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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 REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW

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Susan Baker Manning
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

P. Sabin Willett
Rheba Rutkowski
Neil McGaraghan
Jason S. Pinney
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel for Petitioner Huzaifa Parhat

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I. SUMMARY OF ARGUMENT

The Executive has no authority to imprison Huzaifa Parhat indefinitely. Congress 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." Authorization for Use of Military Force ("AUMF") § 2(a), 115 Stat. 224 (Sept. 18, 2001). Parhat is entitled to judgment as a matter of law because the government does not claim that Parhat had anything to do with 9/11, or that he ever engaged in hostilities against the United States or its allies.

Because it cannot tie Parhat to 9/11, or place him on any battlefield, the government devotes the entirely of its brief to scare tactics and semantics. The government makes much of Parhat's presence at a "camp" affiliated with the East Turkistan Islamic Movement ("ETIM"), and the "military training" he ostensibly received there. But there is no evidence that Parhat was ever a member of ETIM. Appendix ("App.") 016 (noting that there is "no source document evidence . . . that the Detainee [] actually joined ETIM"). Nor is there any evidence that ETIM "planned, authorized, committed, or aided the terrorist attacks" of 9/11, or that it "harbored" those who did. Rather, the government makes the remarkable assertion that ETIM, on one hand, and al Qaeda and the Taliban, on the other, are actually the same "organization" within the meaning of the AUMF. Corrected Brief for Respondent ("Resp.Br.") 29-30.

And how did ETIM become the same "organization"? The first rationale is that people who Parhat does not know, but who are said to have been affiliated with ETIM, allegedly [redacted] at a time when all acknowledge that Parhat was hiding in a cave hundreds of miles away. Resp.Br. 6, 29-30; [redacted] The second rationale is that other people Parhat did not know, but who were also reportedly affiliated with ETIM, may have [redacted] Resp.Br. 6[redacted] The government also claims that the camp was supported by the Taliban and Osama Bin Laden. Resp.Br. 7.

The government's "organization" argument makes no sense. First, the events used to tie ETIM to the Taliban or al Qaeda happened *after* 9/11. But the President's authority under the AUMF is limited to those who perpetrated 9/11, or who harbored the perpetrators. Second, the allegation that the camp was supported by al Qaeda or the Taliban cannot transform Parhat into a member of those organizations. Such a reading would defy the express language of the statute.

The power the Executive now claims to derive from the AUMF is precisely the authority he sought from Congress in the aftermath of 9/11, and which Congress denied him. President Bush sought the authority to use "all necessary and appropriate force...to deter and pre-empt any future acts of terrorism or aggression against the United States." David Abramowitz, *The President, the Congress, and the Use of Force*, 43 HARV. INT'L. L. J. 71, 73 (2002). Congress refused this request. Instead, it limited his war making authority to "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided" the 9/11 attacks, "or harbored such organizations or persons." AUMF § 2(a). The government's overreaching interpretation of "organization" would eliminate those well-considered limitations from the statute.

Nor does the President have inherent authority to imprison Parhat. The government argues that, even if Parhat's indefinite detention violates the AUMF, the Executive has unbridled Article II power to detain him anyway. Resp.Br. 50. But this is contrary to the plain text of the Constitution and centuries of Supreme Court precedent. Indeed, the government pointedly ignores the Supreme Court's recent Guantanamo decisions, which flatly reject the President's claim of immunity from Congressional or judicial oversight. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006). There is no independent Article II prerogative for the President to detain Parhat.

The evidence before Parhat's Combatant Status Review Tribunal ("CSRT") shows that he is not an enemy combatant, as that term was defined by the Secretary of Defense. He was never "part of or supporting al Qaida [or] the Taliban" or "associated forces that are engaged in hostilities against the U.S. or its coalition partners." App. 165 (defining "enemy combatant").

Even if the Court were to assume for purposes of this motion that—unbeknownst to Parhat—the camp was affiliated with ETIM, living there briefly, learning how to break down a rifle, and [redacted] cannot transform him into an enemy combatant. As the Tribunal hearing record shows, there is no evidence that Parhat ever engaged in hostilities against the U.S. or its coalition partners, App. 016 ("[T]he tribunal was presented with no evidence that the Detainee had any involvement with any ETIM operations targeting the United States' interests or those of its allies."), or that he was ever a member of ETIM, *id.* Parhat is thus entitled to judgment as a matter of law that his enemy combatant classification is not supported by a preponderance of the evidence. Detainee Treatment Act of 2005 ("DTA") § 1005(2)(C)(i).

