UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUZAIFA PARHAT,

Petitioner,

v. No. 06-1397

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

Respondents.

Friday, April 4, 2008

Washington, D.C.

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

BEFORE:

CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES GARLAND AND GRIFFITH

APPEARANCES:

ON BEHALF OF THE PETITIONER:

P. SABIN WILLETT, ESQ.

ON BEHALF OF THE RESPONDENTS:

GREGORY G. KATSAS, ESQ.

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C O N T E N T S

P R O C E E D I N G S

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

ORAL ARGUMENT OF P. SABIN WILLETT, ESQ.

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

THE COURT: Yes.

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

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

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

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

THE COURT: AUMF.

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

someone aided them.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Did they ever?

MR. WILLETT: Sorry?

THE COURT: Did they ever, though?

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

THE COURT: You mean, you mean 2002.

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

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

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

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

MR. WILLETT: I think, Your Honor -

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

MR. WILLETT: There are two answers to your

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

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

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

THE COURT: Which says unclassified on it.

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

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

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

THE COURT: Fair enough.

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

is the military panel explaining its finding.

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

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

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

did, the tribunal, and it said different.

MR. WILLETT: Well Your Honor –

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

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

THE COURT: Yes.

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

THE COURT: Yes.

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

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

MR. WILLETT: They do, but they say –

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

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

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

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

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

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

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

MR. WILLETT: We did.

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

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

MR. WILLETT: Well that's a –

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

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

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

THE COURT: I got that, but –

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

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

MR. WILLETT: Well –

JUDGE GARLAND: -- as far as this Court is concerned –

MR. WILLETT: Right.

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

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

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

JUDGE GARLAND: I thought –

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

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

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

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

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

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

THE COURT: Martinez never entered the country?

MR. WILLETT: Well he was physically present, but he had not made –

THE COURT: Yes, he was physically present.

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

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

MR. WILLETT: Well he's a –

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

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

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

MR. WILLETT: But there are no –

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

MR. WILLETT: Let me comment –

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

MR. WILLETT: No.

THE COURT: Placed on the beach in Cuba?

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

there.

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

MR. WILLETT: And there is no other remedy.

THE COURT: Do we know –

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

MR. WILLETT: Oh, I –

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

MR. WILLETT: I disagree, Your Honor.

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

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

THE COURT: You seem to be.

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

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

immigration laws.

MR. WILLETT: Oh, no. His –

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

MR. WILLETT: No, I don't.

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

MR. WILLETT: Well –

THE COURT: -- your most broad claim is.

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

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

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

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

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

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

ORAL ARGUMENT OF GREGORY G. KATSAS , ESQ.

ON BEHALF OF THE RESPONDENTS

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

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

MR. KATSAS: No, it does not. The regulation –

THE COURT: Isn't that a problem?

MR. KATSAS: No. I think the regulation says –

THE COURT: Part of or supporting.

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

THE COURT: It has no –

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

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

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

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

MR. KATSAS: Okay.

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

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

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

MR. KATSAS: Yes.

JUDGE GARLAND: -- or the coalition?

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

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

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

JUDGE SENTELLE: The enemy combatant definition contained within?

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

JUDGE SENTELLE: Well it's regulations.

MR. KATSAS: Yes.

JUDGE SENTELLE: They're not statutes.

MR. KATSAS: Correct.

JUDGE SENTELLE: Does the statute support that definition?

MR. KATSAS: I think it does, because -

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

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

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

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

JUDGE SENTELLE: On September 11.

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

JUDGE SENTELLE: We get that far.

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

JUDGE SENTELLE: Then you have to show that ETIM

and/or the individual Parhat aided, abetted, assisted on or before September 11 –

MR. KATSAS: No.

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

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

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

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

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

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

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

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

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

THE COURT: Planned, authorized, committed or aided.

MR. KATSAS: That's right. Al Qaida –

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

THE COURT: Those attacks.

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

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

MR. KATSAS: Correct.

JUDGE SENTELLE: -- (indiscernible).

MR. KATSAS: With, in order to, in order to fit them in the AUMF, I think –

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

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

JUDGE SENTELLE: Yes.

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

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

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

JUDGE SENTELLE: That was a perfect war.

MR. KATSAS: I'm sorry?

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

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

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

and we weren't in Little v. Barreme.

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

JUDGE SENTELLE: Yes.

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

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

MR. KATSAS: In --

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

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

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

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

president's power.

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

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

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

THE COURT: No it's not. It's not –

JUDGE GRIFFITH: Because –

MR. KATSAS: Maybe not, Judge Griffith. But –

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

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

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

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

THE COURT: Yes.

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

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

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

THE COURT: That's broader.

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

MR. KATSAS: Right.

JUDGE SENTELLE: You are telling us that aiding

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

MR. KATSAS: In response to -

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

MR. KATSAS: Right.

JUDGE SENTELLE: Yes.

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

Judge Sentelle, if I could come back -

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

MR. KATSAS: I'm sorry?

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

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

JUDGE SENTELLE: I understand that.

MR. KATSAS: -- the meaning of organization.

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

THE COURT: Are you saying that the type –

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

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

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

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

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

MR. KATSAS: Right.

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

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

espouse and settle certain claims against Iran. The court –

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

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

JUDGE SENTELLE: Yes.

