No. 11-1027

IN THE

Supreme Court of the United States

ADNAN FARHAN ABDUL LATIF, ET AL.,
Petitioners,

v.

BARACK H. OBAMA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER INTELLIGENCE PROFESSIONALS AND SCHOLARS OF EVIDENCE AND CRIMINAL PROCEDURE IN SUPPORT OF THE PETITION FOR CERTIORARI*

***See inside cover for list of amici**

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INTEREST OF AMICI[1]

Amici are former intelligence professionals and scholars of evidence and criminal procedure. Amici share a concern that the court of appeals' application of a "presumption of regularity" to the type of intelligence reports at issue here rests upon misunderstandings of both the presumption of regularity and the intelligence process. Permitting misapplication of the presumption to such reports would effectively undermine this Court's promises of "meaningful" habeas review in *Boumediene* v. *Bush*.

Amici former intelligence professionals are Lt. Colonel (select) Tony Camerino, U.S.A.F.; Glenn Carle, former Deputy National Intelligence Officer for Transnational Threats (National Intelligence Council); Paul Pillar, former Deputy Chief of Central Intelligence's Counterterrorist Center; and Colonel (Ret.) Lawrence Wilkerson, U.S. Army, former Chief of Staff to Secretary of State Colin Powell.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Counsel of record for all parties have consented to the filing of this brief amici curiae. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

University of Michigan Law School; Christopher Mueller, Henry S. Lindsley Professor of Procedure and Advocacy, University of Colorado Law School; Paul Rothstein, Professor of Law, Georgetown University Law Center; and Geoffrey Stone, Edward H. Levi Distinguished Service Professor, University of Chicago Law School.

The biographical details for each of these amici are in the attached Appendix.

SUMMARY OF ARGUMENT

The majority in this case held that "in Guantanamo habeas proceedings a rebuttable presumption of regularity applies to official government records, including intelligence reports like the one at issue here." *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011). Amici submit this brief in support of the petition for certiorari to explain why the application of a "presumption of regularity" to intelligence reports is erroneous and how that erroneous application compromises the core function of the Great Writ.

Amici make one doctrinal and one empirical submission. First, amici evidence and criminal procedure scholars respectfully submit that the court of appeals majority seriously misunderstood the presumption of regularity. Precedent makes clear that the presumption is accorded only to the kinds of official government records generated by procedures and under circumstances that reasonably can be expected to produce reliable results, frequently in circumstances where testimony regarding the production of the document is provided. Examples

include tax receipts, mailing records, or judicial transcripts.

Second, amici former intelligence officers respectfully submit that intelligence reports of the type involved here, and the processes and circumstances of collecting the information they contain, bear no resemblance to the types of documents and processes to which a presumption of regularity plausibly attaches. As the majority conceded, the report at issue was "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes." *Latif*, 666 F.3d at 748. The dissent added that the report was "drafted by unidentified translators and scriveners of unknown quality," "contain[s] multiple layers of hearsay" and "factual errors," and was "produced in the fog of war by a clandestine method we know almost nothing about." *Id.* at 772, 774, 779, 780. Such conditions are endemic to, and heavily influence the reliability of, reports of this genre. Accordingly, early-stage reports are only the first step of an intelligence process in which they are subject to further analysis, comparison with other intelligence, and verification in order to ascertain their reliability. No responsible intelligence officer would presume the reliability of initial intelligence reports that had not yet undergone such testing. There is no reason why a court should do so.

In presuming the reliability of such reports, the court of appeals eliminated the role of experienced federal district judges most familiar with the many variables affecting the evidentiary value of such intelligence reports. These judges have

until now uniformly refused to apply such a presumption, carefully assessing the government's evidence and finding it to be reliable in some cases but unreliable in others.

Moreover, in holding that the presumption of regularity operates to shift the burden of proof to the detainee, the court of appeals comes close to transforming Guantanamo habeas proceedings from a searching inquiry into the factual and legal basis for detention into a ritual with preordained results. The government frequently relies on such intelligence reports—sometimes, as in *Latif*, as its principal evidence—and the detainees' isolation, their distance from the locus of their capture, and the multiple hurdles to critiquing the report, including anonymity of the interviewer and translator, mean that few, if any, habeas petitioners could meet the heavy burden of proving the reports' unreliability. Certiorari is necessary to review this outcome, which compromises the meaningful review guaranteed by *Boumediene* v. *Bush*, 553 U.S. 723, 783 (2008).