To the extent the enemy combatant definition could, even in theory, be read to extend to Parhat, it is contrary to the AUMF. That statute limits the Executive's authority to use military force, and thus his ongoing detention authority, to those who "planned, authorized, committed, or aided" the 9/11 attacks, or harbored those who did—something no one accuses Parhat or ETIM of doing. Under any reading that would cover Parhat, the enemy combatant definition is contrary to a law of the United States. *Id.* § 1005(2)(C)(ii).

In either case, the Court should order Parhat's immediate release. Release is the only possible remedy because the President has no power—statutory or constitutional—to imprison him. Although the government argues for a new CSRT, no subsequent proceeding can transform Parhat into a member of al Qaeda or the Taliban, involve him in any way with 9/11 or its perpetrators, or make him take up arms against the U.S. Parhat is entitled to judgment—and therefore release—as a matter of law.

II. ARGUMENT

A. Congress Did Not Authorize Parhat's Indefinite Detention.

1. The Constitution makes Congress alone the branch of government that identifies the enemy.

The founders conferred upon Congress alone the power to declare war—that is, to name the enemy. U.S. CONST. art. I, § 8, cl. 11. The President, in turn, is the commander in chief of

the armed forces. *Id.* art. II. From the beginning, Congress's war power was understood to encompass the power to limit the scope and nature of war. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time."); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) ("Congress may authorize general hostilities ... or partial hostilities"); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine and Original Understanding*, 121 HARV. L. REV. 689, 734 & n.137 (2008). The President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006). Here, Congress expressly authorized the President to use force against those who attacked us on 9/11, and those who harbored the 9/11 attackers. AUMF § 2(a).

Before considering whether any express or implied war power can reach Parhat, we can clear away some of the underbrush in the government's brief. The Court need not determine what constitutes the "military arm" of al Qaeda or the Taliban. Even if al Qaeda and the Taliban are entirely and exclusively militias, such that all of their members arguably are combatants, the AUMF would not authorize Parhat's imprisonment because the government does not claim that he was a member of either organization. Nor need the Court determine whether all persons in a training camp of a non-state enemy are subject to military force because Congress did not authorize military action against ETIM. Nor is any question presented as to the President's power to make exigent decisions in a war zone; it is immaterial here whether the President was authorized to capture Parhat in the first place. The issue before the Court is indefinite detention, exercised far from the battlefield, more than six years after the time of capture, of one who was never present in an enemy camp, and who never participated, nor trained to participate, in hostilities against the U.S. or its allies.

2. The President's express war power does not authorize Parhat's indefinite detention.

(a) The AUMF

Just days after the 9/11 attacks, Congress 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." AUMF § 2(a). While the AUMF empowered the President to respond robustly to the 9/11 attacks, it did not give him unlimited power.

The White House asked for, and Congress expressly declined to give, a broader war authority that would have authorized a generalized and global use of military force against all terrorist organizations. The White House's first draft of the AUMF provided "[t]hat the President is authorized to use all necessary and appropriate force ... to deter and pre-empt any future acts of terrorism or aggression against the United States." Abramowitz, 43 HARV. INT'L. L. J. at 73.

> Reaction to this proposal was immediately negative. . . . [H]ad this authority become law, it would have authorized the President to use force not only against the perpetrators of the September 11 attacks, but also against (at least arguably) anyone who might be considering future acts of terrorism, as well as against any nation that was planning "aggression" against the United States.

Id. A congressional "consensus quickly developed that the authority should be limited to those responsible for the September 11 attacks, and to any country harboring those responsible." *Id.* at 74. This led to the text of the AUMF. *Id.* at 74-75.

Congress granted the President express authority to determine, as a factual matter, which entities "planned, authorized, committed, or aided" the attacks, and which entities "harbored" the attackers. AUMF § 2(a). The President was *not* authorized to determine, as a policy matter, which other nations, organizations, or persons we should wage war against, which might be "dangerous," or which should be prevented by military force from harming us in the future. Indeed, that is precisely the authority the White House sought from Congress, and which

Congress refused to grant. Abramowitz, 43 HARV. INT'L. L. J. at 73-75.

The President exercised his delegated authority to make those determinations, and found that al Qaeda launched the attacks, and that the nation of Afghanistan and the Taliban organization harbored al Qaeda.[1] For present purposes, it is enough to note that the government does not assert—and certainly the President never determined—that ETIM "planned, authorized, committed or aided" the 9/11 attacks.

