Chapter 6 – Detainee Admissions and Hearsay Evidence

In many, if not most, of the habeas cases, the government depends heavily on various kinds of out-of-court statements. Some are contained in documents specifically generated for purposes of the habeas litigation, such as affidavits or declarations from military or government personnel. Others appear in documents generated originally for other purposes, such as reporting and analyzing intelligence. These documents include intelligence community reports that record or summarize information provided by various assets and sources; records and summaries of statements made by detainees during interrogation (Intelligence Information Reports (IIRs) or Summary Interrogation Reports (SIRs)); law-enforcement documents such as those used by the Federal Bureau of Investigation and known as Field Documents (FD-302s) and Form 40s (FM-40s); and transcripts and summaries of statements made by detainees when appearing before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), the administrative panels the Bush administration set up to review detentions. At first, each of these categories of documents presented difficult questions in terms of their admissibility, in addition to concerns over the probative value of the material once admitted. In particular, habeas petitioners argued that the Federal Rules of Evidence ("Federal Rules") should apply in full, but the Circuit has rejected this view and the Supreme Court recently denied *cert.* on the question. The admissibility question seems pretty well settled at this stage—at least at the appellate-court level. Yet while these efforts have produced a jurisprudence that is clear on a few high-altitude principles of law, there remains a great deal of leeway to the district courts to call the shots as to how much weight a particular piece of hearsay will get—a matter on which the different judges differ markedly. This, in turn, leaves some concern that the outcome of any given case might depend a great deal on which district-court judge presides over it.

In ordinary civil or criminal litigation, of course, the rules are quite different from those that govern Guantánamo habeas proceedings. Judges would most likely exclude the evidence described above for a number of reasons. As a threshold matter, the Federal Rules of Evidence require that witnesses have personal knowledge of the facts about which they testify, and that principle applies by extension to the underlying source of a hearsay statement, even if the statement otherwise would have been admissible.[296] The Federal Rules also generally forbid the admission of hearsay statements.[297] And while the rules provide for many exceptions to this bar, hearsay derived from custodial interrogation is unlikely to trigger any of the usual exceptions to the hearsay ban, because the likelihood that a particular interrogator would be unable to testify as

[296] FED. R. EVID. 602.

[297] FED. R. EVID. 802.

to the circumstances surrounding the original statement would be fatal to many attempts to invoke those exceptions.[298] And, of course, in any criminal proceeding the use of out-of-court testimonial statements by persons not now available for cross-examination—such as the ever-growing category of persons who have since been released from detention—would run into the Sixth Amendment's unyielding guarantee of a defendant's right to confront the witnesses against him.

Notwithstanding this backdrop of federal evidentiary rules, the plurality opinion in *Hamdi* explicitly invited the use of hearsay in the context of a habeas proceeding brought by an American citizen held in military custody. Indeed, the plurality recognized that practical exigencies may make hearsay the best evidence available in some circumstances.[299] The plurality in *Hamdi* did not elaborate on the point, however, and the issue received only indirect treatment in *Boumediene*.[300] As a result, the lower courts in the wake of *Boumediene* immediately began fashioning various tests for dealing with hearsay, which often formed the core of the government's case.[301]

The key dispute at this stage concerned the role of reliability in assessing hearsay evidence. Was hearsay admissible only upon satisfaction of a reliability test? Or was all hearsay admissible, with reliability merely impacting the *weight* to be given such evidence? The question split the district judges. In *Al Bihani*, however, the D.C. Circuit resolved it: Hearsay will not be excluded simply because it is hearsay, but courts will be charged with assessing its reliability after formally "admitting" the evidence. This appeared at first to be an important development, suggesting that parties would have more latitude to rely on hearsay. But it turns out to be less important than it initially appeared; admitted hearsay that receives little or no weight proves no more useful to a party than

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[298] A petitioner's own statements would not be considered hearsay. *See* FED. R. EVID. 801(d)(2)(A) (excluding a party's own statements from the definition of hearsay). The interrogation statements of *other* detainees, however, would be considered hearsay subject to Rule 802. The most plausible exception in the interrogation context would be Rule 804(b)(3), which encompasses statements made against a person's civil or criminal interests. But application of that exception in the context of military detention would be unpredictable in light of the inevitable argument that the detainee at the time had competing interests—especially currying favor with interrogators—that would preclude reliance on the usual assumption that a person does not make false inculpatory statements. And in any event, all the Rule 804 exceptions require that the declarant be unavailable to testify in the current proceeding, a condition which may not be satisfied if the detainee remains in U.S. custody.

[299] Hamdi v. Rumsfeld, 542 U.S. 507, 533-534 (2004).

[300] *See* Bostan v. Obama, 662 F. Supp. 2d 1, 6 (D.D.C. Aug .19, 2009) (observing that *Boumediene* "did not address the issue of hearsay at all in that case other than to criticize the effects of its unbridled use by the government" in the CSRTs). In many cases, the chief evidence against a detainee consists of statements by the petitioner himself or of statements by the petitioner and other detainees.

[301] Cases in which the petitioner's own statements formed the core of the government's case include, for example, Al Kandari v. Obama, 744 F. Supp. 2d 11 (D.D.C. Sept. 15, 2010); Al Adahi v. Obama, No. 05-0280 (D.D.C. Aug. 17, 2009) (where the court assessed "statements of Petitioner, as well as statements made by other detainees").

inadmissible hearsay. The inquiry hasn't ended, just moved—and as it turns out, the judges still have very different senses of what sort of hearsay evidence is reliable.

Origins and Evolution of the Reliability Test

The courts' emphasis on reliability did not emerge in a vacuum. Rather, the judges appear to have concluded that the D.C. Circuit's *Parhat* decision required them to pay a great deal of attention to reliability.[302] *Parhat* was not a habeas case; rather, it was the sole decision on the merits by the D.C. Circuit pursuant to the now-defunct system for review of CSRT determinations established by the DTA. In *Parhat*, a unanimous D.C. Circuit panel concluded that the CSRT had had insufficient evidence to justify its determination that certain detainees were lawfully detained.[303] The panel emphasized that its suggestion was not "that hearsay evidence is never reliable—only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability."[304]

Following *Parhat*—usually citing it, in fact—but before *Al Bihani*, a few judges of the district court imposed a generalized prerequisite of reliability when deciding whether to admit hearsay. Judges Hogan, Walton, and Bates all fell into this camp, as evidenced by their early case-management orders or opinions. The case management order crafted by Judge Hogan in November 2008 to govern the majority of the habeas cases, for example, excluded unreliable hearsay explicitly.[305] Under that CMO, hearsay could be admitted at the merits stage *only* upon motion in advance of any merits hearing. The judge would determine if the evidence was "relevant and material" to the lawfulness of petitioner's detention, with the movant bearing the burden of establishing that the evidence was "reliable" and that "the provision of nonhearsay evidence would unduly burden the movant or interfere with government efforts to protect national security."[306] Echoing this perspective, Judge Walton in *Bostan* adopted Judge Hogan's two-pronged approach; anything not admissible under the Federal Rules or 28 U.S.C.

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[302] *See, e.g.* Abdah v. Obama (Uthman), 708 F. Supp. 2d 9, 24-25 (D.D.C. Apr. 21. 2010) (quoting Parhat v. Gates, 532 F.3d 834 (D.C. Cir. June 20, 2008)).

[303] Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. June 20, 2008) (finding that key portions of the government's case turned entirely on assertions of fact made by unidentified sources in four U.S. government intelligence documents and the court's determination that the form of hearsay in that case was insufficiently reliable to be accepted as evidence in support of the government's claims).

[304] *Id.* at 849. Drawing support from unreliable statements, the panel observed, would be to deprive the detainee of a fair opportunity to rebut the government's case, effectively establishing an irrebuttable presumption in favor of the government's evidence. *Id.*

[305] *In re* Guantánamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Nov. 6, 2008).

[306] *Id.*

Sec. 2246 would be admissible only if it satisfied Judge Hogan's test.[307] Judge Walton further observed that "[n]othing in [the] dicta from the plurality's opinion in *Hamdi* remotely suggests that hearsay should be routinely admitted into evidence regardless of the circumstances surrounding a detainee's detention."[308] Judge Walton used the test again in Toffiq Al Bihani's case, and there expanded on what it meant to be reliable.[309] Judge Bates expressly concurred with this approach in his first *Khan* opinion, and, for a while, continued to apply it in his case-management orders in other cases.[310]

Other judges, by contrast, viewed reliability not as a prerequisite for admissibility but rather as a key consideration to be applied in assessing the weight of the evidence. In decisions prior to *Al Bihani*, Judge Leon admitted hearsay as long as it was "relevant and material to the lawfulness of petitioner's detention," and he said that consideration of reliability comes "later."[311] Judge Kollar-Kotelly, for her part, repeatedly stated that the "Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it shall make determinations in the context of the evidence and arguments presented during the Merits Hearing—including any arguments the parties have made concerning the unreliability of hearsay evidence."[312] Judge Robertson treated hearsay in the same manner,[313] as did Judges Kennedy[314] and Kessler.[315]

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[307] Bostan v. Obama, 662 F. Supp. 2d 1, 8 (D.D.C. Aug. 19, 2009) ("government must establish the admissibility of its hearsay evidence by showing (1) that the evidence is admissible "under the Federal Rules of Evidence, as modified by 28 U.S.C. § 2246," or (2) that "the proffered hearsay is reliable *and* . . . that the provision of non-hearsay evidence would unduly burden the government . . . or interfere with the government's ability to protect national security.").