ARGUMENT

I. CERTIORARI IS REQUIRED TO REVIEW THE COURT OF APPEALS' IMPROPER AND UNPRECEDENTED APPLICATION OF A "PRESUMPTION OF REGULARITY" TO INTELLIGENCE REPORTS

The "presumption of regularity" is generally invoked in two contexts: challenges to government action; and challenges to documents, frequently in

the context of state court criminal actions (habeas and otherwise). In the first context, the presumption is employed to presume that government officials have acted properly. *See*, *e.g.*, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). In the state court criminal context, it is applied to invest underlying documents – for instance, guilty pleas, waiver of trial by jury forms, statements regarding representation by counsel, or probation reports – with some degree of evidentiary weight. In some of the cases involving documents, the courts take a belt-and-suspenders approach, relying additionally on witness testimony and cross-examination for assurances about the trustworthiness or reliability of the document in question. *See*, *e.g.*, *United States v. Thomas*, 934 F.2d 840, 842, 846 n.12 (7th Cir. 1991) (also observing that defendant had waived challenge to reliability of report by failing to raise it earlier); *Hobbs* v. *Blackburn*, 752 F.2d 1079, 1081 (5th Cir. 1985).

Across the somewhat diverse documentary cases, a common thread emerges: the presumption of regularity is a doctrine that applies to government documents when they are produced under circumstances that give judges confidence in their accuracy and reliability.

Indeed, as applied by the court of appeals majority in this case, the presumption is not merely a general one of "regular" conduct by a government

agent; rather, it is a presumption that the agent's written report is accurate. *See, e.g.*, *Latif*, 666 F.3d at 750. The majority incorrectly applied that presumption to early-stage intelligence reports generated by an intelligence collection process that is highly variable in both raw inputs and the quality of outputs. As intelligence officials recognize, the reliability of such reports cannot be presumed but can only be determined through further analysis, verification, and understanding of the circumstances of their production. Application of the presumption to "intelligence reports of this sort" is therefore both legally and factually erroneous and is in tension with habeas' core function.

A. The Presumption of Regularity Applies to Government Documents Generated by Procedures that Can Reasonably be Presumed to Produce Reliable Documents

The presumption of regularity is applied only to certain kinds of official documents—those that are generated by procedures that predictably produce reliable results of a stable quality. As Judge Tatel aptly explained in his dissenting opinion: "every case applying the presumption of regularity [has] 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." *Latif*, 666 F.3d at 771 (Tatel, J., dissenting). Courts hence often focus upon the details of the procedures through which a given type of document is produced. *See, e.g.*, *Legille* v. *Dann*, 544 F.2d 1, 7 (D.C. Cir. 1976) ("The procedures utilized for the handling of that volume of mail [100,000 items per month] were meticulously

described in an affidavit by an official of the Patent Office, whose principal duties included superintendence of incoming mail."); *Thomas*, 934 F.2d at 842 (A "probation officer[] testified about the preparation, maintenance, and interpretation of special reports prepared by the probation office . . . .").

In some cases, the necessary confidence in the document's reliability is generated by the routine, repetitive, bureaucratic nature of the underlying process, *Legille*, 544 F.2d at 7-8; in others by the procedural safeguards applicable to information reflected in the document, *Hobbs*, 752 F.2d at 1081-82 (reciting safeguards underlying provision, acceptance, and confirmation of guilty plea); and in yet others, the availability of witness testimony substantially aids the court in determining that a presumption is appropriate, *Walker* v. *Maggio*, 738 F.2d 714, 717 (5th Cir. 1984).

