

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 06-1397**

**September Term 2007**

**Filed On:** June 23, 2008

Huzaifa Parhat,

Petitioner

v.

Robert M. Gates, Secretary of Defense, et al.,

Respondents

**BEFORE:** Sentelle, Chief Judge, and Garland and Griffith, Circuit Judges

**NOTICE**

On Friday, June 20, 2008, the court issued an opinion to the parties in the above-captioned case. Pursuant to the Detainee Treatment Act of 2005, the court held invalid a decision of a Combatant Status Review Tribunal that petitioner Huzaifa Parhat is an enemy combatant. The court directed the government to release or to transfer Parhat, or to expeditiously hold a new Tribunal consistent with the court's opinion. The court also stated that its disposition was without prejudice to Parhat's right to seek release immediately through a writ of habeas corpus in the district court, pursuant to the Supreme Court's decision in *Boumediene v. Bush*, No. 06-1195, slip op. at 65-66 (U.S. June 12, 2008). Because the opinion contains classified information and information that the government had initially submitted for treatment under seal, a redacted version for public release is in preparation.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/Nancy G. Dunn  
Deputy Clerk

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT  
3

4  
5 HUZAIFA PARHAT,

6 Petitioner,

7 v.

No. 06-1397

8 ROBERT M. GATES, Secretary of  
9 Defense, et al,

10 Respondents.  
11

12 Friday, April 4, 2008

13 Washington, D.C.

14 The above-entitled matter came on for oral  
15 argument pursuant to notice.

16 BEFORE:

17 CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES  
18 GARLAND AND GRIFFITH

19 APPEARANCES:

20 ON BEHALF OF THE PETITIONER:

21 P. SABIN WILLETT, ESQ.

22 ON BEHALF OF THE RESPONDENTS:

23 GREGORY G. KATSAS, ESQ.  
24  
25

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C O N T E N T SORAL ARGUMENT OF:PAGE

P. Sabin Willett, Esq.  
On Behalf of the Petitioner

3, 49

Gregory G. Katsas, Esq.  
On Behalf of the Respondents

19

1                                    P R O C E E D I N G S

2                    THE CLERK: Case number 06-1397, Huzaifa Parhat,  
3 petitioner, v. Robert M. Gates, Secretary of Defense, et al.  
4 Mr. Willett for the petitioner, Mr. Katsas for the respondent.

5                    ORAL ARGUMENT OF P. SABIN WILLETT, ESQ.

6                    ON BEHALF OF THE PETITIONER

7                    MR. WILLETT: Chief Judge Sentelle, and may it  
8 please the Court. If I might reserve four for rebuttal? I'd  
9 like to make two points this morning. One is why at this late  
10 hour there is no military authority to continue the detention  
11 of Huzaifa, and the second is why release is the right remedy  
12 in this case.

13                    If we could begin with detention power. Now  
14 everybody agrees he's not Al Qaida, he's not Taliban and he's  
15 not on the battlefield. The Government's theory is a two-step  
16 affiliation theory, and they have to show each step by a  
17 preponderance. Parhat, they say, is part of something called  
18 ETIM, East Turkistan Islamic Movement, and ETIM, they say, is  
19 an organization against which the president can use military  
20 force. We suggest that on this unusual record, they can meet  
21 neither of these two steps, and we bear in mind as we analyze  
22 this purpose of military detention, which is to prevent return  
23 to the battlefield, which is meant to be temporary and non-  
24 penal.

25                    So to the first step, is Parhat part of ETIM? The

1 short answer is the CSRT could find no source document, not  
2 one, that he joined. Where do they go from that? We'll  
3 return in a moment to that, but perhaps proceed to the second  
4 question of whether ETIM is an organization -

5 THE COURT: Well you're skipping something. It's  
6 not just part of. It's part of or support, right?

7 MR. WILLETT: Well that's the regulatory definition,  
8 Your Honor.

9 THE COURT: Yes.

10 MR. WILLETT: But there's no showing, if he's not  
11 having, he's hasn't joined ETIM. And I will suggest as well  
12 in the classified session, there's no --

13 THE COURT: Does the word, part of, mean you have to  
14 join something?

15 MR. WILLETT: Well all of this, Your Honor, is a  
16 gloss on the AUMF, itself, which makes the enemy those who  
17 attacked us on 9/11 and those who harbored the attacks. ETIM  
18 is neither. The president was given discretion to determine  
19 who attacked us and who harbored -

20 THE COURT: But again, you're skipping over some  
21 important language from the AUFM. Aid is -

22 THE COURT: AUMF.

23 THE COURT: AUMF, I'm sorry. It's not just those  
24 who attacked, it's those who could have aided. And the  
25 president gets, when the president makes a determination that

1 someone aided them.

2 MR. WILLETT: Well, no, Your Honor. I believe I'm  
3 correct on this statute. What it says is, those nations,  
4 organizations or persons he determines planned, authorized,  
5 committed or aided the attacks, not aided the attackers. It  
6 then goes on to say, anyone who harbored the attackers is also  
7 an enemy. But that's it.

8 THE COURT: What does it mean to aid the attack, and  
9 who gets to decide that?

10 MR. WILLETT: Well the president decides who aided  
11 the attacks. It might mean buying an air ticket for one of  
12 the murderers who was involved. It might mean training those  
13 20 people. But the important thing here is, the president  
14 never determined that ETIM had anything to do with these  
15 attacks. And in fact, the record makes that very clear.

16 So we've got a guy who's held on the affiliation  
17 theory because of his affiliation with an organization he  
18 never joined, and an organization which isn't -

19 THE COURT: I wonder about that term, never joined.  
20 Now without going into anything classified, you have him doing  
21 things at a location affiliated with the ETIM. Do they have  
22 to show a membership card or something?

23 MR. WILLETT: Oh, no, Your Honor. And this -

24 THE COURT: I wonder what you mean by, never joined,  
25 when you have in the record you do of his --

1           MR. WILLETT: I mean what the CSRT panel meant when  
2 they wrote those words, which have become unclassified. They  
3 said, never actually joined. I believe we can show in context  
4 what they need to do is distinguish that from the allegation  
5 that the people at this location are part of ETIM. And  
6 specifically, I would draw the Court's attention to the  
7 undisputed fact that five other people at this place doing all  
8 of the same things were determined by our military not to be  
9 enemy combatants.

10           So where does the Government go? I mean, they go  
11 adroitly to all of the rhetorical tools in the bag, ellipsis  
12 and omission, and they pluck out of the record things that  
13 they regard as helpful. We can describe that better in the  
14 classified session. But they come up with all of these  
15 different theories that it's hard for me to respond to in the  
16 public session, other than to say this.

17           The military, itself, read that whole record, every  
18 bit of it. They read all of the bits that the Government  
19 omits in its brief to you. And the military said, this person  
20 is not someone who is, who has joined this organization, and  
21 we can find no source evidence that this organization has ever  
22 even planned, thought about, contemplated becoming hostile to  
23 us.

24           Now I want to talk about lists. I think this Court  
25 knows a lot about lists. You get a lot of lists cases. Judge

1 Sentelle, you have decided more than a few of them. The  
2 important thing about lists is this. The only list this  
3 organization ever gets on is the list that is not, that  
4 includes entities that have not engaged in hostilities or  
5 direct threats to the United States. There are, there is  
6 another list under 1189. It never makes that list. And it  
7 certainly never makes a list of organizations that aided the  
8 9/11 attacks or harbored the attackers.

9           The other thing about the list is, when Huzaifa was  
10 captured, at about the time he was captured, it wasn't on any  
11 list. In fact, the State Department said, we don't regard the  
12 East Turkistan Organization as a terrorist organization. Then  
13 10 months --

14           THE COURT: Did they ever?

15           MR. WILLETT: Sorry?

16           THE COURT: Did they ever, though?

17           MR. WILLETT: They did after they met with the  
18 Chinese in August of '92. They put it on the watch list, Your  
19 Honor. And the watch list involves organizations in the  
20 United Kingdom.

21           THE COURT: You mean, you mean 2002.

22           MR. WILLETT: I'm sorry. 2002, Your Honor, is when  
23 it goes on the list. The point is, even the record in this  
24 case discloses that it goes on that list at the recommendation  
25 of China. Now lots of people get on China's terrorism list,



1 just ask the Dalai Lama. The point is that it's not Beijing  
2 and it's not even the president who decides who we are at war  
3 against. It's Congress. And Congress never authorized war  
4 against this group. The president could have gone to Congress  
5 and said, look, we need to expand the AUMF, but he didn't. So  
6 he's left with his arsenal of criminal justice tools, none of  
7 which has been deployed against our client for six years.

