

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SUHAIL ABDU ANAM, ET AL	.	DOCKET NUMBER: CA 04-1194
	.	
Petitioner,	.	
	.	
vs.	.	Washington, D.C.
	.	December 14, 2009
BARACK OBAMA, ET AL	.	10:00 P.M.
	.	
Respondent.	.	
. . . . .	.	

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE THOMAS F. HOGAN  
A UNITED STATES DISTRICT JUDGE

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SpeechCAT.

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

2                    THE COURTROOM DEPUTY:   Civil action number 04-  
3 1194, Suhail Abdu Anan, et al versus Barack Obama, et al.

4                    Counsel, would you please state your names and who  
5 you represent for the record?

6                    MR. KILLMER:   Good morning, Your Honor.   For the  
7 petitioner, Mr. Al-Madhwani, Darold Killmer and Mari Newman  
8 of Killer, Lane and Newman in Denver.   Pat Bronte of Stowell  
9 and Friedman who is from Chicago, and on the line with Mr.  
10 Al-Madhwani on the telephonic line into the court is Sapna  
11 Lalmalani of Jenner and Block in Chicago.

12                   THE COURT:   Thank you.

13                   MS. MASON:   Good morning, Your Honor.   Catherine  
14 Mason from the Department of Justice for respondents, and  
15 with me at counsel table, also from the Department of  
16 Justice, is David Avila and March Bell, and from the  
17 Department of Defense, Office of General Counsel, John  
18 Eckleson and Bravid Manley.

19                   THE COURT:   Thank you very much.

20                   Can the detainee's hear as well, and can the  
21 detainee hear?

22                   MS. LALMALANI:   Yes, we can hear.   Thank you, Your  
23 Honor.

24                   THE COURT:   If you have any problems hearing,  
25 please let me know.

1 MS. LALMALNI: We will do that. Thank you.

2 THE COURT: Thank you.

3 All right, we are gathered here again this morning  
4 after some delay because of the complexities that I found as  
5 I went through the evidence for our bench opinion, an  
6 unclassified opinion that I will give first, which will  
7 necessarily be somewhat restricted because of the evidence  
8 in the classified version of the opinion that I will  
9 highlight as well after we close the courtroom.

10 But first I thought that it was important in  
11 these cases to have a public ruling as much as possible,  
12 both not only for the petitioner but also for counsel, and  
13 for the respondents, and the public to understand these  
14 proceedings.

15 As the Judge overseeing the organization of these  
16 cases for the last year and a half, it was difficult when I  
17 had to apply the theories we had developed over the last  
18 year and a half as to how to handle these cases when you  
19 come face-to-face with some of the evidence and the  
20 challenges that we face in these matters.

21 I think the case highlights, actually, the  
22 difficulties inherent in these rather unique proceedings  
23 which go to the heart of our justice system, and that we  
24 have been operating under procedures drawn up by the court,  
25 and principally myself, and the judges who have adopted much

1 of these procedures that we have drafted in a new venue that  
2 has been untested, basically, in this circuit until very  
3 rather recently, perhaps, there will be some cases argued  
4 and heard.

5           It is rather, I think, an unfair process for the  
6 detainees in this sense that the law moves at a glacier  
7 pace, and since this is all new law in many areas, it has to  
8 be litigated through the circuit, which the circuit moves in  
9 very due deliberate speed.

10           I think our court, the District Court, has tried  
11 very hard to move these cases, but we are operating, as I  
12 said, with the procedures, new rules of evidence that will  
13 need clarification.

14           It is unfortunate, in my view, that the  
15 Legislative Branch of our government, and the Executive  
16 Branch have not moved more strongly to provide uniform,  
17 clear rules and laws for handling these cases.

18           We have, for instance, in this court now a  
19 difference in substantive law that will be applied among the  
20 District Court judges. That needs to be somehow resolved,  
21 and I think that would have been best for the Legislature to  
22 have passed new rules and procedures and rules of evidence  
23 to handle these cases.

24           We have different rules and procedures being used  
25 by the judges. Different rules of evidence being used by

1 the judges, all who are working very hard and in good faith,  
2 but it shows to me -- it highlights the need for a national  
3 legislative solution with the assistance of the Executive so  
4 that these matters are handled promptly and uniformly and  
5 fairly for all concerned, and at another time and place  
6 would be appropriate, I think, to talk about a new court to  
7 handle these, perhaps based upon the FISA model, with  
8 special rotating judges and clear defense counsel who are  
9 experts in the area as well as government counsel who are  
10 expert in the area.

11 As to this case for Mr. Al-Madhwani, who is before  
12 me and who has been detained here by the United States at  
13 the Naval Base at Guantánamo Bay, Cuba, since October, 2002  
14 -- so he has been here under the auspices of this government  
15 for seven plus years.

16 We tried the case over four days after it had been  
17 pending filed back in 2004, and finally after the Supreme  
18 Court cleared these cases to proceed, this matter came  
19 before the court in a non-jury hearing.

20 The detainee testified for over a day,  
21 voluntarily, to give his side of the story, and the  
22 government relied principally -- almost solely upon  
23 affidavits -- solely upon affidavits and documents with one  
24 expert filing an affidavit, the doctor involved, as well as  
25 other experts in the matters.

1           The detainee called -- not only testified himself,  
2 but his decision to do so that we discussed with him, as  
3 well as an expert witness who also testified as to his  
4 situation regarding his statements.

5           What I intend to do today is to -- I'm going to  
6 give a brief summary, very briefly, of my bottom line  
7 holding so that the detainee understands, and his counsel  
8 understands, and the government understands the ruling, and  
9 then I will explain it in some detail in the public record  
10 so that we can have a good understanding of why I'm making  
11 this decision.

12           I have submitted 260 exhibits, as I said a four-  
13 day hearing this past month and a half ago or so, and we had  
14 Doctor Xenakis, the expert in psychiatry, testify in Mr. Al-  
15 Madhwani's behalf, and obviously briefs submitted for the  
16 court to review by both sides.

17           The issue before the court is whether the  
18 government's maintaining that Mr. Al-Madhwani's detention  
19 was justified under the authorization of the use of military  
20 force law, which authorized the President to use force  
21 against members of certain terrorist organizations,  
22 including Al Qaeda.

23           Particularly, the government alleges that Mr. Al-  
24 Madhwani traveled knowingly to Afghanistan to receive  
25 weapons training, receive firearms training at an Al Qaeda



1 training camp, and he traveled and associated with members  
2 of Al Qaeda for over a year, and engaged in a two and a half  
3 hour firefight with Pakistani authorities.

4 Mr. Al-Madhwani denied each of those allegations  
5 and filed the petition here, as I said, several years ago,  
6 but had to wait Supreme Court action. So he filed  
7 originally in July of 2004.

8 The government relies upon primarily 26 documents  
9 containing statements from petitioner that he provided at  
10 Guantánamo Bay. In other words he was interviewed --  
11 interrogated multiple, multiple times.

12 I am going to find that a majority of those  
13 statements are tainted by coercive interrogation  
14 techniques to which Mr. Al-Madhwani was subjected, and for  
15 the court, therefore, they lack a sufficient indicia of  
16 reliability.

17 However, I am going to consider Mr. Al-Madhwani's  
18 statements, the live testimony he gave before this court  
19 voluntarily, with the advice of counsel. As well I am going  
20 to, over his objection -- counsel's objection, consider his  
21 statements of the Combatant Status Review Tribunal and  
22 Administrative Review Board, since they were also  
23 voluntarily given by him with personal representatives  
24 present at the time in which he voluntarily made statements,  
25 challenged facts that he considered were not accurate, and

1 agreed to other facts he considered apparently were  
2 accurate.