The term "presumption of regularity" is also used as a label for the more familiar "official records" exception to the hearsay rule on admissibility. Not all documents prepared by a government official, however, are "official records" within the meaning of that hearsay exception. The application of the exception also requires the document to be produced by procedures that confer confidence in the document's reliability and trustworthiness, just as under the presumption of regularity. *See Moss* v. *Ole South Real Estate, Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991) ("[I]n determining trustworthiness under [the official records exception] . . . the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its

conclusions can be relied upon ('reliability')."); *Ellis* v. *Int'l Playtex, Inc.*, 745 F.2d 292, 301, n.8 (4th Cir. 1984) (noting that "sources of information or other circumstances [can] indicate lack of trustworthiness," and that a finding of trustworthiness is supported by "uniform procedures and methods" that are "reliab[ly] . . . applied") (citations and internal quotation marks omitted)).[2]

Precedent cited by the majority opinion is consistent with the narrower reading of the presumption articulated in Judge Tatel's dissent. The majority opinion principally relies upon *Riggs National Corp.* v. *Commissioner*, 295 F.3d 16 (D.C. Cir. 2002) to support the invocation of the presumption of regularity. This case, however, concerned the applicability of the presumption of regularity to an "official tax receipt" that was the product of a presumptively regular, bureaucratic process: the centralized administration of tax collection by Brazil's central bank. *Id.* at 21. All the other cases cited by the majority opinion also involve records produced by procedures that support the records' reliability, sometimes supported by testimony of officials knowledgeable about the production of such documents, such as probation officers' reports, *United States* v. *Thomas*, 934 F.2d

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[2] These cases refer to Federal Rule of Evidence 803(8)(C). In December 2011, that rule was reorganized such that the language previously appearing in FED. R. EVID. 803(8)(C) now appears in FED. R. EVID. 803(8)(A)(iii) and (8)(B). According to the committee's statement on the Amendments, the changes to Rule 803 are "intended to be stylistic only."

840 (7th Cir. 1991); state court proceedings, *Hobbs* v. *Blackburn*, 752 F.2d 1079 (5th Cir. 1985); treatment center reports, *United States* v. *Verbeke*, 853 F.2d 537 (7th Cir. 1988), *United States* v. *McCallum*, 677 F.2d 1024 (4th Cir. 1982); state court records, *Walker* v. *Maggio*, 738 F.2d 714 (5th Cir. 1984); state court documents, *Thompson* v. *Estelle*, 642 F.2d 996 (5th Cir. 1981); and indictments and docket sheets, *Webster* v. *Estelle*, 505 F.2d 926 (5th Cir. 1974).

The *Latif* majority mistakenly sought support for its use of the presumption in the deference accorded state court criminal proceedings in federal habeas corpus cases. See *Latif*, 666 F.3d at 751 ("In a state prisoner's federal habeas proceeding . . . a determination of a factual issue made by a State court shall be presumed to be correct . . . ." (internal citations omitted)). Such deference reflects the fact that those state court proceedings follow established adversarial judicial proceedings conducted pursuant to evidentiary, procedural, and federal and state constitutional requirements, with state court appellate and post-conviction review. Indeed, this Court recognized in *Lackawanna County District Attorney* v. *Coss*, 532 U.S. 394, 403 (2001) that "the presumption of regularity . . . attaches to *final judgments*" (emphasis added) (citations and internal quotation marks omitted). By contrast, the kind of early-stage intelligence at issue here has undergone no scrutiny or adversarial testing to license the application of any analogous presumption.

In addition, the *Latif* majority erred in conflating two forms of the presumption of regularity—its application to official acts and to official documents. *See Latif*, 666 F.3d at 748. The

two inquiries are generally distinct. In the former context, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *Chemical Foundation*, 272 U.S. at 14-15. In the latter context, however, a presumption that an official acted in accordance with his or her official duties in creating a document does not necessarily sustain the reliability of the document. If it did, all government documents would be presumed reliable and accurate, merely because the government produced them and declares their reliability to the court. An earlier decision by the court of appeals soundly rejected just such a proposition. *See Parhat v. Gates,* 532 F.3d 834, 849 (D.C. Cir. 2008).[3] Indeed, even military

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[3] In some cases, the officials' relevant duties consist of generating documents in the course of a routine, regular process that is sufficiently trustworthy to justify confidence that the documents so generated are trustworthy and therefore entitled to a presumption of regularity. In such cases, the outcome would be the same, whether the basis for applying the presumption is labeled as the presumption applied to *acts* or the presumption applied to *documents*. *See Webster*, 505 F.2d at 929-30 (applying presumption of regularity to routine court records such as indictments and docket sheets to prove the appearance of counsel for defendant, based on the presumption that the officials performed their duties in creating such records). But the fact that government officials created the documents would be insufficient to apply a presumption to the documents, where the documents are produced by a process which, because of variables endemic to the process, even good faith efforts of the officials could not justify confidence in their reliability.

commissions—which are directed to view the evidence in the light most favorable to the prosecution—do not apply such a sweeping presumption, even with respect to statements of the detainee himself, much like Latif's statements here. *See* UNITED STATES, MANUAL FOR MILITARY COMMISSIONS III-8 (2010) ("A statement of the accused may be admitted in evidence in a military commission only if the military judge finds . . . *that the totality of the circumstances renders the statement reliable* . . . ." (emphasis added)).