[308] *Id.* at 5-6. In this opinion Judge Walton also elaborated on the meaning of "undue burden," and introduced a four-part test for discerning whether one existed.

[309] T. Al Bihani v. Obama, 662 F. Supp. 2d 9 (Sept. 8, 2009).

[310] *See* Khan v. Obama, No. 08-1101 (D.D.C. Feb. 20, 2009) (in Section II(c) of the case management order, adopting Judge Hogan's two-pronged approach); Moammar Badawi Dokhan v. Obama, No. 08-987 (D.D.C. Mar. 3, 2009) (same).

[311] Boumediene v. Bush, No. 04-1166, Aug. 27, 2008 (adopting the approach in Section II(d)); Boumediene, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (admitting hearsay and stating that the judge will consider its reliability later); Al Alwi v. Bush, No. 05-2223 (D.D.C. Oct. 31, 2008) (doing the same in Section II(d)).

[312] Al Rabiah v. Obama, No. 02-828, slip op. at 5 (D.D.C. Sept. 17, 2009) (citing Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. June 20, 2008)). *See also* Al Odah v. United States, 684 F. Supp. 2d 1, 5 (D.D.C. Aug. 24, 2009) (same); Al Mutairi v. United States, 644 F. Supp. 2d 78, 83 (D.D.C. July 29, 2009) (same).

[313] Khiali-Gul v. Obama, No. 05-877, slip op. at 4 (D.D.C. Apr. 22, 2009) (Robertson, J.) (admitting hearsay into evidence "with the assurance that the Petitioner's arguments [against admissibility would] be considered when assessing the weight of the admitted evidence"); Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. Aug. 12, 2009); Salahi v. Obama, 710 F. Supp 2d 1 (D.D.C. Mar. 22, 2010);

[314] Writing in *Abdah* (Uthman), *Abdah* (Esmail), *Al Harbi* (Mingazov), *Abdah* (Odaini), and *Abdah* (Al Latif) ("the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all the evidence presented to support the parties' arguments").

Judge Urbina, in *Hatim*, expressly chose the prerequisite approach from Judge Hogan's CMO, but he later announced in his merits opinion that he had considered hearsay along with the rest of the government's evidence.[316]

Even before Al Bihani, the distinction between the admissibility of a piece of evidence and the weight afforded it once admitted seemed a trifle academic. Indeed, Judge Walton suggested as much in an interlocutory opinion in Bostan:

> Whether the assessment of a piece of hearsay's evidentiary worth is made at a preliminary hearing on the admissibility of proferred evidence or at the close of merits proceedings after being provisionally admitted into the record, the bottom line is that hearsay of no evidentiary worth will not be considered when the Court makes its factual findings.[317]

This language, along with Judge Kollar-Kotelly's, highlights the fact that the judges in these cases serve both as evidentiary gatekeepers and as factfinders, and that the distinction between excluding and discrediting evidence may as a result be far less important than when a judge keeps material from sight of a jury. This is especially true in light of the way the judges tend to evaluate evidentiary reliability; when they have doubts about reliability, the evidence in question seldom retains any of its value. Rather, the judges treat the question as binary; with few exceptions, they tend to credit the evidence in full or disregard it altogether.[318] This makes the weight inquiry in practice look a great deal like the admissibility inquiry, at least in effect if not in theory.

In any event, the D.C. Circuit's decision in *Al Bihani* resolved this debate in favor of a weight, rather than an admissibility, test. In *Al Bihani*, the petitioner claimed the government's introduction of hearsay violated his right to confront witnesses against him under the Sixth Amendment's Confrontation Clause. The court disagreed, concluding in an opinion written by Judge Janice Rogers Brown not only that did the petitioner not have a Confrontation Clause right but also that he did "not enjoy a right to the psychic value of excluding hearsay."[319] It further held that "whatever right he has is not an independent procedural entitlement. Rather, it operates only to the extent that it provides the baseline

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[315] Ali Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. May 11, 2009), Al Adahi v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009), Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48 (D.D.C. Mar. 10, 2010), and Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010), Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

[316] Hatim v. Obama, 677 F. Supp. 2d 1, 7-10 (D.D.C. Dec. 15, 2009) (noting that hearsay was admitted, with reliability objections to be taken into account in the course of weighing the evidence).

[317] Bostan v. Obama, 662 F. Supp 2d 1, 7 (D.D.C. Aug. 19, 2009).

[318] The small exceptions include Judge Friedman's opinion in Almerfedi v. Obama, 725 F. Supp. 2d 18, 24 (D.D.C. July 8, 2010) (noting that while he did not discount a particular identification altogether, he could not, without more, "be certain" that the detainee's statements referred to the petitioner).

[319] G. Al Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. Jan. 5, 2010).

level of evidentiary reliability necessary for the 'meaningful' habeas proceeding *Boumediene* requires under the Suspension Clause."[320] Considering the petitioner's hearsay challenges, the panel first noted that the petitioner's statements contained in the interrogation reports were not hearsay; rather, they were admissions.[321] Secondly, it observed that the reports' having been translated by an interpreter did not "affect their status."[322] And although the panel agreed with the petitioner that the fact that "the otherwise admissible answers were relayed through an interrogator's account" did introduce a "level of technical hearsay,"[323] it went on to say 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. . . . A procedure that seeks to determine hearsay's reliability instead of its mere admissibility comports not only with the requirements of this novel circumstance, but also with the reality that district judges are experienced and sophisticated fact finders. Their eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries.[324]

The D.C. Circuit wrote that the district court's assessment of the admissions presented by the government as "credible and consistent," and its use of "ample contextual information," was appropriate.[325] The court noted that *Parhat* "did not reject hearsay as inadmissible, but rather deemed it insufficient to support detention because the panel could not 'assess the reliability' of its 'bare assertions' in the absence of contextual information."[326] The dictates of *Parhat* and *Hamdi* are fulfilled, the panel said, as long as the judge, having admitted hearsay, reserves his authority to assess the "sufficiency of the Government's evidence."[327] And, the *Al Bihani* court said, the district judge had done just that: He had expressly reserved his authority to assess the weight of any evidence submitted, and he expressly gave the detainee an opportunity to rebut the government's claims.[328] Because the district court was able to weigh contextual information

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[320] *Id.*

[321] *Id.*

[322] *Id.* at 879.

[323] *Id.* ("Other information, such as a diagram of Al Qaeda's leadership structure, was also hearsay.").

[324] *Id.* at 879-80.

[325] *Id.* at 880. Notably, the district court had opted not to rely on detainee admissions that he later recanted.

[326] *Id.* at 879-80 (quoting *Parhat*, 532 F.3d at 847).

[327] *Id.* at 879 (quoting Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 2271(2008) (internal quotation marks omitted).

[328] *Id.*

appearing in the record and because it was reasonable for the district court to draw inferences from the fact that the petitioner did not "contest the truth" of many of the admissions in the government's proffered hearsay, the district court had not erred.[329]

Later opinions of the D.C. Circuit have followed *Al Bihani*, albeit with ambiguity on a key point that raised a momentary issue for the lower courts. In *Awad*, the D.C. Circuit's second habeas merits decision, the panel discussed the petitioner's claim that the district court had erred by relying upon "unreliable hearsay evidence."[330] The court cited *Al Bihani* and then observed that "hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable"[331]—which was, actually, the opposite of what the panel in *Al Bihani* had said. The next merits opinion, *Barhoumi*, added to the confusion when it wrote that *Awad* "explained that *Al-Bihani* stands for the proposition that 'hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable.'"[332]

In other words, notwithstanding *Al Bihani*'s strong language *rejecting* reliability as a prerequisite for admissibility, these two opinions used language indicating that a reliability assessment was, in fact, a necessary step to be carried out prior to the admission of evidence. Making the matter still more confusing, however, the D.C. Circuit panels in *Awad* and *Barhoumi* actually endorsed the methodologies of Judges Robertson and Collyer, who had admitted all hearsay and evaluated reliability only in determining the hearsay's weight. Moreover, in *Barhoumi* the court wrote that "[a]lthough under *Al-Bihani* and *Awad* hearsay evidence is always admissible in Guantanamo habeas proceedings, such evidence must be accorded weight only in proportion to its reliability."[333] Given the outcomes in the two cases, it seems likely that the language in *Awad* and *Barhoumi* was actually not meant to cloud the precise meaning of *Al Bihani* but was, rather, careless. And, in fact, Judge Walton decided to disregard the *Awad* language in *Sulayman*. He first observed the curious language in *Awad*:

> Unlike *Al-Bihani*, in which the circuit seemingly concluded that the admissibility of the government's hearsay evidence was mandatory . . . , the language used by the circuit in *Awad* appears to suggest that the admissibility of the government's hearsay evidence is conditional on whether the evidence is reliable, as this member of the Court concluded in its June 12, 2009 order.[334]

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[329] *Id.*

[330] Awad v. Obama, 608 F.3d 1, 7 (D.C. Cir. June 2, 2010).

