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[ORAL ARGUMENT NOT YET SCHEDULED]
No. 10-5087

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MOHAMEDOU SALAHI,
Petitioner-Appellee,**

v.

**BARACK H. OBAMA, *et al.*,
Respondents-Appellants.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CORRECTED BRIEF FOR APPELLANTS

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~~SECRET//NOFORN~~**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The petitioner in the district court was Mohamedou Ould Salahi. The respondents in the district court, all of whom are appellants in the court of appeals, are Barack H. Obama, President of the United States; Robert M. Gates, Secretary, U.S. Department of Defense; Jay Hood, Army Brigadier General, Commander, Joint Task Force-GTMO; and Brice Gyurisko, Army Colonel, Commander, Joint Detention, Operations Group-JTF-GTMO.

B. Rulings Under Review

Respondents appeal from the March 19, 2010, order of the district court (Robertson, J.) granting the petitioner a writ of habeas corpus. *See* Joint Appendix (JA) 281.

C. Related Cases

There are several other appeals of district court orders granting or denying a writ of habeas corpus to individuals detained at Guantanamo Bay, Cuba. Those cases, however, do not involve the "same parties," and are thus not related pursuant to Circuit Rule 28(a)(1)(c). Those cases are as follows:

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1. *Bensayah v. Obama*, D.C. Cir. No. 08-5337, is an appeal by an individual detained at Guantanamo from the denial of a habeas corpus petition.

Oral argument was held on September 24, 2009.

2. *Basardh v. Gates*, No. 09-5200 (D.C. Cir.), is a government appeal from a district court ruling that the court may order release of a member of the enemy forces on the ground that the individual will not rejoin the battle or engage in any future act of terrorism.

3. *Al Alwi v. Obama*, No. 09-5125, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

4. *Al-Bihani v. Obama*, No. 09-5051, is also an appeal by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus. This Court issued its decision in that case on January 5, 2010. 590 F.3d 866 (D.C. Cir. 2010).

5. *Awad v. Obama*, No. 09-5351, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus. Oral argument in that case was held on April 5, 2010.

6. *Al-Adahi v. Obama*, Nos. 09-5333 & 09-5339, are cross-appeals of an order granting a petition for a writ of habeas corpus. Oral argument was held on February 15, 2010.

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7. *Shafiq v. Obama*, No. 09-5383, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

8. *Al Hadi v. Obama*, No. 09-5163, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

9. *Sliti v. Obama*, No. 09-5104, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

10. *Al Odah v. United States*, No. 09-5331, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus. Oral argument was held on April 5, 2010.

11. *Hatim v. Obama*, No. 10-5048, is an appeal brought by the government of a grant of a petition for a writ of habeas corpus.

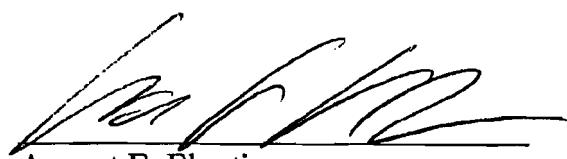
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Counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(c).



August E. Flentje

Counsel for Respondents-Appellants

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~~SECRET//NOFORN~~**GLOSSARY**

AUMF Authorization for Use of Military Force

CSRT Combatant Status Review Tribunal

IIR Intelligence Information Report

JA Joint Appendix

LHM Letter Head Memorandum

SIR Summary Interrogation Report

[REDACTED] [REDACTED]

Tr Habeas trial transcript

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**IN THE UNITED STATES COURT OF APPEALS
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**MOHAMEDOU SALAHI,
Petitioner-Appellee,****v.****BARACK H. OBAMA, *et al.*,
Respondents-Appellants.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CORRECTED BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2241. The district court entered a memorandum order granting Mohamedou Salahi's habeas petition and ordering him "released from custody" on March 19, 2010, and the government filed a timely appeal. JA 250, 282. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

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~~SECRET//NOFORN~~**STATEMENT OF ISSUES**

Salahi admits that he swore allegiance to al-Qaida and fought for al-Qaida in Afghanistan in the early 1990s. The district court's findings show that Salahi maintained continuous contacts with and continued providing assistance to Al-Qaida until 2001, when he was captured. And the district court concluded that Salahi made no showing that he disassociated from Al-Qaida. The questions presented on appeal are:

1. Whether, because the government established that Salahi had joined al-Qaida and sworn loyalty to al-Qaida and Usama bin Laden, the burden shifted to Salahi to prove that he left the organization prior to his capture.
2. Whether, even if the government bore the burden to prove that Salahi did not disassociate from al-Qaida, the district court nonetheless erred as a matter of law by ignoring Salahi's admitted membership and applying an overly narrow legal standard for determining whether Salahi remained "part of" al-Qaida.
3. Whether the district court erred by failing to address the reliability of several significant admissions Salahi provided, which were not the product of coercion, post-date other statements that the district court credited as unaffected by prior coercion, and support the conclusion that Salahi remained part of al-Qaida.

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~~SECRET//NOFORN~~**STATUTORY PROVISION**

The Authorization for Use of Military Force (AUMF), Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001) provides that “the President is authorized to use all necessary and appropriate force against those . . . organizations . . . he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”

STATEMENT OF THE CASE

The government appeals the district court’s order granting the writ of habeas corpus to Guantanamo Bay detainee Mohamedou Salahi. JA 282.

STATEMENT OF FACTS**A. Factual Background and Government’s Case Against Salahi.**

1. Salahi was born in Mauritania in 1970. JA 2368 (Salahi declaration). He began studying on scholarship in Duisburg, Germany in 1988. *See* JA 2585 (Trial Transcript (Tr.) 363). In December 1990, Salahi traveled to Afghanistan “to support the mujahideen.” JA 2369 (Salahi declaration); JA 2619 (Tr. 497). Once in Afghanistan, Salahi obtained seven weeks of weapons training at an al-Qaida terrorist training camp known as al-Farouq. JA 2587 (Tr. 369); JA 339 (CSRT statement). At al Farouq, he assumed an al-Qaida pseudonym, or *kunya*, “Abu Musab,” JA 2619 (Tr.

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497).

In March 1991, Salahi formally joined the al-Qaida terrorist organization by swearing *bayat* (loyalty) to al-Qaida. *Id.* He swore his oath in front of Iz Eldin al-Bahraini, a top lieutenant of bin Laden. JA 263 (Order at 14 n.10); JA 2619 (Tr. 497-98); *see* JA 500 (IIR 4/10/04). Salahi has explained that the oath of *bayat* was for the most elite members of al-Qaida: “Al-Qaida intelligence watches members in the camps and chooses those they feel are the most intelligent” to swear *bayat*. JA 505 (IIR 12/04/03). When swearing *bayat*, Salahi “knew that Osama [bin Laden] was the leader of al-Qaida” and his loyalty was to bin Laden. JA 2619 (Tr. 500); *see* JA 208 (Traverse); JA 344 (CSRT statement) (“I admit to being a member of al-Qaida”). Salahi explained that “*bayat* is not for a specific event, but for everything, or for an overall cause.” JA 505 (IIR 12/04/03).

In March 1991, Salahi left Afghanistan because there was “no fight[ing]” at the time, but returned nine months later and joined the fight on behalf of al-Qaida against the communists. JA 2587 (Tr. 371); JA 2370 (Salahi declaration). During that second trip, Salahi brought two close friends, Karim Mehdi and Eli Qadr. JA 2588 (Tr. 376); *see* JA 2820-21 (Tr. 504-505). In Pakistan, on their way into Afghanistan, the group met Abu Hafs al-Mauritania, JA 2623 (Tr. 515), a senior al-Qaida leader who was also Salahi’s “far cousin.” JA 2608 (Tr. 453). Salahi was sent to the battle lines in Gardiz,

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Afghanistan, where he met Chris Paul, an American member of al-Qaida. JA 2621, 2630 (Tr. 507, 541).

The fighting ended in March 1992, and Salahi returned to Germany. JA 2370 (Salahi declaration). At this point, Salahi claims that he “severed all ties with . . . al-Qaida.” *Id.*

2. In fact, the evidence showed Salahi had an ongoing relationship with al-Qaida until he was captured in 2001.

First, it is undisputed that in December 1992, less than a year after leaving Afghanistan, Salahi attempted to rejoin the jihad in Bosnia, “to fight.” JA 2622 (Tr. 510); *see* JA 2589 (Tr. 378). It is undisputed that Bosnia was, at the time, a known jihad front for al-Qaida. *See* JA 243.