3 I don't find those tainted as I do the other  
4 statements given at Guantánamo, and there will be more  
5 detailed reasons given shortly for that as well as in the  
6 discussion of the classified part of the opinion.

7 But I believe accepting his live testimony and  
8 judging his credibility on that basis, as well as reviewing  
9 the Combatant Status Review Tribunal and the Administrative  
10 Review Board statements by the detainee, along with the  
11 corroborating evidence I find, and it will be more fully  
12 discussed in the classified return.

13 I am holding that the government has proven by a  
14 preponderance of the evidence that Mr. Al-Madhwani was and  
15 became part of or a member of Al Qaeda or related terrorist  
16 group.

17 So considering the pretrial statements, the legal  
18 briefing, the 260 exhibits, the arguments and the  
19 credibility findings I made at the hearing, now assessing  
20 Mr. Al-Madhwani's credibility, I am going to find that the  
21 petition for habeas corpus will be denied.

22 I want to put a caveat to that to say, however,  
23 that I don't find, and I will make a note of this in the  
24 record and my legal opinions that I issue in writing, that I  
25 do not accept the rationale then that find the government

1 had shown a basis for his detention that means that he  
2 should not be released.

3 I see nothing in the record that the petitioner  
4 poses any greater threat than the dozens of detainees  
5 similarly situated who have been transferred or cleared for  
6 transfer.

7 In fact his record is a lot less threatening,  
8 including the government's own records that they know of,  
9 that do not give any basis for his continued detention,  
10 although I have found that he was originally, and he has  
11 been detained legally by the government.

12 Now how did I reach this conclusion? It was not  
13 easy. I think it's a very close case, because if you want  
14 to put this in the most common vernacular, this case is one  
15 of travel and training with some association to alleged Al  
16 Qaeda operatives.

17 We don't have any credible evidence of operations  
18 undertaken by this individual, of planning to do any attacks  
19 by this individual, of actively fighting on behalf of Al  
20 Qaeda or the Taliban.

21 So the standard of the detention that I looked at,  
22 the scope of the detention, the authority that I referenced  
23 briefly at the beginning of this oral opinion was, I adopted  
24 Judge Bates' decision in Hamlily, H-a-m-l-i-l-y, at 16 Fed.  
25 Supp. 763, and I concluded that the President has the

1 authority to detain persons who are part of the Taliban, or  
2 Al Qaeda force, or associated forces.

3 Now that required some knowledge or intent, and  
4 whether the individual functions or participates within or  
5 under the command structure of the organization, or  
6 whether he executes orders, or directions, or receive such  
7 orders.

8 Now absent from this framework as I just referred  
9 to earlier in my comments about the detainee's present  
10 status is the mention of the threat the individual poses to  
11 the national security of the United States.

12 I recognize it is normally an appeal, but I  
13 declined to adopt in this case Judge Ellen Huvelle's  
14 conclusion in Basarda at 612 Fed. Sup, 2nd 30 page, 34,  
15 that the AUMF that I referred to earlier -- for the record  
16 the Authorization for Use of Military Force, Judge Huvelle  
17 held:

18 "Does not authorize the detention  
19 of individuals beyond that which  
20 is necessary to prevent those  
21 individuals from rejoining battle."

22 Judge Robertson in Awad, A-w-a-d, versus Obama,  
23 646 Fed. Supp 2nd 20 at 24, declined to follow Basarda,  
24 acknowledging, however, and I agree with him, the power of  
25 Judge Huvelle's argument.

1 But under the AUMF as it is presently written,  
2 defendant -- it is clear that the President possesses,  
3 quote:

4 "The authority to detain for  
5 the duration of the relevant  
6 conflict based on long-standing  
7 law of war principles."

8 And that is referencing Hamdi, Supreme Court, 542 U.S. 507  
9 at 521.

10 The conflict has not ended, and thus authorizing  
11 the government to detain an individual who became a member  
12 of Al Qaeda, even if that individual does not presently pose  
13 a threat to the security of the United States.

14 As I have said, I believe that the defendant does  
15 not presently pose a threat to the United States, but I  
16 believe the way the law is presently written that I have no  
17 choice but to follow the law as written.

18 Now what was the government's burden of proof to  
19 meet these standard that I articulated? And I've already  
20 indicated judges use different standards, unfortunately, in  
21 these matters.

22 The burden of proof under my management order, the  
23 amended case management order adopted, is the government  
24 bears the burden of proving by a preponderance of the  
25 evidence that register the petitioner's detention is lawful,

1 which is different than the average and every day habeas  
2 case.

3 In any event, we are operating under that premise.  
4 Preponderance of the evidence means that it is more likely  
5 than not true.

6 Here the government has to show that it is more  
7 likely that Mr. Al-Madhwani was a part of Al Qaeda in some  
8 fashion. So they have to have reliable evidence to  
9 demonstrate his membership was more likely than not.  
10 Otherwise -- and if so, then I have to deny his habeas, and  
11 I found such.

12 Now about the evidence and the public evidence  
13 that is unclassified and I can discuss. With this new  
14 paradigm we have under Boumediene, the issues have been  
15 left to the expertise and competence of the District Court  
16 to address in the first instance, quoting Justice Kennedy.

17 So I indicated -- I have determined the accuracy,  
18 and the reliability and the weight of each piece of  
19 evidence, after I considered as a whole, and the arguments  
20 presented during the merits hearing, including the  
21 reliability of hearsay evidence, and that is in my merits  
22 hearing procedure order.

23 Parties submitted 260 exhibits which the court has  
24 now reviewed. I'm going to go -- not only because of  
25 judicial economy, but also because of the classifications,

1 refrain from detailing reliability decisions as to each of  
2 the documents.

3 But based upon my review of those documents and  
4 the record, the arguments presented and the testimony, I  
5 have identified certain exhibits which I feel are material  
6 and reliable.

7 The majority of the material exhibits are  
8 documents containing petitioner's statements, and despite my  
9 opinion I have issued today, in my judgment I find that a  
10 majority of the statements are unreliable.

11 Most of the record in this case is petitioner's  
12 own statements. The government relies primarily upon 26  
13 documents containing statements the petitioner made at  
14 Guantánamo, 23 of which are classified interrogation reports  
15 or summaries.

16 The remaining three documents detailed  
17 petitioner's statement to the Combatant Status Review  
18 Tribunal, and the Administrative Review Board, and his own  
19 testimony.

20 As I have indicated, I can find only those two  
21 documents that he gave at the Review Board and the Tribunal  
22 are reliable along with his testimony here in court. Some  
23 of the testimony, of course, when I say is reliable does not  
24 mean I accept it as credible. I just mean that it was not  
25 given under coerced conditions. It was freely and

1 voluntarily given with the advice of counsel.

2           One of the factors in this case that concerns the  
3 court in the oversight generally of these matters that I  
4 hope the government will address in further cases that come  
5 before myself or other judges, is that shortly before the  
6 case went to trial, after years that it has been pending and  
7 a year and a half of active litigation, the court was  
8 produced -- it was produced to the court for the defendants  
9 -- for the detainee and for the court 15 statements not  
10 previously produced, and that was a few days before the  
11 trial basically.

12           If that had happened in any other kind of case,  
13 they would have been automatically disallowed. You cannot  
14 have discovery where the principal litigant's own statements  
15 are hidden from him until shortly before trial.

