

No. __-__

IN THE
Supreme Court of the United States

UTHMAN ABDUL RAHIM MOHAMMED UTHMAN,

Petitioner,

v.

BARACK OBAMA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

S. William Livingston
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

David H. Remes
Counsel of Record
Appeal For Justice
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508

September 2011

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“AUMF”), authorizes the President to detain, indefinitely and possibly for the rest of his life, an individual who was not shown to have fought for al Qaeda, trained to fight for al Qaeda, or received or executed orders from al Qaeda, and was not claimed to have provided material support to al Qaeda.

2. Whether the AUMF, as applied by the court of appeals for the D.C. Circuit, violates the command of *Boumediene v. Bush*, 553 U.S. 723, 768 (2008), that “[t]he habeas court . . . [will] . . . conduct a meaningful review of . . . the Executive’s power to detain” an individual, and violates the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellee in the court below is Uthman Abdul Rahim Mohammed Uthman.

Respondents in this Court and the appellants in the court below are Barack Obama, President of the United States; Leon E. Panetta, Secretary of Defense; David B. Woods, Commander, Joint Task Force, GTMO; Donnie L. Thomas, Commander, Joint Detention Operations Group, JTF-GTMO.*

* Pursuant to Federal Rule of Civil Procedure 25(d), Petitioner has inserted in this redacted filing the names of individuals currently holding these official positions.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. District Court Proceedings	3
2. Court of Appeals Proceedings.....	9
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	18
APPENDIX	
1. Court of Appeals Decision [March 29, 2011].....	1a
2. Order Denying Rehearing [May 31, 2011].....	17a
3. Order Denying Rehearing en banc [May 31, 2011]	18a
4. Unclassified District Court Memorandum Opinion	19a
5. Map.....	47a

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Al-Adahi v. Obama</i> , 613 F.3d 1102 (D.C. Cir. 2010)	15
<i>Al Alwi v. Obama</i> , --- F.3d ---, No. 09-5125, 2011 WL 2937134 (D.C. Cir. July 22, 2011)	15, 17
<i>Al-Bihani v. Obama</i> , 590 F.3d 866 (D.C. Cir. 2010)	15
<i>Al Odah v. United States</i> , 611 F.3d 8 (D.C. Cir. 2010)	15
<i>Almerfeddi v. Obama</i> , --- F.3d ---, No. 10-5291, 2011 WL 2277607 (D.C. Cir. June 10, 2011)	15, 17
<i>Awad v. Obama</i> , 608 F.3d 1(D.C. Cir. 2010)	15
<i>Barhoumi v. Obama</i> , 609 F.3d 416 (D.C. Cir. 2010)	15
<i>Bensayah v. Obama</i> , 610 F.3d 718 (D.C. Cir. 2010)	15
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	i, 4, 13, 14, 15, 16, 17
<i>Esmail v. Obama</i> , 639 F.3d 1075 (D.C. Cir. 2011)	15, 16, 17
<i>Gherebi v. Obama</i> , 609 F. Supp. 2d 43 (D.D.C. 2009)	4
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	12, 13, 16, 17

<i>Hatim v. Gates</i> , 632 F.3d 720 (D.C. Cir. 2011)	15
<i>Madhwani v. Obama</i> , 642 F.3d 1071 (D.C. Cir. 2011)	15, 17
<i>Rasul v. Bush</i> , 542 U.S. 466 (2004)	3
<i>Salahi v. Obama</i> , 625 F.3d 745 (D.C. Cir. 2010)	15
<i>Uthman v. Obama</i> , 637 F.3d 400 (D.C. Cir. 2011)	1, 15
<i>Warafi v. Obama</i> , No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011)	15
Statutes and Rules	
28 U.S.C. § 1254(1)	2
U.S. CONST. art. I, § 9, cl. 2	i, 2, 13
Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224 (2004)	i, 2, 4, 5, 11, 12, 13, 14, 15

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 637 F.3d 400.

[REDACTED]

References in this petition to the district court's opinion ("Mem.") are references to the classified version.

[REDACTED]

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2011. *See* App. 1a, 16a. A petition for rehearing and rehearing en banc was denied on May 31, 2011. App. 17a (panel rehearing); 18a (rehearing en banc).

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Suspension Clause, U.S. CONST. art. I, § 9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2004):

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

Petitioner, Uthman Abdul Rahim Mohammed Uthman, is a Yemeni who is “detained” at Guantánamo Bay Naval Station in Cuba. Born near Aden, Yemen, Uthman attended the Furqan Institute, a religious high school in Taiz, Yemen, from about 1996 to 1999. He was about 20 years old in December 2001, when Pakistani authorities seized him in or near Parachinar, Pakistan.³ He was transferred to U.S. custody, and the U.S. brought him to Guantánamo in January 2002. Mem. 5. This coming January, Uthman, now about 30 years old, will have spent ten years in Guantánamo—one-third of his life, and his entire adult life. Under the court of appeals decision, Uthman may be “detained” at Guantánamo indefinitely, possibly for the rest of his life.

1. District Court Proceedings

In June 2004, this Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that the district court had statutory jurisdiction to hear Guantánamo detainees’ habeas corpus challenges to “the legality of their detention.” Soon after, Uthman and several fellow detainees filed a consolidated habeas corpus petition.

³ Parachinar is a city of about 70,000 people, located on a plain in Pakistan twelve miles from the mountains in Afghanistan, where the Tora Bora cave complex, in the White Mountains of Afghanistan, is located. See Map, www.maplandia.com/pakistan/f-a-t-a/kurram/parachinar/parachinar-google-earth.html; Map, www.criticalppp.com/archives/8299, App. 47a.

The government filed a factual return for each detainee. The district court stayed all of the Guantánamo habeas corpus cases for four years, for reasons not relevant here.

In June 2008, this Court held in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), that Guantánamo detainees “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” The government filed an amended factual return for each detainee. The government asserts that Uthman is lawfully detained under the Authorization for Use of Military Force (“AUMF”), on the ground that he was “part of” al Qaeda.⁴

In the wake of *Boumediene*, judges of the district court established a “command structure” test to assess government claims that a detainee was “part of” al Qaeda or the Taliban. *See, e.g., Gherebi v. Obama*, 609 F. Supp. 2d 43, 68-70 (D.D.C. 2009). Under this test, as the district court explained, “the key question is whether an individual receives and executes orders from the enemy force’s combat apparatus.” Mem. 2-3 (citations omitted and punctuation altered).

⁴ Originally, the government claimed authority to detain Uthman under the President’s asserted power as Commander in Chief and referred to Guantánamo detainees as “enemy combatants.” In March 2009, the government disclaimed reliance on the President’s asserted Commander in Chief power and abandoned the term “enemy combatant.” *See* Press Release, Dep’t of Justice, Mar. 13, 2009, www.justice.gov/opa/pr/2009/March/09-ag-232.html.

At the government's request, the parties addressed five "contested issues of fact" at the hearing in the district court. The court considered these issues to determine whether the government had proved its case against Uthman by a preponderance of the evidence, the evidentiary standard the court of appeals uses to evaluate whether a Guantánamo detainee is lawfully detained under the AUMF.

The court first addressed the government's claim that "Uthman acted as a bodyguard for Usama bin Laden," which the court characterized as the government's "primary argument." Mem. 5. The court concluded that "respondents have not presented evidence on which the Court can rely to demonstrate that, more likely than not, Uthman was a bodyguard for Usama bin Laden, [and] the Court cannot find that Uthman is lawfully detained on that basis." Mem. 16.

The court turned next to the circumstances of Uthman's capture. The government asserted, and Uthman did not dispute, that Pakistani authorities seized him during or after the battle of Tora Bora "in or near Parachinar, Pakistan," Mem. 16, *see supra* n.3 (describing location and features of Parachinar), although the district court did not think "the exact location" of Uthman's seizure was "clear from the record," Mem. 16 n.15. Uthman also did not dispute that he was captured with a group of about 30 other men, some of whom he knew from Yemen. Mem. 16.

Ultimately, as paraphrased by the court:

Respondents argue that these circumstances—in particular, Uthman’s location and the identities of some of his fellow travelers—are evidence of his affiliation with Al Qaeda. Respondents question why Uthman would choose to stay in Afghanistan after September 11, 2001 if he were not involved in Al Qaeda. They assert that Uthman’s proximity at the time of his capture to the site of an ongoing battle and a known location of Usama bin Laden, a cave complex called Tora Bora[,] strongly suggests he was coming from the complex. Additionally, at least some of those men with whom Uthman traveled—in particular the ones he knew—were admitted, or at least alleged, Al Qaeda members, some of whom were likely coming from Tora Bora.

Mem. 16-17. The court noted that three of the thirty men with whom Uthman was captured “were admitted, or at least alleged, Al Qaeda members.”

Mem. 17. The court accepted the government’s evidence, Mem. 18, giving “credence to the evidence that Uthman . . . was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.” Mem. 25.

The court then considered the government’s claim that Uthman “fought with Al Qaeda members alongside the Taliban in Kabul, Afghanistan against forces trying to overturn the Taliban regime in that country,” and that he “stayed at an Al Qaeda guesthouse in Kabul.” Mem. 18. The court found “so little reason to believe Uthman was a fighter in Kabul” that it would “not conclude it is more likely

than not that [the fighter] allegation is true.” Mem. 20. The court did find that a statement by another detainee provided “some support” for the government’s claim that Uthman was present in an al Qaeda guesthouse in Kabul. Mem. 20.

