~~SECRET~~

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 06-1397

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUZAIFA PARHAT,
Petitioner,
v.
ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

ON PETITION FOR REVIEW FROM THE DECISION
OF THE COMBATANT STATUS REVIEW TRIBUNAL

CORRECTED BRIEF FOR RESPONDENT

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
ROBERT M. LOEB
AUGUST E. FLENTJE
PAMELA M. STAHL
JENNIFER PAISNER
CATHERINE Y. HANCOCK
(202) 514-3469
Attorneys, Appellate Staff
Civil Division, Room 7236
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

~~SECRET~~

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioner is Huzaifa Parhat. Respondent is Robert M. Gates, Secretary of Defense.

B. Rulings Under Review

This case is a petition for review of the decision of the Department of Defense Combatant Status Review Tribunal, which made a final determination on February 20, 2005, that petitioner Huzaifa Parhat, ISN No. 320, is an enemy combatant.

C. Related Cases

1. This case previously involved seven petitioners. On December 18, 2007, the Court assigned separate docket numbers for each petitioner (petitioner Abdusabor No. 07-1508; petitioner Abdusemet No. 07-1509; petitioner Jalal Jalaldin No. 07-1510; petitioner Khalid Ali No. 07-1511; petitioner Sabir Osman No. 07-1512; and petitioner Hammad No. 07-1523).

2. This case was previously before this Court, along with another Detainee Treatment Act petition, *Bismullah* v. *Gates*, 06-1197, on procedural motions. On July 20, 2007, this Court issued a decision. *See Bismullah* v. *Gates*, 501 F.3d 178 (D.C. Cir. 2007). Respondent sought rehearing and rehearing en banc. On October 3,

2007, the panel denied the petition for rehearing. *See Bismullah* v. *Gates*, 503 F.3d 137 (D.C. Cir. 2007). The en banc Court denied the rehearing petition on February 1, 2008. *See Bismullah* v. *Gates*, ___ F.3d ___, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008).

3. Petitioner, along with six other DTA petitioners, is also a party to a pending habeas corpus case in district court. See *Kiyemba v. Bush*, No. 05-1509 (D.D.C.). In an appeal to this Court in that case, this Court held as to petitioner here that his claims are covered by Section 7 of the Military Commissions Act, and ordered that the case be dismissed for lack of subject matter jurisdiction pursuant to *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), and provisions of the Military Commissions Act (28 U.S.C. § 2241(e)(1)-(2)). See *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. March 22, 2007).

4. This case was previously stayed pending this Court's ruling in *Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir.) and *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.). In its ruling in those appeals, this Court, *inter alia*, held that aliens detained at the U.S. military base at Guantanamo Bay, Cuba, do not possess rights under the U.S. Constitution. *Boumediene v. Bush*, 476 F.3d at 992. The detainees in those cases petitioned for review by the Supreme Court, which the Supreme Court granted on June 29, 2007.

5. Currently, there are approximately 180 pending petitions filed under the DTA in this Court.

6. Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

Catherine Y. Hancock
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

---

* Authorities chiefly relied upon are marked with an asterisk.

Constitution:

Statutes:

Legislative Materials:

Miscellaneous:

GLOSSARY

ARB ..... Annual Review Board

AUMF ..... Authorization for Use of Military Force

CSRT ..... Combatant Status Review Tribunal

DoD ..... Department of Defense

DTA ..... Detainee Treatment Act

ETIM ..... East Turkistan Islamic Movement

ICRC ..... International Committee of the Red Cross

MCA ..... Military Commissions Act

~~SECRET~~

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1397

HUZAIFA PARHAT,
Petitioner,
v.
ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

ON PETITION FOR REVIEW FROM THE DECISION
OF THE COMBATANT STATUS REVIEW TRIBUNAL

CORRECTED BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

Petitioner Huzaifa Parhat filed a petition for review on December 4, 2006, challenging the final decision of the Department of Defense's Combatant Status Review Tribunal ("CSRT") of February 20, 2005, which concluded that he is an "enemy combatant." This Court has jurisdiction pursuant to Section 1005(e)(2) of the Detainee Treatment Act ("DTA"), Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), as amended by Section 10 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006),

to "determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."

STATEMENT OF THE ISSUES

Parhat is an ethnic Uighur who left China for the Tora Bora region of Afghanistan to receive weapons training at a military training camp, run by the East Turkistan Islamic Movement ("ETIM") and sponsored by al Qaida and the Taliban. Parhat was at the camp on September 11, 2001, and fled only when the United States bombed the training camp about one month later. After hiding out in the Tora Bora mountains for two months, Parhat was eventually captured in Pakistan. He is now detained at the U.S. Naval Base at Guantanamo Bay, Cuba.

The questions presented by this case are the following:

1. In light of the evidence in the CSRT record, which shows that Parhat was part of or supporting terrorist forces that are associated with al Qaida and the Taliban [redacted], whether Parhat may properly be detained by the U.S. military as an "enemy combatant."

2. If this Court were to determine that Parhat's detention is not authorized by the Authorization for Use of Military Force ("AUMF"), whether his detention

is nevertheless within the scope of the President's constitutional authority as Commander-in-Chief.

3. Whether remand, as opposed to release, would be the appropriate remedy if this Court were to determine that the CSRT record cannot support Parhat's detention.

4. Whether this Court should designate as protected information the names and/or identifying information of U.S. Government personnel and law enforcement sensitive information contained in the unclassified CSRT record.

STATEMENT OF THE CASE

On December 6, 2004, a CSRT unanimously held that Parhat is an enemy combatant. The CSRT Director reviewed and approved that decision, rendering it final on February 20, 2005. Parhat filed in this Court a petition for review of that decision. Pursuant to this Court's order of December 14, 2007, this brief addresses only "the issues raised by [Parhat's] motion for judgment, whether factual or legal, based solely upon the record before the Combatant Status Review Tribunal," as well as the issues raised by the Government's previously filed motion to designate certain information contained in the CSRT record as protected information. See Order of Dec. 14, 2007.

PROVISIONS AT ISSUE

The relevant statutory provisions are reprinted in an addendum to this brief.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured a foreign attack more savage, deadly, and destructive than any other sustained by the Nation in its history. That morning, members of the al Qaida terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and its seat of government. The fourth airplane, bound for the Nation's capitol, crashed in rural Pennsylvania only after the hijackers were overcome by the passengers. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

One week later, Congress reacted swiftly to the attacks by enacting the Authorization for the Use of Military Force ("AUMF"), in which it authorized the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

On the basis of Parhat's testimony, as well as unclassified and classified evidence submitted to the CSRT, the Tribunal unanimously concluded that he was properly being held as an enemy combatant [redacted]

The CSRT Director approved the decision of the Tribunal, rendering it final. Parhat subsequently filed a petition for review under the DTA, challenging the CSRT's enemy combatant determination.

SUMMARY OF ARGUMENT

I. A. The CSRT reasonably concluded that Parhat is an enemy combatant. As the record reveals, at the time of the September 11 attacks, Parhat was in the

[redacted]

[redacted] Those facts are sufficient to support the CSRT's finding that [redacted]

[redacted] Moreover, there is no question that the CSRT's factual findings satisfy the plain language of the Secretary's "enemy combatant" definition. Particularly in light of the deference with which the CSRT's factual findings and interpretation of the Secretary's definition are due, Parhat cannot demonstrate that the CSRT erred in determining that he is an enemy combatant.

