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Evidentiary Rules Governing Guantánamo Habeas Petitions: Their Effects and Consequences

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INTRODUCTION

Beginning in 2001, the United States began transporting hundreds of persons captured overseas in the “War on Terror” to the U.S. Naval Base at Guantánamo Bay, Cuba.¹ They were kept at Guantánamo specifically to insulate from judicial review the military’s decision to detain them.² Seven years later, the Supreme Court in *Boumediene v. Bush* granted Guantánamo detainees the right to petition for the writ of habeas corpus in the Court of Appeals for the D.C. Circuit.³ The Court held that detainees must have “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.”⁴ The Court’s central concern was with the habeas court’s power to admit and consider relevant exculpatory evidence, a power necessary “[f]or the writ of habeas corpus, or its substitute, to function.”⁵

But while the Court’s central preoccupation was with a habeas court’s power to independently review the evidence, the Court did not enumerate any specific procedural requirements. The Court—hesitant to place burdens on the military and cognizant of the need to protect classified information—sketched only the broad outlines of what the Constitution requires.⁶ In so doing, it left “[t]he extent of the showing required of the Government in these cases . . . a matter to be determined”⁷ and charged the district courts with the task of balancing the government’s legitimate interests against each detainee’s right to have a court assess the lawfulness of his detention.⁸

1. See Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263, 267-68 (2004).
2. See *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (“Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention.”); Amann, *supra* note 1, at 267-68.
3. 553 U.S. at 798.
4. *Id.* at 779.
5. *Id.* at 790.
6. *Id.* at 788-89 (holding that the Constitution requires that those wrongfully held must have the remedy of release, the power to challenge the legality of the law pursuant to which they are detained, and an opportunity to present relevant exculpatory evidence).
7. *Id.* at 787.
8. *Id.* at 796 (“[T]he Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.”).

EVIDENTIARY RULES GOVERNING GUANTÁNAMO HABEAS PETITIONS

Since *Boumediene*, the courts within the D.C. Circuit have heard over sixty habeas petitions from detainees at Guantánamo Bay.⁹ At first, many writs were granted. The lower courts applied a functional framework for determining the admissibility, credibility, and probity of evidence, holding the government to the ordinary burden of preponderance of the evidence.¹⁰ However, as the government and detainees began to appeal habeas decisions on the basis of adverse evidentiary rulings, the Court of Appeals announced binding evidentiary rules limiting the district courts' discretion to admit, exclude, weigh, and consider evidence as the district courts saw fit.¹¹

This Note argues that these evidentiary rules deny detainees a “meaningful opportunity” to contest the factual basis of their detention.¹² The D.C. Circuit maintains that it holds the government to a preponderance standard¹³ and has cast its reversals of the District Court's grants of habeas corpus as mere corrections in judging evidentiary probity.¹⁴ However, in substance, the Court of Appeals' evidentiary rules have quietly but significantly eroded the evidentiary burden.

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9. See *Guantanamo Bay Habeas Decision Scorecard*, CENTER CONST. RIGHTS, <http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard> (last visited Nov. 22, 2012) (listing decided Guantánamo cases); Andy Worthington, *Guantánamo Habeas Results: The Definitive List*, ANDY WORTHINGTON, <http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list> (last visited Nov. 22, 2012).
 10. In eleven of the first seventeen habeas cases adjudicated in the district courts, the district court granted the detainee's petition. After *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010), five of the next eleven hearings also resulted in grants. However, after *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 (D.C. Cir. 2010), only a single petition was granted. That grant was later vacated and remanded in *Latif v. Obama*, 666 F.3d 746, 764 (D.C. Cir. 2011).
 11. See, e.g., Benjamin Wittes et al., *The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking*, BROOKINGS INST. (Apr. 2012), http://www.brookings.edu/~media/research/files/reports/2011/5/Guantanamo%20wittes/05_guantanamo_wittes (collecting cases and rulings).
 12. *Boumediene*, 553 U.S. at 729.
 13. “Preponderance-of-the-evidence” is the evidentiary standard, though several judges on the D.C. Circuit Court of Appeals have questioned whether a lower standard would be appropriate. See, e.g., *Almerfed v. Obama*, 654 F.3d 1, 5 n.4 (D.C. Cir. 2011); *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring); *Latif*, 666 F.3d 748; *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); *Al-Adahi*, 613 F.3d at 1103; *Al-Bihani*, 590 F.3d at 878 n.4; *Awad v. Obama*, 608 F.3d 1, 11 n.2 (D.C. Cir. 2010).
 14. See *infra* text accompanying notes 120–122 (describing the ways in which the Court of Appeals has characterized the District Court rulings as erroneous).

The way in which the evidentiary standard and the evidentiary rules interact to weaken *Boumediene* has, for the most part, escaped scrutiny.¹⁵ Many have praised the D.C. Circuit for striking an appropriate balance between the needs of national security and the rights of those wrongfully detained.¹⁶ But this underestimates the combined significance of the D.C. Circuit's evidentiary rulings. *Boumediene*'s central purpose was to withhold from the executive branch the unchecked power to detain whomever it deems a threat.¹⁷ Yet the D.C. Circuit's evidentiary rules have empowered the government to detain upon so little evidence that the habeas hearing no longer serves the checking role the *Boumediene* Court intended.¹⁸

The D.C. Circuit has tacitly reduced the amount and quality of evidence necessary to establish the lawfulness of detention through three powerful mechanisms: (1) all but eliminating corroboration requirements and restrictions on the admissibility of hearsay evidence, no matter how unreliable;¹⁹ (2) establishing that courts consider the evidence in the "whole record" when determining whether a petitioner meets the requirements for detention—a determination that often reduces to the Court of Appeals' deciding that the District Court

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15. Scholars have mentioned that the evidentiary rules might pose concerns about compliance with *Boumediene*, but have ventured no further. See, e.g., Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1466-77 (2011) (suggesting that the D.C. Circuit Court's evidentiary burdens and presumptions may be inconsistent with *Boumediene*).
 16. See, e.g., Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 857-58 (2011); Nathaniel H. Nesbitt, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244, 247 (2010); Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POL'Y REV. 525 (2010); Wittes et al., *supra* note 11, at 49.
 17. See 553 U.S. at 728.
 18. See *Al-Bihani*, 590 F.3d at 879 ("[T]he one constant in the history of habeas has never been a certain set of procedures, but rather the independent power of a judge to assess the actions of the Executive. This primacy of independence over process is at the center of the *Boumediene* opinion, which eschews prescribing a detailed procedural regime in favor of issuing a spare but momentous guarantee that a 'judicial officer must have adequate authority to make a determination in light of the relevant law and facts.'" (quoting *Boumediene*, 553 U.S. at 787)); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009) ("Reading *Boumediene*, one is left with the distinct impression that for Justice Kennedy, at least, the writ of habeas corpus is in part a means to an end—a structural mechanism protecting individual liberty by preserving the ability of the courts to check the political branches.").
 19. See *infra* Part I.

wrongly refused to credit sufficient government evidence;²⁰ and (3) developing irrefutable presumptions of detainability in which a single fact once established—such as a stay at an al-Qaeda affiliated guesthouse—is dispositive on the question of detention, even when other facts in the record point strongly in the opposite direction.²¹

That these rules operate to significantly reduce the government’s burden, and thereby deprive detainees of a meaningful opportunity to contest the factual basis of their detention, is not readily apparent from the D.C. Circuit’s decisions. Rather, the D.C. Circuit has framed its successive evidentiary decisions as meeting *Boumediene*’s goal of striking a careful and necessary balance between the significant burdens that a higher evidentiary requirement would impose on the military during wartime, and the minimal impact that these decisions would have on the substantive rights of detainees in habeas proceedings.²²

This Note explains how, contrary to the Court of Appeals’ rhetoric, these evidentiary rules have played a dispositive role in the outcome of these cases. Part I analyzes how the credibility rules established by the Court of Appeals reduce the government’s evidentiary burden. Part II explains how the mosaic theory that the Court of Appeals has imposed on the district courts often privileges unreliable evidence. Finally, Part III demonstrates how the Court of Appeals’ development of irrefutable presumptions for establishing the lawfulness of detention decreases the quality and amount of evidence that the government must put forth to prove membership in al-Qaeda, the Taliban, or associated groups. This Note concludes that the Court of Appeals’ construction of evidentiary rules and the interaction among them has taken the bite out of *Boumediene*, granting executive detention at Guantánamo Bay judicial sanction without judicial scrutiny.

20. See *infra* Part II.

21. See *infra* Part III. The Court of Appeals does not call its evidentiary rules irrefutable or even presumptions. But, as we hope to show, these rules operate as irrefutable presumptions in all but name.

22. See, e.g., *Almerferdi v. Obama*, 654 F.3d 1, 4-5 (D.C. Cir. 2011) (arguing that other cases in which the Court of Appeals reversed decisions by the District Court were “not close” and that the application of the preponderance standard is “simpl[e]”); *Latif v. Obama*, 666 F.3d 746, 754-55 (D.C. Cir. 2011) (describing the dissent’s fear that the presumption of accuracy will be functionally irrefutable as “unfounded”); *Uthman v. Obama*, 637 F.3d 400, 407 (D.C. Cir. 2011) (describing circumstantial evidence as “overwhelming”).

I. CREDIBILITY RULES²³

The D.C. Circuit has almost entirely eliminated corroboration requirements and limitations on hearsay from post-*Boumediene* habeas hearings. In January 2010, in its first post-*Boumediene* habeas appeal, the D.C. Circuit held in *Al-Bihani v. Obama* that district courts may not exclude hearsay evidence.²⁴ This groundbreaking shift in the structure of evidentiary consideration was then followed with another change in *Latif v. Obama*, decided in October 2011, where the D.C. Circuit found that government reports should be entitled to a presumption of accuracy.²⁵ In ordinary cases, waiving technical objections to evidentiary admissibility is not necessarily unusual. When judges sit without juries, they sometimes relax the ordinary admissibility rules, arguing that they can “let [the evidence] in and just give it the weight that it deserves.”²⁶ Yet the complex, uncertain, evidence-laden inquiries that the D.C. Circuit confronts in post-*Boumediene* habeas cases are far from ordinary. There is far greater reason to adhere to careful admissibility rules in these cases than in almost any other kind of case.²⁷ Moreover, because relaxing admissibility is ordinarily exceptional, evidentiary rules maintain a strong deterrent and structuring effect in ordinary trials that disappears when all such rules are eliminated prospectively.

23. “Credibility rules” are rules for structuring and assessing what evidence should be believed. See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL §12.01[1], at 12-13 (2007) (“[T]he basic aim of all credibility rules [is] that evidence should be admitted if it better enables the trier of fact to determine when a witness is lying or telling the truth.”); see also *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985) (discussing credibility and probity). Rules about credibility can call for some evidence to be excluded or require that other kinds of evidence be corroborated. In criminal law, for example, questions of credibility abound. Did the witness lie? Was the confession false? Was the DNA sample contaminated? Credibility is conceptually distinct from “probity” or “relevance,” however, both of which measure the degree to which evidence tends “to establish the proposition it is offered to prove.” MCCORMICK ON EVIDENCE § 185, at 541 (3d ed. 1984). Credibility rules specifically govern whether evidence should be trusted at all. Some forms of evidence, however, are excluded per se because of their universal tendency to mislead. The exclusion of hearsay and rudimentary corroboration requirements for admissibility “are at least as old as the common law itself.” Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006).

24. 590 F.3d 866, 879 (D.C. Cir. 2010).

25. 666 F.3d at 750.

26. *State v. Stout*, 46 S.W.3d 689, 703 (Tenn. 2001) (adopting the principle that trial judges should have “wider discretion than would normally be allowed under the [state’s] Rules of Evidence” (quoting *State v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001))); see also *Commonwealth v. Irwin*, 639 A.2d 52, 54-55 (Pa. Super. Ct. 1994) (noting that the trial judge is presumed to be able to disregard prejudicial evidence).