[331] *Id.*

[332] Barhoumi v. Obama, 609 F. 3d 416, 422 (D.C. Cir. 2010).

[333] *Id.* at 427-28.

[334] Sulayman v. Obama, 729 F. Supp. 2d 26, 41 n.9 (D.D.C. July 20, 2010).

But, Judge Walton explained, because *Awad* had also quoted *Al Bihani*'s statement that "hearsay is always admissible" and because "a three-judge panel of the District of Columbia Circuit is "without authority to overturn a decision by a prior panel of [the circuit]," admitting all evidence prior to making reliability determination was the correct approach, even though it meant that Judge Walton's own views had been rejected.[335] The admissibility-versus-weight question thus now seems largely settled, absent future Supreme Court intervention.[336]

The D.C. Circuit has glancingly touched on other issues related to hearsay in subsequent opinions. Most importantly, it has repeatedly emphasized that it reviews the lower courts' view of the weight of the evidence only for "clear error." In *Barhoumi* the court wrote:

> When reviewing for clear error, we may not reverse a trial court's factual findings "even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently. . . . [W]e ask whether, "on the entire evidence," we are "left with the definite and firm conviction that a mistake has been committed."[337]

Thus, far from micromanaging the district court's assessment of a given piece of hearsay, the D.C. Circuit will largely defer on matters of reliability. In *Awad*, for example, the panel rejected the petitioner's complaint that it was error for the district court to discredit documentary hearsay for one purpose but to credit it for another.[338] The same was true in *Al Odah*, where the D.C. Circuit seemed uninterested in second-guessing the district court's evidentiary assessment.[339]

The appellate court will not always defer, however. In the *Barhoumi* decision, the D.C. Circuit found plain, though harmless, error when it addressed the petitioner's argument that certain statements contained in a diary submitted by

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[335] *Id.*

[336] Petition for Writ of Certiorari, Awad v. Obama (No. 10-736) (cert. denied Apr. 4, 2011); Petition for Writ of Certiorari, Al Odah v. Obama, (cert. denied) 79 U.S.L.W. 3567 (Apr. 4, 2011) (No. 10-439).

[337] *Barhoumi*, 609 F.3d at 423 (citations omitted). *See also Awad*, 608 F.3d at 7 ("We review a district court's factual findings for clear error, regardless of whether the factual findings were based on live testimony or, as in this case, documentary evidence.").

[338] *Awad*, 608 F.3d at 8. The petitioner claimed that because the government believed that a detainee's exculpatory statements about his own behavior were incredible, the government could not then urge the court to rely on that same detainee's statements incriminating Awad.

[339] Al Odah v. United States, 611 F.3d 8, 12 (D.C. Cir. June 30, 2010) (citation of district-court opinion omitted). Evaluating the district court's admission of hearsay evidence, the D.C. Circuit observed that the district court permitted the use of hearsay by both parties—not just the government—and had expressly stated that it was considering each piece of evidence for reliability before crediting its claims. That the evidence was hearsay was, the D.C. Circuit said, "of no consequence." The panel noted the district court's observation that the hearsay was "corroborated by 'multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad,'" an assessment the D.C. Circuit's own *Al Bihani* ruling had blessed, and thus was not error. *Id.*

the government lacked sufficient indicia of reliability. The panel disagreed. It wrote that, far from seeming unreliable, statements in the diary demonstrated internal consistency, first-hand knowledge of the diary author's account, and consistency with other, uncontested record evidence.[340] Additionally, the "lengthy and highly detailed descriptions of real-world persons, places, and events tend[ed] to enhance the credibility of the diary as a whole."[341] The petitioner had also challenged the district court's reliance on the diary because, he argued, it contained inconsistencies between it and another diary—thus showing it was unreliable. The D.C. ultimately agreed with the petitioner in part and disagreed in part; it wrote that the district court's conclusion, which was that two diary entries described the same event, was incorrect. But in the D.C. Circuit's estimation, the particular inconsistency did not obviate the corroborative value of the diary completely.[342] Therefore, the D.C. Circuit's disagreement with the district court did not result in an outright reversal of the district court's treatment of evidence, though it does show that clear error review is not a blank check to the district-court judges.[343]

Taken together, the D.C. Circuit's opinions have identified in broad strokes the rules regarding hearsay. They are, first, that hearsay is always admissible; second, that it should only be credited to the extent it is reliable; and third, that an appeals court should defer to the district judges on matters of reliability except where those judgments are plainly wrong. But while these principles seem coherent and reasonable, they also have the paradoxical effect of ensuring that similar cases will be treated differently. The lower court judges differ significantly on what constitutes reliability; an appellate posture of deferring to them all guarantees a measure of differential justice depending on whose courtroom a detainee finds himself inside.

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[340] *Barhoumi*, 609 F.3d at 428-29. The court discussed the indicia of reliability, including that Barhoumi's own admissions were consistent with the government's claim that the diary was picked up from a guesthouse, and that characteristics of the statements themselves "reduce[d] any concern that the diary is a government fabrication." The court wrote: the diary "itself suggest[d] that al-Suri possessed first-hand knowledge of Zubaydah and his organization." *Id.* at 429. It was not problematic that the diary's author, al-Suri, was not known personally to the government. Even the fact that the government presented the contents of the diary in an intelligence report (rather than offering the diary itself) did not bother the court: "[T]he al-Suri diary is contained in an intelligence report, it represents a discrete piece of physical evidence, and the nature and reliability of that evidence is not altered just because it bears the label 'intelligence.'" *Id.*

[341] *Id.*

[342] *Id.* at 428-429.

[343] *Id.* at 430 (agreeing with Barhoumi "that three weeks is too large a mismatch to support the district court's conclusion that the diary entries depict the same event," but went on to explain that "[o]nly the al-Suri diary refers to Barhoumi as arriving from Tora Bora, and [the other diary] contains nothing that contradicts that account.").

Hearsay Assessment in Practice

Hearsay takes many forms. Most often, the government seeks to introduce statements obtained from detainees in interrogation. These statements might have been given by the petitioner himself or by another detainee about the petitioner.[344] The use of these statements raises two clusters of concerns. First, detainees frequently allege that their own inculpatory statements—or those of other detainees—were the product of torture or coercion and hence are definitionally unreliable.[345] In that setting, the hearsay analysis becomes inextricably intertwined with coercion concerns. We treat the coercion issue in detail in a separate section concerning voluntariness. For now, we concentrate on the second set of major issues raised by the use of detainee statements: What constitutes reliability in hearsay or, put another way, when should a court rely in whole or in part on hearsay evidence to conclude that the government has met its burden? On these questions, the judges have developed some high-altitude common ground, while considerable differences emerge on close inspection.

Compounding the diversity between the judges is the difficulty inherent in comparing different judges' handling of hearsay evidence in practice. Unlike the judges' discussions of points of law, where they have tended to explain their reasoning in depth, their assessments of the credibility and reliability of evidence involve a lot of instinct and impression. Indeed, as in other areas of Guantánamo habeas law, occasionally even their terminology varies; Judge Walton seems to use "accurate" as a synonym for "reliable," where Judge Leon, for example, does not.[346] A given judge will not generally consider the way a different judge would have handled a piece of evidence that may or may not be similar to the one before her in a given case. She will simply make a decision concerning whether the item's reliability satisfies her and act upon that decision—often without reference to anyone else. The result is that the areas of agreement and disagreement between the judges are generally not explicit. And while it is clear that some judges are more comfortable relying on hearsay than others are, it is generally difficult to map one judge's standards of reliability onto any other judge's.

Judge Walton is unique among the judges in having attempted to distill a

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[344] This type of evidence should be distinguished from other types of detainee statements that might be introduced to support or rebut ancillary issues in the litigation, such as purported abuse. *See, e.g.* Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 35-36 (D.D.C. Apr. 8, 2010) (discussing detainee admissions in the context of ascertaining the credibility of torture allegations.).

[345] *See* Mohammed v. Obama, 689 F. Supp. 2d 38, 62 (D.D.C. Nov. 19, 2009) ("[R]esort to coercive tactics by an interrogator renders the information less likely to be true.").

