No Meaningful Access to Habeas Corpus at Guantánamo

APPENDIX 29

The memorandum opinion that follows was issued in 2012 *In re: Guantanamo Bay Detainee Litigation Continued Access to Counsel* by Chief Judge Lamberth for the U.S. District Court for the District of Columbia. It castigates the State for its ill-advised attempt, yet again, to restrict lawyers' access to the prisoners at Guantánamo Bay. That the dispute which occasioned this opinion occurred shows that even crucial advances in Guantánamo detention policy, such as counsel access rights, are not guaranteed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE CONTINUED ACCESS TO COUNSEL	**Miscellaneous No. 12-398 (RCL)** **Civil Action Nos.** **04-1254 (RCL), 05-1638 (CKK),** **05-2185 (RCL), 05-2186 (ESH),** **05-2380 (CKK)**

MEMORANDUM OPINION

I. INTRODUCTION

Eleven years after the September 11, 2001, attacks on the Pentagon and World Trade Center and the subsequent invasions of Afghanistan and Iraq, 168 people captured in the Global War on Terrorism remain detained at the United State Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). This matter concerns six of those detainees. At its heart this case is about whether the Executive or the Court is charged with protecting habeas petitioners' right to access their counsel. Petitioners contend that the terms and conditions of this Court's 2008 Protective Order ("Protective Order" or "P.O.") govern their access to counsel regardless of whether they are currently petitioning for habeas relief. The Government argues that once a detainee's habeas petition is terminated, the Court's Protective Order expires and the Executive has the prerogative of assuring counsel-access. Upon consideration of the Motions [1, 2, 3, 4, 5, and 6], the Combined Opposition [12], the Replies [19, 20, 21, and 26], the oral arguments, the entire record herein, the applicable law and for the reasons below, the Court finds that the Protective Order

governs access to counsel issues for Guantanamo detainees who have a right to petition for habeas corpus relief, whether or not such a petition has been dismissed or denied.[1]

II. BACKGROUND

A. Procedural Background.

In the process of litigating their individual habeas cases, petitioners Abdu Al-Qader Hussain Al-Mudafari (ISN[2] 40), Hayal Aziz Ahmed Al-Mithali (ISN 840), Mohammed Rajeb Abu Ghanem (ISN 44), and Zakaria Al-Baidany (ISN 1017) each moved to dismiss their habeas petitions, without prejudice, conditioned on their continued access to counsel under the Protective Order. Resp. Opp. [12] at 1, Aug. 7, 2012.[3] In the alternative, petitioners Al-Mudafari and Al-Mithali seek indefinite stays of their cases in order to ensure they continue to have access to counsel under the Protective Order. *Id.* Petitioners Uthman Abdul Rahim Mohammed Uthman (ISN 27) and Yasein Khasem Mohammad Esmail (ISN 522) had their petitions for habeas relief denied after full merits hearings.[4] Counsel for these two petitioners requested permission under the procedures set out in the Protective Order to meet with his clients in May and August 2012. Esmail & Uthman Reply [21] at 7, Aug. 13, 2012. However, the

---

[1] The Court's ruling today is limited to counsel-access under the Protective Order for the purpose of litigating before Federal courts.

[2] "ISN" is the acronym for "Internment Serial Number," and each detainee currently housed at Guantanamo Bay has been assigned an ISN. *Bostan v. Obama*, 821 F. Supp. 2d 80, 82 n.1 (D.D.C. 2011) (citing *Al-Harbi v. Obama*, Civil Action No. 05–2479(HHK), 2010 WL 2398883, at *3 n. 2 (D.D.C. May 13, 2010).

[3] Petitioners have filed six motions in this case: Esmail Mot. [1]; Uthman Mot. [2]; Al-Mudafari Mot. [3]; Al-Mithali Mot. [4]; Ghanem Mot. [5]; and Al-Baidany [6]. Each motion was filed in the above captioned miscellaneous case on July 27, 2012. Respondents filed a single Combined Opposition. Resp. Opp. [12], Aug. 8, 2012. Replies were also filed by petitioners Al-Baidany Reply [19], Al-Mudafari & Al-Mithali Reply [20], and Esmail & Uthman Reply [21] on August 13, 2012. Petitioner Ghanem filed a brief Reply, in which he joined the Reply of petitioners Esmail and Uthman. Ghanem Reply [26] at 1, Aug. 16, 2012.

[4] Uthman's petition for habeas relief was originally granted by the District Court. *Abdah v. Obama*, 708 F. Supp. 2d 9, 11 (D.D.C. 2010). However, the D.C. Circuit reversed with instructions to deny the petition. *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011). The District Court then denied Uthman's Petition, *Abdah v. Obama*, 2011 WL 1642462 (D.D.C. April 29, 2011), and Uthman's present case came to an end after the Supreme Court denied certiorari, *Uthman v. Obama*, No. 11-413, ---S. Ct.---, 80 U.S.L.W. 3678 (U.S. June 11, 2012). Petitioner Esmail's (ISN 522) petition for habeas relief was denied in April 2010. *Abdah v. Obama*, 709 F.Supp.2d 25 (D.D.C. 2010). After the D.C. Circuit affirmed, Esmail took no further appeal to the Supreme Court. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011).

Government denied counsel's requests and barred counsel from meeting with either detainee unless counsel signed a Memorandum of Understanding (MOU), promulgated by the Government that would henceforth set the terms for counsel-access. Esmail Mot. [1] at 2; Uthman Mot. [2] at 1. Esmail and Uthman now move the Court for an Order affirming that the Protective Order continues to apply to them. Resp. Opp. [12] at 1.[5]

The Government objects to court-ordered counsel-access under the Protective Order for all six petitioners and argues that the Protective Order ceases to control counsel-access in the absence of a pending or imminent habeas petition. Resp. Opp. [12] at 1–2. The Government believes that the Protective Order, or at least its counsel-access provisions, expires once a detainee's original habeas petition has been adjudicated on the merits or the case is dismissed. *Id.* at 26–31; Hr'g Tr. 6–7, Aug. 17, 2012. The Government warns that should the court find for the detainees in this case, such a holding would constitute an abuse of discretion as it would result in a permanent injunction without the required showing of actual harm necessary for such an "extraordinary remedy." *Id.* at 2–3.

The universal nature of the counsel-access question cried out of singular resolution. The Court, upon motion by Respondents, and after telephonic consultations on July 27 with counsels for various petitioners and the Government, and after further discussions with Judges Huvelle

[5] All petitioners save Al-Baidany also contend that the Protective Order should govern counsel-access during Periodic Review Board (PRB) proceedings, which were created by Executive Order 13,567 to provide a process for reviewing the justifications for continued detention. Initially, petitioners Esmail and Uthman note that the MOU's terms, specifically paragraph 4, would prevent counsel from using information obtained pursuant to counsels' representation of detainees in habeas proceedings in PRB hearings. Mot. [1, 2] at 3–4. Petitioners Al-Mudafari and Al-Mithali simply note that they have retained counsel for PRB proceedings. Mot. [3, 4] at 3. And petitioner Ghanem simply notes that he has a right to counsel in PRB proceedings. Mot. [5] at 3. In their Replies, petitioners argue that the MOU, as opposed to the Protective Order, would bar counsel from using information obtained pursuant to the MOU in PRB proceedings. Al-Mudafari & Al-Mithali Reply [20] at 11–13; Esmail, Ghanem & Uthman Reply [21] at 9–10. The Government objects and argues that there is no justification for interfering in a strictly Executive matter that does not implicate habeas rights. Resp. Opp. [12] at 31. The Court does not believe that this issue is ripe for review. None of the petitioners addressed whether the Court has jurisdiction over counsel-access during PRB proceedings. Nor have the petitioners alleged that their access to counsel has yet been impaired. Moreover, the Court has now invalidated the MOU.

and Kollar-Kotelly, decided to consolidate the disparate motions into a single miscellaneous case. *See, e.g.*, Ghanem, et al. v. Bush, et al., 05-cv-1638 (CKK), Opp. & Cross-Mot. [264] at 2, July 26, 2012. The above captioned miscellaneous case was opened and this Court entered a scheduling order for briefing and oral arguments.[6] Sched. Order [7] at 1–2, July 27, 2012. Oral arguments were held on August 17, 2012.

B. Legal Background.

It is a sad reality that in the ten years since the first detainees were brought to Guantanamo Bay not a single one has been fully tried or convicted of any crime. Despite this, the Government has fought to deny detainees the ability to challenge their indefinite detentions through habeas proceedings. In a litany of rulings, this Court and the Supreme Court have affirmed that the Federal courts are open to Guantanamo detainees who wish to prove that their indefinite detentions are illegal.

In 2004, the Supreme Court rejected the Government's argument that the Federal courts had no jurisdiction to hear detainee habeas petitions. *Rasul v. Bush*, 542 U.S. 466, 484 (2004). Congress then twice amended the Federal habeas statute, 28 U.S.C. § 2241, in an effort to overturn the Supreme Court's ruling. Congress first passed the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2680 (2005), but the Supreme Court held that the provision of the DTA depriving courts of jurisdiction over detainee habeas petitions did not apply to cases pending when the DTA was enacted. *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–78 (2006). Next, Congress passed the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-

[6] The motions under review here were originally filed in the following five cases: Abdah, et al. v. Obama, et al., 04-cv-1254 (RCL) (petitioners Esmail and Uthman); Ghanem v. Obama, et al., 05-cv-1638 (CKK) (petitioner Ghanem); Al-Mudafari v. Obama, et al., 05-cv- 2185 (RCL) (petitioner Al-Mudafari); Al-Mithali v. Obama, et al., 05-cv-2186 (ESH) (petitioner Al-Mithali); Al-Baidany v. Obama, et al., 05-2380 (CKK) (petitioner Al-Baidany). Judges Huvelle and Kollar-Kotelly each referred their cases to the undersigned judge for resolution. Al-Mithali, 05-cv-2186 (ESH), Order, Jul. 17, 2012; Al-Baidany, 05-2380 (CKK), Minute Order, Jul. 30, 2012.

366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 & note), but the Supreme Court invalidated the jurisdiction-stripping provisions of the MCA and declared that detainees have a constitutional right to petition for habeas relief. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008). This Court and the Supreme Court also held that Guantanamo detainees have a concomitant right to the assistance of counsel. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004); *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004).

These rulings raised significant questions about counsels' access to detainees and classified information. The Court first began to address this problem in *Al Odah*, where Judge Kollar-Kotelly found that the Court had power "to fashion procedures by analogy to existing procedures, in aid of the Court's jurisdiction and in order to develop a factual record as necessary for the Court to make a decision on the merits of" detainee habeas claims. 346 F. Supp. 2d at 6; *see also Harris v. Nelson*, 394 U.S. 286, 299 (1969). Using this power, she proposed a framework for detainee counsel-access. *Al Odah*, 346 F. Supp. 2d at 13–15. The Government subsequently moved for a Protective Order "to prevent the unauthorized disclosure or dissemination of classified national security information." *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 175 (D.D.C. 2004). Judge Joyce Hens Green was designated to coordinate and manage all Guantanamo proceedings and rule on common procedural and substantive issues. All then-pending Guantanamo cases, except those being heard by Judge Richard J. Leon, were transferred to Judge Green. In November 2004 she issued an "Amended Protective Order and Procedures for Counsel Access to Detainees," which set guidelines and procedures for counsel-access to both detainees and classified information. Judge Green's Protective Order was ultimately a boon for the Court, for the Government and for detainees, as it settled many issues that would have otherwise, no doubt, required a great deal of litigation over every minute issue

of counsel-access.

Judge Green's Protective Order stood without objection for four years. In light of the *Boumendiene* decision in 2008, the members of this Court again determined that a single judge should rule on common procedural issues in order to facilitate the expeditious resolution of Guantanamo habeas cases. *In re Guantanamo Bay Detainee Litig.*, Miscellaneous No. 08-442 (TFH), Order [1] at 1–2, July 2, 2012. Judge Thomas F. Hogan was designated, like Judge Green, "to coordinate and manage proceedings in all cases involving petitioners presently detained at Guantanamo Bay, Cuba." *Id.* All then-pending Guantanamo habeas cases, and all such cases thereafter filed, were to be transferred to Judge Hogan for case management and coordination.[7] *Id.* Judge Hogan also determined that the Court should issue a new protective order. After considering the parties' positions espoused both in written submissions and at a status conference, Judge Hogan issued a carefully crafted and thorough Protective Order that contained procedures for counsel access to detainees and to classified information. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. 2008) ("Protective Order" or "P.O."). Judge Hogan's Protective Order was substantially similar to the Protective Order issued by Judge Green.

III. THE GOVERNMENT'S PROPOSED MEMORANDUM OF UNDERSTANDING (MOU)

Despite the fact that the Government never opposed the Protective Order or brought any violations of the Protective Order to the Court's attention, at some point during the Summer of 2012 the Government felt it necessary to promulgate their own procedures for counsel-access at Guantanamo, which it styled as a "Memorandum of Understanding" (MOU).[8] The MOU is

[7] The Order specifically excluded cases over which Judge Richard Leon presided as well as *Hamdan v. Bush*, 04-cv-1519. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH), Order [1] at 2 n. 1.

[8] The Government has requested amendments to the Protective Order. *In re Guantanamo Bay Detainee Litig.*, 08-

meant to replace the Protective Order for those detainees whose cases have been dismissed or whose petitions have been denied on the merits. The Government repeatedly avers that its proposed MOU provides "essentially the same" counsel-access provisions as the Protective Order. Resp. Opp. [12] at 1, 15, 38, 40. "The lady doth protest too much, methinks." William Shakespeare, *Hamlet*, Act III, Scene II. Far from providing "essentially the same" provisions, the MOU, in truth, significantly modifies the Protective Order.

For example, the Protective Order assumes that counsel for detainees have a "need to know," which allows them to view classified information in their own and related Guantanamo cases. P.O. at ¶ I.D.28. Counsel for detainees are also specifically allowed to discuss with each other relevant information, including classified information, "to the extent necessary for the effective representation of their clients." *Id.* And, the Protective Order assures that counsel have continuing access to certain classified information, including their own work-product. *Id.* at ¶¶ I.D.23, 25.

The MOU, on the other hand, strip counsel of their "need to know" designations, and explicitly denies counsel access to all classified documents or information which counsel had "previously obtained or created" in pursuit of a detainee's habeas petition. Resp. Opp. [12] at 11, MOU [12-1] at ¶ 8(b). Counsel can obtain access to their own classified work product only if they can justify their need for such information to the Government. MOU [12-1] at ¶ 8(b). "Need to know" determinations for this and other classified information would be made by the Department of Defense Office of General Counsel (DoD OGC), in consultation with the pertinent classification authorities within DoD and other agencies. *Id.* However, there is no assurance that such determinations will be made in a timely manner. As this Court is keenly

---

0442 (TFH), 2009 WL 2143732, at *1 (D.D.C. July 10, 2009); *see also Bostan*, 821 F. Supp. 2d at 85 n.7 (noting that the Court has previously amended the Protective Order).

aware from experience, the inter-agency process of classification review can stretch on for months. It is very likely that this provision would result in result in lengthy, needless and possibly oppressive delays. It would also require counsel to divulge some analysis and strategy to their adversary merely to obtain their past work-product. Further, the MOU countermands the Protective Order and specifically denies counsel for detainees the privilege of sharing information amongst themselves in the pursuit of representing their clients unless specifically authorized to do so by "the appropriate government personnel." *Compare* Protective Order at ¶ I.D.28 *with* MOU [12-1] at ¶ 8(a)(10). The MOU does not define who such personnel would be.

While this Court is empowered to enforce the Protective Order, all "disputes regarding the applicability, interpretation, enforcement, compliance with or violations of" the MOU are given to the "final and unreviewable discretion of the Commander, Commander, Joint Task Force-Guantanamo Bay" (JTF-GTMO). MOU [12-1] at ¶ 8(f). The MOU further gives the JTF-GTMO Commander complete "authority and discretion" over counsels' access to classified information and to detainees, including in-person visits and written communications. *Id.* at ¶ 6. Apparently, the MOU also gives the Government authority to unilaterally modify its terms. Resp. Opp. [12] at 11, n.3 ("Although not stated in the MOU itself, the Government has advised petitioners' counsel that . . . it anticipates limiting the number of attorneys who may have continued access to a detainee under the MOU to two. Similarly, the Government also anticipates limiting the number of translators for each detainee to one."). Importantly, the MOU is only applicable to attorneys who have represented detainees under the Protective Order; there are no provisions allowing for attorney substitutions or for new counsel. *See* MOU [12-1] at ¶ 3.

Unlike the Protective Order, which repeatedly states that the Government may not unreasonably withhold approval of matters within its discretion, the MOU places no such

reasonableness requirement on the Commander of JTF-GTMO. *See, e.g.*, P.O. at ¶ II.11.b. Because the MOU does not come into effect until countersigned by the Commander at JTF-GTMO, the Commander could presumably refuse to sign the MOU, leaving a detainee in the lurch without access to counsel. *Id.* at ¶ 11. The MOU also states that both the "operational needs and logistical constraints" at Guantanamo as well as the "requirements for ongoing military commissions, periodic review boards, and habeas litigation" will be prioritized over counsel-access. *Id.* at 8(c). This provision is particularly troubling as it places a detainee's access to counsel, and thus their constitutional right to access the courts, in a subordinate position to whatever the military commander of Guantanamo sees as a logistical constraint.

IV. STANDARD OF REVIEW

The foundation of the Supreme Court's habeas jurisprudence is that the Great Writ lies at the core of this Nation's constitutional system, and it is the duty of the courts to remedy lawless Executive detention.

> Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

Rasul, 542 U.S. at 474 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–219 (1953) (dissenting opinion)). The *Boumediene* decision rested in great part on the importance of the Great Writ to our system of government. *Boumediene*, 553 U.S. at 738–46, 797. As the Supreme Court noted, the Constitutional right to petition for habeas relief is a "fundamental precept of liberty." *Id.* at 739; *see also Harris*, 394 U.S. at 290–91 (The Great Writ serves as the "fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."). The Framers considered the Great Writ an "essential mechanism in the

separation-of-powers scheme" because it serves as check against "undivided, uncontrolled power" that is endemic in the "pendular swings to and away from individual liberty." *Boumediene*, 553 U.S. at 742-43. "It is from [the separation-of-powers] principles that the judicial authority to consider petitions for habeas corpus relief derives." *Id.* at 797.

The long history of the Great Writ also firmly establishes that it is the high duty of the Court, not the Executive, to "call the jailer to account" in habeas proceedings, *Boumediene*, 553 U.S. 745–46 (internal citations omitted), and to ensure that access to the courts is "adequate, effective, and meaningful," *Bounds v. Smith*, 430 U.S. 817, 822 (1977). *See also Harris*, 394 U.S. at 292. Practically, this means "that the privilege of habeas corpus entitles the prisoner to *a meaningful opportunity to demonstrate* that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)) (emphasis added).

In the context of Guantanamo Bay habeas litigation, "access to the Court means nothing without access to counsel." *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005). They are inseparable concepts and must run together. [9]

> To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel.

Al Odah, 346 F. Supp. 2d at 9. This reasoning holds true whether petitioners are seeking to file a habeas petition or are actively litigating one.

[9] Indeed, the Government agrees that "the right to counsel attaches to the prisoner's right of access to the courts." Hr'g Tr. at 52.

V. ANALYSIS

The Government maintains that in absence of an "active or impending" habeas case, or where it is "speculative" that a detainee will bring a renewed petition, "the primary responsibility for . . . respecting rights of counsel access the detainee may have[] should fall in the first instance to the [E]xecutive branch." Resp. Opp. [12] at 2–3; Hr'g Trans. at 6–7, 15. The Government further argues that this Court has no power to address the counsel-access question unless and until petitioners' demonstrate that the counsel-access voluntarily provided by the Government's MOU "has impeded their ability to present new habeas petitions to the Court." Resp. Opp. [12] at 15.[10] The Government's reasoning is substantially flawed and confuses the roles of the jailer and the judiciary in our constitutional separation-of-powers scheme. The Court is simply not obliged to give the Executive the opportunity to create its own counsel-access provisions before stepping in and fashioning such procedures. To do so would be to allow the Government to transgress on the Court's duty to safeguard individual liberty by "calling the jailer to account." *Boumediene*, 553 U.S. at 745–46.

As an initial matter, the Court is somewhat nonplussed as to why the counsel-access issue is being re-litigated at all. This Court faced a very similar issue in *Al Odah*. The Government there allowed Guantanamo detainees to meet with counsel under Government issued "Procedures for Counsel Access to Detainees at Guantanamo Bay, Cuba." 346 F. Supp. 2d at 5. Judge Kollar-Kotelly, in a well-reasoned opinion, flatly rejected the Government's proposed

[10] The Government later avers that petitioners have no freestanding right to counsel, and that in the domestic context, the Sixth Amendment right to counsel does not attach until the commencement of adversarial proceedings. Resp. Opp. [12] at 24 n.9, 37. But this case is not about detainees' right to counsel. The Government has conceded that petitioners here have a right to counsel. Hr'g Tr. at 7. This case concerns the rules under which detainees, who are already represented by counsel, can continue to meet with their counsel absent a habeas petition currently before the Court.

procedures. *Id.* at 9–14. She held that "the Government . . . [was] not entitled to unilaterally impose procedures that abrogate the attorney-client relationship" and that petitioners' "access to attorneys [was] not a matter of Government discretion." *Id.* at 5, 10.

The Protective Order has been in place for nearly four years and there is no record that its provisions have threatened classified information or caused any harm to the military's operation of the Guantanamo Bay Naval Base. The Government itself argues that the MOU and the Protective Order provide essentially the same protections. In the first instance, this raises the question of why the Government felt it necessary to promulgate the MOU at all. The old maxim "if it ain't broke, don't fix it" would seem to caution against altering a counsel-access regime that has proven safe, efficient, and eminently workable. Indeed, the Government had no answer when the Court posed this question in oral arguments. The best that they could muster was to argue that the Protective Order simply left a vacuum of procedural rules in the absence of an "active or impending" habeas petition. Of course, when it comes to power, the Government, as much as nature, abhors a vacuum.

A. The Judiciary, and not the Executive, is Charged with Ensuring Access to the Courts.

Regardless, the Government's position here, while not unreasonable, is untenable. The Government's argument is presumes that petitioners who are not actively litigating habeas petitions do not have the same need to access their counsel as detainees who are currently litigating. The Government presented no case law to substantiate this two tiered regime or to support this assumption, and the Court finds none. Instead, the Government argues that the courts have been leery of involving themselves in the operation of jails, and that it would inappropriate for the Court to involve itself, at this point, with the Executive's determination of what procedures appropriately provide counsel-access to detainees. Resp. Opp. [12] at 23–25.

The Court cannot disagree that in the prison context access to counsel is merely a "means for ensuring a reasonably adequate opportunity to presented claimed violations of fundamental constitutional rights to the court." *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (internal quotation marks omitted). The Court likewise agrees that in the prison context, the political branches of government are responsible for running their own facilities and "manag[ing] prisons in such fashion that official interference with the presentation of claims will not occur." *Id.* at 349. But it does not follow that the judiciary has secondary responsibility for ensuring prisoners have adequate access to the courts.

At the outset, the Government's reason simply falls flat because, as the Government itself notes, "the detention facility [at Guantanamo Bay] . . . is not a corrections facility." Resp. Lt'r [28] at 2, Aug. 21, 2012. If it were, under Navy Regulations, detainees would have unconditional access to their attorneys. Dep't of Navy Corrections Manual, Art. 1640-80, Sec. 3 ¶ 2.c (Mar. 29, 2011), *available at* http://www.public.navy.mil/bupers-npc/reference/instructions/BUPERSInstructions/Documents/1640.22.pdf ("Under no condition shall any prisoner be prevented from consulting or corresponding with counsel or the authorized representative of counsel . . . .").

But even in the prison context, the Supreme Court has zealously guarded against policies that threaten prisoners' ability to effectively challenge their detention. It has held, in no uncertain words, that the "state and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). Such abridgment need not be conspicuous or direct. For example, the Supreme Court has mandated that prisoners must be provided with access to law libraries or "alternative sources of legal knowledge," and "with paper and pen to draft legal documents[,] with notarial services to

authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 817, 823–25 (1977). The Supreme Court has likewise invalidated backdoor attempts to prevent inmates from filing habeas petitions, such as policies that ban jailhouse lawyers from assisting other inmates prepare court filings, *Johnson v. Avery*, 393 U.S. 483, 489 (1969), and those requiring indigent prisons to pay filing fees, *Burns v. Ohio*, 360 U.S. 252, 257 (1959). In *Casey*, the Supreme Court affirmed that prisons must ensure that illiterate and non-English-speaking prisoners have meaningful access to the Courts. *See* 518 U.S. 343, 355–56 (1996).

While the Executive may have the responsibility for regulating its facilities, the Court is charged with ensuring that prisoners are "provided with the tools . . . to challenge the conditions of their confinement." *Casey*, 518 U.S. at 355. This is especially true in the context of Guantanamo: "The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional." *Boumediene*, 553 U.S. at 772. As petitioners Uthman and Esmail point out, the "legal framework for uncharged Guantanamo detainees is dynamic and fluid, subject to change for any number of reasons," including changed domestic and international circumstances, and amended legal and regulatory schemes. Reply [21] at 7. Even the Government agrees that "assistance of counsel can be instrumental to proper decision-making about whether and when to file a new habeas petition." Resp. Opp. [12] at 21–22. The Court does not see how these petitioners, who speak no English, have no legal training, and who cannot be expected to remain up to date with new legal and political developments can have the requisite tools to bring habeas petitions without access to counsel.

B. The Government's MOU Transgresses on the Judiciary's Duty to Ensure Detainees Have Access to the Courts by Giving the Military Unreviewable Discretion over Counsel-Access Questions.

The MOU not only threatens separation-of-powers principles by usurping the judiciary's duty to ensure access to the courts, it also takes from the courts the power to adjudicate controversies relating to the MOU. The MOU gives the military commander of Guantanamo "final and unreviewable discretion" over "disputes regarding the applicability, interpretation, enforcement, compliance with or violations of" the MOU. MOU [12-1] at ¶ 8.f. Such controversies will necessarily implicate detainees' access to the courts. If applied, the MOU would also allow the Commander, JTF-GTMO to deny petitioners access to counsel whenever he deems the "operational needs or logistical constraints" justify it. MOU [12-1] at 8(c). The Government has already exercised this broad, unimpeded discretionary power; it informed petitioners' counsel that "it anticipates limiting the number of attorneys who may have continued access to a detainee under the MOU to two" and one translator. Resp. Opp. [12] at 11, n.3. A document so one-sided that it gives one party the power to unilaterally modify its provisions renders any rights provided by such a document meaningless and illusory. Far from merely putting in place rules governing how it will run its own facilities and protect classified information, Hr'g Tr. at 14–15, the Government wants to place itself as the sole arbiter of when a habeas petitioner is "seeking" to challenge their own detention and when a habeas case is "impending," and thus when they can have access to counsel. But "access to the Court means nothing without access to counsel." *Al-Joudi*, 406 F. Supp. 2d at 22. Thus, the MOU actually gives the Government final, unreviewable power to delay, hinder, or prevent access to the courts.

Moreover, the Government actions thus far demonstrate that it cannot be trusted with such power. The Government does not contest that petitioners' right to habeas relief includes a

continuing right to file a habeas petition even after denial on the merits or dismissal without prejudice. Resp. Opp. [12] at 21. And, the Government concedes that detainees "seeking to challenge the lawfulness of their detention, whether for the first time, or thereafter, are entitled to the assistance of counsel." *Id.* at 2. Nor does the Government question that "assistance of counsel can be instrumental to proper decision-making about whether and when to file a new habeas petition." *Id.* at 21–22. Yet, the Government believes that the petitioners bringing the present action have only demonstrated a "conjectural" desire to bring future habeas claims, and regardless of how helpful counsel might be to that decision-making process, these petitioners do not qualify for counsel-access under the Protective Order. *Id.* at 24.

The Court is satisfied that these petitioners have made plain their desire to continue challenging the legality of their detention. Petitioners Al-Mudafari and Al-Mithali seek indefinite stays of their habeas proceedings, and Petitioner Ghanem seeks leave to dismiss without prejudice to re-file. This evidences that each intends to continue fighting their detention, just at a later date. Petitioner Al-Baidany specifically avers that he intends to re-file for habeas relief. Reply [19] at 2. And counsel for Uthman and Ismail submit that they "have asked counsel to pursue every legal avenue to achieve their release," and counsel has assured the Court that he "*will* file for habeas petitions or [commence] other legal proceedings on their behalf." Reply [21] at 6. These petitioners have demonstrated more than merely a conjectural desire to bring habeas petitions. Indeed, they have either active or impending petitions. Thus, by its own rubric, the Government should allow these petitioners access to counsel under the Protective Order.

C. The Government Lacked Authority to Issue the MOU.

It is clear that the Government had no legal authority to unilaterally impose a new

counsel-access regime, let alone one that would render detainees' access to counsel illusory. Because it is emphatically the duty of the Courts to assure access to habeas relief, *Harris*, 394 U.S. at 292, and because "petitioners' access to attorneys is not a matter of Government discretion," *Al Odah*, 346 F. Supp. 2d at 10, the Government's MOU is null *ab initio*. If the Court here were to allow the Executive to substitute its MOU for the Protective Order, regardless of whether it provides "essentially the same" counsel-access provisions or not, Resp. Opp. [12] at 1, 15, 38, 40, the Court would be abdicating its great responsibility to guarantee that its doors remain open to these detainees. *C.f. United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). If the separation-of-powers means anything, it is that this country is not one ruled by Executive fiat. Such blanket, unreviewable power over counsel-access by the Executive does not comport with our constitutional system of government. Therefore, it is the opinion of this Court that the Protective Order continues to govern detainee-counsel access for the purpose of bringing habeas petitions so long as detainees can bring habeas petitions before the Court.