The verb "harbored" denotes the giving of shelter or physical sanctuary. 6 COMPACT OXFORD ENGLISH DICTIONARY 1102 (2d ed. 2004) ("2. To quarter (soldiers or retainers) . . . 3. To give shelter to.") (noting negative modern connotation). Congress did not authorize military force against those who "helped," "supported," "sympathized with," "did business with," "were located near to," "were related to," "knew people in common with," or, most importantly, may have *"aided"* the entities that launched the 9/11 attacks. It only authorized military force against those who "harbored" such persons. "Harbor," of course, gave the President power to wage war against Afghanistan, and the Taliban. It did not authorize him to wage war on ETIM. The President has never determined—and the government does not here argue—that ETIM "harbored" the perpetrators of 9/11.

(b) The government's textual arguments misread the AUMF.

(i) Aided

The first textual argument the government makes is that the word, "aided" expands the President's express war making authority beyond al Qaeda. Resp.Br. 48 (arguing that the Executive may reasonably interpret the term "aided" in the AUMF to "encompass groups and

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[1] For example, President Bush stated, "I have called our military into action to hunt down the members of the al-Qaida organization who murdered innocent Americans. I gave fair warning to the government that harbors them in Afghanistan. The Taliban made a choice to continue harboring terrorists and now they're paying a price." President George W. Bush, (Nov. 8, 2001); *see also* Executive Order, *Detention Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* § 1, 66 Fed. Reg. 57833 (Nov. 13, 2001).

persons who provide support and/or assistance to al Qaida and the Taliban"). That is not what the words say. The text authorizes military force against "nations, organizations or persons that ... aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a). The "aid" described was aid specifically linked to the 9/11 attacks, not general "aid" provided to the entities responsible for them. It would have been simple for Congress to confer war power against anyone who, as a general matter, provided some sort of support to al Qaeda, as opposed to aiding in the 9/11 attacks themselves. Congress could have substituted "aided" for "harbored" in the next clause of the AUMF, or added the word.[2] But it did not.

(ii) Organization

The government's second textual argument is an effort to sweep Parhat within the word, "organization." The government argues that a "group that joins with al Qaida or the Taliban becomes part of those covered 'organizations.'" Resp.Br. 29.[3] Thus, the government argues, ETIM is the same "organization" as al Qaeda and the Taliban for purposes of the AUMF.

The word's core sense has always meant just the *opposite*: a thing distinct from other, similar things. "Organization" derives from Greek "οργανον" (organon), meaning "tool or device used for making or doing a discrete thing." Lidell & Scott, A GREEK-ENGLISH LEXICON (9th ed. 1940). Organon's English progeny always, like the root, cleaved to things discrete and

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[2] If military force were authorized against anyone who "aided" al Qaeda, instead of those who provided aid in carrying out the 9/11 attacks, then the President would arguably have been authorized to attack: (i) a bank where an al Qaeda member maintained an account; (ii) Saudi Arabia, many of whose senior officials are known to have provided generalized aid of one kind or another to bin Laden; and (iii) the now-proverbial little old lady from Switzerland. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (reporting government claim that it could indefinitely detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities").

[3] This argument is lifted directly from a law review article. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization & the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). Its proposition that the power to wage war against an "organization" carries within it a power to define that organization as the executive chooses cites no precedent, and never addresses the obvious recourse of the President to seek authorization from Congress to make war against a new organization, should he believe it to be in our national interest to do so.

identifiable. Thus in anatomy an *organ* is a tool within the body performing a discrete set of functions; in biology, an *organism* is defined in part by its separate existence from similar organisms. Organs, organisms, and organizations all exist in social and interactive contexts, yet a hallmark of each is its discrete existence. The heart and the liver may interact; no one says they are the same organ. Fish school and birds flock, and yet remain distinct organisms. This Court and the Department of Justice are in frequent and regular contact, and in many ways are interdependent. One decides cases in which the other is vitally interested; the other provides briefs and arguments upon which the first must depend to make decisions. Former members of the one sit on the bench of the other. Yet no one would say that the Court of Appeals and the Justice Department are the same "organization." That quality of interacting with others, yet being distinct, is true—definitionally so—of *organizations*.

