



## D.C. Court of Appeals Overturns Release of Gitmo Prisoner

Latif is a Yemeni national currently imprisoned in the Guantanamo Bay detention facility. In a Summary of Evidence [memo](#) prepared by the government, Latif is accused of first, being "an al Qaida fighter; and second, having engaged in hostilities against Americans in Afghanistan."

The ruling by a divided D.C. Court of Appeals reversed an [order](#) entered in July 2010 by Judge Henry H. Kennedy, Jr. wherein the Obama Administration was ordered to "take all necessary and appropriate diplomatic steps to facilitate Latif's release forthwith." In his decision, Judge Kennedy wrote that the government of the United States failed to present sufficient evidence that Latif was a member of al-Qaeda or any affiliated group.



Upon successfully achieving the release of his client via a writ of habeas corpus, Latif's attorney, David Remes, said, "This is a mentally disturbed man who has said from the beginning that he went to Afghanistan seeking medical care because he was too poor to pay for it. Finally, a court has recognized that he's been telling the truth, and ordered his release."

The opinion is of great interest to constitutionalists (Benjamin Wittes analyzing the [story](#) for Lawfare blog describes it as "a very big deal") as it reveals a federal appeals court bench that is very divided on one of the core issues of constitutional civil rights protections.

Habeas corpus is Latin for "you may have the body." It typically takes the form of a writ or order through which a prisoner is released from unlawful detention. Habeas corpus has formed a fundamental part of Anglo-American jurisprudence since the early 14th Century (some argue that the foundations of the writ are found in the Magna Carta, written in 1215).

Alexander Hamilton, writing as Publius in *Federalist* [Number 84](#), declares that the "establishment of the writ of habeas corpus" is one of the "greater securities to liberty and republicanism" found in our Constitution and that the "practice of arbitrary imprisonments [has] been the favorite and formidable instruments of tyranny."

With regard to the men being detained at the Guantanamo Bay Naval Facility in Cuba, provisions of the [Military Commissions Act of 2006](#) mandated that prisoners at the Guantanamo Bay facility were no longer entitled to have the merits of their cases heard by judges or juries in the American civil law system and thus, all outstanding habeas corpus petitions were stayed.

On June 12, 2008, however, in the case of *Boumediene v. George W. Bush*, the Supreme Court of the United States held that the suspension of habeas corpus contained in the Military Commissions Act was unlawful and that all habeas corpus petitions stayed by that law were eligible to be reconsidered and re-



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instated.

The decision in *Boumediene v. Bush* was cited by the D.C. Court of Appeals in its decision to rescind the release order issued as a result of Latif's successful habeas corpus appeal.

Specifically, the parts of the opinion left unredacted directly address the issue of when and why evidence presented by the government should be presumed to have been obtained regularly and thus afforded a high degree of deference in these habeas cases. Defining the limits of that presumption was a central theme in the Supreme Court's decision in the *Boumediene* case.

According to the [majority opinion](#) issued by the D.C. Court in the present matter, the lower court failed to apply the presumption of regularity to the evidence presented by the government. The evidence in question in the Latif case was intelligence reports compiled by the government of the United States and its agents.

Judge Janice Rogers Brown, a George W. Bush appointee, writing for the majority, explicitly endorses the affording of the presumption in favor of all evidence presented by the government in its question to deny habeas corpus rights to the prisoners at Guantanamo Bay. Writes Judge Brown:

The district court has operated under a case management order that specifically authorized reliance on evidentiary presumptions.

Further, in chronicling the lower courts' inconsistent application of the order mandating the presumption, Judge Brown writes:

The confusion stems from the fact that intelligence reports involve two distinct actors - the non-government source and the government official who summarizes (or transcribes) the source's statement. The presumption of regularity pertains only to the second: it presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement. There are many conceivable reasons why a government document might accurately record a statement that is itself incredible. A source may be shown to have lied, for example, or he may prove his statement was coerced. The presumption of regularity-to the extent it is not rebutted-requires a court to treat the Government's record as accurate; it does not compel a determination that the record establishes what it is offered to prove.

Another reason the district court has denied the Government's motions for a presumption of accuracy may be that such a presumption is often unnecessary or irrelevant. The Government has frequently been able to prove its detention authority without relying on any presumption that its records are accurate. And in many cases, detainees do not challenge the Government's recordkeeping. Instead, they attack the sufficiency of the evidence, or they claim that the Government's information is unreliable because it resulted from harsh interrogation techniques, multiple levels of hearsay, or unknown sources.

This case presents a different question because Latif's sole challenge is to the accuracy of the Government's [REDACTION]. When the detainee's challenge is to process itself, should a presumption of regularity apply to the official government document that results? We think the answer is yes.

The [dissent](#) in the *Latif* case offers a distinctly opposing view of the presumption of regularity to be afforded to the government. A written dissent contradicting the majority's holding on the merits of a



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habeas corpus case is very rare and is convincing evidence of the importance of this decision.

In its separate decision, the minority accuses its colleagues in the majority of deviating from "highly deferential clear error review" and in evaluating the evidence (which it finds unreliable), it "moves the goal posts" by applying a "new presumption and then proceeding to find that it has not been rebutted."

According to the reasoning relied upon by the dissent, the ruling handed down in the *Latif* case abolishes all "meaningful opportunity" for review of habeas corpus petitions as guaranteed in the Supreme Court's decision in the *Boumediene* case.

The brief and disturbing history of the treatment of habeas corpus petitions in the federal courts was provided in an [article](#) published by Jurist:

Federal courts have struggled with *habeas corpus* rights for Guantanamo detainees. In May, the DC Circuit affirmed a lower court's decision that Yemeni Guantanamo Bay detainee Musa'ab Omar al-Madhwani is lawfully detained for being part of al Qaeda. In March, the DC Circuit overturned a lower court's decision granting release to Yemeni Guantanamo detainee Uthman Abdul Rahim Mohammed Uthman. In September 2010, Kuwaiti Guantanamo detainee Fawzi Khalid Abdullah Fahad al Odah petitioned the US Supreme Court to reverse a federal appeals court decision that denied him *habeas corpus* relief, but the Supreme Court turned down his appeal in April.

The ruling in the case of *Latif v. Obama* sends the case back to the district court to reconsider the case, taking into consideration the "presumptively reliable government evidence."

As of November 14, Adnan Farhan Abdul Latif has been imprisoned at Camp Delta at Guantanamo Bay for 9 years, 9 months and 29 days.

*Photo of Guantanamo: AP Images*



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