The fourth issue was whether Uthman had “attended an Al Qaeda training camp and was present at an Al Qaeda guesthouse in Kandahar, Afghanistan.” Mem. 20 (capitalization altered). The court found “not persuasive” the government’s evidence in support of its training camp allegation. Mem. 22. The court found “not strong” the evidence the government offered in support of the allegation that Uthman was present at the Kandahar guesthouse, but the court concluded that the evidence was “not so unreliable that the court disregards it entirely.” Mem. 23.

The fifth, and final, issue was “whether Uthman’s prior associations, travel route to Afghanistan, and other circumstances further support [the government’s claim] that he was part of Al Qaeda.” Mem. 23 (capitalization altered). The government alleged that Uthman “went to school in Yemen with men who joined Al Qaeda,” Mem. 23; “received money for his trip to Afghanistan from . . . an individual who encouraged jihad,” Mem. 24; and “traveled from Yemen to Afghanistan along a route . . . that Al Qaeda members also took,” Mem. 24. The district court credited the government’s evidence in support of these allegations, except for the allegation that the individual who provided the money for Uthman’s trip promoted terrorism. Mem. 24 n.25.

Reviewing all of the evidence, the district court stated:

In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle had occurred there.

Mem. 25. The court further stated:

Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Although this information is consistent with the proposition that Uthman was a part of Al Qaeda, it is not proof of the allegation. . . . Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda.

Mem. 25-26.

The district court granted Uthman's habeas petition, concluding that "respondents have failed to demonstrate by a preponderance of the evidence that Uthman was part of Al Qaeda." Mem 5. The government moved for reconsideration, which the court denied.

2. Court of Appeals Proceedings

The court of appeals reversed. It found that the district court had erroneously applied the “command structure” test to evaluate the government’s claim that Uthman’s detention was lawful on the ground that he was “part of” al Qaeda. The court of appeals stated:

In decisions issued since the District Court’s judgment in this case, this Court has rejected “command structure” as the test for determining whether someone is part of al Qaeda. Our cases have held that the “determination of whether an individual is ‘part of’ al-Qaida must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.”

App. 3a (citations omitted and punctuation altered).

The court of appeals decided that, “under the functional test mandated by our precedents, the established facts—that is, those facts found by the District Court or otherwise uncontested—show that Uthman more likely than not was part of al Qaeda.” App. 6a, 16a. In particular, the court found that “the following facts, taken together, are more than sufficient to show that Uthman more likely than not was part of al Qaeda,” as a matter of law:

To sum up, in the years leading up to his capture, Uthman’s life was intertwined with al Qaeda’s operations. Uthman attended a school in Yemen where al Qaeda successfully

recruited. He traveled to Afghanistan along a route used by al Qaeda recruits. He lied about how he paid for that journey. He was seen at an al Qaeda guesthouse in Afghanistan. He traveled to an isolated mountainous region near what was then al Qaeda's last stronghold in Afghanistan, during a major battle there. He was captured on December 15, 2001, in a small group that included two al Qaeda members who were Osama bin Laden's bodyguards and a Taliban fighter. He did not have a passport with him. And he has not credibly explained why he went to Afghanistan or how he found himself traveling with a small group that included two al Qaeda members who were Osama bin Laden bodyguards and a Taliban fighter near Tora Bora in December 2001.

App. 8a, 15a-16a. The court also stated:

Uthman's account piles coincidence upon coincidence upon coincidence. . . . [I]t remains *possible* that Uthman was innocently going about his business and just happened to show up in a variety of extraordinary places—a kind of Forrest Gump in the war against al Qaeda. But Uthman's account at best strains credulity; and the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda.

App. 14a-15a.

In reaching the conclusion that Uthman was “part of” al Qaeda, the court did not consider it

necessary to find that Uthman “attended an al Qaeda training camp, fought against the Northern alliance, [or] became one of Osama bin Laden’s bodyguards,” App. 8a n.5, or that Uthman “purposefully and materially support[ed]” al Qaeda, App. 4a n.2. The court was also clear that Uthman could “properly be considered ‘part of’ al-Qaida even if he never formally received or executed any orders” from that organization, *i.e.*, was not within the command structure of al Qaeda. App. 6a (internal quotation marks omitted).

Uthman filed a motion for rehearing and rehearing en banc, which the court denied. App. 17a (panel); 18a (en banc).

REASONS FOR GRANTING THE PETITION

1. In this and other Guantánamo cases, the court of appeals has held that being “part of” al Qaeda *ipso facto* makes an individual detainable under the AUMF. The test for determining whether an individual was “part of” al Qaeda is described by the court as an indefinite, “functional” one, which the court says is to be applied “case by case.” The test, however, is infinitely malleable in application. The court did not identify *anything* Uthman did for or on behalf of al Qaeda. Applying its misty “functional” test, however, the court concluded that Uthman was “part of” al Qaeda, even though it did not specify any “functions” performed by Uthman for al Qaeda. This was its justification for the detention of Uthman, now going on ten years, and possibly for the rest of his life.

As stated *supra* pages 10-11, in reaching the conclusion that Uthman was “part of” al Qaeda, the court did not consider it necessary to find that Uthman “attended an al Qaeda training camp, fought against the Northern alliance,” or became one of bin Laden’s bodyguards, or that Uthman had purposely and materially supported al Qaeda. The court was also clear that Uthman could “properly be considered ‘part of al-Qaida’” even if he was not within the command structure of al Qaeda. App. 6a (internal quotation marks omitted).

The court of appeals’ “part of” approach is completely at odds with the purpose and meaning of the AUMF. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (plurality opinion), the Court held that the AUMF authorizes the President to detain the “limited category” of “individuals who fought against the United States in Afghanistan,” which includes “individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’” In broader terms, the Court stated:

Under the definition of enemy combatant that we accept today as falling within the scope of Congress’ authorization [under the AUMF], Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” *and* “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict.

Id. at 526 (emphasis added).

The Court construed AUMF detention authority to require that the detainee have “engaged in armed conflict with the armed forces of the United States” because the purpose of detention in an armed conflict is “to prevent captured individuals from returning to the field of battle and taking up arms once again.” 542 U.S. at 513, 518. “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” the Court stated, “in permitting the use of ‘necessary and appropriate force,’ [in the AUMF] Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.” *Id.* at 519. *See also Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (“In *Hamdi v. Rumsfeld*, five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan ‘for the duration of the particular conflict in which they were captured, is [a] fundamental and accepted . . . incident to war’”) (citation omitted). The “return to the battlefield” rationale is obviously inapplicable to Uthman. His detention does not fall within the purpose for which the AUMF authorizes detention. Therefore, under the rationale of *Hamdi*, the AUMF does not authorize Uthman’s detention.

2. Construing the AUMF to authorize detention of an individual solely because he is found to have been “part of” al Qaeda would contravene *Boumediene v. Bush*, 553 U.S. 723 (2008), and violate the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. In *Boumediene*, the Court held that Guantánamo detainees “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” 553 U.S. at 771. Writing for the Court, Justice

Kennedy explained that “the writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers.” *Id.* at 765. “Within the Constitution’s separation-of-powers structure,” he stated, “few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” *Id.* at 797. And “[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.” *Id.* at 765-66. Judicial enforcement of the Suspension Clause is therefore necessary to vindicate its purposes: “This Court may not impose a *de facto* suspension by abstaining from these controversies.” *Id.* at 771.

Here, the court of appeals is effectively “abstaining from these controversies” by construing the AUMF in a manner that vitiates *Boumediene’s* premise that “[t]he habeas court . . . [will] . . . conduct a meaningful review of . . . the Executive’s power to detain.” *Id.* at 771, 783. The court has removed the judiciary as a genuine check on Executive power by holding that being “part of” al Qaeda *ipso facto* makes an individual detainable under the AUMF, and then applying a “know it when I see it” test that enabled the court to find that Uthman is “part of” al Qaeda.

The court of appeals has decided fourteen detainee cases on the merits. The court has not affirmed a single habeas grant, and it has remanded any denial that it did not affirm. Thus, in five of the fourteen cases, the detainee prevailed, but the court of appeals erased all five wins. It reversed three

outright,⁵ and remanded the other two.⁶ By contrast, the court affirmed seven of the nine government wins.⁷ It remanded the other two.⁸

As the court of appeals has construed and applied it, the AUMF not only contravenes *Boumediene* but violates the Suspension Clause by creating a regime in which bringing a detainee habeas case in the D.C. Circuit is becoming an exercise in futility. As a practical matter, this would leave detainees where they were before *Boumediene* held that they “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” 553 U.S. at 771.

Two judges in the D.C. Circuit have not hidden their hostility to *Boumediene*. In a talk at the Heritage Foundation last year, Judge Randolph compared the Justices to the characters in the *Great Gatsby*, “careless people, who smashed things up . . .

⁵ *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Almerferdi v. Obama*, --- F.3d ---, No. 10-5291, 2011 WL 2277607 (D.C. Cir. June 10, 2011).

⁶ *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011).

⁷ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010); *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011); *Al Alwi v. Obama*, --- F.3d ---, No. 09-5125; 2011 WL 2937134 (D.C. Cir. July 22, 2011).

⁸ *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); *Warafi v. Obama*, No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011).

and let other people clean up the mess they made.”⁹ Judge Silberman, in his *Esmail* concurrence, called *Boumediene* a “defiant . . . assertion of judicial supremacy.” *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011). He as much as said that what his colleagues find determinative in a detainee habeas case is not whether the government met its burden by a preponderance of the evidence, even though the court itself purports to apply that standard. Instead, Judge Silberman stated:

I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even “some evidence.”