Second, it is undisputed that Salahi maintained close ties with two al-Qaida operatives – Mehdi and Christian Ganczarski, up until 2001, and consulted with Ganczarski on al-Qaida projects. JA 2633-34 (Tr. 556-57). Mehdi and Ganczarski were subsequently convicted in France for their participation in al-Qaida bombing plots. *See* JA 1246 (New York Times, 10/26/06) & JA 1251 (BBC News, 2/5/09). Ganczarski, who is German, is serving an 18 year sentence for his involvement in a

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2002 suicide bombing of a tourist site in Djerba, Tunisia that killed 21 people. JA

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Third, it is undisputed that Salahi maintained significant contact with Abu Hafs al-Mauritania after Salahi returned from Afghanistan and performed work for Hafs throughout the years leading up to Salahi's capture. Hafs was a "senior Al-Qaeda leader" and "the spiritual adviser to Osama bin Laden." JA 2622, 2608 (Tr. 511, 455). Hafs was also Salahi's "far cousin" (JA 2608 (Tr. 453)), and after Salahi was married, Hafs met and married Salahi's wife's sister. JA 2608 (Tr. 455). At Salahi's CSRT, he stated that he told Hafs, "hey, I want to work a little bit. I didn't want to tell him to forget me, because they would be against me, and they would hunt me down." JA 346.

Between 1993 and 2001, Salahi maintained contact with Hafs and worked on several al-Qaida projects at his direction. In 1993, as Salahi testified, Hafs took Salahi to an al-Qaida safe house he had set up in Mauritania. JA 2623 (Tr. 514-15) (agreeing house was "related to al-Qaeda"). Salahi further testified that in 1995, Hafs asked Salahi to "work with him" to develop a shortwave broadcasting station in the Sudan, where Hafs had gone to be with bin Laden. JA 2632 (Tr. 550). In furtherance of this project, al-Qaida's telecommunications chief at the time – and a senior member of al-

¹ "[C]ourt documents [show that] suicide bomber Nizar Mouar called Khalid Sheik Mohammed and Christian Ganczarski just before he drove a gas-laden truck into the synagogue." *Id.*

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Qaida's shura council – Abu Hajar al-Iraqi, came to Germany in 1995 and 1996. JA 2632, 2609 (Tr. 549-52, 459). Salahi facilitated al-Iraqi's travel in Germany during these visits by, among other things, driving him to various locations, including a meeting with a telecommunications expert. JA 2632 (Tr. 551-52).

In December 1997 and October 1998, Salahi helped Hafs make undetectable money transfers to Mauritania. JA 2609, 2626 (Tr. 457, 525-26). Each transfer was for around \$4,000; Salahi withdrew the money as cash in Germany, and then had his brother hand-carry it into Mauritania. JA 2626 (Tr. 525-26). Salahi claimed he moved this money "as a personal favor and not to help al Qaeda." JA 2395 (Salahi declaration).

In 1999, Hafs provided Salahi with fraudulent passports. Hafs delivered the passports to Salahi through the German al-Qaida operative Ganczarski. JA 2633 (Tr. 553). Up until 2001, Hafs tried to persuade Salahi to use the passports to come to Afghanistan. JA 2609, 2633 (Tr. 459, 553). Salahi claims that he never used the passports, and in the summer of 2001, at Hafs' direction, he gave one of the passports to its purported owner, Ahmed Mazid, a man Salahi claims he did not know. JA 2612, 2637 (Tr. 472, 570). Mazid was an al-Qaida operative who had been in Afghanistan. JA 881 (FBI LHM 7/16/05).

Finally, in 1999-2000, Ganczarski was working on a telecommunications project

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for al-Qaida, at Hafs' direction, obtaining equipment in the west to bring to Afghanistan. *See* JA 2634 (Tr. 557). Salahi was aware of the project and the equipment Ganczarski was obtaining. *Id.* Salahi had told the FBI in 2005 that he was involved in the project and described it in detail, but denied involvement when he testified at trial. JA 455 (FBI LHM (9/14/05)), JA 2633-34 (Tr. 556-57).

Fourth, in addition to working on al-Qaida projects for Hafs, Salahi engaged in al-Qaida recruiting and travel facilitation throughout the 1990s. At trial, Salahi denied being an al-Qaida recruiter, stating that he merely invited people in to his home to "drink tea and just stay for a little bit, watch the news, watch documentary, then they go," JA 2611 (Tr. 467); *see* JA 2391 (Salahi declaration) (it was "possible that I spoke with others about my experiences in Afghanistan"). But prior to trial, he admitted to being an al-Qaida recruiter, JA 500 (IIR 4/10/04); JA 526 (IIR 1/22/04); JA 510 (IIR 1/17/04); JA 1032-33 (IIR 2/25/04), and provided specific examples of recruiting. JA 893-94 (FBI LHM 7/17/05).



As noted above, Salahi met Chris Paul, an al-Qaida operative, in 1992 when fighting together with him in Afghanistan. JA 2629-30 (Tr. 540-41). Salahi's connection with Paul persisted through the 1990s – he met with Paul in Germany in

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1993 and 1998 and communicated with Paul while in Canada in 1999. JA 2631, 2635

(Tr. 545-46, 561-64). In 1997, Salahi contacted Paul, to recruit jihadists into al-Qaida, as evidenced by a facsimile signed by Salahi that was found at Chris Paul's residence and which formed a basis for criminal charges filed against Paul in the United States.

See JA 839 (Paul facsimile) & JA 847 (Paul indictment). Salahi told the FBI in July 2005 that sending a facsimile to Paul like the one found in Paul's home "was something we did to facilitate getting brothers to fight, to get them moving." JA 877 (FBI LHM 7/14/05). He also told the FBI he contacted Paul because he was "a man of great respect in Al Qaeda" and Salahi had signed the facsimile "so that Paul would know it was coming from people Paul would trust." JA 881 (FBI LHM 7/16/05). Paul is now serving 20 years for conspiring to detonate a weapon of mass destruction. JA 857 (plea agreement); *see* Department of Justice Press Release, Ohio Man Pleads Guilty (June 3, 2008), available at www.justice.gov/opa/pr/June/08-nsd-492.html.

In late 1999, Salahi recruited Ramzi Bin al-Shibh, along with two individuals whom Salahi did not recall, but [REDACTED] were Ziad Jarrah and Marwan al-Shehhi. JA 2611 (Tr. 465); [REDACTED] Shibh was no minor al-Qaida member. Rather, he became one of the planners of the 9/11 attacks, and Jarrah and al-Shehhi would become two of the suicide pilots. At trial, Salahi testified that he "hosted Ramzi Bin al Shihb and two companions" in his apartment in October 1999 and "probably fed

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al-Shibh with the information I knew about [going] safely in[to] Chechnya," which meant traveling first to Afghanistan. JA 2611, 2629 (Tr. 465, 539). Mehdi [REDACTED]

[REDACTED] stated that Salahi counseled Shibh and his companions to travel to Afghanistan to receive military training. [REDACTED] JA 718 (Mehdi statement).

Fifth, Salahi moved to Canada in November 1999, and immediately became involved with several al-Qaida operatives, including Ralph Hannachi and Ahmed Laabidi. JA 2634, 2637 (Tr. 559, 569). Salahi stayed with Hasni Mohsen—the man with whom he had tried to fight jihad in Bosnia in 1992 (JA 2589 (Tr. 378-79))—and while there Salahi helped Mohsen travel to Chechnya “for the purpose of violent Jihad” by moving bags and sending him a Tunisian passport. JA 2634-36 (Tr. 560-61, 566).

While Salahi was in Montreal, the millennium bombing plot was foiled when an al-Qaida operative from Montreal, Ahmed Ressam, was captured at the U.S. border with explosives. See JA 2635 (Tr. 564). Investigative interest quickly focused on Salahi: on December 20, 1999, the “police . . . [then] visited me in [Mohsen’s] house and they questioned me about . . . Ressam.” JA 2590 (Tr. 382). Additionally, pocket litter found by investigators on Laabidi linked Salahi, Mohsen, and Ressam. JA 2590 (Tr. 383); JA 481 (Laabidi IIR). Although he denied it at trial, in prior interviews Salahi had said that Mohsen, Laabidi, and Hannachi were in al-Qaida. JA 535. Once

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this investigation had begun, Salahi left Canada for Mauritania, in January 2000. After arriving in Mauritania, Salahi testified that he was stripped of his passport and forced to remain in the country. JA 2637 (Tr. 569).

Sixth, once grounded in Mauritania, Salahi began setting up a web site in late 2000 to “create a discussion group regarding fighting Jihad.” JA 2639 (Tr. 577). He testified that he halted the project because Ganczarski expressed concerns about ~~“surveillance.” Id.~~ At trial, Salahi denied the project’s connection to al-Qaida, but prior to trial, he had specifically tied the work to al-Qaida. JA 591-92. Though at trial Salahi denied the connection to al-Qaida, he also testified that as late as 2001 he was “part of many forums concerning Jihad on [the] Internet.” JA 2638 (Tr. 574). As the district court concluded, documents on Salahi’s computer “corroborate statements of Salahi to the effect that he knew about and had some involvement in planning for denial of service computer attacks” through these forums. JA 274 (citing JA 591); *see* JA 1344 (files on Salahi’s computer showing denial of service directions). By mid-2001, as he testified, Salahi “kn[e]w for a fact” that the “government of Mauritania was watching” him, JA 2637 (Tr. 569-70), and he had previously said he was “kind of scared and too well-known” to travel to Afghanistan on the fraudulent passport given to him by Hafs. JA 954 (IIR 1/29/04).