We need not resort to metaphors, however, to understand why ETIM and al Qaeda are not the same "organization." The Tribunal clearly and repeatedly distinguished between ETIM on one hand and the Taliban and al Qaeda on the other. *See, e.g.*, App. 011-017. Every document presented to the Tribunal that mentions the groups also distinguishes them. For example, [redacted] ETIM and al Qaeda are simply not the same "organization." The government's reading is both implausible and directly contrary to Congressional intent because it would sweep up groups and people who have nothing to do with 9/11.

Even if the Court were to accept this over-reading of "organization," however, the AUMF still would not reach Parhat because he was not part of ETIM. Although it was well

aware of the facts the government relies upon—Parhat's presence at the camp[4] and the supposed "military training"—the Tribunal specifically found that these did not make Parhat part of ETIM. As the Tribunal correctly stated, "no source document evidence was introduced to indicate...that the Detainee has actually joined ETIM." App. 016.[5] That is dispositive.

3. The President's implied war power does not authorize Parhat's indefinite detention.

We have shown that Parhat did not come within any express power to use military force. What remains is the President's implied war power. Parhat is a civilian. *See* Petitioner Huzaifa Parhat's Brief in Support of Motion for Judgment as a Matter of Law ("Pet.Br.") 13-14. Civilians may be subject to military force only when they directly engage in hostilities. *Id.* at 14-16 (citing authorities). All manner of indirect and logistical support is insufficient. *Id.* To dispute this point, the government resorts to two doctrines from the law of war, neither of which is controversial, or relevant.

(a) Co-belligerents

The government tries to make a co-belligerent of Parhat. As its authorities show, the law of co-belligerency is utterly irrelevant here. It has *never* been applied outside the context of state actors. ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW 84 (John P. Grant & J. Craig Barker eds., 2d ed. 2004); Morris Greenspan, THE MODERN LAW OF LAND WARFARE 531 (1959) (stating that a co-belligerent is a *"fully-fledged belligerent fighting* in association with one or

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[4] At bottom, the government's brief traffics in the worst kind of guilt-by-association. Although he may have seen ETIM members, nothing indicates that he knew of their alleged association with ETIM. App. 024-025, 136-138.

[5] During the hour-long unclassified CSRT hearing—the only opportunity the Tribunal had to hear from Parhat himself—no one ever asked him if he was a member of ETIM. Indeed, no one asked him about ETIM at all. When the Personal Representative read off the allegation that ETIM operated facilities "in which Uighur expatriates underwent small arms training" and that "[t]hese camps were funded by Bin Laden and the Taliban," Parhat's only response was a denial. "I believe it's just a Uighur patriot people trying to get back their country from the Chinese. I do not believe Osama Bin Laden or the Taliban they were financially help that camp." App. 123-24.

more of the belligerent powers") (emphasis added). Other than persons who helped to formulate the policy Respondent now argues for, no one has ever suggested that the "co-belligerent" doctrine extends beyond states, and certainly not broadly and malleably to any organization or person that might have a relationship to a belligerent organization.

(b) Irregular forces

The government next argues that the President has implied power to use military force against irregular forces. There is no question that he does, provided the irregular forces engage in the same hostilities as the belligerent against whom Congress has expressly authorized military force. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 38-39 (1942) (holding that irregulars who "associate themselves with the military arm of the enemy government" are subject to military force).[6] Even if civilians who merely *train* to engage in hostilities could be deemed irregular forces subject to military force (a proposition supported by none of the government's authorities, all of which involve actual combat activities), the government concedes that those at the camp with Parhat never trained for the purpose of hostilities *against the U.S.* Civilians training in a military camp without any purpose of hostilities against the Coalition simply do not come within any power to use military force that may be implied from the AUMF. Had there been any evidence that Parhat, or his companions at the camp, served as irregular military forces with al Qaeda and Taliban forces that engaged the Coalition, the Government might call them irregulars. Here it is conceded that they neither participated in combat, nor trained to do so.

The government also argues that the law of war relative to spies somehow aids its case. Resp.Br. 41. There is no question that spies who cross enemy lines to gather intelligence are engaged in battlefield activity, and that they are unlawful combatants that may be charged with

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[6] In all of the authorities the government cites, irregulars joined with the military arm of the enemy belligerent (typically a state) and actually engaged in anti-U.S. combat activities. Resp.Br. 34-38. The only conceivable exception to this rule is Vichy France, but Vichy France was in effect a puppet government of Nazi Germany, and controlled a strategic target in the war.

espionage. *Quirin*, 317 U.S at 46. None of that helps the government's case. A ruling in Parhat's favor would in no way limit the President's power to prosecute anyone who engages in espionage on behalf of an enemy in wartime.