8 So why are we here? He's not part of this, he  
9 doesn't join this group, and the group isn't the enemy. We're  
10 here as the CSRT candidly admitted, because there's a  
11 practical problem. There's nowhere to send him.

12 THE COURT: A little bit like in the last case, I  
13 have to, you at least have to be fair to what they said. And  
14 in the unclassified version, I appreciate there's much that we  
15 can't discuss in the open. But in the unclassified version,  
16 they said that they've classified him as an enemy combatant  
17 because he is affiliated with forces, associated with Al Qaida  
18 and the Taliban, that are engaged in hostilities against the  
19 United States. So they have, and the forces they were talking  
20 about was ETIM. So you have to tell us why that first part of  
21 that argument, affiliated with, doesn't work.

22 MR. WILLETT: I think, Your Honor -

23 THE COURT: Otherwise, you wouldn't be fair to your  
24 client if you weren't going to at least argue that point.

25 MR. WILLETT: There are two answers to your

1 question. The first is, if you read on from where that, I'm  
2 either quoting from page 11 or perhaps page 15.

3 THE COURT: I'm concluding from the bottom line,  
4 which is page, conclusions of the tribunal, page 13.

5 MR. WILLETT: Okay. But the tribunal explains  
6 itself at page -

7 THE COURT: Which says unclassified on it.

8 MR. WILLETT: Yes. And what I'm about to say is  
9 also unclassified. The tribunal explains itself at page 16 of  
10 the record where it says, and I should -

11 THE COURT: Wait. Now you're on the classified  
12 part?

13 MR. WILLETT: This language has been unclassified by  
14 the Government.

15 THE COURT: Fair enough.

16 MR. WILLETT: And it says the following. It picks  
17 up right on the phrase Your Honor mentioned. The tribunal  
18 found the detainee to be an enemy combatant because of his  
19 apparent ETIM affiliation. And then it goes on, but despite  
20 this fact that ETIM is said to be making plans for future  
21 terrorist activities against U.S. interests, no source  
22 document evidence was introduced to indicate whether or how  
23 this group has actually done so, that the detainee has  
24 actually joined ETIM, or that he, himself, has personally  
25 committed any hostile acts against the United States. This

1 is the military panel explaining its finding.

2 Now the rest of my answer to your question  
3 necessarily would be in the classified session. But elsewhere  
4 in these findings, the panel explain, and I am now quoting  
5 from language on page 15, also unclassified by the Government.  
6 The detainee is therefore assessed as a potential threat,  
7 potential threat. The practical problem had already been  
8 experienced because again, an unclassified fact, in 2003, the  
9 colonel who commanded the CITF recommended his release.

10 And if you think about the core issue that we're  
11 talking about here is that you detain the enemy to prevent his  
12 returning to the field to engage in combat with you. Now who  
13 cares more about that than anyone? More than the lawyers,  
14 more than the policymakers, it is the soldiers who do not want  
15 to see the enemy returning to the battle to do harm to their  
16 brothers and sister in arms. We see in this record here, in  
17 two more places I can cite to you in the classified section,  
18 where soldiers are saying the remedy here is release.

19 THE COURT: Counsel, I don't know that that really  
20 cuts a whole lot of ice. Those particular soldiers were not  
21 delegated the authority to make any determination that was  
22 found. They can make recommendation, or the one here can make  
23 a recommendation, but the chain of the decision, I don't mean  
24 the chain of command, the chain of decision did not put them  
25 in the position to make a final determination. Somebody else

1 did, the tribunal, and it said different.

2 MR. WILLETT: Well Your Honor -

3 THE COURT: I'm not sure why we should afford any  
4 great weight to what one individual military person  
5 recommended.

6 MR. WILLETT: Well let's, let's talk about tribunal,  
7 itself. The three military officers -

8 THE COURT: Yes.

9 MR. WILLETT: -- who became the most familiar with  
10 this record, what did they say should actually happen to this  
11 guy?

12 THE COURT: Yes.

13 MR. WILLETT: They said he ought to be released.  
14 And we'll get to the detail on that statement in the  
15 classified session. It's in the record. So -

16 THE COURT: Well that's, that's incomplete. They  
17 said he's an enemy combatant, right?

18 MR. WILLETT: They do, but they say -

19 THE COURT: That's what we're really reviewing.

20 MR. WILLETT: But they're adopting a regulation,  
21 which as their own record explains, has been overbroadly  
22 applied to people who cannot legally be enemy combatants,  
23 because they are not the enemy that Congress named and they  
24 didn't take the field.

25 If, if I may spend a moment or two on remedy? We

1 have asked for an order for his release, which would be an  
2 unusual thing in a DTA case, I submit. I rather think that  
3 the usual would be that a detainee has shown you that there is  
4 exculpatory evidence that wasn't considered, and it ought to  
5 be considered together with the incriminating evidence. But  
6 here, in this case, you see the best record the Government's  
7 ever going to have in this case, a record they've been to,  
8 spent a year, been through three proceedings here, and now  
9 they're in the Supreme Court to vindicate the fact that this  
10 is the record.

11 THE COURT: Can I ask about that? What, in  
12 Bismullah we said that this isn't the record, right? In  
13 Bismullah -

14 MR. WILLETT: You said there's a broader record.

15 THE COURT: There's a broader record. And you asked  
16 that we hear the case in what is an unusual posture for us,  
17 which before there is the complete record.

18 MR. WILLETT: We did.

19 THE COURT: Okay. So the Government says in their  
20 brief on this point, well there is more evidence, and we put  
21 in the evidence, but we have more, and the fact that the case  
22 had gone forward in the normal course, I suppose we would be  
23 seeing that now. So what does that, what does that do to your  
24 argument that this is sort of the only evidence or the best  
25 evidence or anything else? Maybe it's, maybe it's the least

1 amount of evidence the Government thought they could get away  
2 with.

3 MR. WILLETT: Well that's a -

4 THE COURT: (Indiscernible) that include any effect  
5 it may have on what the proper remedy is?

6 THE COURT: Yes, that's, that's the context in which  
7 I'm asking the question.

8 MR. WILLETT: The answer to your, that's a hard  
9 position for the Government to take, because the Government  
10 says, this is what the record ought to be. The Government  
11 makes -

12 THE COURT: I got that, but -

13 THE COURT: You're both, yes. You're both entirely  
14 inconsistent. You're entitled to be, you're litigating. But  
15 get to Judge Garland's question.

16 JUDGE GARLAND: But at least, just to be clear, at  
17 least until the Supreme Court decides otherwise, this is not  
18 what the record is supposed to be, right?

19 MR. WILLETT: Well -

20 JUDGE GARLAND: -- as far as this Court is concerned  
21 -

22 MR. WILLETT: Right.

23 JUDGE GARLAND: -- the record is broader. That's  
24 our precedent, and we are bound to it. I assume that at some  
25 point in the relatively near future, we will know whether the

1 Supreme Court takes Bismullah. If they don't take it, then  
2 our, our opinion will, will be the final on that question.

3 MR. WILLETT: Yes, Your Honor. Two points. First,  
4 the Government has never represented to you that it has any  
5 additional evidence or theory as to Parhat that would make him  
6 an enemy combatant.

7 JUDGE GARLAND: I thought -

8 MR. WILLETT: They say that they may have, and  
9 they've had our motion for, I think since November. They've  
10 never represented to you that there's some other thing they  
11 want to add to the record. That's the first point. The  
12 second point is that this record never gets better for the  
13 Government. It only gets worse, because it sucks in  
14 exculpatory evidence if the law of the case stands. We're  
15 here because he's sitting in Camp 6, and we can't wait for  
16 this appellate (indiscernible) to go until the crack of doom.  
17 When we saw what they said the record was finally after years  
18 of asking for it, we said we went on their record. That's why  
19 we're here.

20 Your Honors, I recognize that in many cases, remand  
21 will be the appropriate remedy. But here, no remand is going  
22 to discover a force authorization from Congress that  
23 authorizes military force against ETIM. The president never  
24 determined that ETIM attacked us on 9/11. It didn't. The  
25 president never determined that ETIM harbored attackers. It

1 didn't. So nothing's going to change in a remand. And the  
2 Government hasn't suggested how anything can change in a  
3 remand.

4 Now I want to be practical. I'm sure it's  
5 uncomfortable to contemplate a direct order for release, but  
6 this is a person who's never been even accused of committing a  
7 crime or engaging in any wrongdoing, unlike Martinez. In  
8 Clark v. Martinez, who was an alien with no right to be  
9 present, who had committed and been convicted of crimes, the  
10 Supreme Court held that he had to be released into the lower  
11 48. And we're asking no more in this case.

