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No. 06-1397

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

HUZAIFA PARHAT,
Petitioner,
v.
ROBERT M. GATES, *et al.*,
Respondents.

ORIGINAL ACTION UNDER THE DETAINEE TREATMENT ACT OF 2005

PETITIONER HUZAIFA PARHAT'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW

INCLUDES INFORMATION FROM DOCUMENTS AND INFORMATION CLASSIFIED SECRET

Filed With Court Security Officer Pursuant to Protective Order

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1),* petitioner Huzaifa Parhat submits the following certifications:

A. Parties and Amici

Petitioner Huzaifa Parhat is a prisoner incarcerated at the United States Naval Station at Guantanamo Bay, Cuba ("Guantanamo").

Respondent is Robert M. Gates, Secretary of Defense of the United States of America.**

B. Rulings Under Review

As provided by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, this case is an original action brought in the first instance in the United States Court of Appeals for the District of Columbia Circuit. The claims asserted in the Petition have not been presented to or reviewed by this Court or any other court.

C. Related Cases

The following cases involve or may involve some of the same parties, or may present similar legal and/or factual issues:

1. *Petitioner is informed and believes that over 160 prisoners at Guantanamo have* brought suit under the Detainee Treatment Act of 2005. Those pending actions

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* Given the novelty of original actions filed under the Detainee Treatment Act of 2005, it is sometimes difficult to apply the standards set forth in the Federal Rules of Appellate Procedure and Circuit Rules to the present case. Petitioner has, to the greatest extent possible, endeavored to conform this brief to the relevant Rules.

** In addition to claims arising under the Detainee Treatment Act of 2005, the Petition asserts an alternative original *habeas corpus* claim and therefore names Petitioner's immediate jailers as additional respondents. In light of this Court's ruling in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078 (2007), Petitioner does not pursue his *habeas corpus* claims at this time, but reserves the right to do so if warranted in light of the Supreme Court's review of *Boumediene*. Secretary Gates is the sole respondent as to Petitioner's Detainee Treatment Act claims, and is referred to as the "Respondent" throughout this brief.

include *Bismullah v. Gates*, No. 06-1197, (D.C. Cir. filed June 9, 2006). This case and *Bismullah* have been effectively coordinated for purposes of resolving certain preliminary procedural motions, including motions related to the identification of the proper "record on review" and to the entry of an appropriate protective order. *See Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

2. *Mahnut v. Gates*, No. 07-1066 (D.C. Cir. filed Mar. 15, 2007), is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Mahnut* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

3. *Abdul Nassar v. Gates*, No. 07-1340, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Nassar*, along with others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on March 15, 2007 and that case was assigned docket number 07-1066. On August 23, 2007, the Court assigned the petitioner in *Nassar* a separate docket number. The petitioner in *Nassar* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

4. *Thabid v. Gates*, No. 07-1341, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Thabid*, along with others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on March 15, 2007 and that case was assigned docket number 07-1066. On August 23, 2007, the Court assigned the petitioner in *Thabid* a separate docket number. The petitioner in *Thabid* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

5. *Abdul Sabour v. Gates*, No. 07-1508, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Abdul Sabour*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 14, 2007, the Court assigned the petitioner in *Abdul Sabour* a separate docket number. The petitioner in *Abdul Sabour* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

6. *Abdusemet v. Gates*, No. 07-1509, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Abdusemet*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 14, 2007, the Court assigned the petitioner in *Abdusemet* a separate docket number. The petitioner in *Abdusemet* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

7. *Jalaldin v. Gates*, No. 07-1510, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Jalaldin*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 14, 2007, the Court assigned the petitioner in *Jalaldin* a separate docket number. The petitioner in *Jalaldin* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

8. *Ali v. Gates*, No. 07-1511, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Ali*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 14, 2007, the Court assigned the petitioner in *Ali* a separate docket number. The petitioner in *Ali* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

9. *Osman v. Gates*, No. 07-1512, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Osman*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 14, 2007, the Court assigned the petitioner in *Osman* a separate docket number. The petitioner in *Osman* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

10. *Hammad v. Gates*, No. 07-1523, is a petition for relief under the Detainee Treatment Act of 2005. The petitioner in *Hammad*, along with Petitioner herein and others, filed a joint Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005 on December 4, 2006. On December 18, 2007, the Court assigned the petitioner in *Hammad* a separate docket number. The petitioner in *Hammad* is a Uighur who was present in Afghanistan with the Petitioner herein, and who was arrested with him in Pakistan.

11. *Kiyemba v. Bush*, No. 05-1509 (D.D.C. filed on July 29, 2005), is a petition for a writ of habeas corpus and a complaint for additional relief. Petitioner herein, as well as each petitioner in Nos. 07-1340, 07-1508, 07-1509, 07-1510, 07-1511, 07-1512, and 07-1523, is a petitioner in *Kiyemba v. Bush*, and Respondent Gates, along with others, is a respondent therein.

12. *Kiyemba v. Bush*, consolidated appeal nos. 05-5487-92 and 06-5042, is an interlocutory appeal from decisions rendered by the U.S. District Court for the District of Columbia in *Kiyemba v. Bush*, No. 05-1509 RMU. On March 22, 2007, this Court dismissed the *Kiyemba* appeal in light of its decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted* 127 S. Ct. 3078 (2007). On May 10, 2007, the Court issued the mandate. On September 7, 2007, the Court recalled the mandate in light of the Supreme Court's grant of certiorari in *Boumediene*.

13. More than 200 original habeas corpus actions were commenced in the U.S. District Court for the District of Columbia by or on behalf of foreign nationals illegally imprisoned at Guantanamo. The following seven actions involve Uighurs who were present in Afghanistan with Petitioner, and who were arrested as a group in Pakistan:

a. *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), appeal docketed, No. 05-5477 (D.C. Cir. Dec. 28, 2005) (dismissed as moot after the government sent the petitioners to Albania one business day before scheduled oral argument before this Court);

b. *Kiyemba v. Bush*, No. 05-1509 RMU (D.D.C. filed July 29, 2005) (*see supra* at ¶ C(11));

c. *Kabir v. Bush*, No. 05-1704 JR (D.D.C. filed Aug. 25, 2005);

d. *Mamet v. Bush*, No. 05-1886 EGS (D.D.C. filed Sept. 23, 2005) (dismissed by petitioners pursuant to Rule 41(a) of the Federal Rules of Civil Procedure after they were sent to Albania along with the *Qassim* petitioners);

e. *Razakah v. Bush*, No. 05-2370 EGS (D.D.C. filed Dec. 12, 2005);

f. *Mohammon v. Bush*, No. 05-2386 RBW (D.D.C. filed Dec. 21, 2005); and

g. *Thabid v. Bush*, No. 05-2398 ESH (D.D.C filed Dec. 14, 2005).

