be

[283] Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. Oct. 14, 2011).
[284] *Id.*
[285] *Id.* at 749 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004)).
[286] *Id.* at 750.

> shown to have lied, for example, or he may prove his statement was coerced. The presumption of regularity–to the extent it is not rebutted–requires a court to treat the Government's record as accurate; it does not compel a determination that the record establishes what it is offered to prove."[287]

Rather than remanding the case for a determination by Judge Kennedy in the first instance as to whether the presumption has been overcome by the flaws he found, however, Brown proceeded to rule on the point: "[W]e can only uphold the district court's grant of habeas if Latif has rebutted the Government's evidence with more convincing evidence of his own. Viewed together, both [REDACTION] and the other evidence he uses to attack its reliability fail to meet this burden."[288]

Judge Brown's opinion casts this holding narrowly, as an incremental development in the court's treatment of hearsay reliability questions. Yet in dissent, however, Judge Tatel' casts it as a far more radical step. He starts with a different baseline understanding of the presumption of regularity. To him, the presumption of regularity stems from the mundane fact that routine business is normally not fouled up.[289] All the cases applying the presumption, he notes, "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. As a result, courts have no reason to question the output of such processes in any given case absent specific evidence of error."[290] The Report on which this case hinges, he argues, stands in sharp contrast, having been:

> produced in the fog of war by a clandestine method that we know almost nothing about. It is not familiar, transparent, generally understood as reliable, or accessible; nor is it mundane, quotidian data entry akin to state court dockets or tax receipts. Its output, a [REDACTION] intelligence report, was, in this court's own words, "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes."[291]

[287] *Id.*
[288] *Id.* at 755–56.
[289] *Id.* at 771 (Tatel, J., dissenting).
[290] *Id.*
[291] *Id.* at 772 (quoting majority opinion at 748).

Judge Tatel stresses that he is not positing that such material is inherently unreliable, but rather that the court "should refrain from categorically affording it presumptions one way or the other."[292] As he puts it,

> One need imply neither bad faith nor lack of incentive nor ineptitude on the part of government officers to conclude that [REDACTION] compiled in the field by [REDACTION] in a [REDACTION] near an [REDACTION] that contain multiple layers of hearsay, depend on translators of unknown quality, and include cautionary disclaimers that [REDACTION] are prone to significant errors; or at a minimum, that such reports are insufficiently regular, reliable, transparent, or accessible to warrant an automatic presumption of regularity.[293]

For Judge Tatel, the language in *Hamdi* permits the use of a presumption with respect to individual pieces of evidence, but it does not require its use for all intelligence reports. The relevant command from above, for him, is the requirement in *Boumediene* that "habeas review be 'meaningful'"—a command that he sees as jeopardized by the majority's standard, which assumes government evidence valid unless proven otherwise.[294] As Judge Tatel wrote, "I fear that in practice it comes perilously close to suggesting that whatever the government says must be treated as true. In that world, it is hard to see what is left of the Supreme Court's command in Boumediene that habeas review be 'meaningful.'"[295]

At least in conceptual terms, *Latif* could be a game changer. At a minimum, it puts the burden of proof on the detainee challenging a government intelligence report (or, less frequently, on the government when a detainee tries to introduce a government intelligence report) to show that there is some reason *not to credit* the translation, transcription, and summary of a complicated interview. Given the role that these intelligence reports play in the Guantanamo cases, that is a significant change that will likely weaken the hand of detainees in the district court. Previously, when a district judge confronted an intelligence report, the government had to persuade the judge that the report summarized an interview that (a) was accurately translated, (b) was accurately recorded, (c) was accurately summarized, and (d) contained relevant statements that were likely true. In *Latif*, the D.C. Circuit instructed the lower court to simply presume points (a) through (c) in the absence of some reason to doubt them. The government now need take responsibility only for (d).

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[292] *Id.* at 773.
[293] *Id.* at 774.
[294] *Id.* at 779 (quoting Boumediene v. Bush, 553 U.S. 723, 783 (2008)).
[295] *Id.* (citations and internal quotations omitted).

Whether it's as big a change in practice as it is in principle, however, remains to be seen. For one thing, very few cases will turn—as *Latif* apparently does—on the credibility of a single document in circumstances in which that document's credibility, in turn, is doubtful enough that it will stand or fall on the presumptions the court does or does not afford it. Moreover, much will depend in the future on whether the D.C. Circuit, assuming the Supreme Court does not decide to hear *Latif*, reads the case in the future in a narrow or broad fashion. That is, only future cases will tell whether Judge Brown is correct that it is merely an incremental step in the treatment of evidence or whether it is, as Judge Tatel alleges, a change great enough to alter fundamentally the scope of review under *Boumediene*.