(c) Without active hostilities, civilians may not be detained.

None of the government's authorities bring Parhat within the implied detention power. In the words of the Congressional Research Service:

> We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not qualify as a legitimate belligerent, with or without the authorization of Congress.

CRS Report for Congress, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS at 11 (updated Mar. 31, 2005), *available at* http://fas.org/sgp/crs/natsec/RL31724.pdf. Where civilians like Parhat are concerned, there must be active combat activity under any theory of military force. By the eighteenth century it was well established that "as long as [persons in occupied territory] refrain from all violence, and do not show an intention of use force" they are not appropriately considered enemy combatants. Wolff, JUS GENTIUM METHODO SCIENTIFICA PERTRACTUM 409-410 (Joseph H. Drake trans., 1934) (1764); de Vattel, LAW OF NATIONS OF THE PRINCIPLES OF NATURAL LAW 283 (Charles G. Fenwick trans., 1916) (1758) (explaining that "[p]rovided the inhabitants [of an occupied country] refrain from acts of hostility, they live in safety as if they were on friendly terms with the enemy"). "The custom of civilized nations...has therefore exempted...private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, *unless actually taken in arms, or guilty of some misconduct* in violation of the usages of war by which they forfeit their immunity." Wheaton, ELEMENTS OF INTERNATIONAL LAW 394-395 (3d ed. 1846) (emphasis added).

Even the Military Commissions Act ("MCA") defines unlawful enemy combatant to require a hostile act or *purposeful* and *material* support of a hostile act:

> A person who has engaged in hostilities or who has purposefully

> and materially supported hostilities against the United States or its cobelligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).

10 U.S.C. § 948a(1)(i). In contrast, the MCA defines a "civilian" for purposes of the Act's prosecution provisions as a person *"not taking active part in hostilities."* *Id.* § 950v(b)(2) (emphasis added). It is undisputed that Parhat did not take part in hostilities against the U.S. or its allies. App. 016.

B. The President has No Article II Power to Detain Parhat.

The government argues that, even if Parhat's detention violates the AUMF, the Executive has inherent Article II power to hold him anyway. Resp.Br. 50. But two centuries of Supreme Court precedent say that Congress, not the President, has sole authority to name and limit the enemy against whom the President may make war, and the President cannot ignore those limits.

1. The President is at the lowest ebb of his authority in detaining Parhat.

The government misconstrues *Youngstown*, arguing that, because Congress authorized the use of force, "the President's authority is 'at its maximum.'" Resp.Br. 51 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). That is true only where the Executive's action is *consistent* with a Congressional grant of authority. Where the President's conduct is "incompatible with the express or implied will of Congress," the President's "power is at its lowest ebb." *Id.* at 637. Because such conduct raises serious separation of powers concerns, a "Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution." *Id.* at 637-38.

Congress alone has the power to "'declare War . . . and make Rules concerning Captures on Land and Water.'" *Hamdan*, 126 S. Ct. at 2773 (quoting U.S. CONST. art. I, § 8, cl. 11). This includes the power to limit the scope of authorized hostilities, such that Congress may "wage a limited war; limited in place, in objects, and in time." *Bas*, 4 U.S. at 43. The President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan*, 126 S. Ct. at 2774 n.23. The President's use of military force against those not named as the enemy by Congress exceeds his Article II power. *Little v. Barreme*, 6 U.S. 170,

178 (1804) (finding the seizure of a ship unconstitutional where the President exceeded Congressional authorization to seize only certain French ships).

It is undisputed that neither Parhat nor ETIM had any actual connection to 9/11, and that neither harbored the attackers. The Executive's detention of Parhat thus not only runs "contrary to the express . . . will of Congress," *Youngstown*, 343 U.S. at 637, it foils the Constitutional design that grants Congress the sole power to name the enemy. The President is beyond the lowest ebb of his power. The Constitution forbids him to disregard Congress's limited authorization.