In sum, the presumption of regularity applies only to the kinds of documents that are generated through processes and under circumstances that warrant confidence in the document's reliability. But, as we discuss in the next section, those preconditions are simply not met by the type of first stage intelligence reports involved here.

B. Intelligence Reports of the Sort at Issue Here Are Not Produced by a Process That Can Be Presumed to Generate Reliable Documents

Judge Tatel correctly recognized that the majority opinion "ignore[d] a key step in the logic of applying a presumption of regularity, namely [whether] the challenged document emerged from a process that we can safely rely upon to produce accurate information." *Latif*, 666 F.3d at 772 (Tatel, J., dissenting). As the majority opinion itself acknowledges, and as the experience of amici intelligence professionals confirms, the type of intelligence reports involved here do not result from such a process. For that reason, federal district court judges in Guantanamo habeas cases have properly

refused to apply the presumption of regularity to such reports.

1. The Process That Produced This Report Does Not Possess Any of the Characteristics of the Processes Generating Documents Subject to the Presumption of Regularity

Although its precise nature is not public, it is clear that the type of report at issue is not produced under circumstances that justify confidence in its reliability. The intelligence report is identified in the government's brief in the court of appeals as a "battlefield screening interview" conducted "to gain actionable intelligence during an armed conflict." Brief for Resp't-Appellant, *Latif* v. *Obama*, No. 10-15319 (D.C. Cir.), filed Dec. 12, 2010, at 42. As noted, the majority opinion accepts that the report was "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes." *Latif*, 666 F.3d at 748. Judge Tatel described the report as "produced in the fog of war by a clandestine method that we know almost nothing about," "drafted by unidentified translators and scriveners of unknown quality" and containing "factual errors" and "multiple layers of hearsay." *Latif*, 666 F.3d at 779-80. A host of errors could afflict a document produced under these circumstances, including errors in translation, mistakes in transcription, mistaken identities, and misunderstandings about words and names; indeed, such errors are not uncommon despite the professionalism and best efforts of the intelligence officers involved. *See*, *e.g.*, *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"); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) (observing that "for over three years" the government had relied on a "typographical error in an interrogation report" to assert that the petitioner had "manned an anti-aircraft weapon in Afghanistan"); *Odah v. Obama*, Case No. 1:06-cv-01668-TFH at 3 (D.D.C. May 6, 2010) (noting that error could easily be introduced in the course of the steps required to create such intelligence documents). The majority also acknowledged these problems, but held that because they are "typical" of similar reports, they were irrelevant to the analysis. *Latif*, 666 F.3d at 748-49. Hence, the majority perversely took the numerous problems typically affecting the reliability of such intelligence reports as a justification for stipulating their reliability.

The varying reliability of intelligence reports is accepted by the intelligence community. A classic CIA monograph on intelligence analysis explains:

> Each source [of information] has its own unique strengths, weaknesses, potential or actual biases, and vulnerability to manipulation and deception. The most salient characteristic of the information environment is its diversity – multiple sources, each with varying degrees of reliability, and each commonly reporting information which by itself is incomplete and sometimes inconsistent or even incompatible with reporting from other

> sources. Conflicting information of uncertain reliability is endemic to intelligence analysis . . . .

RICHARDS J. HEUER, JR., PSYCHOLOGY OF INTELLIGENCE ANALYSIS 115 (1999). Each intelligence report is therefore *sui generis* in terms of reliability.

Intelligence of every sort is *a priori* of only uncertain value, and must be weighed and evaluated based on other information to ascertain its reliability. Rather than serving as an independent basis for official action, each piece of information is part of a mosaic that must be viewed as a whole and analyzed. Accordingly, in its public explications of the Intelligence Community's work, the Government describes the goal of the initial stages of the intelligence process as collecting "large amounts of unfiltered data" that is "often fragmented and even contradictory." *How Intelligence Works: Interpretation*, INTELLIGENCE.GOV, http://intelligence.gov/about-the-intelligence-community/how-intelligence-works/interpretation.html; *How Intelligence Works: Analysis and Reporting*, INTELLIGENCE.GOV, http://intelligence.gov/about-the-intelligence-community/how-intelligence-works/analysis-reporting.html (both last visited March 13, 2012).