On ~~1~~ 2001, Salahi was captured ~~1~~. JA 250.

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~~SECRET//NOFORN~~**B. District Court Proceedings.**

Salahi filed a petition for a writ of habeas corpus, JA 100. The government filed a factual return, JA 135, and Salahi filed a traverse, JA 157. Following extensive discovery, the district court held a four day merits hearing, *see* JA 2495, and granted the petition. JA 250.

The district court held that the government had to prove that Salahi was “part of” al-Qaida at the time of his capture. JA 254-56. Given Salahi’s admission that he had joined al-Qaida, his only serious challenge to the government’s case for detention was to claim that he “severed ties” with al-Qaida in March 1992. JA 263. The court, however, found that Salahi “adduced no evidence that he ‘rejected’ al-Qaida.” JA 258 n.7. Nonetheless, the court held that it would not shift the burden to Salahi to show that he had disassociated from al-Qaida. *Id.* In rejecting shifting the burden to Salahi, the court also imposed a higher burden on the government, explaining that Salahi lacked access to “intelligence sources and witnesses” and the government had a “built in advantage,” the Court held that “[i]t is only fair to the petitioner . . . to view the government’s showing with something like skepticism, drawing only such inferences as are compelled by the quality of the evidence.” JA 257-58.

On the merits, the court found that, even though Salahi had sworn *bayat* to al-Qaida, JA 263, and even though he did not make any affirmative showing that he

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disassociated from al-Qaida, he was no longer “part of” al-Qaida in 2001. The court first rejected the government’s claim that Salahi was a recruiter, concluding that instead Salahi merely “remained in contact with people he knew to be al-Qaida members at least until November 1999 [Shibh], and . . . was willing to make a referral to a known al-Qaida member[, Chris Paul,] in 1997.” JA 269-70. The court described other recruiting evidence as “less significant” because there was no showing “that Salahi was tasked with an order to recruit al-Qaida members.” JA 269.

Next, the court addressed the Hafs relationship. The court reached no conclusions on the 1995-1996 facilitation of al-Iraqi’s travel. It described the 1999 telecommunication project with Ganczarski as “more troubling,” JA 271. It found the money transfers “not . . . material,” JA 275. And it concluded that Salahi’s receipt of fraudulent passports “raised unanswered questions about the lawfulness of his activities and the nature of his relationship with Abu Hafs.” JA 273. Nonetheless, the court dismissed the Hafs allegations either as “sporadic support” or lacking proof “to have happened within the command structure of al-Qaida.” JA 278, 280.

The court next considered computer evidence – denial of service attacks and a jihadi web site – concluding that, while initiated, the computer actions had not “materialized.” JA 274.

As to Salahi’s Canada activities, the Court concluded that it “might well be

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enough to support a criminal charge of providing material support to al-Qaida,” but did not “add any thing of significance to the proof that Salahi was ‘part of’ al-Qaida.” JA 277-78.

The court then addressed Salahi’s ongoing relationships with other al-Qaida members. The court reasoned that Salahi’s relationships with Mehdi and Ganczarski “are clearly of interest,” but found the emails between them in 2001 were “not themselves incriminating” JA 279. His relationships with five other al-Qaida members – Paul, al-Iraqi, Hannachi, Laabidi, and al-Libi – were deemed “too brief and shallow to serve as an independent basis for detention.” *Id.*

The court concluded that the government had failed to “show that the support Salahi undoubtedly did provide from time to time was provided within al-Qaida’s command structure.” JA 280. Instead, the government “has shown that Salahi was an al-Qaida sympathizer – perhaps a ‘fellow traveler’; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida.” *Id.* The court observed that the government’s concern that Salahi would “renew his oath to al-Qaida . . . upon his release . . . may indeed be well-founded.” *Id.* However, this was not enough, in the district court’s view, to make him “part of” the organization at the time of his capture. *Id.*

In assessing the evidence, the district court did not address numerous statements

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that Salahi had made about his al-Qaida activities and associations. Salahi claimed that he was mistreated and the district court concluded that there was “ample evidence [of] .

... mistreatment at Guantanamo from mid-June 2003 to September 2003.” JA 259.

While the government did not seek to rely on any of Salahi’s statements during that period, the government did argue that statements Salahi made thereafter were reliable and attenuated from the prior poor treatment. The district court credited Salahi’s

December 2004 CSRT statement as unaffected by prior coercion, JA 263-64, but the court did not address statements Salahi made thereafter.

SUMMARY OF ARGUMENT

I. Because there is no dispute that Salahi formally joined al-Qaida by swearing loyalty, or *bayat*, to the terrorist group, he had the burden to show by a preponderance of the evidence that he disassociated from the group. This Salahi failed to do, as the district court concluded. JA 258 n.7. Rather than deny the petition on this basis, the district court erroneously placed the burden on the government to show that Salahi had *not* disassociated. This was error, and requires reversal with directions to deny the writ.

Requiring Salahi to prove disassociation is consistent with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Bihani*, and comports with the law governing illegal conspiracies. It is fully appropriate given that al-Qaida and its members operate in an

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illegal and clandestine manner. And it is fair given the enduring nature of al-Qaida membership established through swearing *bayat* – as Salahi himself explained at trial.

II. Even if it remained the government's burden to show that Salahi had not disassociated from al-Qaida, the district court's factual findings establish that this burden was met. The district court found that Salahi continued to provide "support" for al-Qaida and to "associate[] with" and "live[] among" numerous al-Qaida members. JA 280. Under a proper legal standard, those findings would require denial of the writ, because they establish that Salahi did not disassociate from al-Qaida.

Rather than ask whether Salahi had disassociated from al-Qaida, the court improperly looked at his activities in isolation from each other – and isolated from his loyalty oath – to determine whether they established that he "was . . . again" part of al-Qaida or had "renew[ed]" his oath to al-Qaida. JA 256, 280. This was error.

That error was compounded by the district court requiring specific orders directing Salahi's support activities. Salahi's formal membership in al-Qaida, however, creates a strong presumption that his support was either provided within the al-Qaida command structure or in continuing fulfillment of his promise to serve al-Qaida. Additionally, the court improperly isolated Salahi's activities and failed to look at the full picture, which showed a series of actions taken in support of al-Qaida throughout the period between when he swore *bayat* until his capture in 2001. And by

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dismissing the relevance of Salahi's numerous associations with al-Qaida members and leaders because they did not "serve as an independent basis for detention," JA 279, the court committed a legal error that infected its entire analysis. It disregarded Salahi's oath of loyalty, and examined each piece of evidence separately and without regard to the full story it told, namely, that Salahi continued to be a "part of" al-Qaida.

III. Even if this court does not reverse outright, it should remand and instruct the district court to address the reliability of Salahi's incriminating statements under an appropriate standard of proof. In those statements, Salahi admits to more frequent al Qaida recruiting, including fund-raising for recruits; admits his money transfers were for al-Qaida; and admits he was actively involved in the al-Qaida telecommunications project in 1999-2000. These statements were not the product of coercion or abuse. Indeed, the district court credited other statements made earlier as not being coerced. It is error to disregard these statements without assessing their reliability.

STANDARD OF REVIEW

The district court's ultimate determination on habeas corpus is reviewed *de novo*. *See Bihani*, 590 F.3d at 870. The Court's legal conclusions are reviewed *de novo*, while its underlying factual findings are reviewed for clear error. *See ibid.*

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~~SECRET//NOFORN~~~~ARGUMENT~~**I. The District Court Erred By Not Requiring Salahi To Establish By A Preponderance That He Had Disassociated From Al-Qaida, and The District Court Findings Definitively Show Salahi Did Not Establish Disassociation.**

Because it was undisputed that Salahi formally joined al-Qaida and placed

~~himself under its command structure by swearing *bayat* to al-Qaida and Usama bin~~

Laden, Salahi should have been required to show by a preponderance that he withdrew from al-Qaida. Application of the proper burden requires reversal because Salahi “adduced no evidence that he ‘rejected’ al-Qaida” and did not “act affirmatively to sever his ties” to al-Qaida. JA 258 n.7; *see also Khalifh v. Obama*, No. 05-1189 (D.D.C. Apr. 20, 2010) (Robertson, J.) (oral ruling) (“I found in the Salahi case that Salahi didn’t have to prove his disassociation from his early membership in al-Qaeda, even though the burden of proof shifts to Salahi”).

As the district court concluded as a factual matter, Salahi “swore *bayat* [to al-Qaida] in 1991,” fought on al-Qaida’s behalf in Afghanistan, and then, once in the West, proceeded to “provide some support to al-Qaida, or to people he knew to be al-Qaida”; to “associate[] with at least a half-dozen known al-Qaida members and terrorists,” including operatives involved in bombing plots and two al-Qaida leaders; and to “f[i]nd and live[] among or with al-Qaida cell members.” JA 254, 263, 280.