January 7, 2008

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I. JURISDICTION

This is an original action, not an appeal, of which this Court has exclusive jurisdiction pursuant to section 1005(e)(2) of the Detainee Treatment Act of 2005. *Bismullah v. Gates*, 501 F.3d 178, 182 (2007).

II. ISSUES PRESENTED

1. Does the Combatant Status Review Tribunals ("CSRT") hearing record demonstrate as a matter of law that Petitioner's continued imprisonment is inconsistent with the laws of the United States, specifically the Authorization for the Use of Military Force, 115 Stat. 224 (2001) ("AUMF")?

2. Does the CSRT hearing record demonstrate as a matter of law that Petitioner's continued imprisonment is inconsistent with the standards and procedures specified by the Secretary of Defense for CSRTs, properly construed?

3. In light of the undisputed facts, Petitioner's two-and-a-half year quest for judicial review, six years of unlawful imprisonment already suffered, and the grinding cruelty of the conditions of his continued imprisonment, has the government justified any remedy other than immediate release of the Petitioner?

4. Has the government provided an adequate basis for a blanket designation by the Court as "protected information" of (1) all unclassified documents identified as "law enforcement sensitive," (2) all names of U.S. government personnel, and (3) all other and other identifying information pertaining to U.S. government personnel contained in any CSRT record, as requested by Respondent?

III. STATEMENT OF THE CASE

A. Petitioner Should be Released Immediately.

Petitioner Huzaifa Parhat is beginning his seventh year of imprisonment. He lives in almost complete isolation in Camp 6, Guantanamo Bay, Cuba. He was captured in 2001 in Pakistan. In 2003, the military determined that it was "unlikely" that he was a person subject to military detention, and recommended his release. In 2004, a CSRT panel determined that there

was no evidence to show that he had committed any hostile acts against the United States or its coalition partners, or that he had joined any group hostile to the U.S., but nevertheless deemed him an "enemy combatant." In 2005, he sought habeas corpus relief. The district court stayed his case indefinitely, and the government never provided any factual return to justify his imprisonment. In 2006, he brought suit under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06 ("DTA").

The government has never produced the record on review. However, on October 29, 2007, the government for the first time disclosed the evidence considered by Parhat's CSRT. Those documents show he is entitled to relief as a matter of law because they prove that, as the military determined, that he is not a person the Executive is authorized to detain: he was not a part of any Taliban or al Qaeda militia—indeed has no affiliation at all with those organizations—was not a soldier, and never took up arms against the United States or the coalition. Accordingly, pursuant to section 1005(e)(2) of the DTA, 28 U.S.C. § 1651(a) and Circuit Rule 27(g)(1), Parhat seeks judgment as a matter of law on his DTA petition, and an order for immediate release.

B. Procedural History

Although Parhat sought habeas relief in July 2005, and release under the DTA in December 2006, the government for years parried any effective judicial review by litigating first jurisdiction, and then the extent of the "record on review," and, while so litigating, producing nothing at all. On May 15, 2005, the Court heard oral argument on what constitutes the "record on review" for purposes of this case, and on the terms of an appropriate protective order. On May 8, 2007, just before argument, the government (apparently) lodged with the Court the complete record of Petitioner's CSRT hearing, *i.e.,* the documents the government contended should constitute the record on review. Petitioner's counsel requested copies; the government refused.

On July 20, 2007, the Court ruled as to what constitutes the "record on review" in this DTA action.[1] Ten days later, the Court entered a protective order that required the government to produce the record on review so that the case could be briefed. *Bismullah,* 501 F.3d at 194-204 (reporting protective order as issued July 30, 2007 and amended October 23, 2007).[2] Notwithstanding the Court's orders, the government refused to produce any record—not the record ordered, nor even the documents it had argued should constitute the record. On September 7, 2007, the government moved for rehearing and *en banc* review. The Court denied the motion for rehearing on October 3, 2007. After four months, the motion for *en banc* review remains pending.

Finally, on October 29, 2007, the government produced the classified portion of Petitioner Parhat's CSRT hearing record to security-cleared counsel.[3] Those documents conclusively demonstrate that Parhat's imprisonment violates the laws of the United States, and is inconsistent with the CSRT standards and procedures, properly construed. On November 1, 2007, Parhat moved for leave to bring his dispositive motion.

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[1] "[C]ontrary to the position of the Government, the record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as 'such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,' which includes any information presented to the Tribunal by the detainee or his Personal Representative." *Bismullah*, 501 F.3d 180.

[2] Circuit Rule 17(b) requires the government to file a certified index of the record within 40 days of docketing. The protective order requires that the record on review be disclosed to Petitioner when the certified index of record is filed. *Bismullah,* 501 F.3d at 202 ¶ 7(H). The government made no effort to timely comply with the July 20 opinion or July 30 order, and has not to this day provided Petitioner Parhat or any other DTA petitioner with the record on review.

[3] This motion seeks relief under Count I of Parhat's Petition for Immediate Release and Other Relieve under Detainee Treatment Act of 2005 (filed Dec. 4, 2006), which challenges, among other things, the lawfulness of the "enemy combatant" definition applied by his CSRT. The record of Parhat's CSRT hearing is such that he can, without more, show his right to release due to this fundamental flaw in the CSRT. Petitioner reserves his right to the full "record on review," which at all events should be promptly produced in compliance with the governing protective order. *See Bismullah,* 501 F.3d at 180 & 194-204.