B. Parhat's arguments that his detention exceeds the President's authority under the AUMF are also meritless. The text and purpose of the statute, the laws of war, and basic common sense are all fundamentally inconsistent with Parhat's unnatural construction, which would prevent the Defense Department from detaining anyone who is not "a member of the military arm" (Br. 21) of al Qaida or the Taliban (a phrase nowhere found in the AUMF), even those terrorists-to-be who are receiving military training at camps [redacted].

Especially considering that delegations of foreign affairs and warmaking powers ought to be construed broadly, this Court should reject petitioner's misguided reconstruction of the AUMF.

1. The AUMF cannot reasonably be read to be limited merely to members of al Qaida and the Taliban, as Parhat contends. Groups or forces [redacted] are within the scope of the AUMF. Congress well knew that al Qaida and the Taliban receive support from other terrorist groups, and declined in the text of the AUMF to limit the use of force only to members of al Qaida and the Taliban, perhaps in recognition of the fact that terrorists do not always keep membership roles or obey the niceties of corporate form.

Moreover, construing the AUMF to deny the President authority to detain individuals who fight alongside al Qaida and the Taliban simply because those individuals are not members of those groups would gut the broad purpose of the AUMF – to prevent future terrorist attacks – and would defy common sense and historical practice, under which any forces [redacted] have traditionally been subject to the use of force. In any event, the Executive Branch's determination as to which individuals or groups have a sufficient nexus to the September 11 attacks so as to be subject to the use of force under the AUMF is an

inherently political and military judgment that is not judicially reviewable, or, at a minimum, is owed extraordinary deference. Accordingly, Parhat's detention as part of or supporting ETIM [redacted] is well within the scope of the AUMF.

2. Nor can the AUMF reasonably be construed to disallow the detention of Parhat simply because he was a "trainee," as opposed to a fighter on the battlefield. By associating himself with ETIM [redacted], Parhat is subject to detention under the enemy combatant definition and the AUMF. The fact that Parhat is associated with ETIM by undergoing weapons training, the very purpose of which is to prepare for combat, simply underscores, rather than undermines, that his detention is appropriate. The AUMF, in fact, specifically encompasses preparatory activity, such as "plann[ing]" or training. Parhat's contrary interpretation of the AUMF, limiting the President's authority to detain only those who are actively engaged in hostilities, would hamstring the Executive in his ability to carry out the very purpose of that statute: to prevent future attacks. Indeed, it would prevent the capture and detention of forces training with al Qaida to hijack and crash additional aircraft, which would plainly be contrary to Congress' intent. And if there is any doubt as to the scope of the AUMF, this Court should defer to the

Executive's reasonable construction of the statute to authorize the detention of troops training with ETIM. That construction is consistent not only with the text and purpose of the AUMF, but also with the laws of war, under which military trainees are treated as members of enemy armed force and are subject to capture and detention, regardless of whether they have directly participated in combat.

3. Parhat's argument that he lacks any intent to fight the United States is irrelevant to his detention under the AUMF. Parhat underwent weapons training with ETIM [redacted] Regardless of Parhat's motivations in undergoing weapons training, by joining forces with ETIM he properly qualifies as an enemy combatant. Parhat's suggestion, that the Executive would have to divine an individual's intent before it could detain him would be completely unworkable, and there is nothing in the text of the AUMF (or in the laws of war) to suggest that Congress sought to impose such an obstacle on the President's ability to detain enemy forces posing a palpable risk to the United States.

C. Even if this Court were to determine that Parhat's detention exceeds the authority granted by the AUMF, his detention falls squarely within the President's constitutional authority as Commander-in-Chief. Congress, in enacting the AUMF, recognized that the President has constitutional authority to "take action

to deter and prevent acts of international terrorism against the United States." The President's Commander-in-Chief powers include, at a minimum, the power to wage war successfully to defend against foreign attack, which must include the power to capture and detain enemy forces during an armed conflict that the Executive determines are fighting against the United States. Accordingly, under Article II, the Executive has independent authority to determine that ETIM forces are fighting against the United States, and to capture and detain individuals, like Parhat, who are part of or supporting those forces. Parhat does not even argue that Article II contains the atextual limits that he seeks to engraft on the AUMF. Thus, even if his novel construction of the AUMF were correct, and it is not, the President would still have the authority to detain him as an enemy combatant.

II. For these reasons, Parhat is not entitled to judgment as a matter of law. However, if this Court were to disagree, the appropriate remedy would be to remand the case to the CSRT for a determination consistent with this Court's ruling. Release would be entirely inappropriate, given DoD's responsibility for making enemy combatant determinations, this Court's limited review function, and the possibility that the detainee might properly be detained as an enemy combatant, despite an error by the CSRT. DoD should be given an opportunity, in the first instance, to correct any such error.

While Congress provided for review of the CSRT enemy combatant determinations, it clearly did not intend for this Court to pass judgment on inherently military decisions, such as precisely who the enemy is in the field. Thus, while this Court can review whether the CSRT rules were followed and whether those rules violated any enforceable statutory or constitutional rights, it cannot properly second-guess military judgments, especially during an on-going military conflict. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); *Ludecke*, 335 U.S. at 170. And even if the Executive's determination as to which entities are subject to the use of force could be subjected to court review, such review would, at a minimum, be due extraordinary deference.

In any event, whatever the scope of the AUMF's authority might mean at the margins, Parhat's detention falls squarely within it because, as described above, the organization providing him military training – ETIM – [redacted]. *see also* Consolidated List of the United Nations Security Council's Al-Qaida and Taliban Sanctions Committee (designating ETIM as an "entit[y] belonging to or

III. Finally, to safeguard Government personnel and sensitive law enforcement activities, this Court should grant respondent's motion to designate the names of United States Government personnel and Law Enforcement Sensitive information as "protected information" under the *Bismullah* protective order. Parhat has identified no prejudice that would result from granting the motion.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *See Acree* v. *Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). As explained below (*see infra*, p. 23), this Court reviews deferentially the question whether the CSRT's determination is supported by a preponderance of the evidence.

ARGUMENT

I. BASED ON THE RECORD EVIDENCE, THE CSRT REASONABLY CONCLUDED THAT PARHAT WAS PROPERLY CLASSIFIED AS AN ENEMY COMBATANT, AND THAT DETERMINATION IS FULLY CONSISTENT WITH APPLICABLE LAW.

Under the DTA, this Court's review includes consideration of whether the CSRT's enemy combatant determination "was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable

presumption in favor of the Government's evidence)." DTA, § 1005(e)(2). Those procedures define an enemy combatant as:

> an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

App. 158. A review of the CSRT record of proceedings demonstrates that Parhat's motion for judgment as a matter of law must be denied.

As we explain below, the record provides ample support for the CSRT's determination that Parhat is an enemy combatant because he is part of or supporting ETIM forces [redacted]

See infra, Section I.A. Moreover, contrary to Parhat's arguments, his detention in no way exceeds the President's authority under the AUMF. *See infra*, Section I.B. And even if it did, the President has independent constitutional authority as Commander-in-Chief to capture and detain Parhat as an enemy combatant. *See infra*, Section I.C.

A. The CSRT's Enemy Combatant Determination Is Supported By The Record And Consistent With The CSRT Procedures.

As the record reflects, Parhat plainly meets the Secretary's definition of an enemy combatant. At the time of the September 11 attacks, Parhat was in the Tora Bora region of Afghanistan, [redacted]

[redacted]

The Secretary of State, in fact, reached a similar determination in listing ETIM as a foreign terrorist organization: ETIM "has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S.