16           Secondly, perhaps a day, a business day or so  
17 before trial there was new, exculpatory evidence then  
18 produced by the court order to the detainee. Fortunately,  
19 it had actually encompassed some evidence that had already  
20 been produced otherwise and the detainee had.

21           But it again reiterates to the court the failure  
22 of the government to adequately staff and process these  
23 cases that we are going to address in other terms, not in  
24 this case, with the Justice Department.

25           Now of the reports that the government wishes to



1 rely upon, the interrogation of petitioner, they occurred  
2 between March 3, 2003 and September 27, 2004. Prior  
3 statements given by the detainee the government has  
4 indicated they would not rely upon.

5 That is somewhat disingenuous, because the prior  
6 statements were given under coerced conditions and would  
7 never be allowed into a court of law for, I think, any  
8 purposes, and I will document that a little bit more.

9 The government says, however, these 23 documents  
10 are reliable, because the interrogations occurred almost 6  
11 months after petitioner alleged he was tortured, and they  
12 profess sufficient indicia of reliability. But I find those  
13 claims to be without merit.

14 First, it is clear that the petitioner was  
15 subjected to harsh interrogation techniques before he was  
16 transferred to Guantánamo. At the merits hearing the  
17 petitioner provided extensive testimony concerning this  
18 harsh treatment he endured, which the court finds to be  
19 credible.

20 Now it is uncontested that petitioner was captured  
21 on September 11, 2002 by Pakistani officers or officials in  
22 a Karachi apartment. At that time he was 22 years old with  
23 a high school education; that after five days in a Pakistani  
24 prison, he testified that he was handed over to United  
25 States forces and flown to a pitch black prison he believes

1 in Afghanistan.

2           There are cites to each of the exhibits that I am  
3 referring to that I am not going to cite here, but they will  
4 be in the written opinion, so people can track from the  
5 exhibits that are public.

6           In what he called a prison of darkness, aptly  
7 named, I believe, petitioner claimed he was subject to a  
8 variety of harsh interrogation techniques, such as being  
9 suspended in his cell by his left hand where he could not  
10 sit or stand fully for many, many days. To this day he  
11 suffers from pain in his left arm.

12           He alleges the guards blasted his cell with music  
13 24 hours a day in extremely high decibels. His sole respite  
14 from the deafening noise was the screams from the other  
15 prisoners when it was quiet.

16           Under these harsh conditions the petitioner  
17 contends he confessed to whatever allegations interrogators  
18 made of him. Approximately 30 days later he was transferred  
19 to another prison in Afghanistan, where he says the threats  
20 and harassment continued.

21           The government has made no attempt to refute the  
22 allegations or the statements of the petitioner regarding  
23 the treatment that he says he endured. There is no evidence  
24 in the record that his description of what he experienced in  
25 his confinement is inaccurate. To the contrary, his

1 testimony is corroborated.

2           Petitioner submitted uncontested government  
3 medical records describing his debilitating physical and  
4 mental condition during the approximately 40 days in  
5 Pakistan and Afghanistan, confirming his claims of these  
6 coercive conditions.

7           The medical report dated October 22nd, 2002, six  
8 days before he was transferred to Guantánamo, indicates  
9 petitioner then weighed 104 pounds. For comparison, the  
10 petitioner is five eight five, weighing close to 150 pounds  
11 when he left Yemen the year earlier.

12           The report also lists his diastolic blood pressure  
13 as 36, a sign of severe dehydration which would require  
14 hospitalization normally in the United States -- the  
15 testimony from his doctor who reviewed these records.

16           Incredulously, the medical report indicates that  
17 the petitioner appears well, although it is indicated he  
18 could be transferred by stretcher.

19           The records also convey when he arrived at  
20 Guantánamo that he was suffering from severe mental illness  
21 and was in a psychotic state. A psychological evaluation  
22 dated October 30, 2002, states petitioner reported a month  
23 and half period of increasing sleep disturbance. When he  
24 attempts to sleep he experiences recurring thoughts of his  
25 family, and during the night he frequently awakens while

1 hearing screaming voices. He feels jittery, occasionally  
2 dizziness. Has a heavy head.

3 According to both experts witnesses, the doctors  
4 for the government as well as for the detainee, petitioner  
5 was likely suffering from posttraumatic stress disorder.

6 So it is clear from the records that any  
7 statements the petitioner provided in Afghanistan or  
8 Pakistan were coerced and should not be admitted against the  
9 petitioner in any fashion in any court. The government, as  
10 I said, however, is saying they will not rely upon those  
11 confessions he made. They only want to use the ones he made  
12 in Guantánamo.

13 Now, there may be merit to the government's  
14 position in the sense that previously coerced confessions do  
15 not automatically render all subsequent confessions  
16 unreliable. The Supreme Court held many years ago under a  
17 case called Bayer, B-a-y-e-r, that:

18 "A conference obtained under  
19 circumstances which preclude its  
20 use does not perpetually disable  
21 the confessor from making a usable  
22 one after those conditions had  
23 been removed."

24 In other words, attenuation is such that it would  
25 be fair to allow subsequent confessions to be used.

1           The courts usually look at the totality of the  
2 circumstances to consider whether there is a break in the  
3 stream of events sufficient to insulate these statements  
4 from the ones -- from the effect of the ones that went on  
5 before. That is from a State of Texas versus Clewis, C-l-e-  
6 w-i-s, Supreme Court case.

7           So we have to look at the time that passed between  
8 the confessions, the change and place of interrogations, the  
9 change of identity of the interrogators, among other  
10 factors.

11           The case called Oregon versus Elstat, a Supreme  
12 Court case. And the military commissions, also, consider  
13 identical factors to determine whether a military prisoner's  
14 coerced confessions are admissible.

15           So if I apply those factors in this case, I'm  
16 finding the government is unable to prove the petitioner's  
17 statements are untainted. They have not met their burden of  
18 satisfying the court that they are such.

19           Although the names in Afghanistan and Guantánamo  
20 changed, the use of threats, that is coercion, did not. As  
21 described in petitioner's classified testimony about his  
22 conditions of confinement, which I find to be credible, the  
23 United States was involved in the prisons where he was held,  
24 and believed to have orchestrated the interrogation  
25 techniques, the harsh ones to which he was subject.

1           So then when his first Guantánamo interrogation  
2 occurred, which was conducted by United States officials  
3 on the day he arrived in Guantánamo with serious physical  
4 and mental conditions, it is not a surprise that he was  
5 gripped by the same fear that infected his Afghanistan  
6 confessions.

7           The Guantánamo interrogators did little to assuage  
8 that fear. Reliable, classified evidence does not disprove  
9 the multiple Guantánamo interrogations on multiple  
10 occasions threatened him when his alleged attempts to  
11 extract what he said were false statements that he had made  
12 under duress.

13           Although disputing the petitioner was threatened  
14 by any Guantánamo interrogators, the government did not  
15 choose to call those interrogators as witnesses, and even  
16 moved to quash petitioner's subpoena to call one of the  
17 principal interrogators as a witness who was present and  
18 reliable -- who was present and available in this area to be  
19 called as a witness.

20           So the inference that the court could make from  
21 that, obviously, is that the government's decision not to  
22 put the interrogator under oath as to what they actually  
23 said and did to the petitioner.

24           So from the petitioner's perspective, the  
25 interrogators and the custodians did not change in any

1 material way.

2           The concern of the court that I raised during  
3 the hearing is that the interrogators at Guantánamo,  
4 starting with the day that he arrived, and then three or  
5 four months later they resumed when he was feeling better,  
6 had access to apparently his coerced confessions and  
7 materials that he had given, statements he had given from  
8 Afghanistan.