27. See *infra* Section I.C for an in-depth discussion of the reasons why this is so.

A. *Hearsay*

The Supreme Court seemingly left little room for the lower courts to admit hearsay in detention hearings. In *Hamdi v. Rumsfeld*, Justice O’Connor, writing for a plurality, suggested that hearsay was only admissible when no better evidence was available.²⁸ *Boumediene* spoke in similarly general terms about the “discretion” of the district courts to craft rules to vindicate “legitimate [government] interest[s].”²⁹ The D.C. Circuit’s first tangles with hearsay reflected this tentative approach. In *Parhat v. Gates*, the first case decided by the D.C. Circuit after *Boumediene*, the Court of Appeals set a middle bar for the admission of hearsay: it “must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability.”³⁰ The District Court formulated a similar rule in the Case Management Order they adopted four months later,³¹ writing that the habeas judge “may admit and consider hearsay evidence . . . if . . . the hearsay evidence is reliable and . . . the provision of nonhearsay evidence would unduly burden the movant or interfere with the government’s efforts to protect national security.”³²

The government took advantage of the courts’ willingness to consider hearsay under some circumstances to argue that it should be entitled to enter hearsay in every subsequent case, asserting that any other rule would pose an “undue burden” under the Case Management Order. Responding to one such motion in *Bostan v. Obama*, District Judge Reggie B. Walton wrote:

[I]t is no excuse for the government’s lawyers to assert that there are too many habeas corpus petitions . . . to compel fidelity to the centuries-old proscription against the use of hearsay Just as “the costs of

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28. 542 U.S. 507, 533-34 (2004) (stating that hearsay “may *need* to be accepted as the most reliable available evidence from the Government in such a proceeding” (emphasis added)).
 29. *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (“[W]e expect that the District Court will use its discretion to accommodate [the Government’s] interest to the greatest extent possible.”).
 30. 532 F.3d 834, 849 (D.C. Cir. 2008). It is worth noting that *Parhat* was not a habeas case, but rather was a case on direct review to the D.C. Circuit under the Detainee Treatment Act. Nevertheless, the proceeding reviewed a Combatant Status Review Tribunal (CSRT) proceeding in a manner substantially identical to the habeas proceedings that followed.
 31. Following the *Boumediene* decision, most District Court judges “agreed to consolidate their Guantánamo Bay habeas cases before former Chief Judge Thomas F. Hogan for issuance of an initial case management order that would expeditiously move these cases toward resolution.” *Al Odah v. United States*, 648 F. Supp. 2d 1, 4 (D.D.C. 2009), *aff’d*, 611 F.3d 8 (D.C. Cir. 2010).
 32. *In re Guantanamo Bay Detainee Litig.*, No. 02-cv-0828, 2008 WL 4858241, at *3 (D.D.C. Nov. 6, 2008) (emphasis added).

delay can no longer be borne by those who are held in custody,” so, too, the costs of this litigation . . . must be borne by the government, not fobbed off on the petitioners in the form of a blanket presumption of admissibility of otherwise inadmissible hearsay.³³

Yet the Court of Appeals created just such a “blanket presumption” three months after *Bostan* in *Al-Bihani v. Obama*.³⁴ The Court of Appeals wrote that “the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits.”³⁵ The Court of Appeals reasoned that, as aliens, detainees lack Sixth Amendment rights,³⁶ that *Hamdi* and *Boumediene* authorized the lower courts to consider hearsay,³⁷ and that district judges “need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield . . . impressionable juries.”³⁸ Admitting all hearsay and then discounting it appropriately, Judge Janice Rogers Brown reasoned, is essential to achieving a court’s overarching goal in detainee cases: “seizing the actual truth of a simple, binary question: is detention lawful?”³⁹

But it is difficult to fathom that admitting all hearsay furthers the goal of “seizing the actual truth.”⁴⁰ Given that one of the very purposes of excluding hearsay has always been to improve the accuracy of an evidentiary inquiry, admitting all hearsay is more likely to decrease, rather than increase, the accuracy of these proceedings. In *Al-Bihani* itself, for example, the contested hearsay was the petitioner’s own statement, relayed first through an interpreter to an interrogator, and then summarized by the interrogator in an interrogation report.⁴¹ Judge Brown admitted Al-Bihani’s reported statements and credited the veracity of the reports in which they were contained on the grounds that “al-Bihani did not contest the truth of the *majority* of his admissions upon which the district court relied, enhancing the reliability of those reports.”⁴² Whether the re-

33. 662 F. Supp. 2d 1, 4-5 (D.D.C. 2009) (citation omitted). He went on to write that “[t]he very notion that the Court should lower its standards of admissibility to whatever level the government is prepared (or even able) to satisfy is contradictory to the fundamental principles of fairness that inform the Great Writ’s existence.” *Id.* at 5.

34. 590 F.3d 866 (D.C. Cir. 2010).

35. *Id.* at 879.

36. *Id.*

37. *Id.*

38. *Id.* at 880.

39. *Id.*

40. *Id.*

41. *Id.* at 879.

42. *Id.* at 880 (emphasis added).

port’s author was even available to testify as to the accuracy of the disputed portions went unexamined.⁴³ Further, that Al-Bihani was available and willing to testify, thus remedying the hearsay problem, was ignored.⁴⁴

The decision of the Court of Appeals to admit *all* hearsay goes well beyond the modest waivers that courts sometimes grant to technical hearsay. The nature of the hearsay in detainee cases is generally of the most error-prone kind: second- and third-hand statements, which seldom come from identified sources.⁴⁵ Moreover, the sources of the hearsay, when they are identified, are often adverse or unreliable witnesses, against whom confrontation would be critical in an ordinary criminal trial.⁴⁶ The fact that hearsay often forms the core

43. See *infra* Sec. II.A; *cf.* *Al-Bihani v. Obama*, 662 F. Supp. 2d 9, 17-18 (D.D.C. 2009) (“The situation is more complicated with respect to statements made by other detainees that the government seeks to use against the petitioner. The government suggests that statements by various detainees inculcating the petitioner necessarily inculcate the declarants as well and therefore should be considered as statements against their interest under Federal Rule of Evidence 804. But that exception only applies when the declarant is unavailable to testify within the meaning of the rule, FED. R. EVID. 804(b)(3), and the government has not even attempted to demonstrate unavailability on the part of the various detainees who allegedly inculpated the petitioner.”).

44. *Al-Bihani*, 662 F. Supp. 2d at 14 (noting that “the petitioner is available to testify and willing to be subject to cross-examination”).

45. See, e.g., *Ahmed v. Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009) (“Given the extensive briefing and oral argument presented by counsel during the discovery phase of this case, as well [*sic*] the exhibits submitted at the merits trial, it is clear that the accuracy of much of the factual material contained in those exhibits is hotly contested for a host of different reasons ranging from the fact that it contains second- and third-hand hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said.”); see also *Parhat v. Gates*, 532 F.3d 834, 848-49 (D.C. Cir. 2008) (“[T]he government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. . . . In fact, we have no basis for concluding that there are independent sources for the documents’ thrice-made assertions. To the contrary, as noted in Part III, many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source. And as we have also noted, Parhat has made a credible argument that—at least for some of the assertions—the common source is the Chinese government, which may be less than objective with respect to the Uighurs. Other assertions in the documents may ultimately rely on interview reports (not provided to the Tribunal) of Uighur detainees, who may have had no first-hand knowledge and whose speculations may have been transformed into certainties in the course of being repeated by report writers.”).

46. See, e.g., *Ahmed*, 613 F. Supp. 2d at 56-60. In *Ahmed* the government’s witnesses were detainees, one of whom had “shown himself to be an unreliable source” and another of whom suffered from “psychosis.” *Id.* at 57, 58.

of the government's case makes the D.C. Circuit's blanket presumption even more troubling.⁴⁷

Even if the D.C. Circuit had dispensed with the exacting hearsay rules required by the Federal Rules of Evidence, the admission of totally unreliable hearsay needlessly elevates the risk of error. Assertions made by human beings are often unreliable: such statements are often insincere, subject to flaws in memory and perception, or infected with errors in narration at the time they are given.⁴⁸ Some have argued that more reliable evidence in the record can be used to bolster the credibility and probity of hearsay evidence and that excluding hearsay evidence deprives the fact-finder of a potentially critical tile in an otherwise incomprehensible evidentiary mosaic.⁴⁹ But given hearsay evidence's inherent tendency to mislead, it is unclear what independent value hearsay is expected to have—especially if it relies on other more reliable evidence in the record to render it credible and probative.⁵⁰ At best, such unreliable evidence can reinforce a conclusion that the court could have already reached through other means; at worst, it can mislead the factfinder into reaching an erroneous

47. See, e.g., *Al-Bihani*, 590 F.3d at 879 (“[H]earsay made up the majority, if not all, of the evidence on which the district court relied . . .”).

48. See *Williamson v. United States*, 512 U.S. 594, 598 (1994) (“The hearsay rule . . . is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness’ awareness of the gravity of the proceedings, the jury’s ability to observe the witness’ demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.”); GEORGE FISHER, *EVIDENCE* 364 (2d ed. 2008) (stating that direct testimony gives the opposing lawyer an opportunity to probe “for deficiencies in perception, memory, narration, and sincerity”); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

49. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010); *Al-Bihani*, 590 F.3d at 880.

50. See *Al-Bihani v. Obama*, 662 F. Supp. 2d 9, 19 (D.D.C. 2009) (“To the extent that the information within the statement mirrors the corroborating evidence, its admission into the record would be redundant, and to the extent it differs from the corroborating evidence, it is no longer corroborated and therefore has no external indicia of reliability.”). This is especially true with regard to an interrogation report where an error in translation or transcription can result in small but essential pieces of information being misreported, such as dates and names. These concerns are more than theoretical. In *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009), the government argued that its own evidence was unreliable, “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.” *Id.* at 6.

conclusion. Judges may also overestimate their ability to disregard unreliable evidence, a result that counsels caution.⁵¹

Finally, the admission of all hearsay overlooks one of the most important reasons for creating hearsay rules in the first place: their ability to increase incentives to gather reliable evidence, improve pretrial evidentiary procedures, and deter the generation of frivolous or misleading evidence.⁵² Limitations on hearsay deter litigants from generating and introducing large volumes of low-quality evidence by requiring that all evidence meet an objective threshold.⁵³ Indeed, without hearsay restraints, the government has flooded the district courts with thousands of documents and hundreds of exhibits, many of which would have otherwise been inadmissible.⁵⁴ For example, the record in *Kandari v. United States*⁵⁵ was voluminous. The parties “introduced approximately 230 exhibits into the record, consisting of Al Kandari’s own statements as well as the statements of numerous third-party sources and other documents.”⁵⁶ But *Kandari* is hardly unique.⁵⁷ Since detainees cannot hope to match

51. Schauer, *supra* note 23, at 189-92.

52. *See id.* at 196 (“By excluding hearsay . . . the hearsay rule compels the parties to search for more rather than less direct accounts, and to locate and bring forward the most immediate and cross-examinable witnesses.”).

53. For example, in the absence of a bar on hearsay, one might gather numerous second-hand accounts, lending the impression that many independent sources corroborate a particular version of events, even though every second-hand account is actually derived from the same potentially unreliable source.

54. The government’s ability to generate a limitless amount of evidence poses another vexing problem for the courts because it allows the government to frame the background facts against which the litigation takes place to an unusually extensive degree. This advantage in laying what is called a “foundation”—the background facts against which evidentiary relevancy is judged, *see* David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95, 122-23 (2011)—is a particularly significant source of potential prejudice in these proceedings. Even in criminal proceedings, in which the imbalance of power is perhaps most extreme in the American system, judges still can rely on their own extensive knowledge and experience to independently adjudicate and evaluate the relevance of the evidence presented. But the Afghanistan of early fall 2001 is an alien landscape for which judges have no independent compass. They are left to rely on thousands of pages of government evidence to understand the unique culture, geography, and politics of the region in which a detainee was captured. Yet these formulations can be self-serving, and their refutation nearly impossible for an individual petitioner to provide.

55. 744 F. Supp. 2d 11 (D.D.C. 2010).

56. *Id.* at 23.

57. *See, e.g.,* Al Alwi v. Obama, 653 F.3d 11, 24 (D.C. Cir. 2011) (“[T]he government’s factual return in the habeas hearing ran to well over 400 pages.”); Ahmed v. Obama, 613 F. Supp. 2d 51, 53 (D.D.C. 2009); Boumediene v. Bush, 579 F. Supp. 2d 191, 195 (D.D.C. 2008), *rev’d*, Bensayah v. Obama, 610 F.3d 718 (2010) (“The Govern-

the government's power to generate favorable evidence, allowing all hearsay inherently favors the government. This is bolstered by the dozens of cases that have turned on "undisputed" government evidence, which has been used to establish, for example, that a detainee traveled known "al Qaeda route[s]"⁵⁸ or wore accessories commonly worn by members of al-Qaeda,⁵⁹ to give only two of dozens of examples.⁶⁰ Given most petitioners' incarceration and limited means, the evidence proffered by the government is functionally irrefutable. Hearsay exclusion at least imposes minimal requirements that evidence by which facts are proven be nominally reliable, even if the petitioner cannot affirmatively rebut it.

Hearsay itself raises intrinsic concerns about reliability and the risk of error. The decision to admit *all* hearsay, even that hearsay most likely to mislead and least likely to improve the accuracy of the factual inquiry, exacerbates this risk without furthering the objective of reaching "actual truth."⁶¹

ment's return contained approximately 650 pages of exhibits and a 53-page narrative Petitioners' traverse included approximately 1,650 pages of exhibits and over 200 pages of narrative").