In the experience of amici former intelligence professionals, it is the task of experienced intelligence analysts, well-versed in their trade, to sift and evaluate evidence as a whole before drawing inferences. While collectors of intelligence aspire towards accuracy, they produce intelligence reports in the normal course of business with the knowledge

– though certainly not the hope – that they may be inaccurate or false. Particularly in the context of terrorism, as noted below, the intelligence community encourages dissemination of information that may or may not be sound rather than delaying the distribution of information that may have value. The process of separating out the valid from the invalid reporting takes place over time, through the collection of corroborating information and laborious analysis. To leap to conclusions on the assumption that early stage intelligence is inherently reliable and accurate—as the court of appeals suggests—is therefore to court error and even catastrophe.

Of particular relevance here, translation issues affect many kinds of intelligence, adding additional layers of irregularity and potential error. The Army's manual on human intelligence collection identifies several hazards of working in multiple languages: confusion and misunderstanding; difficulty in establishing rapport, a critical aspect of intelligence-gathering; limited ability to assess nuances of speech and body language; and cultural biases. HEADQUARTERS, DEPARTMENT OF THE ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS 11-3 (2006). A former CIA operations officer put the problem succinctly: "[U]nless the interrogator" – not only the translator, but the interrogator himself – "is truly fluent in the subject's language, something is nearly always lost in translation between the interrogator's language and culture and those of the subject's." Decl. of Arthur Brown, Attach. A, *Boumediene* v. *Bush*, No. 04-cv-1166 (RJL) (Oct. 12, 2008) at 3. *See also* JOHN DIAMOND, THE CIA AND THE CULTURE OF FAILURE: U.S. INTELLIGENCE FROM THE END OF THE COLD WAR

TO THE INVASION OF IRAQ 373 (2008) (describing a significant intelligence failure when important comments by a detainee during an interrogation failed to appear in the translation of the interrogation provided to the FBI).

Indeed, even under less stressful circumstances, courts require translators to testify where the accuracy or reliability of the translation is challenged, underscoring the court's role in evaluating the circumstances of translation and the experience of the translator in its assessment of the trustworthiness of the translation. S*ee*, *e.g.*, *United States* v. *Martinez-Gaytan*, 213 F.3d 890, 893 (5th Cir. 2000) (the translated confession was suppressed due to the "absen[ce] of in-court testimony by [the government interpreter] that will help the court assess his reliability as a translator").

As a former CIA operations officer warned, problems of quality control "became even more acute" after September 11, "with respect to raw data that had any relation (however remote) to possible terrorist activities." Ex. 69, Supplemental Decl. of Arthur Brown, *Boumediene* v. *Bush*, No. 04-1166 (RJL) (Oct. 12, 2008) at 3. Fearing the consequences of overlooking any critical information, intelligence collectors would "record and disseminate virtually all raw information they received, regardless of reliability or quality. As a result, the intelligence community tolerated—and, to a large extent, tacitly encouraged—the distribution of unreliable, unverified, faulty, and even erroneous intelligence reports." *Id.*

Compounding the problem, the U.S. government at the time suffered a significant shortage of translators and interpreters in essential languages, including Arabic, the language of many Guantanamo detainees and the primary language spoken in Yemen, petitioner's native country. *See*, *e.g.*, *Foreign Languages: Workforce Planning Could Help Address Staffing and Proficiency Shortfalls: Testimony Before the S. Subcommittee on International Security, Proliferation, and Federal Services, Committee on Governmental Affairs,* 107th Cong. 2, 5-7 (2002) (testimony of Susan S. Westin, Managing Director, International Affairs and Trade, General Accounting Office) (noting urgency of problem that U.S. Army and FBI had dearth of translators, interpreters, and intelligence specialists with adequate foreign language skills); NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 92 (2004); CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 78 (2004) (describing Army interrogation in January 2002 in which interrogator/translator had to "piece th[e] story together through context" and ultimately ended the interrogation when "my Arabic kept breaking down"). Shortly after the beginning of the conflict the CIA similarly lacked adequate foreign language expertise. *See* SUBCOMMITTEE ON TERRORISM AND HOMELAND SECURITY, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, 107TH CONGRESS, COUNTERTERRORISM INTELLIGENCE CAPABILITIES AND PERFORMANCE PRIOR TO 9-11 (2002).