9           So the logical inference is they then reviewed  
10 with him and had him discuss the same incriminating  
11 allegations to which he was forced to confess to in  
12 Afghanistan. So not being insulated then from his coerced  
13 confessions, the confessions at Guantánamo are derived from  
14 the original coerced.

15           The government says that I cannot assume that  
16 they had notes from the prior interrogations they used, but  
17 that claim is no basis of substitute for real evidence as to  
18 what they had, and that was never offered by the  
19 government.

20           Nor can I assume the six-month break in time --  
21 four or six-month break in time is sufficient for the  
22 petitioner to have recovered from his prior abuse. The  
23 government highlights the earlier statement they want to  
24 rely upon is not until March of 2003, almost 6 months after  
25 he arrived at Guantánamo.

1           So even if he had been tortured in Afghanistan, or  
2 wherever he was, the effects of that torture were cleared by  
3 the passage of time.

4           "The critical question is not  
5 the length of time between the  
6 previous coerced confession and  
7 the present convention. It is  
8 the length of time between the  
9 removal of the coercive  
10 circumstances and the present  
11 confession."

12 That is quoting United States versus Karake, K-a-r-a-k-e,  
13 443 Fed. Supp. 2nd, 887, a D.C. District Court case here  
14 referring to the earlier plea in this case The Supreme  
15 Court.

16           The record does not reveal the coercive  
17 circumstances removed during those six months. Petitioner  
18 testified that the conditions at Guantánamo were less  
19 coercive than Afghanistan, but the government failed to  
20 describe with any specificity his condition and treatment  
21 during and before his Guantánamo interrogations.

22           The government's reticence in this is  
23 problematic, because the petitioner's credible allegations  
24 that he was threatened by the interrogators during his first  
25 year of detention at Guantánamo, among other claims of



1 coercion.

2           Obviously, his confinement at Guantánamo did not  
3 occur in a vacuum. Before Guantánamo he endured 40 days of  
4 solitary confinement, severe physical and mental abuse,  
5 malnourishment, sensory deprivation, anxiety and insomnia,  
6 and arrived, as I said, in an extremely debilitated  
7 conditioned at Guantánamo.

8           The government has failed to establish that months  
9 of less coercive circumstances, but still coercive, provides  
10 sufficient insulation from the 40 days of extreme coercive  
11 conditions.

12           The post traumatic stress disorder that both  
13 doctors have diagnosed seem to have exasperated the taint  
14 from harsh treatment. His Doctor, Doctor Xenakis, testified  
15 -- who is a psychiatrist, a former military doctor -- that  
16 he still suffers from posttraumatic stress disorder, and  
17 that time does not necessarily purify the taint from the  
18 harsh treatment for an individual suffering from this  
19 condition.

20           He feels -- his opinion was that his statements  
21 then are all unreliable -- rebuttable -- excuse me. In  
22 rebuttal the government submitted the declaration of Doctor  
23 Malone, a forensic psychiatrist and expert as well who the  
24 court accepted as an expert in this field.

25           He testified he had clinical -- that Mr. Al-

1 Madhwani had clinically significant anxiety symptoms.  
2 During the first few weeks after his arrival at Guantánamo,  
3 they did not appear to be severe enough to inherently impair  
4 his liability as an informant.

5           Those conclusions I find are incomplete. He  
6 focused in the first three or four weeks of detention  
7 instead of the period beginning six months following. It is  
8 unclear whether he was aware of the extent of mental and  
9 physical abuse the petitioner had endured prior to his  
10 detention in Guantánamo, but he does diagnose that the  
11 plaintiff suffered significant anxiety symptoms during his  
12 initial time at Guantánamo.

13           Somewhat skeptical, I am, that subjecting  
14 petitioner's to what mirrors the cause of his severe  
15 anxiety disorder, such as solitary confinement, facilitated  
16 his recovery at Guantánamo. But his significant anxiety  
17 order does suggest to the court that he continued to suffer  
18 the effects of mistreatment -- harsh treatment he had had  
19 during some if not all of the interrogations on which they  
20 government relies.

21           So not only am I concerned about they're being  
22 tainted by coercion, I think the government failed to  
23 establish that interrogation reports have a sufficient  
24 indicia of reliability. They said that they were reliable  
25 because they were recorded for intelligence purposes.

1           One of the -- to step back from this opinion for  
2 just a minute, one of the concerns the court has and why I  
3 think we need a Legislative and Executive corroboration in  
4 assisting the courts to design a new platform to handle  
5 these cases is that the evidence in these cases is mainly  
6 intelligence reports.

7           They are not investigative reports done by the  
8 FBI for use of court. They are a totally different matter,  
9 and it is very different to make them fit into the  
10 traditional rules of evidence that the Federal Courts have  
11 always used.

12           It is no one's fault. It is just the  
13 circumstances we find ourselves with. When these people  
14 were originally picked up there was no, I'm sure, plan of  
15 using the statements that they gave in court against them  
16 eventually. They were done for intelligence reasons, which  
17 is totally different than using them in court as reliable  
18 evidence.

19           The government's argument that, well, they are  
20 intelligence reports, and they are recorded for  
21 intelligence purposes, and military people rely upon them,  
22 and intelligence officers do rely upon them for their own  
23 uses, should make them admissible and reliable for the  
24 court.

25           I don't accept that line of reasoning. It was

1 soundly rejected by the D.C. Circuit in Parhat as quote:

2 "It comes perilously close to  
3 suggesting that whatever the  
4 government says must be treated  
5 as true is true."

6 Directly undermining the deference to these  
7 interrogation reports the government relies upon, the record  
8 shows however the interrogators taking these reports from  
9 the detainee threatened him. The documents themselves are  
10 no more suggestive of reliability. Reliability is  
11 repeatedly described as having not been determined in the  
12 documents.

13 What amazes the court is that petitioner was  
14 administered a polygraph test that he agreed to take after  
15 much discussion. The government did not offer as evidence  
16 or even was able to locate the results of the polygraph. So  
17 the government also touts the consistency of petitioner's  
18 past statements, and because of repeated certain inculpatory  
19 statements they must be true.

20 Again, I'm not persuaded. Again, quoting Parhat:  
21 "The fact that petitioner has said  
22 it thrice does not make an allegation  
23 true."

24 That is quoting Lewis Carroll's, "The Hunting of  
25 the Snark".

1           So it is noted, and it is clear to the court, that  
2 the Guantánamo interrogators had access to and relied upon  
3 his coerced confessions from Afghanistan, and the government  
4 continued to drink from the same poison well does not make  
5 the water clean.

6           So I'm finding that the 23 interrogation reports  
7 and summaries of the statements submitted by the government  
8 are not reliable, do not establish that the taint has been  
9 removed from the prior coerced confinement, nor do the  
10 documents contain in themselves sufficient hallmarks of  
11 reliability.

12           But there are certain documents that I am relying  
13 upon to make my conclusions in ruling against petitioner,  
14 despite my concerns about the government's case.

15           Although I find a majority of the statements are  
16 not reliable, there are two exceptions which I can identify  
17 as a sufficient break from the past coercive conditions.  
18 The circumstances surrounding his statements to the  
19 Combatant Status Review Tribunal -- we call that CSRT.

20           On September 23, 2004, an Administrative Review  
21 Board, known as ARB, in December of 2005 are fundamentally  
22 different from those affecting the interrogation which the  
23 government wants to rely that I do not accept.