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The district court based these conclusions on a series of subsidiary factual findings regarding Salahi's activities in the 1990s after he had sworn loyalty to al-Qaida. Thus, despite Salahi's claim that he "severed all ties with al-Qaida" in March 1992, JA 2370, the district court found that:

- In late 1992, Salahi sought to rejoin the jihad in Bosnia. JA 263.
- From at least 1992-1995, Salahi recruited for jihad without "hesitat[ion]," according to his close friend. JA 269.
- In 1995 and 1996, at al-Qaida-leader Hafs' direction, Salahi facilitated the travel through Germany of al-Qaida leader and telecommunications chief, al-Iraqi. JA 271; JA 2634 (Tr. 549-50).
- In 1997, Salahi recruited would-be jihadists with a known al-Qaida operative, Chris Paul. JA 268-69.
- In 1997 and 1998, Salahi helped Hafs, secrete money into Mauritania. JA 275.
- In November 1999, Salahi recruited Shibh, a future 9/11 conspirator, and two others, to travel to Afghanistan in their effort to join jihad. JA 268-69.
- In 1999 and 2000, Salahi discussed the details of an al-Qaida telecommunications project with an al-Qaida operative, Ganczarski. JA 271-72.
- In 1999, Salahi received a fraudulent passport from Hafs to enable his covert travel to Afghanistan, and money for the trip. JA 272.

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- In late 1999, Salahi moved to Montreal and immediately “found and lived among . . . al-Qaida cell members” who were operating covertly, and provided assistance to one en route to Chechnya for violent jihad. JA 277, 280.
- In 2000, Salahi began setting up a jihadi web site, but halted work at the direction of an al-Qaida operative, Ganczarski. JA 274.
- In 2000 and 2001, Salahi had some involvement in “planning . . . denial of service computer attacks” related to al-Qaida. JA 274.
- In June 2001, Salahi passed his fraudulent passport to a stranger who was introduced to him by an al-Qaida member. JA 272, 279; JA 2612, 2637 (Tr. 472, 570).

The district court’s own findings and the undisputed evidence establish that Salahi formally became part of al-Qaida, continued to support al-Qaida up to the time of his capture, and never severed his ties. After *bayat* is sworn, such ongoing assistance to and associations with al-Qaida is more than sufficient to establish that Salahi had not disassociated from al-Qaida. But rather than assessing Salahi’s activities in light of his oath of loyalty to al-Qaida, the district court ignored Salahi’s established membership, and improperly looked at Salahi’s various activities piecemeal as if each were a separate and isolated basis for proving that he was part of al-Qaida.

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The analysis reflected a legally erroneous narrow interpretation of what it means to be “part of” al-Qaida and was a clearly erroneous reading of the above established facts.

A. As The District Court Held, Swearing *Bayat* Definitively Establishes That One Has Become “Part Of” Al-Qaida.

The only material issue in the case was whether Salahi had withdrawn from al-Qaida by the time of his capture because, as the district court found, “it is clear that Salahi was at one point a sworn al-Qaida member” and was therefore “part of” al-Qaida. JA 255.

The AUMF authorizes the use of military force against those “organizations . . . [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” AUMF, § 2(a). Under that authority, the United States may detain, *inter alia*, those persons who “were *part of* . . . al-Qaida forces . . . that are engaged in hostilities against the United States or its coalition partners.” See March 13 Memorandum, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, No. 05-2386 (Dkt. No. 90) (D.D.C. Mar. 13, 2009), at 1. This Court has held that being “part of” enemy forces is a “valid criter[ion]” for detention under the AUMF. *Bihani*, 590 F.3d at 873-74.

When “[a]l Qaeda members pledge ‘*bayat*,’ . . . they ‘give allegiance to Bin Laden and the group,’ *United States v. Moussaoui*, 591 F.3d 263, 273 (4th Cir. 2010). As Salahi explained at trial, he “knew that Osama [bin Laden] was the leader of al-

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Qaida," and, therefore, that his loyalty was to bin Laden. JA 2619 (Tr. 500); *see JA 47 (Traverse), 344 (CSRT statement)* ("I admit to being a member of al-Qaida"). Thus, swearing *bayat* to al-Qaida shows that the individual has made himself "part of" the "organization" (al-Qaida) that Congress had in mind when it authorized the use of force. *See al-Ginco v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009) ("the more explicit, in word and deed, the conduct of the detainee vis-à-vis the organization, the more likely it is that" he is part of the organization). As one court explained, "[b]y authorizing the use of force against the 'organizations' responsible for the September 11 attacks, Congress also, necessarily, authorized the use of force (including detention) against their members." *Hamilby v. Obama*, 616 F. Supp. 2d at 63, 71 (D.D.C. 2009).

B. The District Court Erred By Not Requiring Salahi To Establish By A Preponderance That He Had Disassociated From Al-Qaida.

There is no dispute that Salahi formally joined al-Qaida by swearing *bayat*, became a member, and was therefore "part of" the terrorist group. As the district court explained, Salahi "testified that he was 'part of' al-Qaida" and "he swore *bayat* in 1991." JA 263. Once the government established that Salahi joined al-Qaida, Salahi should have been required to prove by a preponderance that he had disassociated himself from the group.

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1. Imposing the burden on Salahi to show disassociation is consistent with court precedent treating analogous issues. For instance, in *Hamdi*, the Supreme Court plurality reasoned, in talking about the evidentiary showing that would be required to support detention, that once the government shows a detainee “meets [the detention] criteria, the onus could shift to the petitioner to rebut that evidence with [a] more persuasive” showing. 542 U.S. at 534. This Court held that such a burden-shifting approach “mirrors a preponderance standard” and is constitutionally permissible, *Bihani*, 590 F.3d at 878, as the district court acknowledged. JA 257. Burden-shifting is not only constitutional, it is likewise appropriate when addressing a claim of disassociation, given that prior association makes it highly unlikely we are dealing with a circumstance of “military error.” See *Hamdi*, 542 U.S. at 534 (habeas must “meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error”). Instead, this is a circumstance at the apex of the interest in “giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy.” *Hamdi*, 542 U.S. at 534; see *Boumediene v. Bush*, 128 S. Ct. 2229, 2276, 2277 (2008) (the law “must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security” and reviewing courts may not “disregard the dangers the detention in these cases was intended to prevent”).

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This responsibility is likewise consistent with conspiracy law, which requires the proven member of the illicit scheme to come forward with sufficient evidence that he left the scheme. *See Armco Steel Co., L.P. v. CSX Corp.*, 790 F. Supp. 311, 322 (D.D.C. 1991). This is in part because the member of the conspiracy – like Salahi here – has the best access to relevant information on his membership. *Id.* Thus, the government need not prove continuing association. *See id; cf. Hyde v. United States*, 225 U.S. 347, 369 (1912). Rather, the burden rests upon the party asserting withdrawal – *i.e.*, the participant in the covert, illegal scheme – to prove it as a defense. *Cf. Armco Steel*, 790 F. Supp. at 322 (describing the test for withdrawal from a conspiracy as “stringent” and the burden on the party asserting withdrawal as “rigorous”).

In *Aramco Steel*, the court explained that a “defendant cannot set in motion a criminal scheme and then limit [his] responsibilities for the harm caused by the scheme by simply ceasing to participate in the scheme.” 790 F. Supp. at 322. A similar responsibility arises when one formally joins al-Qaida: by casting his lot with a terrorist organization that violates the laws of war and, by Salahi’s own admission, operates “[j]ust like the mafia,” JA 2622 (Tr. 509), an affirmative showing of disassociation is required if the member should expect to be treated as something other than a part of the enemy forces in war. *Cf. Hyde*, 225 U.S. at 369 (“Having joined in

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an unlawful scheme . . . until he does some act to disavow or defeat the purpose he is no situation to claim delay of the law.”).