On December 14, 2007, this Court granted the motion for leave, referred the government's October 1, 2007 Motion to Designate as "Protected Information" Unclassified Information in Record on Review to the same merits panel, and set a briefing schedule for both. The Court directed the parties to address "the issues raised by petitioner's motion for judgment, whether factual or legal, based solely upon the record before the Combatant Status Review Tribunal."

IV. STATEMENT OF THE FACTS

Parhat is an ethnic Uighur ("Wee-ghur") from China's far-western Xinjiang province. Parhat left China to escape the oppressive communist government, eventually making his way to a Uighur village in Afghanistan in June 2001.[4] App.124; App.126-129. This village had been in existed prior to Taliban take over of Afghanistan, App.191-192, and no Arabs or Taliban were present there when Parhat was present. App.129. In October 2001, U.S. air strikes flattened the village and eighteen unarmed Uighurs, including Parhat, fled the bombing. App.125. There is no evidence in the record—and we believe none exists anywhere—that any of them fought against the United States or coalition forces, or in any way supported forces hostile to the United States. [redacted] App.46-50. The Uighurs were taken in by local villagers who gave them food and shelter. App.149-150. Their "hosts" then

[4] The Uighur people have been severely oppressed by the Chinese government. The United States has long condemned China's record of human rights abuses generally, and its oppression of the Uighurs particularly. According to the State Department, in China during 2004 "[f]ormer detainees reported credibly that officials used electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse. . . . Deaths in custody due to police use of torture to coerce confessions from criminal suspects continued to occur." U.S. Dep't of State, *Country Reports on Human Rights Practices—2004—China*, § 1(c) (2005), available at http://www.state.gov/g/drl/rls/ hrrpt/2004/41640.htm. *See also, e.g.*, Amnesty International, China Report 2005 (China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations."), available at http://web.amnesty.org/report2005/chn-summary-eng.

handed them over to Pakistani officials who turned them over to the U.S. military.[5] *Id.* The U.S. transferred Parhat and the other Uighurs to Guantanamo in June 2002.

For over two years after he arrived in Cuba, Parhat—like the other men at Guantanamo—was held without a hearing of any sort.[6] More than a year before anyone conceived that

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[5] In late 2001, the U.S. distributed leaflets throughout northeastern Afghanistan and western Pakistan, promising substantial bounties for "terrorists." Leaflets were "dropping like snowflakes in December in Chicago," according to Secretary of Defense Donald H. Rumsfeld. Remarks at a Department of Defense News Briefing, Nov. 19, 2001, available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/ rumsfeldtext_111901.html. One leaflet said: "Get wealth and power beyond your dreams . . . You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life." Available at http://www.psywarrior.com/afghanleaf40.html. *See also, e.g.,* Guantanamo detainees say Arabs, Muslims sold for U.S. bounties, USA TODAY, May 31, 2005 (reporting that Uighur detainees at Guantanamo detainees testified to their CSRTs that they had been sold to American forces for a $5,000 bounty).

[6] Although the government has not disclosed the detailed information in its possession, even the scant publicly available information confirms that the U.S. determined long ago that Parhat and the other Uighurs are not a threat. In May 2004, for example, State Department spokesman Richard Boucher reiterated that the U.S. had no interest in continuing to detain the Uighurs. U.S. State Dep't Daily Press Briefing (May 13, 2004), available at http://www.state.gov/r/pa/prs/dpb/2004/32455.htm. In early November, 2004, military officials told the New York Times that "at least half of the Uighurs here are eligible for release." Neil A. Lewis, Freedom for Chinese Hinges on Finding a New Homeland, N.Y. TIMES, Nov. 8, 2004, at A17. *See also* Tim Golden, For Guantanamo Review Boards, Limits Abound, N.Y. TIMES, Dec. 31, 2006, at A20 (quoting a national security official who worked on the Uighur cases, "we were shocked that they even sent those guys before the C.S.R.T.s. They had already been identified for release.") (emphasis added); Demitri Sevastopulo, Uighurs face return from Guantanamo, FINANCIAL TIMES, Mar. 16, 2005 ("The Pentagon determined last year that half of the two dozen Uighur Chinese captured in the war on terrorism have no intelligence value and should be released. The U.S. has so far resisted Beijing's demands for repatriation out of concern that they may be tortured once back in China."); Navy Secretary Gordon England, U.S. Dep't of Defense News Transcript—Defense Department Special Briefing on Combatant Status Review Tribunals at 3 (Mar. 29, 2005) ("I think it has been reported we have Uighurs from China that we have not returned to China, even though, you know, *some of those have been deemed, even before these [CSRT] hearings, to be non-enemy combatants* because of concerns and issues about returning them to their country.") (emphasis added), available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html; Editorial, Detention Dilemma, WASH. POST May 3, 2005 ("[T]he military has determined that about 15 of [the Uighurs at Guantanamo] are not 'enemy combatants.' . . . The Pentagon has, consequently, cleared them for release. The trouble is that the State Department has been unable to find other countries willing to take them."); Carol Rosenberg, Closing Terror Prison Tricky for U.S., MIAMI HERALD, June 12, 2005, at 1A ("Navy Secretary Gordon England confirmed in March that Guantanamo captives include Chinese Muslims—reportedly about two dozen—who are no longer classified as 'enemy combatants,' the Bush administration term for terrorism suspects."); Demetri Sevastopulo, Cheney Backs Guantanamo Prison Amid Growing Unease, FINANCIAL TIMES, June 13, 2005, at 6 ("The U.S. is holding about 550 detainees

(Footnote continued on next page)

Petitioner might have a CSRT, a colonel concluded that "based on the information available at this time, it appears unlikely that Parhat will be determined to be an individual subject to the President's military order of 13 Nov. 2001. I recommend the release of Parhat under a conditional release agreement." App.015 at ¶1. The memo went on, "CITF believes that further investigation is unlikely to produce new information relevant to this case." *Id.*

No new information was found, but the decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), created a new political imperative in the summer of 2004. Despite the colonel's recommendation, Parhat had not been released, and the political command was determined to procure an "enemy combatant" finding to avoid judicial scrutiny. Just nine days after *Rasul* and *Hamdi*, the Department of Defense issued an "Order Establishing Combatant Status Review Tribunal" ("CSRT Order"). App.158-61. Three weeks later, the Secretary of the Navy issued a memorandum entitled "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba" ("CSRT Procedures"). App.162-91.