24           By the fall of 2004, and certainly by 2005, the  
25 medical and physical condition had drastically improved. At

1 the time of the CSRT proceedings, two years had elapsed  
2 since the harsh techniques were used against the petitioner,  
3 and three years when the ARB proceeding commenced.

4 But what makes it important for the court, the  
5 difference of not accepting even the later statements he  
6 gave to the government is not only are the attenuation of  
7 time, because he gave some later statements, but that these  
8 were not interrogations by interrogators that had been  
9 previously interrogating him.

10 These are not the people who first faced him the  
11 day he arrived at Guantánamo in such a terrible condition  
12 and scared him, and he continued to be scared thereafter  
13 when he saw and talked to them.

14 These are formal proceedings where he was  
15 represented by a personal representative. These are  
16 proceedings that are not interrogations. Not threatened by  
17 someone sitting across the table from him saying, I will  
18 revoke your privileges, or whatever they claimed, if he did  
19 not give them what they wanted.

20 So as opposed to being forced into an  
21 interrogation room, brought in shackles, et cetera, he was  
22 given the option of participating in both proceedings. He  
23 did not have to participate. He agreed to.

24 Both times he agreed to answer questions. He did  
25 not have to. He agreed to. As opposed to fending for

1 himself against an interrogator, or several interrogators  
2 facing him, yelling at him, et cetera, during these  
3 proceedings he was assisted by his personal representative.

4           They were done in a more formal setting, a  
5 recorded setting. That is it was put on the record what he  
6 said. He was given an opportunity to speak if he wished to.  
7 He was not forced to speak. He was not forced to answer any  
8 questions if he did not want to.

9           There was no evidence of any coercive techniques  
10 employed in any of these proceedings. There was -- under  
11 the record that I could review, I saw no individual who may  
12 previously have threatened petitioner that were present at  
13 these proceedings.

14           Petitioner claims he was, nonetheless, still  
15 feared if he changed anything, if he did not make false  
16 confessions at these proceedings he again would be tortured.

17           Belying those representations, though, petitioner  
18 repeatedly denied and clarified many of his earlier  
19 incriminating statements. In other words, he felt free to  
20 attack his prior statements, although he is alleging that he  
21 never did, but he actually did. I find that key in judging  
22 his credibility.

23           He specifically stated that he participated in the  
24 ARB proceedings because he was not afraid at that time of  
25 the Americans.

1           Therefore, I have to find his statements at the  
2 CSRT and to the ARB are reliable. The coercive conditions  
3 he would have been subjected to did not affect those  
4 proceedings -- the statements in those proceedings.

5           Now the third piece of evidence that I am basing  
6 my opinion upon is his own live testimony in court here  
7 before me. His live testimony differs in some respects from  
8 the earlier statements on which the government relies,  
9 particularly with respect to the association of members of  
10 Al Qaeda.

11           Now I would just note in the footnote as a matter  
12 of record, petitioner submitted several statements to the  
13 court, or before the court, that I am relying on as live  
14 testimony.

15           He gave a statement in February from counsel to  
16 the ARB. He gave a declaration in July 1, 2008, another one  
17 in February of 2009, and he gave -- sent a letter to Judge  
18 Kennedy, to who the case was originally assigned to in  
19 February of 2009, which are consistent with his live sworn  
20 testimony before me in open court.

21           So as a personal opinion, because there is no  
22 reason to doubt he gave all the statements that he wanted to  
23 give before me, he gave a complete version of his relevant  
24 events in his two days of testimony, so I am going to refer  
25 to his comprehensive testimony in court. Petitioner notes,



1 also, some of the documents that he submitted before the  
2 trial were drafts by counsel.

3 I am going to find the petitioner's testimony in  
4 part is credible, especially with respect to his conditions  
5 of confinement. But listening to petitioner, watching his  
6 demeanor, and looking the other reliable evidence in the  
7 record, there are portions of his testimony that I cannot  
8 find carry much weight, and I cannot accept his explanations  
9 in justifying certain actions that he took.

10 So while his narrative in court here is  
11 inconsistent with the CSRT statements he gave and the ARB  
12 statements, I am accepting those statements.

13 We have to, in any case obviously, judge the  
14 statements of a person who is interested in the case, and  
15 weigh those statements in accordance with the standards to  
16 determine the credibility.

17 What direct evidence is there of the detainee's  
18 participation with and becoming part of Al Qaeda or other  
19 terrorist organizations?

20 There is a dearth of third-party witnesses and  
21 direct evidence in this record. Only a small subset is  
22 actually material. Based on the government's own standards  
23 to assess the credibility and reliability of intelligence  
24 sources, I can find few material documents that are not  
25 reliable.

1           The evidence is classified, and I can only give  
2 now a summation of some of my determinations. I will give a  
3 classified ruling with more detail.

4           First, I cannot find the petitioner's detention is  
5 justified based upon reports he alleged he was trained to  
6 use explosives. Those reports contain triple hearsay and do  
7 not indicate the circumstances in which the report's source  
8 obtained the information.

9           A second point the government has is a report that  
10 they rely upon as describing a two and a half hour firefight  
11 at the Karachi apartment where petitioner was arrested.  
12 They are likewise unreliable.

13           The source of those reports are unknown. The  
14 report does not provide any underlying reporting upon which  
15 the document's bottom line assertions are founded, nor any  
16 assessment of the reliability of that reporting, referring  
17 to the language in Parhat.

18           The government also may not rely upon, and I am  
19 not relying upon, a document -- a report concerning a  
20 document that is directly linked to the petitioner. That is  
21 exhibit 68. The report lacks any indicia of reliability and  
22 will be discussed further in the classified version of this  
23 opinion.

24           So without exception to some circumstantial  
25 evidence and background information, reliable evidence in

1 the record consists of the petitioner's live testimony in  
2 part, the statements before the review board and the  
3 tribunal, and that basically is what the evidence is.

4 So I have to make a decision based on this  
5 truncated body of evidence because of the nature of the  
6 evidence produced in this hearing. And as I indicated I  
7 believe at the beginning of this case, this was not a clear-  
8 cut decision.

9 So the government has four primary allegations,  
10 and these will be my findings in this case.

11 One, the petitioner traveled to Afghanistan with  
12 the intention of receiving weapons training. That is to  
13 join Al Qaeda, or the Taliban, or other organization and to  
14 fight.

15 Two, that he trained to use firearms at an Al  
16 Qaeda training camp.

17 Three, that he traveled and associated with Al  
18 Qaeda members for one year.

19 And four, engaged in a two and half hour firefight  
20 with Pakistani authorities in which two individuals with him  
21 were killed.

22 Based on reliable evidence in the record, the  
23 court finds that the government failed to prove the first  
24 allegation, that he traveled with the intention of receiving  
25 weapons training and joining the military forces in

1 Afghanistan at the time he left Yemen; and the last  
2 allegation, that he was engaged in a two and a half hour  
3 firefight in Pakistan -- Karachi.

4           So the government has failed by a preponderance of  
5 the evidence to show that.

6           The allegations that the plaintiff trained,  
7 traveled and associated with Al Qaeda, petitioner's  
8 incriminating words proved sufficient to this court. The  
9 government has shown by a preponderance of the evidence that  
10 those allegations are true, along with the other evidence in  
11 the case, as I referred to, not much, but other evidence of  
12 his travels and association with Al Qaeda.

13           The first allegation is his travel to Afghanistan.  
14 The government saw it as his recruitment period. The first  
15 allegation is entirely based on circumstantial evidence that  
16 he traveled with the intent to receive weapons training,  
17 that is go up there and join the military.