Id. (citation omitted).¹⁰

⁹ “The Guantánamo Mess,” <http://www.heritage.org/Events/2010/10/Guantanamo-Mess>.

¹⁰ One commentator has written that “the analysis and the holdings” of the D.C. Circuit’s Guantánamo cases “reflect a profound tension with both *Boumediene* and *Hamdi*, and a fundamental unwillingness on the D.C. Circuit’s part . . . to take seriously the implications of the Supreme Court’s analysis (...continued)

The questions presented matter for every Guantánamo habeas case. The decision in this case has already influenced the court’s decisions in four other appeals,¹¹ and additional appeals from denials have been filed or are expected.

in either case. Between them, *Hamdi* and *Boumediene* do not just require some judicial review of the government’s evidence; rather, they compel a ‘meaningful’ opportunity on the detainee’s part to challenge the factual and legal basis for his detention. If every inference is being drawn against the detainee, and if the use of the ‘mosaic’ theory burden of proof, it is difficult to conclude how such review satisfies that command.” Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL L. REV. (forthcoming 2011), at 28-29, available at <http://ssrn.com/abstract-1838402>.

¹¹ *Al Alwi v. Obama*, --- F.3d ---, No. 09-5125, 2011 WL 2937134 (D.C. Cir. July 22, 2011); *Almerfedi v. Obama*, --- F.3d ---, No. 10-5291, 2011 WL 2277607 (D.C. Cir. June 10, 2011); *Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011); *Esmail v. Obama*, 639 F.3d 1075, 1077 (D.C. Cir. 2011).

CONCLUSION

The Court should grant review; construe the AUMF to authorize detention only if the government can show that the detainee has fought against the United States; and restore the court of appeals to perform its constitutional role, under the separation of powers, as a meaningful check on Executive detentions.

David H. Remes

David H. Remes
Counsel of Record
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508

S. William Livingston
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

Counsel for Petitioner

DATED: September 23, 2011

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 11, 2011 Decided March 29, 2011

No. 10-5235

UTHMAN ABDUL RAHIM MOHAMMED
UTHMAN, DETAINEE,
CAMP DELTA
APPELLEE

v.

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

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-01254)

Dana Kaervsang, Attorney, U.S. Department of Justice, argued the cause for appellants. With her on the briefs were *Ian Heath Gershengorn*, Deputy Assistant Attorney General and *Douglas N. Letter* and *Robert M. Loeb*. Attorneys, U.S. Department of Justice.

Anthony J. Phillips argued the cause for appellees. With him on the brief were *S. William Livingston*, *Roger A. Ford*, and *David H. Remes*. *Brian E. Foster* entered an appearance.

Before: GARLAND, GRIFFITH, and
KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Circuit Judge
KAVANAUGH.

KAVANAUGH, *Circuit Judge*: In response to al
Qaeda's attacks against the United States on
September 11, 2001. Congress passed and President
Bush signed the Authorization for Use of Military
Force. The AUMF provides:

That the President is authorized to use all
necessary and appropriate force against those
nations, organizations, or persons he
determines planned, authorized, committed, or
sided the terrorist attacks that occurred on
September 11, 2001, or harbored such
organizations or persons, in order to prevent
any future acts of international terrorism
against the United States by such nations,
organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *see*
U.S. CONST. art. I, § 8. The AUMF, among other
things, authorizes the Executive Branch to detain for
the duration of hostilities those individuals who are
part of al Qaeda or the Taliban. *See Hamdi v.*
Rumsfeld, 542 U.S. 507, 518 (2004).

Under the AUMF, the U.S. military currently
holds Uthman Abdul Rahim Mohammed Uthman at
the U.S. naval base in Guantanamo Bay, Cuba.
Exercising his right under the U.S. Constitution to
judicial review of the basis for his detention, Uthman
filed a petition for a writ of habeas corpus in the U.S.
District Court for the District of Columbia. *See*

Boumediene v. Bush, 553 U.S. 723 (2008). Uthman contended that he was not part of al Qaeda and therefore was not properly detained. Applying a “command structure test,” the District Court ruled that the Government had not proved that Uthman was part of al Qaeda. The District Court therefore granted the petition and ordered Uthman released from U.S. custody.

In decisions issued since the District Court’s judgment in this case, this Court has rejected “command structure” as the test for determining whether someone is part of al Qaeda. Our cases have held that the “determination of whether an individual is ‘part of’ al-Qaida ‘must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.’” *Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)).

Applying the functional standard mandated by our precedents, we conclude that the facts found by the District Court, along with uncontested facts in the record, demonstrate that Uthman more likely than not was part of al Qaeda. We therefore reverse the judgment of the District Court and remand with instructions to deny the petition for a writ of habeas corpus.

I

Uthman Abdul Rahim Mohammed Uthman, a Yemeni man, was captured at the Afghan-Pakistani border near Tora Bora on December 15, 2001. He

was captured in a small group that included two al Qaeda members who were Osama bin Laden bodyguards and another man who was a Taliban fighter.¹ Tora Bora is a cave complex in the mountains of eastern Afghanistan. Al Qaeda forces gathered there in December 2001 to wage a major battle against the United States and its allies.

Soon after his capture, Uthman was transferred to the U.S. naval base in Guantanamo Bay, Cuba. He has been detained at Guantanamo since January 2002.

In 2004, Uthman filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia challenging the basis for his detention. The Government asserted that Uthman was part of al Qaeda and therefore may be detained for the duration of the war against al Qaeda pursuant to the Authorization for Use of Military Force. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Bensayah v. Obama*, 610 F.3d 718, 724-25 (D.C. Cir. 2010).²

¹ Uthman stated that he was captured with about 20 to 30 other men. *See* J.A. 628 (FBI report from Uthman interview); J.A. 771 (Intelligence Information Report from Uthman interview); J.A. 638 (FBI report from Uthman interview).

² This Court has stated that the Executive also may detain those who “purposefully and materially support [al Qaeda or Taliban forces] in hostilities against U.S. Coalition partners.” *Al-Bihani v. Obama*, 590 F.3d 866,872 (D.C. Cir. 2010); *see also Hatim v. Gates*, No. 10-5048, slip op. at 2 (D.C. Cir. Feb. 11, 2011). In this case, the Government has asserted that it is (...continued)

The District Court stated that “the key question” in determining someone’s membership in al Qaeda “is whether an individual receives and executes orders from the enemy force’s combat apparatus.” *Abdah v. Obama*, 708 F. Supp. 2d 9, 13 (D.D.C. 2010) (internal quotation marks and alterations omitted). The District Court derived that test from two previous district court opinions applying this “command structure test.” *See id* at 12-13 (citing *Hamliily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), and *Gherehi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009)). After examining the evidence, the District Court concluded that the Government did “not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda.” *Id.* at 22. On that basis, the District Court granted Uthman’s petition for a writ of habeas corpus. *Id.* at 23.

Several of this Court’s cases – all decided after the District Court granted Uthman’s petition – have held that the “command structure test” does not reflect the full scope of the Executive’s detention authority under the AUMF. “These decisions make clear that the determination of whether an individual is ‘part of’ al-Qaida ‘must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.’” *Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir.

seeking to detain Uthman only because he was part of al Qaeda.

2010) (quoting *Bensayah*, 610 F.3d at 725); *see also* *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (“Nowhere in the AUMF is there a mention of command structure.”). To be sure, demonstrating that someone is part of al Qaeda’s command structure is *sufficient* to show that person is part of al Qaeda. But it is not *necessary*. *See, e.g., Awad*, 608 F.3d at 11. Indicia other than the receipt and execution of al Qaeda’s orders may prove “that a particular individual is sufficiently involved with the organization to be deemed part of it.” *Bensayah*, 610 F.3d at 725 (citing *Awad*, 608 F.3d at 11). It is thus possible that someone may “properly be considered ‘part of’ al-Qaida even if he never formally received or executed any orders.” *Salahi*, 625 F.3d at 752 (citing *Awad*, 608 F.3d at 3-4, 11).

In this case, the question therefore is whether, under the functional test mandated by our precedents, the established facts – that is, those facts found by the District Court or otherwise uncontested – show that Uthman more likely than not was part of al Qaeda.³ Our analysis of that question is *de novo*.

³ Our cases have stated that the preponderance of the evidence standard is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution’s requirements for wartime detention. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1104-05 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11 & n.2 (D.C. Cir. 2010); *Al-Bihani*, 590 F.3d at 878 & n.4. The preponderance of the evidence standard is equivalent to the “more likely than not” standard. *See Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993); *Al-Adahi*, 613 F.3d at 1106.

See Barhoumi v. Obama, 609 F.3d 416,423 (D.C. Cir. 2010).

II

In analyzing whether Uthman more likely than not was part of al Qaeda, we consider the following facts, which were found by the District Court or are otherwise uncontested:

- Uthman was captured in December 2001 in the vicinity of Tora Bora, an isolated, mountainous area where al Qaeda forces had gathered to fight the United States and its allies.
- When captured, Uthman was traveling with a small group of men, two of whom were al Qaeda members and bodyguards for Osama bin Laden and one of whom was a Taliban fighter.
- Leading up to his capture. Uthman's journey began at a religious school in Yemen where al Qaeda had successfully recruited fighters. The two al Qaeda members and Osama bin Laden bodyguards who were later captured with Uthman, as well as the Taliban fighter captured with Uthman, also attended the Furqan Institute.
- Uthman traveled to Afghanistan along a route used by al Qaeda recruits.
- Uthman lied to hide the fact that someone else paid for his travel to Afghanistan.
- While in Afghanistan, Uthman was seen at an al Qaeda guesthouse.
- Uthman's explanation of why he went to Afghanistan and why he was traveling in a small

group that included al Qaeda members and a Taliban fighter near Tora Bora during the battle there involves a host of unlikely coincidences.