58. See *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) ("[T]raveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda.").
59. See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010).
60. Undisputed evidence has also been used to establish that surrendering one's passports, identification, money, or other travel documents was "a standard operating procedure" at guesthouses and training camps, *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 89 (D.D.C. 2009); that al-Qaeda operatives are trained in counter-interrogation tactics, *Kandari*, 744 F. Supp. 2d at 35; that Osama bin Laden was in hiding in August of 2001, *Al-Adahi*, 613 F.3d at 1107; that individuals attending the Al Farouq training camp received training on AK-47 rifles early in the program, *Al Odah v. United States*, 648 F. Supp. 2d 1, 16 (D.D.C. 2009); "that, as the Taliban regime fell, Taliban and al-Qaeda fighters fled south en route to the Tora Bora mountains along the Afghanistan-Pakistan border," *Al Mutairi*, 644 F. Supp. 2d at 89; and, that Al Farouq was evacuated shortly after the September 11, 2001 attacks, and that many of the individuals attending the camp were sent north to Kabul, Jalalabad, and the Tora Bora mountains, *Al Odah*, 648 F. Supp. at 16.
61. *Al-Bihani v. Obama*, 590 F.3d 866, 880 (D.C. Cir. 2010).

*B. Accuracy and Authenticity*⁶²

Relying on language from *Hamdi* (and to a lesser extent *Boumediene*),⁶³ the government has continually sought a presumption of authenticity and accuracy for its documentary evidence.⁶⁴ The way the courts treat intelligence and interrogation reports is particularly important because such reports are often the backbone of the government’s case in Guantánamo habeas hearings.⁶⁵ While presuming the authenticity of such reports is not particularly problematic or unusual, presuming their accuracy is. Often a detention hearing comes down to the accuracy of an interrogation or intelligence report. If the report states that the detainee admitted to some inculpatory fact, the accuracy of that report will often mean the difference between detention and release. Government evidence has repeatedly been shown to be unsourced, unverifiable, internally incoherent, and even mistaken.⁶⁶ Moreover, it is by its very nature almost wholly irrefutable. Nonetheless, in October 2011—in a divided panel decision—the D.C. Circuit ruled that “official government documents” will from now on be presumed to be both authentic *and* accurate.⁶⁷

The initial Case Management Order adopted by the district courts gave judges the discretion to grant a presumption of authenticity and accuracy to the government if it was “necessary to alleviate an undue burden presented by the

62. Presumptions of accuracy and authenticity, though often raised together, are distinct in important ways. Authenticity governs basic questions about a document itself, e.g., “Is it actually an intelligence report?” This question has nothing to do with the weight the factfinder ought to ascribe to it, but rather relates simply to the question of whether it should be admissible at all. Accuracy, on the other hand, speaks to what weight should attach to a particular item of admitted evidence. To presume the accuracy of evidence is to presume the evidence establishes that which it is offered to prove. Rather than answering the question, “Is this an intelligence report?,” a presumption of accuracy assumes that the account of the detainee’s statements in the intelligence report is in fact an accurate rendition of what the detainee actually said.

63. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (“Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (“[E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. . . . [For example,] the Constitution would not be offended by a presumption in favor of the government’s evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided.”).

64. Wittes et al., *supra* note 11, at 49.

65. See, e.g., *Al-Bihani*, 590 F.3d at 880; *Parhat v. Gates*, 532 F.3d 834, 847-49 (D.C. Cir. 2008).

66. *Latif v. Obama*, 666 F.3d 746, 774-75 (D.C. Cir. 2011) (Tatel, J., dissenting).

67. *Id.* at 751, 751 n.2, 755 (majority opinion).

particular habeas corpus proceeding.”⁶⁸ Since then, the government has asked for a presumption of accuracy and authenticity in almost every case.⁶⁹ It is difficult to find fault with a presumption of authenticity in these cases, as the government has generally proffered evidence that would have been admissible anyway under the Federal Rules of Evidence.⁷⁰ Therefore, government requests for a presumption of authenticity are almost uniformly granted.⁷¹

The D.C. Circuit did not grant the government’s evidence a presumption of accuracy, however, until *Latif v. Obama* in October 2011.⁷² Prior to *Latif*, the district courts had refused to grant such a presumption, calling the government’s information unreliable because it often “resulted from harsh interrogation techniques, multiple levels of hearsay, or unknown sources.”⁷³ Government evidence has repeatedly been shown to suffer from serious accuracy problems:

- In *Ahmed v. Obama*, the government admitted that two detainees were given the same identification number, creating “confusion” over which one was actually being referred to in the government’s intelligence report.⁷⁴
- In *Al Mutairi v. United States*, the district judge noted that “the Government believed for over three years that Al Mutairi manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report.”⁷⁵

68. *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241, at *3 (D.D.C. Nov. 6, 2008) (“The Merits Judge may accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner’s detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the particular habeas corpus proceeding.”).

69. *See, e.g.*, Notice of Filing of Motion to Admit Hearsay Evidence with a Presumption of Accuracy and Authenticity at 1, *Al-Zarnouqi v. Obama*, No. 06-01767, 2012 WL 5296112 (D.D.C. Oct. 25, 2012). Substantively identical motions were made in *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011), *aff’d*, 684 F.3d 1298 (D.C. Cir. 2012) and *Hatim v. Obama*, 677 F. Supp. 2d 1 (D.D.C. 2009), *vacated*, *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011).

70. *See, e.g.*, *Ahmed v. Obama*, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (citing FED. R. EVID. 803(6)).

71. *See, e.g.*, *Alsabri*, 764 F. Supp. 2d at 66 (“The court held that although the government’s evidence would, in appropriate circumstances, be afforded a presumption of authenticity, it was not entitled to a presumption of accuracy.”).

72. 666 F.3d at 752.

73. *Id.* at 751.

74. 613 F. Supp. 2d at 61-62.

75. 644 F. Supp. 2d 78, 84 (D.D.C. 2009).

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- In *Al Rabiah v. United States*, the district judge found that “the record contains two reports written about *the same interrogation*” with discrepancies the government “did not address” or attempt “to reconcile.”⁷⁶
- In *Al Odah v. United States*, the government admitted “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.”⁷⁷

Nonetheless, in *Latif*, Judge Brown held that the presumption of accuracy is founded “on inter-branch and inter-governmental comity,” reasoning that “[b]oth the Constitution and common sense support judicial modesty when assessing the executive’s authority to detain prisoners during wartime, for it is an area in which the judiciary has the least competence and the smallest constitutional footprint.”⁷⁸ At its core, Judge Brown’s argument is that an executive branch already trusted to effectively prosecute a war overseas under conditions of extreme uncertainty and risk should be an executive branch the courts trust to turn over accurate evidence.

But Judge Brown’s emphasis on comity and deference is misplaced. First, it seems to flatly contradict the very rationale underlying *Boumediene*: that the judiciary should subject executive detention to judicial scrutiny. Second, deciding disputed questions of fact is the quintessential judicial function; it is hard to think of a task for which the judiciary is *more* competent. Indeed, in *Latif* itself, the District Court found, after carefully weighing the evidence, the government’s report unreliable.⁷⁹ Therefore, the effect of the presumption in *Latif* was to require a judge to presume the accuracy of a piece of evidence he had already concluded was inaccurate.⁸⁰

A presumption of accuracy also tips the balance in favor of the government in disputes over questions of fact that hinge on documentary precision. In a pre-*Latif* case, the petitioner, Al-Nahdi, argued that there were mistranslations at the Administrative Review Board proceeding. Al-Nahdi argued the proceedings made it appear that his voluntary departure from the Al Farouq training camp was the “result of orders handed down by al-Qaida leadership.”⁸¹ Since

76. 658 F. Supp. 2d 11, 18 (D.D.C. 2009).

77. 648 F. Supp. 2d 1, 6 (D.D.C. 2009).

78. 666 F.3d at 752.

79. *Id.*

80. *See id.* at 770-71 (“[T]he court undertakes a wholesale revision of the district court’s careful fact findings.”).

81. *Al-Adahi v. Obama*, 692 F. Supp. 2d 85, 99 (D.D.C. 2010).

following orders from al-Qaeda is grounds for detention,⁸² Al-Nahdi understandably had reason to dispute the report's accuracy. But the court rejected Al-Nahdi's arguments on the grounds that they were "self-serving," "rest[ed] on pure speculation," and were supported by "no facts."⁸³

But all of the reasons given by the Court of Appeals for rejecting Al-Nahdi's arguments would seem to apply to any attempt, by any detainee, to rebut a government intelligence or interrogation report. Since very few detainees are likely to be able to gather any extrinsic evidence to corroborate their exculpatory assertions, any dispute over the accuracy of such a report is destined to look like a "self-serving," "speculati[ve]," and unsupported attempt to retract a statement against interest or undercut adverse testimony.⁸⁴ Indeed, given how prejudicial an admission of guilt is—by definition—it would seem all but impossible for a detainee to rebut it once it is presumed accurate. The functional irrefutability of government reports and records is particularly important because the government's cases ordinarily hinge on them.⁸⁵

The presumption of accuracy stands to impact the substantive evidentiary standard so disproportionately that *Latif* drew the first dissent issued by a judge on the D.C. Circuit in the post-*Boumediene* habeas context. At least one defender of the D.C. Circuit's work in crafting the procedural and evidentiary rules has argued that the Court of Appeals' decisions have "been impressively unanimous" and that "[t]his unanimity gave an impressively institutional flavor to the court's work."⁸⁶ But even this defender readily admitted that *Latif* "end[ed] that streak with a bang."⁸⁷

Judge David S. Tatel's forty-five page dissent in *Latif* was the first open acknowledgment by a judge on the D.C. Circuit that the rules of evidence have a significant impact on the substantive evidentiary standard,⁸⁸ that many of the

82. *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) ("To be sure, demonstrating that someone is part of al Qaeda's command structure is sufficient to show that person is part of al Qaeda.").

83. *Al-Adahi*, 692 F. Supp. 2d at 99.

84. *Id.*; see, e.g., *Sliti v. Bush*, 592 F. Supp. 2d 46, 50 (D.D.C. 2008) ("Petitioner Sliti, not surprisingly, disagrees with these various allegations."); *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28 (D.D.C. 2008), *aff'd*, *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) ("Petitioner, not surprisingly, disagrees.").

85. See, e.g., *Latif*, 666 F.3d at 777.

86. Benjamin Wittes, *Thoughts on Latif #5—Of En Bancs and Cert Grants*, LAWFARE (Nov. 13, 2011, 12:19 PM), <http://www.lawfareblog.com/2011/11/thoughts-on-latif-5-of-en-bancs-and-cert-grants>.

87. *Id.*

88. 666 F.3d at 784-87 (Tatel, J., dissenting) (explaining the ways in which evidentiary rules impact the substantive evidentiary standard and questioning several of the D.C. Circuit's settled evidentiary presumptions and approaches).

evidentiary rules could not be justified as actually showing that a detainee was more likely to be detainable than not,⁸⁹ and that the presumption in *Latif* was so overwhelmingly favorable to the government that it entirely eviscerated *Boumediene*'s judicial check.⁹⁰ As Judge Tatel concluded, the D.C. Circuit's new rule presuming all government evidence is accurate "comes perilously close to suggesting that whatever the government says must be treated as true."⁹¹

C. *Why the Elimination of All Hearsay and Corroboration Requirements Weakens Boumediene*

In their inherent likelihood for error, their interaction with other evidentiary rules, and their effective irrefutability, the D.C. Circuit's admissibility rules significantly reduce the evidentiary standard necessary to prove the lawfulness of detention—so much so that it is difficult to argue that they continue to grant detainees a "meaningful opportunity" to contest the factual basis of their detention.⁹² There are at least four reasons why both hearsay's admissibility and a record's accuracy should be independently assessed and tested.

First, and most importantly, excluding hearsay and requiring that records be corroborated are both rules by their very nature designed to enhance the accuracy of the underlying factual inquiry. This is no less true when judges are factfinders. Judges and jurors alike are likely to overestimate their ability to discount evidence from unreliable sources.⁹³ And few judges will ever face trials so

89. *Id.*

90. *Id.* at 779 ("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.").

91. *Id.* (quoting *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)).

92. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

93. See Schauer, *supra* note 23, at 190 ("[P]rofessionals typically overestimate the power of their own professional skills, the reliability of their own judgments, and the strength of their ability to assess a particular situation. If we can extrapolate from this and related research, we might have reason to believe that judges will typically overestimate their own ability to assess facts, their capacity to rise above the cognitive failings of lesser mortals, and thus their own lack of need for the kinds of exclusions (or, in theory, inclusions or weight-increasers) that are represented by many of the rules of evidence."); Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. PENNUMBRA 1, 9 (2007) ("In the various lists comparing and contrasting the strengths and weakness of judges, jurors, and juries, one important factor is often forgotten: all are human. From earliest infancy, the human cognitive system is a sophisticated tool for detecting patterns, seeing relations, imagining causes, and creating coherent stories (even if sometimes they do not exist). . . . It is difficult to envision how a mere desire, or an admonition, to stop thinking like a human being could be effective.").

inundated with potentially unreliable and uncorroborable evidence. This problem with lowering the admissibility requirements is compounded by the virtual impossibility of accurately assessing the credibility of much of the uncorroborated, ordinarily excluded evidence that the government seeks to use to prove detainability. It is quite simply impossible for anyone to independently assess the credibility of an intelligence or interrogation report from an unknown source.⁹⁴ When such documents are admitted into evidence, they seem more likely to mislead and distract the factfinder than to enhance the accuracy of his or her conclusion.⁹⁵ Thus, to the extent that unreliable uncorroborated evidence is considered because of the lack of admissibility rules, it lowers the evidentiary standard and elevates the risk that irrelevant evidence will be given undue weight.

Second, the removal of any threat that evidence will be excluded creates the wrong incentives. Because nothing can be excluded, the evidentiary rules encourage the generation of overwhelming volumes of government evidence even if the evidence is inaccurate and imbued with a strong tendency to mislead. After all, as long as it remains *possible* that the judge might find a stray article of evidence relevant, there is little reason not to introduce it into the record—especially if that sliver of evidence cannot be rebutted. Indeed, second- and third-hand hearsay have formed an integral component of the analysis in some of the D.C. Circuit’s most important cases.⁹⁶ Rather than encourage the careful gathering, preservation, and presentation of evidence, removing all barriers to admissibility encourages the government to generate large amounts of evidence, much of it of low quality.⁹⁷

Third, both of the previously mentioned concerns are amplified by the D.C. Circuit’s use of mosaic analysis—discussed in Part II—which calls upon judges to consider the credibility and probity of each individual piece of evidence in the context of the record as a whole. Because the record can be inundated with a

94. See *Latif*, 666 F.3d at 777 (Tatel, J., dissenting) (“[I]nterrogation 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.” (quoting *Odah v. Obama*, No. 06-cv-1668, slip op. at 3 (D.D.C. May 6, 2010))). This fact was also acknowledged in *Parhat*, 532 F.3d at 848-50.

95. Cf. FED. R. EVID. 403.

96. See *Al-Adahi v. Obama*, No. 05-280(GK), 2009 WL 2584685, at *15 (D.D.C. Aug. 21, 2009) (“[T]he Government appears to pin its associational evidence that Petitioner was captured while traveling in the company of Taliban fighters on a statement made by Al-Adahi that ‘[a]fter his capture, [he] heard that there were members of the Taliban on the bus.’”).

97. See *Latif*, 666 F.3d at 773 (Tatel, J., dissenting) (“To be sure, the government in this case has produced a declaration stating [redacted] 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.”).

large amount of evidence of slight credibility, mosaic analysis combined with the admissibility rules can lead different factfinders to draw vastly different conclusions about the same evidence.

Fourth, all of these issues are compounded by the D.C. Circuit’s system of appellate review.⁹⁸ Appellate review of district court habeas decisions blurs the line between reexamining evidentiary credibility and reexamining sufficiency.⁹⁹ The Court of Appeals reviews court conclusions about the probity of the evidence in the record *de novo*, but must not overturn a district court’s determination of evidentiary credibility except in cases of clear error.¹⁰⁰ Yet, when the Court of Appeals reviews a District Court decision, it has no way of knowing whether otherwise highly probative evidence was ignored because it simply was not credible or because the district court judge failed to weigh its probity properly. Thus, the Court of Appeals has criticized district court decisions for “not addressing” highly probative evidence that, when closely examined, was determined by the district court not to be credible.¹⁰¹ This fuzzy appellate review can—and has—led the Court of Appeals to treat as entirely true items of evidence that the District Court thought to be almost completely unconvincing.¹⁰²

98. *Id.* at 770-71, 779-80 (arguing that the court in *Latif* bootstrapped a pretended district court failure to properly weigh the evidence in the *whole* record as an excuse to review the District Court’s findings of evidentiary credibility for individual items of evidence *de novo*).

99. *See infra* Part II.

100. *Esmail v. Obama*, 639 F.3d 1075, 1076 (D.C. Cir. 2011) (noting that for “habeas appeals involving Guantánamo Bay detainees, we review district court fact findings for clear error, and we review the ultimate issue of whether the detainee was ‘part of al Qaeda *de novo*’ (emphasis removed) (citing *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010))). Functionally, this means that the Court of Appeals reviews the record as a whole *de novo* because “[d]etermining whether a detainee was ‘part of’ an associated force is a mixed question of law and fact.” *Barhoumi*, 609 F.3d at 423.

101. *Al-Adahi v. Obama*, 613 F.3d 1102, 1106 (D.C. Cir. 2010) (“That Al-Adahi was an al-Qaida recruit is also supported by a witness’s statement—not addressed by the district court—that Al-Adahi was a [redacted].”); *see id.* at 1107 (“Al-Adahi’s story was contradicted by the undisputed evidence that in 2001 Usama bin Laden, who knew he was a military target of the United States, had gone into hiding under tight security” (internal quotation marks omitted)); *id.* at 1108 (“The district court seemed to think it important to determine Al-Adahi’s motive for attending the al-Qaida training camp. We do not understand why.”).

102. *Compare, e.g., Abdah v. Obama*, 708 F. Supp. 2d 9, 21 (D.D.C. 2010) (“The allegation that Uthman was an amir at an Al Qaeda guesthouse is not as easily dismissed as the training camp allegation. Because Belmar’s statement is not a definitive identification, it is not strong evidence of Uthman’s presence at such a guesthouse. But it is not so unreliable that the Court disregards it entirely.”), *with Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011), *rev’g Abdah*, 708 F. Supp.

These four complications with eliminating hearsay and corroboration requirements each contribute to a sense that detainees do not receive the “meaningful opportunity” to contest their detention that *Boumediene* promised. Moreover, reintroducing basic hearsay and corroboration requirements would seem to improve the accuracy of the fact-finding process, and create better incentives to introduce higher-quality evidence while drawing a clear line between appellate review of district court decisions that exclude evidence because it is “not credible” rather than “not probative.” Finally, and most importantly, it seems almost certain that the *Boumediene* Court did not anticipate that the D.C. Circuit would eliminate all such hearsay and corroboration limitations. The Supreme Court had conceived of “meaningful review” as providing a substantially more protective evidentiary framework than has actually been developed.¹⁰³ To comply with *Boumediene*, the evidentiary rules should reintroduce rudimentary hearsay and corroboration requirements, and thereby categorically exclude those kinds of evidence most likely to mislead.

II. MOSAIC THEORY

Mosaic theory is the name given by courts, scholars, and commentators to the D.C. Circuit’s unique approach to judging evidence in post-*Boumediene* habeas cases, a process that involves piecing together evidence from a variety of disparate sources of varying credibility and probity to, paradoxically, determine the credibility and probity of those very pieces of evidence.¹⁰⁴ In combination

2d 9 (“[O]nce he reached Afghanistan, Uthman was seen at an al Qaeda guesthouse.”).

103. See Vladeck, *supra* note 15, at 1467 (“If anything, a closer read of *Boumediene* suggests that . . . the Guantánamo detainees should receive more process than those who seek to use habeas collaterally to attack state-court convictions since their detention does not result from convictions obtained in a court of record, in which ‘considerable deference is owed to the court that ordered confinement.’” (emphasis removed) (quoting *Boumediene v. Bush*, 553 U.S. 723, 782 (2008))).
104. Vladeck, *supra* note 15, at 1472. Mosaic analysis arises from the D.C. Circuit’s admonition to the District Court that it should not “weigh each piece of evidence in isolation, but consider all of the evidence taken as a whole.” *Awad v. Obama*, 608 F.3d at 6-7, 10; see also *Barhoumi*, 609 F.3d at 422-24; *Odah v. United States*, 611 F.3d 8, 13-15 (D.C. Cir. 2010). This method of judging evidence differs in significant and important respects from the ordinary process of assessing evidentiary credibility and probity; it can transform a piece of evidence that is not reliable on its own into reliable evidence by virtue of how it fits together with other pieces of evidence. See *Al-Adahi*, 613 F.3d at 1105-06 (“The government is right: the district court wrongly required each piece of the government’s evidence to bear weight without regard to all (or indeed any) other evidence in the case.” (internal quotation marks omitted)); cf. Wittes et al., *supra* note 11, at 109 (“[*Al-Adahi*]’s key contribution was in changing the nature of the evidentiary approach in general, by in-

with the D.C. Circuit’s lax admissibility rules, mosaic analysis can lead to significant mistakes in judging evidence.

In some ways, mosaic analysis seems intuitive and obvious. An individual piece of evidence is only a single tile: whether it points toward or away from detention depends in some sense on what the other tiles in the mosaic look like. But mosaic analysis actually differs significantly from ordinary evidentiary weighing because it allows one item of evidence to bolster the credibility of another item, an approach that carries with it significant dangers.¹⁰⁵ Mosaic analysis creates the possibility that two pieces of unreliable evidence might falsely corroborate each other.¹⁰⁶ In combination with the D.C. Circuit’s lax admissibility rules—which often result in the introduction of evidence deserving little or no weight—mosaic analysis can lead courts to deny habeas petitions solely on evidence of which no individual item is individually credible.

For these reasons, the theory has been called “wildly exploitable”¹⁰⁷ and “prone to misuse.”¹⁰⁸ Because so many different plausible mosaics can be constructed out of the same tiles, the theory invites manipulation and inconsistent application.¹⁰⁹ Given these concerns with consistency and reliability, the fact

sisting that courts should view each allegation in the context of the other probative evidence on record.”).

105. This is because human beings often improperly weigh endogeneity and base-rate information in making conclusions based on conditional probability. *See, e.g.*, Maya Bar-Hillel, *The Base-Rate Fallacy in Probability Judgments*, 44 *ACTA PSYCHOLOGICA* 211, 211-33 (1980); Robert M. Hamm & Michelle A. Miller, *Interpretation of Conditional Probabilities in Probabilistic Inference Word Problems*, 1983 *INST. COGNITIVE SCI.* 1-7, 13-26, <http://ics.colorado.edu/techpubs/pdf/88-15.pdf>; Robert M. Hamm, *People Misinterpret Conditional Probabilities*, *U.S. ARMY RES. INST. FOR THE BEHAV. & SOC. SCI.* 1-16 (Jan. 1995), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA293527>.
106. Indeed, as Judge Walton aptly noted, a rumor is only as reliable as its source—no matter how many people testify to having heard it. *Bostan v. Obama*, 662 F. Supp. 2d 1, 8 (D.D.C. 2009) (“Ultimately, the government seems to suggest that because so much of its hearsay evidence is (in its view) internally consistent, the contents of all of its proffered hearsay evidence must be true, rather in the same way that a rumor must be true if enough people repeat it. But even the most widespread rumors are often inaccurate in part if not in whole. How, then, is the Court to know which parts are correct and which are not? It does not and will never know, which is why it cannot assess the reliability of hearsay on the basis of other unreliable hearsay that purportedly corroborates it.”).
107. David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628, 675 (2005).
108. *Id.* at 679.
109. This is evidenced by the fact that the Court of Appeals and the District Court has disagreed in six of the fourteen cases in which the method has been reviewed by both the District Court and the Court of Appeals. *See Latif v. Obama*, 666 F.3d 746

that the D.C. Circuit reviews the District Court's applications of the mosaic theory de novo raises additional concerns. By wading so deeply into the district courts' factfinding, the Court of Appeals effectively grants the government a second chance.

A. *Development of the Mosaic Theory*

Soon after *Boumediene*, the government began arguing for the application of an early version of mosaic theory. The government requested that judges synthesize snippets of statements by the habeas petitioner and other detainees drawn from multiple interrogations along with intelligence reports on al-Qaeda and the region.¹¹⁰ Without explicitly adopting or rejecting the government's theory, but faced with the daunting task of piecing together hundreds of discrete pieces of often unrelated, marginally reliable evidence, the district judges proceeded through the inquiry with caution. As Judge Richard J. Leon noted in *el Gharani v. Bush*, a mosaic of tiles bearing murky images "reveals nothing" with clarity.¹¹¹

While the Court of Appeals advised the lower court to view the record as a whole as early as *Awad v. Obama*,¹¹² the delineation of the Court of Appeals' mosaic standard came in 2010 in *Al-Adahi v. Obama*¹¹³—the first case in which the Court of Appeals reversed a district court's grant of habeas corpus. After *Al-Adahi*, an unduly "atomized" view of the record would be subject to reversal de novo, without the traditional deference afforded to lower court evidentiary determinations.¹¹⁴

(D.C. Cir. 2011); *Almerferdi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011) (per curiam); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Al-Adahi*, 613 F.3d 1102.

