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MOHAMMEDOU OULD SALAHI,
DETAINEE, GUANTANAMO BAY NAVAL
STATION AND YAHDIH OULD SALAHI,
AS NEXT FRIEND OF MOHAMMEDOU
OULD SALAHI,

No. 10-5087

Appellants,

v.

BARACK OBAMA, PRESIDENT OF THE
UNITED STATES, ET AL.,

Appellees.

Friday, September 17, 2010
Washington, D.C.

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

BEFORE:

CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES
TATEL AND BROWN

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

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ORIGINAL

C O N T E N T SORAL ARGUMENT OF:PAGE

August E. Flentje, Esq.
On Behalf of the Appellants

3; 54

Theresa M. Duncan, Esq.
On Behalf of the Appellees

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JUDGE SENTELLE: And during this portion of the argument I will ask Counsel to stay away from any classified references, and then if necessary we will seal the courtroom for any portion involving the classified material.

ON BEHALF OF THE APPELLANTS

JUDGE SENTELLE: Thank you, Counsel.

In this case the District Court's factual findings that after Salahi became a sworn al-Qaida member he continued to provide support to al-Qaida and closely associate with several al-Qaida operatives established as a matter of law that he never disassociated from al-Qaida, but remained part of the group. In reaching the opposite conclusion the District Court made two important legal errors, the Court failed to look at Salahi's activities and associations

1 together with each other, and together with the decision he
2 made to join al-Qaida to determine whether it was more likely
3 than not that he had left the group. And the Court erred by
4 failing to put some burden on Salahi to establish that he
5 disassociated from al-Qaida after swearing bayat, a burden the
6 Court found that he had failed to meet because he had not
7 acted to sever his ties.

8 First --

9 JUDGE TATEL: Before you get into those I want to do
10 what I did in the last case and make sure I completely
11 understand the argument the Government's making here. In the
12 District Court the Government argued that there were two bases
13 for detention, that the Petitioner aided the September 11
14 attacks, and that he was part of al-Qaida, right?

15 MR. FLENTJE: Initially, but --

16 JUDGE TATEL: Yes. You abandoned the first claim,
17 right?

18 MR. FLENTJE: Yes.

19 JUDGE TATEL: In the District Court. And added that
20 he could be detained because he personally, in materials,
21 supported al-Qaida, correct?

22 MR. FLENTJE: After the hearing that argument was
23 made in the District Court. Yes.

24 JUDGE TATEL: And the District Court ruled against
25 you on that?

1 MR. FLENTJE: Yes.

2 JUDGE TATEL: And you're not appealing that?

3 MR. FLENTJE: Yes, we haven't raised that issue on
4 appeal.

5 JUDGE TATEL: Okay. So, the only issue before us is
6 whether he is part of it, that's it?

7 MR. FLENTJE: That is the only issue.

8 JUDGE TATEL: Okay. Great. Thank you. Okay.

9 MR. FLENTJE: Did he remain part of al-Qaida?

10 JUDGE TATEL: Yes.

11 MR. FLENTJE: And we would say irrespective of the
12 burden what the Court did here by all but ignoring this
13 decision to swear bayat, an enduring loyalty to al-Qaida was
14 to dissect the time line of his activities in a way similar to
15 the way the Court in *Adahi* dissected the various pieces of
16 evidence --

17 JUDGE TATEL: Well --

18 MR. FLENTJE: -- showing --

19 JUDGE TATEL: -- what's your response to -- I want
20 to ask your response to two things the District Court said.
21 One was he said the reason he didn't shift the burden of proof
22 is because the Petitioner swore bayat in 1991 at a time when
23 the United States and al-Qaida's interests in Afghanistan were
24 identical, that is both the U.S. and al-Qaida were opposing
25 the Communist government of Afghanistan. And the District

1 Court ruled that, you know, al-Qaida at the time of capture
2 was a very different organization than it was at the time he
3 swore bayat. And it's relevant, he says, but not for shifting
4 the burden, right? So --

5 MR. FLENTJE: The Court said that in rejecting the
6 Government's legal argument that it should shift the burden.
7 So, it wasn't a factual finding, but it was sort of a method
8 to analyze whether it was appropriate to shift the burden. We
9 would --

10 JUDGE TATEL: Right.

11 MR. FLENTJE: -- say that is wrong under the laws of
12 war.

13 JUDGE TATEL: Well, yes.

14 MR. FLENTJE: The laws of war look to association
15 with an organization or with a state military force, they
16 don't ask about the motivation of the person who's in the
17 force, and they don't ask about the motivation of the nation
18 when they joined the force.

19 JUDGE TATEL: Yes, but see, you're talking about the
20 hypothetical in your brief, right, about the German soldier?

21 MR. FLENTJE: Sure.

22 JUDGE TATEL: Yes, you're totally right about that.
23 But, you know, a German soldier who joins the German army in
24 the '30s and is captured in 1943, that was your hypothetical,
25 right?

1 MR. FLENTJE: Yes.

2 JUDGE TATEL: Of course you don't look into it
3 because there's absolutely no doubt in 1943 that a uniformed
4 armed German soldier is part of the German military.

5 MR. FLENTJE: Well, the only point we're trying to
6 make --

7 JUDGE TATEL: I mean, that's the question here, is
8 the Petitioner at the time of capture still a member of al-
9 Qaida, and the District Court said, found, as a matter of
10 fact, that because he didn't disregard the bayat he simply
11 said because al-Qaida is a very different organization at the
12 time of capture than it was at the time of the oath that
13 that's not a justification for shifting the burden of proof.

14 MR. FLENTJE: Well, we would say it still makes
15 sense to shift the burden of proof and your question sort of
16 reveals that because after the oath the entire question in the
17 case turns to did he remain part of al-Qaida? And --

18 JUDGE TATEL: Right.

19 MR. FLENTJE: -- his first line of evidence is his
20 claim in his declaration that he severed all ties.

21 JUDGE TATEL: Right.

22 MR. FLENTJE: Now, if he never came into court, and
23 never said he had severed ties from al-Qaida presumably the
24 Government would easily win the habeas case. So, the question
25 must be did he sever ties, and we would say --

1 JUDGE TATEL: Right.

2 MR. FLENTJE: -- he has to come forward with some
3 showing, meet some burden to show that. It doesn't matter
4 when he joined al-Qaida --

5 JUDGE TATEL: Well, you keep ignoring my question.
6 I mean, I agree that the --

7 MR. FLENTJE: I'm trying to address it. I'm sorry.

8 JUDGE TATEL: -- only question is, the question you
9 started talking about was the burden shifting. You said the
10 District Court erred by not shifting the burden. I was asking
11 you number one, how do you respond to his finding that he's
12 not saying that the joining, the swearing of bayat is
13 irrelevant, he's saying that it's not a basis for shifting the
14 burden because al-Qaida's goals changed so dramatically
15 between the time he joined and the time he was captured. And
16 I know, I'm seeing an answer to that. The other thing he said
17 was he said, I mean, the District Court pointed out there's no
18 way someone who's been detained in Guantanamo with no access
19 to information for eight years could possibly meet that burden
20 of proof anyway.

21 MR. FLENTJE: Well, Your Honor, there is a simple
22 way --

23 JUDGE TATEL: So --

24 MR. FLENTJE: -- to meet that burden --

25 JUDGE TATEL: -- yes.

1 MR. FLENTJE: -- it is to tell the Court honestly
2 what you've been up to. He said -- and that's exactly what he
3 tried to do in Court, he said look, I cut off all ties, and
4 then he talked about his activities in the intervening period.
5 And we suggest that if you look at the District Court's
6 specific findings about those activities in the intervening
7 period it does not support his claim to have cut off all ties,
8 and the District Court --

9 JUDGE TATEL: Okay.

10 MR. FLENTJE: -- essentially --

11 JUDGE TATEL: Okay. That's --

12 MR. FLENTJE: -- agreed with that.

13 JUDGE TATEL: -- fine. I mean, and, you know, you
14 can argue the case that way, and --

15 MR. FLENTJE: Well, we're arguing it both ways, Your
16 Honor.

17 JUDGE SENTELLE: Whatever way it takes.

18 JUDGE TATEL: Yes. Okay. I still, I just have to
19 tell you, I still don't get your response to the point I've
20 made about the District Court's finding. It is a finding that
21 the goals of al-Qaida changed, and it's a finding supported by
22 historical fact. I mean, the fact is that at that time it
23 wasn't until after the first Gulf War when United States
24 military forces were in Saudi Arabia that Osama Bin Laden
25 switched to calling for attacks on the United States.

