

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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LAKHDAR BOUMEDIENE, ET AL., : Docket No. CV04-1166 (RJL)  
 :  
 Petitioners, : November 20, 2008  
 :  
 : 11:00 a.m.  
 v. :  
 :  
 GEORGE W. BUSH, ET AL., :  
 :  
 :  
 Respondents. :  
 . . . . . :

TRANSCRIPT OF OPEN HABEAS OPINION HEARING  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioners: STEPHEN H. OLESKEY, ESQ.  
 MARK C. FLEMING, ESQ.  
 ROBERT C. KIRSCH, ESQ.  
 GREGORY P. TERAN, ESQ.  
 JOSHUA D. JACOBSON, ESQ.  
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 60 State Street  
 Boston, Massachusetts 02109  
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 399 Park Avenue  
 New York, New York 10022

(Appearances continued on the next page.)

1 APPEARANCES (continued):

2 For the Petitioners SETH P. WAXMAN, ESQ.  
(continued): PAUL R.Q. WOLFSON, ESQ.  
3 ROBERT J. McKEEHAN, ESQ.  
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6 For the Respondents: GREGORY KATSAS, ESQ.  
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9

NICHOLAS OLDHAM, ESQ.  
10 DAVID C. BLAKE, ESQ.  
TERRY MARCUS HENRY, ESQ.  
11 U.S. Department of Justice  
20 Massachusetts Avenue, N.W.  
12 Washington, D.C. 20530

13

14 Court Reporter: PATTY ARTRIP GELS, RMR  
15 Official Court Reporter  
16 Room 4700-A U.S. Courthouse  
17 Washington, D.C. 20001  
18 (202) 962-0200

19

20

21 ALSO PRESENT: Masud Hasnain, Interpreter

22

23

24 Proceedings reported by machine shorthand, transcript produced  
25 by computer-aided transcription.

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

2 COURTROOM DEPUTY: Civil Action number 04-1166.

3 Lakdhar Boumediene, Mohammed Nechle, Saber Lahmar, Mustafa Ait  
4 Idir, Belkacem Bensayah, Hadj Boudella versus George W. Bush,  
5 et all.6 Counsel, can you please come forward and identify  
7 yourselves for the record?8 MR. OLDHAM: Good morning, your Honor. Nick Oldham  
9 from the Department of Justice on behalf of the United States.  
10 With me is Greg Katsas, Assistant Attorney General, John  
11 O'Quinn, Deputy Assistant Attorney General, Terry Henry, Fred  
12 Young and Dave Blake.

13 THE COURT: Welcome.

14 MR. OLESKEY: Good morning, your Honor. Stephen  
15 Oleskey for the Petitioners with Robert Kirsch, Seth Waxman,  
16 Paul Wolfson, Greg Teran, Mark Fleming, Josh Jacobson, Allyson  
17 Portney, Jeff Gleason, Rob McKeehan, Lynne Soutter, Doug Curtis  
18 and Paul Winke.19 THE COURT: Welcome. And I understand that although  
20 we  
21 can't hear them, our telecommunication line is in place and  
22 that -- and the detainees are in a position in Guantanamo to  
23 hear the Court's ruling today. As an added precaution, we have  
24 provided the staff at Guantanamo with the necessary telephone  
25 numbers to alert us here in the courtroom immediately if there  
26 is a break in communication.

1           And, of course, we have a tape-recording of this  
2 conversation, this hearing, if all else goes wrong.

3           THE INTERPRETER: Can you repeat that, Judge.

4           THE COURT: If all else should go wrong. Hopefully  
5 not. All right.

6           Before I announce my ruling which has been reduced to  
7 a  
8 memorandum order that will be placed on the web later this  
9 morning or early this afternoon, I would be remiss if I did not  
10 acknowledge for the record and for those assembled today how  
11 hard both sides have worked under constant deadlines to file  
12 the  
13 necessary pleadings and make the appropriate arguments to  
14 assist  
15 this Court in resolving the myriad of legal and logistical  
16 issues that have been raised in this case.

17           In addition, notwithstanding the occasional  
18 frustration  
19 that I have endured with the pace of certain bureaucratic  
20 efforts to resolve certain logistical questions, the Government  
21 agencies involved here have bent over backwards under extremely  
22 tight deadlines to meet the Court's orders.

