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Imprisonment without end at Guantánamo

By: Herman Schwartz

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The Supreme Court ruled in a 2008 decision that Guantánamo detainees must have a "meaningful opportunity" to challenge their detention at a habeas corpus hearing.

This decision, *Boumediene v. Bush*, has repeatedly been subverted, however, by right-wing judges on the federal Court of Appeals in Washington. Yet the justices don't seem to care — for they have declined to review any of the D.C. circuit's rulings undermining the Boumediene decision.

Their indifference was most recently demonstrated in June, when the Supreme Court refused to review a decision, *Latif v. Obama*, that granted government intelligence reports a presumption of accuracy — regardless of how they were prepared. As a result of the court's action, many Guantanamo detainees face what could be many years of indefinite detention.

Adnan Farhan Abdul Latif was one of these detainees. Until last week, when he was found dead in his cell on Sept. 9. Yet the military had twice recommended that Latif be released, as Wikileaks disclosed last year. An interagency national security task force had approved this in 2009, and his release was ordered in 2010 by the district court.

But the D.C. circuit court had ignored this. Latif was kept in prison, most of the time in solitary confinement, often in hand and body cuffs and, because he often went on hunger strikes, force-fed.

He made several suicide attempts. Though the government has not yet provided a cause of death, his lawyer believes it was out of despair.

The Boumediene decision had allowed D.C. Circuit courts to flesh out the procedural and evidentiary provisions governing how the habeas hearing should be conducted and made "meaningful." Most trial judges took this charge seriously and adopted procedures generally fair to both sides.

But these efforts have now been largely undone by the D.C. Circuit Court of Appeals. Led by Judges Janice Rogers Brown, Brett Kavanaugh, A. Raymond Randolph, Karen L. Henderson and Laurence Silberman, this circuit court has overturned many of the district court's rulings and mandated rules that make it almost impossible for a detainee to be released.

Out of 19 appeals, including six cases in which the trial court released the detainee, the Court of Appeals has allowed not a single detainee to be released. Five cases have been sent back to the trial court for more consideration, and in 14 cases, the government chose not to appeal.

To those who follow the D.C. Circuit court, this is not surprising. The court tilts sharply to the right – nine of the 13 sitting judges were appointed by Ronald Reagan and George W. Bush and known for government deference in national security matters. Many were active in the Federalist Society and engaged in other right-wing groups and activities. Some, like Kavanaugh (who drafted much of the Starr report on President Bill Clinton), Randolph and Silberman, held important positions in the Reagan, George H.W. Bush and George W. Bush administrations.

These D.C. judges may likely also have a special grievance toward the justices. Three of the four Supreme Court decisions upholding the legal and constitutional rights of Guantánamo detainees reversed D.C. Circuit decisions. All three circuit court decisions were written by Randolph, who expressed his displeasure with the Supreme Court in a 2010 speech at the Heritage Foundation. He described the court by citing F. Scott Fitzgerald's lines about Tom and Daisy Buchanan in "The Great Gatsby." "They were careless people," Randolph quoted, "They smashed up things… and let other people clean up the mess they had made."

Randolph has done more than criticize, however.

In one of the earliest government appeals from a district judge's order releasing the detainee, Randolph harshly lectured District Judge Gladys Kessler, an admired trial judge with more than three decades of trial experience. He explained to her how to evaluate evidence, overturned her fact-finding and set aside the release order.

Appellate judges, however, are not authorized to reverse trial judges' findings just because they disagree with the findings. They can do this only if those findings are "clearly erroneous." Yet the D.C. Circuit judges apparently think that this rule doesn't apply to Guantánamo detainee cases.

In two other appeals in which a detainee had been granted release,, Latif being one, the appellate court again overturned findings of fact made by experienced trial judges.

One factor in all these decisions is that these circuit court judges are unhappy, indeed angry, that the government had conceded early on that it must show that it is more probable than not - what lawyers call "by a preponderance of the evidence"- that the detainee should not be released. Randolph, Brown and Silberman have each argued that in a case involving an alleged terrorist, the government should be required to submit only "some evidence" — which in practice can mean virtually nothing.

The "preponderance" requirement has not, however, raised problems for these judges. Though they purport to be applying that standard, they are achieving the same result as their preferred "some evidence" criterion by ignoring the "clearly erroneous" limit on their authority. They are, instead, making their own detailed findings — including judgments about credibility — that are normally the province of the trial judge.

These prior rulings clearly made it difficult for a detainee to gain his release, but it remained possible. Latif, however, presents Guantánamo detainees with a much greater and often insuperable hurdle.

In Latif, the government urged that the intelligence reports of interviews on which the government was relying should be accorded a full "presumption of regularity" — not only as authentic government documents but also as accurate records of what the government was told, which the detainee would have to disprove. The authenticity presumption was not in dispute, but allowing a presumption of accuracy was something else.

As a group of leading evidence professors and former intelligence agents emphasized in an amicus brief, "the [full] presumption is accorded *only* [emphasis added] to the kinds of official government records generated by procedures and under circumstances that reasonably can be expected to produce reliable results… such as tax receipts, mailing records and judicial transcripts." The accuracy of these records is assured by procedural safeguards or by the "routine, repetitive, bureaucratic nature of the underlying process that is generally reliable because it, for example, is transparent, accessible and often familiar."

The conditions under which the government intelligence reports in these cases were prepared are completely unlike those under which judicial transcripts and other documents are produced. They are based on statements made on battlefields, for example, or in prison cells and makeshift military camps. As all the judges agreed, they were prepared in "stressful and chaotic conditions… . subject to transcription errors and … [with many omissions] for national security purposes." Tatel also pointed out, they are "produced by a clandestine method in the fog of war" and consist mostly of hearsay, often from anonymous sources who could be enemies seeking to settle scores or coerced witnesses. They were usually translated by unknown and often unreliable interpreters — for the military lacked competent Arabic translators in the years when these men were picked up. The 700 files released by Wikileaks last year confirm how shoddy and haphazard much of the intelligence gathering was.

Moreover, as the Latif majority noted, once the presumption is granted, the hearsay statements are admitted into evidence. Then the burden shifts from the government to the detainee to demonstrate the truth of his testimony. This can be a virtually impossible task — as both the concurring judge

(Henderson) and the dissenting judge (Tatel) pointed out — given the detainee's confinement in Guantánamo and lack of resources. For these reasons, the D.C. trial court judges had unanimously refused to adopt the presumption.

Yet none of this apparently troubled Brown and Henderson, since they reversed the order releasing Latif.

The two military recommendations in December 2006 and in January 2008 that he be released, affirmed by the interagency task force in 2009, were ignored by Brown and Henderson. In Boumediene, the Supreme Court seemed to acknowledge a constitutional obligation to treat all people fairly, with due process of law. That obligation has now been dishonored, and 167 men, many of whom might never even be charged with a crime, are now helplessly and hopelessly facing a lifetime in prison — far from family, friends and thousands of miles from home.