CONSTITUTIONAL LAW — GUANTÁNAMO HABEAS — D.C. CIRCUIT HOLDS THAT GOVERNMENT INTELLIGENCE REPORTS ARE ENTITLED TO A PRESUMPTION OF REGULARITY. — *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011).

Boumediene v. Bush[1] was rightly celebrated as a "[g]reat [v]ictory."[2] The Supreme Court's holding that Guantánamo Bay detainees possess the constitutional privilege of habeas corpus[3] and are entitled to a "meaningful opportunity" to contest the lawfulness of their detentions[4] was unprecedented.[5] However, *Boumediene* "left open a raft of important procedural questions" about habeas review,[6] to be decided by lower courts on a common law basis.[7] The emerging jurisprudence, as some have noted, has not always interpreted *Boumediene* "faithfully."[8] Recently, in *Latif v. Obama*,[9] the D.C. Circuit made one of its most significant contributions to this jurisprudence. In a heavily redacted opinion, the court vacated and remanded the district court's grant of a detainee's habeas petition, holding that government-produced intelligence documents are entitled to "a presumption of regularity."[10] This presumption is unsound in both doctrine and policy, and the Supreme Court should grant the pending petition for certiorari and clarify *Boumediene*'s "meaningful opportunity" command.

In late 2001, Pakistani authorities seized Yemeni citizen Adnan Farhan Abd Al Latif near the border of Afghanistan and Pakistan.[11] Latif was subsequently transferred to U.S. custody and has been held in Guantánamo Bay since January 2002.[12] In 2004, Latif challenged his detention by filing a petition for a writ of habeas corpus in D.C. district court.[13] There, the government justified Latif's detention pri-

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[1] 128 S. Ct. 2229 (2008).

[2] Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18, 18; *see also* Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 354 n.6 (2010) (collecting sources).

[3] *Boumediene*, 128 S. Ct. at 2240.

[4] *Id.* at 2266.

[5] Dworkin, *supra* note 2, at 18.

[6] Robert M. Chesney, International Decision, Boumediene v. Bush, 102 AM. J. INT'L L. 848, 852 (2008).

[7] BENJAMIN WITTES ET AL., BROOKINGS INST., THE EMERGING LAW OF DETENTION 4 (2010).

[8] Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1455–56 (2011).

[9] 666 F.3d 746 (D.C. Cir. 2011).

[10] *Id.* at 747.

[11] Abdah v. Obama, No. 04-1254 (HHK), 2010 WL 3270761, at *1, *3 (D.D.C. Aug. 16, 2010), *vacated sub nom. Latif*, 666 F.3d 746.

[12] *Id.*

[13] *See* Petition for a Writ of Certiorari at 2, *Latif*, 666 F.3d 746 (No. 10-5319). "There was no progress in the case" until the Court's *Boumediene* decision in 2008. *Id.* at 2.

marily on the basis of an intelligence report it had produced.[14] The government argued that Latif was recruited to travel to Afghanistan by "an Al Qaeda facilitator" and that he "received military training from, and then fought with, the Taliban."[15] Latif, however, contended that the report was unreliable;[16] that he was not persuaded to leave Yemen by an al Qaeda facilitator;[17] and that he did not train or fight with the Taliban, having instead traveled abroad merely for medical care.[18]

The district court granted Latif's petition.[19] District Judge Kennedy found that the government report was "not sufficiently reliable" to support the allegations that Latif was recruited by a member of al Qaeda or that he trained and fought with the Taliban.[20] Latif's account, while "not without inconsistencies and unanswered questions," was "a plausible alternative story"[21] whose "fundamentals ha[d] remained the same."[22] Judge Kennedy also emphasized the absence of corroborating evidence for any of the intelligence report's incriminating facts.[23] Finding that the government had not met its burden of proof, he concluded that "[Latif's] detention is not lawful."[24]

The D.C. Circuit vacated and remanded.[25] Writing for the panel, Judge Brown[26] identified three errors in the district court's decision.[27] The first was the court's failure to accord a "presumption of regularity" to the government's intelligence report.[28] This presumption, applied in certain other contexts,[29] "supports the official acts of public officers" and requires courts to "presume that they have properly

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[14] The government later acknowledged that the case against Latif depended heavily on the intelligence report. *See* Brief for Respondents-Appellants at 10, *Latif*, 666 F.3d 746 (No. 10-5319) ("The primary evidence in this case was a report . . . .").