1 JUDGE SENTELLE: So far as the record discloses.

2 JUDGE TATEL: Yes. Right. And so, I mean,

3 historically his finding is well supported, so --

4 MR. FLENTJE: Well, the District Court's finding --

5 JUDGE TATEL: -- you know --

6 MR. FLENTJE: -- on the nature of al-Qaida was off

7 by many years. He said --

8 JUDGE TATEL: I agree with you --

9 MR. FLENTJE: -- the late 1990s.

10 JUDGE TATEL: -- that the, al-Qaida's hostility to
11 the United States began occurring much earlier than you would
12 know from the District Court's opinion. But for purposes of
13 this case when he swore bayat the United States and al-Qaida
14 had a common goal, destroying the Communist government in
15 Afghanistan. And it wasn't until the following year that al-
16 Qaida began to change its mission, and it's at that point that
17 he said he disassociated. So, the District Court --

18 MR. FLENTJE: A couple of --

19 JUDGE TATEL: -- is simply saying that's not enough
20 to shift the burden to him, it's still the Government's burden
21 to show using bayat and anything else it wants that he was
22 part of al-Qaida.

23 JUDGE BROWN: Does the record here actually support
24 the finding that al-Qaida's purposes were actually that
25 narrow?

1 MR. FLENTJE: It doesn't. There wasn't much on that
2 in the District Court opinion. It was a one-liner in a
3 footnote in rejecting a legal argument. So, it didn't purport
4 to be any sort of factual finding. And if you look at the 9-
5 11 report you can see that kind of Bin Laden's focus on the
6 U.S. was prompted by the Gulf War build up in 1990. In early
7 1992, which is the same time Salahi was fighting for al-Qaida
8 Bin Laden announced that, announced his intentions to rid the
9 Gulf of U.S. forces. So, there's certainly -- the District
10 Court's statement is not supported by the history of al-Qaida.

11 More importantly, the need to shift the burden doesn't
12 have to do with these intentions. And we would submit that
13 the same analysis that you would apply in the German soldier
14 situation should apply here. If someone has enlistment papers
15 from 1936 you would not go and say well, Germany was friends
16 with the United States in 1936, and you wouldn't say this guy
17 loves America, you would look at whether, that he had a
18 discharge in between 1936 --

19 JUDGE TATEL: No you wouldn't.

20 MR. FLENTJE: -- and the time he was captured.

21 JUDGE TATEL: No you wouldn't. And the reason you
22 wouldn't is that under your hypothetical he was captured in
23 1943, right? As a uniformed, armed member of the German
24 military. There's no question that he's part of the German
25 military.

1 MR. FLENTJE: Well, that part of the hypothetical --

2 JUDGE TATEL: And that's the question in this case.

3 JUDGE SENTELLE: Yes. You're addressing a different
4 issue.

5 JUDGE TATEL: Yes.

6 MR. FLENTJE: Well, the nature of al-Qaida is
7 different, and I agree, there is no, there's probably not a
8 formal discharge from al-Qaida, but that doesn't mean that he
9 should have some obligation to show convincingly that he left
10 the group. Instead, what the evidence here shows enduring
11 ties, he swore bayat, and then year after year after year he
12 is associating with high level al-Qaida --

13 JUDGE SENTELLE: But he did testify that he had
14 left --

15 JUDGE TATEL: Right.

16 MR. FLENTJE: Absolutely.

17 JUDGE SENTELLE: -- al-Qaida.

18 MR. FLENTJE: He's trying to meet that burden. I
19 think he --

20 JUDGE SENTELLE: Yes, he did try to meet that
21 burden. And what is the review that we are making of the
22 District Court's decision if it has that evidence on the one
23 side, and the Government's evidence on the other side?

24 MR. FLENTJE: Point one I would say is the District
25 Court did not accept as true his claim that he severed all

1 ties. The District Court said in that same footnote he never
2 acted affirmatively to sever his ties, and that was his first
3 line of argument. The second point --

4 JUDGE SENTELLE: That's a so-what. I mean, we would
5 assume he would not act affirmatively to sever his ties,
6 that's going to get him killed.

7 JUDGE TATEL: Exactly.

8 JUDGE SENTELLE: Yes, that's going to get him
9 killed. And he --

10 JUDGE TATEL: Right.

11 JUDGE SENTELLE: -- doesn't have to prove that he
12 went and told them I'm quitting, he has to, his burden was, if
13 he has one, would be to establish that he had withdrawn from
14 al-Qaida.

15 MR. FLENTJE: Sure. Well, then we --

16 JUDGE SENTELLE: His evidence is he said I withdrew
17 from al-Qaida, the Government (indiscernible). I'm not saying
18 anything about the Government's evidence, the Government
19 presents good evidence that he's not telling the truth, but
20 the District Court weighed it and came out the other way. So,
21 what is our review supposed to be?

22 MR. FLENTJE: I think we're really at the line
23 between what is a clearly erroneous review, and a legal
24 review. I mean, the Court has said that whether he did X or Y
25 is a factual finding for clear err review, but at the same

1 time the Court said the import of him doing X, Y, and Z, and
2 we have a lot of that here because the District Court found he
3 maintained these associations --

4 JUDGE SENTELLE: The question of being --

5 MR. FLENTJE: -- and he maintained --

6 JUDGE SENTELLE: -- part of al-Qaida is a mixed
7 question of law and fact, right?

8 MR. FLENTJE: Yes. So, it's hard for me to say
9 exactly where on the line --

10 JUDGE TATEL: Yes.

11 MR. FLENTJE: -- this fits.

12 JUDGE TATEL: But the District Court's finding
13 wasn't that he remained part of it, it was that he was, you
14 know, a freelancer, that he was a committed Jihadist. I mean,
15 that's why the District Court looked at this, he said, look,
16 this guy, he's a committed Jihadist, we know that, and he used
17 to be a member of al-Qaida, he has a lot of al-Qaida
18 connections, and from time to time he recruited, sent someone
19 over to al-Qaida, but he did it as a freelancer.

20 MR. FLENTJE: I think that's where we get right into
21 the Adahi problem in this case, because by suggesting he's a
22 freelancer completely ignores that he swore loyalty to the
23 organization.

24 JUDGE TATEL: Okay.

25 MR. FLENTJE: If he swore loyalty and then is

1 continuing to help them --

2 JUDGE TATEL: Yes, I understand.

3 MR. FLENTJE: -- as al-Qaida is turning against the
4 United States how can that --

5 JUDGE TATEL: Yes.

6 MR. FLENTJE: -- not show a continued --

7 JUDGE TATEL: I understand that --

8 MR. FLENTJE: -- voluntarily -- I'm sorry.

9 JUDGE TATEL: Right. I understand that part of your
10 argument. So, we're now beyond the burden of proof. Let me
11 ask you this, you argue -- now, *Awad* was decided after, was it
12 decided after all the briefing, or was it decided before your
13 reply brief? I can't remember.

14 MR. FLENTJE: It was before our reply brief,
15 after --

16 JUDGE TATEL: But after the --

17 MR. FLENTJE: -- after our first brief.

18 JUDGE TATEL: -- after the brief. So --

19 MR. FLENTJE: And I'm not sure about Petitioner's
20 brief.

21 JUDGE TATEL: -- I'm curious about your reaction to
22 *Awad*. And my question relates to the, you know, the command
23 structure argument, right?

24 MR. FLENTJE: Yes. Sure.

25 JUDGE TATEL: *Awad* looks, now, *Awad* looks different

1 to me than this case. In *Awad* the Petitioner there traveled
2 to Afghanistan right after September 11th, right?

3 MR. FLENTJE: Yes.

4 JUDGE TATEL: He traveled right after September
5 11th, and he engaged in armed conflict against the United
6 States and its allies. Okay. His name was a list, which was
7 discovered at this training camp. He joined this group of
8 fighters who were barricaded in this hospital, right?

9 MR. FLENTJE: Yes.

10 JUDGE TATEL: And the District Court, or the Court
11 of Appeals said, "These fighters treated *Awad* as one of their
12 own." So, it was in that context that we said look, that's
13 enough, you don't need any more evidence that he followed
14 orders or commands, this was in and of itself enough.