12 THE COURT: Do we really have jurisdiction to  
13 release him into the United States? This is a person who so  
14 far as the record reflects has never entered the country.

15 MR. WILLETT: He's like Martinez, Your Honor. You  
16 do have jurisdiction -

17 THE COURT: Martinez never entered the country?

18 MR. WILLETT: Well he was physically present, but he  
19 had not made -

20 THE COURT: Yes, he was physically present.

21 MR. WILLETT: -- he had not made an entry.

22 THE COURT: Now your client not only is not, does  
23 not have a legal entry, such as Martinez did not have, your  
24 client doesn't have any entry at all.

25 MR. WILLETT: Well he's a -



1           THE COURT: Under no definition of the word, entry,  
2 has he ever been in the United States. At least you got  
3 Guantanamo, which is another thing the Supreme Court hasn't  
4 really (indiscernible).

5           MR. WILLETT: I understand Your Honor's point. But  
6 the fact of the matter is that in law, he stands no  
7 differently than did Martinez. Because Martinez also had not  
8 made an entry in law. He was part of the (indiscernible).

9           THE COURT: He was held to be improperly detained  
10 within the United States.

11          MR. WILLETT: But there are no -

12          THE COURT: And the Court didn't say you release him  
13 in the general population, it said release him. And where he  
14 was was within the United States. When you released him, it  
15 was here.

16          MR. WILLETT: Let me comment -

17          THE COURT: If we wrote, are you telling us we  
18 should release Parhat into Guantanamo?

19          MR. WILLETT: No.

20          THE COURT: Placed on the beach in Cuba?

21          MR. WILLETT: No, Your Honor. I'm telling you that  
22 there's, I'm telling you that in the third branch of our  
23 government, we're all about remedies that have meaning. Our  
24 government has tried for years to send him to all of our  
25 allies, evidently not worried that he would pose any danger

1       there.

2               THE COURT:   That seems to be the real practical  
3       problem here.

4               MR. WILLETT:   And there is no other remedy.

5               THE COURT:   Do we know -

6               THE COURT:   That doesn't mean we have authority to  
7       do it.

8               MR. WILLETT:   Oh, I -

9               THE COURT:   Because there is no other remedy does  
10       not imply that we have authority to give you the remedy you're  
11       asking.

12              MR. WILLETT:   I disagree, Your Honor.

13              THE COURT:   Well, you're wrong.   You get to  
14       disagree, but you don't get to decide.   I don't know of any  
15       case that says that because there is not some other remedy  
16       satisfactory to the parties, that empowers the Court to do  
17       whatever it is the plaintiff wants.

18              MR. WILLETT:   Well I'm not taking that position,  
19       Your Honor.   But I -

20              THE COURT:   You seem to be.

21              MR. WILLETT:   What I am saying is that if you find  
22       there is a legal wrong in a matter of imperative concern,  
23       which is imprisoned, it is the very essence of the courts to  
24       give a meaningful remedy.   And that's -

25              THE COURT:   That doesn't empower us to override the

1 immigration laws.

2 MR. WILLETT: Oh, no. His -

3 THE COURT: In Martinez, you had a direct issue  
4 there of somebody who had physically entered the country, and  
5 it's whether or not, what his legal status was at that point.  
6 You don't have that here.

7 MR. WILLETT: No, I don't.

8 THE COURT: We would actually be ordering the United  
9 States to allow this person physical entry in the United  
10 States if we did what -

11 MR. WILLETT: Well -

12 THE COURT: -- your most broad claim is.

13 MR. WILLETT: I'm not asking for asylum. He would  
14 still be deported. I'm saying you could order -

15 THE COURT: So they can bring him in, but could you  
16 take him out the next day?

17 MR. WILLETT: If they can find a safe place to send  
18 him, yes, absolutely, Your Honor. The point is, you can order  
19 that he be released, that he not be sent to China, and that he  
20 not be sent to any of China's satellites, and the Government  
21 can figure it out from there. If they can make an arrangement  
22 with France or Germany, fine. If they can't, they have to  
23 bring him here. Otherwise -

24 THE COURT: So you don't have an objection to  
25 transfer, as long as it's not to China or some -

1 MR. WILLETT: Not at all. I have just a moment to  
2 reserve. Thank you very much, Your Honor.

3 THE COURT: Thank you, counsel. We'll round you up  
4 to two minutes on rebuttal. I'll hear from the Government.

5 ORAL ARGUMENT OF GREGORY G. KATSAS , ESQ.

6 ON BEHALF OF THE RESPONDENTS

7 MR. KATSAS: May it please the Court. Let me begin  
8 with the question whether the record supports the tribunal's  
9 determination that Mr. Parhat affiliated himself with ETIM.  
10 The evidence -

11 THE COURT: I take it that the regulation does not  
12 use that word.

13 MR. KATSAS: No, it does not. The regulation -

14 THE COURT: Isn't that a problem?

15 MR. KATSAS: No. I think the regulation says -

16 THE COURT: Part of or supporting.

17 MR. KATSAS: -- part of or support. I think  
18 affiliated is a shorthand for one or the other.

19 THE COURT: It has no -

20 THE COURT: If you want to move to one or the other.

21 MR. KATSAS: The evidence supporting the tribunal's  
22 determination that Mr. Parhat is affiliated with ETIM is  
23 largely in unclassified material that I can discuss here. Mr.  
24 Parhat in his own testimony said that Hasan Mamun (phonetic  
25 sp.) visited the camp at which he, the camp which he joined

1 and identified Mr. Mamun as his, i.e., Parhat's leader. The  
2 significance of that we can talk about later. Mr. Parhat went  
3 voluntarily, traveled from his country to Afghanistan to  
4 attend a military training camp. By his own admission, he  
5 went there in order to prepare for what he hoped would be  
6 belligerency against China. He lived there for four months.  
7 He trained with an AK47 assault rifle.

8 THE COURT: Counsel, you don't need to review the  
9 entire factual record. We have read it, and you, you may want  
10 to get closer to the legal issues.

11 MR. KATSAS: Okay.

12 THE COURT: You can take a long time on what you're  
13 doing now.

14 MR. KATSAS: That's fair. The point is that  
15 someone, someone living at and training in that way with, in a  
16 military camp, Judge Sentelle, would be subject to military  
17 detention under background, law or principles, which support  
18 the detention of members of armed forces and also civilians  
19 who follow the army around. Article IV of the Geneva  
20 Convention speaks of supply contractors and war  
21 correspondents, individuals of that nature. Mr. Parhat is  
22 living at the camp for months. At a minimum, if a supply  
23 contractor or, or a war correspondent can be detained, then so  
24 can someone who is there receiving weapons training and doing  
25 the various things that Mr. Parhat was doing.

1 JUDGE GARLAND: Does it matter, don't you also have  
2 to show that the camp is ETIM camp and that it's, ETIM is  
3 associated with Al Qaida or the Taliban and that ETIM is  
4 engaged in hostilities against the United States -

5 MR. KATSAS: Yes.

6 JUDGE GARLAND: -- or the coalition?

7 MR. KATSAS: Yes. We have to show each of those,  
8 Judge Garland, with respect to the question, the connection of  
9 the camp to ETIM. I can give you the whole story in the  
10 classified setting. But one critical fact in the public  
11 testimony is that Mr. Parhat identifies the camp leader and  
12 his, the leader of this (indiscernible) group as Mamun. We do  
13 also have to show that ETIM is associated with the Taliban or  
14 Al Qaida. The discussion of that has to occur primarily in  
15 the classified setting. And we do under the regulation also  
16 have to show that ETIM forces are engaged in hostilities  
17 against U.S. or coalition forces.

18 JUDGE SENTELLE: Where does the associated language  
19 originate? It's not in the AUMF.

20 MR. KATSAS: No, it's not Judge Sentelle. It's in  
21 the enemy combatant definition, and it's -

22 JUDGE SENTELLE: The enemy combatant definition  
23 contained within?

24 MR. KATSAS: The combatant status tribunal review  
25 tribunal regulations.

1 JUDGE SENTELLE: Well it's regulations.

2 MR. KATSAS: Yes.

3 JUDGE SENTELLE: They're not statutes.

4 MR. KATSAS: Correct.

5 JUDGE SENTELLE: Does the statute support that  
6 definition?

7 MR. KATSAS: I think it does, because -

8 JUDGE SENTELLE: Is the statutory authority the DTA  
9 or the AUMF?

10 MR. KATSAS: The statutory authority is the AUMF.

11 The AUMF -

12 JUDGE SENTELLE: Where in the AUMF would we find the  
13 support for that language in the regulation?

14 MR. KATSAS: The AUMF speaks of nations,  
15 organizations or persons determined by the president to have  
16 committed the attacks or harbored those who do.