[15] *Abdah*, 2010 WL 3270761, at *3.

[16] *Id.* at *4–5.

[17] *Id.* at *5.

[18] *Id.* at *4.

[19] *Id.* at *1.

[20] *Id.* at *9.

[21] *Id.*

[22] *Id.* at *10.

[23] *Id.* at *9.

[24] *Id.* at *10.

[25] *Latif*, 666 F.3d at 747.

[26] Judge Brown was joined by Judge Henderson.

[27] *Latif*, 666 F.3d at 747.

[28] *Id.*

[29] As Judge Tatel noted in dissent, courts "assume that 'official tax receipt[s]' are properly produced, that state court documents accurately reflect the proceedings they describe, that mail was duly handled and delivered, and that agency actions in the ordinary course of business are undertaken on the basis of fact." *Id.* at 771 (Tatel, J., dissenting) (citations omitted) (quoting Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002)).

discharged their official duties."[30] Judge Brown clarified that the presumption "applies to government-produced documents no less than to other official acts."[31] She also gave weight to the Supreme Court's statement in *Hamdi v. Rumsfeld*[32] that "[t]he Constitution would not be offended by a presumption in favor of the Government's evidence,"[33] and she denied that the presumption of regularity "'inappropriately shift[ed] the burden' of proof from the Government to the detainee."[34]

Judge Brown further explained that, although the court had never before applied this presumption to Guantánamo habeas proceedings, this silence resulted from potential confusion about the presumption.[35] She stressed that the presumption "implies nothing about the truth of the underlying non-government source's statement"; it merely presumes that "the government official accurately identified the source and accurately summarized his statement."[36] She also attributed the court's previous silence to the unimportance or irrelevance of the presumption in most cases.[37] Latif's case, however, "force[d] the issue" of whether the presumption applies in Guantánamo habeas cases.[38] Judge Brown answered in the affirmative[39]: the presumption fit with *Boumediene*'s "implicit invitation to innovate" and was warranted by "inter-branch and inter-governmental comity" and "[e]xecutive branch expertise" in evaluating wartime records.[40]

Judge Brown then explained the other two errors made by the district court: its failure "to determine Latif's credibility" and its "unduly atomized approach to the evidence."[41] Regarding the former, Judge Brown insisted that the district court was "obligated to consider [Latif's] credibility" since it "relied in part on [his] declaration in discrediting the Report."[42] With respect to the latter, the court held that the district court was wrong in not "view[ing] the evidence [against Latif] collectively" and in "ignor[ing] relevant evidence."[43] Leaving it

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[30] *Id.* at 748 (majority opinion) (quoting Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007)) (internal quotation mark omitted).

[31] *Id.*

[32] 542 U.S. 507 (2004).

[33] *Latif*, 666 F.3d at 749 (quoting *Hamdi*, 542 U.S. at 534).

[34] *Id.* (quoting *id.* at 783 (Tatel, J., dissenting)).

[35] *Id.* at 750.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 755.

[39] *Id.* at 751.

[40] *Id.*

[41] *Id.* at 747.

[42] *Id.* at 756.

[43] *Id.* at 759. Here, Judge Brown was in effect applying a "mosaic theory" of evidence. *See* Mohammed v. Obama, 704 F. Supp. 2d 1, 7–8 (D.D.C. 2009). This approach may be "a common

to the district court to apply the controlling precedent, Judge Brown vacated the habeas grant and remanded for further proceedings.[44]

Judge Henderson concurred in the judgment.[45] Endorsing Judge Brown's analysis, she wrote separately to address the dissent's "high-pitched rhetoric"[46] and misunderstanding of the clear error standard of review.[47] Judge Henderson also urged reversal of the district court, without remand;[48] because Latif could not "persuasively counter the presumption of regularity," remand was "a pointless exercise."[49]