The Executive created the CSRTs on its own authority, and for its own benefit.[7] The CSRT Procedures established "non-adversarial proceeding[s]," purportedly "to determine

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(Footnote continued from previous page)

at Guantanamo, including about a dozen Uighur Chinese whom the U.S. has determined are no longer 'enemy combatants.' The U.S. does not want to repatriate the Uighurs ethnic Muslims from China's Xinjiang province out of fear that they could be tortured in China. But the Bush administration is having trouble persuading other countries to take the Uighurs.").

[7] Neither the CSRT Order nor the CSRT Procedures refer to any Congressional grant of authority, or purports to implement any statute. On the contrary, the CSRT Order specifically states that it is directed to internal management issues. *See* App.161 § j ("This Order is intended solely to improve management within the Department of Defense concerning its management of enemy combatants at Guantanamo Bay Naval Base, Cuba, and it does not, and is not intended to, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise[.]").

whether each detainee . . . meets the criteria to be designated as an enemy combatant" App.165 § B. The CSRT Procedures defined 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.165 §B. Despite their stated purpose, the CSRTs in fact *began* with a premise that contradicted the colonel's previous determination. In Parhat's case, and that of each prisoner detainee, the CSRT panel was instructed, "Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." App.158 ¶ a.

From this starting point, the CSRTs conducted "non-adversary" hearings under rules and procedures that were, by design, unfair and, in practice, profoundly biased—and that virtually guaranteed enemy combatant designations. The CSRT hearing record—reproduced in its entirety in the appendix—is a remarkable document. It contains no source material. There is no "custodial" information to indicate the particulars of Parhat's capture (as one would expect in a military detention case). It bears striking witness to what this Court previously has been advised in the Declarations of Admiral James A. McGarrah and Col. Steven Abraham. *See Bismullah v. Gates*, No. 06-1197, and *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed, respectively, June 1, 2007 and June 22, 2007). Information appears to have been gathered afresh, without any source indication of reliability. Indeed, as we show below, the patent unreliability of this information was noted by the panel.

On September 29, 2004, Admiral McGarrah appointed three military officers to serve as Parhat's Tribunal. Three weeks before the hearing, on November 15, 2004, Parhat had a single prepatory meeting with his Personal Representative.[8] App.018. It lasted 35 minutes, including translation time.[9] *Id.* The Tribunal held a hearing on December 6, 2004. App.010. Parhat was allowed to attend the unclassified session, which lasted just one hour and eighteen minutes. App.108-56. The classified session, which Parhat was not allowed to attend, lasted three minutes. App.157. The Tribunal classified Parhat as an "enemy combatant" that same day. App.010.

The CSRT hearing record shows neither allegation nor evidence that Parhat was involved with military activity, al Qaeda, or the Taliban. Instead, it appears the panel considered exclusively a theory that Parhat might be detained by virtue of affiliation with an alleged organization known as the "East Turkestan Islamic Movement," or "ETIM," an organization that someone (the CSRT Record does not disclose who) suggested might be hostile to U.S. interests or affiliated with al Qaeda or the Taliban. The President's military authority as to ETIM is academic, in light of the explicit findings of the panel as to Petitioner. The panel found as follows:

- [redacted]

[8] Under DoD regulations, Parhat could not be represented by counsel at the CSRT hearing. App.168 at § (F)(5). The Personal Representative was specifically forbidden from serving as Parhat's "advocate," and the prisoner's discussions with the Personal Representative are not privileged or confidential. App.178 § 3(D). *See also* App.176 (specifying that the Personal Representative cannot be a judge advocate).

[9] Under DoD regulations, the meeting should have included the reading of a detailed script by the Personal Representative. App.177-78.

[redacted]

App.015 ¶ 1(d)(2).

- [redacted]

App.016 ¶ 1(d)(2).

- [redacted] App.015 ¶ 1(d)(2).

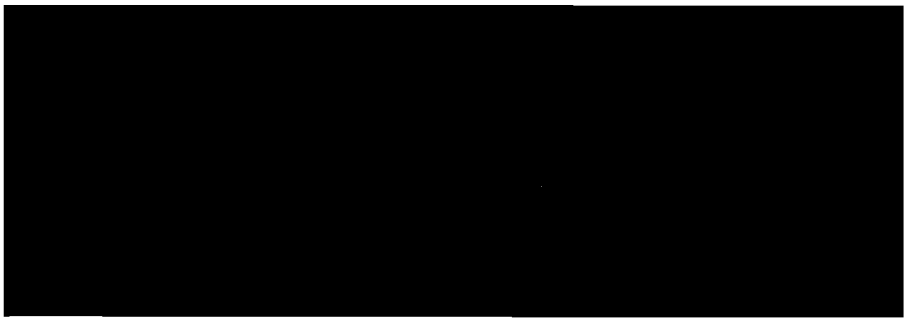
Speaking for the panel, the Tribunal President explained the basis of Petitioner's enemy combatant determination:

[redacted]

App.015 ¶ 1.c (emphasis supplied). In short, the hearing record establishes with painful clarity that there was not one iota of actual evidence to support a finding that Petitioner was a soldier or civilian fighter who participated in hostilities against the coalition; indeed, there was no evidence even of ideological opposition to coalition forces. In short, as a matter of law, an "alleged" affiliation with "ETIM," even had it been proved, could not be enough.

Indeed, the Tribunal noted that the ETIM allegation was itself not reliable, and squarely refuted by the evidence. The Tribunal President wrote:

[redacted]



App.016 ¶ 1(d)(3) (emphasis added).

Of note, the only evidence deemed *credible* by the panel was evidence of noncombatant status. As the Tribunal president wrote, the utter absence of any evidence suggesting Petitioner's involvement with ETIM, IMU, or any hostile actions against the United States, indeed the existence of evidence to the contrary, "cause[d] the Tribunal to doubt the veracity of" the government's assessment of the Petitioner and the other Uighurs. App.016 ¶ 1(d)(2). However, the Tribunal *did* characterize Petitioner's testimony as "credible." App.016 ¶ 1(d)(3). Thus the only *credible* evidence in Petitioner's CSRT came from the Petitioner himself, who "repeatedly stated that neither the United States nor its allies were enemies to him or the Uighur people; only the Chinese were the enemies of the Uighurs because of the brutal Chinese repression of the Uighur people," *id.*, and expressed his affinity for the United States. *See, e.g.*, App.021. He further testified that he did not know who provided the "camp"; he did not believe Bin Laden or

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[10] The classified record provides no source or other basis for such association.