110. See, e.g., *Al-Adahi v. Obama*, No. CIV.A 05-280(GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009); *el Gharani v. Bush*, 593 F. Supp. 2d 144, 148 (D.D.C. 2009).

111. *el Gharani*, 593 F. Supp. 2d at 149.

112. *Awad v. Obama*, 608 F.3d 1, 6-7, 10 (D.C. Cir. 2010).

113. *Al-Adahi*, 613 F.3d at 1104-06 (D.C. Cir. 2010).

114. See *Latif*, 666 F.3d at 759-60; see also *Wittes et al.*, *supra* note 11, at 112 ("The law that is emerging from the D.C. Circuit's reaction is highly favorable to the government's position and represents a dramatic change in the landscape over a relatively short period of time. . . . [T]he government can be expected to prevail under the D.C. Circuit's standards far more frequently than it would have had the district court's approach remained intact").

B. *Mosaic Theory in Practice*

Since *Al-Adahi*, it has become clear that the mosaic theory does not merely call for district courts to consider circumstantial evidence. District courts have repeatedly clashed with the Court of Appeals over just how much evidence must be credited in making a detention determination. In *Al-Adahi*,¹¹⁵ *Uthman*,¹¹⁶ *Almerfed*,¹¹⁷ and *Latif*¹¹⁸ the Court of Appeals reversed grants of habeas relief either in whole or in part because the District Court considered the evidence in an “unduly atomized” manner.¹¹⁹

The language of the Court of Appeals, both in *Al-Adahi* and in the cases following it, makes it seem as if this dispute between the courts is merely a matter of competence. In *Al-Adahi*, Judge Randolph characterized the District Court’s errors as “mundane mistakes” traceable to a “shaky grasp of the notion of conditional probability.”¹²⁰ In *Uthman*, Judge Kavanaugh continued this approach, making it seem as if the district court that granted Uthman’s habeas petition had committed gross errors in weighing the evidence:

Uthman’s account piles coincidence upon coincidence upon coincidence. Here, as with the liable or guilty party in any civil or criminal case, it remains *possible* that Uthman was innocently going about his business and just happened to show up in a variety of extraordinary places—a kind of Forrest Gump in the war against al Qaeda. But Uthman’s account at best strains credulity; and the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda.¹²¹

The Court of Appeals’ rhetoric makes it sound as if the District Court judges failed to realize that in terms of the weight of the evidence, *Uthman* and *Al-Adahi* “were not close.”¹²²

But this account is implausible. The district court judges are sophisticated factfinders who understand how to weigh circumstantial evidence.¹²³ And this is

115. 613 F.3d at 1102.

116. *Uthman v. Obama*, 637 F.3d 400, 407 (D.C. Cir. 2011).

117. *Almerfed* v. Obama, 654 F.3d 1, 4 (D.C. Cir. 2011).

118. 666 F.3d at 747.

119. *Id.* at 759.

120. 613 F.3d at 1105 (quoting JOHN ALLEN PAULOS, *INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES* 63 (1988)).

121. *Uthman*, 637 F.3d at 407.

122. *Almerfed*, 654 F.3d at 4 (citing *Al-Adahi* and *Uthman* as cases in which the evidence was not even “close” to disestablishing the lawfulness of detention).

not a case in which a small contingent of maverick judges are flouting the law of the D.C. Circuit—five different district judges¹²⁴ have been reversed for failing to properly apply mosaic analysis. In addition, the D.C. Circuit has not affirmed a single district court grant of habeas relief—reversing or vacating six such decisions.¹²⁵ This remarkable record seems to indicate a discrepancy that cannot be explained away by the Court of Appeals' claim of error by the district courts.

The substance of the decisions reveals at least three phenomena. First, because of the mosaic theory's requirement that judges take into account the "evidence in the *whole* record"¹²⁶—a record that, under *Al-Bihani*,¹²⁷ includes much explicitly unreliable evidence—even faithful application of mosaic review is likely to lead to different conclusions when considered by different judges.¹²⁸ Second, the Court of Appeals has been choosing tiles and telling the District Court that *those* tiles are to be treated as especially probative even when they actually are not especially probative.¹²⁹ Third, in conducting mosaic review, the

123. The average number of years of experience of the district court judges reversed in these cases is seventeen. Four received their commissions in 1994, while Judge Henry M. Kennedy, Jr. began his service in 1997.

124. Judge Henry H. Kennedy, Jr., Judge Gladys Kessler, Judge Paul L. Friedman, Judge James Robertson, and Judge Ricardo M. Urbina.

125. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010) (Henry H. Kennedy, Jr.); *Abdah v. Obama*, No. CIV.A 04-1254 (HHK), 2010 WL 3270761 (D.D.C. Aug. 16, 2010) (Henry H. Kennedy, Jr.); *Almerfed v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010), *rev'd*, 654 F.3d 1 (D.C. Cir. 2011) (Paul L. Friedman); *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010) (James Robertson), *vacated by* 625 F.3d 745 (D.C. Cir. 2010); *Al-Adahi v. Obama*, CIV.A 05-280(GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (Gladys Kessler); *Hatim v. Obama*, 677 F. Supp. 2d 1 (D.D.C. 2009) (Ricardo M. Urbina), *vacated, sub nom. Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011).

126. *Almerfed v. Obama*, 654 F.3d at 5 ("On review, we ask whether the evidence in the *whole* record—taking into account the premise that two unreliable pieces of information may corroborate each other—establishes that a petitioner's detainability is more likely justified than not (under *de novo* review). As we noted, the court is never called upon to decide whether a petitioner definitively meets the detention standard—instead, it merely makes a comparative judgment about the evidence." (citation omitted)).

127. *See id.*

128. *Cf. Wittes et al.*, *supra* note 11, at 120 (noting that the Court of Appeals' decisions seem to indicate that "it is insufficient for a district judge to merely *say* that he is considering the mosaic as a whole, when in reality he is not truly doing so").

129. For an especially thoughtful rebuke of the D.C. Circuit Court's insistence that district judges give great weight to whether detainees traveled "known" al-Qaeda routes, see *Latif v. Obama*, 666 F.3d 746, 785 (D.C. Cir. 2011) (Tatel, J., dissenting) ("[T]he government argues that because Latif's admitted route is consistent with that of Taliban soldiers [redacted] it is a helpful piece in the puzzle, bolstering its claim that the Report's [redacted] are accurate. Fair enough, but how helpful? If

Court of Appeals has repeatedly and readily credited evidence that was deemed unreliable by the District Court, upsetting the District Court’s careful balancing.

Al-Adahi itself illustrates well the dangers of mosaic analysis. In the course of reconstructing the evidentiary mosaic, Judge Randolph ignored the careful balancing of credibility and probity undertaken by District Judge Kessler in the original proceedings. In granting Al-Adahi’s petition, Judge Kessler expressed concern about the credibility of the government’s meager evidence.¹³⁰ But Judge Randolph characterized the same evidence quite differently. For each of the facts in the record, Judge Randolph ignored Judge Kessler’s decision not to credit the government’s weak evidence and acted instead as if she had merely overlooked it.¹³¹ The only evidence that Al-Adahi was captured on a bus with Taliban fighters was his own statements that he “heard” that there were Taliban fighters from some unidentified source.¹³² Judge Randolph concluded that Al-

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.”).

130. Judge Kessler wrote, “[T]he Government appears to pin its associational evidence that Petitioner was captured while traveling in the company of Taliban fighters on a statement made by Al-Adahi that ‘[a]fter his capture, [he] *heard* that there were members of the Taliban on the bus.’” *Al-Adahi v. Obama*, No. CIV.A 05-280 (GK), 2009 WL 2584685, at *15 (D.D.C. Aug. 21, 2009). In regard to an injury to his arm and leg that Al-Adahi said was due to a motorcycle accident, for example, Judge Kessler wrote that “it is correct that some minor details in the motorcycle story are not described identically in each interrogation” but “the Government provides only speculation to resolve that doubt.” *Id.* In another example, Judge Kessler concluded that that the government tendered no evidence on al-Adahi’s travel routes, only “allegation[s]” that his path tracked major battles. *Id.* Summing up, Judge Kessler wrote, “[Al-Adahi’s] conduct after training at Al Farouq does not demonstrate that . . . [he] took any affirmative steps to align himself with al-Qaida. The record shows that he returned to [his brother-in-law’s] house for a few weeks, attempted to flee Kandahar, injured himself and received treatment, and then again made efforts to escape Afghanistan. *Id.*”
131. This is contrary, however, to the general rule that “[w]hen the district court makes a finding of fact, it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge did not make a series of detailed statements to the effect that he or she did not credit the testimony or part of the testimony of each witness.” 2A Fed. Proc., L. Ed. § 3:812.
132. Judge Kessler also wrote in a footnote that “[i]n another recounting of his story” in the Joint Evidence, Al-Adahi was arrested in a “large, modern city, with a large

Adahi's statement should have been treated as conclusive evidence that he *was* captured among Taliban fighters because it fit cleanly into the mosaic of evidence that the government had presented showing Al-Adahi to be an al-Qaeda fighter.

Uthman, one of a trio of cases following *Al-Adahi* where the D.C. Circuit reversed a district court decision ostensibly on the basis of a misapplication of mosaic review, is another example of the problems with mosaic analysis. In *Uthman*, the District Court was aware that the Court of Appeals had directed it to weigh some pieces of evidence more than others, but ultimately came to its own conclusion about what weight to afford those tiles given the particular circumstances surrounding the detainee.¹³³ For example, although the Court of Appeals had directed lower courts to treat attendance at a guesthouse as "overwhelming" evidence of membership in al-Qaeda, the District Court refused to treat the evidence as probative because other evidence in the record revealed that it was common for young Muslim men to stay in guesthouses when traveling for humanitarian missions in Afghanistan and elsewhere.¹³⁴ The District Court also seemed aware of the Court of Appeals' directive that lower courts treat travel along routes used by al-Qaeda fighters as highly probative, but nevertheless showed skepticism that such evidence actually was probative at all.¹³⁵

In deciding the *Uthman* appeal, Judge Kavanaugh re-weighted the tiles of the evidentiary mosaic, brought in some tiles that the District Court had explicitly chosen not to treat as credible, and fashioned a new mosaic to establish that Uthman was a member of al-Qaeda. Using much of the same evidence as the District Judge, for instance, Judge Kavanaugh determined that Uthman had

market area" several hours after departing the bus and he had "his passport with him." *Al-Adahi*, 2009 WL 2584685, at *15 n.21. To quote Judge Kessler: "This inconsistency simply cannot be resolved. The underlying fact of his arrest by the Pakistani military, however, is not in dispute." *Id.*

133. On the question of whether Uthman actually appeared at guesthouses at all, the evidence was clearly very close. Although the judge ultimately chose to "credit" the evidence, the fact that the evidence was so close clearly influenced the degree to which the court weighed the evidence in the final calculation. *See Abdah v. Obama*, 708 F. Supp. 2d 9, 21 (D.D.C. 2010) ("The allegation that Uthman was an amir at an Al Qaeda guesthouse is not as easily dismissed as the training camp allegation. Because Belmar's statement is not a definitive identification, it is not strong evidence of Uthman's presence at such a guesthouse. But it is not so unreliable that the Court disregards it entirely.").

134. *Id.* at 23 n.17 ("In addition, there is evidence in the record, albeit not specific to Al Qaeda guesthouses, that '[t]he fact that a young Yemeni stays at 'guest houses' while in . . . Afghanistan does not itself imply anything menacing or illicit' because it is common for such a man traveling abroad to seek economical, safe accommodations.").

135. *Id.* at 22-23.

lied to interrogators.¹³⁶ In an additional example in which the Court of Appeals' assumptions diverged from the District Court, Judge Kavanaugh also noted that Uthman was captured with two admitted or alleged al-Qaeda members. But Judge Kavanaugh saves for a footnote that Uthman was captured in a group of thirty men overall, whose detention status is passed over in silence.¹³⁷ Judge Kavanaugh also chided the District Court for failing to respect Circuit precedent holding that attendance at a guesthouse is “powerful—indeed ‘overwhelming’—evidence’ that an individual is part of al Qaeda”¹³⁸ even though that presumption was pulled from thin air by the court in *Al-Bihani*.¹³⁹ The divergent treatment of the guesthouse evidence is especially difficult to understand because the district court was skeptical that Uthman even attended any guesthouses at all,¹⁴⁰ while Judge Kavanaugh acted as if Uthman’s stay at a guesthouse was a virtual certainty.¹⁴¹

Thus, the tiles in *Uthman*, adjudged and carefully weighed by the lower court, were reshuffled and recalibrated in constructing a new account of Uthman’s likely membership in al-Qaeda. Such difference in interpretation is not in and of itself problematic. The true fault in mosaic theory is that it is “wildly exploitable,”¹⁴² and that so many different mosaics can be constructed such that it is nearly impossible to determine which of many equally probable mosaics is true.¹⁴³ At times, the D.C. Circuit’s brand of mosaic review can come across as

136. *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011)..It is not clear how or why Judge Kavanaugh concluded that Uthman lied about the source, rather than misspoke or misremembered, especially given that the District Court at no point concluded that Uthman ever intentionally misled anyone. *See infra* Section III.C (detailing further problems with the false exculpatory statement presumption).