15 This case is totally different. He, the Petitioner
16 here was captured far from the battlefield, right? There's no
17 allegation that he --

18 MR. FLENTJE: Yes.

19 JUDGE TATEL: -- engaged in hostile activities
20 against the United States. So, in a case like this the
21 command structure argument might actually be useful because
22 it's a way of distinguishing as we said in *Ben Asiad* (phonetic
23 sp.), whatever that case is, distinguishing freelancers from
24 people who are actually part of. One way you know someone
25 like this might be part of al-Qaida if he's taking orders, or

1 operating within the command structure.

2 MR. FLENTJE: We know -- we have --

3 JUDGE TATEL: So, isn't that a -- so, what I'm
4 saying is why doesn't the command structure while it was
5 inappropriate in Awad still a perfectly appropriate way to
6 analyze this case?

7 MR. FLENTJE: I think two --

8 JUDGE TATEL: You see my point?

9 MR. FLENTJE: -- responses.

10 JUDGE TATEL: Yes.

11 MR. FLENTJE: One, when thinking about alternatives
12 to showing one is in the command structure alternative number
13 one is formally joining the force, and that's what bayat
14 comprises.

15 JUDGE TATEL: Okay. Why don't we agree for purposes
16 of my question we're going to set bayat aside, okay?

17 MR. FLENTJE: I don't think we can do that. That is
18 not a fair way to analyze the evidence regarding this --

19 JUDGE TATEL: Well, since I'm asking the
20 questions --

21 MR. FLENTJE: Yes. Okay.

22 JUDGE TATEL: -- okay, I get to decide. I'm not
23 deciding the case, I'm just --

24 MR. FLENTJE: Sure.

25 JUDGE TATEL: -- asking a question. Okay? And

1 there's no obligation that I ask all questions at once and
2 consider them in their entirety.

3 MR. FLENTJE: Fair.

4 JUDGE TATEL: It's just a legal question I'm asking
5 you about *Awad*. You make the argument that the command
6 structure argument doesn't apply here. And we certainly did
7 in *Awad* suggest it had problems. I'm only asking you whether
8 or not because of the different factual situations in these
9 cases it's not a useful way to think about the case, along
10 with everything else, okay?

11 MR. FLENTJE: Well, you mentioned about *Awad*. He
12 was treated by the fighters as one of their own.

13 JUDGE TATEL: Right.

14 MR. FLENTJE: *Salahi* was treated by these high level
15 al-Qaida operatives as one of their own.

16 JUDGE TATEL: Okay. But he didn't --

17 MR. FLENTJE: Again --

18 JUDGE TATEL: -- fight with them. He wasn't
19 captured in Afghanistan.

20 MR. FLENTJE: Well, he fought with them initially,
21 and then continued to be treated as if he was one of them.

22 JUDGE TATEL: But he --

23 MR. FLENTJE: He traveled amongst them. He --

24 JUDGE TATEL: Right.

25 MR. FLENTJE: -- lived with al-Qaida --

1 JUDGE TATEL: Yes, but --

2 MR. FLENTJE: -- cells.

3 JUDGE TATEL: -- but wouldn't it help --

4 MR. FLENTJE: He provided recruits.

5 JUDGE TATEL: -- wouldn't it help to, if you're
6 trying to prove that he's, "part of al-Qaida," what's wrong,
7 wouldn't it be a perfectly appropriate question, and wouldn't
8 the Government in fact try to argue that in what he was doing,
9 his recruiting activities, and all these other things that he
10 was in fact following orders?

11 MR. FLENTJE: Well, sure, that is --

12 JUDGE TATEL: Okay.

13 MR. FLENTJE: -- absolutely one way --

14 JUDGE TATEL: Of course, right?

15 MR. FLENTJE: -- to show, and it's --

16 JUDGE TATEL: All right. So --

17 MR. FLENTJE: -- a good way.

18 JUDGE TATEL: -- isn't the absence of orders equally
19 relevant?

20 MR. FLENTJE: Well, I hate to get back to bayat,
21 because you wanted me to ignore it, but bayat is --

22 JUDGE TATEL: I agree, I told you --

23 MR. FLENTJE: -- the best --

24 JUDGE TATEL: -- why don't you accept for purposes
25 of the question that I completely agree with you that the

1 District Court didn't adequately consider bayat in his
2 ultimate analysis, okay?

3 MR. FLENTJE: Okay.

4 JUDGE TATEL: Assume you win that argument. I agree
5 with you.

6 MR. FLENTJE: Then we would certainly want to point
7 out --

8 JUDGE TATEL: Right.

9 MR. FLENTJE: -- indications that there are orders
10 going on.

11 JUDGE TATEL: Okay. And --

12 MR. FLENTJE: And I think we --

13 JUDGE TATEL: -- wouldn't it be equally relevant
14 that there weren't any in terms of whether he was part of?

15 MR. FLENTJE: It depends on the nature of the
16 activity, I believe.

17 JUDGE TATEL: How can it possibly --

18 MR. FLENTJE: I mean, no, I think one good --

19 JUDGE TATEL: -- be relevant one way and not the
20 other way? I mean, if you say it's relevant that he took
21 orders to show that he's part of how can you possibly then say
22 it's inappropriate for the District Court to point out that he
23 didn't take orders?

24 MR. FLENTJE: I think that's a fair point. I
25 mean --

1 JUDGE TATEL: Okay. All right. So --

2 MR. FLENTJE: -- it's obviously --

3 JUDGE TATEL: -- we agree on that too now, right?

4 Right?

5 MR. FLENTJE: (No audible response.)

6 JUDGE TATEL: Can you give me an example, I want an
7 example from you of a situation where someone is dealing with,
8 or cooperating with al-Qaida, okay, but not part of it. Can
9 you get me any examples?

10 MR. FLENTJE: Well, I mean, I guess a completely
11 independent contractor who was, I mean, I haven't thought a
12 lot about that --

13 JUDGE TATEL: Okay. Like --

14 MR. FLENTJE: -- hypothetical. But, I mean --

15 JUDGE TATEL: Well, like maybe someone who sells say
16 cell phones, right?

17 MR. FLENTJE: I mean, *Ben Asiad* suggested --

18 JUDGE TATEL: And he sells cell phones --

19 MR. FLENTJE: Yes.

20 JUDGE TATEL: -- to al-Qaida, even if he knew al-
21 Qaida was al-Qaida he might be guilty of material support,
22 right, but he's not a part of.

23 MR. FLENTJE: I think that's a fair --

24 JUDGE TATEL: Right?

25 MR. FLENTJE: -- that's a fair statement. Yes.

1 JUDGE TATEL: Okay. And what about, for example,
2 you know, a parent who allows an al-Qaida son to stay in their
3 house for a couple of nights?

4 MR. FLENTJE: Absolutely. That's an example from
5 *Gherebi*.

6 JUDGE TATEL: Right. Not part of, right? Yes or
7 no?

8 MR. FLENTJE: I mean, I think you'd have to have
9 more evidence.

10 JUDGE TATEL: Yes.

11 MR. FLENTJE: Yes.

12 JUDGE TATEL: And suppose someone, you know, sets up
13 a website for information about cyber attacks and learns that
14 al-Qaida members are, you know, checking out his website and
15 doesn't take it down, is that person a part of?

16 MR. FLENTJE: I hate to comment on that. I mean,
17 here Salahi was setting up a website, and when an al-Qaida
18 operative said you better shut that down, there's surveillance
19 concerns he shut it down. I mean, that suggests, first, it
20 suggests there's an order coming out. I mean, it might not
21 look like --

22 JUDGE TATEL: Well, you've got a District Court --

23 MR. FLENTJE: -- a military order, but it's --

24 JUDGE TATEL: You've got a District Court finding on
25 that, that doesn't help you.

1 MR. FLENTJE: No, that's not true. The finding --

2 JUDGE TATEL: It's not?

3 MR. FLENTJE: -- by the District Court was this
4 project didn't materialize, it didn't materialize because of
5 the al-Qaida order. That's a helpful finding, that suggests
6 he was following directions, that was in the year 2000, very
7 close to 9-11, and that involved this Ganczarski guy who's a
8 known al-Qaida member, so we know this was tied to al-Qaida.
9 So, I don't think the District Court finding on that is --

10 JUDGE TATEL: I don't think the District Court, I'm
11 just looking at this, the District Court did not find that he
12 did it under orders.