2. Requiring Salahi to show disassociation is also fair and appropriate, given the manner in which al-Qaida and its members operate. First, consistent with the law governing withdrawal from an illegal conspiracy, placing the burden on Salahi is essential in light of the illegal, clandestine nature of al-Qaida. Second, *bayat* is a significant undertaking that shows enduring ties to al Qaida and it is therefore justified to assume that a sworn al-Qaida member will continue acting on behalf of the organization. In reality, once someone has sworn *bayat*, the activities of an al-Qaida member operating covertly in the West are likely to look very much like Salahi’s activities here – a continuing pattern of sporadic support for and associations with al-Qaida operatives and leaders. Placing the burden on the government to prove a negative in these circumstances – where there is undisputed evidence that Salahi swore loyalty to al-Qaida – would reward al-Qaida’s efforts to violate the laws of war.

a. Al-Qaida operates in violation of the laws of war as a loose network that intentionally camouflages its forces as civilians. See ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), ¶ 1944, <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>

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(“Further it may be noted that members of armed forces feigning civilian non-

combatant status are guilty of perfidy.”). As Judge Brown has explained, al-Qaida

members “adopt long-term strategies and asymmetric tactics that exploit the rules of

open societies without respect or reciprocity.” *Bihani*, 590 F.3d at 882 (Brown, J.,

concurring).²

Individuals affiliated with al-Qaida typically seek to hide their affiliation. They

do not wear uniforms or carry an official membership card, *Bihani*, 590 F.3d at 873,

and purposefully attempt to disguise their connection to the organization, as Salahi

himself noted. JA 946 (IIR 1/29/04) (“Al-Qaida taught us since the beginning to not

speak about anything regarding the organization.”); see JA 2622 (Tr. 509); JA 505 (IIR

12/4/03) (*bayat* is sworn “secret[ly]”). Indeed, operatives in the West will frequently

lay in wait to act when missions become available, yet retain the long term relationship

with the organization, i.e., they remain members loyal to their oath of *bayat*. A

member of al-Qaida who has formally sworn *bayat* to the group has, by definition,

dedicated himself to operating in this manner. Salahi himself kept true to this

² See also The 9/11 Commission Report 56, 64-67, 68-70, 190-93 (2004) (noting how many of al-Qaida’s operations are carried out by loosely affiliated terrorist cells made up of volunteers acting with significant autonomy, but taking direction from al-Qaida leadership); *Gherebi*, 609 F. Supp. 2d at 68 (the “leadership and command structures” of “terrorist organizations” are “diffuse”); see also C. Bradley & J. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. at 2109 (collecting sources).

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obligation to al-Qaida in early interviews when he denied that he had sworn *bayat*. See JA 405. He also used his al-Qaida *kunya* throughout the period prior to his capture. See, e.g., JA 839 (Paul facsimile), 1308 (2/13/01 e-mail).

In dealing with members of an organization that operates in this manner, this Court should be cognizant of the potential “systemic effects on the military’s entire approach to war” that could result from application of improperly stringent standards for assessing continuing membership. *Bihani*, 590 F.3d at 877; see *Ghereb v. Obamai*, 609 F. Supp. 2d 43, 67 (D.D.C. 2009) (laws of war are “not a suicide pact; [they] do[] not provide a free pass for the members of an enemy’s armed forces to go to and fro as [they] please so long as, for example, shots are not fired, bombs are not exploded, and planes are not hijacked”); *Hamlily*, 616 F. Supp. 2d at 74 (same). Thus, the efforts by al-Qaida members to conceal their activities justify shifting the burden to prove disassociation once membership is established.

b. It is also justified to assume that a sworn al-Qaida member will continue acting on behalf of the organization. Swearing *bayat* shows an enduring tie to al-Qaida that is unlikely to be vitiated absent extraordinary circumstances. As Salahi testified, the organization operated “[j]ust like the mafia.” JA 2622 (Tr. 509). He explained that “*bayat* is not for a specific event, but for everything, or for an overall cause.” JA 505. And he explained that the *bayat* was for the most elite members of al-Qaida: “Al-

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Qaida intelligence watches members in the camps and chooses those they feel are the most intelligent” to swear *bayat*. *Id*; see Bell, Stewart, *The Martyr’s Oath* at 108 (Wiley 2005) (given paranoia about infiltration, “Al Qaeda took pains to ensure that only those with proven records were granted admission to the inner circle” by swearing *bayat*, and “with so many volunteers . . . they could afford to be choosy”). Salahi’s view is consistent with the generally understood view that swearing *bayat* put one into the “inner circle” of al Qaida’s most committed members. See Atwan, Abdel Bari, *The Secret History of al Qaeda* at 77 (U. Cal. Press 2006) (“[i]n the early days . . . al Qaida ‘was composed of an inner circle giving their bayat (oath of allegiance) to bin Laden’ who was ‘ready to strike at the US’ by 1992); Bell, *The Martyr’s Oath* at 107-08 (recruits “willing to go all the way, to give themselves to Osama” would swear *bayat*, which is “similar [to the Mafia] ritual called omerta,” a “sacred rite” and an “act of personal surrender, in which the individual places himself entirely in the hands of his leader, organization, and cause”); *id.* at 108 (“[b]reaking *bayat* is like breaking a promise to God” because recruits “have been so deeply indoctrinated by their instructors, so thoroughly infused with the idea that Al Qaeda is the army of God . . . that they believe their oath to Osama is a religious undertaking”).

Salahi also stated that if he rejected al-Qaida, after joining, they would “presume that I’m going to provide information about . . . how they operate, and then that would

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be very bad" because they "would hunt me down." JA 2622 (Tr. 508-09). He apparently did all he could to make sure al-Qaida believed that he remained a member in good standing. *Id; see Hamlily*, 616 F. Supp.2d at 75 ("The key inquiry * * * is not necessarily whether one self-identifies as a member of the organization" but instead whether the individual is functionally part of that organization). The district court recognized how difficult and dangerous it would be to leave al-Qaida, explaining that assistance Salahi provided and contacts he made with al-Qaida members – over 10 years after Salahi signed up – was, in part "to avoid making himself an enemy." JA 279. And, as the district court found, Salahi "adduced no evidence that he 'rejected' al-Qaida." JA 258.

Even in a formal military force that follows the laws of war, one normally cannot leave without the consent of the military. *See, e.g.*, 10 U.S.C. 1169. And it is, of course, well established under the laws of war that membership in an armed force need not be voluntary – even if one is drafted or impressed into duty, he is subject to detention if captured. *See In re Territo*, 156 F.2d 142, 146 n.4 (9th Cir. 1946). Thus, even if Salahi were serving al-Qaida begrudgingly – as the district court suggested – he remained part of al-Qaida. But here, begrudging service is not a serious concern, given the district court's findings that Salahi was "an al-Qaida sympathizer" and

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“fellow traveler” and that the government had a “well-founded” concern that Salahi would “renew his oath to al-Qaida and become a terrorist upon his release.” JA 280.

These legal principles and established facts support placing the burden on Salahi to prove disassociation. The district court, however, erred in requiring the government to prove a negative, that Salahi had not withdrawn.

C. The District Court’s Factual Findings Show Definitively that Salahi Failed to Establish Disassociation from Al-Qaida.

When the law is correctly applied, the district court’s factual findings show definitively that Salahi failed to establish disassociation from al-Qaida. The district court explicitly rejected Salahi’s unsupported contention that he “severed all ties” with al-Qaida in 1992, JA 2370, and found, correctly, that Salahi “adduced no evidence that he ‘rejected’ al-Qaida” or that “he acted affirmatively to sever his ties.” JA 258; *see* JA 2657 (Tr. 651) (“I’m inclined to agree with the government’s position that there’s nothing in this record that indicates that [Salahi] ever really rejected or severed his ties [with al-Qaida] The concatenation of events over the years do not indicate that after 1992 he threw away his uniform . . . ”). Indeed, the court erroneously reasoned, at the conclusion of trial, that this was “not a question of whether he continued to be a . . . [m]ember of al-Qaeda because he hasn’t really [ever] rejected it” and “the record supports that” conclusion that he remained a “member.” JA 2656 (Tr. 645). In the

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court's opinion, after applying "skepticism" to the government's evidence, the court found that the government failed to prove that Salahi's continued to be "part of" al-Qaida, even though the court found that Salahi continued to be "an al-Qaida sympathizer" who could very well "renew his oath to al-Qaida . . . upon his release." JA 280. It was error, however, to look for a "renewal" of vows where there was no evidence of disavowal of the prior oath. *See* JA 2656.

Salahi could have satisfied his burden to show disassociation in several ways, but the court found that he made no such showing. For example, the passage of a significant period of time without ongoing associations and support for al-Qaida could have helped Salahi satisfy his burden. *See al-Ginco*, 626 F. Supp. 2d at 129. But where there *are* ongoing al-Qaida contacts and activities over that intervening period, as the district court concluded there were here, that burden has undeniably *not* been met. Accordingly, because Salahi failed to show by a preponderance that he had disassociated from al-Qaida, the district court should have denied his habeas petition.

The district court's findings that Salahi provided support to al-Qaida and maintained continuous contact with al-Qaida operatives, up to the year of his capture, JA 280, show that Salahi did not "sever all ties," as he claimed. JA 2370. Importantly, al-Qaida still "had trust [and] confidence in him," *al-Ginco*, 626 F. Supp. 2d at 129, as it kept him in contact with its operatives right up through 2001 by, among many other

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things, requesting that he use a fraudulent passport to travel to Afghanistan for jihad

and relied on his recruits to carry out the 9/11 attack. JA 2609, 2633 (Tr. 459, 553).

Thus, rather than find disassociation from al-Qaida, the district court found Salahi continued to “provide some support to al-Qaida” and to “members of al-Qaida” throughout this period. JA 254, 280. Because Salahi should bear the burden of proof to show by a preponderance that he withdrew from al-Qaida, these findings are fatal to his petition and the judgment should be reversed.

II. Even If The Burden Is On the Government, the Government Established That Salahi Did Not Disassociate From Al-Qaida After The Swearing of Bayat.