D. The Court's Holding is Consistent with its Equitable Powers.

The Government argues that the Court's holding here turns the Protective Order into a permanent injunction without the showing of harm needed for such an injunction. The Court disagrees. As an initial matter, the Court's holding does not convert the Protective Order into a permanent injunction. The Protective Order remains in place only as long as detainees are held at Guantanamo Bay and can petition for habeas relief or bring other claims before the Federal courts, and no longer. Had, for example, the Obama Administration closed the Guantanamo Bay detention facility as it promised, the Court's Protective Order would no longer have any effect, except as to those provisions regulating disclosure of classified and protected information. *See*

Executive Order 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). The Protective Order itself and the Court's holding today are little more than an appropriate exercise of the Court's equitable powers in pursuit of its charge to ensure detainees have adequate access to the courts.

"Habeas corpus is at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and judges have "broad discretion" to fashion appropriate remedies, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). It may extend beyond simply ordering the release of a petitioner, *Carafas v. LaVallee*, 391 U.S. 234 (1968), and is to "be administered with the initiative and flexibility essential to insure that miscarriages of justices within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291 (1969). Habeas corpus "never has been a static, narrow, formalistic remedy; its scope has been to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). In "reviewing the legality of Executive detention . . . its protections . . . [are] strongest." *Rasul*, 542 U.S. at 474 (citations omitted).

The Supreme Court has noted that its "scope and flexibility—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts . . . ." *Harris*, 394 U.S. at 291. Courts are inherently empowered to "requir[e] additional measure to assure meaningful access [to the courts]," *Bounds*, 430 U.S. at 824, and to "authorize such proceedings with respect to development . . . of the facts . . . as may be necessary or appropriate in aid of [its habeas jurisdiction]," *Harris*, 394 U.S. at 300 (citation and internal quotation marks omitted). In *Al Odah*, this Court confirmed that, where it "is clear . . . that Petitioners are entitled to present the facts surrounding their confinement to the Court[], [i]t is equally clear that the Court is authorized to craft the procedures necessary to make this possible, in order that the Court might

fully consider Petitioners' challenge to their detention." 346 F. Supp. 2d at 7 (citing *Harris*, 394 U.S. at 300). And in *Boumediene*, the Supreme Court specifically left access-to-counsel issues to the discretion of the District Court. 553 U.S. at 796.

Invoking the Court's equitable power in Guantanamo cases is particularly appropriate because this class of cases is *sui generis*. *See Boumediene*, 553 U.S. at 772. Petitioners are not being held in a state or federal detention facility where they can freely send mail, meet with family or phone a friend. Petitioners here, and their fellow detainees, have been held virtually *incommunicado*, and some, including petitioner Ghanem, have been detained for more than a decade. Mot. [5] at 4. Most petitioners do not speak English and other detainees are completely illiterate. Al-Mudafari & Al-Mithali Reply [20] at 9 n.3. Petitioners hail from foreign lands with wildly different legal systems. Any understanding they may possess of the American legal system is likely fraught with confusion and misconceptions.

The Protective Order was put in place to provide counsel with sufficient access to detainees and to classified information so that detainees could appropriately prosecute habeas petitions. Therefore, the Court's holding here, that the Protective Order remains in effect even after a habeas petition has been dismissed or denied, does nothing more than ensure that detainees have access to the courts, through their counsel, and that detainee's counsel-access is "adequate, effective, and meaningful." *Bounds*, 430 U.S. at 822.

E. The History and Terms of the Protective Order Makes it Clear that the Protective Order Remains in Effect After the Dismissal or Denial of a Habeas Petition.

The Government argues that under the terms of the Protective Order, all provisions, save those regulating disclosure of classified information, necessarily expire at the termination of an individual petitioner's habeas case. Resp. Opp. [12] at 28–31, Hr'g Tr. at 6–7. As to the

provisions regulating disclosure of classified information, the Court agrees with the Government. *See* P.O. at ¶¶ I.D.31, I.E.41, I.G.52. However, the Court cannot agree that these provisions, by implication, prove that the rest of the Protective Order was intended to expire after a petitioner's case is dismissed or denied. To the contrary, the terms of the Protective Order and the history behind its creation sufficiently evidence that it applies to Guantanamo cases as a class, and that it remains in effect so long as petitioners have the right bring habeas or other cases before the Court, not merely when a habeas petition is being actively heard.

The Protective Order was not created in a vacuum. It was issued in response to the Government's initial position, that detainees' access to counsel was purely within the Executive's "pleasure and discretion." *Al Odah*, 346 F. Supp. 2d at 5. It was the result of a deliberative process that included oral and written input from the Government and petitioners. It took into consideration that the District Court, as the Court of first resort, is always concerned with the just and expeditious determination of cases and seeks judicial economy whenever possible. *See In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH), Order [1] at 1–2.

The preamble to the Protective Order affirms that it was meant to apply to "all aspects of these coordinated matters." P.O., 577 F. Supp. 2d at 145. The coordinated matters were "all case involving petitioners presently detained at Guantanamo Bay, Cuba" that "have been filed or *may be filed in the future*. . . ." *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH), Order [1] at 1–2 (emphasis added). The Court understands the terms "all aspects" and "cases that have been filed or may be filed" to include all possible legal scenarios, including voluntary dismissal or other periods of inaction, such as between the filing of successive habeas petitions. Section I paragraph 20 specifically notes that "petitioners' counsel in *these and other proceedings*" will have access to classified materials, including attorney work-product. P.O. at

¶¶ I.13, I.20 (emphasis added). And, "petitioners' counsel" was defined as "attorneys employed or retained by or on behalf of a petitioner for purposes of representing the petitioner in *habeas corpus or other litigation* in federal court." *Id.* at ¶ I.11 (emphasis added). Clearly, the order was meant to apply to petitioners who were contemplating bringing cases, but who had not yet filed pleadings with the Court. Finally, the Order mandates that all "documents containing classified information prepared, possessed or maintained by, or otherwise provided to, petitioners' counsel" would not be destroyed until the "final resolution of these cases, including all appeals." *Id.* at ¶ I.33. These provisions read together make it abundantly clear that the Protective Order's applicability lasts beyond the denial or dismissal of a petitioner's habeas case and stretches to the class of present and future cases which have been, or may be, filed by detainees at Guantanamo Bay.

Beyond this fact, the Government's reading of the Protective Order would lead to unreasonable conclusions and create multiple regimes of counsel-access for habeas cases. For example, a petitioner whose habeas claim was denied by the District Court would lose access to counsel at the moment the Court's order was published because any appeal would be "speculative" at that time. Petitioner's attorneys would then have to go through the process of signing the MOU before they would be able to again meet with or speak to their client to determine whether the detainee wished for them to file an appeal. But the MOU mandates that it will not come into effect until countersigned by the Commander of JTF-Guantanamo, at his discretion. MOU [12-1] at ¶ 11. Under these rules, the Government could simply withhold access to counsel for any amount of time it wished. Moreover, if the Government signed the MOU, the MOU would lose force at the moment petitioner made plain his desire to appeal the District Court's ruling, because the petitioner's case would then be "impending." At that

moment, the petitioner's attorneys would again be covered by the Protective Order. The Protective Order cannot be understood to create such a confusing counsel-access scheme.

VI. SUFFICENT EVIDENCE EXISTS FOR THE COURT TO ISSUE A PERMANENT INJUNCTION IF IT SO DESIRED

The Government argues that under the Supreme Court's ruling in *Casey*, detainees must show "actual harm" before the Court has authority to step in and provide procedures for counsel-access. Resp. Mot. [12] at 24; Hr'g Tr. at 8. The Government maintains that petitioners here cannot show any such harm because counsel-access is provided under its MOU and because petitioners can access the Court via regular mail. Resp. Mot. [12] at 38.

The Government's reliance on *Casey* is misplaced. As an initial matter, the Government provided no evidence that the "actual harm" standard applicable in *Casey*, a case involving access to the courts in the domestic prison context, is appropriate for determining counsel-access questions involving detainees at Guantanamo Bay, especially when the Supreme Court has specifically left such questions to the discretion of the District Court. *Boumediene*, 553 U.S. at 796. The facts in *Casey* are also distinguishable.

Casey dealt with inmates held by the Arizona's Department of Corrections (ADOC) who complained that inadequate prison law libraries and legal assistance programs inhibited their access to the courts. 518 U.S. at 346–48. After finding harm, the district court directed a special master to investigate and issue a report containing remedial measures, which the Court adopted as a permanent injunction. *Id.* The Supreme Court reversed and held that these prisoners could not establish harm simply by arguing that the "prison's law library or legal assistance program is subpar in some theoretical sense." *Id.* at 351. The Court also took issue with the permanent injunction. It faulted the district court because the remedial plan was developed by a law professor in New York, rather than by ADOC officials, and it was created "through a process

that failed to give adequate consideration to the views of state prison officials." *Id.* at 362–63.

While the prisoners in Casey may have been in a prickly situation, they certainly were afforded more protections and access to courts than detainees at Guantanamo. The difference between the two is as stark as the difference between the tropical climate of Cuba and the desert climate of Arizona. Prisoners in Arizona had been tried and convicted. They could send mail through the U.S. Postal Service. They could phone friends and family who could assist them with securing representation. And there was no evidence that prisoners, who were represented by counsel, would be restricted from meeting with counsel. In contrast, detainees at Guantanamo have been held without charge or trial, are generally not permitted visitors other than members of the International Committee for the Red Cross, and their mail is subject to review, redaction and seizure by the military. Al-Mithali Mot. [4] at 3.

What's more, *Casey* affirmed the District Court's finding that at least two illiterate and non-English-speaking prisoners suffered actual harm because the ADOC Procedures did not provide them with adequate access to the courts. 518 U.S. at 355–56. If illiterate prisoners who could nevertheless communicate with family, friends and counsel were deemed to lack sufficient access to the courts, there can be little doubt that the Guantanamo detainees, whose are in a far more vulnerable position, and who have been denied access to their own counsel, have likewise suffered an injury which the Court may rightfully redress using its equitable powers.

Unlike the circumstances in *Casey*, the Protective Order was requested by, and developed in consultation with, the Government. Judge Hogan, a wise and experienced jurist who had previously served as the Chief Judge of this Court, and not some mere law professor, carefully considered the pleadings and oral arguments of the parties, and the history of Guantanamo habeas litigation before issuing the Protective Order. Far from providing remedial measures, the

Protective Order simply reaffirmed counsel-access procedures that had been in place for four years.

A. There is Sufficient Evidence to Find that Petitioners Would Suffer Actual Harm Absent Court-Ordered Counsel Access.

But even under *Casey*, the Court need only find "past or imminent official interference with individual inmates' presentation of claims to the courts," before issuing an injunction to prevent such harm. 518 U.S. at 349. As the Court has repeatedly said, in the context of Guantanamo Bay, "access to the Court means nothing without access to counsel." *Al-Joudi*, 406 F. Supp. 2d at 22. It follows that any regulations that imminently threaten detainees' access to counsel likewise threaten their access to the courts. There is no question that the Government here has already interfered and continues to interfere with detainees' presentation of claims to the Court. Petitioners Esmail and Uthman have been denied access to counsel since May 2012. Esmail & Uthman Reply [21] at 7. All other petitioners in this case are threatened with losing access to counsel under the Protective Order. While the Government maintains that counsel-access is nevertheless provided by the MOU, as described in sections III and V.B., *supra*, the MOU gives the Commander of JTF-GTMO immense discretionary authority to unreasonably deny detainees access to counsel.

All petitioners here are represented by private counsel, acting pro bono.[11] The costs

---

[11] The Court would like to note that pro bono counsel in these cases have worked diligently to provide detainees with competent legal counsel. It would have been difficult and costly for the Court to manage its Guantanamo docket without the help of pro bono counsel. They have acted in the highest spirit of our profession. As *The Atlantic* magazine so eloquently put it,

> At its core, pro bono legal work is charity work. It is done by those with a particular expertise -- lawyers, paralegals, investigators -- on behalf of those who cannot afford to help themselves. It is both a gift and an ethical obligation that the legal community in America has undertaken since before the Revolution. . . . [Detainees held at Guantanamo Bay] deserve under our rule of law to be represented by attorneys. This is so because by providing these men with lawyers we say, both to the detainees and to the rest of the world, that we are better, that we are fairer, than those we fight.

Andrew Cohen, *In Defense of Pro Bono Legal Service, Whatever Form It Takes*, The Atlantic, August 24, 2012, *available at* http://www.theatlantic.com/national/archive/2012/08/in-defense-of-pro-bono-legal-service-whatever-form-it-takes/261465/. The Court could not agree more.

associated with such representation are immense. Partners and associates, who would otherwise be billing clients at rates certainly exceeding $500 an hour, have to spend two days to travel back and forth to Guantanamo Bay. Esmail & Uthman Reply [21] at 10. To balance the requirements of their practice and their pro bono work, it is not unusual for law firms to designate a team of attorneys to represent detainees, and individual attorneys often represent multiple detainees. Al-Mudafari & Al-Mithali Reply [20] at 6. *Id.* at 6–7. This allows pro bono counsel to take turns visiting detainees as their schedules allow. *Id.* But the Government's unilateral amendment to the MOU would allow only two attorneys to have access to any particular detainee. Resp. Opp. [12] at 11 n.3. Detainees could be left without representation for long stretches if these attorneys were unable to visit detainees because of other pending matters. If an attorney decided to withdraw representation, the detainee could be left without representation because the MOU only allows those attorneys who had previously signed the Protective Order to provide representation to detainees under the MOU's terms. *See* MOU [12-1] at ¶ 3.

The change to the MOU likewise restricts the number of translators who will be allowed access each detainee to one. Resp. Opp. [12] at 11, n.3. Because the number of private translators holding security clearances sufficient to allow access to Guantanamo is necessarily limited, this restriction would further intrude on counsels' ability to meet with detainees, as coordinating the schedules of a limited number of counsels and a single translator with the military is likely to become prohibitively difficult. Al-Mudafari & Al-Mithali Reply [20] at 6–7; Esmail & Uthman Reply [21] at 16 n.9. And the Court simply cannot countenance placing the "operational needs and logistical constraints" at Guantanamo ahead of detainees' constitutional right to access to counsel. MOU [12-1] at 8(c).

B. The History of Detainee Litigation Provides Sufficient Evidence of Past Interference to Satisfy *Casey*.

The Government notes that if counsel-access under the MOU proves unworkable, petitioners could simply request the Court's intervention at that point. Hr'g Tr. at 10–11. But, under the last two protective orders, the Court was forced to step in multiple times to ensure counsel-access. It is likely that that the Court would be called on to decide future counsel-access issues under the MOU, but without the benefit of precedents governing the Protective Order. For example, petitioner's counsel averred that under the MOU the Government would have the power to read attorney-counsel mail and listen to privileged conversations, both procedures that were specifically rejected in *Al Odah*. Hr'g Tr. at 60–61, *Al Odah*, 346 F. Supp. 2d at 4–5. The Court can see nothing from the face of the MOU that would prevent the Government from requiring counsel to submit to such procedures. For its part, the Government did not guarantee such procedures would be off the table, but instead countered that counsel merely "misunderstood" the MOU and noted that that is not how the MOU "process is meant to work." Hr'g Tr. at 62. Thankfully, even if the Court wished to issue a permanent injunction, it would not have to wait for such issues were ripe for review. *Casey* allows the Court to consider past interference with detainees' presentation of claims in order to satisfy the actual harm requirement. 518 U.S. at 349. While the Court will not review the whole history of detainee counsel-access litigation, a few cases suffice to legitimize the Court skepticism of the Government's promises to provide adequate counsel-access under the MOU.

In *Adem v. Bush*, the Government attempted to create a procedural loophole in order to deny counsel-access. Petitioner Adem, who did not speak English, asked a fellow detainee who did and who had counsel to communicate to his counsel that Adem desired to challenge his detention. 425 F. Supp. 2d 7, 9 (D.D.C. 2006). Pro bono counsel took the case and filed a

habeas petition on Adem's behalf. *Id.* After securing the necessary clearances, petitioner's counsel was denied access to Adem because counsel could not present "written evidence" of representation. *Id.* This presented a comical catch-22 as such evidence was something that counsel could not obtain without first being allowed to meet with her client. The Government first suggested that counsel mail a letter, which was impossible because the legal-mail provisions of the Protective Order were inapplicable before counsel presented evidence of representation. *Id.* at 10 n.5. The Government then proposed that the "only acceptable way to confirm" a detainees desire to be represented by counsel was to have the detainee "sign a form and send it through the 'non-legal mail' channels," a process whose efficacy the Court was skeptical of. *Id.* at 24–25. The Court found that petitioner Adem had the right to meet with counsel in absence of any written evidence of representation under the terms of the Protective Order. *Id.* at 8.

In a series of cases, the Court has been forced to demand that the Government allow counsel to review detainee medical records in order to assure that detainees are not being put in such a state by the Government as to render their right to habeas review meaningless. In *Tumani v. Obama*, counsel argued that the conditions of petitioner's detention had caused such severe mental illness that the detainee was no longer able to participate in his habeas action. 598 F. Supp. 2d 67, 70 (D.D.C. 2009). The Government countered that there was no evidence of significant interference with petitioner's ability to assist counsel. *Id.* The Court sided with the petitioner and ordered production of the detainee's medical records. *Id.* at 71.

In *Al-Joudi v. Bush*, counsel learned that petitioners, who were participating in a hunger strike, were being mistreated. 406 F. Supp. 2d at 15. Petitioners' filed an Emergency Motion to Compel requesting that the Government provide counsel with his clients' medical records or allow counsel telephonic access to detainees. *Id.* at 15–16. Counsel testified that he had been

informed that the Government had shackled or otherwise placed restraints on detainees' arms, legs, waist, chest, knees and head, and had inexperienced medical staff place intravenous lines to force feed detainees. *Id.* At other times, detainees were force fed by tubes that were inserted, without anesthesia, in the nose and traveled down to the stomach, which caused severe pain and bleeding. *Id.* at 16–17. There were also allegations that tubes from one detainee were removed and inserted into another detainee without being sterilized or cleaned, which could have resulted in deadly infections. *Id.* The Government denied all the allegations, but refused to provide detainee-specific medical records or allow telephonic conversations. *Id.* The Government argued that there was "no adequate legal basis for Petitioners' requested relief" and that such relief would constitute impermissible judicial oversight and "second-guessing" of the Executive's policies. *Id.* at 20–21.

The Court was unimpressed with the Government's "trust us" argument. It reasoned that "[u]nless Petitioners' counsel can have access to their clients, and know their true medical conditions, including whether they are in imminent danger of death, so as to counsel them in order to persuade them to stay alive, it is obvious that their ability to present their claims to the Court will be irreparably compromised." *Id.* at 22. The Court considered the detainees' position, as persons who did not speak English and who were "totally unfamiliar with the United States legal system," and the public interest of the United States before holding that "in order to properly represent Petitioners, their counsel must have access to them, be able to communicate with them and must be made aware if their clients are in such fragile physical condition that their future ability to communicate is in imminent danger." *Id.* at 21–22.[12]

[12] The Court in *Al-Joudi* applied a four-factor test for preliminary injunctions, which is the same as the test the Government proposed for a permanent injunction in this case. *Compare* 588 F. Supp. 2d at 19 *with* Resp. Opp. [12] at 14. The *Al-Joudi* Court found that irreparable harm was established by showing that the health of a vulnerable person was threatened, that the likelihood of success on counsel-access claims was established, that there was no

In *Husayn v. Gates*, petitioner alleged that medications prescribed for him by doctors at Guantanamo cause him to become incoherent, psychotic, and interfered with his ability to write and speak. 588 F. Supp. 2d 7, 9 (D.D.C. 2008). Petitioner's counsel sought, *inter alia*, access to all of the detainee's medical records, and the right to consult with and disclose the detainee's medical records to an independent physician. *Id.* The Government objected that the requested remedy would constitute an intrusion into the petitioner's conditions of confinement, which is precluded from judicial review under the MCA. *Id.* The Court held for the detainee and ordered the Government to provide counsel with copies of the detainee's medical records. *Id.* at 12. The Court reasoned that the requested information and access did not interfere with the Executive's prerogative to run the Guantanamo detention facility, but was rather "a legitimate and important effort to provide effective representation and present the court with appropriate information affecting the lawfulness of his detention." *Id.* at 11. The Court noted that if the detainee's "right to present his case with the assistance of counsel is to have any meaning, his counsel must be able to" assess whether the petitioner's physical and mental condition would undermine his right to assist in his own habeas action. *Id.* at 9, 11 (internal quotation marks omitted).

C. Requesting that Petitioners Proceed *Pro Se* or Write to the Court If They Seek Assistance of Counsel Does Not Provide Adequate Access to Counsel.

The Government has taken the quite preposterous position that petitioners are not being denied access to the courts because petitioners can proceed *pro se* or "send letters to the Court requesting initiation of habeas case, or submit the form that the Government makes available to Guantanamo detainees for that very purpose." Resp. Opp. [12] at 25. The Court cannot take this

---

substantial injury to the Government when weighed against the irreparable injury to the petitioners, and that the public interest of the United States was "served by ensuring that habeas petitioners have access to counsel so that they can meaningfully challenge their detention. . . ." *Al-Joudi*, 588 F. Supp. 2d at 19–23. The Court here believes, without deciding, that if it analyzed the present case under the Government's proposed four-factor test, the Court would come to the same result as the Court in *Al-Jourdi*.

contention seriously. It is uncontested that most if not all of the detainees are illiterate in English, if not in their native tongue. While the Government says that forms made available to detainees for the purposes of communicating with the Court are forwarded to the Court, the Government provides no timeline for doing so. *Id.* Nor has the Government has put forward any documentation of the procedures that are in place to ensure that detainees can complete the forms that they are provided with. While the Government also argues that detainees can communicate with the Court or with their counsel through "non-legal mail," the Court has been given no guarantee that detainees will be provided with paper, pens or pencils to write letters, that they will be given envelopes or stamps to mail them, that they will be shown how to properly address mail, or that illiterate detainees will receive any assistance. What's more, non-legal mail is subject to review and censorship by the military. *Id.* And, mail would certainly have been an option unavailable to detainees in *Husayn* or *Al-Joudi*, whose medical conditions left them unable to think or write.

Indeed, the Court has sufficient reasons to doubt that the Government will guarantee detainees the ability to access the Courts through the mail. In the past, the Government's attempts to notify detainees of their rights and to make sure they can exercise those rights were "marginally effective at best." *Adem*, 425 F. Supp. 2d at 15. Although the Government notified detainees of their right to file for habeas relief, the Government failed to explain what habeas relief meant. *Id.* The Governments forms notifying detainees that they could obtain legal representation used "so much legal and technical language" that the Court "doubt[ed] it would mean much of anything to an individual not already familiar with the United States legal system." *Id.* at 18 n.19. Translations of the detainees' notice of rights were poor and confusing, and the government made no provisions to notify illiterate detainees of what the notice said. *Id.*

at 16. Some detainees simply mailed back blank sheets because they did not understand and were not told that more was necessary in order to obtain counsel. *Id.* at 12 n. 9. Guantanamo staff was prohibited from assisting detainees in any way and they were not allowed to answer detainees' questions regarding their rights. *Id.* As related in *Adem*, mailing a letter to counsel certainly did not guarantee it would arrive. *Id.* at 18, 25. Indeed, it was in light similar concerns that the Protective Order specified precise procedures for sending and receiving legal mail. *See* P.O. at ¶¶ II.D.12–II.D.13.

For detainees whose petitions have been heard and denied, the Government's argument is even less persuasive. The Court agrees with petitioners Uthman and Esmail that the "legal framework for uncharged Guantanamo detainees is dynamic and fluid, subject to change for any number of reasons," including changed domestic and international circumstances, and amended legal and regulatory schemes. Reply [21] at 7. Filing successive petitions will necessarily require analysis of these constantly evolving circumstances. And, the Government has conceded that under the MOU, petitioners' access to information, legal and non-legal, is at the unreviewable discretion of the Executive. Nothing would stop the Government from withholding relevant information or preventing the Government from unreasonably denying access to counsel if it fears that new legal developments would benefit a detainee. In such circumstances, the Court would almost certainly be again called on to determine counsel-access issues.

The Government also argues that the Court is interfering with the Executive's prerogative to control classified information. Resp. Opp. [12] at 35. This objection does not pass the smell test. The Protective Order has stood unopposed for nearly four years. The Government requested the Protective Order specifically to protect classified information. The Court is aware

of no leaks of classified information under the Protective Order or otherwise in these Guantanamo cases. Interestingly, the Government's MOU specifically incorporates provisions of the Protective Order that protect classified and other protected information from disclosure without adding new protections (except for stripping counsels' need to know). MOU [12-1] at ¶ 3. The Government seems satisfied that the Protective Order appropriately protects classified and other protected information, and, therefore, the Court is certain that its holding here, which merely affirms that the Protective Order remains in effect, does nothing to challenge the Government's rights to protect classified information.

VII. CONCLUSION

The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends the separation-of-powers principles and our constitutional scheme.

For the foregoing reasons, the Court finds that the Protective Order continues to govern access to counsel for all petitioners in the above captioned case.

A separate Order consistent with this Memorandum Opinion shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, on September 6, 2012.

APPENDIX 30

OPINIONS

Obama turns back the clock on Guantanamo

By Baher Azmy, August 16, 2012

New rules from the Obama Justice Department threaten to return Guantanamo Bay to the legal black hole it was in during the early days of the George W. Bush administration. The rules, which began trickling out in May, are to be reviewed Friday in a hearing before a federal judge in Washington. They restrict lawyers' access to detainees who have lost their initial habeas corpus petitions. The effect would be to wrest control of attorney-client access away from the courts and give the military nearly complete discretion to dictate if and when attorneys can visit detainees, how many attorneys may work on a case, what information lawyers may obtain and use in representing their clients, and where and how this information can be used.

In other words, far from closing the prison camp as he promised, President Obama is steadily returning Guantanamo to the secretive and hopeless internment camp that he vilified as a candidate.

Since the Guantanamo prison opened in 2002, its defining features have been the denial of judicial oversight and its exclusion of lawyers. The George W. Bush administration chose this location to house "enemy combatants" because officials thought the island military base — and treatment of detainees — would be beyond the scrutiny of the courts. After the Supreme Court rejected this strategy in its 2004 ruling in *Rasul v. Bush*, lawyers streamed down to the base. It soon became clear that not only had most detainees been abused but also that most should never have been detained at all. More than 600 of the nearly 800 Muslim men once held at Guantanamo have been released since *Rasul*.

In 2008, the court's ruling in *Boumediene v. Bush* reaffirmed that detainees had a right to meaningful judicial review of the factual and legal basis of their detention. *Boumediene* reopened the courts to detainees, and habeas challenges resumed after years of being put on hold.

In the first three years after *Boumediene*, most detainees won their cases in lower courts, underscoring the weakness of the Bush administration's detention decisions. But over the past year, the U.S. Court of Appeals for the D.C. Circuit has reversed all of those decisions and imposed legal standards that make it virtually impossible to win a habeas case. Meanwhile, the Supreme Court's refusal to review the D.C. Circuit's defiance of the promise in *Boumediene* — despite a plea raised this year in seven separate appeals — signals the end of meaningful judicial oversight of Guantanamo.

And the Justice Department's new rules are bringing Guantanamo full circle. In a court filing this month, the Obama administration showed its faulty reasoning, arguing that in the absence of active habeas petitions, lawyers do not need guaranteed access to their clients or to classified information necessary to pursue their claims. Obama officials, like the Bush administration before them, say that the government should have unfettered control over Guantanamo.

But there is no plausible legal or military justification to punish these detainees in this way. Guantanamo remains thousands of miles from any active hostilities. More to the point, amid the thousands of attorney-client visits that have occurred over the past eight years, there has been no credible report of any disclosure of classified information or harm to national security.

The Obama administration's backtracking, taken with the D.C. Circuit's evisceration of *Boumediene* and the president's failed promise to close the prison, are shifting the status quo at Guantanamo to the pre-*Rasul* era, when Guantanamo was iconic for denying human beings legal rights or access to the outside world.

This development is as unsurprising as it is dangerous. In 2004, the Supreme Court was motivated to ensure judicial supervision over detention operations at Guantanamo by revelations about torture at Abu Ghraib as well as by concerns about detention without charge or trial. Today, most people think Obama has ended torture at Guantanamo. It does not follow, however, that there is no longer a need for judicial oversight. Conditions and treatment at the prison improved precisely because of attorney and judicial oversight. Abuses could easily return absent proper vigilance. Still, the more fundamental problem at Guantanamo has always been indefinite detention without charge or trial — itself a form of torture.

Torture was President Bush's legacy at Guantanamo. I hope that President Obama's legacy will not be that he legitimized indefinite detention without charge and made Guantanamo a place where the United States sends Muslim detainees to grow old and die.