18           The government posited he received military  
19 training because he did get such training eventually, so he  
20 must have known about it ahead of time, because the offer by  
21 the recruiters to send him to Afghanistan for free was  
22 otherwise too good to be true.

23           But if you look at the record, you do not have a  
24 picture of a militaristic youth. You don't have a picture  
25 of an extreme religious individual who wished to join in a

1 jihad. He is described as a hapless individual. Basically,  
2 he didn't realize what he was signing up for, at least he  
3 described himself as that.

4 He stated -- he said he traveled to Afghanistan  
5 with no intention of training or fighting. The two hit men  
6 who reportedly recruited him never mentioned military  
7 training and offered to train for his flight so he could see  
8 how the Muslims were doing under the Taliban and learn about  
9 the Taliban rule.

10 He indicates that lacking employment or any  
11 education he had nothing to lose, so he left Yemen in early  
12 August of 2001. He did admit that he lied to his family  
13 about why he was leaving, where he gave other reasons for  
14 his trip.

15 It was clear then once he got to Pakistan he was  
16 shepherded by strangers to Afghanistan. His group was  
17 transported to the Al Nibras guesthouse, where his passport  
18 and plane tickets were confiscated or collected.

19 At Al Nibras is where petitioner claims that he  
20 first learned he would receive weapons training. One week  
21 later he was taken to an Al Qaeda training camp.

22 Petitioner says he does not know the name of the  
23 guesthouse, but his description is consistent with the  
24 description of the Al Nibras guesthouse provided by others  
25 in the government declaration.

1           Petitioner never challenged in the prior hearings  
2 in the Tribunal or the Review Board that Al Nibras was not  
3 the proper name of the guesthouse. It seems to me it's more  
4 likely not that is true.

5           Al Nibras was a guesthouse used to transport  
6 people to -- as a stopping place for people to be  
7 transported to training camps for Al Qaeda training.

8           Both parties' narratives unfortunately are  
9 lacking, because there is no reliable direct evidence  
10 supporting the government's claim about the petitioner's  
11 intent. There is no evidence submitted by the government  
12 about his family, his schooling, his religious education,  
13 his religious beliefs that suggest he possessed militant  
14 or fanatical view before he left Afghanistan in August of  
15 2001.

16           Many of these cases you find writings, postings,  
17 et cetera, where these people have so dedicated themselves  
18 to fight jihad.

19           However, the court is equally skeptical about the  
20 petitioner's own description of what he was doing. He must  
21 have figured out once he got into Pakistan before he got to  
22 Al Nibras that he was not going on a fact-finding mission or  
23 tourist trip to tour areas in Afghanistan or to teach the  
24 Koran.

25           Yet whenever he realized actually what he was

1 doing, he never left the group he was traveling with,  
2 although he had opportunities to do so. He denied that he  
3 could leave and he was scared.

4 But in any event, the burden of proof rests on the  
5 government as to the first allegation that he traveled with  
6 the intent to receive weapons training and to join this  
7 military force.

8 I cannot find on the record that the government  
9 has shown that by his leaving. Although the court is  
10 skeptical as to his real reasons for leaving, I do not think  
11 that the government has yet met their burden of proof on  
12 that matter.

13 The second allegation is that he trained in an Al  
14 Qaeda training camp for military purposes. That is to take  
15 up arms and learn how to use arms against others.

16 The government alleges that he received training  
17 in firearms and other military matters at Al Farouq, it is  
18 called, an Al Qaeda basic training camp, one of the most  
19 well known ones. This evidence the government relies upon  
20 comes directly from petitioner.

21 He concedes in his own testimony -- live  
22 testimony, as well as his prior testimony that I have  
23 referred to, he attended Al Farouq for 25 days during which  
24 he received basic firearms training.

25 He testified he filed a Kalashnikov rifle. He

1 fired a pistol, among other firearms; that he received  
2 training. He calls it theoretical instruction, but it was  
3 training, on how to use rocket propelled grenade weapons.

4 As I have mentioned, the government alleged that  
5 he also received explosives training, but there is no  
6 reliable evidence, and I don't accept that part of the  
7 evidence.

8 His training was cut short by 9/11. According to  
9 the petitioner on that day the trainees were told the camp  
10 was closing because the instructors feared it would be  
11 bombed after the events of 9/11.

12 The petitioner instead argues not that he didn't  
13 receive firearms training, he wasn't trained in military  
14 warfare in essence, but that he did not intend to ever train  
15 at the Al Qaeda military camp. He said he was forced to  
16 attend the camp.

17 He said four times he tried to leave, including at  
18 Al Nibras, but was rebuffed. He suggested that the camp may  
19 not have been Al Farouq, but at the merits hearing he  
20 claimed he had never heard of the name, Al Farouq, until an  
21 interrogator told him that name. Thus, he does not even  
22 know if it was actually Al Farouq or a camp associated with  
23 Al Qaeda.

24 The court cannot find that this area of testimony  
25 about his attempts to leave Al Farouq is credible. The



1 petitioner was not conscripted. He testified that it was  
2 not impossible to leave the camp. Others had done it. He  
3 knew petitioners -- detainees who had e successfully dropped  
4 out.

5           Additionally, he has been previously silent about  
6 this matter. Not until recently did he testify about any  
7 attempt to leave. Had he tried to leave he would have had  
8 every incentive to discuss his attempts at the ARB or the  
9 CSRT. Yet when he is asked at the CSRT proceeding whether  
10 he was forced to take training, he made no remark or mention  
11 of ever trying to quit or leave.

12           Before the ARB when directly asked why he didn't  
13 leave the camp, he again did not discuss any attempts to  
14 prematurely leave the camp at all. As for the name of the  
15 camp, the court finds that it is more likely than not that  
16 it was Al Farouq.

17           Petitioner's silence on this is somewhat telling  
18 during the proceedings before the Tribunal and the Board.  
19 He did not dispute the camp was named Al Farouq. The  
20 February 23 submission of the ARB that the petitioner  
21 referred to the camp as Al Farouq, and that was in 2007.

22           His description of the camp is consistent with the  
23 description of Al Farouq provided by other detainees in the  
24 government declaration, and as perhaps ultimate  
25 corroboration, the petitioner admitted at the prior two

1 proceedings that I referred to, and I find his testimony to  
2 be reliable, that he saw Osama bin Laden at the camp. He  
3 now denies that in his live testimony before the court.

4 At the merits hearing petitioner unconvincingly  
5 refuted his earlier statements about Osama bin Laden. He  
6 testified during those prior proceedings that he feared he  
7 would be tortured if he tried to change his prior confession  
8 about seeing Osama bin Laden that he had given years  
9 earlier.

10 The record suggests otherwise, because it  
11 discussed the Tribunal and the Board review proceedings that  
12 occurred years after he was subject to harsh treatment and  
13 techniques. He was comfortable enough during those  
14 proceedings to deny certain allegations that he had  
15 previously admitted, including those with respect to Osama  
16 bin Laden.

17 When confronted with his earlier tribunal  
18 testimony about seeing bin Laden of various training  
19 facilities, petitioner clarified that, well, I only saw bin  
20 Laden once at that training camp.

21 Therefore, the court finds by a preponderance of  
22 the evidence the government has proved that the plaintiff  
23 voluntarily trained at Al Farouq for 25 days in military  
24 weaponry and related areas.

25 The third allegations is that according to the

1 government after Al Farouq closed the petitioner traveled  
2 and associated with Al Qaeda members until he was arrested  
3 one year later.