---

[2] Petitioner asserts (Br. 21) that the Executive's authority to detain is limited to the "military arm" of al Qaida and the Taliban, and does not extend to supporters of such military arm, such as civilians and others who provide assistance to the fighters. This position is inconsistent with the CSRT definition, which expressly includes "support[ers]," and with the laws of war. *See infra*, pp. 33-36. But the Court in this case need not address the full extent of Parhat's error because petitioner was, in fact, a [redacted].

nationals or the national security, foreign policy, or economy of the United States."[3] And the evidence that al Qaida and the Taliban fund and support ETIM, and that ETIM provides forces to support those organizations, establishes that ETIM is associated with al Qaida and the Taliban. The United Nations Security Council, Al-Qaida and Taliban Sanctions Committee, has likewise concluded that ETIM is an "entit[y] belonging to or associated with the Al-Qaida organisation." *See* Consolidated List of the U.N. Security Council's Al-Qaida and Taliban Sanctions Committee (updated Jan. 16, 2008), *available at* http://www.un.org/sc/committees/1267/consolist.shtml.[4] Accordingly, the CSRT's factual finding that Parhat was affiliated with ETIM [redacted]

[redacted]

[3] *See* Determination Pursuant to Section 1(b) of Executive Order 13224, Relating to the Eastern Turkistan Islamic Movement (ETIM), 67 Fed. Reg. 57,054, 57,054 (Sept. 6, 2002).

[4] The United Nations, by Security Council resolution, treats an entity as associated with al Qaida based on its "participation in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of" al Qaida; "supplying, selling, or transporting arms and related materials to" al Qaida; "recruiting for" al Qaida; or "otherwise supporting acts or activities of" al Qaida. *See* S/RES/1617, § 2 (2005). Security Council resolution 1390 charged a United Nations committee with identifying "members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them." S/RES/1390, § 2 (2002); *see generally* http://www.un.org/sc/committees/1267/index.shtml (committee web site).

[redacted], fits squarely within the plain language of the "enemy combatant" definition, which includes those individuals who are "part of or supporting" "associated forces that are engaged in hostilities against the United States or its coalition partners."

The CSRT's determination is also fully consistent with the laws of war and common sense. If the United States during World War II had discovered a training camp for irregular forces[5] and also determined that some of those trained at the facility fought side-by-side with the German army against United States or Allied troops, there is no doubt that the U.S. Army could have captured and detained everyone at the camp, especially those who had sought and received weapons training there. *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364 ("Third Geneva Convention") ("members of militias or volunteer corps forming part of" enemy armed forces are combatants); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942) (those "who associate themselves with the military arm of the enemy government * * * are enemy belligerents within the

[5] The term "irregular forces" refers to groups of fighters that are not formally part of a state's armed forces, but that nonetheless participate in the armed conflict, such as guerrillas, partisans, and resistance movements. *See, e.g.,* Winthrop, MILITARY LAW AND PRECEDENTS 783 (2d ed. 1920); Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 36 (2004).

meaning of * * * the law of war"). This case is no different. As more fully explained below, *see infra* pp. 34-36, irregular ETIM forces, like Parhat, [redacted] are properly deemed enemy combatants under the laws of war.

Parhat presents no plausible argument that the CSRT's factual findings do not satisfy the plain language of the enemy combatant definition. Instead, Parhat contends (Br. 18-20) that the CSRT erred in making its factual findings because it credited government evidence, which he alleges is not credible, over his testimony. Parhat cites (Br. 19) the CSRT's statement that "no source document was introduced to indicate how [ETIM] has actually [made plans for future terrorist activities against U.S. interests], that the Detainee had actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners." App. 16. Parhat argues (Br. 19) that that statement means that the CSRT found the allegations regarding Parhat to be not credible.

Parhat, however, mischaracterizes the CSRT's statement and decision. That statement simply acknowledges an absence of evidence in the record regarding those facts. But, as explained above, the CSRT did not find such evidence

necessary to its decision, because there was evidence that ETIM was associated with al Qaida and the Taliban, and that Parhat was part of or supporting ETIM (whether or not a card-carrying member).[6] In any event, in assessing whether the CSRT's factfinding satisfied the CSRT rules, the Court must provide appropriate deference to the military and intelligence judgments of the CSRT, *see, e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988), and there is "a rebuttable presumption in favor of the Government's evidence." DTA, § 1005(e)(2)(C); App. at 160, 170. Even in an ordinary administrative review case, it is not the role of the judiciary to reweigh the evidence or the credibility of witnesses.[7]

---

[6] Parhat also argues (Br. 9), that the CSRT did not, in fact, find that he was affiliated with ETIM, but just that there was an "alleged affiliation" (citing App. at 15). That is incorrect. The language Parhat cites is contained in the CSRT's classified summary, in which the CSRT merely summarizes the evidence before the Tribunal, including Parhat's "alleged affiliation" with ETIM. That summary, however, is not the CSRT's decision. The CSRT's final decision concludes that Parhat "is affiliated" with ETIM, App. 10, which makes clear that the CSRT determined that the evidence adequately supported that allegation. *See also* App. 17 (noting that "no classified evidence [was] unpersuasive," except for portions of one document, upon which the Tribunal did not rely).

[7] Respondents argued in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), that this Court's review under the DTA is limited to whether there was "some evidence" to support the CSRT's conclusion. *See Superintendent, Mass. Correctional Institution v. Hill*, 472 U.S. 445, 455-457 (1985); *People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17, 25 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). This Court in *Bismullah* suggested that the standard of review is preponderance of the evidence. *Bismullah*, 501 F.3d at 186.

Thus, there is plainly sufficient evidence in the CSRT record to support the CSRT's determination that Parhat is an enemy combatant as defined by the DoD regulations.[8] Under the carefully prescribed review role Congress assigned to this Court in the DTA, *see* DTA § 1005(e)(2), that factually based determination must be upheld.

B. Parhat's Arguments That His Detention As An Enemy Combatant Exceeds The President's Authority Under The AUMF Lack Merit.

Recognizing that he falls within the plain language of the Secretary's "enemy combatant" definition, Parhat asserts (Br. 20-23) that the definition must be "construed" more narrowly than its text permits so as not to exceed the authority granted by the AUMF. He raises three arguments as to why his detention is not authorized, but none of these contentions has any merit. First,

---

But the Court's statements were made in the context of discussing the standard for reviewing the totality of the "Government Information." *Id.* at 186-187. The Court did not address what the standard should be for reviewing the closed record of proceedings before the CSRT. Consistent with the accepted standard in typical agency-review proceedings, the Court should review the record in this case deferentially.

[8] Parhat attempts to supplement the record with two declarations, one of which concerns evidence in other cases, App. 192-93, which is contrary to this Court's *Bismullah* decision. *See Bismullah*, 501 F.3d at 186. This Court specifically divided this case into seven separate cases, recognizing that each case depends on a unique record. Thus, the fact that one panel member in an audio recording in another case allegedly questioned the sufficiency of the evidence in that case, has no bearing on the sufficiency of the evidence in the record in this case.

Parhat argues that the AUMF authorizes the use of force only against members of the military arm of the Taliban or al Qaida, and does not extend to ETIM forces. Second, he contends that the AUMF limits the use of force to those who are actively engaged in hostilities, and that his weapons training at the ETIM camp does not suffice. Third, Parhat asserts that the AUMF authorizes force only against those who intend to engage in hostilities or acts of terrorism against the United States, an intent that Parhat disclaims.