17 JUDGE SENTELLE: On September 11.

18 MR. KATSAS: Correct. That, that definition is  
19 unproblematic in its application at least to Al Qaida and the  
20 Taliban. Al Qaida is -

21 JUDGE SENTELLE: We get that far.

22 MR. KATSAS: Okay. Then, then Al Qaida for its own  
23 tactical advantages and in violation of the laws of war, blurs  
24 its own outer bounds.

25 JUDGE SENTELLE: Then you have to show that ETIM

1 and/or the individual Parhat aided, abetted, assisted on or  
2 before September 11 -

3 MR. KATSAS: No.

4 JUDGE SENTELLE: -- to be within the terms of that  
5 statute.

6 MR. KATSAS: No. We have to show, we have to show  
7 one of two things. To get within the AUMF, we have to show  
8 that ETIM is part of the Al Qaida organization in fact. And  
9 to come back to your question about -

10 JUDGE SENTELLE: But you're dependent not upon the  
11 associated with language in a vacuum as it were, but on the  
12 proposition of equivalency. That is to say that ETIM is  
13 equivalent to Taliban or Al Qaida?

14 MR. KATSAS: Is, within the meaning of the statute  
15 is part of the same organization.

16 JUDGE SENTELLE: But those words are not in the  
17 statute, part of the same organization. But you're saying  
18 that that's implicit, that -

19 MR. KATSAS: We're saying, we're saying one of two  
20 things. Either the word, organization, read in context can  
21 permissibly be understood to encompass not only Al Qaida  
22 defined in some rigid, formalistic way as, I don't know what  
23 it would be precisely because they don't issue membership  
24 cards or serial numbers, but people in a direct chain of  
25 command to Bin Laden. Is organization better understood in



1 that sense, or alternatively, can it permissibly be understood  
2 as an organization in fact? People who effectively are  
3 working together towards a common purpose. And we suggest  
4 that given -

5 THE COURT: And how did they aid the 9/11 attacks?

6 MR. KATSAS: It's not that they aided the 9/11  
7 attacks, Judge -

8 THE COURT: Planned, authorized, committed or aided.

9 MR. KATSAS: That's right. Al Qaida -

10 JUDGE SENTELLE: The attacks that occurred, the  
11 attacks that occurred on September 11.

12 THE COURT: Those attacks.

13 MR. KATSAS: Al Qaida, Al Qaida committed those  
14 attacks, and this case is about determining the outer bounds  
15 of that organization in the context of -

16 JUDGE SENTELLE: So you are dependent on the  
17 proposition that ETIM is properly defined as being part of Al  
18 Qaida, not that it aided or abetted, or aided or harbored Al  
19 Qaida, but that it's part of -

20 MR. KATSAS: Correct.

21 JUDGE SENTELLE: -- (indiscernible).

22 MR. KATSAS: With, in order to, in order to fit them  
23 in the AUMF, I think -

24 JUDGE SENTELLE: Well you have to fit them in the  
25 AUMF, unless we go to presidential inherent authority.

1           MR. KATSAS: I don't think so, because we do have  
2 presidential, we do have presidential authority, a rather  
3 modest claim on the facts of this case for the following  
4 reason. Let's assume, as I hope you don't, that you define  
5 organization to mean Al Qaida in some rigid, formalistic  
6 sense. Congress at least has authorized hostilities against  
7 that entity, Al Qaida.

8           JUDGE SENTELLE: Yes.

9           MR. KATSAS: Then you would have a question whether  
10 the president in the context of prosecuting those hostilities  
11 has Article II, commander in chief authority to apply military  
12 force not only to, in the hypothetical, the named entity Al  
13 Qaida, but also to associated forces who in fact are fighting  
14 with Al Qaida, engaged in hostilities.

15           JUDGE SENTELLE: Has (indiscernible) ever been  
16 (indiscernible)?

17           MR. KATSAS: No, it hasn't. But take, take World  
18 War II precedence. Congress authorizes a military conflict  
19 with Germany.

20           JUDGE SENTELLE: That was a perfect war.

21           MR. KATSAS: I'm sorry?

22           JUDGE SENTELLE: That was a perfect war. World War  
23 II was a perfect war.

24           MR. KATSAS: It was a perfect war. The point is -

25           JUDGE SENTELLE: We're not in a perfect war today,

1 and we weren't in Little v. Barreme.

2 MR. KATSAS: The point, Judge Sentelle, is when  
3 Congress named the enemy Germany and it turns out that Vichy,  
4 France, is fighting alongside Germany -

5 JUDGE SENTELLE: Yes.

6 MR. KATSAS: -- the president used military force  
7 against Vichy, France, without legal controversy.

8 JUDGE SENTELLE: That was not a limited war. You're  
9 dealing, we're dealing in Little v. Barreme with a  
10 congressional authorization that allowed the -

11 MR. KATSAS: In --

12 JUDGE SENTELLE: I may get it backward, but to and  
13 from was the distinction on the ships --

14 MR. KATSAS: Right. It's a fair point, but -

15 JUDGE SENTELLE: -- (indiscernible) to France or  
16 from France, and could you seize a Danish vessel who was going  
17 the other way. And the Supreme Court held no, where Congress  
18 has authorized a limited war, the president cannot use his  
19 inherent authority to go beyond the terms of the  
20 authorization.

21 MR. KATSAS: In Little, in the quasi war cases,  
22 Congress was very precise in authorizing the exact  
23 (indiscernible) and bounds for purposes of capture and salvage  
24 rights and so on. In that context, you're, you're right. The  
25 Court drew a negative inference and construed that to bind the

1 president's power.

2 I don't think the AUMF is sensibly construed as  
3 authorizing only a quasi response to September 11. The  
4 difference between the AUMF and the Little v. Barreme  
5 statutes, the AUMF is written in very broad terms. It  
6 expressly, it describes the enemy. It doesn't the name the  
7 enemy. It gives the president the power to work out the  
8 details who the enemy is. It is written expressly in terms of  
9 authorization, so we think the better analogy -

10 THE COURT: You think that any, any entity that was  
11 associated with Al Qaida before the 9/11 attacks in any way, a  
12 hypothetical, an entity that had nothing to do with the 9/11  
13 attacks, but they were associated with Al Qaida in some way,  
14 had a, you know, military came on the North Pole or something,  
15 does the AUMF authorize use of force against them? By the  
16 mere fact that they're associated with Al Qaida.

17 MR. KATSAS: That's a hard case. Maybe not.

18 THE COURT: No it's not. It's not -

19 JUDGE GRIFFITH: Because -

20 MR. KATSAS: Maybe not, Judge Griffith. But -

21 JUDGE GRIFFITH: Because how could that be a hard  
22 case? Because the AUMF says, it has to be linked to the 9/11  
23 attacks.

24 MR. KATSAS: The AUMF grants authorization with  
25 respect to the organization that committed the September 11

1 attacks. It does not speak to the question of how to define  
2 the outer bounds of a terrorist organization.

3 THE COURT: Isn't the 9/11 attacks the touchstone of  
4 the AUMF?

5 THE COURT: Yes.

6 THE COURT: Planned, authorized, committed or aided  
7 the 9/11 attacks, not planned, authorized, committed or aided  
8 this nefarious organization in pursuing its goals. It's the,  
9 the focus on the 9/11 attack.

10 MR. KATSAS: Absolutely. Al Qaida committed the  
11 9/11 attacks, and the question is what constitutes Al Qaida.  
12 But Judge Griffith, I don't, I don't want to, I don't want to  
13 fight this for too much, because the critical point is the  
14 regulations narrowed the government's authority in exactly the  
15 way your question suggests by requiring not only association  
16 with Al Qaida, but also that the associated entity in fact is  
17 committing hostilities against the U.S.

18 JUDGE SENTELLE: (Indiscernible). That's not  
19 narrower, that's different.

20 THE COURT: That's broader.

21 JUDGE SENTELLE: That's not narrower, it's  
22 different. It's broader. The statute speaks in terms of  
23 aiding the 9/11 attacks.

24 MR. KATSAS: Right.

25 JUDGE SENTELLE: You are telling us that aiding

1 terrorist activity or is narrower than that. It's not.