Even if it remained the *government’s* burden to show that Salahi did not disassociate from al-Qaida after he had joined, the government met its burden. Under a proper standard, the undisputed evidence of the significance of his oath and his other activities established as a matter of law that he continued to be “part of” al-Qaida. Alternatively, the conclusion that Salahi was no longer “part of” al Qaida was clear error.

The district court’s fundamental legal error was this: rather than ask whether Salahi had disassociated from al-Qaida after placing himself under al-Qaida’s command by swearing *bayat*, it asked whether any of his activities in isolation established that he had “again” joined or “renew[ed]” his oath to al-Qaida. JA 256,

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280; *see JA 258* (“disassociation” not the issue). This was the wrong question; rather the court should have determined whether Salahi’s activities – as a whole – showed that he remained a part of al-Qaida. Irrespective of where the ultimate burden is placed, in light of Salahi’s oath, the district court’s findings establish that Salahi never left al-Qaida.

A. Because Salahi Swore *Bayat* To Al-Qaida And Continued To Support Al-Qaida He Remained “Part Of” Al-Qaida And Proof Of Specific Orders Was Not Required.

The district court’s finding that Salahi continued to “provide [support] from time to time” to al-Qaida should have been sufficient to prove that he remained “part of” al-Qaida. JA 280; *see id.* (government proved that Salahi “provided sporadic support to members of al-Qaida”); JA 254 (“the evidence does show that he provided some support to al-Qaida”). As Salahi himself explained, once you have sworn *bayat*, “if you assist al-Qaida you are part of al-Qaida.” JA 959 (IIR 7/7/04). However, the district court erred as a matter of law when it disregarded this support as not being “within al-Qaida’s command structure”; being “sporadic”; or being insufficiently material. JA 266, 269, 275, 280.

For the reasons previously explained, once someone has sworn *bayat* to al-Qaida, there should be a strong presumption that support-type activities that serve to help al-Qaida are either taken within the al-Qaida command structure or in continuing

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fulfillment of the general promise to serve al-Qaida, in Salahi's words, "no matter what." JA 491; *see United States v. Bin Laden*, 397 F. Supp. 2d 465, 502-03 (S.D.N.Y. 2005) ("an individual pledging bayat was expected to do whatever was asked of him").

~~Put another way, the loyalty oath itself is the strongest possible evidence that the detainee is operating within the al-Qaida command structure. As Salahi explained during his CSRT, "[t]hey made me swear that you are here to take orders and to follow Osama [bin Laden]."~~ JA 346; *see Bin Laden*, 397 F. Supp. 2d at 503 ("when you make *bayat* . . . you agree about the al Qaeda and . . . anything we ask").

Thus, in the context of someone who has sworn allegiance to al-Qaida, it is error to require new and separate "orders" for all of the ongoing acts he takes to carry out the terrorist group's goals. All such acts of ongoing facilitation should be deemed to be the acts of an al-Qaida member carrying out his duties. Further, the undisputed facts showed that Salahi continued to operate, as a general matter, within the al Qaida command structure. The swearing of *bayat*, of course, is the strongest such evidence. Additionally, Salahi testified, and the district court found, that he was helping al-Qaida throughout the 1990s to "avoid making himself an enemy." JA 279; JA 2608, 2621 (Tr. 453-54, 508). This rationale – that Salahi was doing things for al-Qaida to avoid appearing that he was rejecting the group – shows, even viewed in a light most

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favorable to Salahi, that he was acting under compulsion, akin to a soldier in a legitimate military.

The district court's decision to disregard some of Salahi's assistance as "sporadic" or not sufficiently "material" was also legal and factual error. *See JA 275, 280.* Indeed, this was a way for the court to look at each piece of the government's evidence in isolation, rather than draw inferences from the evidence viewed as a whole, a pervasive and fundamental error that requires reversal. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983); *United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994) (rejecting proposition that "a fact finder must view all of the pieces of evidence in isolation of each other").

Establishing that support is "material" would, of course, be essential in applying this Court's holding that the government may detain "those who purposefully and materially support [enemy] forces," *Bihani*, 590 F.3d at 872. But an act's materiality need not be established to show someone is part of al-Qaida. *Id.* (AUMF authorizes detention of "those who are part of [enemy] forces," in addition to those who provide material support). Thus, by swearing *bayat* to al-Qaida, one makes himself "part of" the organization subject to the AUMF; there is no requirement that the government also prove a material action on the part of the detainee. As the Supreme Court explained, if someone is a part of enemy forces, they may be properly detained under

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the laws of war, even if “they have not actually committed or attempted to commit any act of depredation or entered the theater or zone of active military operations.” *Ex parte Quirin*, 317 U.S. 1, 38 (1942). The materiality threshold imposed by the district court on Salahi’s various activities was inconsistent with this precedent, and was therefore legal error.

Similarly, there is no requirement that an al-Qaida member engage in frequent work for the group to maintain membership. Thus, once someone has joined al-Qaida, even “sporadic” work for al-Qaida shows definitively that membership is continuing. Indeed, under *Quirin*, no “actual[] . . . act[s]” need be committed at all (317 U.S. at 38); *a fortiori*, there is no frequency requirement. Moreover, in describing Salahi’s specific activities as “sporadic,” the court ignored the sum total of those activities. Put simply, sporadic help, year after year, establishes a pattern of a committed al-Qaida member continuing to fulfill his pledge of allegiance to the group and to Osama bin Laden. The government was obviously not watching Salahi’s every move throughout the 1990s and cannot be expected to show constant support or be aware of all of Salahi’s actions. Thus, the district court erred in concluding that Salahi did not remain part of al-Qaida on these bases. *See JA 275, 280.*

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B. The Support The District Court Found That Salahi Provided to Al-Qaida From The Time He Swore *Bayat* Through 2001 Shows That He Did Not Leave Al-Qaida.

The district court found that Salahi “provided . . . support to al-Qaida” and took numerous actions evincing that support. Applying the proper analysis, this support for al-Qaida served to implement the loyalty oath he swore to al-Qaida and shows that Salahi did not disassociate from al-Qaida, but remained “part of” al-Qaida

1. Bosnia. First, the court found that Salahi “attempt[ed] to travel to Bosnia . . . to join the jihad there” (JA 263), and Salahi admitted at trial that he “attempted to travel to Bosnia to fight” in December 1992. JA 2589 (Tr. 378). It was undisputed that Bosnia was, at the time, an al-Qaida jihad front where “[m]any went . . . at the direction of Osama Bin Laden.” JA 243. In fact, in addition to his fellow jihadist Mohsen, Salahi’s three al-Qaida operative friends (Mehdi, Paul, and Ganczarski) also went to Bosnia to fight at around the same time. JA 2622 (Tr. 510); JA 906. The court dismissed the relevance of Salahi’s attempted trip to Bosnia to fight jihad based on Salahi’s self-serving claim that he “did not do so at the request of al-Qaida,” *i.e.*, pursuant to a specific, provable al-Qaida direction that he go to Bosnia. JA 263. It was error for the district court to require proof of a specific direction from al Qaida; rather, Salahi’s trip to Bosnia – even without proof of a specific al-Qaida order – was *highly* suggestive that Salahi had not disassociated from al-Qaida, but remained a “part

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of” al-Qaida. Indeed, it is simply not credible that a person can join a terrorist organization and then seek to travel to the location where the organization is fighting in order to fight, yet disclaim association with the group, as Salahi did here. See JA 263 (Salahi claims he had “severed ties with al-Qaida” prior to the trip to Bosnia).

2. Recruiting and Facilitation. Second, the court found that Salahi engaged in recruiting and travel facilitation throughout the 1990s [REDACTED]

[REDACTED] The court did not question the reliability of this evidence, but disregarded it because there was no evidence Salahi was given “specific recruiting missions” or “tasked with an order to recruit al-Qaida members.” JA 269. Like the trip to Bosnia, his ongoing and frequent jihad recruiting from 1992 to 1995 – even without proof of a specific al-Qaida order – was *highly* relevant to whether Salahi remained a part of al-Qaida. In reality, a fact ignored by the district court was that [REDACTED]

The court also found that Salahi engaged in specific recruiting for al-Qaida. The Court found as a fact that Salahi sent a facsimile to Paul – who Salahi knew to be an al-Qaida member – to recruit for al-Qaida. Thus, Salahi “continued to be in touch with

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people he knew to be al-Qaida members, and . . . was willing to refer would-be jihadists to them." JA 268; *see* JA 1362 (Paul facsimile) ("some brothers are desirous to go for Jihad . Therefore, we would like to meet with you so that you arrange with us . . . their going to . . . Jihad").

The district court also found that Salahi "provided lodging for . . . [9/11 planner] Ramzi bin al-Shibh [and two other men], and . . . discuss[ed] . . . jihad and Afghanistan" with them in November 1999. JA 267. The court found that Salahi "knew [these men] to be al-Qaida members" at the time. JA 269-70. And Salahi agreed at trial that he had "probably fed al-Shibh with the information I knew about [going] safely in[to] Chechnya," which meant traveling first to Afghanistan for

training. JA 2629 (Tr. 539). Thus, Salahi recruited Shihb to go to Afghanistan for jihad. Shihb proceeded to travel to Afghanistan, swore *bayat* to bin Laden, and facilitated the 9/11 attacks with two suicide pilots who he said were also recruited by Salahi. 9/11 Commission Report at 166 (remarking upon the alacrity with which Shihb and his companions met bin Laden, swore allegiance, and were chosen to carry out the 9/11 attacks).