FEATURED ARTICLES

Handy Guide: Buying a Mattress

Notes from a newly converted juicer

Showtime's 'History of the Eagles': Soaring, and occasionally still sore

MORE:

'Life Is but a Dream': Beyonce's world, seen through a mish-mash

Five myths about picking a pope

Warren Buffett's Berkshire Hathaway makes several stock moves, invests in ADM, Verisign

The Secret to Cleaning Grout in Tile Floors

3-D printers could bring manufacturing to your home office

Why Isn't The Dodge Dart Selling?

121

Comments

We Recommend

Supreme Court declines Guantanamo detainee appeals
June 11, 2012

Detainees' Day in Court
September 17, 2008

Guantanamo detainees see legal progress reversed
June 24, 2011

Find More Stories About

Guantanamo Bay

Military Base

APPENDIX 31

Seton Hall University School of Law
Center for Policy & Research

NO HEARING HABEAS:
D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW

Mark Denbeaux
Professor, Seton Hall University School of Law
Director, Seton Hall Law Center for Policy and Research
Counsel for Guantanamo Detainees

Jonathan Hafetz
Associate Professor, Seton Hall University School of Law
Co-Director, Seton Hall Law Transnational Justice Project

Sara Ben-David, Nicholas Stratton, & Lauren Winchester
Co-Authors & Research Fellows

Bahadir Ekiz, Christopher Fox, Erin Hendrix, Chrystal Loyer, Philip Taylor, Edward Dabek, Sean Kennedy, Edward Kerins, Eric Miller, Emma Mintz, Kelly Ross, Kelly Ann Taddonio, Richard Tracy
Contributors & Research Fellows

James Froehlich, Ryan Gallagher, Paul Juzdan, Adam Kirchner, Matt Miller, Lucas Morgan, Rachel Simon, Jason Stern, Kurt Watkins, Joshua Wirtshafter
Research Fellows

May 1, 2012

EXECUTIVE SUMMARY

It is an open secret that *Boumediene v. Bush*'s promise of robust review of the legality of the Guantanamo detainees' detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with *Al-Adahi v. Obama*. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and "a meaningful review" of the evidence having been established in 2008 by the Supreme Court in *Boumediene*.

There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government's factual allegations rather than reject them.[1] The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in *Al-Adahi*.

Detainees won 59% of the first 34 habeas petitions.

Detainees lost 92% of the last 12.

The sole grant post-*Al-Adahi* in *Latif v. Obama* has since been vacated and remanded by the D.C. Circuit.

The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government's factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.

The effect of *Al-Adahi* on the habeas corpus litigation promised in *Boumediene* is clear. After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.

Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court's radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied *Boumediene*. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

[1] Sixty-three detainees have had cases resulting in opinions, some of which were consolidated opinions. The Uighers are excluded from this analysis because the government conceded their case so the district court did not have to make factual findings. This report thus examines 46 of the 63 cases.

I. Introduction

This Report examines the outcomes of habeas review for Guantanamo detainees, the right to which was established by the Supreme Court in *Boumediene v. Bush*.[2] It documents the reality that such review has been rendered essentially meaningless by the rulings of the United States Court of Appeals for the District of Columbia Circuit. At this point, an unmistakable pattern has emerged in decisions. On July 13, 2010, the D.C. Circuit reversed a habeas grant of relief in *Al-Adahi v. Obama*,[3] and the law established in that case triggered a wave of denied petitions in habeas litigation in the United States District Court for the District of Columbia, the court hearing all Guantanamo habeas petitions in the first instance. Before *Al-Adahi*, detainees were more likely than not to have their habeas petitions granted by the district court. Since *Al-Adahi*, district courts have decided twelve petitions, eleven of which were denied. *Latif v. Obama*,[4] the sole grant, has since been reversed and remanded by the D.C. Circuit.

Beyond the stark response of the district court, the D.C. Circuit has remained active since *Al-Adahi*, reversing two grants[5] (*Uthman*, *Almerfedi*), vacating and remanding three grants (*Salahi*, *Hatim*, *Latif*), affirming eight denials (*Al-Bihani*, *Ali*, *Esmail*, *Madhwani*, *al Alwi*, *Khan*, *Kandari*, *Sulayman*), and reversing and remanding one denial (*Warafi*). Though it was unclear at the time of Al-Adahi's certiorari petition, a clear pattern has now emerged: almost no detainees will prevail at the district court level, and if any do, the D.C. Circuit will likely reverse the decision to grant them relief.

As this Report explains, the key element in the post-*Adahi* shift in evaluation of Guantanamo detainee habeas petitions is the decline of the district courts' independent fact-finding powers. Part II of this Report outlines the Center's methodology. Part III presents a brief overview of the requirements set forth by the Supreme Court in *Boumediene*. Finally, Part IV analyzes common government factual allegations in habeas cases, noting how district courts accorded more deference to government allegations after *Al-Adahi*.

II. Methodology

This Report, the first in a series evaluating the factual allegations in each habeas corpus opinion, relies on the published district court opinions for forty-six detainees.[6] The Fellows for the Seton Hall Law Center for Policy and Research extracted recurring factual assertions raised by both the government and the petitioners.[7] Then each factual allegation was classified as to whether the district court accepted, rejected, or was silent as to each allegation. That data was compiled and analyzed to discover what patterns the data revealed. This Report focuses on what the research identified as the most significant factual allegations appearing in court

[2] 553 U.S. 723 (2008).
[3] 613 F.3d 1102 (D.C. Cir. 2010).
[4] 666 F.3d 746 (D.C. Cir. 2011).
[5] The five grants mentioned in this sentence had already been decided at the district court level when the D.C. Circuit decided *Al Adahi*.
[6] Sixty-three detainees have had cases resulting in opinions, some of which were consolidated opinions. The Uighers are excluded from this analysis because the government conceded their case so the district court did not have to make factual findings.
[7] The Center used only district court opinions to develop this Report; as a result, the only allegations reflected in it are those contained in the opinions.

opinions. These allegations include whether a detainee: committed a hostile act; stayed in a guest house; attended a military training camp; and took a suspect travel route. This Report also considers whether intelligence or interrogation reports were mentioned in the opinion.

Through a series of objective queries, this Report thus reveals the actual standard which has emerged for determining who is an enemy combatant, and, consequently, who may justifiably remain in detention.

III. The Supreme Court's Initial Requirements in *Boumediene*

Before the Supreme Court decided *Boumediene v. Bush*,[8] the Department of Defense (DOD) established the Combatant Status Review Tribunals (CSRTs) as the forum for detainees to contest their classification as "enemy combatants."[9] In 2005, Congress passed the Detainee Treatment Act (DTA) which stripped the courts of their jurisdiction to hear habeas petitions from Guantanamo detainees, approved the CSRTs, and vested exclusive review of CSRT decisions in the United States Court of Appeals for the D.C. Circuit.[10] A year later, Congress passed the Military Commissions Act of 2006 (MCA), amending the DTA to strip the courts of jurisdiction in any action against the United States relating to any aspect of detention, effective immediately and applicable to all cases pending without exception.[11]

In *Boumediene v. Bush*,[12] the U.S. Supreme Court held that detainees in Guantanamo Bay have the right under the U.S. Constitution to file petitions for the writ of habeas corpus.[13] The Court was then left with the question of whether the DTA offered an adequate and effective substitute for habeas corpus.[14] Ultimately, the Supreme Court concluded the DTA failed to provide an adequate and effective substitute for habeas corpus because it fostered flawed fact-finding in the initial CSRTs while restricting review in the Court of Appeals.[15]

By rejecting the DTA's substitute system, the Court in *Boumediene* seemed to hold out promise that there would be meaningful review of Guantanamo detentions for any detainee filing a habeas petition. Importantly, the Supreme Court noted that "the writ must be effective" and that the judge "must have sufficient authority to conduct a ***meaningful review of both the cause for detention and the Executive's power to detain.***"[16] The Supreme Court envisioned habeas review in the Guantanamo context not only as a means to challenge the legality of the detainees'

---

[8] 553 U.S. 723 (2008).
[9] *See* DEP'T OF DEFENSE, COMBATANT STATUS REVIEW TRIBUNAL ORDER (2004), *available at* http://www.defense.gov/releases/release.aspx?releaseid=7530.
[10] *See* Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, 119 Stat. 2739, § 1005(e).
[11] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in 28 U.S.C. § 2241(e)(1)–(2)).
[12] 553 U.S. 723 (2008).
[13] *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (rejecting the government's argument that the detainees could not have access to the writ because of their status as enemy combatants or because of their location in Guantanamo Bay).
[14] *See id.* at 771–72.
[15] *See id.* at 791 (noting detainee's ability to request a new CSRT be convened in light of new evidence is "insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus.").
[16] *Id.* at 783.

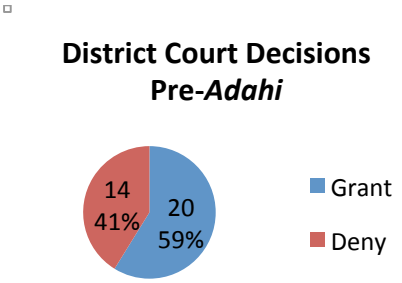
confinement, but also as a means to allow careful judicial scrutiny of the facts used to support their detention.

IV. Restricting Meaningful Review: the D.C. Circuit's Decision in *Al-Adahi*

After the Supreme Court invalidated the congressionally approved scheme of review, district courts began to carefully scrutinize government allegations in order to provide the meaningful review now required. Two years after the Supreme Court decided *Boumediene*, the D.C. Circuit issued its first grant reversal.[17] In *Al-Adahi v. Obama*,[18] a CSRT initially determined the petitioner, Mohammed Al-Adahi was part of al Qaeda and thus subject to indefinite detention under the AUMF.[19] Al-Adahi had filed a petition for habeas relief, and the district court had held he was not part of al Qaeda, ordering his release.[20] The D.C. Circuit's decision reversed that ruling.[21]

The D.C. Circuit's *Al-Adahi* opinion is important not only for being the first grant reversal, but also because district court judges have denied eleven out of twelve petitions since. The sole grant, *Latif v. Obama*,[22] was subsequently vacated and remanded by the D.C. Circuit supporting a conclusion that the D.C. Circuit meant to send a message to the lower courts when it reversed *Al-Adahi* and wanted to resend that message in *Latif*. This Report contends that the D.C. Circuit's message to the district courts was to stop scrutinizing the government's factual allegations so closely. This message reached a new extreme in *Latif* where the D.C. Circuit not only prevented district judges from closely evaluating the government's evidence but mandated that they give a presumption of accuracy to certain evidence (interrogation reports) submitted by the government, even though district courts had previously found that evidence unreliable.

As the chart below demonstrates, petitioners were more likely to win than lose as district courts granted 59% of habeas petitions before the D.C. Circuit's decision in *Al-Adahi*.



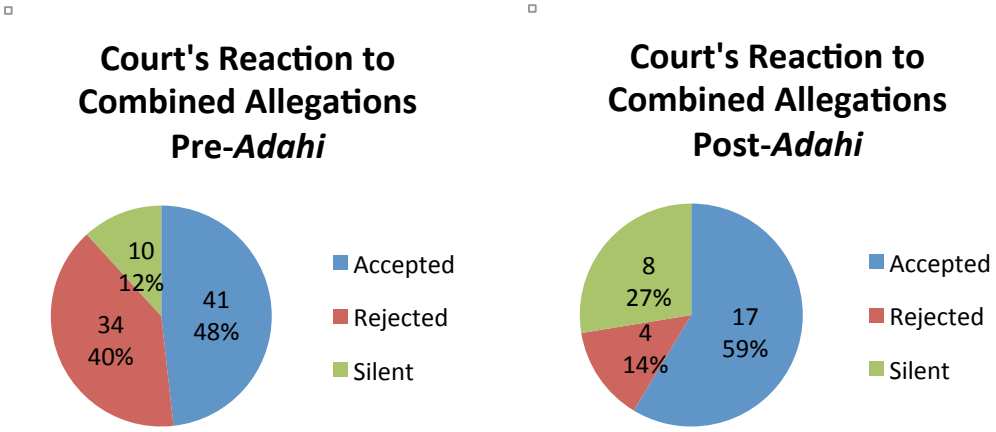
Since *Al-Adahi*, however, an unmistakable pattern of denial has emerged in decisions—the district court has decided twelve petitions, eleven of which were denied. *Latif*, the sole grant, has since been reversed and remanded by the D.C. Circuit. The chart below illustrates the pattern:

[17] Up to this point, the D.C. Circuit had only remanded one denial and affirmed four denials.
[18] 613 F.3d 1102 (D.C. Cir. 2010).
[19] *See* Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010).
[20] *See id.*
[21] *See id.*
[22] 666 F.3d 746 (D.C. Cir. 2011).

Petitioner's Name	Decision	Date	D.C. Cir. Grant Reversed or Remanded (Post-Adahi)
Belkacem Bensayah	Deny	11/20/2008	
Saber Lahmar	Grant	11/20/2008	
Mohamed Nechla	Grant	11/20/2008	
Mustafa Ait Idir	Grant	11/20/2008	
Lakhdar Boumediene	Grant	11/20/2008	
Hadj Boudella	Grant	11/20/2008	
Hisham Sliti	Deny	12/30/2008	
Mohammed el Gharani	Grant	1/14/2009	
Ghaleb Nasser al Bihani	Deny	1/28/2009	
Yasim Muhammed Basardah	Grant	3/31/2009	
Hedi Hammamy/Abdul Haddi Bin Hadiddi	Deny	4/2/2009	
Alla Ali Bin Ali Ahmed	Grant	5/4/2009	
Abd al Rahim Abdul Rassak Janko	Grant	6/22/2009	
Khalid Abdullah Mishal Al Mutairi	Grant	7/29/2009	
Saki Bacha (aka Mohammed Jawad)	Grant	7/30/2009	
Waqas Mohammed Ali Awad	Deny	8/12/2009	
Mohammed Al-Adahi	Grant	8/17/2009	
Fawzi Khalid Abdullah Fahad Al Odah	Deny	8/24/2009	
Sufyian Barhoumi	Deny	9/3/2009	
Fouad Mahmoud Al Rabiah	Grant	9/17/2009	
Farhi Saeed Bin Mohammed	Grant	11/19/2009	
Musa'ab al Madhwani	Deny	12/14/2009	
Saeed Hatim	Grant	12/15/2009	Remanded 2/15/11
Moath Hamza Ahmed al Alwi	Deny	12/30/2009	
Uthman Abdul Rahim Mohammed Uthman	Grant	2/21/2010	Reversed 3/29/11
Suleiman Awadh Bin Agil Al-Nahdi	Deny	3/10/2010	
Fahmi Salem Al-Assani	Deny	3/10/2010	
Mohammedou Ould Salahi	Grant	3/22/2010	Remanded 11/15/10
Mukhtar al Warafi	Deny	3/24/2010	
Yasein Khasem Mohammed Esmail	Deny	4/8/2010	
Ravil Mingazov	Grant	5/13/2010	
Mohamed Mohamed Hassan Odaini	Grant	5/26/2010	
Omar Mohammed Khalifh	Deny	5/28/2010	
Hussein Salem Mohammad Almerfedi	Grant	7/8/2010	Reversed 6/10/11
Al-Adahi Reversal		**7/13/2010**	
Abd al Rathman Abu Ghayth Sulayman	Deny	7/20/2010	
Adnan Farhan Abd Al Latif	Grant	8/16/2010	Remanded 10/14/11
Shawali Khan	Deny	9/3/2010	
Fayiz Al Kandari	Deny	9/15/2010	
Toffiq Nasser Awad Al-Bihani	Deny	10/7/2010	
Obaydullah	Deny	10/15/2010	
Abdul Razak Ali	Deny	1/11/2011	
Mashour Abdullah Muqbel Alsabri	Deny	2/3/2011	
Khair Ulla Said Wali Khairkhwa	Deny	5/27/2011	
Fadhel Hussein Saleh Hentif	Deny	8/1/2011	
Abdul Qader Ahmed Hussein	Deny	10/12/2011	
Karim Bostan	Deny	10/12/2011	

Analyzing the government's most frequently made factual allegations, three patterns emerge decisions before and after *Al-Adahi* that confirm the D.C. Circuit's message has been heard loud and clear by the district judges. First, district judges have become less likely to reject a government allegation. Second, there is an overall rise in the frequency with which the court accepts the government's allegations about the detainee. Finally, there is also a general increase in the district court's propensity for remaining silent on the weight it assigns to a piece of evidence.

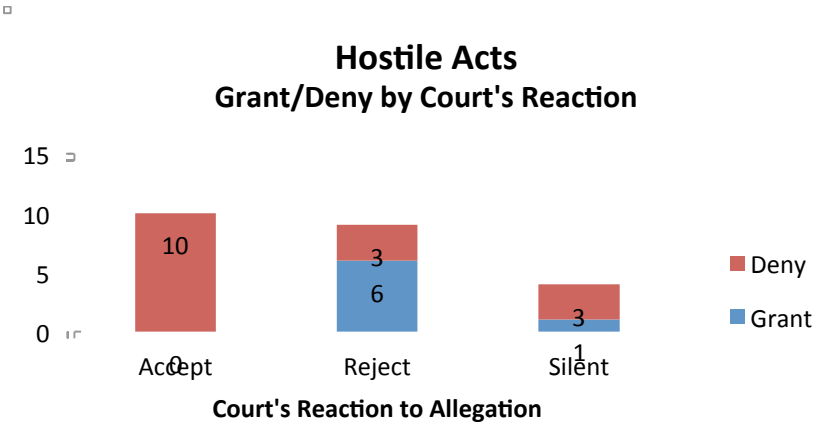
Combining the four main allegations (Hostile Acts, Guesthouse, Training Camps, and Travel), this trend can be seen in the charts below:



As the charts demonstrate, district courts rejected government allegations 40% of the time before *Al-Adahi*, but after the pivotal decision, rejected allegation only 14% of the time. In addition, the courts' acceptance rate of government allegations increased from 48% to 59%. Finally, the silence rate also increased substantially from 12% to 27%

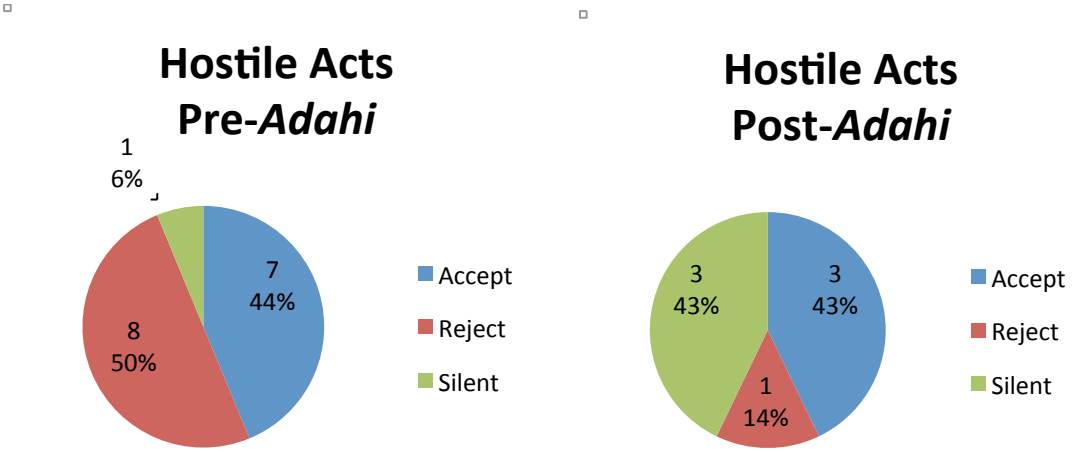
A. Hostile Acts

The government alleged detainees committed hostile acts in 23 out of the 46 cases. This proved to be a very significant factor in a judge's decision because, when a judge accepted the allegation as true, the petition was denied in every case:



Hostile Acts Alleged in 23 out of 46 cases (7 grant, 16 deny)			
	Pre-*Adahi* 16 out of 23	Post-*Adahi* 7 out of 23	Total
Accepted	7 Deny all 7	3 Deny 3	10 Deny 10
Rejected	8 Grant 6/Deny 2	1 Deny 1	9 Grant 6/Deny 3
Silent	1 Deny 1	3 Grant 1 (*Latif*) /Deny 2	4 Grant 1/Deny 3

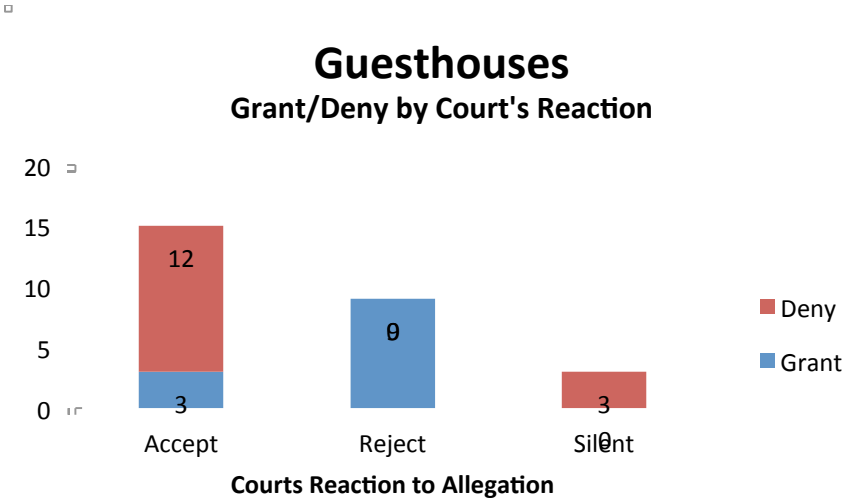
In the 16 cases before *Al-Adahi* where the government alleged a detainee committed hostile acts, the district courts rejected the allegation 8 times or 50%. After *Al-Adahi*, the courts considered hostile act allegations 7 times and rejected the allegation only once, or 14%. Courts accepted this allegation, however, with almost equal frequency before and after *Al-Adahi*.[23] Finally, before *Al-Adahi*, the district courts remained silent about the weight of the allegation only 6% of the time (1 out of 16). After *Al-Adahi*, the district courts remained silent 43% of the time (3 out of 7).



B. Guesthouses

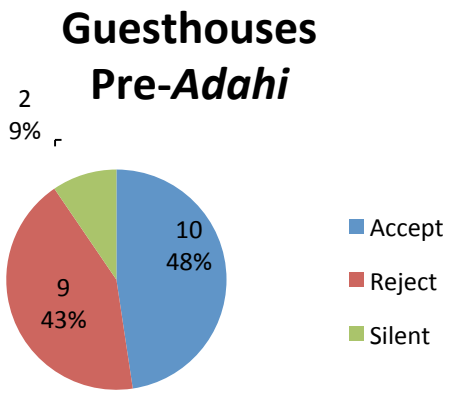
The government alleged that detainees stayed in guesthouses in 27 of the 46 cases. This proved to be another significant factor in a judge's decision because, when a judge accepted the allegation as true, the petition was denied in almost every case:

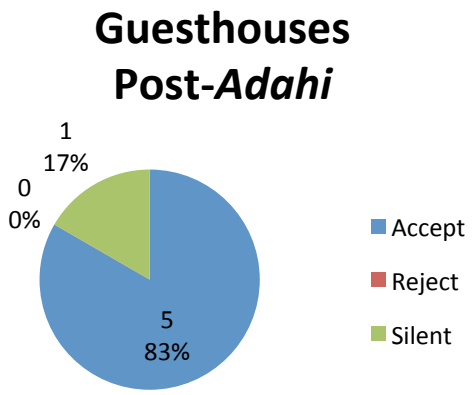
[23] Before *Al-Adahi*, the courts accepted 7 of 16 allegations or 44%. After, the courts accepted 3 of 7 allegations or 43%.



Guesthouses Alleged in 27 out of 46 cases (12 grant, 15 deny)			
	Pre-*Adahi* 21 out of 27	Post-*Adahi* 6 out of 27	Total
Accepted	10 Grant 3/Deny 7	5 Deny 5	15 Grant 3/Deny 12
Rejected	9 Grant 9	0	9 Deny 9
Silent	2 Deny 2	1 Deny 1	3 Deny 3

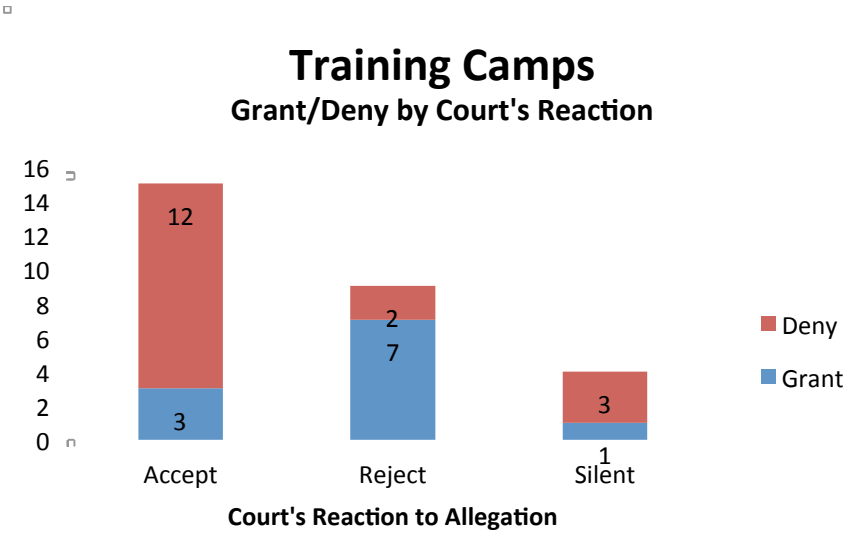
In the 21 cases before *Al-Adahi* where the government alleged that a detainee stayed at a guesthouse, the district courts rejected the allegation 9 times or 43%. All 9 of the petitions were granted. After *Al-Adahi*, the courts considered the allegation 6 times and never rejected it. In pre-*Al-Adahi* cases, the district courts accepted the allegation as bearing on its ultimate decision in 10 of the 21 instances or 48% of the time. This figure rose to 83% (5 out of 6 times) in the cases after *Al-Adahi*. Finally, district courts remained silent 10% of the time (2 out of 21) before *Al-Adahi*, and 17% of the time (1 out of 6) after.





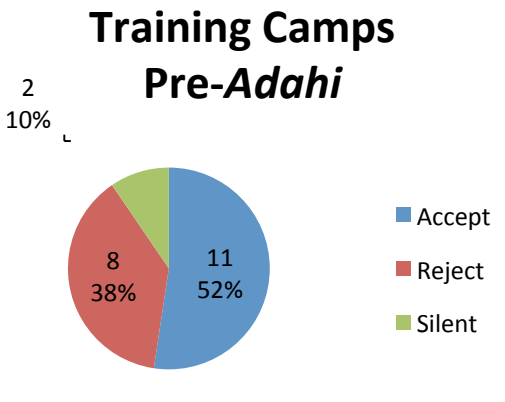
C. Training Camps

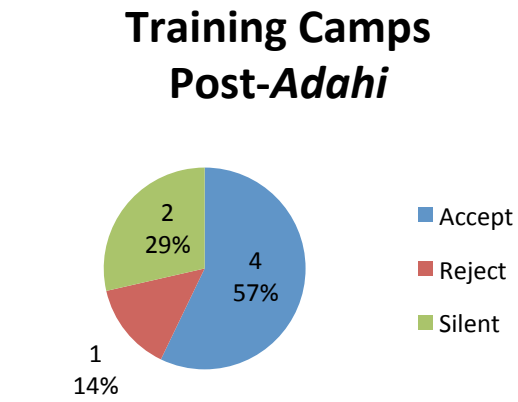
A third important allegation was whether the detainee attended a training camp. The government alleged training camp attendance in 28 of the 46 cases and when courts accepted the allegation, the petition was usually denied:



Training Camps Alleged in 28 out of 46 cases (11 grant, 17 deny)			
	Pre-*Adahi* 21 out of 28	Post-*Adahi* 7 out of 28	Total
Accepted	11 Grant 3/Deny 8	4 Deny 4	15 Grant 3/Deny12
Rejected	8 Grant 7/Deny 1	1 Deny 1	9 Grant 7/Deny 2
Silent	2 Deny 2	2 Grant 1(*Latif*)/ Deny 1	4 Grant 1(*Latif*)/Deny 3

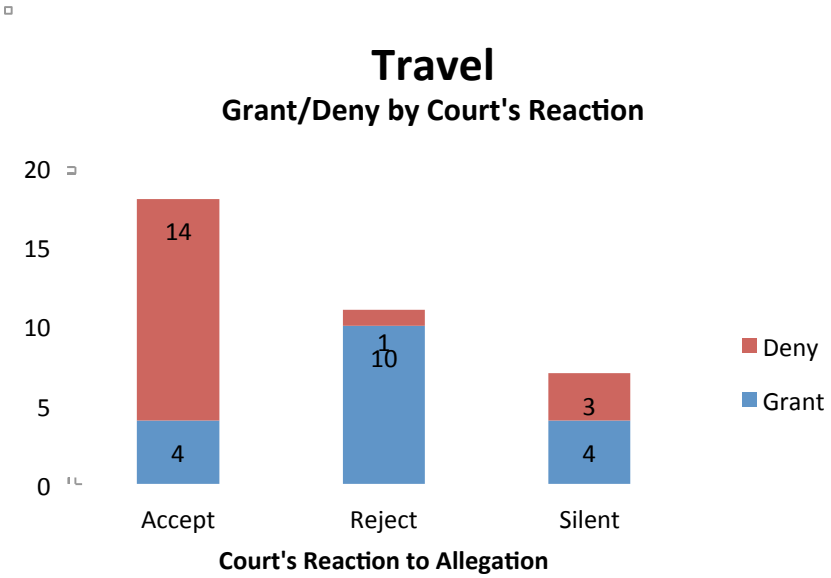
In the 21 cases before *Al-Adahi* where the government alleged a detainee attended a training camp, the district court rejected the allegation 8 times or 38%, 7 of which were granted. After *Al-Adahi*, the courts considered the allegation 7 times and rejected it only once or 14% of the time. The district courts accepted the allegation 11 out of 21 times or 52% of the time it was alleged before *Al-Adahi*, and this figure rose to 57% of the time after, or 4 acceptances out of 7. Finally, before *Al-Adahi*, district courts were silent on the significance of this allegation 10% of the time (2 out of 21), and remained silent on this issue 29% of the time (2 out of 7) after.