The cases the government cites do not support its claim to preclusive Article II power. *See* Opp. at 51-52. On the contrary, its authorities affirm that the proper Constitutional equilibrium is struck only where the President exercises his Article II powers within the limits prescribed by Congress. *See Quirin*, 317 U.S. at 35-36, 45 (finding that an act of Congress authorized military commissions to try German agents on charges of sabotage and espionage on U.S. soil); *Hamilton v. Dillin*, 88 U.S. (Wall) 73, 97 (1874) (upholding duty on commerce with insurrectionary States authorized by Congress); *The Prize Cases*, 67 U.S. (2 Black) 635, 678 (1862) (finding a naval blockade instituted by the President constitutional where Congress gave prior authorization and ratified the blockade after the fact); *Flemming v. Page*, 50 U.S. 603, 618 (1850) (determining that the President was authorized to collect duties at a Mexican port conquered by the U.S. for purposes of weakening an enemy named by Congress).

To be sure, the Constitution may recognize an Executive power to use force against an attacking foe "in a moment of genuine emergency when the government must act with no time for deliberation, . . . [and there is] an imminent threat to the safety of the Nation and its people." *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part). But here we have military force exercised under no exigency at all. Parhat was captured hundreds of miles from any battlefield and was labeled an enemy combatant years later. The government does not contend that Parhat ever posed a threat, let alone an imminent one. Powers to make emergency judgments do not give the President power to imprison deliberately someone

who is not the enemy Congress named.

2. The Executive is not entitled to immunity from judicial review.

The Executive argues that the scope of its own authority under the statue is either non-justiciable or "due extraordinary deference." Resp.Br. 30-31. But this is not about Congress or the Courts directing the Executive to take this hill or that one. It is about an Executive demand for "conclusive and preclusive" power to determine with whom our country is at war, a claim that demands the most cautious scrutiny. *Youngstown*, 343 U.S. at 637-38.

The Supreme Court explicitly "reject[ed] the Government's assertion [of] a heavily circumscribed role for the courts" in the enemy combatant context. *Hamdi*, 542 U.S. at 535-36 (requiring courts to "forgo any examination of the individual case and focus on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, and this approach serves only to condense power in a single branch of government"); *see also Rasul v. Bush*, 542 U.S. 466 (2004). Far from granting special deference, the Supreme Court has subjected the AUMF to exacting scrutiny. *Hamdan*, 126 S. Ct. at 2774-75 (analyzing the AUMF's text and legislative history).

C. Parhat is Not an "Enemy Combatant."

Parhat is not an enemy combatant subject to indefinite detention at Guantanamo. As shown by the preponderance of the evidence presented to his CSRT, he does not fit the Secretary of Defense's definition of that term. DTA § 1005(e)(2)(C)(i). To the extent the Secretary's enemy combatant definition could possibly be read to capture Parhat, the definition is overbroad and contrary to the AUMF, a law of the United States. DTA § 1005(e)(2)(C)(ii). Either way, he is entitled to judgment in his favor.

1. The preponderance of the evidence does not support the enemy combatant classification.

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. Parhat does not meet that definition. Notwithstanding the government's strained *post hoc* "organization" rationalization, all of the evidence indicates that Parhat was never "part of or supporting the Taliban or al Qaida forces." *See, e.g.*, App. 054 [redacted]

The only issue, then, is whether Parhat was "part of or supporting...[an] associated force[] that [is] engaged in hostilities against the United States or its coalition partners." App.165. The Tribunal found no evidence of this. It specifically found that "no source document evidence was introduced to indicate...that the Detainee had actually joined ETIM." App. 016. It likewise found that there was no evidence "that [Parhat] himself had personally committed any hostile acts against the United States or its coalition partners." App. 016; *see also* App. 015 (rejecting the notion that Parhat was a potential threat to U.S. forces or interests); *id.* ("Detainee, at most, underwent military training at the camp but, *according to the evidence, otherwise took no affirmative action to engage in hostilities* against the United States or the Northern Alliance.") (emphasis added).

That resolves the issue. The Tribunal found not just that the preponderance of the evidence did not show that Parhat was "part of or supporting" ETIM, it found that there was *no* such evidence. Given the Tribunal's finding that there was *no* evidence of hostile activity and *no* evidence that Parhat was part of ETIM, there can be no plausible claim that the preponderance of the evidence shows that Parhat is an enemy combatant as defined by the Secretary of Defense.[7] DTA § 1005(2)(C)(i).

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[7] Whatever the basis of the Tribunal's classification of Parhat as an "enemy combatant," it was not the evidence. Command pressure may have been irresistible, particularly if the Tribunal thought, as it apparently did, that Parhat and the other Uighurs were about to be released regardless of the Tribunal decision. App. 106 (copy of October 29, 2004 Washington Post article entitled "Chinese Muslims to be Freed from Guantanamo"); App. 016-017 (specifically noting article, urging "favorable consideration for release for this Detainee," and that Parhat not be forcibly returned to China). *See also* Decl. of Col. Stephen Abraham ¶ 20-21, *Parhat v. Gates*, No. 06-1397 (filed June 22, 2007) (describing command pressure to classify detainees as "enemy combatants").