This Court should reject all of these arguments, which find no support in the AUMF, especially considering the context in which it was enacted. As an initial matter, the Court respectfully should defer to the construction of the statute adopted by the Executive. In an ordinary administrative context, in construing a statute administered by an agency, this Court first looks to whether Congress has directly addressed the particular issue. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If it has not, the Court inquires whether the agency's construction of the statute is permissible. *Id.* at 843-44. Even where the delegation of authority to the agency is only implicit in a statute, the agency's interpretation must be upheld so long as it is reasonable. *Id.*

Plainly, the President should be accorded no less deference here, in the context of exercising the authority granted to him under the AUMF. *See* Cass R.

Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2670-71 (2005); *id.* at 2666. A delegation of authority granted in the context of an attack on the United States, such as the AUMF, where the President has significant independent authority under the Constitution to defend the nation, should be construed broadly. *See Lichter* v. *United States*, 334 U.S. 742, 780 (1948) (delegation of authority in connection with war powers should be construed to provide "broad discretion" because "[i]n time of crisis nothing could be more tragic and less expressive of the intent of the people [of the United States] than so to construe their Constitution that by its own terms would substantially hinder rather than help them in defending their national safety."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (because the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war," congressional legislation "must often accord to the President a degree of discretion and freedom * * * which would not be admissible were domestic affairs alone involved").

Deferential review of the Executive's interpretation of the AUMF is particularly appropriate in the area of foreign policy and national security, where the President has extensive constitutional powers, and "congressional silence is not to be equated with congressional disapproval." *Haig* v. *Agee*, 453 U.S. 280,

291 (1981). *Accord Department of the Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988) (deferring to "judgment call" of Executive in "military and national security affairs"); *Regan* v. *Wald*, 468 U.S. 222, 243 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In addition, if this Court were to agree with Parhat that the AUMF provides the exclusive power of the Executive's detention authority, *but see infra*, Section I.C., the clear statement rule would foreclose Parhat's creative construction of the AUMF, which would impermissibly encroach on the President's authority as Commander-in-Chief to detain the enemy during a war. *See Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); *Carlucci* v. *Doe*, 488 U.S. 93, 102-03 (1988). But even if this Court does not accord deference to the Executive's interpretation of the AUMF, Parhat's detention plainly falls within the text of the AUMF, as explained below.

1. Because ETIM [redacted], ETIM Forces are Subject to Detention Under the AUMF.

Parhat maintains that his association with ETIM is an insufficient basis for his detention under the AUMF. Parhat concedes, however, that, if he were determined to be part of [redacted]

[redacted] *See* Br. 21-22 (arguing that "groups" that "did not participate in the Afghanistan war" could not be detained, but those who "participated directly in battlefield activities with the Taliban or al Qaeda" could) [redacted]

Groups that [redacted] are necessarily within the scope of the AUMF. And the military training bases [redacted], are properly deemed enemy training camps. Parhat's suggestion that Congress intended the AUMF to permit the use of force against only card-carrying members of al Qaida and the Taliban belies the reality of the war and the context in which the AUMF was passed. Congress well knew that terrorist organizations, such as al Qaida or the Taliban, often act with the assistance of associated terrorist groups which share their goals, and that it is often hard to draw the line between who is a member of al Qaida or the Taliban, or of an associated group, or both. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization & The War on Terrorism*, 118 HARV. L. REV. 2047,

2109-2110 (2005). Moreover, it is not uncommon for terrorist groups to splinter, reorganize, or change names, and membership lists of terrorist organizations are hardly publicly available. *Id.; cf. National Council of Resistance* v. *Department of State*, 373 F.3d 152 (D.C. Cir. 2004) (Roberts, J.) (upholding designation of terrorist organization by Secretary of State when subject entity uses varying names and organizational forms).

In light of these concerns, Congress declined to limit the AUMF to only al Qaida and the Taliban. Instead, by the terms of the statute, Congress broadly authorized the President to use "all necessary and appropriate force" against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations." 115 Stat. 224. Under a proper reading of the AUMF, a group that [redacted] becomes part of those covered "organizations." This result follows naturally from the plain meaning of the term "organization," which is a "body of persons * * * formed for a common purpose." BLACKS LAW DICT. 1133 (8th ed. 2004). Here, ETIM joined forces with al Qaida and the Taliban [redacted]

[redacted] resulted in a "body of persons" with a "common purpose," *i.e.*, an "organization" that was involved in the September 11 attacks within the meaning of the AUMF. *Ibid.*

Common sense similarly commands that the Executive Branch must have the flexibility to treat terrorist groups that have joined forces with the Taliban or al Qaida as part of those organizations for the purpose of military operations. To operate effectively, the U.S. armed forces must be able to use force against those entities that have [redacted] If force cannot be used against an organization that [redacted], it would be difficult or impossible to defeat al Qaida and the Taliban militarily. Moreover, the broad purpose of the AUMF "to prevent any future acts of international terrorism," 115 Stat. 224, is defeated.

Indeed, the identification of enemy forces subject to the AUMF is properly left to the Executive Branch. The AUMF authorizes the President to use force against the "nations, organizations, or persons ***he determines*** planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." 115 Stat. 224 (emphasis added). Given his own constitutional authority to conduct military operations and this broad legislative acknowledgment of that power, the

Executive's determination as to which specific entities have a sufficient connection with the September 11 attacks so as to be subject to the use of U.S. military force is not justiciable.

The decision by the Executive to detain those serving with or supporting ETIM in the combat theater of operations is manifestly an inherently military and political determination. During an armed conflict, it is the military that must determine where enemy forces are based, where they are being trained, and who is providing support to enemy forces. *See, e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948) (determination of state of war and status of individual as enemy alien are "matters of political judgment for which judges have neither technical competence nor official responsibility"); *United States* v. *The Three Friends*, 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."); *Curran* v. *Laird*, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means.").[9]

---

[9] *See also Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *Tozer* v. *LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986).

associated with the Al-Qaida organisation") (updated Jan. 16, 2008), *available at* http://www.un.org/sc/committees/ 1267/consolist.shtml.

The laws of war, which form the background of the AUMF, further support the Secretary's position. It is well-established that "[o]perations of war" may be "directed * * * against the forces and the means of making war of the hostile State." Winthrop, MILITARY LAW at 778 n.20.[10] In other words, the laws of war recognize that a nation may use force not just against an enemy's organized, official armed forces, but also against any groups or individuals that [redacted]. Thus, if a group distinct from al Qaida or the Taliban is [redacted] that group constitutes the armed forces of the state for purposes of the laws of war. As we now show, this precept is supported by the concept of "co-belligerency," the power to detain irregular forces supporting the enemy, and the historical practice employing these principles.