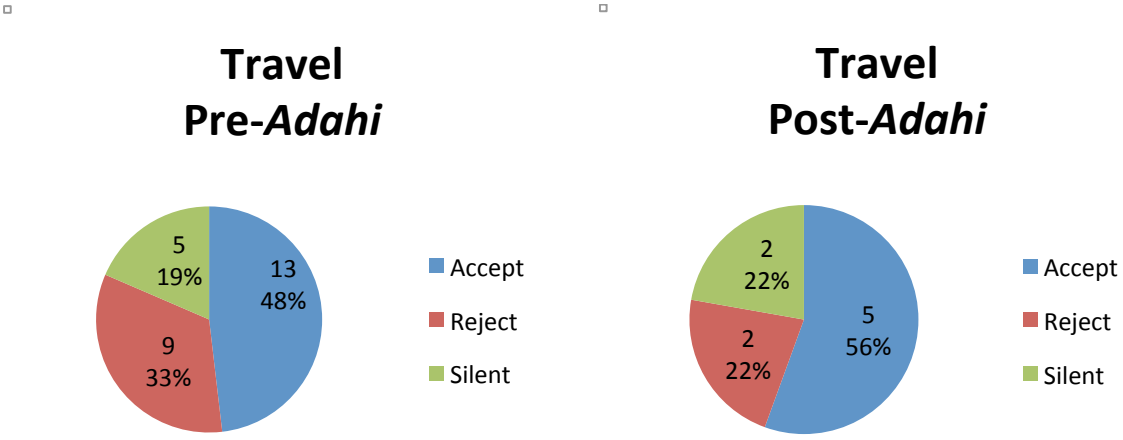
D. Travel

The next notable allegation was whether a detainee traveled on a particular route. The government alleged travel route in 36 of the 46 cases, and when courts accepted the allegation, the petition was usually denied.



Travel Alleged in 36 out of 46 cases (18 grant, 18 deny)			
	Pre-*Adahi* 27 out of 36	Post-*Adahi* 9 out of 36	Total
Accepted	13 Grant 4/Deny 9	5 Deny 5	18 Grant 4/Deny14
Rejected	9 Grant 9	2 Grant 1 (*Latif*)/Deny 1	11 Grant 10/Deny 1
Silent	5 Grant 4/Deny 1	2 Deny 2	7 Grant 4/Deny 3

In the 27 cases before *Al-Adahi* where the government alleged the detainee traveled on a particular route, the court rejected the allegation 9 times or 33%, granting all 9 petitions. After *Al-Adahi*, the courts considered the allegation 9 times and rejected the allegation twice or 22% of the time. As for acceptance, before *Al-Adahi* district courts accepted the allegation 13 out of 27 times or 48% of the time. After Al-Adahi, the courts accepted the allegation 5 out of 9 times or 56% of the time. Finally, before *Al-Adahi*, district courts were silent 19% of the time (5 out of 27) and were silent 22% of the time (2 out of 9) after.



V. Conclusion

Despite the Supreme Court's recognition of a right to habeas and meaningful review for Guantanamo detainees, this Report reveals the current trend of district court deferential fact finding after the D.C. Circuit's decision in *Al-Adahi*. The observation that detainees went from being more likely than not to succeed in their petition to losing every time should be enough to confirm this trend, and yet there is more data to back up this assertion. A thorough analysis of the government's factual allegations and the district courts' reactions show judicial deference to the government is the new norm. Whether this trend will continue remains to be seen, but the D.C. Circuit's opinion in *Latif* may have served as the confirmation that meaningful review is out, and deference to the government's evidence is here to stay.

APPENDIX 32

November 19, 2011

Reneging on Justice at Guantánamo

In 2008, the Supreme Court ruled that Guantánamo Bay prisoners who are not American citizens have the right of habeas corpus, allowing them to challenge the legality of their detention in federal court and seek release.

The power of the ruling, however, has been eviscerated by the Court of Appeals for the District of Columbia Circuit. The appellate court's wrongheaded rulings and analyses, which have been followed by federal district judges, have reduced to zero the number of habeas petitions granted in the past year and a half.

The Supreme Court must reject this willful disregard of its decision in Boumediene v. Bush, and it can do so by reviewing the case of Adnan Farhan Abd Al Latif, a Yemeni citizen imprisoned at Guantánamo Bay since 2002.

This month, the appeals court declassified an opinion it issued in October that reversed a Federal District Court decision ordering Mr. Latif's release. The appellate court improperly replaced the trial court's factual findings with its own factual judgments. It also unfairly placed the burden on Mr. Latif to rebut the presumption that the government's main evidence was accurate: the government should bear the burden of proving by a preponderance of the evidence that his detention is warranted.

It is undisputed that Mr. Latif was in a car accident in Yemen in 1994 and sustained head injuries. In 2001, he went to Pakistan to seek free medical treatment, and eventually traveled to Kabul to find a Yemeni man who had promised to help him. He was arrested near the border between Pakistan and Afghanistan and transferred to Guantánamo Bay, where he has been imprisoned without a trial. The government contends that Mr. Latif was recruited by an Al Qaeda operative and fought with the Taliban.

The federal trial judge found that the government's evidence did not sufficiently support its contention, that incriminating evidence was not corroborated and that Mr. Latif had a plausible alternative explanation for his travels.

The appeals court reversed that decision, arguing that the government's intelligence report on

the Latif case should have been given “a presumption of regularity” and that unless there is “clear evidence to the contrary,” trial judges must presume that this kind of report is accurate. But as the strong dissent by Judge David Tatel explains, there is no reason to make such an assumption about the report, which was “produced in the fog of war, by a clandestine method that we know almost nothing about.”

In ruling on 15 habeas cases since mid-2010, the appellate court has made the standard of review toothless, and its views have affected lower court rulings. Since July 2010, district judges have denied 10 habeas petitions in Guantánamo cases and granted none, compared with 22 habeas petitions granted and 15 denied in the two years before that.

Judge Tatel writes that it is “hard to see what is left of the Supreme Court’s command” that habeas review in federal court be “meaningful.” The appeals court has gone off on the wrong track. The justices need to reaffirm the right of prisoners in Guantánamo to seek justice in federal court and to explain firmly and clearly what that entails.

APPENDIX 33

In successive judicial opinions, the U.S. Court of Appeals for the District of Columbia Circuit has rendered it nearly impossible for a Guantánamo prisoner to win a petition for a writ of habeas corpus. Perhaps the most damaging of these opinions to the rights of Guantánamo prisoners is *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2011), filed on behalf of now deceased former Guantánamo prisoner, Adnan Latif. In what constitutes a remarkable inversion of the burden of proof and persuasion, the court determined that – in the context of Guantánamo detainee litigation – the U.S. government's inculpatory evidence should be presumed accurate. The document that follows is the dissenting opinion in that case by Circuit Judge Tatel. He charged that the court was "not content with moving the goal posts," so it also "calls the game in the government's favor." Id. at 1215.

The U.S. Supreme Court ruled in *Boumdiene v. Bush* that Guantánamo prisoners have the right to a "meaningful" opportunity to challenge the legality of their detention. In practical terms, *Latif v. Obama* and related cases from the U.S. District Court for the District of Columbia have deprived that decision of any practical meaning.

~~SECRET~~ ~~SECRET~~

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 15, 2011 Decided October 14, 2011
Reissued April 27, 2012

No. 10-5319

ADNAN FARHAN ABDUL LATIF, DETAINEE, CAMP DELTA, ET AL.,
APPELLEES

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-01254)

August E. Flentje, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Ian Heath Gershengorn*, Deputy Assistant Attorney General, and *Robert M. Loeb*, Attorney.

Philip A. Scarborough argued the cause for appellees. On the brief were *S. William Livingston*, *Roger A. Ford*, and *David H. Remes*. *Brian E. Foster* entered an appearance.

Before: HENDERSON, TATEL and BROWN, *Circuit Judges*.

TATEL, *Circuit Judge*, dissenting: The government's "primary" piece of evidence, Appellants' Br. 10, is a single report: [redacted] (the Report) [redacted] After carefully laying out the parties' arguments about the Report's internal and external indicia of reliability, the district court found it "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." *Abdah (Latif) v. Obama*, No. 04-cv-01254, slip op. at 25 (D.D.C. July 21, 2010). According to the district court, "there is a serious question as to whether the [Report] accurately reflects Latif's words, the incriminating facts in the [Report] are not corroborated, and Latif has presented a plausible alternative story to explain his travel." *Id.* at 26. The government concedes that its case for lawfully detaining Latif "turn[s]" on the Report. Appellants' Br. 5. This, then, represents a first among the Guantanamo habeas appeals in this circuit: never before have we reviewed a habeas grant to a Guantanamo detainee where all concede that if the district court's fact findings are sustained, then detention is unlawful. *Cf. Almerfedi v. Obama*, No. 10-5291, 2011 WL 2277607, at *4–5 (D.C. Cir. June 10, 2011) (reversing habeas grant and finding detention lawful based on conceded facts and facts found by the district court); *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) (same); *Al-Adahi v. Obama*, 613 F.3d 1102, 1103, 1111 (D.C. Cir. 2010) (same).

But rather than apply ordinary and highly deferential clear error review to the district court's findings of fact, as this circuit has done when district courts have found the government's primary evidence *reliable*, the court, now

facing a finding that such evidence is *unreliable*, moves the goal posts. According to the court, because the Report is a government-produced document, the district court was required to presume it accurate unless Latif could rebut that presumption. Maj. Op. at 11. In imposing this new presumption and then proceeding to *find* that it has not been rebutted, the court denies Latif the "meaningful opportunity" to contest the lawfulness of his detention guaranteed by *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

Compounding this error, the court undertakes a wholesale revision of the district court's careful fact findings. Flaws in the Report the district court found serious, this court now *finds* minor. Latif's account, which the district court found plausible and corroborated by documentary evidence, this court now *finds* "hard to swallow," Maj. Op. at 39. [redacted] the district court found did not implicate Latif, this court now *finds* do in fact implicate him. And on and on, all without ever concluding that the district court's particular take on the evidence was clearly erroneous. *But see* Fed. R. Civ. P. 52(a)(6) ("Finding of facts, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .").

In Part I, I explain why the district court committed no error in declining to apply a presumption of regularity to the Report. In Part II, I apply the deferential clear error standard this circuit has used throughout these Guantanamo habeas cases. Finding no clear error, I would affirm the district court's grant of the writ of habeas corpus.

I.

All agree that this case turns on whether the district court

correctly found that the government's key piece of evidence, the Report, was unreliable. And all agree that the "question whether evidence is sufficiently reliable to credit is one we review for clear error." *Al Alwi v. Obama*, No. 09-5125, 2011 WL 2937134, at *6 (D.C. Cir. July 22, 2011). Our disagreement centers on whether the district court was required to afford the Report a presumption of regularity.

The presumption of regularity stems from a humble proposition—that "[public officers] have properly discharged their official duties." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). The contours of the presumption are best understood by how courts typically apply it. For example, courts assume that "official tax receipt[s]" are properly produced, *Riggs Nat'l Corp. v. Comm'r*, 295 F.3d 16, 21 (D.C. Cir. 2002), that state court documents accurately reflect the proceedings they describe, *Hobbs v. Blackburn*, 752 F.2d 1079, 1081 (5th Cir. 1985), that mail was duly handled and delivered, *Legille v. Dann*, 544 F.2d 1, 7 n.39 (D.C. Cir. 1976), and that agency actions in the ordinary course of business are undertaken on the basis of fact, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citing *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935)).

These cases—in fact every case applying the presumption of regularity—have something in common: actions taken or documents produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar. As a result, courts have no reason to question the output of such processes in any given case absent specific evidence of error. Such a presumption rests on common sense. For instance, courts have no grounds to credit a defendant's allegation that "the state court trial docket" or

"the waiver of trial by jury form" contain inaccurate information when that defendant has no support other than a self-serving allegation. *See Thompson v. Estelle*, 642 F.2d 996, 998 (5th Cir. 1981) (noting that the "district court could properly rely upon the regularity of the state court's documents in preference to [the appellant's] self-serving testimony"). Courts presume accuracy because they can trust the reliability of documents produced by such processes. Courts and agencies are hardly infallible, but for the most part we have sufficient familiarity and experience with such institutions to allow us to comfortably rely on documents they produce in the ordinary course of business.

In saying that "[c]ourts regularly apply the presumption . . . [to] processes that are anything but 'transparent,' 'accessible,' and 'familiar,' " Maj. Op. at 13, this court cites a single case where we presumed the accuracy of a tax receipt from the Central Bank of Brazil for purposes of claiming foreign tax credits under the Internal Revenue Code. *See id.* at 13 (citing *Riggs Nat'l Corp.*, 295 F.3d at 20–22). As the Supreme Court has held, the presumption of regularity applies to "the actions of tax officials," and the "records of foreign public officials." *See Riggs Nat'l Corp.*, 295 F.3d at 20 (citing Supreme Court cases). But again, this is because we have no reason to question or be concerned with the reliability of such records.

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

transcription errors, and heavily redacted for national security purposes." Maj. Op. at 6. Needless to say, this is quite different from assuming the mail is delivered or that a court employee has accurately jotted down minutes from a meeting.

To support its approach here, this court invokes presumptions of regularity for state court fact-finding and for final judgments in criminal habeas proceedings. *See id.* at 12–13. Aside from the abstract and uncontroversial proposition that courts should be sensitive to the separation of powers as well as to federalism, *id.* at 12, the analogy makes little sense. State court judgments and fact findings arise out of a formal and public adversarial process where parties generally have attorneys to zealously guard their interests, and where neutral state court judges, no less than federal judges, pledge to apply the law faithfully. That federal courts give a presumption of regularity to judgments and fact findings that emerge from such a process, where criminal defendants have ample opportunity to challenge adverse evidence, *see Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 402–03 (2001), provides no reason for habeas courts also to presume the accuracy of [redacted] intelligence reports prepared in the fog of war. Indeed, unlike statutory habeas, where federal review follows state court proceedings, constitutional habeas is the only process afforded Guantanamo detainees. *Cf. Boumediene*, 553 U.S. at 780 ("It appears that the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed (or at least not with consistency) in such cases.").

In its analysis, this court ignores a key step in the logic of applying a presumption of regularity, namely, that the challenged document emerged from a process that we can safely rely upon to produce accurate information. Reliability, not whether an official duty was performed, *cf.* Maj. Op. at 6, is the touchstone inquiry in every case this court cites. For example, in a probation revocation decision by the Seventh Circuit—which, incidentally, never uses the term "regularity," *see United States v. Thomas*, 934 F.2d 840 (7th Cir. 1991)—the court found that the probation report "was of the type that generally carries a presumption of *reliability*," *id.* at 846 (emphasis added). A probation officer not only "testified [and was cross-examined] about the preparation, maintenance, and interpretation of special reports prepared by the probation office" but also "applied that . . . knowledge to [the report at issue]." *Id.* at 842. Given that testimony, and given also that "the district court . . . had reviewed the report 'many times,' " the Seventh Circuit saw no reason to think the report was "inaccurate." *Id.* at 846. Reinforcing its emphasis on the importance of assessing reliability, the Seventh Circuit cited an earlier decision, *United States v. Verbeke*, where it had found admissible a report produced by a drug treatment center because the report was found to be "reliable," because the defendant had an opportunity to cross-examine its author, and because no evidence discredited it. 853 F.2d 537, 539 (7th Cir. 1988). These decisions do not, as this court now does, ask only whether an official duty was regularly performed; rather, they examine the reliability of the proffered evidence and the process that produced it. As yet another decision the court cites puts it, courts will permit "the introduction of '*demonstrably reliable*' hearsay evidence in probation revocation proceedings." *United States v. McCallum*, 677 F.2d 1024, 1026 (4th Cir. 1982) (emphasis added).

To be sure, the government in this case has produced a declaration stating [redacted] *see* Maj. Op. at 21 (quoting this affidavit). But we have no idea what the [redacted] is, nor anywhere near the level of familiarity or experience with that course of business that would allow us to comfortably make presumptions about whether the output of that process is reliable. *Cf. Bismullah v. Gates*, 501 F.3d 178, 185–86 (D.C. Cir. 2007) (finding that it was "not at all clear" that even the Combatant Status Review Tribunal was "entitled to a presumption of regularity . . . because a CSRT does not have the transparent features of the ordinary administrative process and the [military officer charged with obtaining and reviewing evidence] is not the final agency decisionmaker"). Of course, we may take some assurance from the fact that the Executive Branch acts in good faith when carrying out its duties. But the very point of *Boumediene* is to ensure that detainees have a "meaningful opportunity" to subject the Executive's detention decisions to scrutiny by an independent Article III court.

This is not to say that reports similar to the one at issue here are necessarily unreliable. Perhaps after careful scrutiny district courts will conclude that many are reliable. *See, e.g.*, *Khan v. Obama*, No. 10-5306, 2011 WL 3890843, at *4–5 (D.C. Cir. Sept. 6, 2011). My point is far more modest: because we are unfamiliar with this highly secretive process, and because we have no basis on which to draw conclusions about the general reliability of its output, we should refrain from categorically affording it presumptions one way or the other. This approach does not reflect "skeptic[ism]" or "cynic[ism]" about the Executive Branch, Maj. Op. at 8—it is nothing more than what *Boumediene* directs us to do. *See*

Boumediene, 553 U.S. at 786 (requiring habeas court "to *assess*," not presume, "the sufficiency of the Government's evidence" (emphasis added)). And indeed, from time immemorial courts have been skeptical of hearsay evidence without implying bad faith or cynicism about the Executive (or whoever is attempting to present that evidence).

Nor am I suggesting that district courts should give no weight to sworn declarations by government officials that such reports are [redacted] because [redacted] Up to a point, the declaration does provide support for the Report's reliability. For one thing, it suggests that the Report is in fact authentic, i.e., that it really is an interrogation summary. Relying on similar declarations, many district courts that have heard Guantanamo habeas cases—including the district court here—have adopted a presumption of *authenticity* for government records like the Report even while consistently rejecting a presumption that such records are *accurate*. *See, e.g.*, *Alsabri v. Obama*, 764 F. Supp. 2d 60, 66–67 & n.8 (D.D.C. 2009); *Hatim v. Obama*, 677 F. Supp. 2d 1, 10 (D.D.C. 2009), *vacated on other grounds*, F.3d 720 (D.C. Cir. 2011); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 54–55 (D.D.C. 2009). *But see, e.g.*, *Al Kandari v. United States*, 744 F. Supp. 2d 11, 19–20 (D.D.C. 2010) (declining to adopt a presumption of either authenticity or accuracy). Going one step further, habeas courts might also properly rely on the analogy between intelligence reports and business records to conclude that "[t]he 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." *Alsabri*, 764 F. Supp. 2d at 68. I thus have no problem with

the observation, made in a decision cited by the concurrence, Con. Op. at 10, that "the basic fact that public officials usually do their duty . . . has . . . that quality and quantity of probative value to which it is entitled." *Stone v. Stone*, 136 F.2d 761, 763 (D.C. Cir. 1943). As that decision goes on to say, however, "the probative strength of the evidence is for the [factfinder] to consider." *Id.* Nor do I quarrel with the observation that, as a general matter, government records consisting of interrogation summaries with inculpatory admissions are more likely to be reliable evidence than documents reporting third-party (and sometimes anonymous) hearsay.

But this court goes well beyond these modest conclusions—and well beyond what the government actually argues in its briefs—when it relies on the bare fact that government officials have incentives to maintain careful intelligence reports as a reason to require district courts to presume that such reports are not only authentic, but also accurate, despite circumstances casting their reliability into serious doubt. *See* Appellants' Br. 30–31 (arguing in passing that the district court in this case erred by failing to give *any* weight to the general presumption that government officials carry out their duties properly but never urging adoption of a categorical, burden-shifting presumption of regularity); Appellants' Reply Br. 22–24 (same). One need imply neither bad faith nor lack of incentive nor ineptitude on the part of government officers to conclude that [redacted] compiled in the field by [redacted] in a [redacted] near an [redacted] that contain multiple layers of hearsay, depend on translators of unknown quality, and include cautionary disclaimers that [redacted] are prone to significant errors; or, at a minimum, that such reports are insufficiently regular,

reliable, transparent, or accessible to warrant an automatic presumption of regularity.

It is thus not at all surprising that our court has never before applied the presumption of regularity in Guantanamo Bay habeas cases despite numerous opportunities to do so. For instance, in *Barhoumi*, the government, seeking to establish that the petitioner was "part of" an al Qaida associated militia, relied on an intelligence report that included an English translation of a diary allegedly authored by a member of that militia. *Barhoumi v. Obama*, 609 F.3d 416, 420 (D.C. Cir. 2010). Among other challenges to this evidence, we considered petitioner's argument that the government's failure to make a copy of the diary available in its original Arabic or to provide information regarding the qualifications or motives of the translator raised doubts about reliability. Although we characterized this objection as "troubling" and "accept[ed] that the additional layer of hearsay added by the diary's translation render[ed] it somewhat less reliable than it otherwise would [have] be[en] (particularly if the government had provided information regarding its translation)," we nonetheless reviewed the diary's internal and external indicia of reliability and concluded that the district court had not clearly erred by relying on it. *Id.* at 430–32. Had we believed that a presumption of regularity applied to the translation recorded in the intelligence report, none of that extended analysis would have been necessary. Instead, we would have simply presumed the document's accuracy—and expected the district court to do the same. As my colleagues begrudgingly admit, Maj. Op. at 16–17, that is exactly what the government asked us to do in *Barhoumi*, but to no avail. *See* Appellees' Br. 52, *Barhoumi*, 609 F.3d 416 (No. 09-5383) (arguing that "translations are *presumed* to be accurate in the absence of evidence to the contrary" (emphasis added)).

We followed exactly the same playbook in *Bensayah* and *Al Alwi*, two cases in which we reviewed district court reliability determinations about the precise type of government intelligence document at issue here [redacted] *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010). In *Bensayah*, rather than granting the government's evidence a presumption of regularity on the grounds that it consisted of government records regularly kept, we carefully evaluated other evidence purporting to corroborate the document's contents, ultimately concluding that the district court committed clear error by finding that document reliable. *See id.* at 726–27. Nor did we apply a presumption of regularity in *Al Alwi* even though the government's evidence, as here, consisted of interrogation summaries allegedly reporting the petitioners' own statements and even though those documents had *greater* indicia of reliability than the Report at issue in this case. Indeed, in *Al Alwi* we adopted a rule—that "the [district] court *must* take the absence of corroboration into account in assessing the reliability of petitioner's out-of-court statements," *Al Alwi*, 2011 WL 2937134, at *6 (emphasis added)—that directly conflicts with this court's observation that "[b]y definition, a presumptively reliable record needs no additional corroboration unless the presumption is rebutted." Maj. Op. at 35.

And most recently, in *Khan v. Obama*, we reviewed the district court's finding that the government's informant reports were reliable. Again, rather than applying a presumption of regularity, we spent page after page carefully evaluating the reliability of the reports. In affirming the district court's determination that the documents were reliable, we emphasized external indicia of reliability, such as

photographs and items seized from petitioner's home, as well as detailed government declarations explaining why the reports were reliable. *Khan*, 2011 WL 3890843, at *7–10.

Our approach in *Barhoumi*, *Al Alwi*, *Bensayah*, and *Khan* reflects a careful and conscious balancing of the important interests at stake. While federal courts typically exclude hearsay unless it falls within a specific exception, *see* Fed. R. Evid. 803, we understand that in the context of enemy combatant proceedings such evidence may be the best available. *Barhoumi*, 609 F.3d at 427. Thus, rather than acting on our deep, historically rooted skepticism of hearsay by excluding such evidence altogether, we admit it but are careful to assign it no more weight than it is worth as measured by any available indicia of reliability. *See id.* (holding that hearsay evidence is "always admissible" in such proceedings, but that it "must be accorded weight only in proportion to its reliability"); *see also Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010). The presumption of regularity, which this court expressly premises on "defer[ence] to Executive branch expertise," Maj. Op. at 12–13, disturbs this careful balance, substituting a presumption in place of careful district court "review and assess[ment of] all evidence from both sides." *Al-Bihani*, 590 F.3d at 880. Given the degree to which our evidentiary procedures already accommodate the government's compelling national security interests by admitting all of its evidence, including hearsay; given the heightened risk of error and unlawful detention introduced by requiring petitioners to prove the inaccuracy of heavily redacted government documents; and given the importance of preserving "the independent power" of the habeas court "to assess the actions of the Executive" and carefully weigh its evidence, *id.*, I find this court's departure from our practice deeply misguided.

To be clear, I make no claim that anything in *Barhoumi*, *Bensayah*, *Al Alwi*, *Khan*, or any of our other Guantanamo habeas cases affirmatively rules out the possibility of applying a rebuttable presumption of accuracy to certain kinds of government evidence in some circumstances. My point is only that our cases, proceeding in the very common-law-like fashion that my colleagues describe, *see* Maj. Op. at 19, have endorsed and applied a careful and fine-grained approach to the assessment of reliability. We have applied that approach to claims that a document was mistranslated (*Barhoumi*) and to claims that a document is insufficiently corroborated (*Al Alwi*, *Khan*)—two of the issues in this case. We have applied that approach to a [redacted] (*Bensayah*, *Al Alwi*), and to government interrogation summaries (*Al Alwi*)—the same type and category of documents as the Report. Following that approach, we have both upheld (*Barhoumi*, *Al Alwi*, *Khan*) and overturned (*Bensayah*) district court findings that a government document is reliable. The only feature of this case not previously encountered is that here the government lost: the district court found the dispositive government Report *unreliable* and *granted* a writ of habeas corpus.

Moreover, the presumption discards the unanimous, hard-earned wisdom of our district judges, who have applied their fact-finding expertise to a wide array of government hearsay evidence. In doing so, they have developed a uniquely valuable perspective that we ought not so quickly discard. These judges, including the district judge in this case, have unanimously rejected motions to give government evidence a presumption of accuracy. *See, e.g.*, *Alsabri*, 764 F. Supp. 2d at 66 (noting "ample reason" to decline to presume the accuracy of the government's exhibits and explaining that circuit precedent supported its approach); *Al Kandari*, 744 F. Supp. 2d at 19 ("Simply assuming the Government's evidence is

accurate and authentic does not aid [the reliability] inquiry."); *Ahmed*, 613 F. Supp. 2d at 55 ("[T]here is absolutely no reason for this Court to *presume* that the facts contained in the Government's exhibits are accurate."); *see also* Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, The Emerging Law of Detention 2.0, at 52 (May 12, 2011) (indicating that "none of the publicly available rulings on the issue have favored the government"), *available at* http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx. Rather than ignoring serious doubts about government evidence by presuming its accuracy, our district courts have instead done exactly what we expect of careful factfinders and precisely what our case law demands: scrupulously assess the reliability of each piece of evidence by applying "a long, non exclusive list of factors . . . 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 [the] declarant . . . , levels of hearsay, recantations, etc." *Ahmed*, 613 F. Supp. 2d at 55; *see also Sulayman v. Obama*, 729 F. Supp. 2d 26, 42 (D.D.C. 2010) ("As to many of the intelligence reports [the government] relies upon . . . there is nothing in the record regarding the qualifications of the interpreters used in those interrogations to render a reliable interpretation. There are other intelligence reports . . . in which the government has failed to provide foundational evidence that those statements 'were made under circumstances that render them intrinsically reliable or were made by reliable sources.' " (citation omitted)).