2 MR. KATSAS: In response to -

3 JUDGE SENTELLE: The 9/11 attacks occurred on 9/11.

4 MR. KATSAS: Right.

5 JUDGE SENTELLE: Yes.

6 MR. KATSAS: Al Qaida committed those attacks. In  
7 response to Judge Griffith's question about whether any entity  
8 affiliated with Al Qaida in any way could be considered Al  
9 Qaida for AUMF purposes, my response to that is, the  
10 regulations are narrower than his hypothetical, because they  
11 require not only affiliation with Al Qaida, but also  
12 engagement in hostilities.

13 Judge Sentelle, if I could come back -

14 JUDGE SENTELLE: How can you have that as narrower  
15 than the 9/11 attacks? Hostilities can include other things,  
16 and I think in application has included things beyond the 9/11  
17 attacks, has it not?

18 MR. KATSAS: I'm sorry?

19 JUDGE SENTELLE: All right. You're saying  
20 hostilities is narrower than 9/11 attacks?

21 MR. KATSAS: No. I'm, I'm addressing the question  
22 of what kind of affiliation with Al Qaida will bring an  
23 affiliated entity within -

24 JUDGE SENTELLE: I understand that.

25 MR. KATSAS: -- the meaning of organization.

1 JUDGE SENTELLE: And in addressing it, you seem to  
2 be saying that the regulations are narrower than the statute,  
3 and I'm not sure that I understand why you're saying that when  
4 the regulations speak in terms of hostilities and the statute  
5 speaks in terms of the 9/11 attacks. Hostilities is -

6 THE COURT: Are you saying that the type -

7 MR. KATSAS: Judge Sentelle, the regulations require  
8 affiliation with either Al Qaida, which committed the attacks,  
9 or the Taliban, which harbored Al Qaida. But they also  
10 require engagement in hostilities against -

11 THE COURT: You're saying, you're saying the nature  
12 of the affiliation has to be engaging in hostility.

13 MR. KATSAS: Right. And I think that language in  
14 the regulation, Judge Griffith, takes care of your  
15 hypothetical.

16 Judge Sentelle, if I could come back to the Little  
17 question of negative implication. Given the breadth of the  
18 AUMF and the invitation of the president to apply it, we think  
19 the better analogy is not the negative implication that flows  
20 from the narrowly drawn statutes in Little, but rather Justice  
21 Jackson's statement in Youngstown that the courts should  
22 strive to uphold, strive as much as possible to uphold  
23 assertions of presidential power with respect to the outside  
24 world, that silence in the area of war making does not  
25 necessarily constitute disapproval. In -

1 JUDGE SENTELLE: In Youngstown, the, part of that  
2 Youngstown analysis, which I think probably has been, although  
3 originally in the concurrence, what has become law of the  
4 court is -

5 MR. KATSAS: Right.

6 JUDGE SENTELLE: Dames & Moore, which I don't think  
7 (indiscernible). But that has three levels. Where Congress  
8 and the president are both acting in the same direction, where  
9 the president's authority is at the zenith, where Congress has  
10 acted in the opposite direction at which point, has acted and  
11 the president doing something inconsistent therewith, where  
12 the presidential authority (indiscernible), and where Congress  
13 is silence. So you are in a situation here that's either the  
14 most or the least, it's not in the middle. Congress is not  
15 silent. It said something. So either you've got to act  
16 consistent with it or you've got to show it that it was within  
17 the president's inherent authority if he (indiscernible).  
18 That's where he's (indiscernible).

19 MR. KATSAS: I don't think so, because Justice  
20 Jackson speaks of Congress sometimes in a category to inviting  
21 an independent presidential response. I think of Dames &  
22 Moore, Dames & Moore is perhaps the best illustration of this  
23 principle. The Supreme Court in Dames & Moore specifically  
24 found that neither the IEPA statute, nor the Hostage Act,  
25 authorized what the president undertook to do, which is



1 espouse and settle certain claims against Iran. The court -

2 JUDGE SENTELLE: I think in fact you did cite Dames  
3 & Moore in the brief. Excuse me. Go ahead.

4 MR. KATSAS: And, and the Court in that context did  
5 not apply a Little v. Barreme negative implication, Judge  
6 Sentelle. It said that legislation, which by its terms does  
7 not apply, can invite, that's the Court's word -

8 JUDGE SENTELLE: Yes.

9 MR. KATSAS: -- invite other measures. In that  
10 case, the president settling the claims incidental to the IEPA  
11 undertaking. In this case, Congress authorizes a war against  
12 Al Qaida. Military forces encounter associated entities that  
13 look a lot like co-belligerents under a traditional laws of  
14 war. Our point is simply that whether you -

15 THE COURT: Can you, that, pause over that. The co-  
16 belligerent definition requires considerably more involvement  
17 than what you're talking about here, doesn't it?

18 MR. KATSAS: Co-belligerent definition is -

19 THE COURT: Don't you have to take an active part?

20 MR. KATSAS: Different, different forces fighting  
21 together. And if we have association and engagement in  
22 hostilities by the associated forces, I think it's a fair  
23 analogy to co-belligerency. So our position -

24 THE COURT: The question about whether he's a, under  
25 co-belligerent rules -

1 MR. KATSAS: Yes.

2 THE COURT: -- you have two recognized armies, two  
3 recognized states.

4 MR. KATSAS: Yes.

5 THE COURT: He's not, Parhat, himself, doesn't fit -

6 MR. KATSAS: No, but -

7 THE COURT: -- easily within the co-belligerent  
8 rule. Maybe for the last part of the argument, but not for  
9 the first part of the argument.

10 MR. KATSAS: Parhat, Parhat easily, I think,  
11 qualifies as either a member of ETIM forces or someone who  
12 follows those forces around in the field in the sense of -

13 THE COURT: Well (indiscernible) as to whether a  
14 mere camp follower is sufficient.

15 MR. KATSAS: I don't think so. The Geneva, third  
16 Geneva Convention is clear on that point. It follows the  
17 Hague Convention, which follows the Lieber Code, all of which  
18 --

19 THE COURT: The third, the third Geneva Convention  
20 uses the word camp followers?

21 MR. KATSAS: It uses, I'll get you the exact.  
22 Persons, Article IV of the third Geneva Convention, IV(a),  
23 subclause 4. Persons who accompany the armed forces within  
24 being members, and it enumerates various categories, civilian  
25 members of aircraft crew, war correspondents, supply

1 contractors, labor -

2 THE COURT: Those, those people are to be treated as  
3 prisoners of war.

4 MR. KATSAS: Treated as prisoners of war.

5 THE COURT: But you're not treating, treating Parhat  
6 as a -

7 MR. KATSAS: Treated as, treated as prisoners of war  
8 in they satisfy the requirements following the laws of war and  
9 wearing uniforms. But we know from Curran that belligerents -  
10 - JUDGE SENTELLE: If you don't wear the uniform,  
11 you're not protected by the laws of war.

12 MR. KATSAS: You're, you're not entitled to POW  
13 protections, but you are subject to detention authority. So a  
14 supply contractor not following the laws of war is subject to  
15 the detention authority, though he would lose his entitlement  
16 to POW status. So connecting, that's our theory for -

17 JUDGE SENTELLE: (Indiscernible) Curran is -

18 THE COURT: I'm not sure how this, this, I mean,  
19 this is a specific section which includes having to receive  
20 authorization from the armed forces they accompany and who  
21 have, have an identify card. It doesn't tell us what to do in  
22 the other situation that we have here.

23 MR. KATSAS: It seems to me a fair analogy that if  
24 a, if someone attached to the military in the way that  
25 civilian member of aircraft crew is can be permissibly

1 detained ancillary to the detention of the actual forces, than  
2 so can Mr. Parhat, who's in the camp for months at a time  
3 receiving weapons training and doing one other military act  
4 reflected at page 852 of the classified appendix.

5 JUDGE SENTELLE: Well let's not get into the  
6 classified.

7 THE COURT: Let me ask you -

8 JUDGE SENTELLE: (Indiscernible.)

9 MR. KATSAS: Right.

10 THE COURT: You said that under the AUMF, ETIM comes  
11 in because it's part of the same organization. That's your  
12 theory, right?

13 MR. KATSAS: Right.

14 THE COURT: And that is because it's working  
15 together for a common purpose. That was your language, right?

16 MR. KATSAS: Working together for a common purpose  
17 and engaged in belligerent acts against -

18 THE COURT: Well on the first point -

19 MR. KATSAS: Yes.

20 THE COURT: -- I take it there's no unclassified  
21 evidence that you can point to on that point, right?

22 MR. KATSAS: That's right. The most I could say  
23 with respect to unclassified evidence is, there is a  
24 circumstantial, there is circumstantial evidence that a  
25 military camp in Taliban-controlled Afghanistan at Tora Bora

1       circa 2001 is likely to be affiliated with either the Taliban  
2       or Al Qaida, but the details of that we can't get in to.