[346] *Compare* T. Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010) (explaining that reliability should be shown through proof that the information is generally "accurate") *with* Judge Leon's language in Al Warafi v. Obama, 704 F. Supp. 2d 32, 39-40 (D.D.C. Mar. 24, 2010) (explaining that while there was "no dispute that [the] documents [were] accurate," they were only reliable "in part.").

coherent legal test for hearsay's admissibility, and in having converted that test from a test of admissibility in his early opinions into a post-*Al Bihani* test regarding weight.[347] In his *Sulayman* opinion, Judge Walton ultimately concluded that the D.C. Circuit's *Al Bihani* decision did away with his "reliability test" as to admissibility, though he still found that the test remained "illuminating for the purpose of determining the probative value of each piece of hearsay evidence."[348] While the issues his test tries to address appear to one degree or another in all of his colleagues' work, no other judge has followed him explicitly. The clearest way to illustrate the diversity of practice on the district court today, then, is to start with Judge Walton's test and then show how the other judges are accounting for the concerns it reflects.

In *Sulayman*, Judge Walton wrote that, for each hearsay statement on which the government seeks to rely that does not meet the requirements of the Federal Rules or 28 U.S.C. Sec. 2246, the government must:

> [E]stablish the reliability of those statements by making the following showing: (1) that with regards to the specific statements that the government seeks to rely upon, those statements "were made under circumstances that render them intrinsically reliable or were made by reliable sources"; (2) that "with respect to statements crucial to the government's case, that it would be unduly burdensome to call the sources as witnesses or provide declarations under oath in lieu of live testimony"; (3) "that the statements purportedly made by these sources were interpreted by a reliable interpreter," e.g., "an interpreter who works for the FBI or who has an ILR score of at least 3 in English," unless

[347] In his 2009 opinion in *Bostan*, Judge Walton rejected the suggestion that he review the government's hearsay in "context" before determining its admissibility, but clarified that this was not tantamount to a judgment that the government's proffered hearsay government must have "intrinsic indicia of reliability" to be admitted into evidence; he said *independently reliable* evidence could be used as corroboration. He also wrote that "the more significant a fact the government seeks to establish through the use of hearsay is, the heavier its burden will [have to] be to justify the Court's consideration of hearsay as a substitute for its non-hearsay alternative." Bostan v. Obama, 662 F. Supp. 2d 1, 4, 8 (D.D.C. Aug. 19, 2009). Later in *T. Al Bihani*, Judge Walton considered a petitioner's concern with statements attributed to him as reported or interpreted by unidentified interrogators or interpreters, and wrote that "hearsay information contained in the regularly prepared intelligence reports that are relied upon in these cases should be deemed sufficiently reliable to be admitted, unless sufficient credible evidence at the merits hearing establishes that the information is unreliable." T. Al Bihani v. Obama, 662 F. Supp. 2d 9, 12 (D.D.C. Sept. 8 2009). In a subsequent opinion *Bostan*, he relied on his *T. Al Bihani* opinion and wrote: "[S]tatements made by other detainees cannot be admitted into evidence merely because they are 'detailed,' or because they are corroborated by other evidence. Rather, the government must establish either that specific statements were produced under circumstances that guarantee their trustworthiness, or 'that independently admissible evidence can be used to assess whether the *source* of a particular statement is sufficiently reliable in general to permit the admission of any statements by that source into evidence.'" Bostan v. Obama, 674 F. Supp. 2d 9, 19 (D.D.C. Oct. 23, 2009) (quoting *T. Al Bihani*, 662 F. Supp. 2d at 17-20) (citations omitted).

[348] *Sulayman*, 729 F. Supp. 2d at 41.

> the statement being interpreted is one "that a person with an ILR score of 2+ would reasonably be able to understand and articulate in English"; and (4) "that the interpreted statements were recorded by the interrogator in a manner that is reliable," and that in cases involving statements crucial to the government's case, such a showing be made by the interrogator's live testimony, the submission of "a declaration or affidavit approximating such testimony," or, "as a last resort, . . . a global affidavit describing the process used by interrogators," unless the government can show that it would be an undue burden to comply with this requirement.[349]

He then admonished: "If the government cannot meet at least one of these four requirements with respect to each document that it seeks to rely upon in justifying the petitioner's detention, then the Court will not ascribe any probative weight to that evidence absent compelling reasons to the contrary."[350]

None of the other judges has followed Judge Walton's test—which itself lacks details about the meaning of certain terms like "intrinsically reliable" or "reliable sources." And while Judge Kessler in an early case did explain that she looked to a "list of factors that any neutral fact-finder must consider such as: consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of declarant about the matters testified to, levels of hearsay, recantations, etc," she was careful to note that this list was "non-exclusive."[351] Absent a clear test for reliability, then, it is unsurprising that what is important to a judge in one courtroom may not be of import to another judge sitting down the hall.

Petitioner Admissions

One area of convergence among the judges involves the habeas petitioners' own inculpatory statements, which they often eventually recant. These recantations (whether they be in live testimony or a written declaration or affidavit) leave the courts, as Judge Leon put it, "posed with the novel dilemma of choosing between two diametrically opposed accounts by petitioner[s]."[352] To be sure, such statements, when introduced by the government, do not constitute hearsay

[349] *Id.* at 41-42.

[350] *Id.* at 42.

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

[352] G. Al Bihani v. Obama, 594 F. Supp. 2d 35, 39 (D.D.C. 2009). *See also* Sulayman v. Obama, 729 F. Supp. 2d 26, 42 (D.D.C. July 20, 2010) (discussing "a declaration or affidavit" as "approximating" live testimony).

under the Federal Rules.[353] Yet while a statement itself made by the petitioner is an admission, the statement might pass through one or two levels of hearsay: that of the interpreter's translation of the statement into English, which the D.C. Circuit has called "technical" hearsay,[354] and that of the interrogator's recorded memorial of the translated exchange between himself and the detainee.[355] Interrogation records that have been kept in the normal course of business are not necessarily automatically credited in their entirety, but some judges have ruled that their similarity to business records is a factor that the court will consider in favor of their accuracy.[356]

In many cases, the petitioner does not contest the underlying facts in his own prior statements, such as patterns of travel or concessions that he performed certain acts; he challenges instead the inferences that the court should draw from those facts.[357] In these instances, judges predictably tend to credit the earlier statements. In such cases, we should not expect to see—and do not actually see—

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[353] G. Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010) ("We first note that Al-Bihani's interrogation answers themselves were not hearsay; they were instead party-opponent admissions that would have been admitted in any U.S. court."). *See also Sulayman*, 729 F. Supp. 2d at 37 ("With regards to the first level of potential hearsay—the statements of the source—the Court observed that 'insofar as the petitioner's own statements are concerned, this is a non issue,' as those statements are considered 'party admissions' that are admissible under the Federal Rules of Evidence.") (Walton, J.); Al Kandari v. United States, 744 F. Supp. 2d 11, 24 n.14 (D.D.C. Sept. 15, 2010) ("It is of course settled that Al Kandari's 'interrogation answers themselves [are] not hearsay; they [are] instead party-opponent admissions that would [be] admi[ssible] in any U.S. Court.'"). Both district judges quoted *Al Bihani*.

[354] In *Al Bihani*, the D.C. Circuit was careful to note that a translation does introduce a level of "technical" hearsay, but held that the fact a statement is translated does not affect its admissibility status. 590 F.3d 866, 879 (D.C. Cir. Jan. 5, 2010) ("That they were translated does not affect their [non-hearsay] status."). *See also* Barhoumi v. Obama, 609 F3d 416 (D.C. Cir. June 11, 2010) (holding that "the additional layer of hearsay added by the diary's translation renders it somewhat less reliable than it otherwise would be (particularly if the government had provided information regarding its translation)," but rejecting petitioner's contention that the district court clearly erred in relying on the diary).

[355] Sulayman v. Obama, 729 F. Supp. 2d 26, 45 (D.D.C. July 20, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 10 (D.D.C. Dec. 15, 2009); Alsabri v. Obama, No. 06-1767, slip op. at 9, 12 (D.D.C. Feb. 3, 2011) (noting that nothing about the purported translation or transcription errors called into question the "inherent reliability of the reports").

[356] *See, e.g.* Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. May 11, 2009) ("Petitioner's counsel in discovery, have all been maintained in the ordinary course of business, the Court will presume, pursuant to Fed.R.Evid. 803(6), that its documents are authentic."); *Alsabri*, slip op. at 12 *(*"fact that these reports were prepared by government agents in the course of their normal intelligence gathering duties provides a degree of support for their reliability").