Judge Tatel dissented.[50] Objecting to the presumption of regularity and the "wholesale revision of the district court's careful fact findings,"[51] he called the majority opinion an "assault on *Boumediene*" and reproached the court for "moving the goal posts" and then "call[ing] the game in the government's favor."[52] Regarding the presumption in particular, Judge Tatel stated that the court had rightly never applied it in Guantánamo habeas cases in spite of several opportunities to do so.[53] This presumption, he contended, was designed for "transparent, accessible, and often familiar" contexts, such as documentation of state court criminal proceedings,[54] and not for intelligence reports "produced in the fog of war by a clandestine method that we know almost nothing about."[55] In assessing whether applying the presumption is appropriate, Judge Tatel argued, the evidence's reliability, rather than the performance of an official duty, should be "the touchstone inquiry."[56]

Judge Tatel also challenged the holding that the district court had made fact-related errors. Arguing that the district court's findings should be granted deference, he criticized the court for "engag[ing] in an essentially de novo review of the factual record" and "providing its own interpretations, its own narratives, even its own arguments."[57] Judge Tatel applied the clear error standard and concluded that the district court committed no clear error in deeming the report to be in-

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and well-established mode of analysis in the intelligence community," *id.* at 7, but some courts have expressly refused to adopt it, *see, e.g.*, *id.*

[44] *Latif*, 666 F.3d at 764.

[45] *Id.* (Henderson, J., concurring in the judgment).

[46] *Id.* at 765.

[47] *Id.* at 764.

[48] *Id.*

[49] *Id.* at 765.

[50] *Id.* at 770 (Tatel, J., dissenting).

[51] *Id.*

[52] *Id.* at 779.

[53] *Id.* at 774.

[54] *Id.* at 771.

[55] *Id.* at 772.

[56] *Id.*

[57] *Id.* at 779.

sufficiently reliable or in crediting Latif's story, and that the district court had "adequately addressed the other record evidence."[58]

The considerable redactions in the court's opinion in *Latif* permit little more than tentative conclusions, but based on the available text, the decision is both important and troubling. In particular, the adoption of a presumption of regularity is at odds with both doctrine and policy. And though in theory the presumption extends only to the *government's* statements in intelligence reports, in practice it may amount to a wholesale presumption of accuracy for the government's evidence. The Supreme Court should overturn *Latif* and use the opportunity to give substance to *Boumediene*'s "meaningful opportunity" command.

To begin, the application of a presumption of regularity to government statements in intelligence reports is inappropriate. As its name implies, the presumption is suited for contexts in which some notion of "regularity" exists in the government's activities; it requires the existence of an "established procedure[]"[59] and is not applied when the agency or government practice is "not regular."[60] As Judge Tatel explained, no regularity can be assumed for intelligence reports on Guantánamo detainees; these documents are produced clandestinely in the "fog of war," under often extreme and chaotic conditions.[61]

Moreover, the accuracy of government statements in these reports is dubious. The presumption of regularity assumes that "the government official *accurately* identified the source and *accurately* summarized his statement."[62] But this assumption is questionable, even without presuming bad faith by the government. As some courts have noted, the conditions under which intelligence reports are produced may cause translation or transcription mistakes.[63] Indeed, at least one such error occurred in Latif's own case: he was "repeatedly questioned" by U.S. officials who thought he was Bahraini or Bangladeshi (rather than Yemeni) because of a "typographical error in 2002."[64]

The court's justifications for the presumption are also unpersuasive. As a doctrinal matter, the court relied on *Hamdi*, *Boumediene*'s "implicit invitation to innovate,"[65] and the court's own common law

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[58] *Id.* at 780.

[59] Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1958).

[60] Davis v. Principi, 17 Vet. App. 29, 36 (2003).

[61] *Latif*, 666 F.3d at 772 (Tatel, J., dissenting).

[62] *Id.* at 750 (majority opinion) (emphases added).

[63] *See, e.g.*, Kandari v. United States, 744 F. Supp. 2d 11, 20 (D.D.C. 2010).

[64] Brief of Petitioner-Appellee at 54–55, *Latif*, 666 F.3d 746 (No. 10-5319). In another case, the government erroneously maintained for years that a detainee "manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report." Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 532 (2010) (quoting Al Mutairi v. United States, 644 F. Supp. 2d 78, 84 (D.D.C. 2009)).