3               THE COURT: All right. So just to be clear, so your  
4       position is that all, any Uyghur in to whom Afghanistan gave  
5       sanctuary against the Chinese, whether it's an ETIM camp or  
6       it's a, some other organization as to which there is no  
7       evidence with connection to Al Qaida, and as which as, least  
8       they argue in this case that their only enemy is China, that  
9       those are, we should, that that would be enough if they were  
10      in such a camp in Afghanistan at that time to detain them as  
11      enemies?

12             MR. KATSAS: Not any Uyghur. Any Uyghur who is -

13             THE COURT: Any Uyghur camp. Any camp of Uyghurs  
14      training -

15             MR. KATSAS: Any -

16             THE COURT: -- to fight the Chinese, if that's,  
17      that's their argument. If that were the case.

18             MR. KATSAS: I think we need an ETIM camp.

19             THE COURT: You need an ETIM camp.

20             MR. KATSAS: Because ETIM is the entity associated  
21      with Al Qaida. And we need for the individual -

22             THE COURT: And you need evidence that ETIM is in  
23      fact part of the Al Qaida organization -

24             MR. KATSAS: Correct.

25             THE COURT: -- right?

1 MR. KATSAS: Correct.

2 THE COURT: And you don't have any unclassified  
3 evidence -

4 MR. KATSAS: Correct.

5 THE COURT: -- of that. And the circumstantial fact  
6 that they are located in that area -

7 MR. KATSAS: Is not enough.

8 THE COURT: -- is not enough.

9 MR. KATSAS: Is not enough.

10 JUDGE SENTELLE: You concede that's not enough.

11 MR. KATSAS: No, it's not enough.

12 THE COURT: And just so I'm clear, and we'll talk  
13 about this more in the classified session. The only  
14 classified evidence does not state the source, is that  
15 correct?

16 MR. KATSAS: Correct.

17 JUDGE SENTELLE: Might I ask we not go any further -

18 THE COURT: Yes.

19 JUDGE SENTELLE: -- into classified until we get -

20 THE COURT: That's fair.

21 JUDGE SENTELLE: -- the courtroom sealed?

22 THE COURT: That raises a question I have, though,  
23 that I think we can, I'm sure we can talk about here. Your  
24 position as to the reliability of the evidence that the, that  
25 the CRSTs. What is, what should we be looking for as we

1 review whether the CSRT followed the procedures that the  
2 secretary set forth, including preponderance of the evidence?  
3 As we look at that, what's, how are we supposed to determine  
4 whether the evidence that was presented is reliable?

5 JUDGE SENTELLE: In addressing that, remember that  
6 although the procedure prescribed to the tribunal could accept  
7 hearsay, it said if circumstances indicate reliability  
8 (indiscernible).

9 MR. KATSAS: Yes. I think -

10 JUDGE SENTELLE: Remember, we have to have that  
11 reliability underlined.

12 MR. KATSAS: With respect to -

13 JUDGE SENTELLE: Excuse me for interrupting you.

14 MR. KATSAS: With respect to the particular  
15 documents, I think I'd rather discuss them in classified  
16 setting. I think in this proceeding where we are talking  
17 about factual determinations about associations -

18 THE COURT: Right.

19 MR. KATSAS: -- and where under the terms of this  
20 Court's order, this Court's review is on the record made to  
21 the agency, I think the review would be deferential to the  
22 combatant status review tribunal that was entrusted to find  
23 the facts.

24 THE COURT: Well then, well then what, what's the  
25 standard by which the tribunal is to determine -

1           MR. KATSAS: The tribunal has to, the tribunal makes  
2 a preponderance of the evidence determination.

3           THE COURT: I'm talking about with reliability.

4           JUDGE SENTELLE: Reliability.

5           THE COURT: Reliability.

6           MR. KATSAS: Well the -

7           THE COURT: They have something in front of them.

8 How do they determine whether it's reliable or not?

9           JUDGE SENTELLE: We're told by your rules they have  
10 to determine reliability.

11          THE COURT: Has to be reliable.

12          MR. KATSAS: The regulations don't spell that out.

13 I think -

14          JUDGE SENTELLE: Right. So what do they do? Since  
15 they don't spell it out, what were they doing here insofar as  
16 you can say it in an unclassified (indiscernible)?

17          MR. KATSAS: They do what any finder of fact does.

18 They look at the evidence and make the best judgments that  
19 they can. I think the judgments in this, the judgments in  
20 this particular case are amply supported.

21          THE COURT: You agree that they have to be able to  
22 assess the reliability of the evidence.

23          MR. KATSAS: Yes. That's part of their fact finding  
24 function, yes.

25          THE COURT: Now when you were talking about



1 reviewing this circuit, I'm a little confused about the  
2 Government's position. Is the Government's position that we  
3 are supposed to review to determine whether a preponderance of  
4 the evidence supports the CSRT's conclusion or just some  
5 evidence, or some other deferential standard that you're going  
6 to ask?

7 MR. KATSAS: A deferential standard.

8 THE COURT: Well then how does that square with what  
9 the solicitor general told the Supreme Court not very long  
10 ago, December 5th, in Boumediene? And the question Justice  
11 Stevens asked General Clement was, what the standard was.  
12 General Clement said, that question, of course, can be  
13 considered by the D.C. Circuit on review because they are  
14 specifically entitled to a preponderance review in the D.C.  
15 Circuit. And Justice Stevens then said, but with respect to  
16 those claims, do you make the argument in your brief that some  
17 evidence is enough to refute that claim or do you say that it  
18 is a preponderance standard. General, and I'm sure you know  
19 this, because I expect you were sitting there. Maybe not, but  
20 you certainly read this. General Clement, it's a  
21 preponderance standard. That's what's set forth in the  
22 statute. And I take it the Government is going to take the  
23 same position before this Court that they took before the  
24 Supreme Court, right?

25 MR. KATSAS: Yes. But the preponderance standard in

1 the statute applies to the tribunal determination.

2 THE COURT: I realize it could be read that way, but  
3 that is not what the solicitor general of the United States  
4 said to the Supreme Court of the United States. He said, they  
5 are entitled to a preponderance view in the D.C. Circuit, and  
6 this was in specific response to a question about the sum  
7 evidence argument, which is the argument you're making to us.  
8 Did he misspeak? Are you authorized to say he misspoke?

9 MR. KATSAS: No. No, I'm not. I think that when,  
10 when a statute requires and administrative tribunal to find  
11 facts by a preponderance and authorizes review in this Court  
12 of that factual determination, I think the more natural  
13 assumption would be that review is deferential to the fact  
14 finder. Now I realize -

15 THE COURT: Are you, so you are saying he misspoke?  
16 The question couldn't have been clearer to him. Are you  
17 saying, I mean, this was presented, and it was presented in  
18 this way because it was a very important issue to the Court as  
19 to whether the DTA was going to be insufficient as compared to  
20 habeas, et cetera. Now do you want to change the Government's  
21 position either by filing a letter with the Supreme Court or  
22 by filing a letter with us? I mean, your brief did not  
23 actually take the sum evidence in this case. You agreed that  
24 our previous opinion in Bismullah seemed to suggest we were  
25 going to review.

1           MR. KATSAS: Bismullah, Bismullah does seem to  
2 foreclose that view with respect to hearings in which this  
3 Court reviews or decides fact questions on the expanded  
4 Bismullah record. I, I have no doubt that's true.

5           THE COURT: Why would there be any difference with  
6 respect to the -

7           MR. KATSAS: The different -

8           THE COURT: -- a narrower record? Why -

9           MR. KATSAS: I think the difference is that in this  
10 case, under the, under this Court's order, the Court is, this  
11 Court is reviewing for purposes of this proceeding on a closed  
12 record made in the agency which is ordinarily done  
13 deferentially.