Amici former intelligence officers wish to stress that this observed lack of regularity is not an

indictment of the intelligence process. To the contrary, the "noise and messiness of intelligence" is inherent to the business. JOHN DIAMOND, THE CIA AND THE CULTURE OF FAILURE: U.S. INTELLIGENCE FROM THE END OF THE COLD WAR TO THE INVASION OF IRAQ 372 (2008). This issue is particularly acute in a conflict zone. It is one of the primary reasons for a recursive process of collection and analysis. It is why intelligence professionals must develop a real skill set in thinking about and analyzing information. It is why no intelligence professional worth his or her salt would mechanically attach a presumption of reliability to any species of intelligence report, let alone one so heterogeneous in origin and quality as the kind of report at issue here. *See also* MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 55 (4th ed. 2009) ("Collection produces information, not intelligence. That information must undergo processing and exploitation . . . before it can be regarded as intelligence and given to analysts.") Judge Tatel is therefore surely correct that the conditions surrounding the production of these reports are hardly "regular, reliable, transparent, or accessible [enough] to warrant an automatic presumption of regularity." *Latif*, 666 F.3d at 774 (Tatel, J., dissenting).

2. Until the Decision Here, None of the Federal Courts in the Guantanamo Habeas Cases Have Applied Any Presumption of Regularity to the Government Intelligence Reports Offered in those Cases

Cognizant of these pitfalls, the courts responsible for reviewing the habeas petitions of Guantanamo detainees have not previously employed

the presumption of regularity, nor applied any presumptions of reliability and accuracy to such intelligence reports.[4] Rather, each of the district courts in these cases engaged in a fact-specific inquiry as to whether the reports were reliable. Given the heterogeneity in the underlying process and output quality for the reports at issue here, case-by-case treatment by the district courts (which prevailed until now) is the appropriate method for judicial consideration of such reports.

In *Ahmed* v. *Obama*, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2009), for example, the district court denied the Government's request that "a rebuttable presumption of accuracy" be granted to the Government's exhibits, including "classified intelligence and interview reports." Instead, the court considered a "list of factors" in its evaluation for "credibility, reliability, and accuracy," including "consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of declarant about the matters testified to, levels of hearsay, [and]

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[4] Although a presumption of *authenticity* has frequently been applied—*i.e.*, a presumption that a government document is what it purports to be—that presumption affects the question of admissibility rather than weight. Courts that have applied a presumption of authenticity have still rejected a presumption of accuracy. *See Alsabri* v. *Obama*, 764 F. Supp. 2d 60, 66-67 (D.D.C. 2011); *Ahmed* v. *Obama*, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2009); *cf. Al Kandari* v. *United States*, 744 F. Supp. 2d 11, 19-20 (D.D.C. 2010) (rejecting presumption of authenticity or accuracy).

recantations." *Id.* Similarly, in *Alsabri* v. *Obama*, 764 F .Supp. 2d 60, 67 (D.D.C. 2011), the court noted that "before relying on any piece of evidence, the district court must make a threshold determination that it is sufficiently reliable and probative." So doing, the court stated that it "would presume the authenticity but not the accuracy of the government's intelligence reports and interrogation reports." *Id.*

The district courts accordingly have engaged in extensive analysis of specific evidence without employing evidentiary presumptions—frequently finding that the evidence is reliable and supports the government's assertions regarding the detainee's status. *See Al Alwi* v. *Obama*, 653 F.3d 11 (D.C. Cir. 2011) (admitting and extensively discussing interrogation reports without mention of presumption), *Khan* v. *Obama*, 655 F.3d 20 (D.C. Cir. 2011) (admitting and extensively discussing intelligence reports without mention of presumption), *Barhoumi* v. *Obama*, 609 F.3d 416 (D.C. Cir. 2010) (admitting diaries and extensively discussing their hearsay status without mention of presumption).