[65] *Latif*, 666 F.3d at 751.

approach.[66] *Hamdi*, however, authorized government-friendly presumptions only when "the Government puts forth *credible* evidence,"[67] and the majority failed to explain why government transcriptions and translations conducted in the fog of war meet that standard. The *Hamdi* language should also be interpreted against the background of *Boumediene*, which altered the legal landscape by affording protections for detainees in a way difficult to reconcile with *Hamdi*. As Chief Justice Roberts stated in his dissent, the *Boumediene* majority rejected precisely the kinds of procedures that "the *Hamdi* plurality [had] concluded . . . would be enough to satisfy due process."[68] Further, while *Boumediene* did invite common law innovation, the *Latif* majority did not acknowledge that such innovation must be consistent with *Boumediene*'s other language, including its "meaningful opportunity" command. Finally, the common law argument is unpersuasive. Rather than following "a careful and fine-grained approach to the assessment of reliability,"[69] the D.C. Circuit took a dramatic step in adopting the presumption of regularity — which helps to explain why the court had never applied the presumption in its previous cases.[70]

The court's policy rationales — "inter-branch and intergovernmental comity"[71] and deference to "[e]xecutive branch expertise"[72] — fare no better. In habeas cases, the importance of comity fluctuates with "the rigor of any earlier proceedings."[73] Comity is thus a powerful justification for upholding judgments made in state court, where defendants have typically had a full and fair opportunity to litigate their cases. But Guantánamo detainees, unlike other federal habeas petitioners, are detained pursuant only to executive determination by a Combatant Status Review Tribunal, whose adjudicative processes the *Boumediene* Court recognized as being "far more limited" and "fall[ing] well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[74] It is in precisely such contexts that a rigorous habeas process is needed to "protect[]

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[66] *Id.* at 755.

[67] Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (emphasis added); *see also Latif*, 666 F.3d at 778 (Tatel, J., dissenting).

[68] Boumediene v. Bush, 128 S. Ct. 2229, 2284–85 (2008) (Roberts, C.J., dissenting); *see also* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 45 (noting that the *Boumediene* Court "seemed more skeptical of military adjudication than the *Hamdi* plurality had been").

[69] *Latif*, 666 F.3d at 776 (Tatel, J., dissenting).

[70] *See id.* at 774–75 (citing Khan v. Obama, 655 F.3d 20, 23–25 (D.C. Cir. 2011); Al Alwi v. Obama, 653 F.3d 11, 16 (D.C. Cir. 2011); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); Barhoumi v. Obama, 609 F.3d 416, 420 (D.C. Cir. 2010)).

[71] *Id.* at 752 (majority opinion).

[72] *Id.*

[73] *Boumediene*, 128 S. Ct. at 2268.

[74] *Id.* at 2260.

against abuse of executive power" and "evaluate the lawfulness of executive detention."[75] Likewise, the latter rationale — deference to executive expertise — is not compelling enough to justify the presumption. That the intelligence community or the Executive relies on certain information "does not relieve courts of their duty independently to assess the evidence."[76] And courts have noted their own competence in assessing, for example, the "consistency or inconsistency [of evidence] with other evidence, conditions under which the [evidence was] obtained, [and the] accuracy of translation and transcription"[77] — precisely the types of issues a presumption of regularity precludes from judicial review. While comity and executive expertise justify *some* deference, a presumption of regularity is simply too deferential.

As for the practical impact of a presumption of regularity, there is a real danger that it will come to function as a wholesale presumption of accuracy for all the content in government intelligence reports. The redactions in *Latif* make it impossible to know with certainty what the presumption's implications are, but one reading of the majority's language is that the presumption will operate — that is, the government's record will be treated as accurate — unless the accuracy of "the underlying non-government source[]" is disproved.[78] Thus, without the presumption, a detainee was able to challenge the accuracy of the government's translations or transcriptions; now, his sole means of rebutting the presumption is to marshal evidence to demonstrate the inaccuracy or unreliability of the underlying source's statements. The prospect of that rebuttal seems unlikely: vast power and information asymmetries exist between the government and detainees, who have often been in detention for many years, with no access to the outside world and certainly not to the government's classified information. And in many cases,[79] including Latif's, the underlying source is the detainee himself.[80] Thus, the detainee will be in the position of having to

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[75] Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 963 (1998).

