

LATIF: PRESUMPTION OF REGULARITY FOR THEE, BUT NOT FOR ME

CAP UNIT:
DOCUMENTS: *medical papers*

In her
opinio
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holdin

g that government documents submitted in habeas corpus petitions must be treated with a presumption of regularity, Judge Janice Rogers Brown, herself, did not follow her own order. And in spite of demanding that judges treat their documents with the presumption of regularity, the government didn't do so consistently in this case either. The government and the judge did not credit what Judges Henry Kennedy and David Tatel found to be one of the most important pieces of evidence in the case: the government's own intake form showing that Adnan Farhan Abd Al Latif was captured in Pakistan with medical records.

As you recall, Latif is a Yemeni who was captured by Pakistanis close to the Afghan border, then turned over to the Americans on December 30 or 31, 2001 (this was the period when the US was paying Pakistanis bounties for Arab "fighters"). In July 2010, Kennedy granted his habeas petition. But the government (which had cleared Latif for release on multiple occasions between 2006 and 2010) appealed, arguing that Kennedy erred because he did not find their single piece of evidence explicitly tying Latif to the Taliban accurate.

I believe that evidence—a report which appears to be the summary of a "debriefing" conducted around December 27 or 28 while Latif was in Pakistani custody (see PDF 25)—is an intelligence report with the serial number TD-314/00684-02 summarizing the stories of at least nine different detainees, all the non-Yemenis of whom have since been transferred out of Gitmo.

The government apparently admitted that its case “turn[s] on the accuracy” of this report (that admission—cited to page 5 at PDF 53—appears to be redacted in the original). And Rogers Brown acknowledged that the report had an obvious mistake on its very first page. But the government argued and Rogers Brown upheld that Kennedy should have taken the report at its word, should have presumed that the government accurately identified the sources of information named in the report and accurately recorded what those sources said. “It is well established that there is a strong ‘presumption of regularity’ for actions of government officials taken in the course of their official duties,” the government argued. Unless Latif provided really good evidence to the contrary (and the fog of war and the Pakistani involvement and the translation and transcription problems were not sufficient, apparently), Rogers Brown’s opinion held that Kennedy should have accepted that the report accurately recorded Latif confessing that he had undergone military training with the Taliban.

The government also argued—critically for their case, given that their case relies on just that one report—that Latif, who explains he did not say what the report claims he said, is not credible. The government argued that, in spite of the fact that he has provided the same general explanation for his trip to Afghanistan since he came into US custody a decade ago (that he was hoping to get affordable medical care for ongoing problems from a head injury he sustained in 1994) the courts must credit the government’s one report with all its acknowledged factual errors rather than Latif’s story.

To attack Latif’s credibility, the government claimed he provided no corroboration for his story.

He submitted no evidence from a family member, from Ibrahim, or from anyone to corroborate his claim that he was traveling to Pakistan in 2001 to seek medical treatment.

But that's not true. In addition to Latif's medical records from being treated in Jordan, a statement from Yemen's Ministry of Public Health recommending he get more care, and a statement from a Gitmo doctor finding Latif's medical claims to be credible, Latif's intake report from December 31, 2001 (PDF 33; shown above) shows he had medical records with him when he was captured.

In his opinion, Kennedy cited the intake report. Latif's lawyers cited the report in their response to the government's appeal. And Tatel cited it in his dissent, noting that, "the most plausible reason for why Latif would have had medical papers in his possession when first seized is that his trip in fact had a medical purpose." Yet in spite of Rogers Brown's claim that,

If a detainee introduces a government record to support his side of the story ... he can benefit from the presumption as well.

She did not give him that benefit.

Because of the extensive redactions in all these documents, we can't be entirely sure how the government managed to dismiss its own intake report while at the same time insisting that all its reports be given the presumption of regularity. But here's what Kennedy says about the issue.