14          THE COURT: So this is only a psychoanalysis of what  
15 this Court decided, is that right?

16          MR. KATSAS: It's an assessment, it's an assessment  
17 of the natural, the most natural legal consequences of an  
18 order limiting review to an administrative record, which I  
19 conceded is not how Bismullah case -

20          THE COURT: It's not how Bismullah was decided.

21          MR. KATSAS: -- will proceed. Is -

22          JUDGE SENTELLE: Are we through with that line? I  
23 would stake you. I know time has long since expired, but we  
24 don't, we don't follow the (indiscernible) of the Supreme  
25 Court (indiscernible). On the question of remedy -

1 MR. KATSAS: Yes.

2 JUDGE SENTELLE: -- I know you don't want to assume  
3 that we rule with the petitioner's own merits, but assuming we  
4 do, their position is that, broadly taken, we release the  
5 petitioner. Narrower taken, that we release him in the United  
6 States. Forget about the where we release him for a moment.  
7 What do you say the relief would be if we do find that the  
8 record does not support detention?

9 MR. KATSAS: I think the relief would be remand for  
10 the Defense Department to assess whether or not it wants to  
11 attempt another tribunal determination. In any event, I don't  
12 think release is appropriate for reasons spelled out by Judge  
13 Roberts in the Qassim opinion. It's difficult to imagine how  
14 this Court could order release into the United States.

15 JUDGE SENTELLE: Okay, forget the into the United  
16 States part -

17 MR. KATSAS: Okay. Then -

18 JUDGE SENTELLE: -- at this point, but I don't have  
19 the precise quotation, perhaps I'm not as well prepared as my  
20 colleagues, but I thought the United States' position in  
21 Boumediene was that the Detainee Treatment Act is the  
22 equivalent of habeas. That therefore, the question -

23 MR. KATSAS: Yes.

24 JUDGE SENTELLE: -- does not have to be reached as  
25 to whether there is a habeas right -

1 MR. KATSAS: Right.

2 JUDGE SENTELLE: -- or that have to be determined.

3 Now if it's the equivalent of habeas, the habeas remedy here  
4 would be release.

5 THE COURT: In fact, to follow up on the, on the  
6 preparation is, Solicitor General Clement did say that if it  
7 was necessary to satisfy the suspension clause, that release  
8 would be available to the Court, right? That's what you say  
9 even in your own brief. We're not at that stage yet, because  
10 we don't know what the Supreme Court's going to say.

11 MR. KATSAS: Right.

12 THE COURT: But under those circumstances, the  
13 solicitor general is saying that release would be, be an  
14 alternative.

15 MR. KATSAS: What he said was that the detainee, the  
16 Detainee Treatment Act doesn't preclude release. But let's  
17 come to the very practical question of what relief, put aside  
18 the Detainee Treatment Act. Let's assume we're here on  
19 habeas, Judge Garland. If we were here on habeas, you would,  
20 and you were to rule against us, you would be in exactly the  
21 same position as Judge Robertson, who ruled against us on a  
22 district court habeas -

23 THE COURT: Well you solved that problem, though,  
24 didn't, you solved, you solved that problem before the court  
25 of appeals had to consider the issue, right?

1 MR. KATSAS: Right.

2 THE COURT: By transferring him to another country.

3 MR. KATSAS: But the point, the point -

4 THE COURT: And if you did that, you would solve our  
5 problem, as well.

6 JUDGE SENTELLE: Yes.

7 THE COURT: As well as, as well as Mr. Parhat's.

8 JUDGE SENTELLE: (Indiscernible) Parhat's problem.

9 MR. KATSAS: The point, the point -

10 JUDGE SENTELLE: The question (indiscernible) before  
11 us today -

12 MR. KATSAS: -- Judge Garland -

13 JUDGE SENTELLE: The question for us today is not  
14 based on his having been released, it's based on the  
15 possibility of his having made a record upon which, are you  
16 having failed to make a record, your side having failed to  
17 make a record upon which he can be detained. If this is the  
18 equivalent of habeas for constitutional purposes -

19 MR. KATSAS: Yes.

20 JUDGE SENTELLE: -- then isn't the only remedy  
21 possible here release?

22 THE COURT: Or transfer. When the -

23 JUDGE SENTELLE: Get him out of the place he's  
24 trying to get habeas out of.

25 MR. KATSAS: One permissible habeas remedy is

1 release or retry within some reasonable time. That would be  
2 equivalent to the remand I'm suggesting.

3 THE COURT: What if he were -

4 MR. KATSAS: But in any event -

5 THE COURT: What if he were retried and either the  
6 tribunal thought that he was not an enemy combatant in light  
7 of whatever we said about, or it was appealed again and we  
8 again said there wasn't enough? Then what if we were at that  
9 stage?

10 MR. KATSAS: On a, on a second appeal?

11 THE COURT: Yes.

12 MR. KATSAS: I think the case for ordering release  
13 at that point would be substantially stronger, but on a first  
14 review, I think whether you conceive of this as an  
15 administrative proceeding where the presumptive relief is  
16 remand or as a habeas -

17 THE COURT: Judge Randolph would not agree with you  
18 that the presumptive relief in an administrative case is  
19 remand, right?

20 MR. KATSAS: I'm not sure.

21 THE COURT: Well he wrote, he's written several  
22 times that vacature (phonetic sp.) is the correct -

23 JUDGE SENTELLE: This is not necessarily parallel to  
24 (indiscernible) --

25

1 THE COURT: Right.

2 JUDGE SENTELLE: -- which I've heard Judge Randolph  
3 on.

4 THE COURT: I disagreed with him, so it's not a  
5 problem. But when you say presumptive -

6 JUDGE SENTELLE: (Indiscernible) with me.

7 MR. KATSAS: If, if you contemplate reliefs, Judge  
8 Sentelle, you suggested a lack of comfort of the option of  
9 releasing to the United States. Think about the other  
10 options. You, the only other possible options are release  
11 into a secure military based or ordering transfer to a, a  
12 country that won't take him, or the only country that would  
13 take him, where there are legitimate concerns of mistreatment.

14 JUDGE SENTELLE: That still gets you to the question  
15 that Judge Garland's asking, if this were the rehearing after  
16 remand. I think you have a very valid argument that the norm  
17 in habeas cases, when we grant habeas is, we say release him  
18 or retry him within x period of time.

19 MR. KATSAS: Right. I think if you came to the  
20 point on a subsequent proceeding where it looked like we were  
21 approaching the endless circle of remands and that was  
22 inappropriate, I think probably the best you could do given  
23 the lack of any better option is order the Defense Department  
24 to treat the detainee as an non-enemy combatant. In some,  
25 Congress authorized the president at least to commit



1 hostilities and detain members of Al Qaida. Whether you  
2 consider -

3 JUDGE SENTELLE: Non-enemy combatant or enemy non-  
4 combatant?

5 THE COURT: You mean as not an enemy combatant.

6 JUDGE SENTELLE: I don't understand the terminology,  
7 not enemy combatant. Do you mean just not as an enemy  
8 combatant?

9 MR. KATSAS: To treat him not as an enemy combatant.

10 JUDGE SENTELLE: At that point then, they have no  
11 authority to detain him.

12 MR. KATSAS: They have no authority under the laws  
13 of war to detain him. They have the practical problem of  
14 finding him a place to go. He would be in a different legal  
15 category in an improved position. But -

16 JUDGE SENTELLE: He'd be out of solitary  
17 confinement.

18 MR. KATSAS: Correct. Absolutely.

19 JUDGE SENTELLE: Unless my colleagues have further  
20 questions, we have long since your, amongst us, we've long  
21 since exhausted your time.

22 MR. KATSAS: And me, as well, thank you.

23 JUDGE SENTELLE: And you, as well. And you have two  
24 minutes left, and I do not warrantee that we will stop at the  
25 end of two minutes. We don't seem to have anything else. Go

1 ahead, counsel.

2 ORAL ARGUMENT OF P. SABIN WILLETT, ESQ.

3 ON BEHALF OF THE PETITIONER

4 MR. WILLETT: Thank you, Your Honor. On the  
5 proposition that Al Qaida equals ETIM, which you can conflate  
6 the two, I needn't waste any time and we can demolish that  
7 proposition in the classified session. It will not stand the  
8 scrutiny of the record.

9 JUDGE SENTELLE: We'll hold that for classified,  
10 then.

11 MR. WILLETT: Your Honor, Little, you're right about  
12 that, never been overruled. And every time Congress acts,  
13 Youngstown, Hamdan, Congress wins. It's only in the zone  
14 where some (indiscernible) while Congress is out of session  
15 that this power arises. The interesting question about  
16 Youngstown is, who wins? President Truman is saying there's a  
17 national catastrophe, and yet, he's not allowed to steal the,  
18 to seize the steel mills.

19 THE COURT: I don't think he tried to steal the  
20 steel mills.

21 JUDGE SENTELLE: Some would say he did.

22 MR. WILLETT: Your Honor, my, my grandmother would  
23 have been among those, Your Honor.

24 THE COURT: Mine would not.

25 JUDGE SENTELLE: You don't want to know what my

1 father said about Harry Truman.