23           This is especially laudable when you consider that  
24 these are not the types of problems that agencies of this kind  
25 are normally asked to deal with during a war. For, in the  
26 final

1 analysis, the practical effect of the Boumediene decision is to  
2 superimpose the habeas litigation process into the national  
3 security process that was already up and running critical to  
4 our  
5 war effort.

1           It has been the challenge and the honor of the counsel  
2           and this Court to try to craft an unprecedented system of  
3           procedures that fairly balance the national security interests  
4           of the United States during the war with the civil liberty  
5           interests of these aliens to be free from unlawful detention as  
6           enemy combatants.

7           Only time will tell whether what we did was prudent.  
8           Let me turn to my opinion.

9           Petitioners are six prisoners at the U.S. naval base  
10          at  
11          Guantanamo Bay, Cuba, and they allege that they are being  
12          unlawfully detained by Respondents George W. Bush, Secretary of  
13          Defense Robert Gates, Army Brigade General Jay Hood, and Army  
14          Colonel Nelson Cannon.

15          On November 6th this Court commenced habeas corpus  
16          hearings for Petitioners Lakdhar Boumediene, Mohammed Nechle,  
17          Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir and Saber  
18          Lahmar. That morning, counsel for both parties made  
19          unclassified opening statements in a public hearing.

20          As a result of certain technical difficulties, the  
21          Petitioners listened to a tape-recording of these arguments the  
22          following day and received an Arabic translation of the  
23          transcript of the proceeding shortly thereafter. As a result  
24          of  
25          certain technical difficulties, the Petitioners listened to a

- 1 tape-recording of these arguments the following day and
- 2 received
- 3 an Arabic translation of the transcript of the proceedings

1       shortly thereafter.

2               On the afternoon of November 6th, the Court convened a  
3       closed door session with counsel to begin reviewing certain  
4       classified evidence being relied upon by both sides in this  
5       case. These closed-door sessions continued throughout the  
6       remaining six days of hearings. On November 12th, 2008, the  
7       Government rested its case in chief.

8               Petitioners' counsel thereafter put two of the  
9       detainees on the stand via video teleconference from Guantanamo  
10      Bay, Cuba. The detainees, Mr. Ait Idir and Mr. Boudella, were  
11      questioned by their counsel and cross-examined by Government  
12      counsel. Thereafter, the Government excised its right to put  
13      on  
14      a rebuttal case. Its rebuttal focused primarily on evidence  
15      relating to Mr. Bensayah.

16              On November 14th, 2008, counsel for Petitioners and  
17      the  
18      Government presented nearly four-and-a-half hours of closing  
19      arguments.

20              Once again, because the information discussed in those  
21      arguments was overwhelmingly classified, they had to be held in  
22      closed-door session. As a result, neither the public nor the  
23      Petitioners were able to listen to those arguments.

24              At the end of the final arguments, the Court informed  
25      the parties that it would hold a public hearing today to  
26      announce its decision. A closed hearing will be held hereafter



1 to discuss in greater detail the Court's reasoning based on the

1 classified evidence relevant to these six detainees.

2 At this point, in the Court's opinion, there is a  
3 five-page statement of relevant, factual and procedural  
4 background of this case.

5 In light of the complexity of the translation process,  
6 I will forgo going over that now. It will be part of the  
7 record

8 and it will be part of the memorandum order that will be on the  
9 web later today.

10 Much of what is stated in that background and  
11 procedural section are facts and procedures that were  
12 previously

13 discussed in the Court's last public session. But let me point  
14 to one paragraph in specific that may be of value to those  
15 listening today.

16 To say the least, this is an unusual case. At the  
17 time

18 of their arrest, all six Petitioners, who are native Algerians,  
19 were residing in Bosnia and Herzegovina, over a thousand miles  
20 away from the battlefield in Afghanistan.

21 Petitioners held Bosnian citizenship or lawful  
22 permanent residence, as well as their native Algerian  
23 citizenship. All six men were arrested by Bosnian authorities  
24 in October 2001 for their alleged involvement in a plot to bomb  
25 the U.S. embassy in Sarajevo.

1           The Respondents have since withdrawn that allegation

2 as

3 a basis for the Petitioners' detention.