13 MR. FLENTJE: He said he stopped at --

14 JUDGE TATEL: He stopped.

15 JUDGE SENTELLE: He didn't find one way or the other
16 on that question, did he?

17 MR. FLENTJE: He halted it at Ganczarski's request.

18 JUDGE TATEL: Right. But he didn't --

19 MR. FLENTJE: I mean --

20 JUDGE TATEL: -- find it was pursuant to orders.

21 MR. FLENTJE: Well, I mean, we're not going to find
22 military style orders with al-Qaida, that's pretty close.

23 JUDGE TATEL: You're not?

24 MR. FLENTJE: That is pretty close. And I think if
25 you look at --

1 JUDGE TATEL: Well, yes, but see that's my point.
2 The point here is that, you know, these are facts, and you're
3 disagreeing with the inferences the District Court drew from
4 the facts, but, you know, we're --

5 MR. FLENTJE: It's --

6 JUDGE TATEL: I mean, ultimately we face a question
7 of law, but when the District Court doesn't make a finding one
8 way or another about whether he took that down pursuant to
9 orders, we can't conclude that he did.

10 MR. FLENTJE: Well, we would suggest that --

11 JUDGE TATEL: I mean, I know your inference is that
12 he did, but the --

13 MR. FLENTJE: We would suggest --

14 JUDGE TATEL: -- trier of fact didn't make that
15 inference.

16 MR. FLENTJE: I mean, I think you can in one
17 circumstance, because Salahi himself testified at trial that
18 that is why he took it down, and he said it was concerns about
19 "surveillance," he agreed there was concerns about
20 surveillance that led Ganczarski to tell him that he should
21 stop. That's at J.A. 2639.

22 But beyond that, I mean, another response to that is the
23 District Court didn't find there were not orders, and the
24 District Court in other places where it found that there were
25 not orders does not look at bayat, it separates the activities

1 from bayat. And I hate to, I know I'm getting back to --

2 JUDGE TATEL: No, no, no, I --

3 JUDGE SENTELLE: Yes.

4 MR. FLENTJE: -- that first point --

5 JUDGE TATEL: I told you --

6 MR. FLENTJE: -- but it's a really --

7 JUDGE TATEL: -- for purposes of all this you can
8 accept the idea that I agree with you on that.

9 JUDGE SENTELLE: Yes.

10 MR. FLENTJE: Submitted --

11 JUDGE SENTELLE: And he has two other judges he can
12 be talking to while he's saying all these things.

13 MR. FLENTJE: Exactly.

14 JUDGE SENTELLE: Your time actually --

15 JUDGE BROWN: I want to get --

16 JUDGE SENTELLE: Excuse me, go ahead.

17 JUDGE BROWN: I want to get back to this command
18 structure discussion for a moment. On the one hand you say
19 that no longer applies because after Al-Adahi said you don't
20 have to show that, but you also say but whether he was
21 receiving orders is not irrelevant. Is there anything
22 inconsistent about those positions? In other words could
23 someone receive orders and not be part of the command
24 structure of the organization?

25 MR. FLENTJE: I doubt it. I mean, I think if you're

1 getting orders and following through you're definitely part of
2 it. So --

3 JUDGE TATEL: Right.

4 MR. FLENTJE: -- as Chief Judge Sentelle said
5 sufficient but not necessary in the *Awad* opinion. And, you
6 know, I want to point out, Salahi himself said at his CSRT
7 statement that bayat was a direction to, "take orders and
8 follow Osama Bin Laden." That is a pretty powerful evidence
9 that the bayat means something in an ongoing way, it means
10 that when he's doing stuff to help al-Qaida it is likely just
11 someone carrying out their duties to the group as a sworn
12 member. And I think there's another --

13 JUDGE BROWN: Well, so is your argument that the
14 command structure standard is no longer necessary, but that it
15 was met here?

16 MR. FLENTJE: Certainly. We certainly think it was
17 met here because of the nature of bayat as suggesting that the
18 things he's doing to help al-Qaida are within the command
19 structure. He is a part of the force, so when he's taking
20 actions to help the force he's --

21 JUDGE SENTELLE: But you don't have to show --

22 MR. FLENTJE: -- part of the force.

23 JUDGE SENTELLE: -- it's within the command
24 structure. However, when you can show it that does carry your
25 case.

1 MR. FLENTJE: It certainly helps our case. And, you
2 know, Abu Hafs --

3 JUDGE SENTELLE: Well, if you actually could show it
4 conclusively that he was in the command structure you've won
5 your case on that point, right?

6 MR. FLENTJE: Sure. Abu Hafs who is an al-Qaida
7 leader and asking him to help Mr. al-Iraqi get around Germany,
8 another al-Qaida leader, that strongly suggests that there are
9 orders along to help him, and that they come from al-Qaida,
10 because these are two al-Qaida leaders that are being --

11 JUDGE TATEL: Again, the District Court's findings
12 don't help you on that.

13 JUDGE SENTELLE: Yes.

14 MR. FLENTJE: Well, the District Court kind of
15 dismissed the evidence but didn't --

16 JUDGE TATEL: No it didn't. He evaluated all the
17 evidence, and drew inferences from that event differently from
18 the ones you wish to draw, and those inferences are the ones
19 we're reviewing here. If they're clearly erroneous, fine, but
20 you don't say they are.

21 MR. FLENTJE: Well, we're willing to win on a
22 clearly erroneous standard.

23 JUDGE TATEL: Okay. One last question. If we agree
24 with you that the District Court, that the opinion, that the
25 District Court's opinion has problems under these later

1 decided cases, like Awad, and the one that requires the
2 evidence to be looked at in its entirety, I assume the answer
3 is what you're looking for is a remand, right?

4 MR. FLENTJE: We would be happy with a remand.

5 JUDGE TATEL: Yes.

6 MR. FLENTJE: We do think the facts --

7 JUDGE TATEL: Yes.

8 MR. FLENTJE: -- that were found by the District
9 Court show as a matter of law that he remained part of al-
10 Qaida, that someone who swore loyalty and continued to closely
11 associate and provide support to al-Qaida is still in al-
12 Qaida, and that is the District Court's finding, the District
13 Court found there was continuing support, and the District
14 Court found there were close associations with numerous al-
15 Qaida operatives. And if you look, even look under those the
16 types of support, and in particular the recruiting is the type
17 of thing that would make someone part of the force.

18 JUDGE SENTELLE: Is the United States conceding that
19 the preponderance standard is required, or are you merely
20 accepting that it's likely to be applied?

21 MR. FLENTJE: We think the preponderance standard is
22 appropriate.

23 JUDGE SENTELLE: Okay. You understand --

24 MR. FLENTJE: And it's --

25 JUDGE SENTELLE: You've read what Judge Randolph has

1 written in the past that a standard less than a preponderance
2 might be applicable in --

3 MR. FLENTJE: We're conceding a preponderance
4 standard in this case for sure.

5 JUDGE SENTELLE: You are conceding a preponderance
6 standard. Okay.

7 MR. FLENTJE: No further questions, so thanks.

8 ORAL ARGUMENT OF THERESA M. DUNCAN, ESQ.

9 ON BEHALF OF THE APPELLEES

10 MS. DUNCAN: May it please the Court, Theresa Duncan
11 appearing on behalf of the Petitioner/Appellee Mohammedou Ould
12 Salahi.

13 In this appeal the Government is arguing against rulings
14 the District Court never made, and ignoring the rulings it did
15 make. Recognizing the weakness of its case and the
16 correctness of the trial court's decision the Government also
17 misrepresents the record and the District Court's factual
18 findings, ignoring the substantial deference to which those
19 factual findings are due. Judge Robertson held four days of
20 hearings in this case, heard two days of testimony including a
21 day and a half by Mr. Salahi who testified by video
22 conferencing from Guantanamo so that Judge Robertson was able
23 to watch him as he testified and assess his credibility.

24 JUDGE SENTELLE: Was the Court properly assessing
25 the evidence when it treated the Government's evidence as

1 being, viewing the Government's evidence with something like
2 skepticism?

3 MS. DUNCAN: Yes, Your Honor. The District Court
4 was doing what all of the District Courts have done in these
5 Guantanamo Bay cases, and that is refusing to give the
6 Government a presumption of reliability.

7 JUDGE SENTELLE: Now, he didn't say he was refusing
8 to give them presumption of liability, he went beyond that,
9 didn't he?