137. *See id.* at 402 & n.1 (D.C. Cir. 2011). The government apparently kept Uthman in custody because it believed that he was a bodyguard for Osama bin Laden, a fact that the District Court refused to concede. *See Abdah*, 708 F. Supp. at 14-19.

138. *Uthman*. 637 F.3d at 406.

139. *See infra* Section III.A.

140. *Abdah*, 708 F. Supp. 2d at 21. The District Court released two versions of *Uthman*, with two vastly different presentations of “facts.” A number of scholars have commented on what is actually a “fact” in *Uthman*. *See, e.g.*, Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality*, PROPUBLICA (Apr. 25, 2011), <http://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality> (contrasting the original opinion released by the District Court in *Uthman* with an opinion released after the original was withdrawn for redaction, suggesting that the government redacted portions of the opinion which highlighted the government’s reliance on unbelievable witnesses).

141. *See, e.g., Uthman*, 637 F.3d at 406 (D.C. Cir. 2011) (“[O]nce he reached Afghanistan, Uthman was seen at an al Qaeda guesthouse.”).

142. Pozen, *supra* note 107, at 675.

143. *Id.* at 672.

little more than a way of using paper-thin evidence to justify detention post hoc, a result that can be damaging to the legitimacy of *Boumediene* review and to America's prestige and credibility abroad.

C. *How Mosaic Theory Is Problematic*

The risk of error that arises out of the mosaic theory's ability to rehabilitate unreliable evidence is simple to explain.¹⁴⁴ An individual item of evidence may not be enough on its own to meet the preponderance standard. If a second item of evidence on its own is also not enough to meet the preponderance standard, mosaic theory holds that the two items of evidence taken together might nevertheless be more probative than either standing alone. While it is certainly *possible* that they do in fact corroborate each other, it is also likely that they are no more probative together than each was individually.

This can be illustrated effectively by way of example. Imagine the government seeks to introduce a statement against a habeas petitioner that another detainee "overheard" conversations at Guantánamo Bay about the petitioner's travels in Afghanistan.¹⁴⁵ This statement, unverifiable hearsay on its own, might be insufficient to meet the preponderance standard. But what if a second detainee testifies to the same effect but later recants, arguing that he implicated the petitioner only because "he feared further torture?"¹⁴⁶ Mosaic analysis counsels that *both* statements are more likely to be true because there are now two data points, rather than one, pointing against the petitioner's release, and these two data points corroborate each other.¹⁴⁷

But there are multiple reasons to doubt that the reliability of either of these statements is enhanced by the existence of the other. Perhaps none of the detainees at Guantánamo should be trusted when they inculcate other detainees because of the harsh interrogations to which they have been subjected. It is easy to see that if the government were sufficiently persuasive in its questioning, it could obtain statements from all of the detainees at Guantánamo implicating other detainees. Moreover, it could be the case that the detainee who testified that he "overheard" conversations by other detainees merely overheard the *other* detainee whose testimony the government now seeks to enter into evidence to corroborate his story. In that case, both statements reflect the sentiments of the same witness and therefore do not enhance the evidence's reliability at all.

Ordinarily, when each individual item of evidence a party seeks to enter is itself unreliable, that party is not permitted to corroborate it with other unrelia-

144. See Vladeck, *supra* note 15, at 1472 n.112.

145. The facts of this hypothetical are inspired by *Ahmed v. Obama*, 613 F. Supp. 2d 51, 57 (D.D.C. 2009).

146. *Id.* at 58.

147. See Vladeck, *supra* note 15, at 1472 n.112.

ble evidence.¹⁴⁸ But mosaic analysis alters the ordinary approach, requiring that courts attempt to patch together unreliable evidence in such a way that individual pieces rehabilitate each other in forming a coherent whole. This elevates the risk of error enormously, and would seem to be flatly inconsistent with the Circuit's stated fidelity to the preponderance standard.

The likelihood of error is further multiplied, however, by the D.C. Circuit's use of *de novo* review to rectify perceived failures in applying the mosaic theory properly. Generally, it is the trial court's task to resolve or interpret conflicting or ambiguous testimony, judge credibility, and weigh evidence.¹⁴⁹ The reasons for the rule are threefold. First, district judges are in a better position to evaluate the evidence than appellate judges because the former see the live testimony and engage with the evidence in the context of the whole trial,¹⁵⁰ and because they are experts at assessing and weighing evidence. Second, the costs, both to the parties and to the courts, are thought to outweigh the benefits of having a second proceeding that renders the first moot.¹⁵¹ Third, in the context of a proceeding in which the government seeks a restraint of liberty, it is problematic to grant the government a second bite at the apple to prove the guilt of the accused.¹⁵² In addition, the government has the unfair advantage of using what it learned in the first proceeding to perfect its strategy in the second.

Thus, in addition to importing mosaic theory's inherent complexity and capacity to mislead, the D.C. Circuit's new evidence-intensive appellate review multiplies the risk of erroneous detention both by calling on the appeals court to judge evidentiary credibility outside the context of the trial, and by granting the government a chance to hone its arguments and relitigate the case on appeal.

To rectify the problems with mosaic analysis, the Court of Appeals should reintroduce clear lines between assessing evidentiary credibility and evidentiary probity. Evidence that is unreliable should not be permitted to rehabilitate other unreliable evidence but should be independently assessed. Functionally, this will make it more difficult for the government to prove that detainees are detainable—but only because it will return the evidentiary standard to preponderance-of-the-evidence, the very standard that the Court of Appeals already purports to apply.

148. See *Al-Bihani v. Obama*, 662 F. Supp. 2d 9, 20 n.11 (D.D.C. 2009).

149. 2A Fed. Proc., L. Ed. § 3:812.

150. See *Concrete Pipe & Prods of Calif., Inc. v. Constr. Laborers Pension Trust for S. Calif.*, 508 U.S. 602, 623 (1993).

151. See *id.*

152. Cf. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .”).

III. IRREFUTABLE PRESUMPTIONS

In the early habeas cases following *Boumediene*, the D.C. Circuit approached the legal determination of whether a particular detainee was an unlawful enemy combatant by holistically evaluating the evidence proffered by each party for its “authenticity, reliability, and relevance.”¹⁵³ But in the four years since the Case Management Order’s adoption, the Circuit has almost wholly abandoned its practice of exercising this individualized inquiry.¹⁵⁴ The D.C. Circuit initially considered several factors that weighed heavily towards a detainee meeting the standard of “unlawful enemy combatant.”¹⁵⁵ That Court has now articulated four evidentiary rules that operate as nearly irrefutable presumptions of membership in al-Qaeda, the Taliban, or its associated forces. The Court of Appeals has held that visiting an al-Qaeda affiliated guesthouse or attending an al-Qaeda affiliated training camp, being captured without a passport, or providing a false exculpatory statement each provide sufficient grounds for a court to conclude that a detainee was an unlawful enemy combatant. Moreover, the Court of Appeals has indicated that this evidence of membership cannot be rebutted by explanation or mitigating circumstances.

Given the number of habeas petitions that the Court of Appeals has heard, one might chalk up these rules to judicial experience. Perhaps some facts have come to be recognized as strongly associated with being an unlawful enemy combatant. But the district courts—which have considered every habeas petition and from which the Case Management Order was developed—have resisted the rules to varying degrees. While some District Court judges have dialed back the irrefutable presumptions to mere factors to consider in their overarch-

153. See, e.g., *Al Odah v. United States*, 648 F. Supp. 2d 1, 6 (D.D.C. 2009).

154. One can, of course, argue that irrefutable presumptions are the inevitable product of experience, and that they serve to reduce the cost and possibly the risk of error in judicial factfinding. But for reasons explained earlier, the presumptions created by the D.C. Circuit do not seem to be of this kind.

155. See *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (“[T]raveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda.”). But see *Abdah v. Obama*, 708 F. Supp. 2d 9, 22 (D.D.C. 2010) (“[P]roceeding on the same path as Al Qaeda members is not evidence of participation in Al Qaeda.”).

ing evidentiary analysis,¹⁵⁶ at least one judge has gone further and refused to apply the Court of Appeals “dicta” altogether.¹⁵⁷

There are, however, three critical reasons why these irrefutable presumptions are unlikely to reflect judicial experience as much as a desire to give the executive clear guidelines for the gathering of minimal evidence to support a finding of lawful detention. First, an irrefutable presumption—by virtue of its irrefutability—leaves the petitioner no “ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant,” a requirement *Boumediene* imposed upon the habeas court.¹⁵⁸ The Court of Appeals has repeatedly held that when evidence shows a petitioner to meet one of the four presumptions, he cannot explain the evidence away by showing that he was simply in the wrong place at the wrong time.¹⁵⁹ Second, presumptions can distort the underlying credibility inquiry by vastly raising the stakes of a finding that a detainee did or did not engage in the presumptively detainable activity. When the evidence that a detainee actually visited an al-Qaeda guesthouse is close, for example, the gravitational pull of the presumption’s binary effect may tempt judges to find the evidence credible.¹⁶⁰ Third, and most importantly, these presumptions are not nearly as probative of membership in al-Qaeda as their overwhelming weight in these proceedings implies. Although these presumptions

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156. See, e.g., *Kandari v. United States*, 744 F. Supp. 2d 11, 35 (D.D.C. 2010) (“Recent D.C. Circuit precedent counsels that the provision by a detainee of an implausible explanation for his activities in Afghanistan is a relevant consideration in these habeas proceedings given the ‘well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt.’” (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010))).
157. *Al Harbi v. Obama*, No. CIV.A. 05-02479 (HHK), 2010 WL 2398883, at *16 n.41 (D.D.C. May 13, 2010) (“The Court has explained in its previous rulings on the habeas petitions of other Guantanamo Bay detainees that this statement is dicta and for other reasons should not necessarily control the outcome of these cases. . . . Here, respondents have failed to show that Issa House was an Al Qaeda guesthouse. The Court simply will not conclude that a one-night stay at Abu Zubaydah’s house, where Mingazov was unable to communicate with most if not all other occupants, from which he was sent away shortly after his arrival, and which goes in no way to show that Mingazov was part of Al Qaeda’s command structure, meets the standard for lawful detention.” (internal citations omitted)).
158. *Boumediene v. Bush*, 553 U.S. 723, 729 (2008).
159. See, e.g., *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (disregarding the petitioner’s claim, cited by the district court among other reasons for granting habeas, that he traveled to Afghanistan “to teach the Koran”); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (reversing the district court’s determination that although al-Adahi stayed at a guesthouse and visited a training camp, there was no evidence that he acted as a trainer, fought for al-Qaeda, or provided any support to al-Qaeda).
160. See, e.g., *Almerferdi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011).

have now been found by the D.C. Circuit to be definitive on the question of membership in al-Qaeda or the Taliban—and therefore on detainability—the fact is that many people satisfying these criteria were not members of either of these organizations.

A. *Al-Qaeda Affiliated Guesthouse or Training Camp*

The Court of Appeals introduced the first two irrefutable presumptions together in *Al-Bihani v. Obama*. Relying on the 9/11 Commission Report,¹⁶¹ Judge Brown noted that evidence showing the petitioner visited an al-Qaeda guesthouse or attended an al-Qaeda training camp in Afghanistan “would seem to overwhelmingly, if not definitively, justify the government’s detention of such a non-citizen.”¹⁶² In *Almerfedi v. Obama*,¹⁶³ *Al-Madhwani v. Obama*,¹⁶⁴ *Al-Adahi v. Obama*,¹⁶⁵ and *Al-Bihani v. Obama*,¹⁶⁶ the D.C. Circuit relied upon this rule to either affirm the lower court’s denial of habeas—in *Al-Bihani* and *Al-Madhwani*—or to reverse the lower court’s grant of habeas—in *Al-Adahi* and *Almerfedi*. In total, the district courts relied upon this presumption in five separate habeas petitions to deny relief.¹⁶⁷

161. Judge Brown cites pages 66 and 67 from the Report to justify her rule. But the Report is ambiguous at best.

The Taliban seemed to open the doors to all who wanted to come to Afghanistan to train in the camps. The alliance with the Taliban provided al Qaeda a sanctuary in which to train and indoctrinate fighters and terrorists, import weapons, forge ties with other jihad groups and leaders, and plot and staff terrorist schemes. While Bin Ladin maintained his own al Qaeda guesthouses and camps for vetting and training recruits, he also provided support to and benefited from the broad infrastructure of such facilities in Afghanistan made available to the global network of Islamist movements. U.S. intelligence estimates put the total number of fighters who underwent instruction in Bin Ladin-supported camps in Afghanistan from 1996 through 9/11 at 10,000 to 20,000.