[357] For example, in *Salahi*, Salahi admitted having said that he wanted to "work a little bit," but disclaimed the inference proposed by the government that "work" meant working for Al Qaeda. 710 F. Supp 2d 1, 10 (D.D.C. Mar. 22, 2010). And in *Abdah v. Obama* (Esmail), 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010), the government claimed that Esmail's training at Al Farouq tended to show he was a member of Al Qaeda; and Esmail did not dispute his prior admission of receiving training there, but rather "offer[ed] reasons that his participation in training courses do not prove that he was part of Al Qaeda."). *See also* Al Adahi v. Obama, No. 05-0280, slip op. at 21 (D.D.C. Aug. 17, 2009) (noting that petitioner admitted to having attended Al Farouq training camp).

judges prodding the government to provide corroboration for the statement itself. Rather, the toughest argument for the government is not about whether the underlying fact is true but about what sort of significance it has under the relevant legal standard.

In the courts' treatment of *contested* petitioner admissions, by contrast, judges must choose between competing factual assertions that derive from the same source, albeit at different times and under arguably different circumstances. Generally, the courts seem to credit prior inculpatory admissions unless the petitioner presents a good reason not to, and a petitioner's simple claim that the government's account is wrong is typically not good enough to convince a court to discount a statement.[358] Something that rises above a generalized claim that the court should doubt a statement's accuracy, however, does give the courts pause in their credulousness of the government's allegations. The courts are particularly attuned to situations in which the government may be seeking to have its cake and eat it too. For example, in *Anam*, Judge Hogan declined to credit inculpatory statements made in interrogation reports in which the petitioner's reliability had been repeatedly described by U.S. government officials as "having 'not been determined.'"[359] Similarly, in *Al Rabiah*, Judge Kollar-Kotelly declined to credit a prior admission where it was clear from the documents that government interrogators themselves expressed doubts about the admission's reliability.[360]

Where the inconsistencies lie mainly as between a set of inculpatory admissions and later exculpatory recantations or within a set of inculpatory admissions, the judges tend to find some reason to satisfy themselves that one set or another is more credible. For example, in *Al Kandari*, Judge Kollar-Kotelly assessed two sets of conflicting petitioner statements. She did not even look beyond the statements themselves to come to a conclusion regarding which set of statements was more credible. She simply noted that the statement denying the relevant government allegation was "made without further explanation," and was thus not credible, and that the detainee's inculpatory statement, by contrast, was "consistently admitted" across several interrogations.[361] She thus credited the inculpatory admission. In *Mohammed*, Judge Kessler took a subtly different approach.[362] In that case, Judge Kessler observed that there were inconsistencies between the petitioner's early interrogation statements and a later declaration he had submitted for the habeas litigation. Comparing the relative credibility of the two sets of statements, she noted first that the "declaration [did] not explain"

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[358] G. Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. Jan. 28, 2009); Al Odah, (Kollar-Kotelly, J., finding that the government's account was more persuasive); Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. July 29, 2009) (same).

[359] Anam v. Obama v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 9 (D.D.C. Jan. 6, 2010).

[360] Al Rabiah v. Obama, 658 F. Supp. 2d 11 (D.D.C. Sept. 17, 2009).

[361] Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010).

[362] Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

details in the earlier interrogation statements. But, she continued, statements of a third party confirmed the government's account, and she thus credited the earlier, inculpatory admissions. Judge Kessler effectively sought out corroboration for the earlier admission.

Corroboration

The subtle distance between Judge Kessler and Judge Kollar-Kotelly in these two opinions reveals the importance of corroborating evidence in the context of contested petitioner admissions. While Judge Kessler did not say that the corroboration she found in *Mohammed* was necessary to her decision, she gave the distinct impression that it likely was very helpful in that case.[363] *Mohammed* draws attention to another trend: Judges seem particularly amenable to crediting *corroborated* prior admissions, though it is not clear that corroboration is a necessary condition for reliability in such cases. Judge Bates, for example, held in his *Khan* decision that materials outside the "four corners" of a statement that was itself of questionable reliability could corroborate that statement and render it reliable.[364] Judge Lamberth in *Al Warafi* similarly credited interrogation reports containing admissions over later, contrasting recantations because the government had provided corroboration; in his words, the government had "demonstrated the accuracy of the interrogation summaries and reports by including the original notes of the interrogators."[365] And in Esmail's case, Judge Kennedy seemed to believe corroboration from another detainee's account was important when he decided to credit the prior admission over a subsequent declaration.[366] Conversely, the government's lack of adequate corroborating evidence was definitely a factor in *Abdah* (Al Latif), when Judge Kennedy decided to credit the petitioner's subsequent recantation over a prior interrogation report.[367] Judge Robertson made similar rulings in both directions in *Khalifh*.[368] Put simply, the judges are more confident crediting corroborated petitioner admissions that pass through levels of "technical" hearsay, but they have never said that corroboration is strictly required.

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[363] *Id.* at 54-55

[364] Khan v. Obama, 741 F. Supp. 2d 1, 17 (D.D.C. Sept. 3, 2010).

[365] Al Warafi v. Obama, 704 F. Supp. 2d 32, 39 (D.D.C. Mar. 24, 2010). Judge Lamberth does not elaborate on what about the underlying notes adds to the accuracy of the reports, but seems to suggest later that they lend corroborative value when considered with the interrogation summary and interrogation reports: "Petitioner's recent denials of his statements in the interrogation reports do not outweigh his previous consistent admissions." *Id.* at 41.

[366] Abdah v. Obama (Esmail), 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010).

[367] No. 04-1254, slip op. at 40-41 (D.D.C. Aug. 16, 2010).

[368] No. 05-1189, slip op. at 11, 15 (D.D.C. May 28, 2010) (Robertson, J., finding "independent corroboration" for the petitioner's statement regarding how he lost his leg, and later noting that the fact the government had "presented no corroboration" among several reasons he doubted a purported petitioner confession about having been at Taloqan and Tora Bora).

Third-Party Statements

Perhaps unsurprisingly, the courts seem to display more trepidation—and more diversity of practice—when it comes to the statements of third-party declarants. These declarants are generally other detainees who may or may not still be in U.S. custody and thus may or may not be available for testimony during the habeas proceeding. At the most basic level, the judges now all seem to begin from the standpoint that a statement is not unreliable simply because it is hearsay. They also all seem to acknowledge that statements from third-party declarants present reliability problems greater than those presented by admissions by the petitioners themselves. As a result, some judges have displayed a reluctance to consider third-party statements when doing so is not necessary to resolve a detainee's status; where it is possible for them to resolve a case based on the petitioner's own admissions (even contested admissions) and other non-hearsay evidence, they do.[369] But when they must consider third-party hearsay, the judges are receptive to arguments about the reliability of the statements and they give the arguments fulsome treatment in their merits opinions. They do generally seem to prefer hearsay statements to have some type of corroboration, and seem to require it if the petitioner plausibly challenges the statement's credibility. They do not necessarily agree, however, regarding the quantity or quality of corroboration that will suffice to back up a contested piece of hearsay evidence. The D.C. Circuit has given only limited—and largely deferential—guidance on how courts should treat third-party statements.

Judge Kessler's opinions have represented one end of the spectrum in their approach to hearsay. She seems to employ something of a hair trigger in rejecting the government's hearsay evidence as flawed, discarding government evidence liberally in situations in which detainees present even *possible* reasons to doubt reliability and almost beginning her assessment of statements from a position of skepticism. As she wrote in *Ali Ahmed*, the government's evidence was not entitled to a presumption of accuracy because the statements contained second-level hearsay, had been alleged to have been obtained by torture, and did not "purport[] to be a verbatim account of what was said."[370] She then rejected a

[369] Judge Leon observed in one of his early opinions, for example, that courts should only undertake assessments of other detainees' statements when the court "has no other choice." Al Alwi v. Bush, 593 F. Supp. 2d 24, 29 (D.D.C. Dec. 30, 2008). *See also* Mohammed v. Obama, 689 F. Supp. 2d 38, 53 n.15 (D.D.C. Nov. 19, 2009) ("The Government has provided sufficient evidence on this point even without the contested statements made by Binyam Mohamed. Because his testimony is not necessary to prove the factual allegations regarding guesthouses, the Court will not address Petitioner's objections to his testimony in this section."); Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010) (observing that the court could not make a decision regarding which account regarding a statement concerning the petitioner's passport was accurate, but stating that, because the presence or absence of the passport at the time of detention was "not material" to the court's decision). *Id.* at 91-92.