[11] Said by whom? The Chinese to whom Parhat cannot now be returned under U.S. law because they would likely torture or kill him? The CSRT Hearing Record provides no source for this information. State Department records show that ETIM's September 2002 designation as a terrorist organization was procured by the Chinese from the U.S. long after Petitioner's capture, as part of an August, 2002 deal in which the Chinese agreed not to object to U.S. war plans for Iraq. *See* Petition ¶¶ 1-4 & 66-77, and sources cited. The classified record in Petitioner's case acknowledges that "in 2001, China recommended for U.S. state department recognition of ETIM/ETIP on the list of foreign terrorist organizations. The U.S. Department of State has designated the ETIM as part of the Department of State's terrorist exclusion list and under Executive Order 13224." App.100.

the Taliban funded it; and the only people at the "camp" were Uighurs. *See, e.g.*, App.020-025.

That ought to have been the end of it, but as Col. Abraham has previously advised the Court, the panels operated under intense pressure from Washington, and in some cases were forced to re-do noncombatant findings. Abraham Decl. ¶¶ 22 & 23. As the Tribunal put it, "This Detainee is part of a group of Uighur detainees whose cases present unique challenges to the Tribunal." App.014 ¶ 1(a). Thus many CSRT panels, including this one, rubber stamped "enemy combatant" results, even after having made findings that contradicted that conclusion. The panel's chafing under this political control was evident. It concluded by urging "favorable consideration for release of this Detainee." App.017 ¶ 1.(e).

V. SUMMARY OF THE ARGUMENT

The President's military detention power was only that power recognized by the laws of war as incidental to the powers conferred on him by the AUMF. Such power was limited to the power to detain enemy soldiers in the Afghanistan war, or civilians who directly participated in combat. Parhat is neither. Accordingly, in violation of section 1005(e)(2)(C)(ii) of the DTA, Petitioner's status determination as an "enemy combatant" was not "consistent with the ... laws of the United States." *See infra* § VI(A). Because the Department of Defense had no power to expand the President's power by rule, the "enemy combatant" definition in the regulations must be read to conform with those limitations, and accordingly, Parhat's status determination violated section 1005(e)(2)(C)(i) of the DTA, because it was not "consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals." *See infra* § VI(B).

Release is a remedy necessary and available under the DTA, and in view of the government's astonishing record of delay, and the Petitioner's long suffering, the remedy in this case must be release. *See infra* § VI(C).

The government has not made out a case for blanket designation of information as "protected information," and under this Court's previous ruling in *Bismullah v. Gates*, 501 F.3d , 188 (D.C. Cir. 2007), must be denied on the present record. *See infra* § VI(D).

VI. ARGUMENT

A. The CSRT Hearing Record Demonstrates as a Matter of Law that Petitioner's Imprisonment is Inconsistent with the Laws of the United States.

1. The Law of the United States Permits Military Detention of Civilians Only When They Actively and Directly Participate in Military Action.

Petitioner is entitled to relief under the DTA if his "enemy combatant" status determination was inconsistent with federal law. DTA §1005(e)(2)(C)(ii).[12] The laws of the United States relative to the President's power to detain Parhat are discussed below.

Where Congress delegates military power to the Executive without gloss, the laws of war define the scope of that power. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (relying on law of war to interpret Article 21 of the Uniform Code of Military Justice); *Hamdi v. Rumsfeld*, 542 U.S. at 517-19 (plurality relies on international law of war for definition of enemy combatant); *id.* at 550 (concurring justices find detention unauthorized because of noncompliance with Geneva Conventions); *In re Quirin*, 317 U.S. 1, 27-28 (1942) (Court has "recognized and applied

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[12] Under the DTA, the Court is to consider:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien 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); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

DTA § 1005(e)(2)(C).

the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals").[13]

Here, the relevant enabling legislation was the AUMF, which 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.

AUMF § 2(a) (emphasis added).[14] Because the authorization included no direct detention power, the only detention authority delegated to the Executive was the implicit power recognized under the laws of war, limited to the enemy Congress defined.

a. Combatants

Detention power exists first and foremost as to "combatants": persons who join "the military arm of the enemy government." *Hamdi*, 542 U.S. at 519; *see also Quirin*, 312 U.S. at 37-38. United States treaties and international law generally recognize a power to detain "members of the armed forces of a Party to a conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3 ("Additional Protocol I"); *see generally* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949,

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[13] *See also The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863) (looking to international law of war to determine legality of wartime seizures by executive); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (international law of war governs prosecution of hostilities authorized by Congress); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (same as to general declarations of war); *In re Territo*, 156 F. 2d 142 (9th Cir. 1946).

[14] The legislative record confirms the AUMF's limitation to entities and persons connected to September 11. *See, e.g.*, 147 Cong. Rec. S9417 (Sen. Feingold) (the AUMF "is appropriately limited to those entities involved in the attacks that occurred on September 11.") (daily ed. Sept. 14, 2001); *id.* at S9416 (Sen. Levin) ("[The AUMF] is limited to the nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks.").

art. 4(A)(1), 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364 ("Third Geneva Convention"); 1 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* 11 (2005).[15]

b. Civilians

Military detention power over civilians is far narrower. An individual who is not a "combatant" under the laws of war is a "non-combatant" or "civilian." Additional Protocol I, art. 50 (defining "civilian" as any person who does not fall under identified sections of article 4 of the Third Geneva Convention or article 43 of Additional Protocol I). The laws of war prohibit the use of military force against civilians unless and for such time as they actually "take a direct part in hostilities." Third Geneva Convention, art. 3, 6 U.S.T. 3316 (prohibiting military force against civilians "taking no active part in the hostilities"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13(2)-(3), 1125 U.N.T.S. 609 ("Additional Protocol II") (civilian population "shall not be the object of attack" "unless and for such time as they take a direct part in hostilities"). To be sure, "[c]ivilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked." Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 11-1 (1995) ("U.S. Navy Handbook"); U.S. Air Force Pamphlet 110-31, § 5-3(a)(1)(c) (Nov. 19, 1976) ("U.S.A.F. Pamphlet 110-31"); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2114 (2005) ("The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities.").