4           On January 17th, 2002, upon their release from prison

1 in Sarajevo, Petitioners were detained by Bosnian authorities  
2 and U.S. personnel. Petitioners were transported to the U.S.  
3 naval station at Guantanamo Bay and have remained there since  
4 their arrival on January 20, 2002.

5 In July 2004, after the Supreme Court's decision in  
6 Rasul versus Bush, detainees filed on their own behalf, and  
7 through certain relatives as their next friend, a petition for  
8 a  
9 writ of habeas corpus alleging, among other things, that the  
10 U.S. Government holds them in violation of the Constitution and  
11 various U.S. and international laws.

12 The Government moved to dismiss this action in October  
13 of 2004. In January 2005, this Court granted the Government's  
14 Motion to Dismiss, holding that Guantanamo Bay detainees had no  
15 rights that could be vindicated in a habeas corpus proceeding.

16 After intervening Supreme Court precedent and  
17 legislation changed the legal landscape in which these  
18 petitions  
19 were brought, the Supreme Court on June 12th, 2008, reversed  
20 this Court and held in Boumediene versus Bush that Guantanamo  
21 detainees are entitled to the privilege of habeas corpus to  
22 challenge the legality of their detention.

23 Although the Supreme Court made it clear that the  
24 privilege of habeas corpus entitles a prisoner to a meaningful  
25 opportunity to demonstrate that he is being held pursuant to  
26 the

1 erroneous application or interpretation of relevant law --

2 THE INTERPRETER: Can you please repeat the last

1 sentence?

2 THE COURT: -- to demonstrate that he is being held  
3 pursuant to the erroneous application or interpretation of  
4 relevant law, it left largely to the habeas court's discretion  
5 to craft, in the first instance, the framework in which these  
6 unique cases would proceed. Indeed, the Supreme Court even  
7 delegated the decision as to which definition of enemy  
8 combatant  
9 should govern these proceedings.

10 Above all, the Supreme Court made it very clear that  
11 the detainees were entitled to a prompt habeas corpus hearing.

12 Under the Case Management Order issued by this Court,  
13 the Government bears the burden of proving by a preponderance  
14 of  
15 the evidence the lawfulness of the Petitioners' detention. The  
16 Government argues that Petitioners are lawfully detained  
17 because  
18 they are enemy combatants who can be held pursuant to the  
19 authorization for the use of military force and the President's  
20 powers as Commander-in-Chief.

21 The following definition of enemy combatant governs  
22 the  
23 proceedings in this case: An enemy combatant is an individual  
24 who was part of or supporting Taliban or al-Qaeda forces or  
25 associated forces that are engaged in hostilities against the  
26 United States or its coalition partners. This includes any

1 person who has committed a belligerent act or has directly  
2 supported hostilities in aid of enemy armed forces.

3 Accordingly, the question before this Court is whether

1 the Government has shown by a preponderance of the evidence  
2 that

3 each Petitioner is being lawfully detained; that is, that each  
4 is an enemy combatant under the definition adopted by this  
5 Court.

6 The Government sets forth two theories as to why these  
7 men should be lawfully detained as enemy combatants. First, as  
8 to all six Petitioners, the Government contends that they  
9 planned to travel to Afghanistan in late 2001 and take up arms  
10 against U.S. and allied forces. Additionally, as to Belkacem  
11 Bensayah alone, the Government contends that he is an al-Qaeda  
12 member and facilitator.

13 The Court will address each of these theories in turn.

14 THE INTERPRETER: Can you say again?

15 THE COURT: The Court will address each of these  
16 theories in turn.

17 First, with respect to the plan to travel to  
18 Afghanistan to engage U.S. forces, the Government alleges that  
19 all six Petitioners planned to travel to Afghanistan to take up  
20 arms against U.S. and allied forces, and that such conduct  
21 constitutes support of al-Qaeda under the enemy combatant  
22 definition adopted by this Court.

23 Petitioners disagree. Petitioners contend that the  
24 Government has not shown by a preponderance -- that the  
25 Government has not shown by a preponderance of the evidence  
26 that



1 any of the Petitioners planned to travel to Afghanistan to

1 engage U.S. forces. And even if the Government had shown that  
2 Petitioners had such a plan, a mere plan unaccompanied by any  
3 concrete acts is not, as a matter of law, supporting al-Qaeda  
4 within the meaning of the Court's definition of enemy  
5 combatant.