[370] Ali Ahmed v. Obama, 613 F. Supp. 2d 51-56, 59 (D.D.C. May 11, 2009). When assessing four particular statements, Judge Kessler noted that one of the detainee statements was made by the same detainee whose testimony Judge Leon rejected in *El Gharani*—and Judge Kessler agreed with

number of the statements, and not only those of a detainee who had a documented history of mental health problems,[371] or of a detainee whom Judge Leon had deemed unreliable in a different case,[372] but also statements of a detainee whose statements she characterized as "cursory and equivocal."[373] In that instance, she wrote, the fact that the statements were "in and of themselves . . . equivocal and lacking in detail or description" was "most important[]."[374]

In *Al Adahi*, where the government's evidence included "classified intelligence and interview reports" and statements of the petitioner and other detainees, Judge Kessler credited the other detainees' statements in the reports only to the extent the petitioner did not contest them.[375] While she accepted, for example, that the detainee stayed in a guest house for one night—a fact that the petitioner had admitted repeatedly—she decided not to credit the other detainees' statements, which she described as "vague and uncorroborated."[376] Indeed, because the third-party statements she did credit contained facts identical to statements the detainee himself had made, it is hard to discern whether she primarily credited the third-party hearsay itself or whether that evidence was in fact superfluous corroborative evidence of facts that were actually "proven" by the detainee's own admissions. For Judge Kessler, it seems, a petitioner needs to raise a legitimate doubt about a piece of government evidence for her to discount it, but raising that doubt is not hard.

Other judges seem less eager to toss out hearsay as unreliable—to the point that they seem to have been persuaded by government arguments, made early in the habeas litigation, that a court should not discount hearsay unless the petitioner presents affirmative evidence that the statement is unreliable, rather

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Judge Leon's skeptical assessment of him. A second witness, she ruled, gave statements that were "equivocal and lacking in detail or description" and "riddled . . . with equivocation and speculation," while a third gave inconsistent statements, had a history of mental health problems, and may have faced torture. The fourth apparently also had credibility problems, though redactions in the opinion make it impossible to discern what they were. *Id.* at 57-58. She noted among a particular statement's infirmities that it did "not purport to be based on [redacted] direct observations. It is simply a declarative statement that [redacted] trained at some point, without any information as to how [redacted] knew that." ("Even more troubling is the fact that, in later interrogations, when [redacted] was asked to list the names of those he trained with, he did *not* include the Petitioner."). *Id.* at 61. Ultimately Judge Kessler granted the petition.

[371] *Id.* at 58 (describing his mental health problems and "inconsistent identifications.").

[372] *Id.* at 56-57 (noting that "[a]lthough the Government tries to establish the credibility of [redacted] statements and distinguish *this* case from Gharani [redacted] statements cannot be credited").

[373] *Id.* at 58-59.

[374] *Id.*

[375] Al Adahi v. Obama, No. 05-0280 (D.D.C. Aug. 17, 2009).

[376] *Al Adahi*, slip op. at 27 (noting her distrust of a detainee's "vague and uncorroborated" statements and declining to credit the proffered hearsay).

than just a claim to that effect.[377] For these judges, the rule that a statement is reliable in the absence of a good reason to doubt it does not translate into an especially tough slog for the government, because their sense of a "good reason" is more demanding than that of their colleagues. This is true particularly where the statement exhibits some internal features suggesting reliability. In *Rezak Ali*, for example, Judge Leon considered hearsay to assess a contested claim that the petitioner stayed at a particular guesthouse and had participated in one of Abu Zubaydah's various training programs while he was there. He characterized the statements of "fellow guesthouse dwellers" as "credible" without explaining what exactly about them made them so. He thus implied that on their face they were believable even though the petitioner challenged their accuracy.[378] He also described the evidence behind claims that the petitioner had been with Abu Zubaydah's force in various places in Afghanistan as "credible."[379] He made note of a photo-based identification, the particularity of the detainee's recollection, as well as corroboration of the statements in a diary. And when discussing evidence about whether the government had shown that the petitioner had ties to Abu Zubaydah's Al Qaeda-associated force, he described third-party statements, in combination with corroborating evidence, as "*more than* enough credible evidence," implying that the third-party statements might have even been sufficiently reliable without the corroboration.[380] Judge Kollar-Kotelly's opinion in *Al Kandari* and Judge Kennedy's opinion in *Abdah* (Esmail) also stand in some degree of contrast to Judge Kessler's approach.[381]

Corroboration

The notion that a statement will be considered reliable in the absence of a professed reason to doubt its reliability has another nuance: Where a statement exhibits flaws that rise to a certain level of gravity, nearly all of the judges will acknowledge their skepticism about its reliability but they will then entertain arguments that the statement can be rehabilitated by some form of corroboration. As stated above, however, the judges do not necessarily agree about how much or what type of corroboration the government must present to back up a contested piece of hearsay evidence.

Several judges have found arguments about corroboration persuasive when

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[377] *See*, *e.g.* T. Al Bihani v. Obama, No. 05-2386 (D.D.C. Sept. 22, 2010) (recounting the government argument that "hearsay information contained in the regularly prepared intelligence reports . . . should be deemed sufficiently reliable to be admitted, unless sufficient credible evidence . . . establishes that the information is unreliable").

[378] Razak Ali v. Obama, No. 10-1020, slip op. at 12 (D.D.C. Jan. 11, 2011) .

[379] *Id.* at 13.

[380] *Id.* at 13 (emphasis added).

[381] Al Kandari v. Obama, 744 F. Supp. 2d 11, 58 (D.D.C. Sept. 15, 2010); Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 37 n. 16 (D.D.C. Apr. 8, 2010) ("that an SIR lacks certain details does not make the information it does include inaccurate").

considering the reliability of otherwise unreliable material. For example, Judge Bates in *Khan* found that "raw" intelligence reports were "amply corroborated by . . . reliable evidence," and he later concluded that "reliable" evidence served sufficiently to corroborate reports from an "unnamed Afghan government official" that he could credit those reports.[382] Judge Kessler also seemed to look for corroboration where evidence was of doubtful quality in *Al Adahi*.[383] Though she found none and noted that corroboration was lacking, she implied that if the government *had* been able to provide some corroboration, she might have found in its favor on that issue. In *Awad*, Judge Robertson considered allegations supported by statements in various pieces of documentary evidence, as well as statements of other detainees. He went so far as to chart out the overlap between the facts alleged in each of the pieces of evidence and found that the mutual corroboration was "too great to be mere coincidence."[384] He thus credited the government's claim, and ultimately ruled in its favor as well. The D.C. Circuit upheld Judge Robertson's reading, explaining that that it was not error for to have discredited documentary hearsay for one purpose but credited it for another.[385]

But the premise that corroborating evidence can convert otherwise unreliable evidence into reliable support has a significant dissenter; Judge Walton has explicitly disagreed with this interpretation.[386] He wrote in *Bostan* that

> the use of otherwise reliable corroborating evidence as a means to assess the reliability of otherwise unreliable hearsay is ultimately misguided, as its ultimate effect is only to possibly mislead the factfinder (in this case,

[382] Khan v. Obama, 741 F. Supp. 2d 1, 8 (D.D.C. Sept. 3, 2010), citing Khan v. Obama, 646 F. Supp. 2d 6, 17 (D.D.C. Aug. 18 2009) (concluding that Khan's HIG activities during the Soviet invasion were "amply corroborated by . . . reliable evidence" and later finding that the "reliable information" of one individual "corroborate[d] the reliability of the same information provided by [REDACTED] and the unnamed Afghan government official."). That the government put information in subsequent declarations did not alone suffice to convince Judge Bates to credit otherwise unreliable statements. In *Khan*, the detainee challenged the declarations themselves. Judge Bates's credulity is a function of the fact that the contents of the declarations, when closely scrutinized, convinced him that the government's evidence is not only what the government claimed it to be, but was also as reliable as the government claimed it to be.

[383] Judge Kessler stated that a "vague and uncorroborated" statement of another detainee was insufficient evidence to credit a statement the government alleged revealed a meeting with Al Adahi at an "unnamed Kandahar guesthouse." Al Adahi, No. 05-0280, slip op. at 20 (D.D.C. Aug. 17, 2009).

[384] Awad v. Obama, 646 F. Supp. 2d 20, 27 (D.D.C. Aug. 12, 2009).

[385] *Awad at* 8. The petitioner claimed that because the government believed Al Joudi's exculpatory statements about his own behavior were incredible, the government could not then urge the court to rely on Al Joudi's statements incriminating Awad.

[386] Bostan v. Obama, 674 F. Supp. 2d 9, 25 (D.D.C. 2009) ("This member of the Court respectfully disagrees with Judge Bates insofar as he suggests that hearsay can be deemed reliable if it is "corroborated by otherwise reliable evidence.").

the Court) into thinking that the weight of the government's evidence is greater than it actually is.[387]

Complicating the issue further is the fact that not all corroborating evidence carries equal weight in the different courtrooms, and the judges have given different indicators about what types of details tend to shore up hearsay statements that might otherwise be of dubious value. In *Almerfedi*, for example, Judge Friedman wrote that he would have had more confidence in the reliability of the statements contained in an IIR "if there was any evidence in the record to corroborate them."[388] Yet the quality of corroborating evidence was important to Judge Friedman as well; he required something more than mere "snippets" of "circumstantial" evidence.[389] When Judge Leon discussed the sufficiency of corroboration in *Obaydullah*, he wrote that "what matter[ed]" in the case was "that the automobile found in the petitioner's compound that night contained the residue of dried blood, a fact that is consistent with the pre-raid intelligence claim that petitioner was seen using a vehicle to ferry wounded individuals to a local hospital, once again corroborating the government's intelligence."[390] It is impossible to know whether Judge Friedman would have considered the dried blood in the *Obaydullah* automobile merely "circumstantial" or whether Judge Leon would have been as unpersuaded as was Judge Friedman of the "snippets" the latter confronted.