2. To the extent the Secretary of Defense's enemy combatant definition could be read to capture Parhat, it is inconsistent with the AUMF.

As shown above, the AUMF does not authorize the use of military force against Parhat explicitly—because he had nothing to do with 9/11—or implicitly—because he never engaged in hostilities against the U.S. Nor, as also shown above, does the President have any inherent authority to disregard the limits of the AUMF and indefinitely detain Parhat. The enemy combatant definition should be read consistent with the AUMF to require either a connection to 9/11 or active hostilities. To the extent the enemy combatant definition could be read to omit those requirements, it is inconsistent with the AUMF, and Parhat is entitled to judgment on that basis. DTA § 1005(2)(C)(ii).

D. The Remedy is Release.

1. Only release order will end Parhat's unlawful detention.

Often a reviewing court's decision resolves a discrete error, but does not dictate the outcome on the merits. Remand is practical because it fits the decision. Where a party is entitled to relief as a matter of law, however, an appellate court may order direct relief. *See, e.g., Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1194-97 (10th Cir. 2007) ("[T]here is no point in remanding the case so that the Plan can again deny benefits, only to be reversed a second time on appeal . . . . [W]e must award Plaintiffs the benefits to which they are clearly entitled"); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007) (finding that remand to reconsider alien's removability is "unnecessary and inappropriate" where "record on remand would consist only of those documents already in the record" and the record "either supports the finding of removability or it does not"); *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993) (determining that remand is unnecessary because petitioners were entitled to judgment as a matter of law). Here, Parhat is entitled to judgment as a matter of law because the CSRT hearing record shows that he is a non-combatant. No remand will make him a soldier on a battlefield, connect him to 9/11, or change the scope of the AUMF.

Remand would be especially cruel here. The record establishes that Parhat has been eligible for release since before his CSRT. App. 056, 057, 106. If, after years of wrongful imprisonment, the Executive may conduct endless CSRT "do-overs," then the Courts afford no remedy at all. The Supreme Court has cautioned that where "there is not the slightest uncertainty as to the outcome of a proceeding" before the agency, "judicial review of agency action [should not be converted] into a ping-pong game." *Nat'l Labor Relations Bd. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). Remedy is an imperative that must not be frustrated by formalism and delay. *Id.*

In December, the government assured the Supreme Court that there was no obstacle to release under the DTA. Tr. of Oral Argument at 37:20-25, *Boumediene v. Bush*, No. 06-1195 (U.S. argued Dec. 5, 2007). Now it argues that release is a remedy only if the Supreme Court endorses it in *Boumediene*—a case in which the remedy in a DTA action is not squarely presented. Resp.Br. 55. This argument is more clever than straightforward, and the Court should recognize it as such.

In arguing against release, the government relies on *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005). The *Qassim* petitioners were two Uighur detainees who were at the camp with Parhat, who also engaged in "weapons training," and who also fled following U.S. bombing. *See, e.g.*, Petition for Immediate Release, *Parhat v. Gates*, No. 06-1397 ¶¶ 133-142. (D.C. Cir. filed Dec. 4, 2006). Based on exactly the same facts the government relies upon now, the *Qassim* petitioners' CSRTs determined that they were not "enemy combatants." *Id.* [8]

The government hid this critical fact from counsel and the District Court for many

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[8] The military has repeatedly stated that the Uighurs at Guantanamo are identically situated. *See, e.g.*, Petition for Original Writ of Habeas Corpus at 7, *In re Ali*, No. 06-1194 (U.S. filed Feb. 13, 2007) (quoting Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman as stating that "16 other Uighurs with identical circumstances were determined to be ECs" and providing information for do-over CSRTs for those Uighurs found not to be enemy combatants); *id.* at 8 (quoting military officer as stating, "they [the Uighurs] are all considered the same").

months. *Id.* at 199. When the truth came to light, the district court found the *Qassim* petitioners' continued detention "unlawful." *Id.* at 201. The *Qassim* court erred, however, when it also found that it was powerless to prevent that illegal activity. *Id.* The *Qassim* petitioners remained at Guantanamo until May 2006—when they were hastily sent to Albania one business day before oral argument in this Court. The government imprisoned the *Qassim* petitioners for fourteen months after the military determined that they were not enemy combatants.