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[15] Combatants are permitted to use force against other combatants and are generally immune from criminal *prosecution* for the use of force in wartime. *See* Additional Protocol I, art. 43(2) (combatants "have the right to participate directly in hostilities"). Combatants may be prosecuted for conduct that violates the laws of war. *See, e.g., Quirin,* 317 U.S. at 31.

Thus detention power exists where the prisoner, although a civilian, actually and directly participated in the international armed conflict authorized by Congress—referred to variously as "combat" or "hostilities." This participation must be *direct and military*:

> The United States understands the phrase "direct part in hostilities" to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.

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). Mere sympathizers—even those whom a commander suspects might take part in hostilities in future—are not subject to military force. *See* Intl Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 619 (Claude Pilloud, *et al.*, eds. 1987); S. Exec. Rep. No. 107-4, at 7 (2002) ("training," "combat support," and "combat service support" are not direct participation in hostilities).[16]

Our Supreme Court has always recognized this distinction. It is why Hamdi, alleged to have carried a Kalashnikov against U.S. troops on an Afghan battlefield, was subject to military detention, *Hamdi,* 542 U.S. at 522 n.1, and Milligan, the Confederate sympathizer who conspired with the enemy and sought the overthrow of the government during wartime, but did not engage in battlefield activity, was not. *Ex parte Milligan,* 71 U.S. 2 (1866).[17] Our nation's insistence on

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[16] The United States' requirement of a "direct causal connection" follows the authoritative commentary on the Geneva Conventions. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* at 516 (Sandoz, *et al.*, eds., 1987) ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place").

[17] *See also* International Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶ 1942 (Sandoz, *et al.* eds., 1987) (describing direct participation as "acts which by their nature *and purpose* are *intended* to cause actual harm to the personnel and equipment of the armed forces" (emphasis added)).

distinguishing between the combatant and the non-combatant civilian reflects the framers' abhorrence of Executive assertions of unbridled military power. *See, e.g., Loving v. United States*, 517 U.S. 748, 760 (1996) ("[T]he Framers harbored a deep distrust of executive military power and military tribunals."); *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."). Congress's refusal to grant the President's request for a broad authorization to use force, *see infra at* 16-17, or to authorize force against civilians in circumstances not authorized by the laws of war was conclusive.[18]

2. The Laws of the United States Relative to Detention Power Were Not Expanded by DoD Rule.

The DoD had no power to expand the President's military detention power by promulgating an overbroad definition of "enemy combatant." An executive agency's power is limited by Congressional delegation. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986); *Railway Labor Executive Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*). Quasi-legislative power (for example, expanding existing law as to who may be detained by the military) must be "rooted in a grant of . . . power by the Congress and subject to limitations which that body imposes." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). As this Court has explained:

> [T]he board's position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature.

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[18] Of course, civilians may be *punished* for activity short of direct participation in hostilities, even though they cannot be targeted with *military force.* Unlike the privileged belligerent, the civilian who engages in violence may be liable for crimes such as murder and assault. Such activity may or may not have anything to do with terrorism (another crime), but all such activities properly may be (and at all relevant times have been) criminalized by Congress. *See, e.g.,* 18 U.S.C. §§ 2339A (material support for terrorist acts), 2339B (material support to a foreign terrorist organization); 2339C (financing of terrorist acts). Petitioner has never been accused of any crime.

Railway Labor Executive Ass'n, 29 F.3d at 670 (where statute conferred standing on certain persons, but not on carriers, agency had no "gap-filling" power to confer standing on carriers). This result was entirely consistent with *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). "To suggest, as the Board effectively does, that *Chevron* step two[19] is implicated any time a statute does not expressly negate the existence of a claimed administrative power (*i.e.*, when the statute is not written in 'thou shalt not' terms) is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent." *Railway Labor*, 29 F.11 3d at 671 (emphasis in original).[20]

The rule of *Railway Labor* takes on particular force here, because the power to name the enemy in warfare is constitutionally delegated to Congress. U.S. Constitution art. I, § 8, cl. 11; *see Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Congress was exquisitely careful in naming the enemy here. When the President sought leave to use force against persons unconnected with September 11 "'to deter and pre-empt any future acts of terrorism and aggression against the United States,'" Congress declined, and instead defined the enemy only by express reference to the September 11 attacks. *See* David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002) (quoting Draft Joint Resolution Authorizing the Use of Force provided by the President to Congress). Congress defined the enemy in one way and not another, and authorized the use of

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[19] "Step two" of *Chevron* gives an agency discretion to fill gaps where Congress is silent as to a specific issue but has delegated general authority. In such cases the agency may make a reasonable construction of the enabling statute and fill the gap. *Chevron*, 467 U.S. at 844.

[20] This Court has repeatedly confirmed that *Railway Labor* is the law of the Circuit. *See, e.g., Aid Ass'n for Lutherans v. U.S.P.S.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003) (rejecting Postal Service's position that regulations were permissible because statute did not expressly foreclose them); *Halverson v. Slater*, 129 F.3d 180, 187 (D.C. Cir. 1997) (silence did not authorize regulation); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995) (same); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse to presume a delegation of power merely because Congress has not expressly withheld such power.").

military force (including detention) against that enemy and not another. The Department of Defense had no power to revoke this constitutional prerogative by rule.[21]

3. The CSRT Hearing Record Demonstrates as a Matter of Law that the Government Concluded that Parhat was not a person Properly Subject to Military Detention.