Uthman argues that those facts do not add up to his being part of al Qaeda.⁴ As we will explain, we conclude that those facts, taken together, are more than sufficient to show that Uthman more likely than not was part of al Qaeda.⁵

First, Uthman was captured on December 15, 2001, “in the vicinity of Tora Bora.” *Abdah v. Obama*, 708 F. Supp. 2d 9, 22 (D.D.C. 2010). As the District Court noted, it was “widely known” that Tora Bora was a battleground between al Qaeda and the United States and “few, if any noncombatants would have

⁴ Uthman does not challenge any of the subsidiary factual findings of the District Court that the Government currently relies on to support Uthman’s detention. (In any event, we see no basis for deeming clearly erroneous any of those factual findings. *Cf. Awad v. Obama*, 608 F.3d 1, 6, 8-10 (D.C. Cir. 2010).) Rather, he argues that the facts found by the District Court do not establish that he was part of al Qaeda.

⁵ Some of Uthman’s other activities during his time in Afghanistan are contested. The Government claims, for example, that Uthman attended an al Qaeda training camp, fought against the Northern Alliance, and himself became one of Osama bin Laden’s bodyguards. Uthman responds that those allegations are not true. The District Court concluded that the Government did not offer sufficient evidence to establish those facts. Because the Government has not challenged those aspects of the District Court’s decision in this Court, we do not consider those additional allegations for purposes of this appeal. We also do not consider the Government’s allegation that Uthman was present at a second al Qaeda guesthouse.

been in the vicinity during this time.” *Id.* at 19 n.11. Because “few, if any” non-combatants were near Tora Bora, it follows that most, if not all. of those in the vicinity of Tora Bora on December 15, 2001, were combatants. In a prior case, we found it significant that a detainee was captured near Tora Bora in late 2001. *See Al Odah v. United States*, 611 F.3d 8, 11, 16 (D.C. Cir. 2010). In short, the fact that Uthman was captured in December 2001 near Tora Bora suggests that he was affiliated with al Qaeda.

Second, the company Uthman was keeping when he was captured near Tora Bora in December 2001 makes it even more likely that he was part of al Qaeda. *See Abdah*, 708 F. Supp. 2d at 22 (Uthman “was with Al Qaeda members in the vicinity of Tora Bora”). Uthman admits that, when captured, he was part of a small group including at least five other Yemeni men. Two of those men were al Qaeda members and have since confessed to being bodyguards for Osama bin Laden. Another fought with the Taliban against United States forces. One of the bin Laden bodyguards in Uthman’s band described the group as “brothers” retreating from battle. In our prior cases, we have stated that evidence of association with other al Qaeda members is itself probative of al Qaeda membership. *Cf Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 9-10 (D.C. Cir. 2010); *id.* at 3 (noting that al Qaeda fighters treated Awad “as one of their own”); *see also Salahi v. Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010) (district court may be able to “infer from Salahi’s numerous ties to known al-Qaida operatives that he remained a trusted member of the organization”). So it is here.

Being captured in the company of a Taliban fighter and two al Qaeda members and Osama bin Laden bodyguards 12 miles from Tora Bora in December 2001 might not be precisely the same as being captured in a German uniform 12 miles from the Normandy beaches in June 1944. But it is still, at a minimum, highly significant. And absent a credible alternative explanation the location and date of Uthman's capture, together with the company he was keeping, strongly suggest that he was part of al Qaeda. And there is more.

Third, the narrative of Uthman's journey before his capture suggests that it was not an accident that he ended up near Tora Bora on December 15, 2001, in the company of two al Qaeda members who were Osama bin Laden's bodyguards, as well as a Taliban fighter. That narrative begins with Uthman's studies at the Furqan Institute, a religious school "at which other men were recruited to fight for Al Qaeda." *Abdah*, 708 F. Supp. 2d at 22. Uthman downplays this particular fact, noting that most students at the school probably did not become al Qaeda fighters. Uthman's argument ignores two points. First, attendance at such a school – which was a fruitful al Qaeda recruiting ground – is a fact that, while perhaps not alone of great significance, can assume greater significance when considered in light of other facts suggesting al Qaeda membership. *Cf. Al-Adahi*, 613 F.3d at 1105-09; *Al Odah*, 611 F.3d at 16. Second, the two al Qaeda members and Osama bin Laden bodyguards and the Taliban fighter captured with Uthman in the vicinity of Tora Bora also attended the Furqan Institute. Uthman admitted he knew all of them from the Institute. including the

Osama bin Laden bodyguard and former Furqan Institute student who described the group as “brothers.” Uthman’s long association with those three fellow travelers, dating back to their shared time at an al Qaeda recruiting ground, renders it rather unlikely that their travel together near al Qaeda’s embattled stronghold at Tora Bora in December 2001 was a coincidental reunion of old schoolmates. *Cf. Salahi*, 625 F.3d at 753; *Al-Adahi*, 613 F.3d at 1105, 1107; *Awad*, 608 F.3d at 3,9-10.

Fourth, after studying at the Furqan Institute, Uthman “traveled to Afghanistan along a route also taken by Al Qaeda recruits.” *Abdah*, 708 F. Supp. 2d at 22. Specifically, Uthman flew from Sana’a, Yemen, to Karachi, Pakistan. From Karachi, he traveled by bus to Quetta, Pakistan, and then by taxi to a Taliban office there. From Quetta, a Taliban official arranged for Uthman’s transportation to Kandahar, Afghanistan. Uthman’s route is similar to the paths of admitted al Qaeda members now in U.S. custody. This Court has stated that traveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda. *See Al Odah*, 611 F.3d at 16. Uthman again argues that this fact alone is not significant, as people who were not al Qaeda recruits may have followed the same track. But the fact that Uthman followed a common al Qaeda route nonetheless makes it somewhat more likely that he was an al Qaeda recruit. *See Al-Adahi*, 613 F.3d at 1105; *cf. Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987) (“individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it”).

Fifth, Uthman's route to Afghanistan is even more suspicious because he lied about how he paid for the trip. The Government contends that a Yemeni sheikh who supported terrorism funded Uthman's journey. In his sworn statement to the District Court, Uthman said he raised the funds himself primarily by working at summer jobs selling food at a roadside shack. The Government says this explanation is preposterous, observing that Uthman would have had to earn more than three times the average Yemeni's annual income in only a few summers' unskilled work. The District Court agreed with the Government, finding that Uthman received the funds from the sheikh, as Uthman originally told interrogators. *Abdah*, 708 F. Supp. 2d at 22. Although the District Court made no finding as to whether that sheikh supported terrorism, its determination that Uthman's trip to Afghanistan was financed by the sheikh necessarily means the court found Uthman's sworn statement that he paid for his own travel to be false. Uthman's false explanation is relevant here because, as we have said in another case, "false exculpatory statements are evidence – often strong evidence – of guilt." *Al-Adahi*, 613 F.3d at 1107 (citing *United States v. Penn.* 974 F.2d 1026, 1029 (8th Cir. 1992), and *United States v. Meyer.* 733 F.2d 362, 363 (5th Cir. 1984)).

Sixth, once he reached Afghanistan, Uthman was seen at an al Qaeda guesthouse. *See Abdah*, 708 F. Supp. 2d. at 22. In two prior cases, this Court has stated that staying at an al Qaeda guesthouse is "powerful – indeed 'overwhelming' – evidence" that an individual is part of al Qaeda. *Al-Adahi*, 613 F.3d at 1108 (quoting *Al-Bihani v. Obama*, 590 F.3d 866,

873 n.2 (D.C. Cir. 2010)) (alterations omitted). The reason for that assessment is plain: It is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake, either by the guest or by the host. Uthman retorts that he was only seen at an al Qaeda guesthouse, which does not necessarily mean that he was staying there. True, but just being present at an al Qaeda guesthouse is hardly the kind of innocent fact that can be tossed aside as insignificant. Moreover, absent another explanation (and Uthman provides none), the most plausible reason for Uthman's presence at an al Qaeda guesthouse is that he was affiliated with al Qaeda and staying at the guesthouse. *See Al-Adahi*, 613 F.3d at 1108. That implication is strongly buttressed by the fact that Uthman did not have his passport when he was captured. As this Court has explained, surrendering one's passport was "standard al Qaeda and Taliban operating procedure[]" when checking into an al Qaeda guesthouse in Afghanistan. *Al Odah*, 611 F.3d at 15.

Seventh, Uthman's account of his activity in Afghanistan and Pakistan involves many coincidences that are perhaps possible, but not likely. According to Uthman, he went to Afghanistan to teach the Koran. As of September 11, 2001, he was in Kabul, teaching the Koran, although he does not remember the names of any of his students and cannot describe his school in Kabul.⁶ Unlike many

⁶ In *Al Odah v. United States*, 611 F.3d 8, 12 (D.C. Cir. 2010), we found significance in the fact that a detainee could not remember the names of any students he allegedly had taught.

civilians living in Kabul at the time, Uthman remained in the capital as the United States began its attack against the Taliban regime. Only after the Taliban and its al Qaeda allies lost control of Kabul did Uthman choose to leave. Although he wished to flee to Pakistan, Uthman did not take the eastward road through the Khyber Pass that leads directly to Pakistan. Instead, Uthman took the long way home. He fled south, parallel to Pakistan's border, into rugged, mountainous terrain – following his interpreter, he claims.⁷ Unfortunately, as the story goes, his path led him near Tora Bora, where Osama bin Laden and Ayman al-Zawahiri happened to have relocated and where it was widely known that al Qaeda was gathering for a major battle against the United States and its allies. There, in the Afghan mountains, he chanced to meet up with schoolmates from his school days in Yemen. Unfortunately for Uthman, those schoolmates also happened to be two al Qaeda members who were Osama bin Laden bodyguards and a Taliban fighter. Then, Uthman finally chose to enter Pakistan – as it turns out, at the height of the U.S. bombardment of Tora Bora and al Qaeda's flight from Afghanistan – where he says he was mistaken for an al Qaeda fighter and detained.