The importance of corroboration is nowhere as easy to spot as in cases where, with corroboration lacking, the court opts *not* to credit the claim in question. Judge Leon's decision in *El Gharani* provides just such an illustration. In that case, Judge Leon observed that one of the statements of a detainee was "plagued with internal inconsistencies," and he wrote that in the absence of corroborating evidence, the court could not rely on the allegation.[391] Similarly, in *Al Mutairi*, Judge Kollar-Kotelly assessed a set of statements that contained inconsistencies across one another, and she declined to credit the statements absent corroboration.[392] Although it is difficult to discern in both of these cases whether the inconsistencies themselves were the pivotal factors leading the courts to

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[387] *Id.* This language may indicate that Judge Walton judges the utility of corroborating evidence from it perfectly overlaps with evidence that was perfectly overlapping in scope.

[388] Almerfedi v. Obama, 725 F. Supp. 2d 18, 25 (D.D.C. July 8, 2010) (emphasis added).

[389] *Id.* at 27-28 ("these snippets of circumstantial or 'corroborating' evidence add little to the government's unreliable direct evidence that petitioner stayed in Tehran guesthouses in 2002, or, indeed, at any time.")

[390] Obaydullah v. Obama, 744 F. Supp. 2d 344, 351 (D.D.C. Oct. 19, 2010).

[391] El Gharani v. Bush, 593 F. Supp. 2d 144, 147-149 (D.D.C. 2009) (deciding, in a case in which the government's evidence consisted "principally of . . . statements made by two other detainees while incarcerated at Guantánamo Bay," not to "accredit [the] allegation").

[392] 644 F. Supp. 2d 78, n.12 (D.D.C. July 29, 2009). *See also* Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 58 (D.D.C. May 11, 2009) (describing "inconsistent identifications" and declining, based on the inconsistency and other deficiencies, to credit the statements).

disregard the statement, [393] it seems obvious that corroboration is crucial where inconsistency is an issue; otherwise, the court has very little in the way of tools for choosing between the two opposing claims.

The D.C. Circuit has made very few rulings concerning corroboration. The appeals court upheld Judge Robertson's analysis of the corroborating evidence in *Awad*, noting that the district court had "considered the circumstances of the document, and weighted it accordingly."[394] It also affirmed the district judges' use of corroborating evidence in *Al Odah* and *Barhoumi*.[395] But the D.C. Circuit has not always deferred to the district judges' analysis of evidence offered as corroboration. In particular, its opinion in *Bensayah* and its review of Judge Leon's assessment in that case stands in contrast to the breezy approval it gave to Judge Robertson's treatment in *Awad*.[396] In fact, in *Bensayah*, the court made an important statement about the relationship between reliability and corroborative evidence as it barred the use of an exhibit that the district court had found both reliable and corroborative of other evidence in the record. Judge Ginsburg, writing for the panel, first noted that raw hearsay evidence was not categorically inadmissible.[397] Rather, he wrote, in determining whether a particular piece of evidence should be admitted against the petitioner, credibility will be a function of the sufficiency of the corroborating evidence the government offers. The court wrote:

> The only direct evidence the Government offered in support of its contentions about Bensayah was contained in a classified document [REDACTED] from an unnamed source and in certain other pieces of evidence it claimed corroborated that document. . . . We disagree with Bensayah's broad contention that two pieces of evidence, each unreliable when viewed alone, cannot ever corroborate each other. We agree, however, with his alternative argument that even if the additional evidence relied upon by the district court in this case is itself reliable, it is

[393] *El Gharani,* 593 F. Supp. at 147-48 (noting that some statements were facially problematic because the documents containing the inculpatory statements revealed that the government itself doubted the credibility of the interrogation subjects). *Ali Ahmed* 613 F. Supp. at 58 (Kessler, J. taking note of flaws in the statements beyond their inconsistencies such as that the individual who made the statements had a "background of mental health problems.").

[394] 608 F.3d 1 (D.C. Cir. June 2, 2010).

[395] Al Odah v. United States, 611 F.3d 8, 12 (D.C. Cir. June 30, 2010) (finding no abuse of discretion in the district court's determination that the government's proffered hearsay had been "corroborated by 'multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad'"); Barhoumi v. Obama, 609 F.3d 416, 429 (D.C. Cir. June 11, 2010) (upholding the district court's view that "an intelligence report's reliability can be assessed by comparison to 'exogenous information.'") (quoting Parhat v. Gates, 532 F.3d 834, 848 (D.C. Cir. June 20, 2008)).

[396] 610 F.3d 718 (D.C. Cir. June 28, 2010).

[397] *See id.* at 725-726.

not sufficiently corroborative to support reliance upon the statements concerning Bensayah in [REDACTED]." [398]

The court noted that, in the time since the district court's decision, the government had "eschewed" a piece of evidence that Judge Leon had relied upon during the lower-court case, and barred the district court's use of that document on remand.[399] Though the specifics of the court's reasoning are so heavily redacted as to render spotty any detailed assessment we might offer here, the D.C. Circuit's ruling here did two things: First, it disagreed with the district court's use of a key piece of corroborating evidence such that the document that evidence purported to corroborate was barred from consideration on remand. Second and more importantly, the court indirectly cast doubt on Judge Walton's ruling regarding corroborating evidence. Recall that Judge Walton had written that "the use of otherwise reliable corroborating evidence as a means to assess the reliability of otherwise unreliable hearsay is ultimately misguided." The D.C. Circuit did not merely appear to disagree on this point, it seemed to take an approach to corroboration far more lenient than the one Judge Walton found "misguided"—not only allowing reliable evidence to corroborate unreliable evidence but potentially allowing *unreliable* evidence to do so as well. This strongly suggests that Judge Walton's approach, if challenged, might not be sustained.

Source Information

Another area of concern to all of the judges when they consider hearsay has been the nature of the source of the information itself. And in this area, too, there has been little D.C. Circuit intervention to guide the lower courts. The judges agree that reliability involves a minimum level of information about the underlying source of the statement; the judges do not agree, however, about what that minimum is. Often, source information is contained in so-called "raw" intelligence reports that have not been processed by the intelligence community. The absence of source information, including the identity of the source and information about how the source procured the information, presents a concern—particularly in the absence of other indicia of reliability in the statement. The issue the judges grapple with is how *much* concern to give source information.

Judge Leon's very first GTMO opinion, *Boumediene*, provides a good lens through which to view the importance of source information.[400] In the case, the government offered information concerning all six of the *Boumediene* petitioners

[398] *Id.* at 721, 726.

[399] *Id.* at 726.

[400] Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008).

in a classified document from "an unnamed source."[401] Judge Leon wrote that, as pertaining to five of the petitioners, he could not "adequately assess the credibility and reliability" of the information.[402] The evidence from the government contained "some information about the source's credibility and reliability," but not enough under *Parhat*, in Judge Leon's opinion.[403] "For example," he wrote, "the Court has no knowledge as to the circumstances under which the source obtained the information as to each petitioner's alleged knowledge and intentions."[404] Although he did not elaborate further on the particular deficiencies of the evidence, it was clear he found it lacking in important ways and he then granted those detainees' petitions.

With regard to the one petitioner whose petition he *denied*—Belkacem Bensayah—the nature of the information regarding the unnamed source's statements was no different, but the government had "met its burden by providing additional evidence that sufficiently corroborate[d] allegations from this unnamed source that Bensayah is an al-Qaida facilitator."[405] This showed that corroborating evidence can sometimes compensate, at least to some degree, for a dearth of detail concerning sources.

Judges Bates takes a similar approach. If source information is entirely missing, the information might be deemed "inherently unreliable." The information can then only be saved if "other reliable evidence corroborates the information contained in the report."[406] In *Khan*, the government submitted raw intelligence reports describing the petitioner's role within Hezb-i-Islami Gulbuddin ("HIG"), an associated force of the Taliban and Al Qaeda. These "raw" reports fell into the "inherently unreliable" category because the sources for the reports were confidential.[407] In deciding a motion for judgment on the record, Judge Bates individually assessed a dozen such reports, finding in each instance that he could not make a reliability determination because the government had either not identified the original source of the relevant assertions or merely described the source as a "senior level Afghan tribesman."[408] For the same reasons the D.C. Circuit was concerned about the source of the information *Parhat*, it was crucial for Judge Bates that he have source information to be able to independently assess reliability and credibility.[409] The public version

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[401] *Id.* at 198.