The stated basis for the "enemy combatant" determination was that Parhat was "affiliated with forces associated with al Qaida and the Taliban (i.e., the East Turkestan Islamic Movement") that are engaged in hostilities against the United States and its coalition partners." App.011. The alleged "affiliation" was that Parhat was received "training" at a "camp" in Afghanistan, and that the supposed camp "was operated by the East Turkestan Islamic Movement (ETIM), a group funded in part by Usama bin Laden and the Taliban." *Id.*

From a legal perspective, the theory would be inadequate in the first place. Congress never authorized military activity against ETIM. There was no showing in the CSRT Hearing Record either that ETIM had been involved in hostilities against the coalition, or that Parhat was involved in actual military activity of any kind, either with ETIM or anyone else.[22] (The allegation that the group was funded by bin Laden and the Taliban is unsourced in the CSRT Hearing Record.) The government's best case would be that Parhat had a sort of "camp follower" status, which would be an insufficient basis for detention of a civilian, even if the "camp" had contained the enemy as defined by Congress, which by definition it did not. *See*

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[21] Congress knew precisely how to delegate when it wanted to. *Compare Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (2001) (power delegated to secretary to identify terrorist organizations). The executive branch has never determined that Uighurs, or the so-called "East Turkestan Islamic Movement" (*see infra*), or Petitioner himself played any role in the murderous attacks of 9/11, and of course he did not.

[22] Training in the use of a firearm, which "consisted of weapon disassembly and cleaning," *see* App.37, is simply not anti-coalition *military* activity, particularly in a place like pre-war Afghanistan, where firearms were common.

supra at 12-15.

But here a much more fundamental problem renders the government's case a failure: *the panel did not find the allegations credible.* On their own, military authorities had concluded in 2003 that no basis for further military detention was present or likely to be demonstrated. App.057. Once again in 2004, military authorities found the allegations unsupported. [redacted] App.016. The panel further noted that [redacted] *Id.* (emphasis added). Parhat (whom the panel found credible, App.016) denied any knowledge of an al Qaeda or Taliban link to the "camp": [redacted] App.040. [redacted] App.050.

What was required for an enemy combatant determination was membership in an enemy military force, or direct participation in military hostilities against the coalition. There is no evidence in the record of *any* such activity.

As the Tribunal president wrote, the utter absence of any evidence suggesting Petitioner's involvement with ETIM, the allegedly related organization IMU, or any hostile actions against the United States, indeed the existence of evidence to the contrary, "cause[d] the Tribunal to doubt the veracity of" the government's assessment of the Petitioner and the other Uighurs. App.016 ¶ 1.d.2.

But it goes further. In considering the preponderance of the evidence, the Court should note that the only evidence deemed *credible* by the panel was Parhat's testimony. App.016 ¶ 1.d.3. Thus the only *credible* evidence in Petitioner's CSRT came from the Petitioner himself, who "repeatedly stated that neither the United States nor its allies were enemies to him or the Uighur people; only the Chinese were the enemies of the Uighurs because of the brutal Chinese repression of the Uighur people," *id.*, and App.021. He further testified that: he did not know who provided the "camp"; he did not believe Bin Laden or the Taliban funded it; and the only people at the "camp" were Uighurs. App.020-025.

These findings, and the utter absence of any evidence of military activity, are conclusive. Petitioner was and is a noncombatant as a matter of law. No further proceeding could change this result.

B. The CSRT Hearing Record Demonstrates as a Matter of Law that Petitioner's Imprisonment is Inconsistent with the Standards and Procedures Promulgated by the Secretary of Defense.

1. The CSRT Procedures Must be Construed so as not to Exceed the Powers Delegated by Congress.

Petitioner is also entitled to relief under the DTA because his "enemy combatant" status determination was inconsistent with DoD regulations, properly construed. DTA § 1005(e)(2)(C)(i). As discussed above, Congress did not delegate to the Executive any authority to expand the detention power beyond the power incidental, under the laws of war, to the AUMF. Accordingly, the CSRT Procedures must be construed in conformity with this power.

Those procedures defined 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.165 (highlighting terms construed below). DoD was bound to construe and apply this definition according to the law-of-war principles discussed above. As we show below, the definition *can* be read to conform with those principles. Once the definition is so construed, it becomes clear that Parhat was improperly classified as an "enemy combatant."

2. The "Enemy Combatant" Definition, Properly Read, Defines as Enemy Combatants only those Persons who either were Members of a Military Force of al Qaeda or the Taliban, or those Civilians who Actually Engaged in direct Military Activity Against the Coalition.

a. "Part of or supporting"

The definition first identifies *forces* of "the Taliban or al Qaida," and "associated forces." To be consistent with the AUMF and the laws of war, this must, in the first instance, refer to military forces: organized, armed militias engaged in military activity against the coalition. No authority was delegated to define as the enemy persons outside the "military arm" of the Taliban and al Qaeda, or other military forces complicit in the 9/11 murders. Consistent with the terms of the AUMF, "part of or supporting the Taliban or al Qaida forces" can mean nothing broader than being a *member of the military arm* of al Qaida or the Taliban.

b. "Associated Forces"

The term, "associated" must also be read in concert with the AUMF. It can only mean *military forces* of "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." The term, "associated forces" assuredly cannot mean ideological groups—even quasi-military groups—that did not participate in the Afghanistan war, for Congress expressly refused to authorized this.[23] In Petitioner's case, it is enough to note that

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[23] Sloganeering to the contrary, Congress did not authorize a "global war" on terror or on "terrorists" generally. It authorized military action against those who "planned, authorized, committed, or aided" the 9/11 attacks and those who "harbored" them. AUMF § 2(a). *See also* David Abramowitz, The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism, 43 HARV. INT'L L.J. 71, 73 (2002).

the term could not conceivably be read, consistent with the authority delegated to the DoD, to reach political dissident groups who are philosophical opponents of the communist regime of the People's Republic of China.

c. "This includes."

The second sentence of the definition addresses the alternative branch of detention power under the laws of war—the detention of civilians. It provides, "[t]his includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Once again, the language may not be construed to expand detention power ancillary to the AUMF. That means that only civilians who directly participated in hostile military action against the coalition would fall within the definition. Further, "belligerent act" and "directly supported hostilities" can only be construed to mean direct and active participation in hostile battlefield activity. *See supra* at 12-15.