Uthman's account piles coincidence upon coincidence upon coincidence. Here, as with the

⁷ In Al Odah, we found significance in a detainee's similarly circuitous route out of Afghanistan into Pakistan by way of Tora Bora. Id at 16.

liable or guilty party in any civil or criminal case, it remains *possible* that Uthman was innocently going about his business and just happened to show up in a variety of extraordinary places – a kind of Forrest Gump in the war against al Qaeda. But Uthman’s account at best strains credulity; and the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda. When presented with similar circumstantial evidence in prior cases, we have had no trouble reaching the conclusion that the detainee more likely than not was part of al Qaeda. *See Al-Adahi*, 613 F.3d 1102; *Al Odah*, 611 F.3d 8; *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Awad*, 608 F.3d 1; *Al-Bihani*, 590 F.3d 866. So too here.

To sum up, in the years leading up to his capture, Uthman’s life was intertwined with al Qaeda’s operations. Uthman attended a school in Yemen where al Qaeda successfully recruited. He traveled to Afghanistan along a route used by al Qaeda recruits. He lied about how he paid for that journey. He was seen at an al Qaeda guesthouse in Afghanistan. He traveled to an isolated mountainous region near what was then al Qaeda’s last stronghold in Afghanistan, during a major battle there. He was captured on December 15, 2001, in a small group that included two al Qaeda members who were Osama bin Laden’s bodyguards and a Taliban fighter. He did not have a passport with him. And he has not credibly explained why he went to Afghanistan or how he found himself traveling with a small group that included two al Qaeda members

who were Osama bin Laden bodyguards and a Taliban fighter near Tora Bora in December 2001.

We do “not weigh each piece of evidence in isolation, but consider all of the evidence taken as a whole,” *Al Odah*, 611 F.3d at 15 (quoting *Awad*, 608 F.3d at 6-7); *see also Al-Adahi*, 613 F.3d at 1105-07. Uthman’s actions and recurrent entanglement with al Qaeda show that he more likely than not was part of al Qaeda.⁸ We therefore reverse the judgment of the District Court and remand with instructions to deny Uthman’s petition for a writ of habeas corpus.

So ordered.

⁸ In recounting the evidence, we do not imply that all of the evidence in this case is *necessary* to find someone part of al Qaeda. We hold only that the evidence in this case is *sufficient* to find that Uthman was part of al Qaeda.

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-5235

September Term 2010

1:04-cv-01254-HHK

Filed On: May 31, 2011

Uthman Abdul Rahim Mohammed Uthman,
Detainee, Camp Delta,

Appellee

v.

Barack Obama, President of the United States, et al.,

Appellants

BEFORE: Garland, Griffith, and Kavanaugh, Circuit
Judges

ORDER

Upon consideration of appellee's petition for panel
rehearing filed on May 13, 2011, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-5235

September Term 2010

1:04-cv-01254-HHK

Filed On: May 31, 2011

Uthman Abdul Rahim Mohammed Uthman,
Detainee, Camp Delta,

Appellee

v.

Barack Obama, President of the United States, et al.,

Appellants

BEFORE: Sentelle, Chief Judge, and Ginsburg,
Henderson, Rogers, Tatel, Garland, Brown, Griffith,
and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAHMOAD ABDAH, et al.,

Petitioners,

v.

BARACK H. OBAMA, et al.,

Respondents.

**Civil Action No. 04-
1254 (HHK)**

MEMORANDUM OPINION

Uthman Abdul Rahim Mohammed Uthman (ISN 27) a Yemeni citizen, has been held by the United States at the naval base detention facility in Guantanamo Bay, Cuba since January 2002. Uthman contends he is unlawfully detained and has accordingly filed a petition for a writ of habeas corpus. Respondents in this case, President Barack H. Obama and other high-level officials in the United States Government, argue that Uthman is lawfully detained and should remain in U.S. custody. Both parties have filed cross-motions for judgment on the record and appeared before this Court for hearings on those motions on January 27 and 28 and February 1, 2, and 3, 2010. Upon consideration of the motions and oral presentations of the parties as well as the record of this case, the Court concludes that respondents have not demonstrated that the detention of Petitioner Uthman is justified. Therefore, Uthman's petition shall be granted.

I. LEGAL STANDARDS

A. Scope of the Government's Detention Authority

The Authorization for Use of Military Force (“AUMF”). Pub. L. No. 107-40, 115 Stat. 224 (2001), provides that the President may “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Pub. L. 107-40, § 2(a), 115 Stat. at 224. Although the U.S. Supreme Court has held that the District Court for the District of Columbia has jurisdiction over petitions for writs of habeas corpus brought by detainees held at Guantanamo Bay pursuant to the AUMF, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008); *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004), it has provided “scant guidance” as to whom respondents may lawfully detain under the statute, *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010) (noting that the Supreme Court has “consciously le[ft] the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality opinion of O’Connor, J.); *Boumediene*, 128 S. Ct at 2276)).

In the absence of controlling law on this matter, the Court shall rely on the reasoning of other Judges of this Court who have ‘thoroughly and thoughtfully

addressed the question of by what standard to evaluate the lawfulness of the detention of the individuals held at Guantanamo Bay. Accordingly, as Judge Bates ruled in *Hamilly v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), the government may detain “those who are ‘part of’ the ‘Taliban or al Qaida forces,’” *id.* at 69-70,¹ and as Judge Walton ruled in *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009), “[t]he key question is whether an individual ‘receive[s] and execute[s] orders’ from the enemy force’s combat apparatus,” *id.* at 69 (alterations in original).²

B. Burden of Proof

As stated in the Amended Case Management Order that governs this case, “[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful.” *In re Guantanamo Bay Litig.*, Misc. No. 08-442, CMO § II.A (Nov. 6, 2008). Accordingly, Uthman need not prove that he is unlawfully detained; rather, respondents must produce “evidence which as a whole shows that the fact sought to be proved,” that Uthman was part of Al Qaeda, “is more probable than not.” *United States v. Mathis*, 216 F.3d 18, 28 (D.C. Cir. 2000) (quoting *United States v. Montague*,

¹ “It is not in dispute that Al Qaeda is the organization responsible for September 11,” *Al-Bihani*, 590 F.3d at 873, and is therefore among the entities to which the AUMF refers.

² There are, of course, unresolved questions about the scope of the government’s detention authority, but this case does not require the Court to address any of them.

40 F.3d 1251, 1255 & n.2 (D.C. Cir. 1994)); *see also Al-Bihani*, 590 F.3d at 878 (rejecting Guantanamo Bay detainee's argument that use of the preponderance of the evidence standard in his habeas case was unconstitutional). If respondents fail to meet this burden, the Court must grant Uthman's petition and order his release.

C. Evidentiary Issues

The Court notes at the outset two issues regarding the evidence in this case.

First, as explained in an order entered in this case on August 26, 2009 [#606], the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all of the evidence presented to support the parties' arguments. This approach is consistent with a directive from the D.C. Circuit. *See Al-Bihani*, 590 F.3d at 879 (“[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible-it is always admissible-but what probative weight to ascribe to whatever indicia of reliability it exhibits”). The Court's assessment of the weight properly accorded to particular pieces of evidence appears throughout this memorandum opinion.

Second, the nature of the evidence before the Court is atypical of evidence usually presented in federal actions. Respondents have offered a variety of types of documents produced and used by government intelligence agencies that are not the direct statements of the individuals whose personal knowledge they reflect. The Court also heard from

one live witness, an investigator for a federal law enforcement agency called the Criminal Investigation Task Force (“CITF”), whose testimony is described below.

II. ANALYSIS

Uthman’s activities between his schooling in Yemen and seizure preceding his detention at Guantanamo Bay are in dispute and are the focus of this case. In sum, respondents argue that Uthman traveled to Afghanistan to join Al Qaeda, and once there, he trained to be a fighter, fought against forces seeking to overturn the Taliban’s regime, and became a bodyguard for Usama bin Laden. Uthman contends that he went to Afghanistan to teach the Quran to children and was not part of Al Qaeda.

At the Court’s request, the parties identified five contested issues of fact before the merits hearing commenced and structured their presentations to address each issue in turn during that hearing. This opinion similarly addresses each issue in turn, and it then considers the reliable evidence as a whole to explain the Court’s conclusion that respondents have failed to demonstrate by a preponderance of the evidence that Uthman was part of Al Qaeda.

A. Issue One: Whether Uthman Served as a Bodyguard For or Was Part of the Security Detail of Usama Bin Laden

Respondents’ primary argument in this case is that Uthman acted as a bodyguard for Usama bin Laden. The evidence they present in support of this contention fails to convince the Court that it is more likely than not that Uthman was a bodyguard.