In the case at bar, Judge Kennedy applied this careful methodology. He found that misstatements or mistranslations and a lack of corroboration raised significant questions about the report's trustworthiness. He therefore concluded that the report "is not sufficiently reliable to support a finding by a preponderance of the evidence" that Latif should be detained. *Abdah* v. *Obama*, 2010 WL 3270761, No. 04-1254, at *9-*10 (D.D.C. Aug. 16, 2010), *reversed and remanded*, *Latif* v. *Obama*, 666 F.3d 746 (D.C. Cir. 2011), *petition for certiorari pending*,

No. 11-1027 (2012). The judgment of Judge Kennedy and the other district court judges who have developed deep expertise in evaluating the evidence in Guantanamo habeas cases is now swept aside by the court of appeals, and their careful, case-by-case analysis of reliability is replaced by a presumption which unreasonably presumes the reliability of these sorts of intelligence reports, notwithstanding the recognition of the many problems accompanying their generation. Review by this Court is needed before such a fundamental transformation of the evidentiary standards in the Guantanamo habeas proceedings is permitted.

II. CERTIORARI IS WARRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF A PRESUMPTION OF REGULARITY TO THE INTELLIGENCE REPORTS CONFLICTS WITH *BOUMEDIENE*'S TEACHINGS

The majority invoked the presumption of regularity not merely to sustain the government's factual proffer, but also to shift the burden of proof to the habeas petitioner. While the majority technically drew a distinction between whether information in the report was accurately recorded and whether it is true, *Latif*, 666 F.3d at 750-51, the effect of the application of the presumption where the report contains the detainee's own statements is to presume the truth of the contents of the report as well. The majority thereby leveraged the presumption to overturn the district court's finding of unreliability and to shift the burden of proof to the detainee: "Because the Report is entitled to a presumption of regularity, and because the Report, if reliable, proves

the lawfulness of Latif's detention, we can only uphold the district court's grant of habeas *if Latif has rebutted the Government's evidence with more convincing evidence of his own*." *Latif*, 666 F.3d at 755 (emphasis added); *see also id.* at 779 ("[T]his court now require[s] district courts to categorically presume that a government report . . . is accurate . . . . [I]n practice it comes perilously close to suggesting that whatever the government says must be treated as true." (internal citations omitted)) (Tatel, J. dissenting). The standard for rebuttal of a presumption, even in a civil case, is not nearly so demanding. *See, e.g.*, FED. R. EVID. 301 (stating that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but "this rule does not shift the burden of persuasion"). Indeed, even if a presumption of regularity were to be applied in this case, the flaws discussed above in the type of intelligence report involved here would suffice to rebut it, without considering any particulars of the case.

Boumediene requires "[t]he habeas court . . . to conduct a meaningful review of [] the cause for detention" and "assess the sufficiency of the Government's evidence against the detainee." *Boumediene*, at 783, 786. For the reasons developed in this brief, amici respectfully submit that in ruling that a "presumption of regularity applies to . . . intelligence reports," the D.C. Circuit has short-circuited the process of meaningful review. *Latif*, 666 F.3d at 755; *see also id.* at 748-51. Instead, it unreasonably presumes the reliability of the reports, without conducting any review—even though it

recognizes the many problems affecting their reliability.

By employing the presumption to shift to the detainee the burden to "rebut[] the Government's evidence with more convincing evidence of his own," *Latif*, 666 F.3d at 755, the court of appeals would render illusory the habeas right guaranteed by *Boumediene*. As a practical matter, many Guantanamo detainees lack the capacity to carry this burden. It is the government, not an outside lawyer, who has the resources and access to information to show that a specific government report is reliable and warrants trust. Lawyers appearing on petitioners' behalf have limited access to the government's own records. To impose a burden of production on a factual issue on the party that will systematically have far less access to the relevant information is fundamentally unfair. The rebuttable presumption in practical terms may be irrebuttable.

This will have two devastating consequences for Guantanamo detainee habeas proceedings. First, intelligence reports are hearsay, but under the standards applied in those proceedings, intelligence reports are admissible, even without the application of a presumption of regularity, because all hearsay is admissible. *Al-Bihani* v. *Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010). The only constraints on the use of hearsay are that the hearsay is subject to an evaluation of its weight and reliability. The court in *Al-Bihani* recognized that these constraints were necessary to meet *Boumediene*'s requirement of a meaningful review of the sufficiency of the evidence. *Id.* By now applying the presumption of regularity to intelligence reports and imposing what may be an

irrebuttable presumption of accuracy, the court of appeals removes those constraints.