Parhat's detention is fully justified first by the established laws-of-war concept of "co-belligerency." Co-belligerents are states "engaged in a conflict

---

[10] Bradley & Goldsmith, 118 HARV. L. REV. at 2081-2082 ("Executive Branch practice in prior wars and the international laws of war inform the boundaries of a broad authorization of force such as the AUMF, and the phrase 'necessary and appropriate' can be viewed as encompassing these boundaries"); *Hamdi*, 542 U.S. at 518 (plurality opinion) (looking to what is "fundamental and accepted [] incident to war").

with a common enemy, whether in alliance with each other or not." Parry & Grant, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 84 (John P. Grant & J. Craig Barker eds., 2d ed. 2004); *see* Morris Greenspan, THE MODERN LAW OF LAND WARFARE 531 (1959) (co-belligerent is a "fully fledged belligerent fighting in association with one or more belligerent powers"). Even a state that has declared itself neutral in a conflict can become a co-belligerent, and thus subject to force, if it "participate[s] in acts of war by the belligerent." Bradley & Goldsmith, 118 HARV. L. REV. at 2112. And if a neutral state can become a lawful military target [redacted]. *See id.* at 2113 ("Terrorist organizations that * * * participate with al Qaeda in acts of war against the United States * * * are analogous to co-belligerents in a traditional war").

Moreover, the laws of war recognize no distinction between actual members of an enemy's armed forces and irregular forces [redacted]. Irregular forces are subject to capture, even if they are not part of, or subject to, the organized armed forces of the enemy. *See, e.g.*, *Ex parte Quirin*, 317 U.S. at 38-39 (upholding capture and detention of Germans "who associate themselves with the military arm of the enemy government" as "enemy belligerents within the meaning of * * * the law of war"); *see also* Third Geneva Convention, art. 4(A)(1)

("[m]embers of armed forces" "as well as members of militias or volunteer corps forming part of" enemy armed forces are combatants); Jean-Marie Henckaerts & Louise Doswald-Beck, International Committee of the Red Cross ("ICRC"), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Volume II: Practice, at 80 (2005) (combatants include "'[a]ll persons participating in military * * * activities'"); Winthrop, MILITARY LAW, at 783 (irregular or guerilla forces "not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders" may be captured); MANUAL FOR COURTS MARTIAL, U.S. Army, ¶ 163 (1949) (enemies "include[] not merely the organized forces of the enemy in time of war, but also * * * any hostile body that our forces may be opposing, such as * * * a band of renegades").[11] Thus, it is of no moment

---

[11] *Accord* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 13 (combatants include "members of dissident armed forces or other organized armed groups"); Henry S. Maine, *International Law*, The Whewell Lectures, Lecture IX (1887) (recognizing as enemy "persons other than regular troops in uniform * * * committing acts of hostility against the enemy" who are "organised in such a manner * * * as to give their opponents due notice that they are open enemies"); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 522 (Winter 2005) (unlawful enemy combatants include "civilians who have joined the conflict or members of a purported military organization who do not meet the requirements for lawful combatant status"); George G. Lewis & John Mewha, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945, 214-15 (1955) (discussing Allied capture and custody in France of members of German non-uniformed paramilitary construction organization); *see also* Lieber Code, General Orders No. 100, ¶ 82 (referring to "squads of men * * * who commit hostilities, whether by fighting * * * or by raids of any kind * * * without being part and portion of the organized hostile army"),

that ETIM forces were not formally part of the Taliban or al Qaida forces and were instead [redacted].

Unsurprisingly, throughout our history, the United States has taken military action against irregular forces, including individuals who were not nationals of the enemy state, and other belligerents who were otherwise treated as enemies because of military necessity.[12] For example, during World War II, the United States took military action against the armed forces of Vichy France, even though no war had

---

reprinted in Richard Shelly Hartigan, LIEBER'S CODE AND THE LAW OF WAR 45 (1983).

[12] *See* Bradley & Goldsmith, 118 HARV. L. REV. at 2066-67 ("during the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy"); Winthrop, at 783-84 (Civil War guerillas – "persons acting independently, and generally in bands, * * * who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage," were captured as unlawful combatants); H.R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894) (noting that there were "numerous rebels * * * that * * * furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment" as unlawful combatants); *Conners* v. *United States*, 180 U.S. 271, 274-75 (1901) (recounting use of force against independent band of Indians that had engaged in hostilities against the United States, even though the tribe from which they had broken away was "in amity with the United States"); Martin Gilbert, THE FIRST WORLD WAR, A COMPLETE HISTORY 62 (1994); Lewis & Mehwa at 92 (although the Soviet Union was allied with the United States after Germany's invasion of the Soviet Union in 1941, Russians who were captured wearing German uniforms by the United States were nevertheless treated as German prisoners of war).

been declared against that nation or government, because "[t]he Vichy France government had a loose alliance with Germany, was in various ways under German influence," and controlled a key strategic target in North Africa. *See* Bradley & Goldsmith, 118 HARV. L. REV. at 2111-12. Also during World War II, nationals of neutral countries such as Abyssinia, Afghanistan, Andorra, Iran, Iraq, Liberia, Switzerland, and Turkey were detained when they joined the forces of a belligerent. *See* Report of the ICRC on its activities during the Second World War (September 1, 1939-June 30, 1947), Volume II, p. 282, Geneva, May 1948.

Likewise, during the Korean War, individuals from nations not participating in the conflict were nevertheless captured and detained as enemy combatants for associating with forces involved in the conflict. Specifically, although the Chinese People's Democracy proclaimed its neutrality and averred that no soldier of its army was on Korean soil, William L. White, THE CAPTIVES OF KOREA 214 (1957), over 21,000 Chinese nationals from the Chinese People's Volunteers were captured and held by the United Nations Command when the Korean War Armistice Agreement was signed in 1953. Jonathan F. Vance, Ed., ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT 226 (2d ed. 2006).

Accordingly, detention of individuals who are part of or supporting ETIM, which, in turn, [redacted] is plainly authorized by the

AUMF. That conclusion is only strengthened if the Court needs to resort to the laws of war to resolve any ambiguities in the statute.

2. The AUMF Authorizes Parhat's Detention Because He Has Joined Forces with ETIM by Preparing for Combat at an ETIM Military Training Camp.

Parhat also contends (Br. 21-22) that the AUMF's authorization is limited to "*member[s] of the military arm* of al Qaida or the Taliban" who engage in "direct and active participation in battlefield activity," and that his weapons training at the al Qaida and Taliban sponsored military training camp does not amount to "battlefield activity."[13] But the AUMF contains no such artificial limitation on the President's use of force, which would exclude from capture and detention even members of al Qaida and the Taliban who were not fighting on the battlefield.

To the contrary, there is nothing in the plain language of that text that supports Parhat's contention that it encompasses only those actually engaged in "battlefield activity," and excludes those training or preparing for such activity. Instead, the AUMF specifically authorizes the use of force against those who "planned, authorized, committed, or aided" the September 11 attacks or "harbored" them. Congress deliberately included within the scope of the AUMF,

---

[13] Parhat's assertion (Br. 18) that he "was [not] involved in actual military activity of any kind," is rather remarkable, given that he testified to the CSRT that he engaged in weapons training on a Kalashnikov rifle at a military training camp, App. 24.

therefore, not only those who actually carried out the attacks, but also those who facilitated them. In addition, the statute permits the use of "*all* necessary and appropriate force" against the entire "organization[]," not just one component of it. The statutory language thus makes plain that Congress did not intend to limit its authorization of force to only those who carried weapons on the battlefield. Individuals or groups that engage in preparatory activities, such as planning an attack or training for future combat, fall comfortably within the force Congress envisioned.