[76] Khan v. Obama, 646 F. Supp. 2d 6, 12 (D.D.C. 2009). A fruitful analogy may be found in Fourth Amendment law. Courts assessing whether a police officer had reasonable suspicion to make an investigatory stop acknowledge the experience and collective knowledge of the police, but still require that the officer's "[p]ermissible deductions or rational inferences . . . be grounded in objective facts and be capable of rational explanation." United States v. Michael R., 90 F.3d 340, 346 (9th Cir. 1996).

[77] Al-Adahi v. Obama, 698 F. Supp. 2d 48, 54 (D.D.C. 2010).

[78] *Latif*, 666 F.3d at 750; *see id.* ("There are many conceivable reasons why a government document might accurately record a statement that is itself incredible. A source *may be shown* to have lied, for example, or *he may prove* his statement was coerced." (emphases added)).

[79] *See* Mark Denbeaux et al., Latif v. Obama*: Redaction Riddle Resolved*, JURIST (Jan. 14, 2012), http://jurist.org/forum/2012/01/denbeaux-stratton-winchester.php.

[80] That Latif was the underlying source in his own case cannot be ascertained from the opinion itself, but it is an inference that may be drawn from a passage in the government's brief on

prove that his own statements were falsehoods or the product of coercion. What is more, the presumption is a hurdle nearly every detainee will have to clear in the future, since the government possesses intelligence reports on each of them.[81] Therefore, even detainees like Latif who have "plausible alternative stor[ies]"[82] will have to counter intelligence reports that may be uncorroborated,[83] contain "multiple levels of hearsay," or have been "drafted by unidentified translators and scriveners of unknown quality."[84] *Boumediene* surely permits some advantages to the government — the admissibility of hearsay evidence is one example — but when such advantages have the potential to cripple detainees' ability to contest their detention, they go too far.

If there is a silver lining to *Latif*, it is that it presents the Supreme Court with an opportunity to clarify its command in *Boumediene* that detainees have a "meaningful opportunity" to contest their detention. In issuing this language with little guidance, the Court left it to the D.C. Circuit to establish rules to govern detainees' claims.[85] There was nothing per se wrong with this move — common law development of habeas jurisprudence certainly has virtues.[86] However, the Court's broad delegation of authority must be subject to close supervision, particularly in light of the D.C. Circuit's predisposition for strong deference to the Executive on national security matters.[87] *Latif*, perhaps more than any previous Guantánamo habeas decision, presents a compelling case for exercising this supervisory authority.

The D.C. Circuit's Guantánamo habeas jurisprudence has broad implications. The emerging case law will impact not just Guantánamo detainees, but also any detainees across the world over whom American courts acquire habeas jurisdiction in the future.[88] Crafting just rules for Guantánamo habeas cases is also fundamental to preserving the integrity of the writ itself. Accordingly, the Court should reverse *Latif*, eliminate the presumption of regularity for intelligence reports, and give substance to the language of *Boumediene*.

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appeal. *See* Reply Brief at 24, *Latif*, 666 F.3d 746 (No. 10-5319) ("[H]ere, . . . we know the source of the statement in the report, and the source is the habeas petitioner himself.").

[81] *See* Denbeaux et al., *supra* note 79.

[82] Abdah v. Obama, No. 04-1254 (HHK), 2010 WL 3270761, at *9 (D.D.C. Aug. 16, 2010), *vacated sub nom. Latif*, 666 F.3d 746.

[83] *Id.*

[84] *Latif*, 666 F.3d at 779 (Tatel, J., dissenting).

[85] Vladeck, *supra* note 8, at 1453.

[86] *See, e.g.*, Richard H. Fallon, Jr., & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2043–45 (2007).

[87] *See* Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 697 (2005) (noting the court's "remarkable tendency toward National Security Fundamentalism").

[88] WITTES ET AL., *supra* note 7, at 4.