Qassim does not counsel against an release order. On the contrary, the lesson of *Qassim* is that the Court *must* order release. "Remand" is meaningless when even a non-enemy combatant finding does not mean release unless and until this Court gets involved.

Parhat endures his seventh year of unlawful imprisonment. He has abandoned hope of release. Where each passing day matters, remand is particularly inappropriate. *See Zervos v. Verizon New York, Inc.*, 277 F.3d 635, 648 (2d Cir. 2002) (finding an abuse of discretion to remand where "each day mattered" because petitioner suffered from incurable cancer). Because Parhat's imprisonment necessarily is "inconsistent with the . . . laws of the United States," DTA § 1005(e)(2)(C)(ii), only an order for immediate release can remedy the wrong done.

2. In the alternative, the Court may order transfer.

Nearly five years ago, the military decided Parhat should be released. App. 015. Since that time, the government claims to have contacted a number of countries about resettlement of the Uighurs. App. 106. Under these circumstances, a release order is long overdue. If the Court is disinclined to order release, however, we propose, in the alternative, that the Court should rule that there is no lawful basis for military detention, and order Respondent to transfer Parhat to a military brig or other suitable facility in the United States. Parhat's presence in the continental United States would eliminate any question whether he is entitled to *habeas* jurisdiction. The parties and the district court would be able to determine appropriate release conditions.

E. The Government's Motion to Designate Unclassified Information as Protected Should be denied.

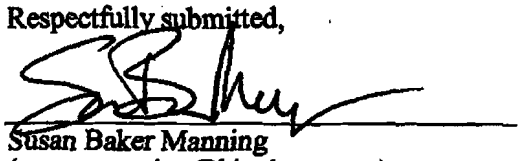
The government has asked the Court for a blanket designation of all "information

identifying Government personnel" and all "Law Enforcement Sensitive" information as "protected." Petitioner shares the government's commitment to national security, and does not object to designating as "protected" the names of those military personnel who served in CSRT hearings. For other government personnel, the Court should determine on a case-by-case basis, whether there is a security risk that would justify the designation.

The Court has already explicitly rejected the government's request to designate all "Law Enforcement Sensitive" material as "protected." *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007). "Law Enforcement Sensitive" is undefined, and there is no clear standard for what information is given this designation. U.S. Gen. Accounting Off., GAO 06-385, *Information Sharing: The Federal Government Needs To Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information* 13-14 (2006), *available at* http://www.gao.gov/new.items/d06385.pdf. No fewer than seven different agencies use the term, and each defines it differently. *Id.* at 24. It may be that some "Law Enforcement Sensitive" information should be "protected," but the Court cannot make that determination absent the identification of specific documents or information at issue. *Bismullah*, 501 F.3d at 188 ("It is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.") (citations omitted).

Dated: February 20, 2008

Respectfully submitted,



Susan Baker Manning
(susan.manning@bingham.com)
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Sabin Willett
(sabin.willett@bingham.com)
Rheba Rutkowski
(rheba.rutkowski@bingham.com)
Neil McGaraghan
(neil.mcgaraghan@bingham.com)
Jason S. Pinney
(jason.pinney@bingham.com)
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel for Petitioner Huzaifa Parhat

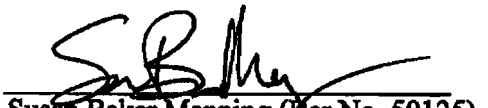
CERTIFICATE OF COMPLIANCE

I, Susan Baker Manning, hereby certify that, based upon the word count feature of the word processing system used to prepare this brief, the brief contains 6,967 words.

Susan Baker Manning (Bar No. 50125)

CERTIFICATE OF SERVICE

I certify that, on this 20th day of February, 2008, I served the foregoing Petitioner Huzaifa Parhat's Reply Brief in Support of Motion for Judgment as a Matter of Law on the Respondent's counsel of record by depositing copies with the Court Security Officer as provided by the Protective Order. *Bismullah v. Gates*, 501 F.3d 178, 194-204 (D.C. Cir. 2007). I am informed and believe that, pursuant to the same protective order, the Court Security Officer will cause copies to be delivered by hand to Robert M. Loeb, Attorney, Appellate Staff, Civil Division, Room 7268, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.



Susan Baker Manning (Bar No. 50125)