Moreover, Parhat's suggested interpretation of the AUMF would seriously undermine the broad purpose of the statute, which is to "prevent any future acts" of terrorism against the United States, 115 Stat. 224. The use of force against persons engaging in military training on behalf of an enemy organization is "necessary" to defeat the enemy and prevent future attacks; otherwise forces undergoing training will join the fight. *See also* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at ¶ 1943 (Yves Sandoz et al. eds., 1987) (forces "prepar[ing] for combat" or "return[ing] from combat" qualify as participants in hostilities); *accord* ICRC Report: Direct Participation in Hostilities (2005) (www.icrc.org/Web/eng

/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205).[14] This is a core element of the force that the Supreme Court in *Hamdi* expressly recognized, namely, "detention * * * to prevent captured individuals from * * * taking up arms" against the United States. 542 U.S. at 518 (plurality opinion); *see also* St. Petersburg Declaration of 1868 (the "only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy"). United States armed forces need not wait for a trainee to have graduated from his military training program before they have authority to detain him.

In any event, even if Parhat's illogical construction of the AUMF were possible, as explained above, *see supra* pp. 25-27, this Court should defer to the Executive's interpretation of the statute, because it is reasonable. Indeed, if this Court were to construe the AUMF narrowly, as an attempt to limit the President's constitutional powers as Parhat suggests, such a construction would violate the clear statement rule. *See Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). In granting the President authority to use "all necessary and appropriate force" to "prevent any future acts" of terrorism, the AUMF cannot possibly be read as

---

[14] *See also* M. Bothe, K.J. Partsch, W.A. Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS at 285-86 (Martinus Nijhoff 1982) ("'military operations' means any 'military action or the carrying out of a strategic, tactical, service, *training* or administrative military missions'") (emphasis added); Dinstein at 37 (discussing requirements for "combatant[s]" who are "discharging duties not linked to a [specific] military mission (*such as training* * * *)") (emphasis added).

evincing a clear intent by Congress to restrict the President's constitutional authority to use force against only those individuals who are engaged in "battlefield activity."

Moreover, Parhat's atextual, narrow construction of the AUMF would prevent the detention of individuals who plainly qualify as combatants under the laws of war. For example, spies, who cross enemy lines to collect intelligence during a time of war are combatants (albeit unlawful combatants), even though they may carry no weapon or come near the actual battlefield. *See Quirin*, 317 U.S. at 31; Winthrop, MILITARY LAW at 767-68; Lieber Code, §§ 83, 88. And, Parhat's limitation would prevent the capture and detention of forces training with al Qaida to hijack and crash additional aircraft and planning to bomb airports. That result cannot be consistent with the AUMF, which was clearly intended, at a minimum, to prevent a repeat of the September 11 attacks.

As the Supreme Court explained in *Quirin*, 317 U.S. at 37-38, individuals "who associate themselves with the military arm of the enemy government * * * are enemy belligerents within the meaning of the Hague Convention and the law of war," even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Id.* at 37 ("It is without significance that petitioners were not alleged to have borne

conventional weapons."). Consistent with this position, individuals who simply accompany enemy armed forces, but who do not fight with them, have also routinely been subject to detention. See DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 392 (William Winthrop ed., 1880) (synopsizing Civil War era decision: "An engineer captured while doing duty on a steamer of the enemy, *held* properly detained as a prisoner of war; civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army."); Third Geneva Convention, art. 4(A)(4) (recognizing right of detaining power to seize and confine "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces").[15] A fortiori, [redacted] may also be detained.

---

[15] *See also* Regulations Respecting the Laws and Customs of War on Land, art. 13, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907 (combatants include "[i]ndividuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors"); Winthrop, MILITARY LAW at 789 (laws of war permit detention even of "civil[ian] persons engaged in military duty or in immediate connection with an army"). *Cf. In re Territo*, 156 F.2d 142, 144-45 (9th Cir. 1946) (upholding capture and detention of a private in the Italian Army who performed manual labor in an army engineering corps)

Nor can Parhat insulate himself from the AUMF by labeling himself a "civilian" under the laws of war. A civilian or non-combatant is simply defined as an individual who is not a combatant. As a leading authority explains, the definition of civilian "follow[s] a 'negative approach,'" because it "do[es] not tell us who or what the protected persons and objects are." Dinstein, THE CONDUCT OF HOSTILITIES at 114 (footnotes omitted). Rather, "'the concepts of the civilian population and of the armed forces are only conceived in opposition to each other,'" so "that there is no undistributed middle between the categories of combatants (or military objectives) and civilians (or civilian objects)." *Ibid.* (footnotes omitted).

Parhat nonetheless contends that a "civilian" cannot be detained unless he "direct[ly] participat[es] in hostilities," and he cites a protocol that the United States has refused to ratify.[16] The cited sections, however, speak only to nations directly "attack[ing]" civilian populations – *e.g.*, bombing civilian neighborhoods. They do not purport to limit our detention authority. In any event, petitioner is not a civilian but someone who has trained in and helped guard a military-training camp.

---

[16] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II").

Next, Parhat cites (Br. 14) the Third Geneva Convention, art. 3, but that provision does not prohibit us from detaining "[p]ersons taking no active part in hostilities." Rather, it requires that we treat them humanely. Indeed, common article 3 expressly contemplates that detained combatants are a subset of individuals "taking no active part in hostilities."

Further, Parhat cites (Br. 15) three documents addressing the United States' understanding of that phrase for purposes of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict. *See* Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37, at VII (2000). This Protocol simply raises the permissible age for compulsory recruitment of children into the armed forces, and requires States to "take all feasible measures" to ensure that any members of their armed forces under the age of 18 "do not take a direct part in hostilities." Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000. The Protocol does not purport to limit our ability to deem someone a combatant or to detain him.[17] Indeed, children covered by the

[17] In addition, because the Optional Protocol was intended to protect children, the United States sought to interpret the prohibition on "direct part in hostilities" as broadly as it could in that particular context without jeopardizing its military needs. *See* S. Treaty Doc. 106-37, Article-by-Article Analysis of Optional Protocol. That

Protocol who do not take "direct part in hostilities" would nevertheless be subject to detention during an armed conflict under the laws of war. *See* Third Geneva Convention, art. 4(a).

Finally, contrary to Parhat's contention (Br. 19), the fact that the CSRT suggested that he should be released, in part because the record contains no evidence he has attacked the United States, App. 16, does not undermine the CSRT's determination that he is an enemy combatant. Whether an individual is an enemy combatant is an issue entirely separate from whether continued detention of that individual is warranted. As explained above, enemy combatants may be detained under the laws of war until the cessation of hostilities. It may well be, however, that individuals properly captured as enemy combatants are later determined to pose no continuing threat and can therefore be released.

Throughout our Nation's history, individuals captured and detained as enemy combatants have routinely been released prior to the cessation of hostilities if it can be determined that they pose no ongoing threat. *See, e.g.*, Lewis & Mewha, HISTORY OF PRISONER OF WAR UTILIZATION 25 (during the Mexican War, some prisoners of war were released "on the condition that they would not

---

understanding of "direct participation in hostilities," therefore, is limited to the specific context of using minors in military operations, and has no bearing as to whether an individual qualifies as a combatant.

reengage in the hostilities"); *id.* at 76, 97-98 (same in World War II). That same practice is applicable here and is consistent with the United States' statements that it does not want to hold detainees at Guantanamo Bay any longer than necessary. *See, e.g.*, DoD Press Release, *Detainee Transfer Announced* (Dec. 28, 2007), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11591. If Parhat is determined to not pose a continuing threat to the United States or its allies, he may be released. Indeed, to date, more than 500 Guantanamo detainees have been released.