Reading it as *illustrative* only, the government apparently construes the sentence as, "[t]his includes, *without limitation,* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." But that reading would expand detention power, and therefore is impermissible. Moreover, "the word 'including' need not always be used by Congress in an illustrative manner. The term can also be used and construed as restrictive and definitional." *Cashman v. Dolce International/Hartford,* 225 F.R.D. 73, 84 (D. Conn. 2004).[24] Only thus can the definition be made consistent with the incidental detention power recognized by *Hamdi* and the law of war. Civilians could be detained only where they participated directly in battlefield activities with the Taliban or al Qaeda, and DoD rules may not be construed so as to broaden that detention power.

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[24] *See also Semble, Bausch & Lomb v. U.S.*, 148 F.3d 1363, 1367 (Fed. Cir. 1998); *Adams v. Dole*, 927 F. 2d 771, 777 (4th Cir. 1991); *Cloverdale Equipment v. Manitowoc Engineering*, 964 F. Supp. 1152, 1159 n.6 (E.D. Mich. 1997).

3. The Government Cannot Show that a Preponderance of the Evidence Supported an Enemy Combatant Determination.

In short, because the "enemy combatant" definition is a key component of the CSRT "standards and procedures," and because, properly construed, the definition is confined by the limits of the Executive's detention power ancillary to the AUMF, Parhat's status determination, as a matter of law, violated the DoD standards and procedures. *See supra* at 17-19.

C. Petitioner is Entitled to Immediate Release.

1. Remedy is of the Essence of the Judicial Function.

The DTA contains no limitation on remedy. Courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992); *see also Crocker v. Piedmont Aviation*, 49 F.3d 735, 749 (D.C. Cir. 1995) ("courts are presumed to possess the full range of remedial powers—legal as well as equitable—unless Congress has expressly restricted their exercise"); *Cobell v. Norton,* 240 F. 3d 1081, 1108 (D.C. Cir. 2001). Congress may limit remedies, but where it does not do so (as it did not in the DTA), Courts have the full range of remedial power.

This power has constitutional dimension, for it is central to the "judicial power of the United States" vested in the federal courts by Article III of the Constitution. *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision"); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971) (judicial branch has the function of requiring the executive to stay within the limits prescribed by the legislative branch); *Cobell v. Norton,* 283 F. Supp. 2d 66, 119-20 (D.D.C. 2003) ("[T]he interest of the judicial branch in taking remedial measures necessary to give effect to its substantive judgments is intimately related to the "judicial power"

vested in the federal courts by Article III."), *stay dissolved by* 2004 WL 210700 (D.C. Cir. 2004).[25]

The remedial power requires that judicial decrees grant *meaningful* relief designed to right the wrong in a given case or controversy. *See Kendall v. United States*, 12 Pet. 524, 624 (1838) (It is "a monstrous absurdity in a well organized government that there should be no remedy, although a clear and undeniable right should be shown to exist."); *Gwinnett County Public Schools*, 503 U.S. at 66 (remedies "historically . . . thought necessary to provide an important safeguard against abuses of legislative and executive power, as well as to ensure an independent judiciary").[26] Indeed, the Constitution does not confer merely the power to grant remedies; remedial action is a judicial duty. "[T]he judicial branch of the Federal government *has the constitutional duty* of requiring the executive branch to remain within the limits stated by the legislative branch." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604-05 (D.C. Cir. 1974) (emphasis added).

2. The Court Has the Power to Order Release in a DTA Action.

As the government concedes,[27] release is an available remedy. First, the statute itself provides that the Court's jurisdiction continues until "release of such alien from the custody of the Department of Defense." DTA §1005(e)(2)(D). Release, then, is the statutory terminus of a DTA action. Contemplated by its terms, it is the logical remedy afforded by the statute, where the Court's substantive finding in favor of petitioner cannot be cured.

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[25] The decision in *Cobell* was vacated after enactment of a new statute. Nothing in that *vacatur* limited the district court's exposition of the constitutional dimension of remedies.

[26] *See also Marbury v. Madison*, 1 Cranch 137, 163 (1803) (Our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[27] At oral argument before the Supreme Court in *Boumediene*, the government conceded that "if what the Constitution requires to make the DTA to be an adequate substitute is the power to order release, there is no obstacle in the text of the DTA to that. And the All Writs Act is available to allow them [the court] to order release to protect their jurisdiction under the DTA." Transcript of Oral Argument at 37:20-25, *Boumediene v. Bush*, No. 06-1195 (U.S. argued Dec. 5, 2007).

Second, anything less than release would contradict a Treaty of the United States. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention") provides that one who, like the Petitioner, was taken by mistake must be promptly released upon determination that he is not in fact a combatant. *See* Fourth Geneva Convention art. 132, Aug. 12, 1949, 6 U.S.T. 3606 ("Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."). Soon after the DTA was enacted, both the Supreme Court, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and Congress, in section 6 of the Military Commissions Act of 2006, reaffirmed that the Geneva Conventions are the law of the United States. The Court need not accord to Petitioner any private right of action under the Geneva Conventions to conclude, in construing its own remedial power under the DTA, that Congress could not have intended to legislate a result inconsistent with a treaty of the United States.[28]

The third point is prudential. As the government has conceded, the Court must have a view to the suspension clause, and the argument that the DTA could never pass constitutional muster unless it provided the same remedy that is guaranteed to a successful *habeas* petitioner. *See* U.S. CONST. art. I, § 9, cl. 2. While the law of this circuit, after *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), is that Petitioner has no *habeas* rights to vindicate, a judge of this Court dissented from that proposition, and the Supreme Court took the almost unprecedented step of reconsidering denial of *certiorari*. The proposition hangs by a thread, and if it is rejected, it will be clear that the DTA could never approximate *habeas* unless without a swift and sure

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[28] Article 118 of the Third Geneva Convention mandates release for prisoners of war immediately upon the cessation of active hostilities. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). Petitioner is unconditionally entitled to release since the active hostilities between the contracting powers (Afghanistan and the United States) that were authorized by the AUMF have ended. Although news reports indicate the brigandage and crime is rife in Afghanistan, the former Taliban regime in Afghan was toppled in 2002, Afghanistan and the United States have exchanged ambassadors, and the two nations enjoy full and friendly diplomatic relations. The international armed conflict Congress authorized ended years ago.