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TCP 'Disappointed' with Supreme Court Failure to Review Latif

Sloan: Undue deference to executive branch 'undermines' independent courts

WASHINGTON, D.C. -- A bipartisan constitutional watchdog group expressed deep disappointment that the Supreme Court decided today not to review a troubling rule of evidence in cases brought by prisoners at Guantanamo Bay.

By denying certiorari in *Latif v. Obama*, the Court let stand a decision by the U.S. Court of Appeals for the D.C. Circuit that requires judges to presume the accuracy of intelligence reports the government often relies on to justify indefinite detention. The decision makes it nearly impossible for most Guantanamo detainees to mount an effective challenge to the government's evidence.

"The D.C. Circuit's decision in *Latif* unfairly stacks the deck against Guantanamo detainees. There is simply no good reason to assume that government intelligence reports produced under difficult and stressful circumstances during the chaos of war are inherently reliable," said Virginia Sloan, president of The Constitution Project (TCP).

Nearly four years ago, the Supreme Court decided in *Boumediene v. Bush* that prisoners at Guantanamo Bay have a constitutional right to meaningful judicial review of their detention and can pursue such challenges through petitions for habeas corpus.

"If the justices meant what they said, they should not continue to sit silent in the face of lower court decisions that essentially undercut *Boumediene's* promise of legitimate, independent review," Sloan said, "and we are deeply disappointed they elected not to take this opportunity to clarify their earlier position. Giving undue deference to the executive branch undermines the independent role of our courts envisioned by the framers of the Constitution."

Adnan Farhan Abdul Latif, a Yemeni national, was picked up by Pakistani police in December 2001 and later transferred to U.S. custody. He has been detained at Guantanamo Bay since January 2002. Latif maintains that he went to Pakistan - via Afghanistan - in search of medical treatment that wasn't available to him in Yemen. The government claims that Latif traveled a route followed by terrorist recruits, received military training in Afghanistan, and fought alongside the Taliban. Its principal evidence is an intelligence report that summarizes a "battlefield screening interview" with Latif himself.

Latif challenged his detention through a writ of habeas corpus, and won. In a July 2010 ruling, D.C.

District Judge Henry H. Kennedy Jr. found that the intelligence report wasn't sufficiently reliable to prove that Latif was more likely than not a part of Al Qaeda or the Taliban. In a 2-1 ruling last March, the D.C. Circuit disagreed. According to the majority, Judge Kennedy committed legal error by refusing to apply a "presumption of regularity" to the government's intelligence report. In other words, Judge Kennedy should have presumed that the report accurately reflected what Latif said during his "battlefield screening interview."

But Sloan said, "District judges are experienced and capable fact-finders and must be allowed to assess the government's evidence on a case-by-case basis. It's a huge mistake to deprive them of that essential role in favor of blind deference to the government when the stakes are so high."

Given the central role that government intelligence reports play in Guantanamo habeas cases, the D.C. Circuit's decision has far-reaching consequences. It effectively shifts the burden of proof from the government to the detainee, a shift that district court judges had consistently rejected prior to *Latif*.

According to a June 2010 report by a distinguished group of former federal judges brought together by TCP and Human Rights First, "[u]nlike presumptions of authenticity, the District Court bench has denied nearly all requests for a presumption of accuracy. The courts have expressed a concern that a presumption of accuracy would tip the delicate balance of interests too far in the government's favor and intrude on the role of the court. Courts have emphasized that final decisions about the reliability, accuracy, and weight of evidence -- issues which are often "hotly contested" -- are best left to the fact-finder."

Their report, [*Habeas Works: Federal Courts Proven Capacity to Handle Guantanamo Cases*](#), found that District Court judges had "capably answered the Supreme Court's charge" by developing rules and procedures in *Boumediene's* aftermath that addressed the government's interest in national security while protecting the right of prisoners to fairly challenge their detention.

Eight of the sixteen former federal judges who endorsed *Habeas Works* joined an amicus brief urging the Supreme Court to accept review in *Latif*.

[About The Constitution Project](#)

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.



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