10 MS. DUNCAN: No, Your Honor, I don't believe --

11 JUDGE SENTELLE: No.

12 MS. DUNCAN: -- he did. He --

13 JUDGE SENTELLE: What did he mean by that phrase
14 then that he was viewing it with something like skepticism?

15 MS. DUNCAN: That he was --

16 JUDGE SENTELLE: It sounds as if he is downgrading
17 the evidence before he ever hears it, like --

18 MS. DUNCAN: He was --

19 JUDGE SENTELLE: -- the Government has some other
20 burden to overcome besides a preponderance.

21 MS. DUNCAN: He was refusing to consider the
22 Government's evidence without skepticism. And when you look
23 at the, in his opinion at the place where he mentions I'm
24 applying my judicial skepticism to this evidence he's weighing
25 the credibility of different types of evidence from different

1 places and giving them the weight that he thinks it deserves.
2 So, in his application of that comment --

3 JUDGE SENTELLE: That's not what he said, though.
4 He said that he was viewing it with something like skepticism,
5 and he said it twice, I think, didn't he?

6 MS. DUNCAN: Correct, Your Honor, he did say it
7 twice. He said it at the very beginning, and I think there
8 he's talking about not accepting the Government's evidence
9 without skepticism, which --

10 JUDGE SENTELLE: That's two different things, to say
11 not accepting it without skepticism, saying I'm applying
12 skepticism to it. I mean, he didn't say he was going to apply
13 skepticism to the Petitioner's evidence, did he?

14 MS. DUNCAN: But, Your Honor, he did apply
15 skepticism to our evidence. If you read in his footnote his
16 treatment of Dr. Iacopino's testimony it shows the application
17 of judicial skepticism. So, I think Judge Robertson did --

18 JUDGE SENTELLE: What did he say about skepticism in
19 that footnote?

20 MS. DUNCAN: He doesn't say the word skepticism --

21 JUDGE SENTELLE: No, he doesn't.

22 MS. DUNCAN: -- Your Honor, but he, when you read
23 through his analysis of Dr. Iacopino's testimony he's applying
24 judicial skepticism.

25 JUDGE SENTELLE: He didn't believe all of it, right?

1 MS. DUNCAN: That's correct. That's skepticism.

2 JUDGE SENTELLE: That doesn't mean he's applying
3 skepticism, it means he didn't believe all of it.

4 MS. DUNCAN: But it's applying skepticism, applying
5 skepticism is a way of analyzing evidence. If you accept
6 evidence without skepticism it's saying whatever is written on
7 this page I accept. And to apply skepticism to it is to --

8 JUDGE SENTELLE: Why did he bother saying this
9 unless he's applying some different level of skepticism?

10 MS. DUNCAN: Well, Your Honor, in *Awad* he said it a
11 different way. He said that he would assess the evidence
12 credibility line by line, that --

13 JUDGE SENTELLE: Yes.

14 MS. DUNCAN: -- he would look for internal
15 corroboration.

16 JUDGE SENTELLE: Yes.

17 MS. DUNCAN: So, he references *Awad* --

18 JUDGE SENTELLE: But that's not what he said here,
19 he didn't say I'm going to treat this the way I normally treat
20 evidence, by weighing it and looking for internal
21 inconsistencies, he said I'm treating it with skepticism.

22 MS. DUNCAN: He does say that, Your Honor, but I
23 think when you read, I mean you read the opinion in total, and
24 you read the way that he has approached the other two cases in
25 which he denied the opinions the skepticism is --

1 JUDGE SENTELLE: Can we look at those other two
2 cases?

3 MS. DUNCAN: I think that they informed to the
4 extent that he incorporated *Awad* into this opinion, so clearly
5 you can look at his analysis there. But when you look at his
6 approach to the three Guantanamo cases he's decided, and when
7 you incorporate *Awad* into this opinion that skepticism is not
8 a higher burden, it's merely a way of approaching the
9 Government's evidence, and it is consistent with the way that
10 the other District Courts have approached the Government's
11 evidence, and the way this Court has approached --

12 JUDGE SENTELLE: Have any of the other District
13 Courts used that phrasing that I'm approaching the
14 Government's evidence with skepticism?

15 MS. DUNCAN: Your Honor, I don't recall if any other
16 judge has worded --

17 JUDGE SENTELLE: Have we ever approved that
18 formulation?

19 MS. DUNCAN: Not the word skepticism, but in *Ben*
20 *Asiad* this Court did look at the Government's evidence with
21 some skepticism and asking whether some, you know, outside
22 evidence corroborated evidence at issue in that case, which is
23 not accepting the Government's exhibit at face value, but
24 rather approaching it, making your own credibility
25 determinations of whether that evidence under the totality is

1 reliable.

2 JUDGE SENTELLE: But he has to make credibility
3 determinations on all evidence in all cases.

4 MS. DUNCAN: Correct, Your Honor.

5 JUDGE SENTELLE: But he normally would not say all
6 right, I'm going to look at your evidence, but I'm treating it
7 with skepticism. He's doing something, or seems to be saying
8 that he's doing something different here than he does in a run
9 of the mill case.

10 MS. DUNCAN: Well, I would agree with you to some
11 extent, but it's not imposing a higher burden on the
12 Government, rather it's recognizing the unique nature of this
13 evidence, that the Government relied exclusively on
14 interrogation reports in its case, and particularly
15 interrogation reports of Mr. Salahi after admitting that Mr.
16 Salahi was subjected to --

17 JUDGE SENTELLE: Let us -- I'm not sure where we
18 crossed the line into classified.

19 MS. DUNCAN: Your Honor, I promise you that I --

20 JUDGE SENTELLE: Okay, good.

21 MS. DUNCAN: -- know that line and I'll --

22 JUDGE SENTELLE: Be careful.

23 MS. DUNCAN: -- honor it.

24 JUDGE SENTELLE: Good.

25 MS. DUNCAN: I promise.

1 JUDGE SENTELLE: Okay.

2 MS. DUNCAN: That the circumstances under which Mr.
3 Salahi made the statements on which the Government relied
4 were, I mean, the Government has admitted in public reports in
5 a public pleadings that we would call it torture they would
6 call it coercive circumstances, but nonetheless that those
7 circumstances as Judge Robertson found rendered all of Mr.
8 Salahi's statements to interrogators suspect. Given those
9 circumstances, given the nature of the evidence in this case
10 where we don't always know who the declarant is, we don't know
11 what the circumstances, under what circumstances statements
12 were made, evidence was gathered, judicial skepticism is
13 really just a means of assessing the reliability of evidence
14 under this unique circumstance of the Guantanamo cases. And
15 when you read his opinion as a whole it's clear that he's not
16 holding the Government to a higher standard, he's properly
17 applying the preponderance of the evidence standard, but
18 figuring out a way where you have conflicting accounts where
19 things aren't corroborated to give the particular pieces of
20 evidence and the Government's ultimate showing the weight it
21 deserves.

22 JUDGE TATEL: I'm sorry, were you done?

23 JUDGE SENTELLE: Go ahead. Go ahead.

24 JUDGE TATEL: I have a couple of questions. I hear
25 what you're saying about fact finding and our obligations to

1 review that on the appropriate standard, I have a couple of
2 questions about the legal standards the District Court applied
3 that I'd like to ask you. You're familiar with our opinion in
4 *Ben Asiad*, right?

5 MS. DUNCAN: Yes, Your Honor.

6 JUDGE TATEL: Where we say that the determination
7 must be made on a case by case basis with a functional rather
8 than formal approach, right?

9 MS. DUNCAN: Correct.

10 JUDGE TATEL: And of course you're familiar with
11 *Awad*. So, and you heard my questions about why I think, at
12 least I think *Awad* and the -- why I think the command
13 structure approach may still have relevance in a case like
14 this, okay. But my question has to do with whether, with how
15 the District Court applied it here. Let me just give you an
16 example or two. When he's talking about recruiting, and we
17 can stay away from classified stuff here, he says, he's
18 talking about the detainee's, the Petitioner's statements
19 about recruiting, he says in none of those statements did he
20 say he was tasked to do so, that is to do the recruiting.
21 Tasked. Nor did he provide detail about any specific
22 recruiting mission he was given. Okay?

23 MS. DUNCAN: Correct.

24 JUDGE TATEL: So, is this really consistent with
25 *Awad*? I mean, what he's looking for is -- and there's more

1 examples, let me just give you one other and then you'll see
2 my point. He's talking about the damaging, he's talking about
3 the most damaging evidence against the Petitioner here is
4 these things he did with his brother in law who was close to
5 Osama Bin Laden, right? And then he says, he says none of
6 these events or incidents has been shown to be, to have
7 happened within the command structure, right?