4           Once again, the government relies upon  
5 petitioner's own words. Petitioner stated he was  
6 transported with a group of approximately 20 other detainees  
7 from Al Farouq to various guesthouses in Afghanistan.

8           He testified that two trainers from Al Farouq  
9 were initially part of the group. The trainers slept apart  
10 from the group and did not socialize with them. And this  
11 is his own testimony that I am relying upon here in open  
12 court.

13           At one point the trainers told petitioners to grab  
14 a Kalashnikov rifles, and he complied. He was afraid to get  
15 rid of the rifle, he testified, because he thought that he  
16 would get in trouble.

17           The group traveled to various towns in  
18 Afghanistan. He was entirely dependent upon the others he  
19 was with for food, shelter, transportation, protection and  
20 guidance.

21           After months of wandering, the petitioner somehow  
22 reconnected with his passport and made his way to Pakistan.  
23 He then stayed in the multiple Pakistani cities, including  
24 Karachi. In Karachi the petitioner was told that the safest  
25 route to Yemen was through Iran.

1           It proved to be unhelpful, and he was detained in  
2 Iran, and he was sent back. Now he had his passport all of  
3 this time. He did not get his plane ticket back. But he  
4 returned to Karachi and set up an apartment with a multiple  
5 roommates.

6           According to reliable classified evidence in the  
7 record, a neighbor from across the hall who frequently  
8 visited the apartment was a member of Al Qaeda. The  
9 government also alleges that petitioner interacted with  
10 high-level members of Al Qaeda through his year-long  
11 journey.

12           According to petitioner's statements to the  
13 Tribunal and the Review Board, while he was in Khost, K-h-o-  
14 s-t, Afghanistan, he again saw bin Laden. At the merits  
15 hearing he originally denied seeing bin Laden here, but I  
16 accept his statements that he saw him when he talked to the  
17 Tribunal and the Review Board otherwise.

18           There is no other direct evidence in the record  
19 that the petitioner associated with high-level Al Qaeda  
20 members, although he admitted to meeting with such high-  
21 place operatives in the past such as having actually met  
22 Khalid Shaik Mahamed.

23           The statements that the government relies upon are  
24 not reliable, and I am not accepting that evidence.

25           Petitioner gives us various explanations for his

1 continued association with Al Qaeda members during this one-  
2 year period. You have to realize his one year, when he did  
3 not get back to Yemen after 9/11, and months after he'd  
4 gotten his passport.

5 Initially he said that he had no choice but to  
6 travel with members from Al Qaeda because he needed his  
7 passport. But once he located his passport and made his way  
8 to Pakistan, he could not sever his ties with Al Qaeda  
9 members because he feared being arrested by Pakistani  
10 authorities and bounty hunters.

11 For this reason he told the CSRT he could not make  
12 it to the Yemen embassy in Pakistan. But those explanations  
13 are simply not credible to the court. The missing passport  
14 certainly could not tie -- could not be the tie that bound  
15 petitioner to Al Qaeda, since his association with its  
16 member did not abate when he crossed into Pakistan.

17 As to the threat posed by the Pakistani  
18 authorities, that fear did not inhibit petitioner from  
19 travel all over Pakistan for many months. If you look at  
20 the root of his travel, it looks like somebody took a tour  
21 of Pakistan for months and months, including from Karachi to  
22 Iran and back to Karachi.

23 The court cannot see how petitioner was able to  
24 journey from Karachi to Iran and back that he could not have  
25 reached the Yemeni Embassy during his multiple stays in

1 Karachi just down the road.

2           The petitioner acknowledged even calling his  
3 family while in Afghanistan, he did not call for assistance  
4 when he was supposedly trapped in Pakistan and could not get  
5 out.

6           Accordingly, the court finds that the petitioner  
7 voluntarily traveled and associate with Al Qaeda members in  
8 Afghanistan and Pakistan that the government has shown by a  
9 preponderance of the evidence is true.

10           Finally, the firefight in Karachi is the last  
11 claim against the petitioner. The government's final and  
12 most inflammatory allegation is that petitioner engaged in a  
13 two and a half hour firefight with Pakistani authorities.

14           The only direct evidence of the petitioner's  
15 participation is a classified report, but I am not finding  
16 that report is reliable as detailed in the classified ruling  
17 that I will make.

18           The allegation has no leg to stand on. Petitioner  
19 told the CSRT and the ARB that he did not fire any weapons.  
20 He did not resist arrest, and that he was arrested before  
21 the firing began.

22           That statement has been consistent. His testimony  
23 is entirely consistent with those representations. Even the  
24 newspaper article the government submitted for background  
25 information is not consistent with petitioner's story.

1           The article states that three Yemenis from the  
2 apartment were arrested before the firefight began. The  
3 government has thus failed to establish that petitioner  
4 participated in that firefight.

5           Now although he may not have actually been in the  
6 battle where two people were killed, two others in the  
7 apartment were killed, the statements revealed that he  
8 associated with members of Al Qaeda at that apartment.

9           It is not disputed that a firefight occurred  
10 between Pakistani authorities and individuals with whom  
11 petitioner had been living. The petitioner concedes one of  
12 his roommates resisted arrest and was killed by the  
13 Pakistanis in the battle. An individual who lived across  
14 the hall from petitioner also participated in the gun battle  
15 and was killed.

16           I recall the petitioner indicating that he never  
17 saw weapons in the apartment, and yet a two and a half hour  
18 gun battle ensued with grenades and automatic weaponry being  
19 used by the people in the apartment. So his credibility  
20 suffers in that regard.

21           So according to reliable classified evidence in  
22 the record, the neighbor who was killed in the apartment, as  
23 well as who came over during the battle, was a member of Al  
24 Qaeda.

25           Petitioner testified that Al Qaeda members would

1 often drop by the apartment. It is therefore more likely  
2 than not that the petitioner associated with and lived with  
3 Al Qaeda members in Karachi, some of whom fought to their  
4 death to avoid capture.

5           So the final analysis is that the government has  
6 met its burden of proof with respect to the allegations.  
7 Petitioner voluntarily trained with Al Qaeda for 25 days,  
8 and then traveled, associated and lived with members of Al  
9 Qaeda for an entire year.

10           Those facts are sufficient to prove by a  
11 preponderance of the evidence that petitioner was part of Al  
12 Qaeda as I have indicated in the definitions of the  
13 substantive law that applies in this case.

14           His actions demonstrate a clear intent to be  
15 associated with Al Qaeda. Though his motives arriving  
16 originally in Al Farouq are murky, once in Afghanistan he  
17 demonstrated an unrelenting desire to be with these people  
18 from Al Qaeda.

19           Petitioner had to know that Al Qaeda -- I am  
20 sorry, that Al Farouq was an Al Qaeda training camp. He was  
21 not trained to fight there with weapons. He learned to use  
22 multiple firearms. He received what he called theoretical  
23 instruction, that is training, in RPGs.

24           He realized he was not there to do charitable  
25 work, obviously, and yet he stayed. By the end of his



1 training when the camp was being closed he heard from bin  
2 Laden, the founding leader of Al Qaeda. Yet he stayed with  
3 the people there and traveled with them.

4 He finally got what he said he wanted, his ticket  
5 out of camp, because they were closing it. He followed Al  
6 Qaeda trainers around Afghanistan. He traveled with the  
7 group that again brought him back before bin Laden.

8 He moved into an apartment eventually in Karachi  
9 where members of Al Qaeda lived and visited, and yet  
10 petitioner stayed. He could have walked out and gone to the  
11 embassy at any time. He said he was scared to do that, he  
12 could be captured. I cannot accept that explanation.