2 MR. WILLETT: Mr. failed haberdasher, I once heard.  
3 Your Honor, Mr. Katsas' position inevitably takes the  
4 Government to the very force authorization that Congress  
5 denied on September 14th. They wanted the authority to wage a  
6 preemptive war globally against those who threaten us, and  
7 Congress said, no. It is 9/11. It's not 9/10, it's not 9/12.  
8 And that's set out in detail in the brief. There's no dispute  
9 about it.

10 On this notion that aided the attacker is close  
11 enough to aiding the attacks in the statute, the Government  
12 never explains where you go with the next clause, which says,  
13 harbored the attackers. Harbored is a much narrower kind of  
14 aid. It would meaning nothing if aiding the attacks would be  
15 -

16 JUDGE SENTELLE: Well have lots of make sure  
17 (indiscernible) cases. That the fact that you have another  
18 word which might be encompassed within the first word does not  
19 inherently narrow it. It could be that Congress is simply  
20 making certain.

21 MR. WILLETT: Well where would you go in this  
22 reading, Your Honor? Because what, what they're trying to  
23 single out is attackers -

24 JUDGE SENTELLE: We'd go to that quote from  
25 Shakespeare that Judge Williams likes. Well, they're trying

1 to make surety sure. They're trying to be sure of it there.

2 MR. WILLETT: Well we prefer that the quality of  
3 mercy is not strained after six years, Your Honor.

4 THE COURT: That's very good (indiscernible).

5 MR. WILLETT: How many minutes do we have?

6 THE COURT: I did not prefer Shakespeare, sorry. I  
7 obviously should have.

8 MR. WILLETT: Now it is, the standard is  
9 preponderance. The rules say preponderance.

10 THE COURT: Before you, could you just skip to the  
11 remedy question just for the moment and come back to  
12 preponderance? Judge Sentelle raised, Chief Judge Sentelle  
13 raised an interesting analogy, which is the habeas, which is  
14 an ordinary case habeas if we found the evidence insufficient,  
15 the person would be sent back for a retrial. Why is that not  
16 a, I hadn't thought about that. Why is that, oops.

17 THE COURT: I have just -

18 THE COURT: Why, I give you dispensation. Why isn't  
19 that an appropriate analogy here? And not even an analogy.  
20 Obviously, you think habeas is a better remedy than DTA.

21 MR. WILLETT: Because Your Honor, the, when you get  
22 a remand in a habeas case, what's happening is the same thing  
23 that's happening in a remand in an (indiscernible) case. A  
24 rule has been established that has to be applied. You know,  
25 the, the prisoner didn't get a lawyer or he wasn't able to

1 confront the evidence, or a document should have been  
2 admitted. So it has to be, it's not that there isn't  
3 incriminating evidence. There's now a broader package of  
4 evidence, so the right remedy is remand. Here, nothing can  
5 make ETIM the enemy, nothing. We'll address this notion that  
6 ETIM is somehow on a battlefield. It's, it gets us into the  
7 classified zone. But ETIM as an entity never fits any of the  
8 categories, because Congress never made it, never defined the  
9 category that you can put ETIM in to. And this is where the  
10 Government really gets into it.

11 JUDGE SENTELLE: Just a minute, counsel.  
12 Abstractly, if the Government could show that ETIM was working  
13 side by side, hand in glove, all of those other cliches with  
14 Al Qaida prior to September 11, why wouldn't it be a proper  
15 holding that they are the equivalent of Al Qaida in terms of  
16 the AUMF?

17 MR. WILLETT: Well I can't answer in the public  
18 session, but I can in the classified session.

19 THE COURT: No, he's asking you a hypothetical.

20 JUDGE SENTELLE: I'm asking you to make an  
21 assumption.

22 MR. WILLETT: Hypothetically -

23 JUDGE SENTELLE: You don't need anything classified  
24 to answer that question.

25 MR. WILLETT: Your Honor, it's your transitive

1 principle in the, in the Iranian case.

2 JUDGE SENTELLE: Yes.

3 MR. WILLETT: If it's the same entity with a  
4 different name, it's the same -

5 JUDGE SENTELLE: If A equals B, B equals C -

6 MR. WILLETT: Yes.

7 JUDGE SENTELLE: -- then C equals A.

8 MR. WILLETT: Right. But that's, there's no fact in  
9 this record to suggest that. And here's -

10 JUDGE SENTELLE: You would concede that the  
11 principle would apply if the facts were such that we could  
12 hold that the tribunal could properly recognize that an entity  
13 were working hand in hand, and hand in glove, and side by side  
14 and hand in hand with the Al Qaida. Then we could hold that  
15 it's included within the AUMF.

16 MR. WILLETT: If it were the same entity, yes, Your  
17 Honor. But you know -

18 JUDGE SENTELLE: That, that would make it the same  
19 (indiscernible) AUMF.

20 MR. WILLETT: Yes, it would. But Your Honor, I come  
21 -

22 JUDGE SENTELLE: I understand if you say that's not  
23 this case.

24 MR. WILLETT: Not this case, and it's not even  
25 represented to you in year six of this imprisonment that

1       there's any basis to believe that.

2               If I may just come back to this preponderance point.  
3       The way that the architecture works is this. The regulations  
4       say preponderance of the evidence. The question to be asked  
5       is whether they followed the regulations, so you're entitled  
6       to look at the evidence and see whether a preponderance  
7       supports the conclusion. Now Your Honor asked the question  
8       about reliability. The interesting thing is, the CSRT panel  
9       composed of three military officers did make a determination  
10      of reliability. It's a powerful one. It's at page 16. It's  
11      quote in the briefs. It is not classified any longer, and it  
12      says as follows.

13              Despite the fact that the ETIM is said to be making  
14      plans for future activities, future terrorist activities  
15      against U.S. interests, no source document evidence was  
16      introduced to indicate whether or how this group has actually  
17      done so.

18              THE COURT: That, unfortunately, that doesn't get  
19      you home.

20              MR. WILLETT: I'm sorry, Your Honor?

21              THE COURT: That doesn't get you home, because  
22      that's an assessment of future attacks on the United States.  
23      That's not a discussion at all about what their relationship  
24      may have been before.

25              MR. WILLETT: And I can get home on the past in the

1 classified session.

2 THE COURT: Oh, fine, fine. But you agree that  
3 that's, that one assessment that you're talking about -

4 MR. WILLETT: Well I -

5 THE COURT: -- doesn't really solve the problem.

6 MR. WILLETT: I don't quite agree. I think in the  
7 context of the statement, what's really being said is, look,  
8 we get this information that's unsourced and that suggests  
9 ETIM is our enemy. We can't find any source document that  
10 they're even planning to be our enemy. That's what, that's  
11 what they're saying.

12 Your Honor, I have deep -

13 THE COURT: If my colleagues have further questions,  
14 your time is once again exhausted. I'm going to arbitrarily  
15 and capriciously give you a minute to wind up if you need it,  
16 and then we will close the courtroom, empty the courtroom  
17 except for necessary, for those persons that have a need to  
18 know and have security clearances. Now go ahead with your one  
19 minute and then we'll clear the courtroom.

20 MR. WILLETT: Thank you, Your Honor. If I had one  
21 minute left before you, I would devote it to a great judge  
22 from my hometown.

23 THE COURT: That is what you have, one minute. This  
24 better be a good judge.

25 JUDGE SENTELLE: It's about up.



1                   MR. WILLETT: Who sentenced, who sentenced the shoe  
2 bomber some years ago and famously admonished him that we  
3 Americans are all about freedom. And I think at the end of  
4 the day, this case isn't really about military law at all,  
5 given what's in the record. This case is whether, it's about  
6 whether Judge Young got that right, and whether we  
7 institutionally are serious about that value. They guy's in  
8 year six. They've been trying for years to send him to all of  
9 our allies, and nobody wants to brook China. There's no other  
10 remedy. That's why we're here. Thank you.

11                   JUDGE SENTELLE: Okay. The argument in the  
12 unclassified phase has now ended. As I said, we will take a  
13 brief recess, however long is necessary to clear the courtroom  
14 of all but those personnel who have clearances and a need to  
15 know. I understand a sweep will be conducted, so everybody,  
16 please cooperate. Those who are entitled be here I think  
17 (indiscernible). And if you don't know if you're not entitled  
18 be here. Give us recess.

19                   (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

*Stephanie N Collins*

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Stephanie N. Collins

April 9, 2008

DEPOSITION SERVICES, INC.