Furthermore, there are indications in the record that when Latif was seized traveling from Afghanistan to Pakistan, he was in possession of medical records. JE 46 at 1 (noting that Latif was seized in a "[b]order [t]own in [Pakistan]" with "medical papers"); JE 66 (unidentified government document compiling information about Latif) at 2 (stating that "[Latif] had medical papers but no passport or weapon" when he "surrendered himself to [Pakistani]

authorities").¹²

12 Respondents argue that these indications are evidence only that Latif said he had medical records with him at the time he was seized rather than that he in fact had them. They point to evidence in the record that Latif was in possession of money when captured, see JE53 at 1 (document recording chain of custody of Pakistani currency), to demonstrate that Latif possessed only money when he was transferred to U.S. custody. But that evidence does not exclude the possibility that Latif had other items at the time he was seized [sic]. Because respondents do not present evidence that counters the notations in government documents that Latif held medical records when taken into Pakistani custody, the Court does not credit their argument. [my emphasis]

That is, the government apparently claims inaccuracies enter into its intake forms because screening personnel conducting the intake process simply ask detainees what they have in their possession, rather than examining those possessions themselves.

Here's what the Army Field Manual says about what Military Intelligence screeners do with documents captured with incoming detainees (compare Figure 6-1 in Part Three with the intake form to verify that this is the same screening process).

US forces capturing enemy forces or detaining civilians on the battlefield search each individual for weapons, documents, or other material of intelligence interest. Each individual receives a Capture Tag which records basic biographic data such as name, rank, serial number, unit of assignment (military), location of capture, and any special circumstances concerning the

capture. (See Appendices E and F.) Each document or item removed from the captive is also “bagged and tagged” to identify from whom it was taken. This initial step is vital, as properly processing captives and their equipment greatly simplifies the screening process. All documents associated with the source and any possessions taken from him must be evacuated with the source, but not on his person.

[dnip]

The MI screeners examine captured documents, equipment and, in some cases, personal papers (journals, diaries, and letters from home).

[snip]

The screeners will also examine all documents and possessions found on the source (if any) and all documents pertaining to the source (if any). [my emphasis]

According to the Army Field Manual, that great guarantor of regularity of process in the military, when screeners process a detainee, they examine documents captured with him. They don't just ask a detainee what he had on him when captured. They look at those documents themselves. So by attributing the reference to medical documents to Latif rather than the screener's own examination of the documents, the government effectively argues against the presumption of regularity for its own intake form.

The government, even while arguing that “there is a strong ‘presumption of regularity’ for actions of government officials taken in the course of their official duties,” is arguing that this screener did not follow protocols in the course of his or her official duties.

I can think of two possible explanations for

what is going on here:

- The government has no reason to believe that this screening process was irregular, but would prefer to claim it is, thereby blaming Latif, again, for inconsistencies in their own process and ultimately the fact that they subsequently “lost” the documents that supported Latif’s story (note, the case of Pacha Wazir, in which the CIA bureaucratically “lost” documents inconvenient to their detention narrative, offers precedent for “losing” exonerating documents and holding detainees for years as a result).
- The intake screener really did, as the government claims, simply ask Latif whether he had documents and weapons when he was picked up. But that would only be necessary because of irregularities in the prior chain of custody and screening process—it would only be necessary if the Pakistanis hadn’t provided the Americans with a solid chain of evidence from their

own intake process. The DOD intake form would only be irregular if the Pakistani screening process that produced the document at the heart of the government's case was too (in its appeal, the government refers to the earlier process in Pakistan as a "battlefield screening interview;" see PDF 42). That would effectively mean that US personnel were not involved enough in the initial intake into Pakistani custody to ensure the process met their own protocol.

In short, the only reason I can think of that the government would need to treat their own intake form as irregular is if the prior intake process was itself irregular—precisely the process they have demanded be presumed to be regular. But if the process they controlled proceeded regularly according to protocol—if the intake screener examined the documents captured with Latif, as required by the Army Field Manual, and discovered them to be medical documents—then the government itself corroborates Latif's story he traveled for medical care.

In an attempt to discredit Latif by disavowing the government's own evidence that corroborates his story, the government has placed the two intake processes in conflict: the one conducted in Pakistani custody that appears to have resulted in a group document with admitted errors, and the one conducted in US custody that produced individualized records and some

transparency. The former is an outlier with the known evidence in this case, the latter corroborates it. But for some reason, the government has insisted that only the Pakistani-based process, not the American-led one, be treated as presumptively regular.