Brushing aside these district court rulings, my colleagues think that those courts "may" have been denying a presumption of accuracy because they "[c]onfus[ed]" it for a presumption of truth, Maj. Op. at 9, the difference being that the latter presumes the content of a report is *true*, whereas the

former presumes that the government official filling out the report did so accurately—i.e., that in doing the interview, he correctly heard, translated, recorded, and summarized the content embodied in the report. The district courts have suffered from no such confusion, nor do I, for the core question presented in this case is whether the Report *accurately* reflects Latif's words. Unsurprisingly, my colleagues cite not a single case where a district court refers to a presumption of truth or, for that matter, a single instance in which the government argued for a presumption of truth rather than a presumption of accuracy. They cite *Ahmed*, but nowhere did the district court there say that "the requested presumption would go to the truth of 'the facts contained in the Government's exhibits.' " Maj. Op. at 10 (citing *Ahmed*, 613 F. Supp. 2d at 55). Rather, the district court denied a presumption of *accuracy*, doing so for several reasons, including the need to assess the "accuracy of translation and transcription," and not just because of alleged torture, as this court now implies. 613 F. Supp. 2d at 55; *see also Al Mutairi v. United States*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) (expressing concern that the government's evidence "is based on reports of interrogations (often conducted through a translator) where translation or transcription mistakes may occur"). In *Al Mutairi*, the district court even pointed to evidence in that very case exemplifying such problems: "for over three years" the government had, "based on a typographical error in an interrogation report," erroneously insisted "that Al Mutairi manned an anti-aircraft weapon in Afghanistan." *Id.*; *see also Al Rabiah v. United States*, 658 F. Supp. 2d 11, 18 (D.D.C. 2009) (noting "discrepan[cies]" between two reports summarizing *the same interrogation* that the government had made no attempt to reconcile); *Al Odah v. United States*, 648 F. Supp. 2d 1, 6 (D.D.C. 2009) (noting that "interrogators and/or interpreters included incorrect dates in *three* separate reports that were submitted into evidence based

on misunderstandings between the Gregorian and the Hijri calendars"). Indeed, the same district court whose decision we now review explained in another Guantanamo case that it "has learned from its experience with these cases that the interrogation summaries and intelligence reports on which [the Government] rel[ies] are not necessarily accurate and, perhaps more importantly, that any inaccuracies are usually impossible to detect." *Odah v. Obama*, No. 06-cv-1668, slip op. at 3 (D.D.C. May 6, 2010); *see also id.* ("[T]here are many steps in the process of creating these documents in which error might be introduced[:] . . . the interpreter must understand the question posed and correctly translate it; the interviewee must understand the interpreter's recitation of the question; the interpreter must understand the interviewee's response and correctly interpret it; the interrogator must understand the interpreter's translation of the response; the interrogator must take accurate notes of what is said; and the interrogator must accurately summarize those notes when writing the interrogation summary at a later time."). Of course, concerns about the accuracy of the reports necessarily raise concerns about their truth. But there are no grounds for assuming the district courts are confused about this distinction.

In support of a presumption of regularity, this court relies on the plurality opinion in *Hamdi*, which, applying Due Process analysis, states that "the Constitution would not be offended by a presumption in favor of the Government's evidence" in enemy combatant proceedings for citizen detainees "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion). According to this court, because the *Hamdi* plurality provisionally blessed such a general presumption, its own presumption requiring deference to official government

documents must pass constitutional muster. Maj. Op. at 7. But the *Hamdi* plurality made clear that the presumption it sanctioned would apply only if the government "puts forth *credible* evidence that the habeas petitioner meets the enemy-combatant criteria." 542 U.S. at 534 (emphasis added); *see also Almerfedi*, 2011 WL 2277607, at *4 & n.7 (explaining the *Hamdi* framework requires the government to "put forth credible facts" tending to show that the petitioner meets the detention standard, such as that he received military training at an al Qaida camp, which the petitioner can then rebut with his own facts and explanation). In other words, a presumption is acceptable if the government can first show that its evidence is credible, but the *Hamdi* plurality never suggested that the government could make that showing by relying on a presumption that government-produced evidence is credible and accurate. It is the latter presumption that is at issue here and about which the *Hamdi* plurality had nothing to say. Given that the district court in this case concluded that the Report was "not sufficiently reliable," *Latif*, slip op. at 25—i.e., that it was not credible—the court's reliance on the *Hamdi* plurality to defend its presumption of regularity is misplaced.

This court believes that our decisions in *Al-Bihani*, 590 F.3d 866, and *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) support the "continuing viability" of applying a presumption of regularity to Guantanamo habeas cases. Maj. Op. at 14. In *Al-Bihani*, however, although the district court "reserved [the] authority" granted by its case management order to presume the government's evidence accurate, it went on to "assess[] the hearsay evidence's reliability as required by the Supreme Court." *Al-Bihani*, 590 F.3d at 880. Even the government agrees with this view of *Al-Bihani*. *See* Appellees' Br. 52, *Barhoumi*, 609 F.3d 416 (No. 09-5383) ("In this case, *as in Bihani*, the district court did not presume the accuracy or

authenticity of the government's evidence." (emphasis added)). The most one can say about *Al-Bihani* on this issue is that we suggested—in dicta—that a district court *could* apply a presumption to a particular piece of evidence *if* appropriate—a power the district court in that case declined to exercise. This is a far cry from the holding today—that all such reports and their underlying hearsay *must* be granted a presumption of regularity. As to *Parhat*, a pre-*Boumediene* case arising under the Detainee Treatment Act of 2005, it is true that the Act incorporated a "rebuttable presumption that the Government Evidence is genuine and accurate." Maj. Op. at 15 (emphasis removed). But in that case, we took the opportunity to clarify that, at a minimum, hearsay evidence "must be presented in a form, or with sufficient additional information, that permits [an assessment of] its reliability." *Parhat*, 532 F.3d at 849. As we recently reiterated, "[t]he government's evidence in *Parhat* was insufficient to enable the court to assess its reliability." *Khan*, 2011 WL 3890843, at *6. This hardly supports the proposition that courts *must* assume government reports like the one at issue here are accurate, especially given that the Supreme Court in *Boumediene* specifically found that the process provided by the Detainee Treatment Act was an inadequate substitute for the writ of habeas corpus. *See* 553 U.S. at 792.

In sum, given how and where we typically apply the presumption of regularity, and given the balance this circuit has already struck on how to deal with hearsay evidence in Guantanamo Bay cases, and given the seasoned observations of our district courts about the reliability of such evidence, the question still unanswered to my satisfaction is "Why?" Why does this court now require district courts to categorically presume that a government report—again, one created in a [redacted] near an [redacted] with multiple layers of hearsay, and drafted by unidentified translators and

scriveners of unknown quality—is accurate? Whether the presumption can be overcome by a preponderance of the evidence or by clear and specific evidence—this court never says which—I fear that in practice it "comes perilously close to suggesting that whatever the government says must be treated as true," *see Parhat*, 532 F.3d at 849. In that world, it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be "meaningful." 553 U.S. at 783.

But the court's assault on *Boumediene* does not end with its presumption of regularity. Not content with moving the goal posts, the court calls the game in the government's favor. Instead of remanding to give Latif an opportunity to rebut the presumption of regularity, this appellate court engages in an essentially de novo review of the factual record, providing its own interpretations, its own narratives, even its own arguments, *see* Maj. Op. at 20–52, and *finds* that "neither internal flaws nor external record evidence rebuts that presumption in this case," *id.* at 7. *But see Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (where district court fact "findings are infirm because of an erroneous view of the law, a remand is the proper course"). To be sure, such a finding would be appropriate if the record supported "only one resolution of the factual issue." 456 U.S. at 292. But that cannot be the case where, as here, the question of reliability turns entirely on witness credibility, inferences drawn from errors and inconsistencies in the Report, and the resolution of conflicts in other record evidence, *see infra* Part II. Given the court's conclusion that the presumption has not been rebutted, remand may well be a "pointless exercise." Con. Op. at 1.

II.

Rather than adopting a presumption of regularity, I would apply clear error review to the district court's findings of fact just as we have consistently done throughout our Guantanamo cases. *See, e.g.*, *Almerfedi*, 2011 WL 2277607, at *3 (reviewing district court fact findings for clear error); *Al-Madhwani v. Obama*, No. 10-5172, 2011 WL 2083932, at *3 (D.C. Cir. May 27, 2011) (same); *Salahi v. Obama*, 625 F.3d 745, 750 (D.C. Cir. 2010) (same); *Al Odah v. United States*, 611 F.3d 8, 14–15 (D.C. Cir. 2010) (same); *Bensayah*, 610 F.3d at 723 (same); *Barhoumi*, 609 F.3d at 423–24 (same); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (So long as "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it" and, critical to this case, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (citations omitted)). Under that standard, I would conclude that the district court committed no clear error by finding that the Report was insufficiently reliable; that it committed no clear error by crediting Latif's account of what happened only insofar as it needed to; and that it adequately addressed the other record evidence.

A

The starting point, of course, is the Report itself. *See Awad*, 608 F.3d at 6–7 (holding that the same clear error standard applies to fact findings based on documentary evidence and inferences drawn from that evidence). The district court's primary concern about the Report related to the circumstances under which it was produced, circumstances that, according to the district court, increased the likelihood that mistakes had been made. In particular, the

court emphasized the [redacted] summarized in the Report and another report produced around the same time. *Latif*, slip op. at [redacted] In addition, [redacted] The Report's heavy redactions—portions of only [redacted] out of [redacted] pages are unredacted—make evaluating its reliability more difficult. The unredacted portions nowhere reveal whether the same person [redacted] or whether someone else performed each of these tasks. And because all the other [redacted] in the Report are redacted, the district court was unable to evaluate the accuracy of [redacted] by inquiring into the accuracy of the Report's [redacted] In view of all these concerns, the district court found it especially troubling that neither the Report nor any of the Government's other evidence "provide[s] any information with which to confirm [redacted] used the high level of care necessary to ensure [redacted] was accurate." *Id.* at 26.

"[F]actual errors" in the Report reinforced the district court's concerns. *Id.* Specifically, although the Report states "that Latif said he had been to Jordan to accompany a friend who needed medical care for his hand[,] . . . Latif has

repeatedly told interrogators, and has provided evidence to show, that he went to Jordan for treatment of an injury to his own, not a friend's, head, not hand." *Id.* at 15. In addition, the Report erroneously states that "Latif is unmarried and has no children," even though "a declaration Latif submitted for use in this litigation states that he is married and has a son." *Id.* Lastly, in what even my colleagues concede is an "obvious mistake," Maj. Op. at [redacted] the Report's first page states that [redacted]

Also troubling the district court was the lack of "corroborating evidence for any of the incriminating statements in the [Report]." *Latif*, slip op. at 26. As the district court explained: "No other detainee saw Latif at a training camp or in battle. No other detainee told interrogators that he fled from Afghanistan to Pakistan, from Tora Bora or any other location, with Latif. No other type of evidence links Latif to Al Qaeda, the Taliban, a guest house, or a training camp." *Id.*

The district court properly weighed the cumulative effect of these subsidiary findings. *See Al-Adahi*, 613 F.3d at 1105–06. According to the district court, those findings "support[] an inference that poor translation, sloppy notetaking, [redacted] or some combination of those factors resulted in an incorrect summary of Latif's words." *Latif*, slip op. at 26.

All of the concerns just described are obviously relevant to evaluating the Report's accuracy. It goes without saying that the circumstances under which the Report was produced and the evidence, or lack of evidence, of care taken to avoid

mistakes when the Report was produced shed light on that question. Likewise, it is undoubtedly probative of the Report's reliability that it contains factual errors, for the presence of a known error increases the likelihood that other information in the Report is inaccurate as well. And of course, it is also relevant that the government has offered no independent corroboration for any of the Report's incriminating facts. After all, skepticism about the trustworthiness of uncorroborated confessions has deep, historical roots, so much so that a criminal defendant "may not be convicted on his own uncorroborated confession." *Smith v. United States*, 348 U.S. 147, 152–53 (1954) (noting that the rule's "foundation lies in a long history of judicial experience with confessions"). And we recently made clear that in these Guantanamo habeas cases "the [district] court *must* take [such an] absence of corroboration into account in assessing the reliability of the petitioner's out-of-court statements." *Al Alwi*, 2011 WL 2937134, at *6 (emphasis added).

Moreover, none of the subsidiary fact findings the district court made about the Report itself were clearly erroneous. As this court acknowledges, "the [district] court cited problems with the Report itself, including its substantial redactions, [redacted] its reference to Latif's 'hand' instead of his head injury, its internally inconsistent statements [redacted] and the perceived lack of corroboration." Maj. Op. at 34–35. And this court agrees that "[t]he inconsistencies in the Report may suggest a document produced on the field by imperfect translators or transcribers." *Id.* at 27.

Nonetheless, this court insists, "[i]t is almost inconceivable," *id.* at 25, that the inculpatory information in

the Report could have resulted from "poor translation, sloppy notetaking [redacted] or some combination of those factors," *Latif*, slip op. at 26. According to the court, there is too high a "level of inculpatory detail" in the Report for it to have resulted from such mistakes. Maj. Op. at 25. And because the incriminating statements "are intertwined with other details in the Report that persist in Latif's current account of his travels," the court believes, [redacted]

My colleagues' interpretation of the evidence is undoubtedly plausible. Yet when one accounts for all of the Report's various problems, the fact that admittedly true facts "are intertwined" with contested inculpatory ones also supports another plausible explanation, akin to what happens in the children's game of telephone. In that game, one child whispers a phrase to another, who in turn whispers it to a third, and so on, until the last child announces what he or she has heard. As anyone who has played well knows, the whole point of the game is that what the final child hears is both recognizably similar to the original statement and yet amusingly transformed. *Cf.* Carol D. Leonnig & Josh White, *An Ex-Member Calls Detainee Panels Unfair*, WASH. POST, June 23, 2007 (reporting former-Combatant Status Review Tribunal member, Lieutenant Colonel Stephen Abraham, as "equat[ing] the government hearsay presented [to the CSRTs] about detainees with a game of telephone" (internal quotation marks omitted)).

Now imagine the game when, as may have happened here, [redacted] and the Report produced "[i]n the field," with the assistance of "imperfect translators or transcribers," Maj. Op. at 27. And imagine further, as may also have happened here, that the "imperfect" translator may

have misheard Latif's exact words, or the interrogator may have misheard the "imperfect" translation, or the "imperfect" notetaker may have failed to transcribe precisely what was "imperfect[ly]" translated, or that whoever wrote up a summary based on those notes, [redacted] may have failed to understand what exactly that "imperfect" notetaker had written, or that some combination of all those things may have occurred. This problem is all the more exacerbated when—again as may have happened here—the same [redacted] and fails to [redacted] until [redacted] As Latif's [redacted] —as so often occurs in the game of telephone [redacted]

And so, Latif's statement about a charity-worker named Ibrahim Al-Alawi from Ibb encouraging him to travel from Yemen may have become a reference to a jihadi recruiter; his statement about traveling to an Islamic Center in Kabul run by an imam named Abdul Fadel may have transformed into one about serving north of Kabul under an Afghan commander with the homophonous name Abu Fazl; and his statement about three teachers named Abu Bakr of the Arab Emirates, Awba of Kuwait, and Hafs of Saudi Arabia, may have turned into one about fellow Taliban soldiers with the similar sounding (or identical) names Abu Bakr, Abu Hudayfa, and Abu Hafs—just as his statement about a trip to Jordan for treatment of an injury to Latif's head became a statement about treatment for his friend's hand. Indeed, my colleagues nowhere disagree that all of the names and statements

appearing in the Report sound similar to names and statements Latif later made. And, although only [redacted] that appear to have been [redacted] are in the record and unredacted, both contain details that also appear in [redacted], details which an [redacted] might have [redacted] if they were having trouble understanding [redacted] say [redacted] Obviously, moreover, we have no way of knowing whether the redacted [redacted] likewise contain [redacted] Given that the circumstances under which the Report was produced increased the probability of mistakes, given that the Report contains other "factual errors," and given that the government has failed to corroborate any of the Report's incriminating information, *Latif*, slip op. at 26, this explanation is at least plausible—the only question for us when reviewing fact findings, such as these, for clear error. *See Awad*, 608 F.3d at 7 (reiterating that "[i]f the district court's account of the evidence is plausible in light of the record in its entirety, the court of appeals may not reverse it" (quotation omitted)). *But see* Maj. Op. at 26 (conceding this explanation is "possible," yet incorrectly asserting that "the relevant question is whether th[e] hypothesis is likely").

B

The district court did not stop with the Report. It also "consider[ed] the explanation of events Latif has offered"—again in service of the critical question of whether the Report was "sufficiently reliable." *Latif*, slip op. at 27. According to

Latif, with the help of a charitable worker, he left Yemen in 2001 seeking free medical treatment for the lingering effects of a serious head injury suffered in a 1994 car accident. Although the government challenges Latif's claim that he left Yemen in 2001 seeking medical treatment, it never disputes that "in 1994, [Latif] sustained head injuries as the result of a car accident and [that] the Yemeni government paid for him to receive treatment" in Jordan at that time. *Id.* at 5.

Besides his own narrative, Latif also offered documentary evidence to corroborate his account. Three documents are particularly noteworthy. The first, "a letter, dated August 21, 1994, from a doctor at the Islamic Hospital in Amman, Jordan," confirms "that Latif 'was admitted' on July 9, 1994 'following a head injury.' " *Id.* at 23 (quoting letter). The second, "a letter dated August 18, 1999 from Yemen's Ministry of Public Health," states "that '[w]e recommend that [Latif] return to the previous center outside for more tests and therapeutic and surgical procedures at his own expense.' " *Id.* (alterations in original) (quoting letter, which also states that Latif "is hard of hearing" and that "a wide circular hol[e] was detected in [Latif's] left eardrum"). And the third—the most important—is Latif's intake form dated December 31, 2001 (i.e., shortly after he was seized [redacted] Filled out when Latif was taken into United States custody, the intake form states that Latif was in possession of "medical papers" when seized traveling from Afghanistan to Pakistan. *Id.* at 23 & n.12.

This documentary evidence, the district court found, "corroborat[ed]" Latif's "plausible" story. *Id.* at 26–27. The district court also rejected the government's contention that Latif's exculpatory account was a "cover story" and found the government's "attack[s]" on the "credibility of [the] story . . .

unconvincing." *Id.* at 26. This too was an obviously relevant evidentiary consideration. A petitioner's version of events, should he choose to provide one, can be relevant when assessing the government's evidence. After all, the more believable the petitioner's exculpatory account, the greater the reason to doubt the government's inculpatory one. *Cf., e.g.*, *Al-Adahi*, 613 F.3d at 1107 (weighing petitioner's "false exculpatory statements" in the government's favor). Having thus assessed Latif's story positively, and given that the story contradicts incriminating information contained in the Report, the district court relied on the story to support its finding that the Report is "not sufficiently reliable." *Latif*, slip op. at 25.

Although agreeing that Latif's story is relevant, my colleagues nonetheless conclude that by describing it as "plausible" and "not incredible," the district court never actually credited that account. But "reading the district court's explanation in [such] a parsed manner that overlooks its meaning in context" is inconsistent with clear error review. *United States v. Brockenborrugh*, 575 F.3d 726, 741 (D.C. Cir. 2009). Here is what the district court actually said about Latif's story:

> The Court makes this ruling [i.e., about the accuracy of the Report] having taken into consideration the explanation of events Latif has offered. Latif's story is not without inconsistencies and unanswered questions, but it is supported by corroborating evidence provided by medical professionals and it is not incredible. [The district court then rejected the government's theory that Latif had told inconsistent stories over the course of his detention and was therefore telling a "cover story." The district court reasoned that the government's theory was based on just "two isolated statements," one of which "does

> not contradict Latif's version of events." Finally, the district court found the government's] other arguments attacking the credibility of Latif's story . . . similarly unconvincing. The smaller inconsistencies to which [the government] ha[s] pointed may be no more than misstatements or mistranslations; even if some details of Latif's story have changed over time, for whatever reason, its fundamentals have remained the same.

Latif, slip op. at 27–28. What else could the district court have meant other than that it found Latif's account convincing enough, plausible enough, consistent enough, and corroborated enough to give it at least some weight against the government's evidence? And as we have held, "[m]erely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence 'may be tossed aside and the next [piece of evidence] may be evaluated as if the first did not exist.' " *Salahi*, 625 F.3d at 753 (alteration in original) (quoting *Al-Adahi*, 613 F.3d at 1105). After all, it is the government that bears the burden to demonstrate the lawfulness of detention, and here the district court concluded that the government had failed to meet that burden because (1) "there is a serious question as to whether the [Report] accurately reflects Latif's words" given (1a) the circumstances under which it was produced and (1b) the "factual errors" it contains; (2) "the incriminating facts in the [Report] are not corroborated[;] and [(3)] Latif has presented a plausible alternative story to explain his travel." *See Latif*, slip op. at 26. It is in just this circumstance—where doubts about the government's evidence and confidence in the detainee's story combine with other evidence to fatally undermine the government's case—that a detainee may prevail even without the district court needing to credit the detainee's story by a full preponderance

of the evidence. To require otherwise would, in effect, inappropriately shift the burden of proof to Latif.

Given that the district court found Latif's story entitled to at least some weight and given that such a finding could properly guide its evaluation of the government's evidence, the only remaining question for us is whether that finding was clearly erroneous. It was not. As this court itself acknowledges, Latif's story, on its own terms, is not "intrinsic[ally] implausib[le]." Maj. Op. at 39. And that observation is reinforced by corroborating evidence showing that Latif needed to leave Yemen for medical care in 1994, that Yemen's Ministry of Public Health recommended he do so again in 1999, and that Latif had medical papers with him when seized crossing into Pakistan. That a trip abroad for medical care had been necessary, not once but twice, makes it more likely that Latif would have needed to travel abroad for medical care in 2001 as well. And the fact that Latif's condition was still serious enough to require such a trip in 1999, five years after he was first injured, increases the odds that the injury continued to be that serious two years later in 2001. Equally important, the most plausible reason for why Latif would have had medical papers in his possession when first seized is that his trip in fact had a medical purpose.

Attempting to cast doubt on the district court's favorable assessment of Latif's account, this court insists that the district court "toss[ed] . . . aside" inconsistencies in Latif's account. *Id.* at 45; *see also id.* at 42–45. But the district court did no such thing. It expressly recognized those inconsistencies, *Latif*, slip op. at 24–25 (summarizing the alleged inconsistencies); *id.* at 27 ("Latif's story is not without inconsistencies and unanswered questions."), ultimately finding the government's "attack[on] the credibility of Latif's story" based on those inconsistencies "unconvincing." *Latif*,

slip op. at 27. Particularly significant to the district court was the fact that the "fundamentals [of Latif's story] have remained the same." *Id.* As Latif points out, those fundamentals—appearing in more than a dozen interrogation summaries and statements from December 31, 2001 [redacted] until May 10, 2009—"include [Latif's] adamant denials of any involvement with al Qaida or the Taliban; his serious head injury from a car accident in Yemen; his inability to pay for the necessary medical treatment; and his expectation and hope that Ibrahim Alawi would get him free medical care." Appellee's Br. 57. Indeed, at least some in the government apparently agree. The commanding officer of the Defense Department's Criminal Investigative Task Force noted in a June 16, 2004 memo that Latif's statements to interrogators had "been relatively consistent." Ex. 80, Memorandum from Criminal Investigative Task Force to General Counsel, Department of Defense (June 16, 2004). Moreover, before making too much of smaller inconsistencies it is important to remember that they appear not in verbatim transcripts prepared by a court reporter with the aid of an audio or video recording, but rather in brief summaries of translated interrogations. As mentioned above, it would be unsurprising to discover that minor errors crept in as Latif's account passed from his mouth to a translator (of unknown ability) to an interrogator to the interrogator's notes and finally to the interrogator's summary of those notes—the last of which represents the only evidence in the record of what Latif actually said in each of his interrogations. As we remarked in another Guantanamo Bay habeas case, "[t]he task of resolving discrepancies among the various accounts offered into evidence is quintessentially a matter . . . for the district judge sitting as the fact-finder." *Al-Madhwani*, 2011 WL 2083932, at *5 (internal quotation marks omitted).

Rather than applying clear error review to the district court's resolution of such discrepancies, this court suggests its own story—a story not found by the district court, never argued by the government, and based on its own review of the raw evidence—about how Ibrahim may have "promised Latif the medical treatment he needed to induce him to join the Taliban." Maj. Op. at 27–28. Exhibiting heretofore unknown expertise in al Qaida recruitment strategies, the court posits that "[s]uch a recruiting tactic (or cover story)" would make sense. *Id.* "Latif's medical records and his professed desire for medical treatment," the court thus *finds*, "are therefore consistent with the Report, not inconsistent." *Id.* at 28. *But see United States v. Microsoft*, 253 F.3d 34, 117 (D.C. Cir. 2001) (en banc) ("[D]istrict court factfindings receive either full deference under the clearly erroneous standard or they must be vacated. There is no de novo appellate review of factfindings and no intermediate between de novo and clear error, not even for findings the court of appeals may consider sub-par.").

C

The government points to several additional pieces of evidence that, it believes, buttress its argument that the Report is reliable. The district court considered all of this evidence. Some items it found insufficient to outweigh its concerns about the Report and its positive assessment of Latif's story. Others it found failed to implicate Latif or prove the point the government hoped to make. As a reviewing court, our job is to determine only whether those assessments were clearly erroneous. They were not.

First, consider the circumstances leading up to Latif's seizure by Pakistani authorities—circumstances to which the district court gave less weight than the government would

have liked. Latif left Kabul in November 2001 and then traveled through Jalalabad before eventually arriving at the Pakistani border where Pakistani authorities detained him. According to the government, this path mirrors that of Taliban soldiers retreating from Kabul. Although not contending that this evidence is dispositive, the government argues that because Latif's admitted route is consistent with that of Taliban soldiers and with information in the Report, it is a helpful piece in the puzzle, bolstering its claim that the Report's inculpatory statements are accurate.

Fair enough, but how helpful? If this route is commonly used by innocent civilians, then the evidence is not that helpful at all. To understand why, consider a simple hypothetical. Suppose the government were to argue in a drug case that the defendant drove north from Miami along I-95, "a known drug route." Familiar with I-95, we would surely respond that many thousands of non-drug traffickers take that route as well. Given what we know about our own society, the I-95 inference would be too weak even to mention. *Cf. Almerfedi*, 2011 WL 2277607, at *4 n.7 (noting that some conduct such as possessing an AK-47 is so "commonplace in Afghanistan [that it] does not meaningfully distinguish an al Qaeda associate from an innocent civilian"). On the other hand, if the alleged drug trafficker had driven along an infrequently traveled country road, then a contention that that road was "a known drug route" would carry more weight. The burden of proof is on the government to demonstrate whether travel on a particular route to the Pakistani border, when considered in context, is more like the lonely country road and thus worthy of consideration when it comes to distinguishing between enemy combatants and innocent civilians.

Based on nothing more than a few anecdotes, this court suggests that Latif's route was akin to the country road. It asserts that the details of Latif's post-Kabul travels are "analogous" to those we found "strong[ly] suggest[ive]" of al Qaida membership in *Uthman*. Maj. Op. at 47. But how analogous are they really? Uthman was captured "in the vicinity of Tora Bora" at a time when "most, if not all, of those in the vicinity of Tora Bora . . . were combatants." *Uthman*, 637 F.3d at 404. By contrast, the record in this case contains no evidence that Latif ever traveled through the Tora Bora mountains, and the city we know he did travel through—Jalalabad—has over 160,000 residents, most of whom were presumably not combatants, *see Jalalabad*, Britannica Academic Edition, http://www.Britannica.com/EBchecked/topic/299643/Jalalabad (last visited Sept. 20, 2011) (estimating population as of 2006 at 168,600). In *Uthman*, the detainee had not only taken a particularly suspicious route, but also was captured with a "small group" that included two "confessed . . . bodyguards for Osama bin Laden" and another admitted Taliban fighter, all three of whom Uthman had studied with at the Furqan Institute, "a religious school at which other men were recruited to fight for Al Qaeda." *Uthman*, 637 F.3d at 404–05 (internal quotation marks omitted). One of the bodyguards "described the group as 'brothers' retreating from battle.' " *Id.* at 405. Here, Latif told interrogators that his Afghan guide was the only person who accompanied him to the Pakistani border, Ex. 25, Summary Interrogation Rep. (Mar. 6, 2002), and the only evidence to the contrary are [redacted] My colleagues accuse the district court of "fail[ing] even to consider" Latif's route. *Id.* at 42. But the district court did consider it, expressly acknowledging that "Abu Khalud arranged travel for other detainees along the

same route Latif reportedly took to Afghanistan." *Latif*, slip op. at 10. Given that the government failed to demonstrate that route was towards the country road end of the I-95-country road continuum—i.e., that the evidence was sufficiently probative—the district court committed no clear error by failing to "factor[] [it] into [its] decision," Maj. Op. at 42.

Second, consider the government's argument that "Latif was recruited by an al Qaeda member" in Yemen, a theory the district court found the government had failed to prove. *Latif*, slip op. at 25. To support its theory, the government pointed to evidence allegedly showing that Latif's charitable benefactor, Ibrahim Alawi, is actually an al Qaida facilitator known as Abu Khalud, whose real name is Ibrahim Ba'alawi. Some of this evidence could certainly have led a reasonable factfinder to accept the government's interpretation, including that "Ba'alawi" and "Alawi" have similar spellings and that the route Latif took to Afghanistan at Ibrahim's urging was the same path reportedly taken by other detainees who, unlike Latif, admit to having taken that trip to fight alongside the Taliban and some of whom have also admitted, again unlike Latif, to being Abu Khalud-recruits. That evidence, however, hardly forecloses the district court's contrary finding that the government had failed to prove by a preponderance of the evidence that Ibrahim Alawi was Abu Khalud. To repeat, although we have treated evidence that a petitioner reached Afghanistan along a "route similar to the paths of admitted al Qaeda members now in U.S. custody" as a plus factor in determining whether that petitioner was "part of" al Qaida, *Uthman*, 637 F.3d at 405, we have never suggested nor has the government shown that this particular path is so uniquely associated with al Qaida recruits that a district court clearly errs when it treats such evidence as more akin to traveling along I-95 than a lonely country road.

