

Testimony of Susan Baker Manning**Before the****SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND
OVERSIGHT
HOUSE COMMITTEE ON FOREIGN AFFAIRS****Hearing on****Exploring the Nature Uighur
Nationalism: Freedom Fighters or
Terrorists?****June 16, 2009**

Good morning Chairman Delahunt, Ranking Member Rohrabacher, and all members of the Subcommittee. My name is Susan Baker Manning, and I am a partner with Bingham McCutchen. I want to thank you for holding this hearing—both for me, for my four clients recently freed to Bermuda, and for the 13 innocent Uighur men who languish in Guantanamo. I am extremely grateful for your leadership in examining the important issues before the Subcommittee today, including the role of Chinese government propaganda in rationalizing the detention of the Uighurs at Guantanamo Bay.

For over four years a team of Bingham attorneys and staff have acted as *pro bono* counsel to two of the thirteen Uighur men incarcerated today at Guantanamo Bay, as well as all four Uighur men who were granted refuge in Bermuda last week. We have litigated their cases vigorously at every level of the federal courts, including the Supreme Court where we are currently seeking review. We have become intimately familiar with what is—and, equally important, what is *not*—supported by the evidence. Every federal court that has looked at the evidence has ruled for the Uighurs.

The first federal court to do so was the United States Court of Appeals for the District of Columbia Circuit. It issued a detailed opinion in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), analyzing the administration's evidence (classified and unclassified) regarding the East Turkistan Islamic Movement ("ETIM"). The unanimous panel—made up of two Republican appointees and one Democratic appointee—vacated Huzaifa Parhat's enemy combatant classification. It held that there was no evidence that Mr. Parhat was a member of ETIM, no credible evidence that ETIM was associated with either al Qaeda or the Taliban, nor credible evidence that ETIM had ever fought the U.S. The Court rejected the government's ETIM evidence as wholly inadequate and likely little more than anti-Uighur propaganda by the Chinese government.

The D.C. Circuit ordered the government to release Mr. Parhat, to transfer him, or conduct another CSRT. The government conceded that there was no purpose to holding

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

another CSRT for Mr. Parhat. Nevertheless, it imprisoned him at Guantanamo until last Thursday when it finally transferred him and three others to Bermuda for release.

Background

Before I discuss the *Parhat* case in more detail, I'd like to remind the Subcommittee of some of the undisputed facts in the Uighur cases. In 2002, twenty-two Uighurs were sent to Guantanamo. Most had been present together in a Uighur village in the mountains of Afghanistan. All were sold to U.S. forces by bounty hunters. In 2005, five of the twenty-two were determined not to be enemy combatants, while the remaining seventeen were mislabeled enemy combatants even though the facts were the same as to all. However, the seventeen Uighur men have been exonerated repeatedly—by the U.S. military, by the Bush administration, and by multiple federal courts. Specifically:

- The military itself has cleared all of the Uighurs for release. Most of them were cleared for release *six years ago*, in 2003.
- The Bush administration has conceded that none of the seventeen Uighur men classified as “enemy combatants” was in fact enemy combatant. It made that concession in the fall of 2008 after imprisoning them for over seven years.
- Noting the government’s concession that none of the Uighurs are enemy combatants, the U.S. District Court for the District of Columbia held that there is no lawful basis for imprisoning noncombatant Uighurs at Guantanamo. Although the district court’s release order was overturned on appeal, the finding that the Uighurs’ imprisonment is unlawful remains undisturbed.
- It is recognized at every level of the U.S. government that the only reason the Uighurs have been imprisoned long after being cleared for release is that they cannot be lawfully returned to China, where they would likely be tortured or killed.
- In 2006, the government released five of the Uighurs to Albania on the eve of an appellate court hearing regarding the legality of their continued detention. They have been living peaceful productive lives ever since. One was just granted permanent asylum in Sweden.

There has been an enormous amount of misinformation spread recently about the Uighurs. But the basic facts of these cases are well known and beyond dispute. Let me talk about those facts for a moment.

- The Uighurs are not terrorists. None has ever engaged in or planned any sort of terrorist activity, or been accused of terrorist activity. *This is undisputed.*
- None of the Uighurs has ever engaged in hostilities against the U.S. None has ever contemplated engaging in hostilities against the U.S.