6 For the following reasons, the Court finds that the  
7 Government has failed to show by a preponderance of the  
8 evidence

9 that any of the Petitioners, other than Mr. Bensayah, either  
10 had  
11 or committed to such a plan.

12 To support its claim that Petitioners had a plan to  
13 travel to Afghanistan to engage U.S. and allied forces, the  
14 Government relies exclusively on the information contained in a  
15 classified document from an unnamed source. This source is the  
16 only evidence in the record directly supporting each detainee's  
17 alleged knowledge of or commitment to the supposed plan.

18 And while the Government has provided some information  
19 about the source's credibility and reliability, it has not  
20 provided the Court with enough information to adequately  
21 evaluate the credibility and reliability of this source's  
22 information.

23 For example, the Court has no knowledge under -- what  
24 circumstances under which the source obtained the information  
25 as  
26 to each petitioner's alleged knowledge and intentions. In

1        addition, the Court was not provided with adequate  
2        corroborating  
3        evidence that these Petitioners knew of and were committed to  
4        such a plan.

1           Because I cannot on the record before me adequately  
2       assess the credibility and reliability of the sole source  
3       information relied upon for five of the Petitioners to prove an  
4       alleged plan by them to travel to Afghanistan to engage U.S.  
5       and  
6       coalition forces, the Government has failed to carry its burden  
7       with respect to these Petitioners.

8           Because the Government's case rests almost entirely on  
9       classified information, I cannot, unfortunately, be more  
10      specific about the deficiencies of the Government's case at  
11      this  
12      time.

13           Suffice it to say while the information in the  
14      classified intelligence report relating to the credibility and  
15      reliability of the source was undoubtedly sufficient for the  
16      intelligence purposes for which it was prepared, it is not  
17      sufficient for the purposes for which a habeas corpus court  
18      must  
19      now evaluate it.

20           To allow enemy combatancy to rest on so thin a reed --

21           THE INTERPRETER:   Come again.

22           THE COURT:   -- to rest on so thin a reed would be  
23      inconsistent with this Court's obligation under the Supreme  
24      Court's decision in Hamdi to protect Petitioners from the risk  
25      of erroneous detention.

1                   Because the Court has concluded that the Government  
2   has  
3   not met its burden with respect to the existence of a plan to  
4   travel to Afghanistan to engage U.S. and coalition forces by

1       these five Petitioners, the Court need not address the issue of  
2       whether commitment to such a plan would be enough as a matter  
3       of  
4       law --

5               THE INTERPRETER:   Could you say that again?

6               THE COURT:   -- would be enough as a matter of law to  
7       constitute support under the Court's definition of enemy  
8       combatant.

9               Thus, because the Government has failed to establish  
10      by  
11      a preponderance of the evidence the plan that is the exclusive  
12      basis for the Government's claim that Messrs. Boumediene,  
13      Nechle, Boudella, Ait Idir, and Lahmar are enemy combatants,  
14      the  
15      Court must and will grant their petitions and order their  
16      release.

17              As to Mr. Bensayah, however, the Government has met  
18      its  
19      burden by providing additional evidence that sufficiently  
20      corroborates its allegations from this unnamed source that  
21      Bensayah is an al-Qaeda facilitator.

22              The Government contends that Mr. Bensayah planned to  
23      go  
24      to Afghanistan to both take up arms against U.S. and allied  
25      forces and to facilitate the travel of unnamed others to  
26      Afghanistan and elsewhere.   In order to establish Bensayah's

1     role as an al-Qaeda facilitator, the Government depends on the  
2     same intelligence information described above, but also puts  
3     forth a series of other intelligence reports, based on a  
4     variety  
5     of sources and evidence, which it contends corroborate the

1 facilitator allegation.

2 I agree. Although the Court is, once again,

3 restrained

4 in its ability to discuss and analyze the classified

5 information

6 relied upon by the Government, the Court can describe the

7 information in general terms. The Government provides credible

8 and reliable evidence linking Mr. Bensayah to al-Qaeda and,

9 more

10 specifically, to a senior al-Qaeda facilitator.

11 The Government additionally provides credible and

12 reliable evidence demonstrating Mr. Bensayah's skills and

13 abilities to travel between and among countries using false

14 passports in multiple names.