The record contains ample additional evidence that supports the district court's finding. Latif introduced expert declarations explaining that "Ba'alawi" and "Alawi" are distinct Arabic names and that both are common in Yemen. *Latif*, slip op. at 18–19. Notably, therefore, Latif's interrogation summaries all refer to some variation of the name Ibrahim Alawi but none include the "Ba," and none mention Abu Khalud. By contrast, interrogation summaries for seven of the eight detainees mentioning the al Qaida facilitator named Abu Khalud refer either to "Abu Khalud" or "Ibrahim Ba'alawi" but never "Ibrahim Alawi," *id.*, and the eighth, who apparently used the name "Alawi," is a detainee this very district court, in a different case, found not credible because his statements conflicted with those of several other detainees, *id.* at 19 n.10 (citing *Abdah v. Obama*, 717 F. Supp. 2d 21, 35 (D.D.C. 2010)). *But see* Maj. Op. at 39–41 (ignoring the district court's adverse credibility finding about that detainee). Moreover, Latif described Ibrahim to interrogators as "skinny," with a "big beard" and as "30–40 yrs. old," as having two children—[redacted] a boy, and [redacted] a girl, and as being from Ibb. *Latif*, slip op. at 19–20. By contrast, other detainees described Abu Khalud as short, fat, with a short beard and moustache, and around 27 years old, with a visible injury on his face caused by a bullet injury sustained in Bosnia, with one daughter named [redacted] and as being from Ta'iz, not Ibb. *Id. But see* Maj. Op. at 50 (dismissing these differences because Latif's descriptions of Ibrahim Alawi appear in interrogation summaries produced after Latif's initial interview). In light of this mixed record it is self-evident that "there are two permissible views of the evidence," meaning that "the factfinder's choice between [those two views] cannot be clearly erroneous." *Awad*, 608 F.3d at 7.

Next, consider record evidence that, according to this court, shows "that Latif stayed at al-Qaida guesthouses." Maj. Op. at 45. That evidence consists of [redacted] which the government claims include [redacted] The [redacted] contain [redacted] along with [redacted] Seeking to connect these [redacted] to [redacted] the government argues that the [redacted] the [redacted] and the [redacted] The government also points to an [redacted] Finally, the government contends that the fact that [redacted] buttresses its [redacted] given its theory that the [redacted] contain [redacted]

But the district court found that the [redacted] the government points to "is not [redacted] The district court based that finding on the differences between [redacted] and the [redacted] as well as the fact that [redacted] is not [redacted] The district court also noted Latif's innocent explanation for not having his passport—that he "gave it to Ibrahim to use in arranging his stay at a hospital." *Id.*

Ample record evidence supports the district court's factual analysis. At the most basic level, as the district court noted, [redacted] Moreover, [redacted] explaining that even the apparent [redacted] between the [redacted] is misleading given that [redacted]

[redacted] Indeed, implying [redacted] In addition, as [redacted]

This court nonetheless accuses the district court of overlooking the government's expert evidence that [redacted] By that theory, Latif could be any [redacted] and maybe he goes [redacted] But the district court committed no clear error when, after considering the [redacted] it concluded that [redacted]

Finally, the district court's reliance on Latif's explanation for not having his passport is plausible in light of other record evidence about the practice of at least one hospital, the Islamic Hospital in Jordan, of taking foreign patient's passports "to guarantee that [those] patients will not leave the country before settling their bills." Pet'r Trial Ex. No. 7. Moreover, although leaving behind one's passport with an al Qaida operative at an al Qaida run guesthouse might suggest al Qaida affiliation, *see Al Alwi*, 2011 WL 2937134, at *4,

such a scenario is several inferential steps removed from the only relevant fact we know about Latif—that he did not have his passport with him when seized. To be sure, a reasonable factfinder might have interpreted this evidence differently. Yet again, the record contains enough evidence to support "two permissible views of the evidence," *Awad*, 608 F.3d at 7 (quotation omitted), meaning that "the factfinder's choice between [those two views] cannot, [therefore,] be clearly erroneous." *Id.*

D

The court groups many of its criticisms about the district court's fact finding under the catch-all header of *Al-Adahi*. According to my colleagues, the district court took an "unduly atomized" approach to the evidence. Maj. Op. at 39. The district court did no such thing.

Absent some affirmative indication to the contrary, we "presum[e] that the district court knew and applied the law correctly." *United States v. Mouling*, 557 F.3d 658, 668 (D.C Cir. 2009). Such affirmative evidence of legal error was quite obviously present in *Al-Adahi*, as the "fundamental mistake" we identified in that district court's opinion makes clear:

> Al-Adahi's ties to bin Laden "cannot prove" he was part of Al-Qaida and this evidence therefore "*must not distract* the Court." The fact that Al-Adahi stayed at an al-Qaida guesthouse "is not *in itself* sufficient to justify detention." Al-Adahi's attendance at an al-Qaida training camp "is not sufficient to carry the Government's burden of showing he was a part of" al-Qaida.

Al-Adahi, 613 F.3d at 1105 (emphasis added) (quoting district court opinion). By contrast, here the district court placed the Report, which the government concedes represents its "primary" piece of evidence, Appellants' Br. 10, and on which the government admits its "case turned," Appellants' Br. 5, at the center of its analysis. The district court devoted two and a half pages to analyzing the Report and then another fifteen pages to summarizing other evidence introduced by the parties to prop it up or knock it down. Finally, the district court examined the cumulative effect of various evidentiary concerns on the Report's reliability. When read in its full context, the district court's opinion suffers from nothing like the flaws that we reviewed in *Al-Adahi*.

This court uses *Al Adahi* to turn the presumption of district court lawfulness on its head. Rather than giving the district court the benefit of the doubt, it seems to assume that the district court considered the evidence in isolation and ignored key facts. Take, for example, the contention that the district court tossed aside and considered in isolation alleged inconsistencies between statements attributed to Latif in different interrogation reports. Maj. Op. at 43–45. This argument fails to recognize the leeway we have afforded district courts to resolve discrepancies among various accounts in other Guantanamo cases. In *Al-Madhwani*, we found no error in the district court's decision to credit two different detainees' interrogation summaries even though the detainees' statements contradicted each other in certain respects, reasoning that the "task" of "resolving" such discrepancies "quintessentially" belonged to the district court. *Al-Madhwani*, 2011 WL 2083932 at *5. Yet the only indication that the district court in that case had actually resolved the relevant contradictions between the two reports is its bald assertion that those reports are reliable; the discrepancies are never mentioned, let alone analyzed. By

contrast, as this court concedes, the district court here expressly noted that it had "taken into consideration the explanation of events Latif has offered" in assessing the Report and expressly acknowledged that Latif's story is not without "inconsistencies and unanswered questions." Maj. Op. at 42. The district court then specifically assessed the two primary inconsistencies the government relied on, as my colleagues implicitly acknowledge. *Id.* at 43–45. Finally, the district court explained that any concern about "smaller inconsistencies," most of which it had earlier summarized, was outweighed by the possibility that they had resulted from translation or transcription errors and by the fact that the "fundamentals [of Latif's story] have remained the same." *Latif*, slip. op. at 27. For its part, this court reluctantly recognizes all this as "a welcome step toward the holistic approach to the evidence we called for in *Al-Adahi*." Maj. Op. at 42–43. But it is in fact more than that. If the district court's implicit resolution of discrepancies in *Al-Madhwani* was adequate, then it follows *a fortiori* that so too was this district court's far more explicit treatment. My colleagues acknowledge that their approach is in tension with "the usual practice" of "assum[ing] the [district] court considered all the evidence," but nonetheless find this justified by the "unusual posture of this case"—i.e., a he-said, she-said case involving detainees at Guantanamo Bay. *Id.* at 50. But if we take seriously the notion that district courts are better at finding facts and determining credibility, then we should be all the more eager to defer to their expertise when the stakes are high and when the case comes down to he-said, she-said—that is, when it rests entirely on credibility and how one interprets the facts.

The only affirmative indication this court identifies allegedly showing that the district court took an unduly atomized approach to the evidence relates to the

circumstances of Latif's capture and to [redacted] The court makes much of the fact that in weighing the former, the district court employed language similar to the language used at one point by the district court in *Al-Adahi*—specifically that "the timing of [Latif's] departure . . . *is not sufficient* to create an inference that he was involved in fighting." *Latif*, slip op. at 27 (emphasis added). The court, however, neglects to mention that this sentence appears in the middle of a paragraph evaluating the credibility of Latif's account, which itself appears in the middle of an extended assessment of the *combined* impact of multiple pieces of evidence on the Report's reliability. This "pars[ing]" of the district court's words "overlook[s]" what those words "mean[] in context," an approach that is, again, inconsistent with clear error review. *See Brockenborrugh*, 575 F.3d at 741.

As for the district court's decision [redacted] my colleagues offer no convincing explanation for why the district court should have considered evidence that it found does not implicate Latif—unless, of course, that finding was clearly erroneous, something they never claim. Suppose, for example, that a witness in a burglary case testifies to having seen a man with a similar build as the defendant walk away from the site of the crime. If the factfinder concludes that the person the witness saw was not the defendant, then surely the factfinder can reasonably set aside the witnesses' testimony in assessing whether the defendant was the burglar. So too here. Once the district court had determined that [redacted] did not implicate Latif, it was entirely proper for it to put them aside when evaluating the rest of the evidence.

The remainder of the court's *Al Adahi* critique rests entirely on the claim that the district court "ignore[d] relevant

evidence." Maj. Op. at 38. Not so. The district court expressly considered virtually all the evidence this court points to—including every single item of evidence the government claims is of primary or even secondary relevance. *Compare id.* at 39–41 ("correspondence" between names appearing in the Report and names Latif later mentioned to interrogators), *with Latif*, slip op. at 15–16 (discussing same); *compare* Maj. Op. at 41–42 (Latif's travel route from Yemen to Afghanistan), *with Latif*, slip op. at 10–11 (discussing same); *compare* Maj. Op. at 42–45 (purported inconsistencies in Latif's statements), *with Latif*, slip op. at 27–28 (discussing same); *compare* Maj. Op. at [redacted] *compare* Maj. Op. at 47–49 (circumstances of Latif's departure from Kabul and subsequent seizure by Pakistani authorities), *with Latif*, slip op. at 12–13, 25, 27 (discussing same); *compare* Maj. Op. at 50–52 (evidence that Latif's benefactor, Ibrahim Al-Alawi, is in fact the Al Qaida facilitator Abu Khalud), *with Latif*, slip op. at 17–21, 23–28 (discussing same). As for the claim that Latif may have (or may not have) traveled across the Pakistani border with Taliban-affiliated men, the district court's silence is easily explained: [redacted] both of which already chosen not to credit. *But see* Maj. Op. at 45–46 (unreflectively treating this omission as an error distinct from the district court's analysis of the Report).

To determine, as this court apparently does, that an experienced district court judge has totally ignored relevant evidence and so committed legal error because his twenty-seven page opinion omits mention of a handful of tertiary items plucked from thousands of pages of record evidence not

only ignores the presumption of district court lawfulness, but also imposes on that court a virtually impossible burden. As the First Circuit put it, "[t]he district court could have written a 200-page decision on this case, but the far more compact assessment it made was entirely adequate under Rule 52(a)." *Addamax Corp. v. Open Software Foundation, Inc.*, 152 F.3d 48, 55 (1st Cir. 1998) ("[T]he district court was not required to make findings on every detail, was not required to discuss all of the evidence that supports each of the findings made, and was not required to respond individually to each evidentiary or factual contention made by the losing side."). *See also Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944) ("While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court."); *Medtronic, Inc. v. Daig Corp.*, 789 F.2d 903, 906 (Fed Cir. 1986) ("We presume that a factfinder reviews all the evidence presented unless he explicitly expresses otherwise."); *cf. Puerto Rico Maritime Shipping Authority v. Federal Maritime Comm'n*, 678 F.2d 327, 351 (D.C. Cir. 1982) ("It is frivolous to contend that the Commission did not consider the evidence because it did not catalogue every jot and tittle of testimony. Nothing is gained by a laundry-list recital of all evidence on the record supporting each view on every issue.").

The district court's opinion is by no means perfect. But clear error review demands a good deal less than perfection. *See Microsoft*, 253 F.3d at 118. That said, had the district court otherwise committed legal error or made some other mistake requiring remand, then I would have asked it to clarify whether it had indeed considered this evidence holistically. *See, e.g., Salahi*, 625 F.3d at 753 (noting that "the district court generally" considered all the evidence together but that "its consideration of certain pieces of evidence *may*

have been unduly atomized" and that "*since* we [were] remanding" we would encourage the district court to clarify (emphasis added)). But nothing in our case law requires, nor would I now hold, that the mere fact that a district court that obviously and carefully considered the entire record failed to mention a couple items of tertiary importance reflects *undue* atomization of the evidence.

III.

For the foregoing reasons, I would affirm the grant of the writ of habeas corpus.

Access to Fair Trials / Military Commissions

APPENDIX 34

Summary of
Military Commissions Procedure
March 1, 2013

Office of the Federal Public Defender
District of Nevada
Gerald Bierbaum
AFD / R&W

In 2006, President George W. Bush proposed legislation that would establish the current military commissions system operating within the United States Naval base in Guantanamo Bay, Cuba.[1] In an introductory message to Congress attached to the legislation, the President explained the proposed commissions procedures would reinterpret standards of conduct prescribed by Common Article 3 of the Geneva Convention in accord with definitions provided by American law and that the commissions would track the courts-martial procedures of the Uniform Code of Military Justice, but depart from those procedures where they would be impracticable or inappropriate for the trial of unlawful enemy combatants. George W. Bush, Message from the President of the United States, (Sept. 7, 2006), 109th Congress, 2d Session, House Document 109–133. These departures currently swallow the fairness and reliability inherent to both war crimes and criminal litigation.

President Barack Obama, while campaigning in 2007, recognized the unfairness inherent in the military commissions system, and promised,

> I will reject a legal framework that does not work. I have faith in America's courts and I have faith in our [Judge Advocate Generals]. As president, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists . . . Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers and that justice is not arbitrary.

[1] This submission was prepared for review by the Inter-American Commission on Human Rights in order to outline the history of the Military Commissions system at Guantánamo Bay and to highlight the unfairness of its procedures. It does not contain any information deemed by the State to be classified, nor do any of the arguments herein refer to classified information.

Reuters, Obama Fulfills Campaign Promises, US News, October 28, 2011; Jason Leopold, Former Guantanamo Chief Prosecutor: "A Pair of Testicles Fell Off the President After Election Day," Truthout, November 13, 2011.

When elected, President Obama signed an order closing the Guantanamo Bay detention camp. Obama, Executive Order -- Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, January 22, 2009. However, four months later, facing pressure from the Department of Defense and many legislators, he reversed course and decided to resurrect the military commissions system. CNN, Obama Resurrects Military Trials for Terror Suspects, May 15, 2009.

President Obama promised to revise President Bush's commissions system, noting the 2006 act "failed to establish a legitimate legal framework and undermined our capability to ensure swift and certain justice against those detainees." Id. Unfortunately, President Obama's revamped commissions look strikingly like the prior commissions. See Jennifer K. Elsea, The Military Commissions Act of 2009: Overview and Legal Issues, Congressional Research Service (April 6, 2010); Professor David W. Glazier, Still a Bad Idea: Military Commissions under the Obama Administration, Loyola Law School (2010).

Within the commissions system, the discretion to pursue or refuse to pursue charges, to appoint and provide resources to counsel and to accept, reject or modify any final result rests with a civilian employee of the defense department, a Convening Authority, who carries no accountability to the public because he is not an appointed

government officer.[2] 10 U.S.C. § 949 - 950. The Secretary of Defense hired the Convening Authority utilizing the minimally accountable hiring procedures used for General Services Employees.[3] Never in the history of the Constitution has one bureaucrat exercised so much governmental authority over life and death with so little democratic accountability. See U.S. v. Al-Nashiri, Defense Motion to Dismiss Because the Convening Authority Assumes the Responsibilities of an Officer of the Government Without the Minimal Procedures Required by the Appointments Clause That Ensure Democratic Accountability, AE087 (June 15, 2012).

The remainder of this summary offers specific examples of unfairness in the procedures used to seek the execution of a detainee. Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri stands in front of the military commissions court charged of several capital crimes.[4] In Al-Nashiri's case, some of the charges presented and referred to by the

[2] The Convening Authority apparently exercises very poor discretion when approving or referring charges. The Convening authority referred charges of material support for terrorism against Salim Ahmed HAMDAN even though the acts he allegedly committed were not prohibited by law when he committed them. After Hamdan's conviction, the United States Court of Appeals for the District of Columbia overturned the conviction and vacated the charges as violating the *Ex Post Facto* clause of the United States Constitution. See Hamdan v. U.S., 696 F.3d 1238 (C.A.D.C., 2012). The Convening Authority repeated the mistake against Ali Hamza Ahmad Suliman AL BAHLUL and the same appellate court corrected the error, post-trial. Al Bahlul v. U.S., 2013 WL 297726 (unpublished) (C.A.D.C., Jan. 25, 2013). Bahlul boycotted his trial, offered no defense, and the reviewing court still vacated his conviction and charges.

[3] The Convening Authority is neither appointed by the President nor confirmed by the Senate. He is a civil servant whose position and tenure, salary and duties can be varied at any time by the Secretary of Defense.

[4] Counsel currently represents Al-Nashiri in habeas litigation in United States District Court for the District of Columbia.

unaccountable civilian Convening Authority, Charges IV (Conspiracy) and V (Terrorism), were not cognizable as violations of the laws of nations when he allegedly committed the underlying acts. In a similar vein, these offenses are not justiciable by a law-of-war commission such as the military commissions, yet the Convening Authority referred the charges to the commissions court anyway. See U.S. v. Al-Nashiri, Defense Motion to Dismiss for Lack of Jurisdiction over the Charge of Conspiracy, AE048; Defense Motion to Dismiss for Lack of Jurisdiction over the Charge of Terrorism, AE049, (March 12, 2012).

The charges against Al-Nashiri also represent a sham in that the government has no intention of releasing Al-Nashiri should the commissions panel acquit him. In a variety of contexts, officials of the United States, including the President, have suggested that no matter what the outcome of the trials in Guantanamo, individuals such as Al-Nashiri will not be released because they are allegedly terrorists. See e.g., Remarks by the President on National Security, 21 May 2009, http://www.whitehouse.gov/the_press_ office/Remarks-by-the-President -OnNational-Security-5-2 1-091; United States v. Ghailani, 743 F.Supp.2d 261, 288 (S.D.N. Y. 2010) (suggesting that even if acquitted for lack of evidence, the government "probably may detain [the defendant] as an enemy combatant as long as the present hostilities continue."); United States v. Hamdan, Government Motion for Reconsideration (Corrected), at 6 (24 September 2008)("[A]fter charges are sworn in a military commission against a detained enemy combatant, those charges may be withdrawn, or the Convening Authority may choose not to refer them for

trial, or the commission may dismiss them for one reason or another. Nevertheless, the United States would be fully justified to continue to detain someone adjudged to be an enemy combatant in order to prevent his return to the battlefield"); See U.S. v. Al-Nashiri, Motion for Appropriate Relief: To Determine if the Trial of this Case is One from Which the Defendant May Be Meaningfully Acquitted, AE011 (October 19, 2011); Government Response to Defense Motion for Appropriate Relief to Determine if the Trial of this Case is One from Which the Defendant May Be Meaningfully Acquitted (October 27, 2011).

The process of the trial also contains flaws after the charging procedure. Within the trial, Al-Nashiri has no independent subpoena power. He has to explain his requests for expert consultation both to the prosecutor and the Convening Authority. He has no right to even be present during the introduction of classified information. Under the current Commissions rules, only the court and trial counsel ("the government") may issue subpoenas; defense counsel must explain his need for records or witnesses to the government and beg the government to issue a subpoena on his behalf. The government may refuse. Rule 703(e)(2)(c) [Manual, p. 80, II-52]. Specifically, defense counsel may submit a request to the government to compel the attendance of a witness or to compel the production of evidence but that submission must include a "synopsis of the expected testimony sufficient to show its relevance and necessity." Rule 703(c)(2)(B)(I)[Manual, p. 78, II-50]; 703(f)(3)[Manual, p. 83, II-54]. The government may contest the relevance or necessity of the witness based on the defense showing. Rule 703(c)(2)(D); see U.S v. Al-Nashiri, Email Deputy Legal Advisor to Defense with Memos, AE132C, available at

http://www.mc.mil/CASES/MilitaryCommissions.aspx. By requiring witness lists, synopses of expected testimony (including a justification for relevance and necessity), and not providing for a "blank subpoena" process, the rules fail to properly shield the defense's witnesses, work-product, or case strategy. See U.S. v. Al-Nashiri, Motion to Find That RMC 703(c) Violates 10 U.S.C. 949j.(A)(1) and Mr. Nashiri's Constitutional and Statutory Rights to Due Process, AE114 (September 21, 2012).

Al-Nashiri has to plead with the commissions court and the government before he may retain an expert for consultation. The MCA and the Manual for Military Commissions authorize the employment of experts to assist the parties in the development and presentation of their cases. R.M.C. 703(d). In order to employ an expert at government expense, a party must submit a request to the Convening Authority to authorize and to fix the compensation for the expert. A request denied by the Convening Authority may be reviewed by the commissions judge, who shall determine whether the testimony of the expert is relevant and necessary. R.M.C. 703(d). The government can oppose the request for expert consultation at each stage.

In Al-Nashiri's case, he requested the Convening Authority provide funding for a consultation with a psychologist, Dr. Elizabeth Loftus. The Convening Authority refused the funding. Al-Nashiri appealed the denial to the commissions court. The government opposed the motion again, citing Al-Nashiri's failure to submit a "complete statement" supporting the necessity of hiring Dr. Loftus. The Convening Authority intervened and opposed in front of the commissions judge. The commissions court ultimately granted the

resources for the consultation but that occurred after Al-Nashiri had to explain potential trial strategy and theory of the case, twice, to the government. See U.S. v. Al-Nashiri, Order, Motion to Compel the Funding of Dr. Elizabeth Loftus as a Consultant to Aid the Defense, AE077 (November 16, 2012).[5]

The government even contests Al-Nashiri's right to be present for portions of the proceedings against him. The right to be present during trial is a bedrock of modern democratic process. One has to be able to see and hear the evidence, as it is presented, to either refute it or support it. Nonetheless, the government informed the commissions court that

> Although the accused has the right to be present during pretrial hearings, that right is not absolute. The accused may not be present during pretrial hearings where classified information derived from a source other than the accused is disclosed. Thus, if the defense believes that it must disclose classified information, and the Commission rules that the classified information is relevant, admissible, and that no government-offered alternative is acceptable, then the accused may not be present during that limited port ion of the pretrial hearing where classified information will be disclosed.

U.S. v. Al-Nashiri, Government Response to Defense Motion to Prevent the Accused from Being Removed from the Courtroom During a Closed Session, AE 142 (January 3, 20113). The government intends to coerce Al-Nashiri into either ignoring classified evidence or be removed from the courtroom for portions of his trial.

[5] In addition to these problems, the rules limit Al-Nashiri's counsel from discussing, with him, any of his prior statements they see in discovery. See U.S. v. Al-Nashiri Government Motion for Protective Order to Protect Classified Information Throughout All Stages of the Proceedings, (October 27, 2011).

The commissions also used flawed physical procedures to seek the death of detainees. For the first several years of his incarceration at Guantanamo Bay, Al-Nashiri could only meet with counsel while chained. Al-Nashiri's counsel repeatedly complained that the restraints inhibit communication and the understanding of his case. U.S. v. Al-Nashiri, Defense Motion for the Defendant to Be Unrestrained During Legal Meetings (December 14, 2011). Defense specifically informed the commissions court that "as a result of the torture, the use of restraints is a retraumatization of his torture and interferes with his communications with his counsel and in light of his behavior with counsel and in court is unnecessary." U.S. v. Al-Nashiri, Renewed Defense Motion to Require JTF GTMO to Allow the Defendant to Be Unrestrained During Attorney Client Meetings, AE026 (March 9, 2012). Such a condition for meeting counsel could only mar the trust needed for an adequate attorney /client relationship.

Communications, both in writing and in person, between Al-Nashiri and his trial attorneys may also have been monitored by the government. During the week of October 11, 2011, guards at the Guantanamo Bay facility seized Al-Nashiri's legal bins for inspection to determine the "baseline" level of compliance with camp rules. The guards read and inspected legal materials as part of this process. See Defense motion to Bar JTF-GTMO Personnel from Violating the Attorney - Client Privilege by Reading Attorney-Client Information, AE012 (October 26 2011). As recently as last month, attorneys representing another high value detainee that faces a capital trial discovered hidden microphones in the booths where they met with the defendant. Carol Rosenberg,

FBI Hid Microphones in Guantánamo, but No One Listened, Prison Commander Testifies, Miami Herald, February 13, 2013. Both reading legal mail and listening to attorney-client discussions further skews the already unfair litigation process of the commissions.

In sum, the commission process began with a promise by President Bush to deviate from both the Articles of the Geneva Convention and the standard Uniform Code of Military Justice and currently keeps the promise. The commissions create a one-sided litigation process whereby the defendant cannot subpoena evidence or witnesses or consult with experts without permission from the government and the court or even discuss his prior statements, included as part of discovery, with his counsel. Any such system, that attempts to snuff out human life, should be closely and thoroughly scrutinized by every entity with the power to comment. We should remember the words of Thomas Paine: "He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."

We thank the Commission for its consideration.

Respectfully submitted,

_____

Gerald Bierbaum
Office of the Federal Public Defender
District of Nevada
AFD / R&W
Las Vegas, NV. 89101
Tel: (702) 388-5115
Email: Gerald_Bierbaum@fd.org

APPENDIX 35

salon.com http://www.salon.com/2013/02/05/guantanamos_perverse_justice_partner/

TUESDAY, FEB 5, 2013 1:26 PM UTC

What's really going on at Guantanamo?

A cut media feed during a pre-trial hearing exposes the paranoia and confusion surrounding military commissions

BY JOHN KNEFEL

In this May 13, 2009 file photo reviewed by the U.S. military, the sun rises over the Guantanamo detention facility at dawn, at the Guantanamo Bay U.S. Naval Base, Cuba. (Credit: AP/Brennan Linsley)

This article originally appeared on AlterNet.

Over the week of January 28-31 a great mystery played out at JTF-GTMO, the notorious military base and indefinite detention facility better known as Guantanamo Bay. The question at hand: who cut the media feed during a pre-trial hearing for Khalid Sheik Mohammed, self-proclaimed mastermind of 9/11, thus temporarily censoring the proceedings? Was there an unknown, outside force controlling the court? If so, who was it? What was intended to be a dry week of legal wrangling became a full-on whodunnit that was part Law & Order, part spy novel – if the final 50 pages had been blacked out.

On top of that, the week ended with defense attorneys openly questioning whether their conversations with clients were being secretly monitored. "We have significant reasons to believe we have been listened in [on]," David Nevin, defense attorney for KSM said at at press conference. "After this week," said defense attorney James Connell, "the paranoia levels have kicked up a notch."

If none of this sounds familiar, you can be forgiven. In the Obama era, news about GTMO (the military doesn't use the "i") is either unwarrantedly optimistic – we're closing it, we swear – or, more frequently, totally ignored. And, quite tellingly, rather than close the prison, Obama has instead decided to close the office responsible for determining how to close the prison.

Last week the government held a round of what's called pre-trial motion hearings, which establish the specific

rules of a trial. Given the almost complete lack of precedent in military commissions – more on that shortly – this process is even more important than it would be in a normal court.

The cast of characters in this would-be Agatha Christie play are numerous and colorful. At the center are Khalid Sheik Mohammed and his four co-defendants, all of whom stand accused of war crimes and face the death penalty. They've been detained at GTMO since 2006.

The attorneys representing the accused are an impressive posse of civilian and military lawyers given the difficult task of navigating a legal universe that, despite the government's claims to the contrary, often feels like it's being created before our very eyes.

Brig. Gen. Mark Martins is the lead prosecutor and the man most singularly tasked with defending the legitimacy of this young legal universe. Gen. Martins is the picture of the military's self-perception. Tall, disciplined, and by all accounts extremely intelligent, he's also stoic as a Brit. He once said, after being asked his feelings on a week's events, "I don't tend to experience highs and lows in litigation."

Overseeing the endeavor is Army Colonel Judge James Pohl, a man with a self-deprecating sense of humor and a passing resemblance to Bill Murray.

The final character in this drama is the new legal universe itself. Military commissions, as GTMO trials are called, are a confusing mix of civilian court, which is overseen by the judicial branch, and courts martial, the justice system for members of the military, which is under the purview of the executive branch. Military commissions are similarly overseen by the executive branch, though Gen. Martins is quick to point out any similarity they share with civilian court. Congress created military commissions in 2006, and updated them in 2009.

Last week was supposed to be boring. But then lightning struck, the lights went out, and when they came back on there was a dead body in the middle of the room – metaphorically speaking, of course. The mystery had been set in motion.

Mystery

It's hard to imagine the week going any worse for the government. On the first day of proceedings, a previously unknown, outside entity reached into the courtroom like the hand of god and cut the audio/visual feed to the media – which is on a 40-second delay – apparently surprising even the judge. The judge and his assistant, a court security officer (CSO), have always had the authority to cut the feed, but they didn't hit the button. Neither had the CSO's assistants.

When the button is pushed, a red light that looks like a hockey light goes off. That has now happened three times including the most recent instance, and each time the judge ruled the censoring inappropriate, so the hidden testimony was put on the public record.

So who was that outside entity? The open secret among everyone on base is it was the CIA, though no one can confirm that on the record because the information is classified. That's just one of many instances where "classified" doesn't mean secret as much as it means controlled.