8 MS. DUNCAN: Correct.

9 JUDGE TATEL: Okay. So, under *Awad* and *Ben Asiad* it
10 seems to me that while that's certainly one question, it's
11 important to know whether, you know, there was an explicit
12 order, or if something was carried out within the command
13 structure, don't you think it's possible that if you take
14 those cases, what those cases are about that the District
15 Court should also have been asking well, maybe there aren't
16 any explicit orders, but the Petitioner's behavior over these
17 period of years, his recruiting and all these other things,
18 although there were no specific orders it was such that it was
19 pretty obvious that there was a formal relationship. In other
20 words it was happening so regularly, and there was so much
21 activity that even if there wasn't an order he wasn't really a
22 freelancer, it was a formal relationship and he could be
23 considered part of al-Qaida.

24 MS. DUNCAN: Your Honor, I'll treat each of those
25 facts differently --

1 JUDGE TATEL: Yes.

2 MS. DUNCAN: -- but within that analysis. Judge
3 Robertson recognized that the test for determining whether a
4 person is part of al-Qaida is a flexible and functional test.
5 He adopted Judge Bates' decision in *Hamliily*, which also
6 recognizes it's not formal but more of a functional test.

7 JUDGE TATEL: Yes, but in each of these examples I
8 gave you it's not flexible.

9 MS. DUNCAN: But --

10 JUDGE TATEL: He's looking for actual functioning
11 within the command structure.

12 MS. DUNCAN: And his approach to those particular
13 facts makes sense under the circumstances. With respect to
14 recruiting, the allegation of recruiting, the record below
15 indicates that when Mr. Salahi was a member of the broader
16 Jihadi community.

17 JUDGE TATEL: Right.

18 MS. DUNCAN: As you discussed earlier with
19 respect --

20 JUDGE TATEL: Right.

21 MS. DUNCAN: -- to Afghanistan in 1991 --

22 JUDGE TATEL: Yes.

23 MS. DUNCAN: -- there were Jihadi community in
24 Bosnia and Chechnya, which is separate and different from al-
25 Qaida as the judge specifically found below. So, the evidence

1 is ambiguous about the nature of conversations that he would
2 have had with people about his experiences in Afghanistan, or
3 about the Jihadi movement in general, so that Judge Robertson
4 needed to apply a framework for determining, is this as Mr.
5 Salahi testified simply not recruiting, maybe talking to
6 people about his experiences but not recruiting for al-Qaida,
7 or is it recruiting for al-Qaida? And the judge applied the
8 command structure --

9 JUDGE TATEL: Right. But my question is --

10 MS. DUNCAN: -- analysis --

11 JUDGE TATEL: -- did he ever, given that we hadn't
12 yet decided *Awad* did he ever ask the question whether even if
13 there aren't formal orders, or formal commands that the
14 Petitioner's behavior over a period of years could still be
15 viewed as part of al-Qaida? And he didn't ask that question.

16 MS. DUNCAN: Your Honor --

17 JUDGE TATEL: And are you telling me that that
18 question is, that he did ask it, or that he didn't, and he
19 didn't ask it because it's inappropriate?

20 MS. DUNCAN: Your Honor, I can't speak for Judge
21 Robertson whether --

22 JUDGE TATEL: No, we can only look at his order.
23 I'm asking you --

24 MS. DUNCAN: Right.

25 JUDGE TATEL: -- where in his opinion he did it?

1 MS. DUNCAN: And I think in --

2 JUDGE TATEL: Right?

3 MS. DUNCAN: In his order I think that he did apply
4 sort of a functional approach to the evidence. I think that,
5 you know, that he -- the command structure test made sense
6 where the evidence was ambiguous, where it was open to two
7 different interpretations.

8 JUDGE TATEL: No, no, no. My question is -- I'm
9 with you that, at least speaking for myself, that the command
10 structure test still makes sense in a case like this. My
11 question is whether given *Awad* and *Ben Asiad*, the opinion here
12 applies it in a formalistic way that's too formalistic. I
13 mean, even his conclusion, you know, you said well, he was
14 just looking at that fact, but look at his conclusion, he says
15 I'm at page 280 under conclusion, he says the Government had
16 to show that the support Petitioner provided from time to time
17 was provided within al-Qaida's command structure.

18 MS. DUNCAN: Correct.

19 JUDGE TATEL: And -- yes. And do you think that
20 after *Awad* and *Ben Asiad* is a correct statement of the law?
21 Or do you -- well, why don't you answer that question?

22 MS. DUNCAN: Well, clearly under *Ben Asiad* and *Awad*
23 it's no longer the law that --

24 JUDGE TATEL: Right.

25 MS. DUNCAN: -- that Court --

1 JUDGE SENTELLE: Yes.

2 MS. DUNCAN: -- had to make that specific factual --

3 JUDGE TATEL: Exactly.

4 MS. DUNCAN: -- finding.

5 JUDGE TATEL: So, don't we really need to remand
6 this now for the District Court to look at this under the
7 proper test? I mean, look, these cases were decided after he
8 wrote his opinion, so, you know, we all understand that. But
9 now the law is pretty clear, and why doesn't this have to go
10 back?

11 MS. DUNCAN: Because under the Court's factual
12 findings, Your Honor, even if you apply a more functional test
13 and you --

14 JUDGE TATEL: Right.

15 MS. DUNCAN: -- the evidence still doesn't lead up
16 to the finding of by a preponderance of the evidence that Mr.
17 Salahi was part of al-Qaida, as Judge Robertson found from,
18 you know, for the last year and a half when Mr. Salahi was
19 living in Mauritania there was no evidence of a connection
20 between him and the members of al-Qaida in a support role.
21 And we can talk more about that later. But even under the
22 record as it exists there's no need to remand because it's
23 still those factual findings when given the deference --

24 JUDGE TATEL: Well, what about the Government's
25 argument about *Al-Adahi*, our decision in *Al-Adahi*, and their

1 argument that the District Court here looked at, too often
2 looked at the evidence in isolation and didn't step back and
3 look it all in its entirety?

4 MS. DUNCAN: Your Honor, the Government looks --

5 JUDGE TATEL: You know, the conditional probability
6 standard.

7 MS. DUNCAN: Correct, Your Honor. The Government
8 looks at one statement by Judge Robertson late in his opinion
9 and ignores the rest of the opinion. At the very beginning
10 Judge Robertson summarizes all of the Government's allegations
11 against Mr. Salahi, he devotes two full pages to a time
12 line --

13 JUDGE TATEL: Right.

14 MS. DUNCAN: -- summarizing the allegations --

15 JUDGE TATEL: Yes.

16 MS. DUNCAN: -- against Mr. --

17 JUDGE TATEL: That's true.

18 MS. DUNCAN: -- Salahi.

19 JUDGE TATEL: That's true.

20 MS. DUNCAN: He, throughout the opinion he, you
21 know, he builds on the evidence, and views that evidence as a
22 whole in connection to each other. The part where the
23 Government focuses and argues that he committed the error of
24 *Adahi* is where Judge Robertson is addressing the Government's
25 argument that aside from what Mr. Salahi may or may not have

1 done, the fact of his association with so many people that the
2 Government alleges are al-Qaida is a reason for finding him as
3 part of al-Qaida, and the --

4 JUDGE TATEL: Independently.

5 MS. DUNCAN: Independently.

6 JUDGE TATEL: Yes.

7 MS. DUNCAN: Because by the time Judge --

8 JUDGE TATEL: No, but that's the word the Judge
9 used. But that's exactly what we said in --

10 MS. DUNCAN: *Adahi*.

11 JUDGE TATEL: You know which case I mean.

12 MS. DUNCAN: Yes, I know what you mean.

13 JUDGE SENTELLE: Don't hold any of us to the --

14 JUDGE TATEL: That's exactly what --

15 JUDGE SENTELLE: -- proper pronunciation of these
16 cases.

17 JUDGE TATEL: Yes.

18 MS. DUNCAN: Me either, Your Honor.

19 JUDGE TATEL: That's exactly what we said in the
20 conditional probability case that he can't do.

21 MS. DUNCAN: Right, but --

22 JUDGE TATEL: You can't look at a piece of evidence
23 and say this evidence independently is insufficient to hold
24 him.