None has even been accused of contemplating hostiles against the U.S. *This too is undisputed.*

- Most of the Uighurs had never even heard of the ETIM until they were questioned about it by U.S. interrogators. Nor had they heard of al Qaeda.
- None of the Uighurs have undergone terrorist training. Many of them were previously accused of having obtained “military training” because they were shown how to break down and reassemble a single Kalashnikov rifle. Some, but not all, fired two or three bullets at a target. To call that “military training” or “terrorist training” is absurd. In this country, such conduct would be protected by the Second Amendment. In Afghanistan—a country that had no effective government, much less a police force, in 2001—is certainly unremarkable.
- None were in a “terrorist training” camp. In the fall of 2001, eighteen Uighurs—including all of the men now living peacefully in Albania or Bermuda—were in a Uighur expatriate village in the mountains of Afghanistan. It is undisputed that the so-called “camp” had only Uighurs. There were no Taliban or al Qaeda there. Moreover, what happened there was not “training.”
- The Uighur men at Guantanamo object to the oppression of their people by the Chinese government, and to Chinese human rights abuses. But so does the U.S. government.
- ETIM was placed on the exclusion list *after* the Uighur men at Gitmo had been in U.S. custody for over a year. This was part of the Bush administration’s *quid pro quo* for China’s support of the Iraq war.

The D.C. Circuit’s *Parhat v. Gates* Opinion

When Congress purported to strip the federal courts of jurisdiction over Guantanamo *habeas* claims—an effort the Supreme Court found unconstitutional in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008)—it created a new cause of action under the Detainee Treatment Act of 2005 that allowed any detainee to challenge his classification as an enemy combatant. In 2006 my firm filed a case on behalf of Huzaifa Parhat and other Uighurs that became a lead DTA case.

Under the DTA, the D.C. Circuit had jurisdiction to consider three specific issues, one of which was whether the decision of a Combatant Status Review Tribunal (“CSRT”) to label the detainee an “enemy combatant” was supported by a preponderance of the evidence.¹ It took well over a year of DTA litigation to obtain even one page of

¹ Detainee Treatment Act of 2005 § 1005(e)(2)(C).

evidence that purported to justify the Mr. Parhat's imprisonment. When counsel finally received the records of his CSRT, we immediately moved for judgment due to the lack of evidence.

The key facts were undisputed:

- “It is undisputed that [Parhat] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies.”²
- There was “no source document evidence was introduced to indicate ... that the Detainee had actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners[.]”³
- “No evidence was introduced to support” the proposition that ETIM was focusing its efforts on the United States “or that the Detainee himself had played any role in doing so; in fact the Detainee denied that he considered the United States an enemy.”⁴
- “[T]he Tribunal was presented with no evidence that the Detainee had any involvement with any ETIM operations targeting United States’ interests or those of its allies[.]”⁵

As the Court noted, the Tribunal had based its decision to classify Mr. Parhat as an enemy combatant on its finding that he was “affiliated with forces associated with al Qaida and the Taliban (i.e., the East Turkistan Islamic Movement,) that are engaged in hostilities against the United States and its coalition partners.”⁶

² *Parhat*, 532 F.3d at 835-36. As Mr. Parhat and his companions have repeatedly stated since being freed in Bermuda, they had never even heard of al Qaeda until after they arrived in Guantanamo. See, e.g., Jonathan Kent, “We’d never heard of al Qaeda,” THE ROYAL GAZETTE (June 13, 2009), available at www.royalgazette.com/siftology.royalgazette/Article/article.jsp?articleId=7d966a73003001e§ionId=60; For Gitmo Uighurs, new life is no walk on the beach, CHRISTIAN SCIENCE MONITOR (June 15, 2009), available at <http://www.csmonitor.com/2009/0616/p06s04-woeu.html>.

³ *Id.* at 843.

⁴ Brief in Support of Motion for Judgment as a Matter of Law (unclassified), *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Jan. 7, 2009) (quoting Tribunal statement of decision).

⁵ *Id.*

⁶ *Id.* at 843 (quoting Tribunal Statement of Decision) (internal quotations omitted).