DoD has expressly recognized this distinction between enemy combatant status and continued detention in establishing its annual Annual Review Board ("ARB") procedures. Pursuant to those procedures, on an annual basis, a detainee is allowed to "present information relevant to his continued detention, transfer, or release." *See* ARB Mem., Enc. 13 (July 14, 2006) (latest version of ARB procedures) (http://www.defenselink.mil/news/Aug2006/d20060809ARB ProceduresMemo.pdf). The ARB process, however, does not reevaluate a detainee's enemy combatant status, but instead determines whether an enemy combatant "should be released, transferred, or continue to be detained" based on several factors, including whether the detainee "represents a continuing threat." ARB Mem., § 1.a. Such a discretionary decision as to release, therefore, has no

bearing on whether an individual is properly deemed an enemy combatant. This case, in fact, illustrates that principle: although the CSRT determined that Parhat is an "attractive candidate for release," App. 15, it nevertheless determined that he is an enemy combatant, App. 10, 14.

3. Parhat's Subjective Intent is Irrelevant to his Detention under the AUMF.

Finally, Parhat argues that his detention is not authorized by the AUMF because he allegedly was training only to fight China, and had no knowledge of ETIM's hostilities against the United States. This contention finds no support in the AUMF, nor could it reasonably be so construed in light of the laws of war.

The AUMF authorizes the use of "all" force "necessary and appropriate" against those "nations, organizations, or persons" that the President determines were involved in the September 11 attacks "in order to prevent any future acts of international terrorism against the United States." 115 Stat. 224. The use of force, therefore, turns on the President's determination as to which nations, organizations, or persons were responsible for the attacks. The President need not determine whether particular individuals belonging to those nations, organizations, or persons acted knowingly or intentionally. The AUMF contains no individual scienter requirement.

To the contrary, the AUMF's language broadly extends to those who "aided" the September 11 attacks. It is plainly reasonable for the Executive to construe such language to encompass groups and persons who provide support and/or assistance to al Qaida or the Taliban, without inquiring whether individual members or supporters intend to fight directly against the United States.

ETIM, by providing military weapons training to individuals [redacted] "aided" al Qaida and the Taliban in their ability to carry out the September 11 attacks. Parhat, whatever his intent, performed guard duty at the ETIM camp and participated in weapons training, the very purpose of which is preparation for hostilities, and provided support to ETIM, and therefore to al Qaida and the Taliban. Parhat's detention, therefore, is authorized by the AUMF, and his particular intent is of no importance. *See Quirin*, 317 U.S. at 25 n.4 (fact that petitioners alleged they had no intention to obey orders from the German High Command not relevant to their status as enemy combatants); *Cf. In re Territo*, 156 F.2d at 146 ("Petitioner argues that he was impressed against his will into the Italian Army, but the status of a volunteer or that of a draftee, as a prisoner of war who is captured upon the field of battle, is not different.").

Accordingly, if a person joins forces with al Qaida, even if solely for the purpose of assisting al Qaida in terrorist attacks against countries other than the United States, those forces are subject to the AUMF. The person helps promote al Qaida's larger objective of global terrorism, and the person's participation frees other individuals of the terrorist organization to participate in al Qaida's other fronts, including attacks against the United States.

And even though Parhat's claimed primary objective was to fight the Chinese, he was receiving military training during an armed conflict at a camp that was sponsored by [redacted] our enemy. Parhat was thus personally assisting ETIM, al Qaida, and the Taliban in their goals by performing guard duty to protect the terrorist training camp. The United States attacked the camp, which Parhat was charged with defending; he cannot now claim that his lack of personal animosity towards the United States shields him from detention. In addition, ETIM, [redacted] is assisting al Qaida and the Taliban in their goals.

Finally, Parhat's suggested interpretation of the AUMF would be wholly unworkable. The Executive would have to divine the intent of nations, organizations, and persons he sought to detain before he could do so. It is entirely

unclear how such a task could be accomplished (or the applicable standards) during a time of armed conflict, and such a standard would hobble the President's ability to detain enemy combatants under the AUMF.[18] And, there is nothing in the laws of war governing the detention of enemy combatants, discussed above, that would support such a construction of the AUMF.

C. Even if this Court were to Determine that Parhat's Detention Exceeds the Authority Granted by the AUMF, his Detention Falls within the President's Constitutional Authority as Commander-in-Chief.

As we have explained, therefore, Parhat's detention is plainly within the scope of the AUMF. If this Court, however, were to reach the contrary conclusion, Parhat's detention must nevertheless be upheld as an appropriate exercise of the President's constitutional powers as Commander-in-Chief.

---

[18] Parhat's related assertion (Br. 20) that his testimony regarding his intent must be "conclusive" as to his enemy combatant status is absurd. It is not surprising that many enemy combatants will not readily own up to the facts that give them that status, particularly given that al Qaida's training program specifically instructs terrorist operatives to develop a "security plan," *i.e.*, a detailed and plausible-sounding cover story "through which he will be able to deny any accusation." *See* Al Qaida Training Manual seized in Manchester, England, *available at* http://www.usdoj.ag/manualpart1_3.pdf. In any event, Parhat's statement (Br. 20) that "the only evidence deemed *credible* by the panel was Parhat's testimony," is a gross misstatement of fact. The CSRT made an express credibility finding only as to Parhat's testimony regarding the condition and treatment of the Uighurs in China, which had been corroborated by other Uighurs detained at Guantanamo, App. 16. Such testimony is irrelevant to Parhat's enemy combatant status.

In enacting the AUMF, Congress was not purporting to limit the constitutional Article II powers of the President. To the contrary, in authorizing the use of military force, Congress expressly recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." 115 Stat. 224 (2001). Thus, this is plainly an instance where the President's authority is "at its maximum." *See Youngstown*, 343 U.S. at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

Under Article II, Sec. 2, cl. 1 of the Constitution, "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As the Supreme Court observed in *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950), this textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." *Accord Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) ("The war power of the national government 'is the power to wage war successfully.'"); *Hamilton* v. *Dillin*, 88 U.S. (Wall.) 73, 87 (1874) (the President is "constitutionally invested with the entire charge of hostile operations").

Especially in the case of foreign attack – as occurred on September 11, 2001 – the President's authority to defend the Nation is not dependent on "any special

legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Thus, the President has the authority to "employ [U.S. forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *see also Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to repel and defeat the enemy * * *."); *Stewart v. Kahn*, 78 U.S. 493, 506 (1870) ("The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."). This power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *In re Yamashita*, 327 U.S. 1, 12 (1946).

The Framers appreciated the importance of giving the Executive broad authority to defend against foreign attack. As Alexander Hamilton wrote in *The Federalist No. 70*, "[d]ecision, activity, secrecy, and dispatch" are characteristic of the chief Executive's power and are "essential to the protection of the community against foreign attacks." Forty-five years later, Justice Story, in discussing the Commander-in-Chief Clause, reaffirmed that: "Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which

distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success * * *." COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 767, at 546-547 (Ronald D. Rotunda & John E. Nowak eds. 1987).

Petitioner does not and cannot dispute that the President's war powers include the authority to capture and detain enemy combatants in wartime. *See Quirin*, 317 U.S. at 30-31 (by "universal agreement and practice," lawful and unlawful combatants alike are "subject to capture and detention"). Primarily, he argues, instead, that he does not fall within the class of individuals covered by the AUMF. But, as explained above, the AUMF does not purport to limit the President's broader power to use military force, when he deems necessary, to defend this Country. In order to defend the Nation, the President's power as Commander-in-Chief must, at a minimum, include the authority to capture and detain those who persons and groups who have elected to [redacted]. This constitutional power provides an independent basis for Parhat's detention.