1. Statements of Hajj (ISN 1457) and Kazimi (ISN 1453)

Respondents' most important pieces of evidence regarding this issue are intelligence reports, referred to as FM40s, reporting statements of two other detainees currently held at Guantanamo Bay. In light of the abusive circumstances of the detention of these men and serious questions about the accuracy of their identifications of Uthman, the Court finds these statements to be unreliable and will not consider them in evaluating whether the detention of Uthman is lawful.

The statements are quite damning on their faces. Sharqwi Abdu Ali Al-Hajj, identified as ISN 1457, is a member of Al Qaeda often called, among other aliases, Riyadh the Facilitator. Respondents presented evidence, in an FM40, that Hajj identified a photograph of Uthman as "Hudaifa al Adani," a name respondents contend Uthman used as an alias, and stated that Uthman "became a bodyguard for [Usama bin Laden] a couple of months prior to the September 11, 2001 attacks." Joint Exhibit ("JE") 29 at 4.)³ Hajj also stated that in traveling within Afghanistan just after September 11, 2001, he encountered "Hudaifa al Adani," one of several Usama bin Laden guards, at a particular location

³ In several of the intelligence reports quoted in this opinion, the text appears in all capital letters. For ease of reading, the Court reproduces all quoted text in lowercase regardless of its appearance in the source.

near a meeting Usama bin Laden attended. JE 70 at 5.⁴

Sanad Yislam Ali AI Kazimi, ISN 1453, is also a member of AI Qaeda. An FM40 summarizing an interrogation of Kazimi indicates that he stated that a picture of Uthman “looks like Hudaifa Al Yemeni” and stated that “he heard” Uthman became a bodyguard for Usama bin Laden. JE 28 at 5.

i. Torture

The Court will not rely on the statements of Hajj or Kazimi because there is un rebutted evidence in the record that at the time of the interrogations at which they made the statements, both men had recently been tortured.

a. Evidence of torture

Uthman has submitted to the Court a declaration of Kristin B. Wilhelm, an attorney who represents Hajj, summarizing Hajj’s description to her of his treatment while in custody. The declaration states that while held in Jordan, Hajj “was regularly beaten and threatened with electrocution and molestation,” and he eventually “manufactured facts” and confessed to his interrogators’ allegations “in order to make the torture stop.” JE 142 at 2. After transfer to a secret CIA-run prison in Kabul, Afghanistan. Hajj was reportedly “kept in complete darkness and was subject to continuous loud music.” *Id.* at 3.

⁴ The relevant FM40 is split into two parts: JE 29 is the first part and JE 70 is the second.

Uthman has also submitted a declaration of Martha Rayner, a Professor at Fordham University Law School who represents Karimi, regarding Kazimi's description of his treatment in detention. Rayner reports that while Kazimi was detained outside the United States, his interrogators beat him; held him naked and shackled in a dark, cold cell; dropped him into cold water while his hands and legs were bound; and sexually abused him. Kazimi told Rayner that eventually "[h]e made up his mind to say 'Yes' to anything the interrogators said to avoid further torture." JE 145 ¶ 13. According to Rayner's declaration, Kazimi was relocated to a prison run by the CIA where he was always in darkness and where he was hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music. Kazimi reported trying to kill himself on three occasions. He told Rayner that he realized "he could mitigate the torture by telling the interrogators what they wanted to hear." *Id.*, ¶ 34. Next, Kazimi was moved to a U.S. detention facility in Bagram, Afghanistan, where, he told Rayner, he was isolated, shackled, "psychologically tortured and traumatized by guards' desecration of the Koran" and interrogated "day and night, and very frequently." *Id.* ¶ 37. Kazimi told Rayner that he "tried very hard" to tell his interrogators at Bagram the same information he had told his previous interrogators "so they would not hurt him." *Id.* ¶ 42.

b. Failure to rebut

Respondents replied to these declarations by presenting as a witness a criminal investigator for

CITF, but the testimony of the investigator fails to effectively rebut the evidence of abuse of Hajj and Kazimi. The investigator conducted interviews of Hajj and Kazimi in June 2004 at the Air Force Base in Bagram, Afghanistan at which both men were then held, as well as later that year in Guantanamo Bay. The FM40s that report each man's identification of a photograph of Uthman as Hudaifa, an Usama bin Laden bodyguard, are the investigator's summaries of the Bagram interviews. See JE 28 at 1; JE 29 at 1.⁵ The investigator's testimony added to the record persuasive evidence that the investigator herself did not mistreat Hajj or Kazimi and that the investigator did not observe any torture, or even any signs of abuse in the demeanor or physical state of either man, while the investigator was with them. But the investigator has no knowledge of the circumstances of either detainee's confinement before his arrival at Bagram and quite limited knowledge of his treatment there. The investigator testified to meeting with each man in an interrogation room on several days for approximately four hours at a time. The investigator did not see Hajj or Kazimi other than during those four-hour sessions and did not inquire of them, or anyone else, about their treatment in the various prisons in which they were held.

⁵ The FM40s resulting from the interviews of Hajj and Kazimi that the investigator conducted at Guantanamo Bay after those men were transferred there are part of the record before the Court, but they do not contain any information about, or possibly about, Uthman.

Respondents also ask the Court to disregard Wilhelm and Raynor's declarations because they are not direct, sworn statements of the detainees themselves.⁶ The Court shall not do so. As noted above, the nature of these proceedings is unique, and the Court is forced to rely on evidence that would normally not be accorded weight in the legal system. Respondents themselves ask the Court to detain Uthman on the basis of hearsay. Without a reason to doubt the veracity of the declarations, the Court cannot ignore them.

c. Legal analysis

Uthman asserts that the proximity in time between the torture Hajj and Kamizi described and their interrogations by the CITF investigator, however cordial, renders their statements unreliable. In general, "resort to coercive tactics by an interrogator renders the information less likely to be true." *Mohammed v. Obama*, 2009 WL 4884194, at *23 (D.D.C. Dec. 16, 2009) (citing *Linkletter v. Walker*, 381 U.S. 618, 638 (1965)). To determine admissibility in analogous situations criminal cases, courts assess the voluntariness of statements made after the application of coercive techniques based on a totality of the circumstances test. *Id.* (citing *United*

⁶ In addition, respondents object to the unauthenticated statements regarding abuse that appear in a third document containing evidence of torture, which Uthman presents as the translation of a letter written by Hajj. *See* JE 144. Because there is other, unrebutted evidence of torture in the record, the Court need not resolve the question of whether to take this exhibit into consideration.

States v. Karake, 443 F. Supp. 2d 8, 87 (D.D.C. 2006)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances.”). Judges of this Court have adopted this test in the cases of other Guantanamo Bay detainees seeking release. *See, e.g., Mohammed*, 2009 WL 4884194, at *23; *Anam v. Obama*, —F. Supp. 2d —, 2010 WL 58965, at *4 (D.D.C. Jan. 6, 2010). The test calls for considering, inter alia, “the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators.” *Mohammed*, 2009 WL 4884194, at 23 (quoting *Oregon v. Elstad*. 470 U.S. 298, 310 (1985) (internal quotation mark omitted).

Respondents do not argue that the alleged torture of Hajj and Kazimi is sufficiently attenuated from the interviews at which they gave the relevant statements to support a conclusion that despite the coercion, the statements are nonetheless reliable.⁷

⁷ Respondents do offer reasons the statements appear to be reliable. Specifically, they refer to (1) the CITF investigator’s testimony that the investigator believed Hajj and Kazimi were truthful in response to questions and (2) Kazimi’s statement in an interview with the investigator at Guantanamo Bay in November 2004 that he was unfairly accused of more charges than other detainees because he had been truthful with interrogators. GE 8 at 2. But these indicia of reliability do not outweigh the reasons to infer, based on the coercive circumstances so close in time to the interrogation, that they are unreliable.

The interviews on which the relevant FM40s are based occurred in Bagram, where torture of Hajj was ongoing and where Kazimj had arrived directly from the CIA prison, at which he was tortured, only about a month earlier. See JE 145 ¶ 36; JE 28 at 1. Therefore, the Court concludes that there has been no “break in the stream of events ... sufficient to insulate the statement from the effect of all that went before.” *Clewis v. Texas*, 386 U.S. 707, 710 (1967). Accordingly, the Court will not treat Haji and Kazimi’s statements as true.

ii. Reliability of identification

Furthermore, there are serious questions as to whether Hajj and Kazimi’s statements, even if considered outside the context of the coercion that limits their value, constitute significant evidence that Uthman was a part of Al Qaeda. Specifically, the assertions that “Hudaifa” was a bodyguard for Usama bin Laden are only relevant if “Hudaifa” is an alias for Uthman.

According to the Defense Intelligence Agency, members of Al Qaeda use aliases, often referred to as kunyas, to “conceal[] the individual’s identity” and “as a security, denial and deception measure.” JE 2 at 2. Therefore, it would not be surprising that, were Uthman a former bodyguard for Usama bin Laden, he had an alias by which Al Qaeda fighters knew

him. But respondents have not demonstrated a link between Uthman and the name “Hudaifa.”⁸

They offer one piece of evidence to support the contention that Uthman used Hudaifa as an alias. but the Court will not consider it. The D.C. Circuit has made clear that hearsay evidence “must be presented in a form, or with sufficient additional information, that permits [the factfinder] to assess its reliability.” *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008). Here, the relevant document contains limited information about its source. Therefore, the Court does not have “knowledge as to the circumstances under which the source obtained the information.” *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (concluding that “the information in the classified intelligence report[] relating to the credibility and reliability of the source ... is *not* sufficient for the purposes for which a habeas court must now evaluate it” where “the Court has no knowledge as to the circumstances under which the source obtained the information” on which respondents rely); *see also Anam*, 2010 WL 58965, at *8 (declining to rely on an intelligence report of

⁸ “Hudaifa al Adani.” the name Hajj used when shown the photograph of Uthman, means Hudaifa from Aden. JE 2 at 7. “Hudaifa Al Yemeni,” the name in the FM40 of Kazimi’s interview. means Hudaifa from Yemen. *Id.* at 12. Because Uthman is from Aden. which is in Yemen. these descriptors are appropriate to him. but they do not alone constitute an identification. Many people. including many suspected or admitted Al Qaeda members about whom there is evidence in the record currently before the Court, are from Aden, Yemen.

which “[t]he source (or sources) ... is unknown” and another that “lacks any indicia of reliability”). Because the Court cannot evaluate whether the information in document is credible, it will not rely on it.