Whoever secretly pushed the button is known as an Original Classification Authority, or OCA. OCA is not a position, rank, or job title. It's a term to describe someone, usually fairly high-level though not always, who "owns" the information that's classified, and is able to declassify it. There are also OCAs in the DoD, FBI, NSA, and other government agencies, and we don't know if any of them also had access to the kill switch.

Whether or not the judge knew an outside someone – or several someones – had the power to cut the media feed prior to it actually happening is unclear. Once the feed came back on, he certainly seemed surprised, and

furious, about what had happened. "[N]ote for the record, that the 40-second delay was initiated, not by me," Judge Pohl said when the feed came back. "I'm curious as to why." He continued, "if some external body is turning the commission off under their own view of what things ought to be ... we are going to have a little meeting about who turns that light on or off."

But it's also possible that he wasn't totally aware of or familiar with his own rules for shutting court to ensure classified information doesn't "spill" accidentally.

What's certain, however, is that the defense was not aware that an outside entity could shut down the court. "I would like to know who has the permission to turn that light on and off, who is listening to this," defense attorney Nevin said once the feed returned.

Many at the prosecution table, however, seemed non-plussed. Prosecutor Joanna Baltes actually offered to explain to the judge what had happened in his chambers, away from the public. James Connell, defense attorney for Ammar al-Baluchi, said that the OCA's cutting of the feed on Monday, "demonstrates a level of involvement by the OCA on the prosecution side that we had never previously seen."

Judge Pohl issued a ruling at the end of the week demanding the government disconnect any system that allows an outside body to trigger the hockey light and cut the media feed, but as lawyers like to say: you can't unring a bell. The damage caused by an independent entity that is widely recognized to be the CIA temporarily shutting court – to the apparent surprise of everyone but the prosecution – will be difficult, if not impossible, to repair. Making matters worse for the government, defense attorney Cheryl Bormann characterized the discussion that triggered the closing as "innocuous."

The location of the OCA could be important as well. A reporter for the *Miami Herald* asked defense attorney David Nevin if there could be constitutional implications if the OCA killed the feed from US soil. Nevin said there almost certainly would be, though he reiterated that the government has provided no information about who the OCA is or where they were.

Whether or not the Constitution applies at Guantanamo Bay remains an unresolved matter. Judge Pohl denied a defense motion to presume the applicability of the Constitution, saying instead he would review the matter on a case by case basis, as the prosecution argued was appropriate.

Brig. Gen. Mark Martins, the lead prosecutor and primary advocate for the legitimacy of the commissions, constantly extols the openness of the proceedings and the fairness of the process. He's in an unenviable position, and this week only made his job more difficult.

Paranoia

The procedures for military commissions are unclear, especially when compared with civilian court. In response to a question I asked regarding whether or not the case could effectively be tried in a regular courtroom in the United States, Gen. Martins reiterated that Congress had ruled GTMO detainees couldn't be transferred to US soil. "The case is in this jurisdiction, this is the only place it's gonna be tried," he said at a press conference at the beginning of the week. "That doesn't mean it's gonna be unfair. It urges us on to make [military commissions] laudable, fair, and accountable."

Despite Gen. Martins' reassurances, the five defense teams are united in their criticisms of the entire system as fundamentally flawed, and possibly susceptible to outside influence. "Who is the master of puppets?" Commander Walter Ruiz asked at the end of the week in a wry homage to Metallica, suggesting that there are hidden players pulling the strings of the case. Ruiz also said he believed the killing of the media feed on Monday was in direct violation of the rules governing closure of the court. The judge's order removing the outside

entity's ability to kill the feed is further evidence for Ruiz's claim.

The defense is also united by a troubling concern that goes to the very heart our our idea of justice: they claim to have reason to suspect their private conversations among themselves and with their clients may have been secretly recorded. Defense attorney David Nevin introduced an emergency motion on Thursday morning to abate – or halt – the proceedings until the question of whether or not attorney/client privilege has been compromised has been adequately explained and resolved. Judge Pohl saw the importance of the motion, and moved it to the top of the pile.

All the tables in the courtroom have desktop microphones with mute buttons on them. On the final day of the proceedings, defense attorneys James Connell and Lt. Col. Sterling Thomas both bent their microphones away from them, pointing them at the floor. "The question of who listens to microphones from the defense tables is still very much an open question," Connell said, regarding the motion defense attorney Nevin filed on Thursday morning. A note on the courtroom door reads: "Assume microphones are live at all times." During a brief recess on Thursday morning, the five defense teams huddled against the wall, away from their desks for fear of secret monitoring.

If it is true that defense attorneys' private conversations, among themselves or with their clients, have been surreptitiously recorded it would a catastrophic blow to a system who's fairness is constantly under scrutiny. Even if that information hasn't been provided to the prosecution – Gen. Martins has stated unequivocally that his team has not been given any privileged information – the ramifications would be hard to overstate. "If attorney client privileges are being violated, and it's not clear that is the case, it would be a serious violation of one of the most important fundamental protections provided in the US criminal justice system and would have serious implications for the validity of these proceedings," Laura Pitter of Human Rights Watch wrote in an email.

The first evening we were there, security officials gave reporters a tour of the Expeditionary Legal Complex – the courtroom and nearby holding cells. There hadn't been a tour in years, as near as I could tell. DoD officials repeatedly stressed that they were trying to make the GTMO experience more transparent; this tour was one example of that.

Inside the courtroom a security expert said, "Everything said in here is recorded." Ironically, journalists weren't allowed to bring recording devices inside. Our tour happened before the defense's allegations of secret monitoring, and one wonders whether that security expert would've used the same phrasing had the tour been given at the end of the week.

Beyond the defense's specific questions, general suspicions of surveillance are common at GTMO. Some people will say off-handedly that they have no idea if their phone conversations or personal email are actually private, or are subject to monitoring. I've certainly wondered about that, and I doubt I'm the only journalist who has.

Uncanny Justice

As the military commission system begins to take shape, slowly, I'm reminded of the artificial intelligence phenomenon of the uncanny valley. That theory states that as the appearance of non-human entities comes to resemble real humans closely but not exactly, the observer responds with revulsion.

What's happening at Guantanamo Bay now is something that could be called uncanny justice. As the proceedings inch toward what defense attorney Nevin suggested was merely the "appearance of justice," the military commissions don't become more pleasing and comforting. Rather, they've taken on a ghastly, unfamiliar complexion, like if the Department of Justice had a wax museum wing.

It's not only human rights groups that are critical of the military commission system. Phyllis Rodriguez's son Greg was killed on September 11th. She attended the week's hearings along with several other family members of victims. She's against the death penalty, and so was her son. She characterized the attacks on 9/11 as "political opportunities to get into the Middle East." On numerous occasions over the week, she said she'd prefer that the trial took place in regular civilian court.

The secrecy and civil liberties concerns that have arisen in the United States since 9/11 bother her, too. "Our rights have been compromised," she said, standing in a gigantic hangar that houses the media center. "We live in fear. It reminds me of the Cold War and McCarthy era."

John Knefel is the co-host of Radio Dispatch *and a freelance writer based in Brooklyn. Follow him on Twitter @johnknefel.*

APPENDIX 36

'Imagine the Worst Possible Scenario': Why a Guantanamo Prosecutor Withdrew From the Case

By Jess Bravin

Lieutenant Colonel Stuart Couch truly believed Mohamedou Ould Slahi was guilty. He also believed that Slahi's interrogators had broken the law — tormenting him physically and sexually, and threatening the gang-rape of his mother.

In Washington, D.C., members of the group Witness Against Torture protest the Guantanamo Bay detention camp. (Reuters)

Stuart Couch had been waiting nearly two years to start this job. He had been waiting since September 11, 2001.

Couch, a lieutenant colonel in the United States Marine Corps, was a military prosecutor. When President George W. Bush decreed that the 9/11 perpetrators would face trial by military commission, a form of martial justice last used against German and Japanese war criminals following World War II, Couch had volunteered for the mission.

Arriving at Guantanamo in October 2003, Couch was startled by an unlikely sound: grating, blasting, heavy-metal music. He went to look into the commotion. Perhaps some off-duty guards were fooling around with a boom box, he thought.

With his escort trailing behind, Couch followed the music toward an open door, where a strobe light's flash was spilling into the corridor.

Couch turned into the doorway. He froze.

On the floor, amid the flashing lights and the deafening metal sounds, was a shackled detainee, kneeling, mumbling, rocking back and forth. Praying. This man was in agony.

Let the bodies hit the . . . floor! the song roared. *Beaten, why for (why for).*

Couch suddenly noticed that two men in polo shirts — apparently civilians, judging by their hair length — also were in the room. They planted themselves in the doorway, blocking his view.

"Can I help you?" one of the men shouted over the music. They looked to be in their late 20s or early 30s. Neither seemed particularly fit, nor were they groomed like military men. One wore hair mousse. The other, the fatter one, had a chin-beard.

"I'm Lieutenant Colonel Couch, and I'm trying to have an interview over here," Couch said. "You guys need to turn that down."

The men shut the door.

***

That scene was still resonating through Couch's mind when he met with his CITF investigator. The top priority was Mohamedou Ould Slahi — the detainee, Couch concluded, with "the most blood on his hands."

Born around 1970, Slahi, a military interrogator later said, was "bright, capable, likable." Slahi knew Arabic, French, and German when he arrived at Guantanamo and picked up casual English by his second year at the prison.

This sophistication was remarkable, given that Slahi came from simple circumstances in Mauritania. He was the eighth of a camel herder's 13 children. After his father died, Slahi's mother kept the family together. Mohamedou revered her.

In 1988, Slahi won a scholarship to study in Germany. He was the first in his family to attend university — or fly on an airplane. He studied computers, electrical engineering and microelectronics.

"He was supposed to save us financially," his younger brother Jahdih later said. On a visit home, Slahi

brought toys, cameras, and soccer balls.

"It was very clumsy," Slahi later said, "but they wanted to give the message that 'We are watching you.'"

But Slahi spent much of 1990 through 1992 in Afghanistan, one of many Arabs helping fight the Communist regime in Kabul. He trained at the al Farouk camp, took the alias Abu Masab, and pledged allegiance to Osama bin Laden.

After the Communists fell, Slahi returned to Germany, where over the next six years he ran low-profile businesses that U.S. intelligence later suspected were al Qaeda fronts to launder money and recruit fighters. After making the *hajj*, the pilgrimage to Mecca required of Muslims, Slahi moved to Canada and became a prayer leader at a mosque in Montreal.

Western intelligence agencies had been aware of Slahi before the Millennium Plot, which involved plans to bomb the Los Angeles airport and four popular tourist sites in Jordan. When Ahmed Ressam was arrested for his role in the plot in December 1999, intelligence officials learned that he belonged to the Montreal mosque where Slahi led prayer services.

Canadian authorities questioned Slahi, sent officers to his mosque, and put a police car on his tail. One night, Slahi later said, he was awoken by agents drilling holes into his third-floor apartment to plant surveillance cameras. He called the local police station, saying his neighbor was spying on him; the police suggested he cover the holes with glue.

"It was very clumsy," Slahi later said, "but they wanted to give the message that 'We are watching you.'" He moved to a room at the mosque, but the surveillance continued.

Tired of constantly having "people right behind me, at the market, watching my butt," Slahi decided to return to Mauritania. The FBI tracked his itinerary: flying via Brussels to Dakar, Senegal, where his brothers were to pick him up for the 270-mile drive north to Nouakchott, the Mauritanian capital.

At Washington's request, Senegalese police arrested Slahi when he landed. He was questioned about the Millennium Plot and his jihadist past, but denied everything. Four days later, the Senegalese put Slahi on a private plane to Nouakchott, where he was arrested again.

An American team came to interrogate Slahi. He continued to deny wrongdoing, and after three weeks the Mauritanians released him. "The Americans keep saying you are a link," Slahi later said Mauritanian officials told him. "But they didn't give us any proof, so what should we do?"

After 9/11, American agents went back to question Slahi in Nouakchott. One struck him with a plastic water bottle and threatened torture, Slahi said. The next month, Mauritanian intelligence called Slahi in for more questions.

Why not flee?

"Maybe I'm stupid, I don't know," Slahi later said. "I went to the police and said, 'Why do you want me?' They said, 'Please don't worry, it is just formalities.' "

After a week in jail, however, he learned he was being sent to Jordan. This was disturbing, Slahi thought, because "the Jordanians have [a] very bad reputation when it comes to treatment of

detainees."

"Can you turn me over to the United States?" he asked. "What do I have to do with Jordan? Turn me over to America."

"The United States wants you to be turned over to Jordan," he was told.

"Then, man," Slahi said, "what happened to me there is beyond description."

Jordanian agents pressed him on the Millennium Plot. One "struck me twice in the face on different occasions and pushed me against concrete many times because I refused to talk," Slahi said. "He threatened me with torture" and pointed out another prisoner, "this guy who was beaten so much he was crying, crying like a child." As the months dragged on, Slahi said, he lost so much weight that he looked "like a ghost."

In July 2002, U.S. agents showed up to retrieve him.

"They stripped me naked like my mom bore me, and they put new clothes on me," Slahi said. Aboard the plane, he was chained in place and fitted with a diaper. "I had to keep my water for eight hours straight," he recalled. "Psychologically, I couldn't [urinate] in the diaper. I tried to convince myself that it was okay, but I couldn't and I was exploding [on the inside]."

Slahi figured he would be returned to the Germans. "I was happy, because [I] know Germany and I think Europe is a lot more liberal than America," he said. "I thought they were going to ask me a few questions and then I would go to jail and I will be all right."

When Slahi arrived at Guantanamo, the FBI insisted on taking charge. For several months, he was questioned exclusively by FBI and CITF investigators, who generally followed their law enforcement training.

"The FBI guy said, 'We don't beat people, we don't torture. It's not allowed,"' Slahi said. "I was, every once in a while, taken to interrogation. Okay, so far so good."

***

Up until this point, Slahi was considered a Qaeda operative linked only to the Millennium Plot. Then, in Pakistan, Ramzi Binalshibh was captured. At Guantanamo, things "changed drastically," Slahi said.

Binalshibh told officials that in 1999, he had been on a train in Germany with Mohammed Atta, Marwan al-Shehhi, Ziad Jarrah, and Ramzi when they were approached by a fellow Arab who noticed their pious beards. They discussed Chechnya, and jihad.

Later, Binalshibh and Shehhi telephoned the man about joining the fight. He referred them to Slahi, who told them to come to Duisburg. Once they arrived, Slahi provided instructions on obtaining visas, contacts, and a connection in Karachi for travel to Afghanistan.

After Binalshibh disclosed the Duisburg meeting, Slahi suddenly became "the highest value detainee" at Guantanamo, "the key orchestrator of the al Qaeda cell in Europe," a brigadier general later testified.

Slahi's interrogators were under pressure. Stop "playing games," the FBI man told Slahi. "I am advising you to just tell the truth." But Slahi stuck to his story.

On May 22, 2003, the FBI interrogator "said this was our last session. He told me that I was not going to enjoy the time to come," Slahi said. It sounded less like a threat than a lament. Once military interrogators take over, you won't "be invited to tea and snacks," the agent said.

"I don't care," Slahi said. "Goodbye, good friend," the agent said.

The Defense Intelligence Agency had its own plan for Slahi. A January 2003 agency memorandum listed "interrogation tools" that included yelling, strip searches, shaving the head and beard, and twenty-hour days. Water could be poured on Slahi's head to "enforce control." He could be ridiculed, placed in a mask, made to wear signs with Arabic labels like "liar," "coward," or "dog." Dogs could be brought in "to bark and agitate" him. Slahi himself could be forced to act like a dog — collared, barking, and performing tricks.

Slahi was childless and divorced, and interrogators sought to exploit his presumed feelings of sexual inadequacy.

He could be treated as a woman and forced to wear a burka or confronted with a female interrogator in "close physical contact." The plan called for preventing Slahi from praying or, alternatively, forcing him to worship a stag idol. Violating such "religious taboos" would "reduce the detainee's ego and establish control," the plan explained. He could be kept in a completely white room "to reduce outside stimuli and present an austere environment," or have light filtered through "red plastic to produce a stressful environment." Interrogators could question Slahi while using a strobe light to "disorient [him] and add to [his] stress level." Or he could be hooded while being questioned, thus inducing "feelings of futility."

On July 1, 2003, the Guantanamo prison commander, Major General Geoffrey Miller, signed the DIA proposal. By August 13, 2003, when Rumsfeld himself signed off on the "special interrogation plan," but this was merely a formality: military intelligence had been interrogating Slahi for six weeks.

"The single most important aspect of these techniques is the initial shock of the treatment," the plan said. Slahi was forced to stand, stripped naked, bent over; his anal cavity was searched. He was beaten — medical records later recorded "rib contusions" as well as bruises and cuts to his lip and head — placed in isolation, subjected to temperature extremes, including a room called the "freezer." He would be accused of breaking rules, of hiding things in his cell, then insulted and disciplined again. The "interrogation team will make detainee feel psychologically uncomfortable, emotionally uncomfortable, assert superiority over detainee, escalate stress, play loud music, and continue to condition detainee to menial tasks," the plan said.

Slahi was childless and divorced, and interrogators sought to exploit his presumed feelings of sexual inadequacy. One female interrogator adopted a "maternal role and said things to him like, 'I'm very disappointed in you.' When she eventually left for another assignment, Slahi cried," said one person familiar with the interrogations.

Other female interrogators removed their camouflage tops and rubbed their breasts against the shackled prisoner, fondled his genitals, insulted him, and laughed at him. Photographs of the reproductive process, of vaginas and birth canals and babies, were plastered on the walls. A woman

interrogator ridiculed him for failing to impregnate his wife.

By July 8, the shackling, strobe light, and rock music treatment had begun. Stripped and yelled at, Slahi was kept "awake and in a state of agitation," records say.

That day, a masked interrogator called "Mr. X" visited. Mr. X would direct when Slahi was forced to stand or shackled in place, when he would freeze under an overworked air conditioner or melt as the heater was turned up.

On July 17, Mr. X told Slahi about a recent dream. In his mind's eye, Mr. X said, he had seen four detainees "chained together at the feet. They dug a hole that was six feet long, six feet deep and four feet wide." Into that grave the detainees lowered "a plain, unpainted, pine casket with the number 760." It was Slahi's Guantanamo serial number, painted in orange, the color of detainee uniforms.

Perhaps Slahi was ready to die for his cause, Mr. X said. But what about his loved ones? Must they, too, pay for his recalcitrance?

***

Three days later, Mr. X informed Slahi that his family in Mauritania had been "incarcerated." Later, Slahi was told that his mother and brother were taken from Mauritania. Placed aboard a cargo plane, they wept during the flight.

On August 2, 2003, the White House adviser on detainee operations, a Navy officer named Captain Collins, arrived. Collins was a busy man, and minced few words. The United States had taken custody of Slahi's family. Things looked particularly bleak for his mother, who might well be transferred to Guantanamo. Camp Delta was stuffed with desperate men who hadn't seen a woman in years. Unfortunately, the United States couldn't guarantee her safety. How would Slahi feel if his mother was gang-raped? If that happened, Collins said, it would be Slahi's fault.

"Slahi had a special link to his mother, and that was used on him," a person familiar with the interrogation explained.

Captain Collins offered Slahi a way out.

"You can be part of the solution or you can be part of the problem," he said. "We are two men here in this room. We can stop the killing and make the world a better place."

After planting that seed of hope, the pressure was increased. An August 2, 2003, memorandum relates that the interrogator returned to Slahi's cell with a message.

The interrogator told Slahi to imagine "the worst possible scenario he could end up in." Surely, "beatings and physical pain are not the worst thing in the world," the interrogator said. Instead, he urged, just focus on "what scares [you] more than anything else."

On August 24, 2003, the plan called for military police in riot gear, accompanied by German shepherds, to hood Slahi, drag him from his cell, and trick Slahi into thinking he had been taken from Guantanamo to some place far worse.

When the plan was executed, Slahi was taken to a boat, in blacked-out goggles and shackles, and was beaten. Groaning in pain, he could hear discussions, in Arabic, about his fate. He was to be killed, his

body dumped overboard. He urinated in his pants.

Instead, the boat made landfall and Slahi was pulled ashore. "I was moaning and I recognized a voice, and he was talking to two Arab guys," Slahi later said. "They told him in Arabic that they were there to torture me." Soon "they were hitting me all over. They put ice in my shirt until it would melt," he said. Next a doctor came in, but he "was not a regular doctor, he was a part of the team. He was cursing me and telling me very bad things," Slahi said. "He gave me a lot of medication to make me sleep."

The sensory manipulation apparently worked. "Slahi told me he is 'hearing voices' now," an interrogator wrote in an email to Lieutenant Colonel Diane Zierhoffer, an Army psychologist on the special projects team. "He is worried as he knows this is not normal . . . By the way . . . is this something that happens to people who have little external stimulus such as daylight, human interaction etc.???? Seems a little creepy," the interrogator wrote.

"Sensory deprivation can cause hallucinations, usually visual rather than auditory, but you never know," Zierhoffer responded. "In the dark you create things out of what little you have."

Slahi asked to see Captain Collins. The "detainee had made an important decision," interrogation records said. He "was not willing to continue to protect others to the detriment of himself and his family."

"After he broke, he gushed, he told us more than we could process," said a person familiar with the interrogations. "He wrote and wrote, he did homework every night. We gave him a computer, and he immediately wrote a long autobiography. Then he began to map out the structure of al Qaeda — each name with a hyperlink, showing who else he knew."

***

It would be months before Stu Couch got a fuller picture of the Slahi interrogation. But as he began to piece together the facts, he became increasingly alarmed. Each detail suggested a sustained, systematic regime of physical and psychological coercion that undermined the reliability of everything Slahi said. The trial could end up being more about what the government did to Slahi than what he did for al Qaeda.

Couch was convinced that Slahi had spent years organizing the Qaeda network in Europe, culminating with recruitment of the Hamburg cell that supplied hijackers for 9/11. If any detainee deserved the death penalty, it was Slahi.

Yet Couch hesitated. He ruminated for weeks. Was the United States justified in beating Slahi, in subjecting him to isolation, sensory deprivation, temperature extremes, and sexual humiliation? Was it justified in constructing elaborate scenarios that literally put the fear of death in him, convincing him that he was about to be killed?

One threat, Couch believed, was the worst of all: To have his mother raped.

"Military guys are real big about their mommas," Couch said. And few more than Stu Couch. "Other than my wife, my mom is my best friend," he said. "That's just who I am."

Couch wondered if he could prosecute Slahi at all.

He would lie awake for hours almost every night. During the 10-hour workdays at commissions, dark circles under Couch's eyes exaggerated his hangdog look.

One Sunday, as usual, Couch drove his family to church. He was distracted as the service unfolded, possessed by the Slahi case. He mechanically obeyed when the minister called on worshippers to stand.

"Will you seek and serve Christ in all persons, loving your neighbor as yourself ?"

"I will, with God's help," came the echo. All persons. That included Osama bin Laden. And Mohamedou Ould Slahi.

"Will you strive for justice and peace among all people, and respect the dignity of every human being?" Every human being.

He was surrounded by people, but suddenly Couch felt very, very small. It was as if he stood alone in a dark, cavernous hall, a bright, single shaft of light illuminating him, unseen persons, or powers, awaiting his answer.

"I will," he said. "With God's help."

After the service, he told his wife, Kim, of the threat to rape the prisoner's mother. It was the linchpin to the prisoner's cooperation, the foundation of the entire case.

He told Kim he would have to drop a case. A 9/11 case. "I hate to say it," he said, "but being a Christian is gonna trump being an American."

Colonel Bob Swann, a military judge at Kentucky's Fort Campbell, had been at Crystal City for three days when Couch went to see him about Detainee 760, Mohamedou Ould Slahi.

Couch sketched out the Slahi case and its many problems. He had determined that Slahi's treatment was torture, and Article 15 of the Convention Against Torture prohibited using his statements. Couch said he had reflected deeply on this troubling situation before reaching the conclusion: He could not bring charges.

Swann's small eyes bore in on him, angry and impatient.

"What makes you think you're so much better than the rest of us around here?" he said.

"That's not the issue at all! That's not the point!" Couch said, slamming his hand on Swann's desk." Swann grunted, and made a dismissive gesture with his hand. Commissions staff would grow familiar with it; they called it "the wave." It indicated the discussion wasn't worth his time.

"Gimme the stuff and I'll give it to someone else," Swann said. "Fine," Couch said. He turned to leave. Later, Swann made his thinking clear. "I don't want to hear anything else about international law," he told a staff meeting.

A week later, Couch sent Swann a memorandum. "Due to legal, ethical, and moral issues arising from past interrogations of this detainee, I refuse to be associated with any further prosecution efforts against him," it said. "As a legal matter, I am of the opinion these techniques violate provisions of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and any statements produced by them should be excluded as evidence against this

detainee pursuant to Article 15 of the Convention. If these techniques are deemed to be 'torture' under the Convention, then they would also constitute criminal violations of the War Crimes Act, 18 U.S. C. §2441."

In other words, the interrogators should be prosecuted. Couch continued:

"As an ethical matter, I opine that the interrogation techniques utilized with this detainee are discoverable by defense counsel, as they relate to the credibility of any statements given by him. As discoverable material, I have an ethical duty to disclose such material to the defense.

"As a practical matter, I am morally opposed to the interrogation techniques employed with this detainee and for that reason alone, refuse to participate in his prosecution in any manner."

This post is adapted from *The Terror Courts: Rough Justice at Guantanamo Bay.*

This article available online at:

http://www.theatlantic.com/national/archive/2013/02/imagine-the-worst-possible-scenario-why-a-guantanamo-prosecutor-withdrew-from-the-case/273013/

APPENDIX 37

The Miami Herald
Posted on Thu, Jan. 31, 2013

Guantánamo defense attorneys worry about eavesdropping

By CAROL ROSENBERG
crosenberg@miamiherald.com

JANET HAMLIN / AFP/GETTY IMAGES

In this Pentagon-approved sketch by court artist Janet Hamlin, observers watch the September 11 hearings from the soundproofed viewing gallery at the U.S. Navy base at Guantanamo Bay, Cuba, on Thursday, Jan. 31, 2013. Col. James L. Pohl, Commissions judge, can be seen on the five monitors overhead. General Mark Martins is standing, speaking to the judge.

Defense lawyers in the Sept. 11 case said they were worried Thursday about outside agencies listening in on their privileged conversations, and sought a freeze in the death-penalty trial.

“After this week, the paranoia level has kicked up a notch,” said Jay Connell, the Pentagon-paid lawyer for Ammar al Baluchi. Baluchi’s uncle, Khalid Sheik Mohammed, is the alleged 9/11 plot mastermind and the lead defendant in the case.

The latest controversy to bedevil the war court came on the day Guantánamo’s chief judge ordered unnamed government agencies to unplug their censorship switches that reach into the $12 million state-of-the-art courtroom.

On Monday, the judge, Army Col. James Pohl, erupted in anger when an outside censor cut off audio from the court to the public during unclassified arguments by Mohammed’s lawyer, David Nevin, at the word “secret.” Pohl has been trying to balance transparency in the case with protecting national security secrets.

Pohl “didn’t even know there was an outside entity controlling the courtroom,” said Navy Cmdr. Walter Ruiz, defense lawyer for Saudi Mustafa Hawsawi.

Nevin, spoke of “shadowy third parties” with the power to intrude on the judge’s courtroom adding:

“We have significant reasons to believe that we have been listened in on — not just in the courtroom.” For an example, Nevin said that the Guantánamo prison requires that, before private conversations between attorney and client, the lawyers must divulge what language they’ll be speaking.

For his part, Army Brig. Gen. Mark Martins, the Pentagon’s chief prosecutor, would not say how many outside intelligence agencies had an audio kill-switch at their disposal outside the

courtroom.

Nor would he say whether the agents who control the mute buttons — representing, in intelligence-speak, the Original Classification Authority, or OCA — were monitoring the Guantánamo security court proceedings.

“The prosecution never listens to any confidential communications between the accused and their counsel,” said Martins. “To do so would be a blatant violation of our professional responsibilities and our oaths to serve justice.”

Martins also would not say whether the censors were stationed at the remote U.S. Navy base or tuning in from U.S. soil.

“Who is pulling the strings? Who is the master of puppets?” Ruiz asked reporters in a news briefing. “Is this a system that you can believe in?”

Veteran death-penalty defender Jim Harrington, attorney for alleged 9/11 plot deputy Ramzi bin al Shibh, said the latest censorship episode was a dramatic illustration of the difference between federal courts and the Guantánamo tribunals. Had a civilian judge realized an intelligence agency was merely listening in on the court, said Harrington, that judge would’ve ordered a criminal investigation — of the government.

“This proceeding would’ve been stopped — there’d have been hell to pay,” he said.

The judge recessed until Feb. 11 the pretrial hearings in the case of the five men accused of creating the plot and then training and financing the hijackers who killed nearly 3,000 people on Sept. 11, 2001. First up: The defense lawyers’ request to freeze the proceedings pending an investigation of who has been listening in, and where.

War court hearings resume next week, however, in the death-penalty case against the alleged USS Cole bomber, Abd al Rahim al Nashiri.

In response to Thursday’s developments, Nashiri’s lawyer, Navy Lt Cmdr Stephen Reyes, said he was filing an emergency motion to first hold a hearing with a government witness “to testify as to the extent of third party monitoring and censoring.”

Nashiri is the alleged mastermind of al Qaida’s October 2000 suicide attack on the warship off Yemen that killed 17 American sailors.