While finding these events occurred, the court dismissed the particular incidents of al-Qaida recruiting and facilitation on the ground that they were too "sporadic," JA 280; *see* JA 268, 270 (Salahi made "a [single] referral . . . in 1997" and provided

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“lodging for three men for one night” in 1999). This was error. Referring would-be jihadists to al-Qaida is precisely what the government sought to prove – *i.e.*, that Salahi was in fact recruiting for al-Qaida throughout the 1990s [REDACTED]

[REDACTED] after he claimed he had cut off all ties. Given the evidentiary challenges presented in these cases, definitively establishing specific incidents of al-Qaida recruiting is a powerful sign that Salahi continued to be working to fulfill his oath to support al-Qaida. Indeed, the court disregarded these incidents as sporadic even after acknowledging [REDACTED]

[REDACTED] These dueling conclusions, whereby the court dismissed specific incidents of al-Qaida recruiting and facilitation as “sporadic”; and then dismissed evidence of frequent recruiting as lacking a specific al-Qaida command, reveal the court’s improper approach. Instead, Salahi’s recruitment of al-Qaida operatives in 1997 and November 1999 showed that he remained a part of al-Qaida: by steering would-be jihadists towards al-Qaida, he was continuing to act on his oath to support the “overall cause” of al-Qaida. *See JA 505.*

3. Hafs Taskings. The district court also found that Salahi did, in fact, “work a little bit” (JA 346) for Salahi’s cousin, the al-Qaida leader Hafs, on matters related to al-Qaida.

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First, the court found that Hafs took Salahi to an al-Qaida safehouse in Mauritania in 1993. JA 271. Salahi had testified at trial that fighters from Afghanistan were staying there. JA 2623 (Tr. 514-15). Traveling to an al-Qaida safehouse is evidence that Salahi had not disassociated from, but instead remained “part of,” al-Qaida. *See Bihani*, 590 F.3d at 873 n.2 (noting the importance of “evidence that Al-Bihani . . . visited Al Qaeda guesthouses”).

Second, the Court concluded that Salahi “hosted” the al-Qaida telecommunications chief, al-Iraqi, in Germany in 1995 and 1996 and “spoke to him about the telecommunications equipment” he was buying for al-Qaida. JA 271. Salahi admitted at trial that he knew this request to help al-Iraqi was coming from Hafs. JA 2632 (Tr. 549-50) (“my cousin [Hafs] called me, he said I want to introduce you to [al-Iraqi]” and I then “received [him] in my house” in Germany); *id.* (Hafs asked if Salahi would “work with him”). Salahi admitted at trial that he “assisted” Al-Iraqi during these trips. *Id.* (Tr. 552). Salahi explained that he “drove him to the train station”; “drove him to a meeting with Dr. Al-Attar,” a telecommunications expert; and “spoke with [al-Iraqi] about what he was doing there” and “the equipment he sought to purchase.” *Id.* (Tr. 551-52). Al-Iraqi was al-Qaida’s chief of telecommunications who was indicted for taking part in the 1998 U.S. embassy bombing by, among other things, “travel[ing] to places on behalf of al Qaeda . . . including . . . Germany” and

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"purchasing communications and electronics equipment." Indictment at 12. This work was on behalf of al-Qaida, and given that the instruction to help al Iraqi came from Hafs, a high-level al-Qaida member, it shows Salahi's willing participation within the group's command structure. Further, by facilitating the travel of a high level al-Qaida operative in and around Germany, he was continuing to act on his oath to support the "overall cause" of al-Qaida. JA 505.

Third, the court concluded that Salahi in fact "transferred money for Abu Hafs twice – about \$4,000 in December 1997 and another \$4,000 in December 1998." JA 275. Salahi described the transaction at trial: Salahi withdrew the money as cash in Germany, and then had his brother hand-carry it into Mauritania. JA 2609, 2626 (Tr. 457, 525-26). While Salahi claimed the money was for Hafs' family and not al-Qaida, he agreed at trial that "Hafs became upset" when he offered to "deliver the money to Abu Hafs' father instead of his phone store" and that his cousin was "ordered . . . to give [the] money to people [he] . . . did not know." JA 2627 (Tr. 530).

Fourth, the court found that in November 1999, Hafs provided Salahi with fraudulent passports to allow him to travel covertly to Afghanistan, as well as money for the trip. JA 272. Salahi testified that right up through 2001, Hafs tried hard to persuade Salahi to come to Afghanistan using these fraudulent passports. JA 2609, 2633 (Tr. 459, 553). Salahi told the court he never used the passports, but instead gave

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one of them to a man he did not know, named Mazid, who was introduced to him by “a Libyan al-Qaida member,” JA 279, al-Libi. JA 2612, 2637 (Tr. 472, 570); JA 279. These passports, the court reasoned, “raise[] unanswered questions about . . . nature of his relationship with Abu Hafs.” JA 273.

In spite of acknowledging these “questions,” the court largely disregarded this evidence that Salahi assisted al-Qaida pursuant to Hafs’ direction. The court called the money transfer insufficiently “material.” JA 275. And the court concluded that “[n]one [of the Hafs activities] has been shown to have happened within the command structure of al-Qaida.” JA 278. It is hard to see how performing a wide range of work that “support[s] . . . al-Qaida” (JA 280) at the direction of a high level al-Qaida leader, can be deemed to be work performed outside the al-Qaida command structure. Nor is moving \$8,000 to Mauritania – an amount that was quadruple the per capita gross domestic product (CIA World Factbook 1999) – immaterial.

In truth, these facts found by the district court, as a whole, provide a sufficient answer to the “unanswered question” about this relationship: Salahi was performing tasks for Hafs that served al-Qaida up to the year of his capture. *A fortiori* he remained part of al-Qaida as he performed these tasks.

4. Ganczarski and Computer Activities. The district court also found that Salahi performed computer activities with a goal of helping al-Qaida. The district

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court found that documents found on Salahi's computer pertaining to cyber attacks helped "corroborate statements of Salahi to the effect that he knew and had some involvement in planning for denial of service computer attacks." JA 274. Similarly, the court found that Salahi "attempt[ed] to start his [own] web forum for this type of information" in Mauritania in 2000, but halted that work because an al-Qaida operative, "Ganczarski[,] discouraged the plan." *Id.* Salahi agreed at trial that he was planning to "create a discussion group regarding fighting Jihad" but that "Ganczarski . . . talked [him] out of" the idea due to his concerns about "surveillance." JA 2639 (Tr. 577).

The court disregarded the computer activities on the basis that they were not completed – and therefore did not constitute "material[] support[] [for] al-Qaida." JA 274; *id.* (cyber attack "never materialized"); *id.* (Salahi halted web site because "Ganczarski discouraged the plan"). This was error. Instead, attempting these computer jobs for al-Qaida and consulting with al-Qaida operative Ganczarski, about the details is powerful evidence that Salahi remained part of the terrorist group. Similarly, the finding that Salahi halted the jihadi web site plan at the request of Ganczarski emphasizes the connection with al-Qaida and his functioning within the diffuse command structure of the organization. If someone is proposing internet projects and running them by al-Qaida operatives in 2000 for approval, that action is

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strong evidence of Salahi's continuing association with al-Qaida taken pursuant to his oath of loyalty to al-Qaida.

C. Salahi's Frequent and Ongoing Association with Important Al-Qaida Operatives Also Shows He Remained "Part Of" Al-Qaida And Had Not Disassociated From the Group.

Other compelling evidence of Salahi's continued membership in al-Qaida was not evidence of specific activities, but instead evidence that he sought out and lived among al-Qaida members who were operating covertly in the West. These close associations with important al-Qaida operatives show that Salahi had not disassociated from, but remained "part of" al-Qaida. This is not to suggest a "guilt by association" theory. Rather, having sworn *bayat*, Salahi's continued close association with other al-Qaida members is circumstantial evidence showing that he continued to be in the fold and trusted, and shows it is more likely than not he remained "part of" al-Qaida. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence").

Thus, living with and among al-Qaida members is itself highly probative of the issue before the district court – whether Salahi had disassociated himself from al-Qaida. As we have explained, al-Qaida operates covertly, and an ability to travel

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among members – particularly in the West – is therefore highly indicative that al-Qaida trusted him and that he continued to be a “part of” the organization. Salahi himself explained to interrogators in July 2005 that one “must . . . have been trusted by . . . other al-Qaida member[s] in order to come in contact or associate with them.” JA 925 (SIR 7/1/05). And he testified that had he left the organization, “they can presume that I’m going to provide information about people,” JA 2622 (Tr. 509), so there is little chance he could have continued to travel with and among its covert operatives in the West were he not still a member. Cf. *Bihani*, 590 F.3d at 873 (“accompanying the brigade” is relevant); *Al Odah*, 648 F. Supp. 2d at 15 (“Al Odah’s movements throughout the country were consistent with someone who was taking orders from the Taliban and who decided to join the fight against coalition forces.”).