15 Finally, the Government creates sufficient doubt as to

16 Bensayah's credibility that his proposed explanations in

17 response to the Government's allegations should not, in this

18 Court's judgment, be credited.

19 For all of these reasons and more, the Court concludes

20 that the Government has established by a preponderance of the

21 evidence that it is more likely than not that Mr. Bensayah not

22 only planned to take up arms against the United States, but

23 also

24 planned to facilitate the travel of unnamed others to do the

25 same.

26 There can be no question that facilitating the travel



1 of others to join the fight against the United States in  
2 Afghanistan constitutes direct support to al-Qaeda in  
3 furtherance of its objectives, and that this amounts to support

1 within the meaning of the enemy combatant definition governing  
2 this case.

3 The Court accordingly holds that Belkacem Bensayah is  
4 being lawfully detained by the Government as an enemy  
5 combatant.

6 As such, the Court must and will deny Bensayah's petition for a  
7 writ of habeas corpus, and will not order his release.

8 So for all of the foregoing reasons and for the  
9 reasons

10 set forth on the record at the closed hearing to be held this  
11 day, it is hereby ordered Petitioner Belkacem Bensayah's  
12 petition for a writ of habeas corpus is denied.

13 It is further ordered that Petitioner Lakdhar  
14 Boumediene's petition for a writ of habeas corpus is granted.

15 It is further ordered that Petitioner Mohammed  
16 Nechle's

17 petition for a writ of habeas corpus is granted.

18 It is further ordered that Petitioner Hadj Boudella's  
19 petition for a writ of habeas corpus is granted.

20 It is further ordered that Petitioner Mustafa Ait  
21 Idir's petition for a writ of habeas corpus is granted.

22 It is further ordered that Petitioner Saber Lahmar's  
23 for a writ of habeas corpus is granted.

24 And it is further ordered that the Respondents are  
25 directed to take all necessary and appropriate diplomatic steps  
26 to facilitate the release of Petitioners Boumediene, Nechle,

1 Boudella, Ait Idir and Lahmar forthwith.

2 Now, I want to raise a note of caution to those who

3 may

1 be listening or to those who will read my ruling. This is a  
2 unique case. Few, if any others, will be factually like it.  
3 Few, if any others, will be factually like it. Nobody should  
4 be  
5 lulled into a false sense that all of the Government's cases  
6 will look like and be like this one. If there is any lesson  
7 that the parties and the Court have learned, these cases are  
8 unique and the habeas process must be flexible.

9 The practical effect of the Supreme Court's decision  
10 to  
11 superimpose the habeas process into the world of intelligence  
12 gathering is to create a virtually limitless complex of novel  
13 and difficult questions. As a result, the precedential value,  
14 if any, should be and is -- should be and is limited to these  
15 cases.

16 One last point I would like to make.

17 The Court appreciates fully that the Government has a  
18 right to appeal its decision as to these five detainees whose  
19 petitions I have granted. I have a right, too, to appeal to  
20 the  
21 senior-most leadership at the Department of Justice, Department  
22 of Defense, and the CIA and other intelligence agencies. My  
23 appeal to them is to strongly urge them to take a hard look at  
24 the evidence, both presented and lacking, as to these five  
25 detainees. Seven years of waiting for our legal system to give  
26 them an answer to a question so important, in my judgment, is

1 more than plenty.

2 The appellate process for these five detainees would,

1 at a minimum, constitute another 18 months to two years of  
2 their  
3 lives. It seems to me that there comes a time when the desire  
4 to resolve novel, legal questions and decisions which are not  
5 binding on my colleagues pales in comparison to effecting a  
6 just  
7 result based on the state of the record.

8 Detainees' counsel will undoubtedly file an appeal  
9 with  
10 regard to my decision denying Mr. Bensayah's petition. That  
11 appeal will provide more than enough opportunity for both sides  
12 to challenge the novel, legal rulings that this Court has had  
13 to  
14 make.

15 I appeal to the senior leadership of those agencies to  
16 bring to an end this process as to these five detainees. We  
17 will stand in recess.

18 (Whereupon, at 11:59 a.m., the proceedings were  
19 concluded.)

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CERTIFICATE OF REPORTER

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I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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