25 MS. DUNCAN: But by the time Judge Robertson makes

1 that statement of --

2 JUDGE TATEL: Yes.

3 MS. DUNCAN: -- independently he has already
4 analyzed in total the connections between Mr. Salahi and these
5 individuals, what the Government has alleged Mr. Salahi did,
6 which we countered with evidence that he did not, and has
7 looked at that evidence as a whole. And so here the Court is
8 simply looking at just given the fact of the relationships,
9 having determined that, you know, recognized for example that
10 there's the accusation that Mr. Salahi sent money, or helped
11 his cousin get money to his family in Mauritania, having
12 looked at that is the mere fact that he has a connection with
13 his cousin sort of divorced from that enough to make his al-
14 Qaida. No. And when you get to the very end of Judge
15 Robertson's opinion he again summarizes all of the evidence.

16 JUDGE TATEL: Well, I'm not sure he does. And you
17 just got to my next question. I'm looking at the same part of
18 the opinion you are, page 280, right? And my question is
19 prompted by the Government's argument that, assume for
20 purposes of this question, by the way, that I completely agree
21 with you about not shifting the burden of proof, okay?

22 MS. DUNCAN: Okay.

23 JUDGE TATEL: But still, swearing bayat is relevant
24 to the ultimate decision, correct?

25 MS. DUNCAN: Correct, Your Honor.

1 JUDGE TATEL: You agree with that? Okay.

2 MS. DUNCAN: I do agree with that.

3 JUDGE TATEL: And do you see any evidence in this
4 opinion that once the District Court rejected the Government's
5 argument about shifting the burden that he still kept the
6 importance of swearing bayat on the table?

7 MS. DUNCAN: Yes, Your Honor. He did consider the
8 fact of bayat for what it was. I mean --

9 JUDGE TATEL: Well, look at page 280. You wanted to
10 talk about the conclusion, okay, here's what the Court says,
11 this is his conclusion, the Government has shown that
12 Petitioner, that Salahi is an al-Qaida sympathizer, perhaps a
13 fellow traveler, that he was in touch with al-Qaida members,
14 and that from time to time he provided sporadic support,
15 right?

16 MS. DUNCAN: To members of al-Qaida.

17 JUDGE TATEL: Yes. No mention of swearing bayat.
18 In other words, when he got down to the bottom line about his
19 judgment here he didn't seem to have taken account of the fact
20 that he swore. Now, maybe the proper finding would have been
21 look, I've taken account of bayat, he did swear it, but the
22 fact is it was pre-'92, I think it's of little value, and, you
23 know, he was a freelancer, and that's not sufficient to be
24 part of it. That might have been a perfectly defensible
25 decision that would have survived an appeal. But since he

1 didn't say that we don't know what he would think if our
2 decision in *Al-Adahi* had been decided, and it was so clear at
3 the time he wrote this opinion that he clearly had to consider
4 bayat in the contents of his final conclusion. We just don't
5 know what he would have done.

6 MS. DUNCAN: Well, Your Honor, we --

7 JUDGE TATEL: And we can't make that judgment for
8 him, can we?

9 MS. DUNCAN: Well, Your Honor, we do know that he
10 considered it.

11 JUDGE TATEL: How do we know?

12 JUDGE SENTELLE: How do we know that?

13 MS. DUNCAN: If you continue on in his conclusion --

14 JUDGE TATEL: Yes.

15 MS. DUNCAN: -- it's in the next paragraph he says,
16 he acknowledges that Salahi fought with al-Qaida in
17 Afghanistan 20 years ago.

18 JUDGE TATEL: Right.

19 MS. DUNCAN: That he was part of al-Qaida 20 years
20 ago.

21 JUDGE TATEL: Right.

22 MS. DUNCAN: So, he does include that in his overall
23 analysis of the facts.

24 JUDGE SENTELLE: Had he fought with al-Qaida he did
25 not reference the oath of bayat.

1 MS. DUNCAN: He doesn't specifically say --

2 JUDGE SENTELLE: He doesn't say.

3 MS. DUNCAN: He does not specifically say bayat.

4 JUDGE SENTELLE: Lose the specifically. He doesn't
5 say anything about the oath of bayat does he in that
6 conclusion?

7 MS. DUNCAN: But I think that he doesn't -- he does
8 not say the word bayat, Your Honor. But the time that Mr.
9 Salahi fought with al-Qaida in Afghanistan, I mean, that is a
10 central fact. To that Mr. Salahi --

11 JUDGE SENTELLE: That's a fact, and then one of the
12 other facts is when he fought with them he had already sworn
13 bayat, too.

14 MS. DUNCAN: That's correct. And he --

15 JUDGE SENTELLE: And he did not reference that fact
16 in this conclusion, did he?

17 MS. DUNCAN: He doesn't say the word bayat in
18 this --

19 JUDGE SENTELLE: He doesn't say anything about the
20 oath at all, does he? And Counsel, you can't change the
21 record.

22 MS. DUNCAN: I'm not trying to change the record --

23 JUDGE SENTELLE: Okay.

24 MS. DUNCAN: -- Your Honor, but I'm trying to
25 explain what the record supports in terms of the fighting with

1 al-Qaida.

2 JUDGE SENTELLE: And that record is that in this
3 opinion, in the conclusion he does not make any reference in
4 any fashion to the oath of bayat, right?

5 MS. DUNCAN: He does not mention the word.

6 JUDGE SENTELLE: He does not make any reference to
7 that oath at all, does he? Yes or no? Don't tell me anything
8 but yes or no.

9 MS. DUNCAN: I guess I'm trying --

10 JUDGE SENTELLE: Then you can explain, but first you
11 have to say yes or no. Does he make any reference to that
12 oath in any fashion in that conclusion?

13 MS. DUNCAN: I would say yes, Your Honor.

14 JUDGE SENTELLE: All right. Tell me where it is,
15 read it to me.

16 MS. DUNCAN: Okay. In the --

17 JUDGE SENTELLE: Read me the part about that oath,
18 Counsel.

19 MS. DUNCAN: In where he says Salahi fought with al-
20 Qaida in Afghanistan there was testimony below by Mr.
21 Salahi --

22 JUDGE SENTELLE: That's your best answer to that
23 question?

24 MS. DUNCAN: Well, let me tell you what Mr. Salahi
25 testified. He testified --

1 JUDGE SENTELLE: Never mind what Salahi testified,
2 we're talking about what's in this conclusion at this point.
3 Counsel, you can admit that it's not in there.

4 MS. DUNCAN: I admit the word is not there, Your
5 Honor.

6 JUDGE SENTELLE: Okay. Now, admit that there is no
7 reference at all of that oath in there.

8 MS. DUNCAN: I -- there --

9 JUDGE SENTELLE: It's not there, Counsel, is it?

10 MS. DUNCAN: But it's implicit in the fighting with
11 Afghanistan, Your Honor, because Mr. Salahi testified below
12 that he swore bayat in order to fight with al-Qaida against
13 the Communist in 1991, that he could not have fought had he
14 not --

15 JUDGE SENTELLE: Are those not two different facts,
16 swearing the oath and fighting?

17 MS. DUNCAN: Not on the record as it stands below.

18 JUDGE SENTELLE: Those are two different facts.

19 MS. DUNCAN: They are, but they're connected facts.

20 JUDGE SENTELLE: Those are two different facts.

21 MS. DUNCAN: They're different but connected.

22 JUDGE SENTELLE: And he finds one -- Counsel, please
23 don't try to defend a record you don't have.

24 MS. DUNCAN: I do have this record, though, Your
25 Honor. I mean, it is the testimony --

1 JUDGE SENTELLE: You have the -- you're stuck with
2 the record you've got, and he doesn't make any reference to
3 that in here.

4 MS. DUNCAN: I acknowledge that he does not
5 explicitly reference --

6 JUDGE SENTELLE: Thank you, Counsel.

7 MS. DUNCAN: -- that here.

8 JUDGE TATEL: Can I --

9 JUDGE SENTELLE: You could have saved a lot of time
10 if you'd done that sooner.

11 JUDGE TATEL: Can I -- question. My last question.
12 So, we have an interesting situation here, we have a situation
13 where we're reviewing a District Court decision that was
14 decided shortly before three really important opinions of this
15 Court about how to review these cases, right?

16 MS. DUNCAN: Correct.

17 JUDGE TATEL: It's pre-Awad, it's pre-Ben Asiad,
18 which makes it very clear that we need not a formal but a
19 flexible approach, right?