II. EVEN IF THE COURT WERE TO DETERMINE THAT THE CSRT'S ENEMY COMBATANT DETERMINATION MAY NOT BE SUSTAINED, REMAND, NOT RELEASE, IS THE APPROPRIATE REMEDY.

For the reasons explained above, Parhat is not entitled to judgment as a matter of law. However, if this Court were to disagree, the appropriate remedy would be to remand Parhat's case to the CSRT for a determination consistent with this Court's ruling.

This Court has specifically stated that the "proper course" is to "remand the matter to the agency for further proceedings" when a party establishes that "flaws in the procedures by which the agency produced [the] record" led to an "inadequa[te] * * * administrative record." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 346-47 (D.C. Cir. 1989). This is because "'Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.'" *Id.* at 338. Otherwise, the court would "propel[] [itself] into the domain which Congress has set aside exclusively for the administrative agency.'" *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 545 (1978). Here, where the DTA explicitly gives the Secretary of Defense deference to develop the procedures employed (DTA § 1005(e)(2)(C)(i) (reviewing whether determination "consistent with the standards and procedures *specified by the*

Secretary of Defense") (emphasis added)), Congress was clearly directing this Court to adopt a limited review function, not a fact development function. *See McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991).

Accordingly, under these principles, if this Court ultimately determines that Parhat's CSRT proceeding was not consistent with applicable standards and procedures, or was in violation of the Constitution or laws of the United States (to the extent they are applicable), the Court may remand Parhat's case to the Secretary of Defense for further proceedings. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Occidental Petroleum*, 873 F.2d at 346-47.

Petitioner asks this Court to order his release, rather than remand for further proceedings. The DTA does not expressly grant the power to order release. If, however, the Supreme Court determines in *Boumediene v. Bush*, No. 06-1195, that courts must have the power to order release under the DTA to uphold that statute as constitutional, then this Court would have the power to order release in an appropriate case. In any event, a release order would not generally be the appropriate remedy where this Court finds a deficiency in a CSRT ruling, and it is not the appropriate disposition here.

As explained above, Parhat argues that the CSRT rules and the AUMF should be construed so as to limit the President's authority to detain unless the individual: (1) is a member of the Taliban or al Qaida, (2) is involved in direct and active participation in battlefield activities; and (3) had a mens rea showing a desire to attack the United States. We have explained why these asserted limitations are wholly without merit. Even if, however, the Court were to adopt one or all of Parhat's positions, the Government would have to be given an opportunity to conduct a new CSRT hearing in conformity with those standards. *See PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards"). Thus, even in the highly unlikely event that Parhat were to prevail, the result would not be release (as he has requested), but rather a remand for a new CSRT hearing.

Moreover, an argument that the CSRT record is insufficient to support an enemy combatant determination should not ordinarily be grounds for release. Under the CSRT procedures, due to concerns for protecting classified or sensitive information, the Recorder *does not* present the tribunal with *all* of the material

supporting a finding that the detainee is an enemy combatant. Rather, the Recorder presents to the CSRT only "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant." App. 174. Given this standard, in any given case there may be additional evidence against a petitioner that supports an enemy combatant determination, but which was never presented to the Tribunal. Accordingly, if this Court were to determine that a petitioner's enemy combatant status cannot be affirmed on the record of proceedings before the CSRT, DoD should be given an opportunity on remand, under the standards that this Court determines are applicable, to establish that the detainee is an enemy combatant, which may include submitting additional evidence to the Tribunal.[19]

Furthermore, national security concerns implicit in these circumstances militate strongly against vacating the enemy combatant designation while the matter is on remand to the agency to correct any procedural error. *See National*

---

[19] Petitioner makes the extraordinary argument that he should be released into the United States. Even under habeas jurisdiction, Judge Robertson correctly held that a court has no authority to order such relief. *Qassim v. Bush*, 407 F.Supp.2d 198, 202-03 (D.D.C. 2005) ("a strong and consistent current runs through [the cases] that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens * * *. These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States * * * would have national security and diplomatic implications beyond the competence or the authority of this Court").

Council of Resistance of Iran v. Department of State, 251 F.3d 192, 209 (D.C. Cir. 2001) (remanding terrorist designation determination, but declining to "order the vacation of the existing designations" because of "the realities of the foreign policy and national security concerns").

III. THIS COURT SHOULD GRANT THE GOVERNMENT'S MOTION TO DESIGNATE THE NAMES OF UNITED STATES GOVERNMENT PERSONNEL AND LAW ENFORCEMENT SENSITIVE INFORMATION AS PROTECTED INFORMATION.

As the Government explained in its motion, the Government seeks to protect from public disclosure any names and/or identifying information of United States Government personnel and any sensitive law enforcement information in either the unclassified or classified version of the CSRT record (which includes both the written transcript and audio recording of the CSRT proceedings). This Court in *Bismullah* specifically recognized that it would be appropriate to deem certain information, although unclassified, as protected from public disclosure. *See Bismullah* v. *Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007). And the protective order provides that "[t]he Government may apply to the court to deem any information 'protected,' and if filed in this court to be maintained under seal." *Id.* at 201 (Protective Order, § 7.A).

Respondent explained that protection from public disclosure of identifying information about Government personnel is appropriate because those individuals

– in particular members of the armed forces – often deploy to war zones or other locations abroad, where they are particularly vulnerable to security risks. The risks to the safety of those personnel would be heightened if their involvement in the detention of enemy combatants at Guantanamo were made public. We further explained that this Court has expressly recognized that such an interest is a legitimate basis for designating material as "protected." *See Bismullah*, 501 F.3d at 196 (Protective Order, § 3.F); *id.* at 188.

Respondent further pointed out that it is also appropriate to protect Law Enforcement Sensitive material, such as FBI interview reports, from public disclosure because such material is highly confidential information, public disclosure of which could harm the Government's ongoing law enforcement activities related to the global war against al Qaida and its supporters. Safeguarding the Nation's counterterrorism law enforcement activities is plainly a "significant government interest[]" within the meaning of the protective order.

As protected information, such information would be withheld solely from public disclosure. It is not withheld from Parhat's counsel; indeed, the information that the Government seeks to designate as protected has already been disclosed to counsel in this case. Yet Parhat has presented no reason why public disclosure of such information is necessary (or even helpful) to his case.

Accordingly, given the weighty interests in protecting United States Government personnel from potential harm and safeguarding counterterrorism law enforcement activities, balanced against no identifiable harm to Parhat, the Government's motion should be granted.

CONCLUSION

For the forgoing reasons, this Court should deny Parhat's motion for judgment as a matter of law, and grant respondent's motion to designate certain unclassified information as protected.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
ROBERT M. LOEB
AUGUST E. FLENTJE
PAMELA M. STAHL
JENNIFER PAISNER
CATHERINE Y. HANCOCK
(202) 514-3469
Attorneys, Appellate Staff
Civil Division, Room 7236
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

FEBRUARY 2008

~~SECRET~~

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,880 words (which does not exceed the applicable 14,000 word limit).

_____

Catherine Y. Hancock

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2008, I filed and served the foregoing Corrected Brief for Respondent by delivering an original and fourteen copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

Sabin Willett
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110-1726

Susan Baker Manning
2020 K Street, N.W.
Washington DC 20006-1806

_____
Catherine Y. Hancock