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

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

MR. KATSAS: Co-belligerent definition is –

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

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

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

MR. KATSAS: Yes.

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

MR. KATSAS: Yes.

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

MR. KATSAS: No, but -

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

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

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

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

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

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

contractors, labor –

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

MR. KATSAS: Treated as prisoners of war.

THE COURT: But you're not treating, treating Parhat as a –

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

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

JUDGE SENTELLE: (Indiscernible) Curran is –

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

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

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

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

THE COURT: Let me ask you –

JUDGE SENTELLE: (Indiscernible.)

MR. KATSAS: Right.

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

MR. KATSAS: Right.

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

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

THE COURT: Well on the first point –

MR. KATSAS: Yes.

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

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

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

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

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

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

MR. KATSAS: Any -

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

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

THE COURT: You need an ETIM camp.

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

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

MR. KATSAS: Correct.

THE COURT: -- right?

MR. KATSAS: Correct.

THE COURT: And you don't have any unclassified evidence –

MR. KATSAS: Correct.

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

MR. KATSAS: Is not enough.

THE COURT: -- is not enough.

MR. KATSAS: Is not enough.

JUDGE SENTELLE: You concede that's not enough.

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

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

MR. KATSAS: Correct.

JUDGE SENTELLE: Might I ask we not go any further –

THE COURT: Yes.

JUDGE SENTELLE: -- into classified until we get –

THE COURT: That's fair.

JUDGE SENTELLE: -- the courtroom sealed?

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

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

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

MR. KATSAS: Yes. I think –

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

MR. KATSAS: With respect to –

JUDGE SENTELLE: Excuse me for interrupting you.

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

THE COURT: Right.

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

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

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

THE COURT: I'm talking about with reliability.

JUDGE SENTELLE: Reliability.

THE COURT: Reliability.

MR. KATSAS: Well the -

THE COURT: They have something in front of them. How do they determine whether it's reliable or not?

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

THE COURT: Has to be reliable.

MR. KATSAS: The regulations don't spell that out. I think -

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

MR. KATSAS: They do what any finder of fact does. They look at the evidence and make the best judgments that they can. I think the judgments in this, the judgments in this particular case are amply supported.

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

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

THE COURT: Now when you were talking about

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

MR. KATSAS: A deferential standard.

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

MR. KATSAS: Yes. But the preponderance standard in

the statute applies to the tribunal determination.

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

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

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

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

THE COURT: Why would there be any difference with respect to the –

MR. KATSAS: The different –

THE COURT: -- a narrower record? Why –

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

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

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

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

MR. KATSAS: -- will proceed. Is –

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

MR. KATSAS: Yes.

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

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

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

MR. KATSAS: Okay. Then -

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

MR. KATSAS: Yes.

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

MR. KATSAS: Right.

JUDGE SENTELLE: -- or that have to be determined. Now if it's the equivalent of habeas, the habeas remedy here would be release.

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

MR. KATSAS: Right.

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

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

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

MR. KATSAS: Right.

THE COURT: By transferring him to another country.

MR. KATSAS: But the point, the point –

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

JUDGE SENTELLE: Yes.

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

JUDGE SENTELLE: (Indiscernible) Parhat's problem.

MR. KATSAS: The point, the point –

JUDGE SENTELLE: The question (indiscernible) before us today –

MR. KATSAS: -- Judge Garland –

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

MR. KATSAS: Yes.

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

THE COURT: Or transfer. When the –

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

MR. KATSAS: One permissible habeas remedy is

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

THE COURT: What if he were –

MR. KATSAS: But in any event –

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

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

THE COURT: Yes.

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

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

MR. KATSAS: I'm not sure.

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

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

THE COURT: Right.

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

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

JUDGE SENTELLE: (Indiscernible) with me.

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

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

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

hostilities and detain members of Al Qaida. Whether you consider –

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

THE COURT: You mean as not an enemy combatant.

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

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

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

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

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

MR. KATSAS: Correct. Absolutely.

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

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

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

ahead, counsel.

ORAL ARGUMENT OF P. SABIN WILLETT, ESQ.

ON BEHALF OF THE PETITIONER

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

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

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

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

JUDGE SENTELLE: Some would say he did.

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

THE COURT: Mine would not.

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

father said about Harry Truman.

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

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

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

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

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

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

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

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

MR. WILLETT: How many minutes do we have?

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

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

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

THE COURT: I have just –

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

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

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

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

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

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

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

MR. WILLETT: Hypothetically –

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

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

principle in the, in the Iranian case.

JUDGE SENTELLE: Yes.

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

JUDGE SENTELLE: If A equals B, B equals C –

MR. WILLETT: Yes.

JUDGE SENTELLE: -- then C equals A.

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

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

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

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

MR. WILLETT: Yes, it would. But Your Honor, I come –

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

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

there's any basis to believe that.

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

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

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

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

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

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

classified session.

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

MR. WILLETT: Well I –

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

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

Your Honor, I have deep –

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

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

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

JUDGE SENTELLE: It's about up.

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

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

(Recess.)

DIGITALLY SIGNED CERTIFICATE

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

Stephanie N. Collins

Stephanie N. Collins April 9, 2008

DEPOSITION SERVICES, INC.