20 MS. DUNCAN: Correct.

21 JUDGE TATEL: And we also have Al-Adahi, right?
22 Which makes it clear that you have to look at it all together.
23 So, why wouldn't it make sense for an Appeals Court in this
24 situation, even though we may think that the District Court
25 under the law at that time, you know, made, let's assume

1 you're right, pretty much got it right, wouldn't it make sense
2 for purposes of consistency of our decisions to send it back
3 for a fresh look at the record under these new decisions so
4 that we have consistent, as much consistent decision-making
5 about the handling of these habeas cases as possible? What's
6 wrong with doing that?

7 MS. DUNCAN: Your Honor, the record, the opinion as
8 it stands, and the record as it stands fits well, snugly
9 within those later three opinions.

10 JUDGE TATEL: Well, assume I don't agree with you,
11 but I know that's what you think, and that's what I'd argue if
12 I were you, too. But let's assume I don't agree with you,
13 okay? And you've heard my questions about all three of these
14 cases, about *Awad* and *Al-Adahi*. And if that's my view, which
15 I understand you don't agree with, wouldn't it be appropriate
16 for the Appeals Court to ask the District Court to take
17 another look under these stands so that we have the decisions,
18 you know, we have a lot of District Courts deciding lots of
19 detainee cases, and the only way we're going to get
20 consistency here to have all the detainees treated equally
21 under the same legal principles is to make sure that when we
22 have a situation like this where we do have three new
23 decisions with three new sets of principles that it's
24 re-evaluated under them. What's the matter with that?

25 MS. DUNCAN: Your Honor, I mean, there's nothing --

1 JUDGE TATEL: Right.

2 MS. DUNCAN: -- there's nothing legally the matter
3 with it.

4 JUDGE TATEL: Right.

5 MS. DUNCAN: I think, I mean, as you recognize I
6 think it's unnecessary. It also essentially means starting
7 from scratch given Judge Robertson's retirement from the
8 bench.

9 JUDGE TATEL: Well, yes. Well, we have a big record
10 and it might be necessary to hear some more evidence. But the
11 point is we would have, we would then have a decision, and it
12 still might come out your way because you're confident that it
13 meets those standards. We would have a decision that meets
14 the D.C. Circuit's most recent standards, and then we'd be
15 sure also that this detainee will be treated the same way as
16 other detainees by other District Courts. See what I mean?

17 MS. DUNCAN: I understand what you're saying.

18 JUDGE TATEL: Yes.

19 MS. DUNCAN: We would ask the Court to first
20 consider --

21 JUDGE TATEL: Yes.

22 MS. DUNCAN: -- under Judge Robertson's factual
23 findings and giving them the deference to which they are --

24 JUDGE TATEL: Right.

25 MS. DUNCAN: -- due, and under those three cases

1 it's our position, of course, that --

2 JUDGE TATEL: Right.

3 MS. DUNCAN: -- we win.

4 JUDGE TATEL: I understand.

5 MS. DUNCAN: And we have no need to go back --

6 JUDGE TATEL: I completely --

7 MS. DUNCAN: -- down, but --

8 JUDGE TATEL: I understand that. Right.

9 MS. DUNCAN: -- I understand what you're saying,

10 Your Honor.

11 JUDGE TATEL: Yes. But you get my point, right?

12 MS. DUNCAN: I do understand your --

13 JUDGE TATEL: Yes.

14 MS. DUNCAN: -- point, Your Honor.

15 JUDGE TATEL: Okay.

16 JUDGE BROWN: In your exchange with the Chief Judge

17 you said that there were, these facts were connected, bayat

18 and the fighting in Afghanistan. But is it the case that

19 every al-Qaida sympathizer who fought in Afghanistan had to

20 swear bayat?

21 MS. DUNCAN: I don't know the answer to that, Your
22 Honor. What I know is that Mr. Salahi testified below that he
23 swore bayat because he understood if he didn't he wouldn't be
24 able to fight with al-Qaida against the Communist government
25 in 1991. That was his understanding of the oath.

1 JUDGE SENTELLE: Okay. If there's no further
2 questions, I realize rebuttal would be in order, but I -- do
3 we need to have a classified session?

4 JUDGE TATEL: I don't think so. Do you?

5 JUDGE SENTELLE: Right now it doesn't sound like it.

6 JUDGE TATEL: Janice?

7 JUDGE SENTELLE: Do you think we need a classified
8 session? Okay. Let's go directly to rebuttal then in this,
9 one of the -- unless one of Counsel wishes to ask us to go
10 into classified session. We have ruled that we will go into
11 it if it's needed, but --

12 MS. DUNCAN: Your Honor, may I consult with my co-
13 counsel?

14 JUDGE SENTELLE: Okay. We'll go ahead and have a
15 rebuttal then, and then you can consult. I was thinking we
16 might not go into rebuttal, but we'll go ahead and go into
17 rebuttal and then you can consult.

18 MS. DUNCAN: Thank you, Your Honor.

19 JUDGE SENTELLE: Come ahead then, Counsel.

20 ORAL ARGUMENT OF AUGUST E. FLENTJE, ESQ.

21 ON BEHALF OF THE APPELLANTS

22 MR. FLENTJE: May it please the Court. I just want
23 to take one last stab at burden shifting. Judge Tatel, you
24 expressed concern about how the nature of al-Qaida has
25 changed, and we would say that is certainly relevant to

1 whether Salahi has shown convincingly that he left the group,
2 that and things like the passage of time, and absence of al-
3 Qaida associations, but it's not a reason not to shift the
4 burden as a legal matter. Once we have shown him to be a
5 formal member of the group, and I think at any point in time
6 it would be some, there's some obligation for him to come and
7 say look, no, actually I've left, I'm doing other things now,
8 and I'm no longer in the group. And here we don't have that.
9 As --

10 JUDGE SENTELLE: Are you contending that he had to
11 formally go to al-Qaida and tell them he quit?

12 MR. FLENTJE: Absolutely not. There are, I think --

13 JUDGE SENTELLE: Okay.

14 MR. FLENTJE: -- a number of ways you can --

15 JUDGE SENTELLE: I misunderstood what you just said,
16 then.

17 MR. FLENTJE: No, he's telling the Court I've left
18 the group.

19 JUDGE SENTELLE: Okay.

20 MR. FLENTJE: He's not telling al-Qaida he's left
21 the group.

22 JUDGE SENTELLE: Well, he did tell the Court that he
23 quit the group, didn't he?

24 MR. FLENTJE: Yes, and that's --

25 JUDGE SENTELLE: Okay.

1 MR. FLENTJE: -- what the Court --

2 JUDGE SENTELLE: So, he made it that far.

3 MR. FLENTJE: Yes. And we submit that the Court
4 didn't really buy that completely. And, you know, he
5 continued to voluntarily affiliate, and that's the words from
6 *Ben Asiad* with al-Qaida as al-Qaida issued its fatwa
7 Americans, and as it, after that fatwa he --

8 JUDGE TATEL: Are you arguing this on your rebuttal
9 because you think you need to shift the burden to win this
10 case?

11 MR. FLENTJE: Absolutely not, Your Honor. I mean --

12 JUDGE SENTELLE: Okay.

13 JUDGE TATEL: Okay.

14 MR. FLENTJE: -- shifting the burden is sort of a
15 small piece. I mean, I think effective --

16 JUDGE SENTELLE: Right. Is that really proper
17 rebuttal, even?

18 MR. FLENTJE: Sorry, Your Honor.

19 JUDGE SENTELLE: Yes. Unless my colleagues have
20 further questions I think your time is now expired. I'll give
21 everybody one more chance to ask us to go into classified
22 session. Take a minute if you need to.

23 MR. FLENTJE: The Government does not think --

24 MS. DUNCAN: And Your Honor, neither do we.

25 JUDGE SENTELLE: I'm sorry? I don't hear well.

1 MS. DUNCAN: Your Honor, we don't see the need to go
2 into a classified session.

3 JUDGE SENTELLE: All right. Thank you, Counsel.

4 MS. DUNCAN: Thank you, Your Honor.

5 JUDGE SENTELLE: It doesn't seem to me we need it,
6 so we'll submit the case and take recess.

7 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

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

A handwritten signature in cursive script that reads "Paula Underwood".

Paula Underwood

October 5, 2010

DEPOSITION SERVICES, INC.