[402] *Id.* at 197.

[403] *Id.*

[404] *Id.*

[405] *Id.* at 198.

[406] Khan v. Obama, 646 F. Supp. 2d 6, 14 (D.D.C. Aug. 18, 2009).

[407] *Id.* at 13.

[408] *Id.* at 14.

[409] *Id.* at 11-12, 15 (describing that a lack of such information prevented a court from making a determination about the reliability of the information and made a rebuttable presumption "effectively irrebuttable") (quoting Parhat v. Gates, 532 F.3d 834, 846-47 (D.C. Cir. June 20, 2008)).

of Judge Bates's opinion on this point does not clearly identify precisely what his considerations are, but an unredacted passage in it does state that the reliability assessment should consider the presence or absence of information about "why the source had indirect access to this information, what kind of control the collector had over the source, or what kind of motivation or wittingness the source had when making the statement," as well as some level of detail "regarding the circumstances in which the information was obtained."[410]

By the time Judge Bates decided the same case on the merits in late 2010, the government had provided additional declarations about the same intelligence reports that Judge Bates previously had found "inherently unreliable."[411] He assessed the reliability of two people: an unidentified person and an "unnamed Afghan official."[412] Judge Bates clearly believed that relying on anonymous information could still be consistent with *Parhat*, and he focused instead on whether the source had given the information voluntarily, on the intelligence collectors' ability to independently verify the source's accounts, and on whether the information in question also became the basis for a life-threatening capture operation.[413] He accepted additional sworn declarations that all stopped short of revealing the identity of the source, observing that the officials had credibly been able to "independently verify much of the information" in the reports. Judge Bates noted that intelligence collectors had, "based on their training," made conclusions about whether the source was reliable."[414] And, analyzing the collectors' analysis, he was satisfied that the reports' contents were "generally accurate."[415] After *Khan*, then, it seems clear that, at least in Judge Bates's court, the government does not necessarily need to share the source's identity if sufficient indicators in other declarations and affidavits "provide the information necessary to assess the sources' reliability under the principles accepted in the intelligence community."[416]

Judge Kennedy also expressed concern about source information in *Abdah* (Uthman), to the point that he concluded that the "limited information" about the source was enough of a problem to warrant discrediting that source's

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[410] *Id.* at 14. Judge Bates noted that the intelligence community itself espoused certain criteria for assessing source credibility, and he stated that these factors gave him "some insight" about what information should be available to the courts. *Id.* at 12. *Accord* Boumediene v. Bush, 579 F. Supp. 2d 191, 197 (D.D.C. November 20, 2008) ("Suffice it to say, however, that while the information in the classified intelligence report, relating to the credibility and reliability of the source, was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is not sufficient for the purposes for which a habeas court must now evaluate it.").

[411] Khan v. Obama, 741 F. Supp. 2d 1 (D.D.C. Sept. 3, 2010).

[412] *Id.* at 14.

[413] *Id.* at 15.

[414] *Id.*

[415] *Id.* at 13 (quoting T. Al Bihani v. Obama, 662 F. Supp. 2d 9, 20 n.12 (Sept. 8, 2009)).

[416] *Id.*

statements entirely.[417] The government had alleged that the petitioner was a bodyguard for Osama bin Laden under the alias "Hudaifa"; this was based on the fact that two detainees had alleged that "Hudaifa" was part of bin Laden's security detail. After discussing the evidence of alleged mistreatment of the two detainees, Judge Kennedy—who was notably meticulous about distinguishing between reliability arguments based on alleged torture and those based other factors—went on to say that, even if the detainees' statements were considered "outside the context of the coercion that limits their value," the importance of their allegation—that "Hudaifa" was a bodyguard—was only relevant if "Hudaifa" was indeed an alias for Uthman.[418] Judge Kennedy then wrote that a statement by a co-detainee, Bukhari, that Uthman was a member of Osama bin Laden's security detail, was unpersuasive because it was not clear that the statement was based on personal knowledge.[419] Judge Kennedy continued: "Without more information as to how Bukhari came to believe that Uthman was part of Usama bin Laden's security detail, the Court cannot evaluate the credibility of the statement and therefore cannot rely on it."[420] From this ruling alone, it is unclear whether declarations of the type that satisfied Judge Bates in *Khan* would have provided enough information to satisfy Judge Kennedy about the source had they been available for him to consider, but his concern for having the information is just evident.

Other judges have demonstrated similar concerns about source information, but they, like Judge Kennedy, have generally done so in the course of excluding information and thus not given as a clear a roadmap as did Judge Bates for what sort of information would be sufficient to rehabilitate a questionable statement. In *Bacha*, Judge Huvelle expressed intense frustration with the government's reliance on intelligence reports at all—and particularly those containing assertions from unspecified sources. After suppressing the petitioner's own statements, and after learning from government counsel that the government might respond by offering a new source of evidence against the petitioner, Judge Huvelle required any new evidence to involve a specifically identified source, and even suggested that the source would have to testify subject to cross-examination either live at the evidentiary hearing or at least in the form of a

[417] Abdah v. Obama (Uthman), 708 F. Supp. 2d 9 (D.D.C. Apr. 21, 2010).

[418] *Id.* at 17.

[419] *Id.* at 14-19; *cf.* Alsabri v. Obama, No. 06-1767 (D.D.C. Feb. 3, 2011) slip op. at 8 n.15 (noting that a third party's statements were reliable because they were "based on his personal knowledge, were not the result of torture, and the petitioner himself relied on them").

[420] *Abdah* (Uthman), slip op. at 28. *But see Abdah* (Esmail) (Kennedy, J., writing that he was not persuaded by petitioner's effort to point to discrepancies in his own prior statements as indication that they were unreliable). Judge Kennedy wrote that the discrepancies were not "sufficiently important to have bearing on the Court's determination regarding the main, relevant facts." *Id.* at 37 n.16.

deposition if the person were unavailable for testimony.[421]

Judge Friedman also excluded information based on a lack of source information in *Almerfedi*, where he wrote that the lack "information provided about the source or sources of the group's information" in an interrogation report of a detainee made the statements within it "inherently unreliable."[422] He then explained why:

> The only source identified for ISN 230's information about petitioner is an unnamed group of detainees who arrived in Guantanamo in 2004. Not only does ISN 230 not identify who they are, but there is no information provided about the source or sources of the group's information. It could be based on personal knowledge, hearsay, multiple hearsay, or rumor. Although hearsay evidence is admissible in these proceedings, the Court still must determine whether the hearsay statements are accurate, reliable and credible. Information that came from an unnamed group of detainees, for which the original source cannot be pinpointed, amounts to no more than jailhouse gossip, if that, and cannot serve as the basis for petitioner's detention. The Court will not credit any of these four documents.[423]

Judges Huvelle and Friedman seem to require a specific identification of the source, not merely information about the circumstances in which the government obtained the statement. Judges Leon and Bates do not, and Judge Kennedy seems like he might be amenable to unspecified sources as long as there is some indication of how the source came across his information. To complicate matters further, in *Bostan*, Judge Walton seemed to signal a potential middle-of-the-road approach to source information: He indicated the possible suitability of *ex parte* disclosure of source identity, employing special procedures similar to those envisioned in the Classified Information Procedures Act (CIPA),[424] as one way to alleviate the burden on the government while providing the court with enough information to decide whether in the circumstances it is appropriate for the judge to consider the evidence.[425] Absent a clear statement from the D.C. Circuit regarding the necessity of source information, then, there seem to be three schools of thought regarding how to analyze it in the Guantánamo habeas

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[421] *See* Transcript of Hearing at 6-7, Bacha v. Obama, No. 05-2385 (D.D.C. Jul. 16, 2009) (insisting upon "a live witness for this one… either there is a witness who is going to put this guy there subject to real cross examination like a real case instead of all of this intelligence and attributing it to people who are either cooperators, unknown, unidentified. . . . The real people can show up. You can bring them to me in whatever form. If you have to go to Afghanistan to take a deposition, fine.").

[422] Almerfedi v. Obama, 725 F. Supp. 2d 18, 25 (D.D.C. July 8, 2010).

[423] *Id.* at 25.

[424] Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025.

[425] *Id.* at 26-27.

context.

Conclusion

Together, the courts' opinions are forming a relatively clear set of rules on a certain key principle: hearsay is admissible and should receive weight to the extent it is reliable. But the opinions continue to diverge with respect to the indicia of reliability in specific instances. In practice, a given piece of hearsay evidence may play a very different role in a habeas case depending on the identity of the judge presiding. Given the D.C. Circuit's avowed reluctance to disturb factual findings, and given the difficulty of formulating more specific doctrinal rules defining the hallmarks of reliability, this is probably not going to change much as further cases develop.