Second, in cases like this one, where the report purports to describe the detainee's own statements to an interrogator, the detainee is confronted by a serious dilemma. He can either pit his own credibility against a government report that the district court must take as accurate or risk undermining his credibility by changing his story.

Review by this Court is therefore warranted to assure that the right to habeas guaranteed to Guantanamo detainees is not rendered meaningless in cases where the government's evidence consists of early-stage intelligence documents such as those at issue here.

CONCLUSION

The court of appeals' ruling imposes a presumption of reliability on all early stage intelligence reports. That is irrational, unprecedented, and unjust. The ruling has far-reaching consequences beyond this particular case. It has overturned the considered judgments of every experienced federal district court judge as to how such reports should be evaluated, and has severely undermined *Boumediene*. For all these reasons, amici submit the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX: BIOGRAPHIES OF AMICI

Lieutenant Colonel (select) Tony Camerino has served for over twenty years in the U.S. Air Force and Air Force Reserves. He is a former senior military interrogator and veteran of three wars. He conducted or supervised over 1,300 interrogations in Iraq and was awarded the Bronze Star Medal for his achievements. Camerino currently teaches interrogations and counterterrorism as an independent consultant and is a Fellow at the UCLA Burkle Center for International Relations.

Glenn Carle served for twenty-three years in the Clandestine Services of the Central Intelligence Agency, including as the Deputy National Intelligence Officer for Transnational Threats on the National Intelligence Council, and has worked extensively on terrorism issues. Mr. Carle was responsible for interrogating a suspected high-level member of Al Qaeda soon after September 11, 2001.

Richard D. Friedman is the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School, where he teaches courses in evidence, civil procedure and constitutional law, among others. He is the general editor of *The New Wigmore*, a multi-volume evidence treatise, the author of *The Elements of Evidence*, now in its third edition, and co-author of *Evidence: Cases and Materials*, a coursebook now in its eleventh edition. He is the author of many law review articles on evidence issues. He is a co-Chair of the ABA's Committee on Criminal Procedure, Evidence and Police Practices.

Christopher Mueller is the Henry S. Lindsley Professor of Procedure and Advocacy at the

University of Colorado Law School. He has taught Evidence for almost forty years. He is co-author of the five-volume *Federal Evidence* and a widely-used coursebook on *Evidence*, as well as texts and practitioners' guides. He has taught and written about presumptions and the public records hearsay exception.

Yale Kamisar is the Clarence Darrow Distinguished University Professor of Law Emeritus at the University of Michigan Law School, and has taught law for nearly fifty years, primarily in constitutional law and criminal law and procedure, a context in which the presumption of regularity frequently arises. Professor Emeritus Kamisar has also authored widely used casebooks in both areas.

Paul Pillar served for twenty-eight years in the U.S. intelligence community, including positions as National Intelligence Officer for the Near East and South Asia, chief of analytic units at the CIA, and Deputy Chief of the Director of Central Intelligence's Counterterrorist Center. He is currently Director of Graduate Studies in the Security Studies Program at Georgetown University.

Paul Rothstein is a Professor of Law at Georgetown University Law Center. He is author or co-author of multiple books on evidence, including *Federal Rules of Evidence*; *Evidence: Cases, Materials and Problems*; *Evidence in a Nutshell: State and Federal Rules*; and *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses and Documents in Federal Law Cases*. Professor Rothstein has also served as chair of the ABA Rules of Evidence and Criminal Procedure Committee and

chair of the American Association of Law Schools Evidence Section.

Geoffrey Stone is the Edward H. Levi Distinguished Service Professor at the University of Chicago Law School, where he has served on the faculty since 1973. Professor Stone teaches primarily in the areas of evidence and constitutional law and has published multiple books on issues arising during wartime. Professor Stone is also chief editor of a fifteen-volume series, *Inalienable Rights*, published by the Oxford University Press.

Colonel (Ret.) Lawrence Wilkerson served as Chief of Staff to Secretary of State Colin Powell and Associate Director of the State Department's Policy Planning staff, after serving thirty-one years in the U.S. Army. Colonel Wilkerson is currently a Distinguished Adjunct Professor of Government and Public Policy at the College of William and Mary.