APPENDIX 38

The New York Times

January 26, 2013

Who Decides the Laws of War?

By CHARLIE SAVAGE

WASHINGTON

UNTIL recently, no uniformed lawyer was viewed by the Obama administration with greater favor than Brig. Gen. Mark S. Martins, the scholarly chief prosecutor of the military commissions system who is leading the case against Khalid Shaikh Mohammed and four other Guantánamo Bay detainees accused of aiding the terrorist attacks of Sept. 11, 2001.

A Rhodes Scholar who graduated first in his class at West Point and earned a Harvard law degree alongside a young Barack Obama, General Martins served for five years in Iraq and Afghanistan, helped review detainee policies for President Obama in 2009, and was handpicked to reboot commissions in the hope that his image and conduct would persuade the world to respect the outcome of the Sept. 11 case — prosecutors are seeking death sentences — as legitimate.

But next week, when General Martins returns to public view at a pretrial hearing in the Sept. 11 case, he may appear to have gone rogue. He has engaged in an increasingly public dispute with the administration centered on an uncomfortable question he is refusing to drop: is it valid for the United States to use tribunals to charge idiosyncratic American offenses like "conspiracy," even though they are not recognized as war crimes under international law?

General Martins's standoff with the administration is writing a new chapter in a familiar narrative: since the 2001 terrorist attacks, military lawyers in the Judge Advocate General's Corps have repeatedly clashed with politically appointed lawyers over the laws of war.

During George W. Bush's administration, uniformed lawyers pushed back against civilian officials over the applicability of the Geneva Conventions in the war on terrorism, torture and protections for defendants in tribunals. Then as now, uniformed lawyers adopted rigid interpretations of the rules of warfare as constraining government policies, while civilian lawyers gravitated toward more flexible (or expedient) understandings.

The current dispute traces back to an appeals court ruling in October that vacated a tribunal's verdict in 2008 against an Al Qaeda driver because his offense, "material support for terrorism," was not a recognized international war crime at the time of his actions. The judges rejected the Justice Department's argument that the charge was nevertheless valid under an

American "common law of war" and because Congress had listed the crime as an offense for the tribunals in a 2006 statute.

The ruling raised the question of what to do about other cases with the same defect, including the appeal of a convicted Al Qaeda propagandist whose charges included "conspiracy," which is also not an international war crime but was sometimes charged by tribunals in American history, including in cases from World War II and the Civil War.

General Martins pushed to abandon the propagandist's conviction and scale back the charges that are triable in a military commission, contending that pressing forward with failed arguments would delegitimize the system and cast a distracting cloud over the Sept. 11 case. But Attorney General Eric H. Holder Jr. decided to go forward with defending the propagandist's conviction and the validity of conspiracy as a tribunal charge, and the schism opened.

General Martins refused to sign the Justice Department brief in the propagandist case and announced he would seek to drop conspiracy from the list of charges in the Sept. 11 case and focus on "legally sustainable" ones, like the classic war crime: attacking civilians. But the Pentagon official who oversees tribunals refused to withdraw the conspiracy charge, citing the Justice Department. General Martins responded that his prosecutors would not argue against a defense motion asking a judge to scuttle it.

"It really is amazing," said Gary Solis, a retired military judge who teaches wartime law at George Washington and Georgetown Universities. "They brought Martins in to square it away, and everyone on all sides said 'if anyone can do it, it's Martins.' Then when Martins offers his best advice, it's rejected."

In certain respects, the current dispute is knottier and more abstract than Bush-era fights over the laws of war. But a common concern connects them: reciprocity, or the principle that a military should treat wartime prisoners the same as it wants adversaries to treat its soldiers.

David Glazier, a retired naval officer who teaches the laws of war at Loyola Law School in Los Angeles, posed the question: if Iran someday shoots down an American pilot, could the Iranian military — citing the administration's position — prosecute and execute him for an idiosyncratic war crime derived from Persian tradition rather than international law?

"What we are seeing is that it's easy for civilian members of the government, who are in power for a comparatively short time, to get tunnel vision on a particular case or situation," he said. "But how the United States handles these cases is going to influence how other countries in future wars treat captured Americans."

There are complications. Few expect a terrorist group to obey the laws of war regardless of the example the United States sets. The administration's arguments have focused on litigation strategy as much as principle. Some civilian officials backed General Martins, while some military lawyers disagreed with him.

And shortening the list of charges for tribunals could mean that fewer Guantánamo detainees get trials rather than indefinite detention. A 2009 review deemed about three dozen detainees eligible for prosecution, but only about a third of them were linked to specific attacks, officials have said.

Other triable detainees might be charged with conspiracy with Al Qaeda under domestic law, but Congress has forbidden prosecuting them in civilian courts. Against that backdrop, Eugene R. Fidell, who teaches military law at Yale Law School, argued that the drama may be less about individuals than it is about institutions struggling to make the system work despite impediments.

"It's tempting to view this as about General Martins, but it's not," he said. "Decisions about prosecuting detainees have become about what is feasible as opposed to what is rational. The constraints imposed by Congress are forcing officials into contorted positions which are particularly uncomfortable for military lawyers, who don't want to get near the 'third rail' of destroying reciprocity."

Charlie Savage is a security reporter for The New York Times.

APPENDIX 39

April 4, 2011

In a Reversal, Military Trials for 9/11 Cases

By CHARLIE SAVAGE

WASHINGTON — The Obama administration, ending more than a year of indecision with a major policy reversal, will prosecute Khalid Shaikh Mohammed and four other people accused of plotting the Sept. 11 terrorist attacks before a military commission and not a civilian court, as it once planned.

Attorney General Eric H. Holder Jr. announced on Monday that he has cleared military prosecutors at Guantánamo Bay, Cuba, to file war-crimes charges against the five detainees in the Sept. 11 case.

Mr. Holder had decided in November 2009 to move the case to a federal civilian courtroom in New York City, but the White House abandoned that plan amid a political backlash.

The shift was foreshadowed by stiffening Congressional resistance to bringing Guantánamo detainees into the United States, and by other recent steps clearing the way for new tribunal trials.

Still, it marked a significant moment of capitulation in the Obama administration's largely frustrated effort to dismantle counterterrorism architecture left behind by former President George W. Bush. President Obama, in one of his first initiatives, had announced his intention to close the Guantánamo prison in a year, a goal that he failed to fulfill.

Mr. Holder said Monday that he stood by his judgment that it made more sense, based on the facts and evidence of the case, to try Mr. Mohammed, described as the mastermind behind the Sept. 11 attacks, and the four others in a federal court. He criticized restrictions imposed by Congress last year that banned the military from using its funds to transfer detainees to domestic soil, even for trials.

"We must face a simple truth: those restrictions are unlikely to be repealed in future," Mr. Holder said. "And we simply cannot allow a trial to be delayed any victims of the 9/11 attacks or for their families who have waited nearly a decad

While Mr. Holder has portrayed his original decision as based narrowly on legal tactics — like avoiding the prospect of a drawn-out appeal challenging the commissions system itself — it was both hailed and condemned on ideological grounds.

On Monday, several Republicans praised the decision to hold a military trial, while attacking the administration for ever thinking of doing otherwise.

"It's unfortunate that it took the Obama administration more than two years to figure out what the majority of Americans already know: that 9/11 conspirator Khalid Sheikh Mohammed is not a common criminal, he's a war criminal," said Representative Lamar Smith, the Texas Republican who is chairman of the House Judiciary Committee.

But groups that had praised Mr. Holder's original plan as helping to restore the role of the traditional criminal justice system reacted with frustration on Monday. Some criticized Mr. Obama, who announced his re-election bid on Monday, and others singled out Mr. Holder.

"The attorney general's flip-flop is devastating for the rule of law," said Anthony D. Romero, executive director of the American Civil Liberties Union.

Military prosecutors are expected to seek the death penalty, although they did not say Monday whether they would do so. Mr. Mohammed had originally been charged in the tribunal system late in the Bush administration alongside Walid Muhammad Salih bin Attash, Ramzi bin al-Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed al-Hawsawi.

The defendants indicated in December 2008 that they were inclined to plead guilty without a full trial. But in one of his first steps after taking office, Mr. Obama halted all the commissions under way at Guantánamo while he reviewed the detainee policies he had inherited.

The administration eventually came up with a hybrid approach under which detainees would be prosecuted in a civilian court where possible, and in a revised commission system where not. Still others, deemed too dangerous to release but too difficult to prosecute in either system, would be held without trial indefinitely.

Mr. Obama charged Mr. Holder with deciding which detainees would go to each system, leading to his original decision about a Sept. 11 trial in New York. It would become Mr. Holder's signature policy move, then his bane.

Amid the wave of fear that followed the attempted bombing of a Detroit-bound airliner the next month, New York City officials balked at the prospect of what they portrayed as potentially hugely expensive and disruptive security arrangements.

By early 2010, the White House decided to reconsider. On Monday, New York's mayor, Michael R. Bloomberg, and its police commissioner, Ray Kelly, both spoke approvingly of the decision to keep the trial at Guantánamo.

In practice, it was never clear that the security would be as expensive and cumbersome as city officials warned; another high-profile Guantánamo detainee, Ahmed Khalfan Ghailani, was tried without incident in a New York courtroom last year for plotting Al Qaeda's 1998 embassy attacks in Africa.

Still, Mr. Ghailani case ended up stiffening resistance to civilian trials because a jury acquitted him on more than 280 charges. Although he was still convicted on one count and sentenced to life in prison, critics pointed to the result as a sign that civilian trials were too uncertain.

The Justice Department on Monday also disclosed that a federal grand jury in New York had indicted the five detainees under seal in December 2009. It released the 81-page indictment — nearly half of which consisted of the names of 2,976 people who died in the attacks — along with a judicial order unsealing and dismissing it.

Prosecutors had asked a judge to seal the indictment on the grounds that some of the defendants had "potentially admissible evidence" in their cells, and a public announcement of the indictments might lead them to destroy it, a court document showed. It offered no further details.

Throughout 2010, Mr. Holder continued to press internally to hold the trial in a civilian court, even as elected officials in all three federal jurisdictions where the attacks had taken place objected to trying the suspects there. On Monday, Mr. Holder disclosed that he had focused on prosecuting the case at the federal prison in Otisville— a rural facility about two hours northwest of the city.

An official familiar with the deliberations said the administration has not moved on the proposal or consulted with local officials or Congress about Otisville, fearing that the dynamics of the midterm election would prompt Democrats to join Republicans in trying to block it. As it turned out, a bipartisan majority of lawmakers effectively did so after the election anyway.

Senator Charles E. Schumer, a New York Democrat who objected to holding the trial anywhere in New York State, hailed the administration's decision Monday.

"This means with certainty that the trial will not be in New York," he said. "While not unexpected, this is the final nail in the coffin of that wrong-headed idea. I have always said that the perpetrators of this horrible crime should get the ultimate penalty, and I believe this

proposal by the administration can make that happen."

Benjamin Weiser contributed reporting from New York.

APPENDIX 40

A Campaign Promise Dies: Obama and Military Commissions

Monday 08 March 2010

by: t r u t h o u t | Investigative Report

The crowd at the Wilson Center in Washington, DC, gathered to hear their candidate outline his grand strategy for a new way forward and Barack Obama delivered.

"I will reject a legal framework that does not work," Obama said, his words slightly drowned out by the loud applause that erupted. "There has been only one conviction at Guantanamo. It was for a guilty plea on material support for terrorism. The sentence was nine months. There has not been one conviction of a terrorist act. I have faith in America's courts, and I have faith in our [Judge Advocate Generals]."

"As president, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions," he continued. "Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists ... Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary."

That was three long years ago, when the world was led to believe that Hope and Change was more than just a campaign slogan. But the cracks in the façade began to surface just a month after the presidential election on November 4, 2008.

It was then that President-elect Obama convened a meeting at his transition headquarters in Chicago to discuss policies related to detainees being held at Guantanamo Bay. In attendance were Republican Sens. Lindsey Graham and John McCain, who suffered a stinging defeat by the iconic Democratic challenger.

Obama is said to have told Graham, who is also a judge advocate general (JAG), that he needed his help shutting down Guantanamo and wanted him to enter into discussions with Rahm Emanuel, whom Obama tapped to be his chief of staff, about working on a bipartisan plan to turn that vision into a reality.

Emanuel and Graham did speak and the hard-charging, cutthroat political dealmaker soon realized that winning Graham's support as well the support of other Republicans to shutter Guantanamo would not be possible unless self-professed 9/11 mastermind Khalid Sheikh Mohammed was prosecuted before discredited military commissions established by the Bush administration.

The military commissions were set up after the invasion of Afghanistan in 2001. They were immediately discredited and challenged by civil liberties and human rights groups because they did not provide alleged terrorists with rights they would have received had they been prosecuted under the Uniform Code of Military Justice or in a civilian courtroom. Since Obama's first gave his speech at the Wilson Center in August 2007, two more detainees were prosecuted before military commissions and two of those former detainees have since been released.

Meanwhile, since 2001, according to the Justice Department, there have been more than 300 people convicted of terrorism or terrorism related crimes in federal civilian courts, a fact that Republicans critical of using the civilian justice system refuse to acknowledge.

Still, Emanuel communicated to Obama the risk associated with a civilian trial and underscored how it would likely amount to political suicide for Democrats.

But Attorney General Eric Holder argued in favor of civilian trials. It was unknown then, a time when the public was still enamored with the stunning electoral victory of the country's first African-American president who made grand promises to gut his predecessor's unlawful counterterrorism and national security

policies, but Graham wielded enormous influence over the administration's proposed plans for prosecuting alleged terrorists detained at Guantanamo.

Backtracking

Just days after he was sworn into office, Obama issued an executive order halting the military commissions at Guantanamo while he set up a task force and ordered a review of the more than 200 cases there to determine who should face criminal prosecution as part of a larger effort to permanently close the facility by January 2010. It appeared Obama was on track to make good on one of his key campaign pledges - reject military commissions.

But on May 15, 2009, following months of pressure from Defense Department and National Security officials, according to three knowledgeable sources, Obama changed course and announced that his administration would resurrect the Bush-era military commissions he had vowed to oppose. His decision followed a month of blistering attacks that Republicans and former Vice President Dick Cheney leveled against him and the Justice Department for releasing torture memos drafted by Bush administration lawyers.

Obama's reversal followed another high-profile flip-flop: an agreement to release photographs depicting US soldiers abusing prisoners in Iraq and Afghanistan. A federal appeals court ordered the administration to turn over the pictures to the ACLU after the Bush White House lost several legal challenges to keep the images under wraps. Obama agreed, but then swiftly decided against it when the attacks against him became more intense.

The White House attempted to sell the decision to revive the military commissions system by saying Obama intended to call on Congress to implement some legal safeguards in the military commissions law currently on the books that would ensure detainees received a fair trial. The changes included a prohibition on evidence obtained through torture and evidence obtained through hearsay, and providing detainees with more freedom in choosing their own military lawyers.

In a three-paragraph statement released after the announcement was made, Obama said, "Military commissions have a long

tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered."

Moreover, the White House spun Obama's about-face by saying his decision to add legal protections into the military commissions law was consistent with statements he made in September 2006 as a senator in which he voted in favor of a bill that included them and against a version of the bill that did not, which he called "sloppy" and which ultimately became law.

While that's true, it's not what Obama said in August 2007 when he riled up the crowd at the Wilson Center who hung on his every word.

Still, the new plan had its supporters, namely Senator Graham, who said it was a step in the right direction.

"I continue to believe it is in our own national security interests to separate ourselves from the past problems of Guantanamo," Graham said at the time. "I agree with the president and our military commanders that now is the time to start over and strengthen our detention policies. I applaud the president's actions today."

Civil liberties groups and legal scholars, however, pounced on the proposal, characterizing it as Bush-lite.

Zachary Katznelson, the legal director of Reprieve, a legal charity based in London that represents more than two dozen Guantanamo prisoners, said, as a constitutional scholar, "Obama must know that he can put lipstick on this pig - but it will always be a pig."

Constitutional law professor Jonathan Turley said no amount of spin from the White House could change the fact that Obama was politicizing the law.

"It is clear that Obama has determined that these men stood a chance of being released if they were given full legal protections and procedures," Turley wrote on his blog when the decision was announced. "Thus, he has discovered the value of extrajudicial punishment with indefinite detentions and tribunals. The tribunal system is run on rules written by the Bush administration to ensure convictions. It has even fewer protections than allowed in the military system and has been widely ridiculed, even by some conservatives, as a Kangaroo trial system."

"Broken Beyond Repair"

In the months that followed, Congress held hearings on the legal issues surrounding the military commissions and heard explosive testimony from Lt. Col. Darrell Vandeveld, a former prosecutor in the military commissions who resigned in protest in September 2008 because of, among other issues, the "slipshod, uncertain 'procedure' for affording defense counsel discovery."

His testimony before a House Judiciary subcommittee was blunt.

"I am here today to offer a single, straightforward message: the military commission system is broken beyond repair," Vandeveld said. "Even good-faith efforts at revision, such as legislation recently passed by the Senate Armed Services Committee, leave in place provisions that are illegal and unconstitutional, undermine defendants' basic fair-trial rights, create unacceptable risks of wrongful prosecution, place our men and women in uniform at risk of unfair prosecution by other nations abroad, harm the reputation of the United States, invite time-consuming litigation before federal courts, and, most importantly, undermine the fundamental values of justice and liberty upon which this great country was founded."

"The military commissions cannot be fixed, because their very creation - and the only reason to prefer military commissions over federal criminal courts for the Guantanamo detainees - can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation," he added.

Congress made additional changes to the Military Commissions Act several months later, but kept many of the controversial Bush-era guidelines in place despite the alarm bells sounded by Vandeveld and a request by at least one defense attorney who represented detainees being prosecuted before the Guantanamo military commissions to further tweak the law.

The 9/11 Trial

But there was some progress. Last November, Attorney General Eric Holder announced that Khalid Sheikh Mohammed and four 9/11 co-conspirators would be prosecuted in federal criminal court in downtown New York City. He also said five others suspected

terrorists, including Abd al-Rahim al-Nashiri, the alleged mastermind of the USS Cole bombing, would be prosecuted before military commissions.

Holder singled out McCain and Graham in his public statements for their work on "reforming" the military commissions system. But three months before Holder unveiled details of the Justice Department's plan to prosecute Mohammed and other 9/11 co-defendants in federal court, Graham had already been briefed that was the direction Holder was headed toward and he was hard at work trying to thwart those efforts.

Along with McCain and Sens. Joe Lieberman (I-Connecticut) and Jim Webb (D-Virginia), Graham sent a letter to Obama, urging him to support the prosecution of Mohammed and other alleged "war on terror" detainees before military commissions.

A week before Holder's announcement, Graham introduced an amendment barring the Obama administration from prosecuting "anyone accused of plotting the 9/11 attacks on America in federal district court." The amendment failed.

Holder's decision to use a two-tiered system of justice to prosecute alleged terrorists had other critics as well, namely, the former chief prosecutor of the military commissions at Guantanamo, Col. Morris Davis.

In an op-ed published in The Wall Street Journal last November, Davis said "a decision to use both legal settings is a mistake.

"It will establish a dangerous legal double standard that gives some detainees superior rights and protections, and relegates others to the inferior rights and protections of military commissions," he wrote. "This will only perpetuate the perception that Guantanamo and justice are mutually exclusive."

Davis, like Colonel Vandeveld, resigned from the military commissions in October 2007 because he believed the system was fundamentally flawed and designed to win convictions based on weak evidence. At the time he published the op-ed, as well as a letter to the editor of The Washington Post, Davis, who spent 25 years in the Air Force, was working for the Congressional Research Service (CRS). He was fired shortly afterward for allegedly violating

internal policies even though he was acting in the capacity of a private citizen when he wrote the letter and column. The ACLU sued CRS on his behalf for violating his civil rights, which a federal judge ruled was likely the case. However, the court stopped short of forcing CRS to reinstate him in his former position.

Still, Mayor Michael Bloomberg and other officials hailed the decision to prosecute Mohammed in New York City.

Rep. Jerrold Nadler (D-New York), who had chaired the House Judiciary subcommittee hearing four months earlier where he heard testimony from Vandeveld and others about the widespread legal problems with the military commissions system, said "it is fitting" to prosecute Mohammed and the four other 9/11 co-conspirators in New York.

"New York has waited far too long for the opportunity to hold these terrorists responsible," Nadler said. "We have handled terrorist trials before, and we welcome this opportunity to do so again. Any suggestion that our prosecutors and our law enforcement personnel are not up to the task of safely holding and successfully prosecuting terrorists on American soil is insulting and untrue. I invite any of my colleagues who say that they are afraid to bring detainees into the United States to face trial to come to New York and see how we handle them."

Then Christmas happened.

The Underwear Bomber

On December 25, Nigerian Umar Farouk Abdulmutallab allegedly attempted to blow up a Northwest Airlines jet he boarded in Amsterdam that was bound for Detroit with a bomb concealed in his underwear. Aside from the intelligence failures enacted during the Bush administration that allowed Abdulmutallab to board the jetliner undetected, Republicans blasted the Obama administration for turning the al-Qaeda sympathizer over to the FBI for questioning after he was treated at a hospital for his injuries, a decision that Holder ultimately made after consulting the FBI, the Pentagon and the CIA.

Republicans issued statements saying he should have been treated as an "enemy belligerent" and accused the administration of

"criminalizing" the war against al-Qaeda. Sen. Susan Collins (R-Maine) and Lieberman falsely asserted that because Adulmutallab was read his Miranda rights and provided with a lawyer, intelligence officers were unable to obtain valuable information about al-Qaeda in the Arabian Peninsula where he was radicalized. Collins and Lieberman demanded that Abdulmutallab be turned over to the Department of Defense and prosecuted before military commissions.

Justice Department spokesman Matthew Miller issued a terse statement January 21 accusing Republican lawmakers of hypocrisy.

"Those who now argue that a different action should have been taken in this case were notably silent when dozens of terrorists were successfully prosecuted in federal court by the previous administration," Miller said. "Furthermore, neither detaining Abdulmutallab under the laws of war nor referring him for prosecution in military commissions would force him to divulge intelligence or necessarily prevent him from obtaining an attorney."

But the issue became a rallying cry for Republicans to cast Democrats as weak on national security and they used the Abdulmutallab case and the federal trial of planned civilian trial of Mohammed to make their case. And it appears to have made an impact.

The campaign to force the Obama administration to fully embrace military commissions for Mohammed and other detainees accused of planning the 9/11 attacks was about to take off.

On January 28, a day after Mayor Bloomberg withdrew his support for holding the trial in New York, citing costs, the White House ordered the Justice Department to find a new venue, while still insisting that it would be held in a civilian setting. News reports suggested that Obama would personally be involved in choosing a new venue for the trial.

Emanuel Politicizing DOJ

With Graham leading the charge, Democrat and Republican senators turned up the pressure on the Obama administration, introducing legislation in early February aimed at prohibiting federal funds from being used to prosecute Mohammed and others

alleged to have planned the 9/11 attacks in federal court.

In a letter sent to House Speaker Nancy Pelosi and Republican Minority Leader John Boehner February 25, Holder and Secretary of Defense Robert Gates urged them to block legislation that would cut off funding and derail efforts to transfer Guantanamo detainees to the US to face trial.

"The exercise of prosecutorial discretion has always been and should remain an Executive branch function," their letter said. "We believe it would be unwise and would set a dangerous precedent for Congress to restrict the discretion of our Departments to carry out specific terrorism prosecutions. Indeed, we have been unable to identify any precedent in the history of our nation in which Congress has intervened in such a manner to prohibit the prosecution of particular persons or crimes."

Around this time, several news reports began to surface suggesting Rahm Emanuel, a close ally of Graham, had clashed with Holder over his decision to prosecute Mohammed in federal court. In each one of those stories, several of which were based on unnamed sources, Emanuel is said to have indirectly communicated to Holder his opposition to prosecuting Mohammed in federal court because it would alienate Graham and thwart the administration's efforts to close Guantanamo.

It seemed that the Justice Department was being politicized once again.

In a report published on the New Yorker's Web site in early February, Jane Mayer, quoting an unnamed source, wrote, "Rahm felt very, very strongly that it was a mistake to prosecute the 9/11 people in the federal courts, and that it was picking an unnecessary fight with the military-commission people."

"Rahm had a good relationship with Graham, and believed Graham when he said that if you don't prosecute these people in military commissions I won't support the closing of Guantanamo.... Rahm said, 'If we don't have Graham, we can't close Guantanamo, and it's on Eric!'"

Emanuel said as much in an interview with The New York Times last month.

"You can't close Guantanamo without Senator Graham, and KSM was a link in that deal," Emanuel said, referring to Mohammed. Graham told The Times the issue "is the one that could bring the presidency down."

By publicly stating his own position on the Mohammed trial, Emanuel seemed to be suggesting that the White House no longer supported Holder's decision.

And that's the impression Holder gave to The Washington Post in an interview published February 12, three days before the Times story appeared, where he left the door open for prosecuting Mohammed before a military commission.

"Trying the case in an article III court is best for the case and best for our overall fight against al-Qaeda," he said. "The decision ultimately will be driven by: How can we maximize our chances for success and bring justice to the people responsible for 9/11, and also to survivors?"

Democrats for the most part remained silent while Republicans spent months attacking the decision to prosecute Mohammed in federal court. However, on February 11, Senate Judiciary Chairman Patrick Leahy and Senate Intelligence Committee Chairwoman Dianne Feinstein sent Obama a letter saying they believe that whether [the 9/11] trial is held in New York City or another location, these men should be brought to justice in a federal court."

Holder continued to lobby for civilian trials. On February 22, federal prosecutors secured a guilty plea in New York against Najibullah Zazi, a native of Afghanistan and permanent legal resident of the US, who admitted he was recruited by al-Qaeda to plan an attack on New York City's subway system.

At a news conference following the announcement of Zazi's agreement to plead guilty to three criminal charges, which included providing material support to al-Qaeda, Holder said the case "demonstrates that our federal civilian criminal justice system has the ability to incapacitate terrorists, has the ability to gain intelligence from those terrorists and is a valuable tool in our fight against terrorism.

"To take this tool out of our hands to denigrate the use of this tool flies in the face of the facts, in the face of the history of the use of that tool and is more about politics than it is about facts," Holder said.

Reversing Holder

But the writing was already on the way. Or so it seemed.

It would appear that the half-dozen or so news reports published over the past two months that detailed the infighting and disagreements between Emanuel and Holder over the 9/11 trial were coordinated by the Obama administration as a way of softening the blow for what lay ahead.

Last Friday, The Washington Post, citing unnamed sources, said Obama's "advisers" are close to recommending that Mohammed be prosecuted before a military commission.

"The president's advisers feel increasingly hemmed in by bipartisan opposition to a federal trial in New York and demands, mainly from Republicans, that Mohammed and his accused co-conspirators remain under military jurisdiction, officials said," according to the Post. "If Obama accepts the likely recommendation of his advisers, the White House may be able to secure from Congress the funding and legal authority it needs to close the US military prison at Guantanamo Bay, Cuba, and replace it with a facility within the United States."

Justice Department spokesman Dan Boyd told Truthout that the "case is under review. There hasn't been a final decision made, and I can't speculate on what the department might or might not do until that happens," Boyd said.

Civil liberties groups, however, wasted no time condemning the anticipated move.

"If this stunning reversal comes to pass, President Obama will deal a death blow to his own Justice Department, not to mention American values," said Anthony Romero, executive director of the ACLU. "If the president flip-flops and retreats to the Bush military commissions, he will betray his campaign promise to restore the rule of law, demonstrate that his principles are up for grabs and lose

all credibility with Americans who care about justice and the rule of law."

Human Rights First quickly arranged a conference call for reporters with three retired military officials who warned the Obama administration about caving in to political pressure and embracing a system of justice that is rife with flaws.

"I think it's sad and a mistake that we should politicize these decisions and get Congress involved in what is clearly the constitutional responsibility of the president," said US Navy Rear Adm. John D. Hutson, a retired judge advocate general and longtime critic of the Bush-era military commissions, who testified about the issue before a Senate Armed Services Committee hearing last July. "The president has to push back and say, this is the right thing to do and I'm going to do it that way. I'm not going to succumb to the political pressure of people who are trying to undermine the administration."

Maj. Gen. William L. Nash of the US Army said if Obama reversed Holder, it "would give aid to our enemies, it would lessen our reputation with our allies who have been extremely happy with the reverse course that we've taken.

"This is not the time to be scared," Nash said. "This is not the time to accommodate those who have led this country under an aura of fear for eight years. And it's time to do the right thing and persevere through."

On Sunday, the ACLU ratcheted up the pressure and delivered a blunt message to Obama in the form of a full-page ad in The New York Times, which posed the question: "What will it be Mr. President? Change or more of the same?"

The ad showed showed a picture of Obama morphing into George W. Bush across four panels.

Senator Graham, in an appearance Sunday on CBS News' "Face the Nation," responded to the ACLU's ad, saying it shows how Obama is getting "unholy grief from the left."

Graham then put his offer on the table, the same one that Emanuel told Obama to seriously consider 15 months earlier after the

president met with Graham at his transition headquarters in Chicago and the same one Emanuel has been publicly lobbying for the past few months.

Graham said he told the White House that if Mohammed is prosecuted before a military commission, "I will help you in getting the Republican votes that are needed to close Guantanamo."

A decision is expected to be announced before Obama leaves for Indonesia March 18.