But as the Tribunal itself acknowledged, the ETIM allegation was itself not reliable. The Tribunal President wrote:

The Tribunal found the Detainee to be enemy combatant because of his *apparent* ETIM affiliation . . . (as ETIM is *apparently* associated with al Qaida and Taliban because they have received support from them), but despite the fact that the ETIM is *said to be* making plans for future terrorist activities against U.S. interests, *no source document evidence was introduced to indicate whether or how this group has actually done so, that the Detainee has actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners.*

The Court found the Tribunal's rationale for labeling Mr. Parhat an enemy combatant wanting:

The Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is "affiliated" with a Uighur independence group, and the further finding that the group was "associated" with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability. Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements.⁷

The Court rejected the Tribunal's finding as unfounded. As noted above, it was undisputed that Mr. Parhat was not a member of ETIM.⁸ As to the claims that ETIM is "associated" with al Qaeda, or that ETIM had engaged in hostiles with U.S. or coalition forces, the former administration relied on four classified documents. Although the public unclassified version of the *Parhat* opinion redacts the Court's specific discussion of these documents, its overall analysis is instructive. In short, it rejected government say-so.

⁷ *Id.* at 836 (emphasis added). *See also id.* at 834 (also noting lack of evidence connecting Mr. Parhat with ETIM).

⁸ *Id.* at 843 ("no source document evidence was introduced to indicate ... that [Parhat] had actually joined ETIM"). The Court did not rule upon the government's guilt-by-association theory that being present in the same Uighur village as an alleged ETIM member could constitute an "affiliation" between Parhat and ETIM. *See id.* at 844.

The documents make assertions—often *in haec verba*—about activities undertaken by ETIM, and about that organization’s relationship to al Qaida and the Taliban. The documents repeatedly describe those activities and relationships as having “reportedly” occurred, as being “said to” or “reported to” have happened, and as things that “may” be true or are “suspected of” having taken place. But in virtually every instance, the documents do not say who “reported” or “said” or “suspected” those things.[] Nor do they provide any of the underlying reporting upon which the documents’ bottom-line assertions are founded, nor any assessment of the reliability of that reporting.⁹

The Court was unmoved by the government claim that repetition of these assertions was an indication of their reliability: “Lewis Carroll notwithstanding, the fact that the government has “said it thrice” does not make an allegation true.”¹⁰ Nor did it find persuasive the government claim that assertions must be true because they appeared in Defense Department and State Department documents. “This comes perilously close to suggesting that whatever the government says must be treated as true[.]”¹¹

The D.C. Circuit made it clear that it would act as a court of law, insist that evidentiary standards be met, and—importantly—not accept Chinese propaganda uncritically:

Insistence that the Tribunal and court have an opportunity to assess the reliability of the record evidence is not simply a theoretical exercise. Parhat contends that the ultimate source of key assertions in the four intelligence documents is the government of the People’s Republic of China, and he offers substantial support for that contention.[] Parhat further maintains that Chinese reporting on the subject of the Uighurs cannot be regarded as objective, and offers substantial support for that proposition as well.[]¹²

⁹ *Id.* at 846-47.

¹⁰ *Id.* at 848-49 (quoting Lewis Carroll, *The Hunting of the Snark* 3 (1876) (“I have said it thrice: What I tell you three times is true.”)).

¹¹ *Id.* at 849 (also noting the repeated use of qualifiers and the lack of any reliability assessment).

¹² *Id.* at 848 (classified footnotes omitted).

Because the Court found that the Tribunal’s decision was not supported by credible evidence, it vacated Mr. Parhat’s enemy combatant classification and ordered the government to “release Parhat, to transfer him, or to expeditiously convene a new Combatant Status Review Tribunal to consider evidence submitted in a manner consistent with this opinion.”¹³ On August 4, 2008, the government conceded that it would not re-CSRT Parhat.¹⁴ It imprisoned him for another year until transferring him to Bermuda for release on June 11, 2009.

Other Evidence of the U.S. Military’s Reliance on Chinese Propaganda.

Although the documents in the *Parhat* case cited by the Court with regard to Chinese propaganda were classified, at least one Uighur CSRT hearing record had an unclassified description of how ETIM had “allegedly” been involved in terrorist acts within China, and was “allegedly” connected to al Qaeda.¹⁵ The document’s source? The Chinese Information Office of the State Council. It was propaganda top to bottom—and yet it was part of the rationale for imprisoning another of my Uighur clients at Guantanamo.

The U.S. Government Conceded That None of the Uighurs are Enemy Combatants.