Moreover, it is not clear that the name by which Kazimi referred to the photograph of Uthman was consistent with an identification of Uthman. Respondents produced a copy of the photograph the CITF investigator showed to Kazimi during the investigator’s interview with him; on the back of that photo. Kazimi wrote a line of text in Arabic. GE 2. At some point after the interview, someone wrote a translation of that line in English just beneath it, which reads: “He is Arab, and Looks Like Huthaifa Al-Anzi.” *Id.* Uthman obtained a declaration of a professional translator who stated that the line of Arabic reads: “Shafai Adani looks like Khuthaifa Al Anzi.” PE 4 (Declaration of Masud Hasnain).⁹ Whatever the significance of the inconsistencies in translations on Kazimi’s intended meaning and the accuracy of the investigator’s recording of Kazimi’s statements, both English versions of the text indicate that Kazimi wrote “Al Anzi.” Al Anzi, according to an undisputed definition from Wikipedia, “is an ancient and prolific Arab tribe, originating in the Hadhramaut region of Yemen.” PE 5. There is no evidence in the record that Uthman has any connection to this tribe or has used an alias that includes this reference. The Court therefore cannot

⁹ Respondents have not rebutted this alternative translation.

conclude that Kazimi recognized Uthman from the photograph or was talking about Uthman when he said Hudaifa Al Anzi was a bodyguard for Usama bin Laden.¹⁰

2. Other evidence

i. Statement of Bukhari (ISN 493)

Respondents offer as additional evidence that Uthman was a bodyguard for Usama bin Laden another statement, this one recorded in an intelligence report resulting from an interrogation of Abd Al Hakim Abd Al Karim Amin Bukhari, ISN 493. Bukhari stated that Uthman “was a member of the Usama bin Laden ... security detail.” JE 77 at 2.

The Court finds this evidence unpersuasive for two reasons. First, it is not clear that Bukhari’s statement is based on personal knowledge. Bukhari stated in testimony before the Combatant Status Review Tribunal that he was only in Afghanistan for ten days after the September 11 attacks and that before then, he had been in Saudi Arabia. JE 149 at 8. If this information is correct, Bukhari could not

¹⁰ Uthman places great weight on the statement in the FM40 of Kazimi’s interrogation that the photograph “looks like Hudaifa.” JE 28 at 5. He reasons that the assertion that an individual “looks like” a particular person falls short of being an identification. Although this language certainly does not assist respondents in making their case, it is not clear to the Court whether it compromises the identification. In any event, because the Court will not consider the statement as weighing against Uthman’s petition for the reasons explained above, resolution of this issue is unnecessary.

have observed Uthman acting as a bodyguard in Afghanistan before September 11. In reply to this logic, respondents point to a report containing intelligence the Department of Defense received from Bukhari; Bukhari described a speech Usama bin Laden gave in Kandahar, Afghanistan “approximately three months before 9/11.” JE 150 at 1. Respondents infer that Bukhari’s presence at this speech means he and Uthman were in Kandahar at the same time. Even accepting that inference as true, there is no evidence in the record that the two men were at the same speech, in the same building, or ever even saw each other in Kandahar. Without more information as to how Bukhari came to believe that Uthman was part of Usama bin Laden’s security detail, the Court cannot evaluate the credibility of the statement and therefore cannot rely on it. See *Boumediene*, 519 F. Supp. 2d at 197; *Anam*, 2010 WL 58965, at *8.

ii. Opportunity to become a bodyguard

Respondents have presented a variety of other statements to support the proposition that Uthman had the necessary contacts to become a bodyguard for Usama bin Laden. These contacts are relevant, respondents assert, because according to Hajj, “those who were bodyguards would try to get people they knew, or people who were from their hometown, to be bodyguards,” JE 29 at 4, so one of these men may have recommended Uthman.

This evidence, even if accepted as true, does not demonstrate that Uthman was a bodyguard for Usama bin Laden. It might assist in corroborating or explaining other evidence of such a fact were there

indications in the record from reliable sources supporting the proposition. But, as explained, there are not. The ability to become a bodyguard is simply not proof, even under the preponderance of the evidence standard, that Uthman actually took the opportunity. In sum, because respondents have not presented evidence on which the Court can rely to demonstrate that, more likely than not, Uthman was a bodyguard for Usama bin Laden, the Court cannot find that Uthman is lawfully detained on that basis.

B. Issue Two: Whether Uthman’s Seizure Near the Site of the Battle of Tora Bora is Incriminatory

By his own admission, Uthman was seized in late 2001 in the general vicinity of Tora Bora. JE 10 at 3; JE 13 at 2-3. He was with a group of approximately thirty other men, a few of whom he knew from Yemen. JE 10 at 3; JE 13 at 2.

Respondents argue that these circumstances—in particular, Uthman’s location and the identities of some of his fellow travelers—are evidence of his affiliation with Al Qaeda. Respondents question why Uthman would choose to stay in Afghanistan after September 11, 2001 if he were not involved in Al Qaeda. They assert that Uthman’s proximity at the time of his capture to the site of an ongoing battle and a known location of Usama bin Laden, a cave complex called Tora Bora, strongly suggests he was coming from the complex.¹¹ Additionally, at least

¹¹ After the September 11 attacks, Al Qaeda fighters went to Tora Bora, which is in eastern Afghanistan, “to make a last (...continued)

some of the men with whom Uthman traveled—in particular, the ones he knew—were admitted, or at least alleged, Al Qaeda members, some of whom were likely coming from Tora Bora. *See* JE 10 at 3; JE 13 at 2; JE 93 at 9; JE 29 at 4, 5.

Uthman rejoins first that respondents have presented no direct evidence that Uthman was at Tora Bora. Second, he argues that insofar as respondents have identified circumstantial evidence suggesting that he was present at the battle there, the inferences necessary to so conclude assume the truth of the allegation that Uthman was a bodyguard for Usama bin Laden. Third, despite reiterating that the burden is on respondents to prove their case rather than for Uthman to prove anything, he argues that the information from other detainees is consistent with Uthman’s assertion that he was in Khost, Afghanistan, rather than Tora Bora, before being seized.¹²

stand in their fight against the United States and its allies.” JE 63 at 1-2. Tora Bora was the target of air strikes, the “most intense” of which occurred from December 10 through 17, 2001. *Id.* at 2. As the battle went on, many fighters escaped the cave complex. *Id.* at 3. Because the call for fighters to join Usama bin Laden at Tora Bora was “widely known,” “few, if any noncombatants would have been in the vicinity during this time.” *Id.* at 4.

¹² According to Uthman, after September 11, he went to the village of the man who was his translator while he was a tutor, located outside the city of Khost, to escape the bombing of Kabul. JE 103 (Decl. of Uthman) ¶ 12.

On balance, the Court accepts respondents' evidence, which is largely based on and consistent with Uthman's own admissions, as true and will consider it in evaluating whether the evidence as a whole supports the continued detention of Uthman.

C. Issue Three: Whether Uthman Fought on the Front Lines and was Present at an Al Qaeda/Taliban Guesthouse in Kabul, Afghanistan

Respondents argue in further support of their contention that Uthman was part of Al Qaeda that (1) he fought with Al Qaeda members alongside the Taliban in Kabul, Afghanistan against forces trying to overturn the Taliban regime in that country and (2) he stayed at an Al Qaeda guesthouse in Kabul. As evidence of their first allegation, respondents point to a statement by Kazimi during an interview with the CITF investigator at Bagram that Uthman "was in Kabul on the front line." JE 28 at 5. An intelligence report also indicates—perhaps based on the CITF investigator's interview—that Kazimi identified a picture of Uthman as "Hudayfah [Al-Adani]," who Kazimi "believe[d] was fighting on the front lines." JE 43 at 3. Another intelligence report indicates that a different detainee identified a photograph of Uthman as "Yasser Al-Madani (Yemeni)" and indicated that he was at the "Omar Seif position," a location on the front lines, in Kabul. JE 44 at 2. Regarding the second allegation, respondents note that the intelligence of which Kazimi is the source indicates that Kazimi stated he "last saw" Hudayfah at a guesthouse in Kabul in "early 2001." JE 43 at 3.

Uthman attacks each piece of evidence. As to Kazimi's statements, Uthman argues they are tainted by torture and therefore unreliable. He also argues that Kazimi does not explain how he came to "believe[]" Uthman was on the front lines, JE 43 at 3, rendering the information unreliable, and that Uthman asserts he was not in Kabul until March 2001, JE 10 at 2, which is inconsistent with Kazimi's having seen him there in "early" 2001, JE 43 at 3. As to the statement of the other detainee. Uthman argues the use of the name "Yasser" as well as "al-Madani," which refers to someone from Medina. Saudi Arabia, demonstrate that the identification is inaccurate.