THE 9/11 COMMISSION REPORT 66-67 (2002).

162. *Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011).

163. 654 F.3d 1 (D.C. Cir. 2011).

164. 642 F.3d 1071 (D.C. Cir. 2011).

165. 613 F.3d 1102 (D.C. Cir. 2010).

166. 590 F.3d 866.

167. *Hentif v. Obama*, 810 F. Supp. 2d 33 (D.D.C. 2011); *Hussein v. Obama*, 821 F. Supp. 2d 67 (D.D.C. 2011); *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011), *aff’d*, 684 F.3d 1298 (D.C. Cir. 2012); *Kandari v. United States*, 744 F. Supp. 2d 11 (D.D.C. 2010); *Sulayman v. Obama*, 729 F. Supp. 2d 26 (D.D.C. 2010).

The 9/11 Commission Report, however, does not make as strong a claim as Judge Brown does. The Commission Report notes that “[w]hile Bin Ladin maintained his own al Qaeda guesthouses and camps for vetting and training recruits, he also provided support to and *benefited from the broad infrastructure of such facilities in Afghanistan* made available to the global network of Islamist movements.”¹⁶⁸ The Report itself thus acknowledges that there existed many guesthouses, and even training camps, in Afghanistan that were *not* al-Qaeda controlled. Yet these guesthouses and camps have been swept within the D.C. Circuit’s now-broad rule of “al Qaeda affiliated,” since an al-Qaeda member *might* have once visited it or sent it food supplies.¹⁶⁹

This incongruity between the *actual* probity of staying at a particular guesthouse and the legal presumption of detainability that arises from such a stay has led to resistance among some of the district court judges. In *Abdah v. Obama* and *Al Harbi v. Obama*, for example, District Judge Kennedy rejected the government’s claim that “Issa House” is a bona fide al-Qaeda guesthouse. Instead, he found that the “house was not a tightly controlled environment,”¹⁷⁰ and that “some, and possibly most, of the occupants of Issa House were not members of Al Qaeda.”¹⁷¹ The question of what qualifies as a guesthouse has also led to confusion. District Judge Friedman noted that the “government has not proven that the word ‘guesthouse’ is a term of art such that its use would always imply an al-Qaeda affiliation. This uncertainty about the use of the word ‘guesthouse’ is all the greater given the significant complications caused by Arabic translation.”¹⁷² Further, guesthouses in Afghanistan and Pakistan are known sanctuaries for humanitarian volunteers.¹⁷³ The fact that Al-Adahi stayed at a guesthouse and visited a training camp because he thought that they were a “gathering place for Muslims”¹⁷⁴ is not so far-fetched when one realizes that Afghanistan was home to multiple guesthouses and training camps, and some had nothing to do with al-Qaeda.

168. The 9/11 Commission Report 66-67 (emphasis added).

169. See, e.g., *Abdah v. Obama*, 717 F. Supp. 2d 21, 33 (D.D.C. 2010); *Al Harbi v. Obama*, No. CIV.A. 05-02479 (HHK), 2010 WL 2398883 (D.D.C. May 13, 2010).

170. *Abdah v. Obama*, 717 F. Supp. 2d 21, 33 (D.C. Cir. 2010).

171. *Al Harbi v. Obama*, No. CIV.A. 05-02479 (HHK), 2010 WL 2398883, at *16 (D.D.C. May 13, 2010).

172. *Almerfed v. Obama*, 725 F. Supp. 2d 18, 23 (D.D.C. 2010), *rev’d*, 654 F.3d 1 (D.C. Cir. 2011).

173. Guesthouses are ubiquitous throughout Afghanistan and Pakistan. See Alissa J. Rubin, *Guesthouses Used by Foreigners in Kabul Hit by Deadly Attacks*, N.Y. TIMES, Feb. 26, 2010, <http://nytimes.com/2010/02/27/world/asia/27kabul.html>.

174. *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010).

In fact, prior to the establishment of these two rules, three detainees who had visited guesthouses¹⁷⁵ and one who had also attended a training camp¹⁷⁶ had seen their habeas petitions granted. After *Al-Bihani*, however, only one detainee who had visited a guesthouse that was in any way associated with al-Qaeda was released—and only because the district judge explicitly refused to apply *Al-Bihani*'s presumptions and the government chose not to appeal the grant.¹⁷⁷ For those detainees who trained at an al-Qaeda affiliated training camp, no petitions have been granted since *Al-Bihani*.

The underlying facts of the three cases that predate *Al-Bihani* reveal precisely why such irrefutable presumptions are problematic and error prone. Of these, *Al Ginco v. Obama* is especially illustrative.¹⁷⁸ In *Al Ginco*, it is undisputed that the petitioner stayed at al-Qaeda guesthouses *and* attended the Al Farouq training camp.¹⁷⁹ Nonetheless, District Judge Leon did not find this evidence sufficiently persuasive to justify Al Ginco's continued detention because Al Ginco was "tortured by al Qaeda into making a false 'confession' that he was a U.S. spy, and imprisoned thereafter by the Taliban for over eighteen months at the infamous Sarpusa prison in Kandahar."¹⁸⁰ In defending his decision to not treat as dispositive Al Ginco's attendance at either the training camp or his stay at al-Qaeda guesthouses, Judge Leon noted that "[t]o say the least, five days at a guesthouse in Kabul combined with eighteen days at a training camp does not add up to a longstanding bond of brotherhood."¹⁸¹ If Judge Leon had followed the irrefutable presumptions that the Court of Appeals later developed in *Al-Bihani*, Al Ginco would not have been released—regardless of his compelling personal story and even though, as Judge Leon noted, the government's argument that he was "part of" the Taliban "defie[d] common sense."¹⁸²

175. Farhi Saeed Bin Mohammed, Alia Ali Bin Ali Ahmed, and Abdulrahim Abdul Razak Al Ginco each had his petition granted in the District Court, even though the Court found that each had visited or stayed at al-Qaeda affiliated guesthouses. See *Mohammed v. Obama*, 689 F. Supp. 2d 38, 54 (D.D.C. 2009); *Alia Ali Bin Ali Ahmed, Ahmed v. Obama*, 613 F. Supp. 2d 51, 65 (D.D.C. 2009); *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009). While *Mohammed* was initially appealed, the government later dismissed the appeal. Both Ahmed and Al Ginco were transferred out of Guantánamo Bay.

176. *Al Ginco*, 626 F. Supp. at 129.

177. Judge Kennedy, in *Abdah v. Obama*, 717 F. Supp. 2d 21, 22 & n.25, 27, 30, 34 (D.D.C. 2010), refused to accept the government's evidence that Issa House is a bonafide al-Qaeda guesthouse, even though some al-Qaeda members may have stayed there.

178. 626 F. Supp. 2d 123.

179. *Id.* at 129.

180. *Id.* at 127.

181. *Id.* at 129.

182. *Id.* at 128.

Furthermore, the creation of these irrefutable presumptions distorts the initial credibility determination a judge must undertake before deciding whether a particular detainee meets the preponderance of the evidence standard. In the appeal of *Almerfedí v. Obama*, Judge Silberman disregarded the district court's findings of fact that the government's intelligence reports claiming that Almerfedí stayed in a Tehran guesthouse were "inherently unreliable."¹⁸³ Instead, Judge Silberman envisioned a mosaic that included Almerfedí's stay at an al-Qaeda-affiliated guesthouse, which immediately triggered *Al-Bihani's* irrefutable presumption that doing so is sufficient for detention.¹⁸⁴ Reliance on such presumptions can upset the underlying credibility inquiry, adulterating the judge's efforts to determine the reliability of the evidence before weighing its relevance.

B. Capture Without Passport

Six months after *Al-Bihani*, the D.C. Circuit introduced its third irrefutable evidentiary presumption in *Al Odah v. United States*, this one relating to detainees captured without their passports.¹⁸⁵ When a detainee is captured without his passport, the D.C. Circuit maintains that *that* fact is itself irrefutable evidence of enemy combatant status, since "surrendering one's passport was 'standard al Qaeda and Taliban operating procedure' when checking into an al Qaeda guesthouse in Afghanistan."¹⁸⁶ The problem with creating an irrefutable presumption of unlawful enemy combatant status is that, before *Al Odah*, two detainees who had either lost their passports or were captured without their passports had their habeas petitions granted.¹⁸⁷ In both cases, Judge Kollar-Kotelly found the government's evidence insufficient to prove more likely than not that the petitioners were indeed a part of al-Qaeda or its associated groups. Judge Kollar-Kotelly granted these petitions despite the fact that it is "undisputed . . . that al Qaeda followed a standard operating procedure whereby individuals who entered al Qaeda and Taliban-associated guesthouses would commonly surrender their passports,"¹⁸⁸ and despite the fact that each petitioner had visited an al-Qaeda affiliated guesthouse. The reason Judge Kollar-Kotelly

183. *Almerfedí v. Obama*, 725 F. Supp. 2d 18, 25 (D.D.C. 2010).

184. "And, of course, that a petitioner trained at an al Qaeda camp or stayed at an al Qaeda guesthouse 'overwhelmingly' would carry the government's burden." *Almerfedí v. Obama*, 654 F.3d 1, 6 n.7 (D.C. Cir. 2011).

185. 611 F.3d 8, 12 (D.C. Cir. 2010).

186. *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (citing *Al Odah*, 611 F.3d at 15).

187. *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 96 (D.D.C. 2009); *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 42 (D.D.C. 2009).

188. *Al Rabiah*, 658 F. Supp. 2d at 40.

granted the petitions—and why the government did not appeal her grants—is because in each case individual circumstances made it clear that, far from being bona fide members of al-Qaeda or its associated groups, the petitioners were merely in the wrong place at the wrong time.

Caught in the aftermath of the American bombing campaign while on a planned two-week humanitarian mission to Afghanistan, one of these petitioners, Fouad Mahmoud Al Rabiah, attempted to return to his home in Kuwait multiple times, going so far as to send two letters to his family explaining that he had lost his passport while staying at a guesthouse and asking them to tell his supervisor at Kuwait Airlines, where he worked, that he would be back later than he had originally planned.¹⁸⁹ Similar circumstances befell Khalid Abdullah Mishal Al Mutairi, who traveled to Afghanistan for the purpose of building a mosque and, while also staying in guesthouses and trusting local community leaders, had his passport stolen in Kabul.¹⁹⁰ In both cases, Judge Kollar-Kotelly found that the individual circumstances of the petitioners' cases mitigated the facts that each was captured without a passport and that each had stayed at guesthouses that required the surrendering of passports.

The irrefutable presumption of unlawful enemy combatant status for those arrested without a passport illustrates the general dangers inherent in creating such strong evidentiary rules. There are a number of reasons why a detainee may have lost his passport in Afghanistan and surrounding regions, and not all of them indicate a tie to al-Qaeda. For a detainee to have any meaningful opportunity to contest his detention, he must be afforded the opportunity to at least explain himself.¹⁹¹ When a petitioner, like Al-Adahi, insists that he had his passport on him when captured, but that his Pakistani bounty hunters¹⁹² seized it upon his capture, he is given no opportunity to prove his case and refute the government's evidence.¹⁹³ The use of such functionally dispositive rules reduces the amount of evidence needed to find detention lawful. This, in turn, erases whatever vestiges of due process remain from *Boumediene*.

189. *Id.* at 21-22.

190. *Al Mutairi*, 644 F. Supp. 2d at 86-87.

191. *Boumediene v. Bush*, 553 U.S. 723, 728-29 (2008).

192. See, e.g., PERVEZ MUSHARRAF, *IN THE LINE OF FIRE: A MEMOIR* 237 (2006); Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 2-3* (Seton Hall Pub. Law, Research Paper No. 46, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659 (providing statistics and noting use of large bounties).

193. *Al-Adahi v. Obama*, No. CIV.A 05-280 (GK), 2009 WL 2584685, at *15 n.21 (D.D.C. Aug. 21, 2009) (“However, the arrest took place in a ‘large, modern city, with a large market area,’ Petitioner had walked there after leaving the bus several hours earlier. . . . He stated that he had his passport with him. [Redacted] This inconsistency simply cannot be resolved. The underlying fact of his arrest by the Pakistani military, however, is not in dispute.” (internal citations omitted)).