Every one of the Uighur men was labeled an “enemy combatant” based on the same tenuous alleged affiliation with ETIM the Court analyzed and rejected in *Parhat*. In the wake of the D.C. Circuit’s decision, the Bush administration conceded that none of the Uighur men were enemy combatants.¹⁶ It could not connect of the Uighurs at

¹³ *Id.* at 836.

¹⁴ Petition For Rehearing at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Aug. 4, 2008) (“After reviewing this Court’s decision, the government has determined that it would serve no useful purpose to engage in further litigation over his status. As the Court is aware, the government had concluded that Parhat should be cleared for release, and it has now determined that it will treat Parhat as if he were no longer an enemy combatant[.]”).

¹⁵ Combatant Status Review Tribunal hearing record for Edham Mamet (ISN 102) at Exhibit R-5 (unclassified), *Mamet v. Bush*, No. 05-1602 (D.D.C. filed Dec. 29, 2005).

¹⁶ See Government’s Motion to Enter Judgment from *Parhat v. Gates* in These Actions, With Modification, and to Remove from Oral Argument Calendar at 4, *Abdul Semet v. Gates, et al.*, Nos. 07-1509, 07-1510, 07-1511, 07-1512 (D.C. Cir. filed Aug. 18, 2008) (conceding non-combatant status as to four Uighur men); Judgment, *Abdul Semet v. Gates, et al.*, Nos. 07-1509, 07-1510, 07-1511, 07-1512 (D.C. Cir. Sept. 12, 2008) (granting government motion and vacating enemy combatant classification of four Uighur men); Notice Of Status, *In re Guantanamo Bay Detainee Litigation* (a.k.a. *Kiyemba v. Bush*), Misc. No. 08-442 (TFH), 05-1509 (RMU), 05-1602 (RMU), 05-1704 (RMU), 05-2370 (RMU), 05-2398 (RMU), and 08-1310 (RMU) (D.D.C. filed Sept. 30, 2008) (conceded that none of the 12 other Uighur men were enemy combatants either).

Guantanamo with ETIM, and made no attempt to prove any connection between ETIM and our enemies. Four of the men have been released to Bermuda, but the other thirteen remain imprisoned at Guantanamo.

President Obama specifically noted in his May 21, 2009 on detainee issues that the courts had ordered the executive branch to release the 17 Uighur men. The President also confirmed his intention to release the cleared Uighur men: “The United States is a nation of laws, and we must abide by these rulings.”

I submit to you that the President is exactly right. If we respect the Constitution and the rule of law, this country cannot continue to knowingly imprison innocent men for even another day. Chinese propaganda was used to rationalize the imprisonment of men who should never have been at Guantanamo at all. Releasing all of the Uighurs *now* is one of the most important steps the American government could take to reject China’s manipulation of the “war on terror,” and its false claim that Uighur political dissent is a form of terrorism.

Conclusions and Recommendations

The prison at Guantanamo Bay has become notorious—the best recruiting poster our enemies could ever have imagined. President Obama has ordered that it be closed, and has made clear that his administration will work with Congress as it takes the necessary steps to carry out his Executive Order. But the issues facing the administration and Congress are not simple, and are made more difficult by misinformation about the detainees. This Subcommittee’s hearings are an important tool for bringing the truth to light.

My colleagues and I have known the Uighur men for several years now. But until a few days ago, the only Americans who did were their guards and us. To this day the Department of Defense refuses to allow any detainee to speak with the press or have his picture taken. The Uighurs, like other men at Guantanamo, are faceless—and therefore profoundly dehumanized.

Now that four Uighur men have been released to Bermuda, the world can see them for who they really are. Chairman Delahunt and Ranking Member Rohrabacher, I urge you to go to Bermuda to meet the Uighur men. Talk with them yourselves. It is critical that Members of Congress from both sides of the aisle understand who we are really talking about here. Only then will Congress be able to make fully informed decisions on critical issues related to the upcoming closure of Guantanamo Bay, and to our nation’s detention policies going forward.

Thank you for this opportunity to speak with you.

Attachments:

- *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (unclassified opinion)
- Combatant Status Review Tribunal hearing record for Edham Mamet (ISN 102) at Exhibit R-5 (unclassified), *Mamet v. Bush*, No. 05-1602 (D.D.C. filed Dec. 29, 2005) (relying on and citing Chinese government propaganda re ETIM)