The Court agrees with Uthman as to most of this evidence. As explained above, the Court cannot appropriately rely on the information of which Kazimi is the source, primarily because Kazimi's statements are not sufficiently attenuated from torture, of which there are unrebutted allegations in the record, by other interrogators. The other detainee's reference to "Yasser al-Madani" calls into serious question his identification of Uthman. Even assuming at respondents' suggestion that "al-Madani" is an erroneous transcription of "al-Adani," respondents have identified no indication anywhere in the record that Uthman used "Yasser" as an alias. Because there is so little reason to believe Uthman was a fighter in Kabul, the Court will not conclude it is more likely than not that this allegation is true.

D. Issue Four: Whether Othman Attended an Al Qaeda Training Camp and Was Present at an Al Qaeda Guesthouse in Kandahar, Afghanistan

Respondents also contend that Uthman took part in Al Qaeda-sponsored activities in Kandahar, Afghanistan before going to Kabul, which, respondents reason, is consistent with and reinforcing of the proposition that Uthman was a bodyguard for Usama bin Laden. Specifically, they assert that he attended a training camp for Al Qaeda fighters and, as in Kabul, stayed at an Al Qaeda guesthouse. Respondents base their training camp allegation largely on an intelligence report that the contents of a “document issued by the Office of Mujahideen Affairs” that, according to the report, “lists over 150 Al-Qaeda members scheduled for tactics, artillery, security, snipers and anti-aircraft training.” JE 51 at 2.¹³ The name “Abu Huthayfah Al-‘Adani” appears in a list of individuals who were to attend a tactics class on March 24, 2001.¹⁴ *Id.* at 7.

Uthman makes three arguments regarding the training roster. First, he argues that respondents have not shown that Hudaifa is a kunya Uthman used. Second, even had they so demonstrated, Uthman asserts that the inclusion of “Abu” in the

¹³ The list “was recovered by U.S. Coalition Forces from an Al-Qaeda house in Kandahar.” JE 51 at 3.

¹⁴ The document uses the Islamic Calendar but the parties agree the relevant date corresponds to this day on the Gregorian Calendar.

name on the list distinguishes it from the name by which Kazimi and Hajj referred to the photograph of Uthman. Abu means “father of,” so the name immediately following it is normally the name of a man’s first-born child, not his own name. JE 2 at 2. Uthman reasons that even if a man with no children uses Abu in his kunya to conceal his identity, the name following Abu would not be the same name he uses to identify himself in another kunya. Third, he points to references in the record of this case to two other men who used the alias Abu Hudaifa. *See* JE 154 at 1; JE 23 at 2.

The Court concludes that this evidence, although not necessarily unreliable, is not persuasive as to the contention respondents seek to support. As discussed above, there is no reliable evidence linking Uthman to the name Hudaifa. Therefore, the appearance of that name on the training list, especially without corroboration from any other source that Uthman might have been at a training camp, does not make it more likely than not that Uthman attended the tactics course. That Abu Hudaifa was an alias for other men, whether or not the particular men identified were likely to have attended this particular training, further weakens the proposition that the list itself can support respondents’ allegation.

As to the guesthouse allegation, a summary of an interrogation of Richard Dean Belmar, ISN 817, indicates that when shown a picture of Uthman, Belmar stated that he “may have been a lower

amir,” or leader, “in the Kandahar guest house.” JE 36 at 2.¹⁵

Again, Uthman attacks all of respondents’ evidence. Uthman discounts the recollection of Belmar, who (1) was not Arab, (2) indicated by saying the photo “may have been” of an amir that he was unsure of his statement. and (3) was not in Kandahar at the same time as Uthman. *See* PE 7 at 3 (summarizing Belmar’s statements before the Combatant Status Review Board in November 2004, including an admission that he “traveled from the United Kingdom to Kandahar, Afghanistan around July 2001”); JE 10 at 2 (reporting that Uthman asserted he left Yemen for Afghanistan in March 2001 and about a week after arriving in Kandahar went to Kabul).

The allegation that Uthman was an amir at an Al Qaeda guesthouse is not as easily dismissed as the training camp allegation. Because Belmar’s statement is not a definitive identification, it is not strong evidence of Uthman’s presence at such a guesthouse. But it is not so unreliable that the Court disregards it entirely.

¹⁵ To explain this allegation that Uthman was not just a guest at, but a lower leader of, a guesthouse, respondents infer that Uthman likely traveled to Afghanistan before 2001, when he asserts he arrived, JE 103 ¶¶ 6-8, such that he was able to train, fight in Kabul, rise to a position of some prominence at a guesthouse, and serve as a bodyguard during that year.

E. Issue Five: Whether Uthman's Prior Associations, Travel Route to Afghanistan, and Other Circumstances Further Support that He Was Part of Al Qaeda.

Respondents present a variety of additional evidence and arguments to support their case, and Uthman responds to each point. For example, Uthman argues that giving weight to the undisputed fact that he might have known some men who became involved in terrorism constitutes inappropriately permitting respondents to prove guilt by association.

Respondents also attach significance to the fact that Uthman traveled from Yemen to Afghanistan along a route—a flight from Yemen to Karachi, Pakistan; a stay at a hotel in Karachi, a bus from Karachi to Quetta, Pakistan; a ride to Kandahar, Afghanistan—that Al Qaeda members also took. *See* JE 1036-7 (recounting Uthman's trip); GE 7 at 1 (citing to interrogation reports of other alleged Al Qaeda members who described similar travel routes). Uthman asserts that travel to Afghanistan, which did not have a functioning international airport in 2001, required an indirect route, and proceeding on the same path as Al Qaeda members is not evidence of participation in Al Qaeda.

Uthman has not disputed the factual accuracy of most of these contentions, instead arguing that they are not sufficient to demonstrate that he is lawfully

detained.¹⁶ The Court therefore accepts each of respondents' allegations as true and discusses their significance below.

G. Conclusion

In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.

¹⁶ Respondents also argue that Uthman now offers an implausible alternative account of his activities in Afghanistan. The Court has considered the version of events Uthman describes and notes that some aspects of the story he tells are less than entirely believable. In particular, Uthman asserts he taught children in Afghanistan, but he does not know Pashtu, the primary language spoken in that country. But Uthman offers two explanations of this questionable detail: because the Arabic spoken in Yemen is "considered to be the closest to the classical language of the Quran," knowledge of Yemeni Arabic is a bona fide job skill in the educational sector in ... Afghanistan," JE 114 ¶ 16(f). and Uthman "depended on [a man who served as a translator for him] for communication," JE 103 ¶ 10. Overall, Othman's account is not so incredible as to lead the Court, in weighing all the evidence before it, to conclude the respondents have met their ultimate burden of showing by a preponderance of the evidence that Uthman was part of Al Qaeda.

Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Although this information is consistent with the proposition that Uthman was a part of Al Qaeda, it is not proof of that allegation. As explained, the record does not contain reliable evidence that Uthman was a bodyguard for Usama bin Laden or fought for Al Qaeda. Certainly none of the facts respondents have demonstrated are true are direct evidence of fighting or otherwise “receiv[ing] and execut[ing] orders,” *Gherebi*, 609 F. Supp. 2d at 69,¹⁷

¹⁷ The Court notes that the D.C. Circuit has suggested that evidence that a detainee “visited Al Qaeda guesthouses ... would seem to overwhelmingly, if not definitively, justify the government’s detention” of that individual. *Al-Bihani*, 590 F.2d at 873 n.2. But this statement is dicta, and it appears in an opinion reviewing a case in which respondents presented significantly stronger evidence supporting the detention of the individual in question than they have here—including that the detainee had “accompanied and served a paramilitary group allied with the Taliban ... which fought on the front lines against the Northern Alliance,” *id.* at 869—and noting explicitly that the Circuit Court did not rely on evidence regarding guesthouses in affirming denial of the petition. *id.* at 873 n.2. Furthermore, respondents have not argued that Uthman’s detention is justified based solely on his having been seen at Al Qaeda guesthouses. In addition, there is evidence in the record, albeit not specific to Al Qaeda guesthouses, that “[t]he fact that a young Yemeni stays at ‘guest houses’ while in ... Afghanistan does not itself imply anything menacing or illicit” because it is common for such a man traveling abroad to seek economical, safe accommodations. JE 114 (Decl. of Dr. Sheila Carapico) ¶ 15. Moreover, there is no evidence before the Court that Uthman did anything more incriminatory than appear at Al Qaeda guesthouses. For these reasons, the Court (...continued)

and they also do not, even together, paint an incriminating enough picture to demonstrate that the inferences respondents ask the Court to make are more likely accurate than not. Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not alone enough. to demonstrate that, more likely than not, Othman was part of At Qaeda. *See Ahmed v. Obama*, 613 F. Supp. 2d 51,63-64 (D.D.C. 2009) (granting the habeas petition of a Guantanamo Bay detainee where the evidence that remained after excluding unreliable evidence amounted to “essentially a charge of guilt by association”).

Respondents have presented some evidence that, at first blush, is quite incriminating of Uthman and supportive of the position that he is lawfully detained. Upon close examination of that evidence, however, the Court finds that there is reason not to credit some of it at all and reason to conclude that what remains is not nearly as probative of respondents’ position as they assert. Therefore, the evidence against Uthman is not sufficient to carry respondents’ burden.

III. CONCLUSION

For the foregoing reasons, Uthman’s petition for a writ of habeas corpus shall be granted. An appropriate order accompanies this memorandum opinion.

sees no basis for detaining Uthman on the minimally incriminating facts before it.

Henry H. Kennedy, Jr.
United States District
Judge