C. *False Exculpatory Statements*

The most recent irrefutable evidentiary presumption—and arguably the most troubling—was established in *Al-Adahi*. There, Judge Randolph wrote that “false exculpatory statements are evidence—often strong evidence—of guilt.”¹⁹⁴ Seven cases have relied on this rule to deny requests for habeas relief since *Al-Adahi*, three of which were decided by District Court judges.¹⁹⁵ In announcing the rule, Judge Randolph cited two cases from other circuits to bolster his view of false exculpatory statements: one from the Fifth Circuit¹⁹⁶ and one from the Eighth Circuit.¹⁹⁷ But there is a circuit split on this issue; in fact, the Second and Ninth Circuits approach the issue quite differently. The Ninth Circuit has repeatedly held that “false statements,” even when combined with other incriminating evidence, are “weak circumstantial evidence because the innocent as well as the guilty may lie when confronted with criminal charges.”¹⁹⁸ Similarly, the Second Circuit has held that:

[F]alsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant’s innocence as it is to the Government’s theory of guilt.¹⁹⁹

The Federal Jury Practice and Instructions similarly advise that when an exculpatory statement is shown to be false:

[Y]ou may consider that there may be reasons—fully consistent with innocence—that could cause a person to give a false statement showing that [*he*] [*she*] did not commit a crime. Fear of law enforcement, reluc-

194. *Al-Adahi v. Obama*, 613 F.3d 1102, 1007 (D.C. Cir. 2010).

195. See *Hentif v. Obama*, 810 F. Supp. 2d 33, 43 (D.D.C. 2011); *Hussein v. Obama*, 821 F. Supp. 2d. 67, 78 (D.D.C. 2011); *Kandari v. United States*, 744 F. Supp. 2d 11, 35 (D.D.C. 2010).

196. *United States v. Meyer*, 733 F.2d 362, 363 (5th Cir. 1984) (“False exculpatory statements may be used not only to impeach, but also as substantive evidence tending to prove guilt.”).

197. *United States v. Penn*, 974 F.2d 1026, 1029 (8th Cir. 1992) (“A false exculpatory statement instruction is properly given when the defendant’s exculpatory explanation is later proven to be false.”).

198. *United States v. Lorea*, 72 F.3d 136 (9th Cir. 1995) (“The evidence against appellant was, in summary: presence, knowledge, nervousness, and false statements. But numerous decisions of this circuit have held that that is *not* enough for a conviction for aiding and abetting. There was no evidence of the required element of intent from appellant’s acts to assist the criminal enterprise.”).

199. *United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir. 1977) (quoting *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975)).

tance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.²⁰⁰

Clearly, the circuits do not agree on how to treat false exculpatory statements, with the Fifth and Eighth Circuits more hawkish than the Second and Ninth, and the practice manual counseling the dovish approach. Interestingly, the Tenth Circuit is somewhere in the middle, recently holding that “[a]lthough false exculpatory statements ‘cannot be considered by the jury as direct evidence of guilt,’ such statements ‘are admissible to prove circumstantially consciousness of guilt or unlawful intent.’”²⁰¹

In treating false exculpatory statements as “substantive evidence tending to prove guilt,”²⁰² the Court of Appeals would be taking a stance in ordinary criminal law that is not necessarily unsupported by other circuits, but one that is certainly out of sync when considering that the majority of these “false exculpatory statements” were made by petitioners who had been captured overseas and often harshly interrogated.²⁰³ When one considers the circumstances under which the detainee’s statements were given, their motives to lie become clear:

200. 1A Fed. Jury Prac. & Instr. § 14:06 (6th ed.) (alterations in original).

201. *United States v. Davis*, 437 F.3d 989, 996 (10th Cir. 2006) (quoting *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982)).

202. *United States v. Meyer*, 733 F.2d 362, 363 (5th Cir. 1984).

203. *See, e.g., Latif v. Obama*, 666 F.3d 746, 761 (D.C. Cir. 2011) (“The court observed, for example, that in Latif’s 2009 declaration (in which he claimed to be too disabled to fight) Latif said he ‘spent three months at the Islamic Jordanian Hospital in Amman, Jordan’ . . . but his own medical records reveal that he was released just five days after admission.”). *But see Hentif v. Obama*, 810 F. Supp. 2d 33, 48 n.33 (D.D.C. 2011) (“Respondents counter that each of the descriptions Hentif gave, described below, are vague. They argue this lack of specificity is evidence that he was using counter-interrogation techniques and renders the information he provided insignificant for purposes of determining whether his descriptions of these men conflict with those given by other detainees.”); *Kandari v. United States*, 744 F. Supp. 2d 11, 35 (D.D.C. 2010) (“The Government has also introduced evidence that the particular explanation provided by Al Kandari in this case is consistent with al Qaeda counter-interrogation tactics Evidence that Al Kandari provided an implausible explanation for his reasons for traveling to and his activities within Afghanistan, and that the explanation provided is consistent with al Qaeda counter-interrogation tactics, therefore supports a reasonable inference that Al Kandari was not in Afghanistan solely to assist with, and did not engage solely in, charitable work, as claimed.”); *Al Harbi v. Obama*, No. CIV.A. 05-02479(HHK), 2010 WL 2398883, at *9 (D.D.C. May 13, 2010) (“With respect to the use of counterinterrogation techniques, the Court will not draw any conclusions with so little indication of how often or for what purpose Mingazov may have employed them. Mingazov’s attempts to bargain with his interrogators about his destination upon departure from Guantanamo Bay supports the proposition that he wanted to be sent somewhere other than Russia.”).

“Deception often arises from fear, an emotion felt acutely in criminal inquiries, and it typically aims at control, a desire central to the power struggle in an investigative interview.”²⁰⁴

When confronting evidence from harsh interrogations, the judges in the D.C. Circuit seem to hardly blink, treating them much as they would statements made during an ordinary criminal investigation. Yet military and intelligence interrogations differ profoundly from interrogations and depositions conducted in the course of ordinary criminal investigations.²⁰⁵ Coercive interrogations are almost sure to result in shifting, variable accounts of conduct, associations, and events.²⁰⁶ Detainees are not aware of what the government knows or believes about them or even the standards of detention, and they cannot be sure that they will ever go free if they do know something useful.²⁰⁷ Even in these circumstances, it is more likely that the innocent will tell a convenient lie over an ambiguous truth.²⁰⁸ These concerns have long been recognized as the bases for

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204. Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1519 (2009).
205. See *Background Paper on CIA’s Combined Use of Interrogation Techniques*, CENT. INTELLIGENCE AGENCY (Dec. 30, 2004), <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC001126.pdf>. The report describes the CIA’s interrogation techniques to include forced nudity, sleep deprivation, dietary manipulation, slaps, holds, grasps, “walling,” water dousing, stress positions, wall standing, and cramped confinement. *Id.* at 5-9. These techniques were employed individually and in combination through at least 2004. See *id.* “The interrogators’ objective is to transition the [High Value Detainee] to a point where he is participating in a predictable, reliable, and sustainable manner.” *Id.* at 16.
206. See *Watts v. State of Ind.*, 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring in the result) (“[N]o confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body.”).
207. See *Al Odah v. United States*, 648 F. Supp. 2d 1, 11 (D.D.C. 2009) (“Detainee: I had a visa for Pakistan. If I would have tried to go back, they would have questioned me as to why I was in Afghanistan. It would have been difficult for me. It would have been complicated. I was afraid of being accused of anything I might not have done.”).
208. Cf. *Rubin v. United States*, 525 U.S. 990, 994 (1998) (Breyer, J., dissenting from denial of certiorari) (“[T]he complexity of modern federal criminal law, codified in several thousand sections of the United States Code and the virtually infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law, make it difficult for anyone to know, in advance, just when a particular set of statements might later appear (to a prosecutor) to be relevant to some such investigation.”).

the Fifth Amendment's privilege against self-incrimination.²⁰⁹ The Supreme Court has emphasized that one of the Fifth Amendment's "basic functions . . . is to protect *innocent* men . . . 'who otherwise might be ensnared by ambiguous circumstances,'" recognizing that "truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."²¹⁰ Even though the Fifth Amendment's protections do not extend overseas, their rationales are no less availing on the battlefields of Afghanistan than in the comforts of a police investigation room in the United States.

In *Uthman*, for example, the petitioner lied about who paid for his plane ticket to travel from Yemen to Afghanistan. Rather than admitting that a Yemeni sheikh—whom the government contends supports terrorism—funded his trip, Uthman instead claimed that he "raised the funds himself primarily by working at summer jobs selling food at a roadside shack."²¹¹ The District Court conceded that this was unlikely, given that "Uthman would have had to earn more than three times the average Yemeni's annual income in only a few summers' unskilled work."²¹² Though the District Court concluded that Uthman received the funds from the sheikh, it still found that, based on the record as a whole, Uthman was not lawfully detainable. In a stinging reversal of the District Court's grant of habeas corpus, Judge Kavanaugh cited to *Al-Adahi* for the proposition that false exculpatory statements are substantive evidence of guilt.

The divide between the District Court and the Court of Appeals raises troubling questions about a presumption of detainability based solely on petitioner's lie. From one perspective, Uthman's "lies" were not even "exculpatory." That is, the truth that a sheikh paid for his trip to Afghanistan was not actually exculpatory, since the District Judge did not credit his statements, yet found separately that his association with the sheikh was not grounds for detention. Moreover, Uthman may have had no idea that the sheikh had any ties to terrorism, but simply did not want to get anyone in Yemen involved in his mess. After all, he was well aware of the resources of the U.S. government, and could imagine this sheikh, perhaps a respected member of his community, being picked up because of Uthman's own admission. If Uthman had indeed lied, it is understandable why he might have, especially under the pressure of intense interrogation.

Furthermore, the government's evidence that the courts rely upon to determine the falsity of exculpatory statements is sometimes inaccurate. In *Kandari v. United States*, the petitioner disputed certain statements attributed to

209. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself. . .").

210. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421-22 (1957)).

211. *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011).

212. *Id.*

him, arguing, “As to these statements, I can only say that they are not my words.”²¹³ Though the court did not find Kandari’s version of the facts credible, it also did not take into account that the government report might be inaccurate. When a false exculpatory statement is considered “strong evidence” of a petitioner’s guilt and government inaccuracies nonetheless exist, the risk of error increases dramatically.

CONCLUSION

Many have faulted *Boumediene* for its lack of clarity. In his dissent in *Boumediene*, Chief Justice Roberts wrote,

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants . . . without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has exhausted the procedures under the law.²¹⁴

Boumediene’s ambiguity left some room for discretion in the lower courts in fashioning the procedures that would govern the habeas petitions that would inevitably follow. As Judge Brown wrote in *Al-Bihani*, “[t]he Supreme Court . . . [left] the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion.”²¹⁵

But on two points *Boumediene* was unmistakably clear. First, *Boumediene* sought to check the executive’s unilateral, unchecked detention authority.²¹⁶ Second, *Boumediene* rested its faith in the courts’ ability to check that authority in the requirement that the executive come to court and produce the evidence upon which the legality of detention is supposed to be founded.²¹⁷ The *Boumediene* Court repeatedly returned to the notion that a judge’s discretion over evidentiary evaluation would be enough to both deter and reverse executive overreach.²¹⁸

However, the evidentiary rules developed by the D.C. Circuit undermine *Boumediene* by accepting weak and unreliable evidence. Under the D.C. Circuit’s current evidentiary rules, the much-derided “Mobbs Declaration”—the sole and insufficient basis for detaining Yassir Hamdi in *Hamdi*—would be ad-

213. *Kandari v. United States*, 744 F. Supp. 2d 11, 26 (D.D.C. 2010) (quoting Al Kandari’s declaration to the court).

214. *Boumediene v. Bush*, 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting).

215. *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010).

216. Vladeck, *supra* note 15; see *Boumediene*, 553 U.S. at 783.

217. 553 U.S. at 739-47.

218. *Id.* at 767, 773, 780-81, 783-84, 786, 789, 790-91.

missible, relevant, and probably dispositive on the question of the lawfulness of detention. The Circuit's evidentiary rules simply turn *Boumediene* inside-out.

As this Note has explained and highlighted, the remedy for the D.C. Circuit's evidentiary framework rests in the well-established rules and procedures courts already use to ensure that evidence is credible enough and reliable enough to support a finding by a preponderance-of-the-evidence. The D.C. Circuit should reestablish rudimentary hearsay and corroboration requirements. It should also dispense with the mosaic theory and return to the ordinary approach to weighing evidence. Finally, the D.C. Circuit should forego the use of evidentiary presumptions and instead require the government to explain the inferential chains that lead to the conclusion that staying at a guesthouse, visiting a training camp, being captured without a passport, or lying to interrogators are evidence at all—let alone overwhelming or substantial evidence—of membership in al-Qaeda, the Taliban, or associated forces. None of these requirements is extraordinary; rather, they are the ordinary requirements of preponderance of the evidence employed by federal courts on a regular basis.

In the end, the effects and consequences of the evidentiary rules currently applied in the D.C. Circuit are to deprive detainees the meaningful check on executive detention authority that *Boumediene* promised them nearly five years ago.