13 The evidence is strong in this point at least that  
14 petitioner knew -- had to know that he was associated with  
15 Al Qaeda. During the course of the year he had trained with  
16 Al Qaeda members.

17 He learned that United States forces were at war  
18 with them and would bomb his camp. He heard bin Laden speak  
19 twice. He followed the Al Qaeda trainers out of the camp  
20 and traveled with them. He traveled with other expected Al  
21 Qaeda and lived with Al Qaeda members.

22 At some point over the course of the year it is  
23 inconceivable that the plaintiff did not hear or learn  
24 something to alert him about the people with whom he was  
25 associating with were Al Qaeda, and yet petitioner stayed.

1           Now as to what did the petitioner ever do to  
2 participate with Al Qaeda within or under the command  
3 structure of the organization?

4           He attended a basic training camp for the  
5 organization for 25 days. When the camp ended he followed  
6 the camp instructors around Afghanistan. The instructors  
7 gave him orders, and he obeyed those orders. When told to  
8 grab a rifle, he picked one up out of fear that if he  
9 disobeyed he would get into trouble.

10           He was simply not following orders. It amounts to  
11 semantics that he claims that he never got orders. He  
12 testified that when he picked up the rifle that he was  
13 following the suggestion of someone who was providing  
14 assistance.

15           But petitioner's characterization does not account  
16 for the fear that he would get into trouble if he did not  
17 follow the trainer's instruction of someone who was  
18 providing assistance.

19           The trainers obviously held a special status in  
20 the group. They slept in separate quarters and did not  
21 socialize with the group. The most reasonable  
22 interpretation of the incident is the superior issued an  
23 order, and petitioner obeyed.

24           The fact that petitioner is able to navigate  
25 successfully through Afghanistan and Pakistan, having never

1 visited either country, and did not speak the languages, and  
2 had no money, the evidence is he followed the direction of  
3 Al Qaeda members -- of an organization that could help  
4 support him.

5           The reunion with his passports weeks after he  
6 left Al Farouq, for example, cannot be explained by mere  
7 happenstance. He gave it up at Al Nibras, an Al Qaeda  
8 guesthouse, and then suddenly it comes back to him.

9           He is telling -- it is also telling how Al Qaeda  
10 considers petitioner to be a member. He was admitted to the  
11 training camp. He participate in the training camp. He was  
12 trusted enough to be in the presence of bin Laden twice. In  
13 the presence I do not mean that he had a one-on-one bin  
14 Laden. I do not want to misstate the record. It is alleged  
15 he was in a very large group of people when he came to give  
16 a talk.

17           He was assigned to the charge of two Al Qaeda  
18 instructors when the camp closed. He was fed, sheltered and  
19 protected by Al Qaeda. He was sent to live in an apartment  
20 in Karachi frequented by Al Qaeda members.

21           There can be no doubt in my mind that petitioner  
22 had to be accepted by these people as reliable and as a  
23 member to be able to do all of that, to travel with them for  
24 a year; to be in this last place of reference -- of refuge  
25 he was in in the safehouse in Karachi that ended up in this

1 battle with diehard Al Qaeda members who fought to the death  
2 and not believe that he was somehow not a member, that he  
3 was some stranger who was just there because they took him  
4 in, simply defies credibility.

5           In the papers today we have read in the last week  
6 the five American Muslims who went over to Pakistan,  
7 allegedly to join a terrorist group and were turned down  
8 because they did not have the credentials. If that is true,  
9 I think that is telling.

10           If you use common sense here, this petitioner  
11 traveled for a year, all through Afghanistan and Pakistan,  
12 alleging he was attempting to leave and did not have  
13 anything to do with Al Qaeda, but always supported, and  
14 moved around, and taken care of, and ending up with Al Qaeda  
15 members from the time of his capture.

16           So it seems to me that there is sufficient  
17 evidence in the record and conclusions that can be validly  
18 drawn from that to show by a preponderance of the evidence  
19 that the government has met its burden by a preponderance of  
20 the evidence that petitioner was part of Al Qaeda.

21           I am not convinced it is more likely than not,  
22 however, that he is a continued threat to the security of  
23 the United States.

24           Petitioner was a young, unemployed, uneducated --  
25 under educated Yemeni, particularly vulnerable to the

1 demagoguery of the religious fanatics, and the record  
2 reflects at best he was a low level -- the lowest level Al  
3 Qaeda member.

4           It does not appear he even finished training.  
5 There is no evidence he fired a gun in battle or was on the  
6 front lines, or participated, planned, or knew of terrorist  
7 plots.

8           Classified records confirmed the court's  
9 assessment.

10           The fact that he appears to have been a model  
11 prisoner during the seven years of the detention. So while  
12 I concluded that the government has sufficient evidence to  
13 prove by a preponderance of the evidence that I find to be  
14 credible and reliable that two of their allegations are  
15 sufficient to meet the burden that he is part of Al Qaeda  
16 and has lawfully been detained by the United States, but I  
17 fail to see on the record now that he poses any greater  
18 threat than most of the detainees who have already been  
19 released or are now eligible for release by the government.

20           So that is the unclassified ruling by the court  
21 denying petitioner's petition for habeas corpus.

22           I have another matter I believe. I'm going to ask  
23 the parties before me to take about a 10 minute recess while  
24 I take up the other matter, and then we will close the  
25 courtroom, and I will go back to a brief classified ruling

1 for the record as well.

2           So if counsel for the detainees would take a  
3 break. And since the detainee will not be able to hear this  
4 classified ruling, he does not have to stay on.

5           We will take very short break -- I don't even need  
6 a break. If we could just get everyone to step back for a  
7 few minutes, I will take up the other matter. I have a very  
8 short matter to consider, but the detainee will be released  
9 at this time.

10           **(Recess.)**

11           THE COURT: This is the case entitled Suhail Abdu  
12 Anan, et al versus Barack Obama, et al, CA 04-1194.

13           I had meant to say something, and I apologize to  
14 counsel. It should have been -- well, the court is still  
15 opened, but it should have been when the detainee was on the  
16 line, and my attempts to get through this rather lengthy  
17 opinion, I did not do what I intended to do, and  
18 that was to thank counsel for their work in this case.

19           I don't know how possibly a firm in Colorado, and  
20 a smaller group, can afford to do the work that they have  
21 done, and the other firm that is also helping out, where you  
22 have taken on more than one of these cases, where you have  
23 spent hundreds if not thousands of hours of your time and  
24 travel to Guantánamo and back in a very difficult, as I  
25 indicated at the beginning, new area of the law that is

1 still developing with different rules and procedures and  
2 different substantive rules of law from various judges,  
3 making it very difficult.

4 In connection with the evidence being classified  
5 and you cannot share with your client, it is an extremely  
6 trying and challenging situation, and I have seen nothing  
7 but the best in the traditions of the Bar and the work that  
8 has been done by volunteer counsel in this case, and in most  
9 of the other cases, and I want to make sure that not only  
10 Mr. Al-Madhwani but the public understands the work and  
11 dedication that has been done by the Killmer law firm as  
12 well as by Stowell and Freeman on these matters.

13 And you have the thanks of the court, and the  
14 public should be indebted to you for your services.

15 **(Whereupon, the proceedings were adjourned.)**

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17 CERTIFICATE OF COURT REPORTER

18 I certify that the foregoing is a correct transcript of  
19 the proceedings in the above-captioned case.

20  
21 \_\_\_\_\_  
22 SUSAN PAGE TYNER, CVR-CM  
23 OFFICIAL COURT REPORTER  
24  
25