1. The district court concluded that Salahi “associated with at least a half-dozen known al-Qaida members and terrorists” and “found and lived among al-Qaida cell members.” JA 280.

First, the court found numerous contacts with Hafs that lasted “right up to 2001,” explaining that Salahi had “an ongoing and relatively close relationship with Abu Hafs.” JA 275, 278. Further, Salahi was in “contact with [Mehdi and Ganczarski] until at least May 2001 and April 2001,” the men convicted for covert al-Qaida bombing plots. JA 279; see JA 1251 (Ganczarski convicted for helping

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organize bombing of tourist sites in Tunisia that killed 21 people). The district court also concluded that Salahi “found and lived among or with al-Qaida members in Montreal.” JA 280. Salahi testified that he was aware of illegal activities being engaged in by these cell members, JA 2634, 2637 (Tr. 559-60, 569), and helped Mohsen “transport[] . . . bags” for a trip to Chechnya “for the purpose of violent jihad” and later sent him a Tunisian passport to facilitate his travel once millennium bombing investigators closed in. JA 2635-36 (Tr. 561, 566). Finally, the Court identified five other al-Qaida operatives with whom Salahi was in contact through the period after he swore *bayat* and up to his time of capture – al-Iraqi (1995-1996); Paul (1993, 1997-1998, 1999); Hannachi (1999-2000); Laabidi (1999-2000), and al-Libi (1993 & 2001). JA 279.

These ongoing multiple associations with numerous al-Qaida members show that Salahi never disassociated with al-Qaida, but remained in the fold and trusted by al-Qaida. He was still “part of” al-Qaida

2. The district court rejected the relevance of all of these numerous ongoing al-Qaida contacts for legally improper reasons. First, it held that Salahi’s associations with several of the al-Qaida contacts – including Paul, al-Iraqi, and the Montreal cell members – were “too brief and too shallow to serve as an *independent basis for detention.*” JA 279 (emphasis added). Even if we assume this holding to be correct,

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Salahi's associations were not submitted as an independent basis for detention. Rather, the evidence of these associations over a period of ten years follows the key fact in this case: Salahi's decision to formally join al-Qaida by swearing *bayat* to the terrorist group. The court's minimization and atomization of this association evidence reflects the kind of legal error that affected its entire analysis of the evidence regarding

~~whether Salahi disassociated from al-Qaida~~

The court next concluded that "f[inding] and liv[ing] among or with al-Qaida cell members in Montreal" did not add "any thing of significance" to the government's case. JA 277-78. It concluded that the Hafs contacts were not "shown to have happened within the command structure of al-Qaida" (JA 278); and the contacts with Mehdi and Ganczarski were "not themselves incriminating" and showed Salahi was "avoiding close relationships with al-Qaida members" (JA 279). These conclusions are infected with error because they ignore the larger import of Salahi's continued and extensive al-Qaida associations, namely, that they make it more likely than not that Salahi had not disassociated from al-Qaida.

Further, as factual findings, the district court's conclusions are not permissible inferences given the subsidiary facts found by the district court: The contacts with Hafs show that Salahi took several actions over a period of years to support al-Qaida,

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as we have explained above. Thus, the contacts with Hafs tended to directly show that Salahi was operating in the al-Qaida command structure, not the opposite.

The contacts with Ganczarski and Mehdi, are “incriminating” in that they were made in the context of al-Qaida activities. Salahi testified that he knew Ganczarski was traveling to and from Afghanistan “to join the Jihad,” JA 2632-33 (Tr. 552-553); that he was taking radio equipment “for the Afghan mujahideen” (JA 2634 (Tr. 557)); and that Salahi was “aware of the equipment Ganczarski had purchased to work on the project.” JA 271-72. It is highly unlikely Ganczarski would discuss such al-Qaida operational matters with someone who was not a “part of” al-Qaida. Salahi also testified at trial that it was Ganczarski who delivered the fraudulent passports (JA 2633 (Tr. 553)) that “raise[d] . . . questions about the lawfulness of [Salahi’s] activities and the nature of his relationship with Abu Hafs.” JA 273. And it was Ganczarski who directed Salahi to stop work on a web site based on concerns about “surveillance.” JA 2639 (Tr. 577). These contacts are “incriminating,” in that they show a continuing al-Qaida link, not mere friendship.

The contacts with Mehdi were also “incriminating.” Not only was Mehdi involved in both recruiting for Paul and the recruiting of Shihb, JA 265-68, in 2000, Salahi had Mehdi send him materials from Germany once investigators were bearing down on him and testified that after this shipment, he told Mehdi that he “was in

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trouble for weeks . . . about what I received from you. . . . They look at our every breath. May god pu[ni]sh them.” JA 2616 (Tr. 487). And in May 2001, Salahi asked for Mehdi’s bank account number – purportedly in furtherance of a claim for German pension funds – and warned him to “be careful because . . . people cause me trouble when you send me e-mails.” JA 2615 (Tr. 481); JA 1258.

Similarly, the contacts with the other al-Qaida operatives were all made in circumstances showing they were connected to al-Qaida operations, even accepting Salahi’s trial testimony and the district court’s findings as correct: Salahi testified that he ferried al-Qaida leader al-Iraqi at the direction of Hafs to help on the broadcasting project (JA 278; JA 2632 (Tr. 551-52)); Salahi recruited jihadi fighters for the known al-Qaida member, Paul (JA 268-69); Salahi “support[ed]” the “important” Montreal al-Qaida operatives Hannachi and Laabidi (JA 277-79); and Salahi testified that al-Libi was the man who not only fought with him for al-Qaida in 1992, but also came to his office with stranger to pick up one of the fraudulent passports provided by Hafs. JA 2637 (Tr. 570).

In sum, Salahi’s numerous associations with al-Qaida members was “incriminating,” each involving al-Qaida operations and showing that Salahi had not disassociated from al-Qaida, but remained, consistent with his loyalty oath, “part of” al-Qaida.

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III. The District Court Held The Government To A Standard of Proof Higher than a Preponderance And Erred In Declining To Address The Reliability of Salahi's Statements.

The district court imposed a standard of proof on the government higher than a preponderance of the evidence and, in doing so, failed to address the reliability of numerous inculpatory statements Salahi made to interrogators. These statements further show Salahi's continued activities in fulfillment of his oath to al-Qaida. While this evidence is not necessary to find Salahi remained "part of" al-Qaida, the evidence paints an even more troubling picture of Salahi's activities during the relevant period. Thus, at the very least, a remand is needed with instructions that the district court address the reliability of Salahi's inculpatory statements.

A. The District Court Held the Government To A Standard Of Proof Higher Than Preponderance of the Evidence

The district court recognized that the government had the burden of proving the lawfulness of Salahi's detention by a preponderance of evidence, JA 256, yet rather than apply a straightforward preponderance standard, the court devised an inappropriately *higher* standard in assessing the government's evidence. The court explained that "[i]t is only fair to the petitioner, however - and, considering the government's built in advantage, not unfair to the government - to view the government's showing with something like skepticism, drawing only such inferences

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as are *compelled by the quality of the evidence.*" JA 258 (emphasis added). This standard, which diverges from a preponderance standard and approaches a requirement of clear and convincing evidence, is inconsistent with *Bihani*, 590 F.3d at 878; see *United States v. Montague*, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994) (under preponderance of the evidence standard, the government's burden is to submit evidence that "as a whole shows that the fact sought to be proved is more probable than not"). Imposition of this higher standard of proof was error and requires remand.

B. The District Court Had Tools To Evaluate Salahi's Reliability, But Did Not Apply Them, Requiring Remand.

The district court's improper burden of proof exhibited itself in the court's refusal to consider numerous inculpatory statements made by Salahi. The district court recognized that the government's case rested "heavily on statements made by Salahi himself . . . most of them now retracted by Salahi." JA 252. Recognizing Salahi's claims of mistreatment "at Guantanamo from mid-June 2003 to September 2003," some of which were corroborated by government investigations, the government declined to rely on statements Salahi made from this period. JA 259-60. Thus, the only question was whether the court could rely on later-made statements, given that "at some point – after the passage of time and intervening events, and considering the

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circumstances – the taint of abuse and coercion may be attenuated enough for a witness's statements to be considered reliable.” JA 259.

That determination depended on, among other things, whether the statements “are corroborated.” JA 260. It also depended on Salahi’s credibility at trial– he was, after all, asked directly about the contradictions between his testimony and his prior statements. *See, e.g.*, JA 2642 (Tr. 591-92) (Salahi confirmed he told CSRT he “provided good information” to interrogators about al-Qaida). In short, it depended on an evaluation of the reliability of Salahi’s later-made statements, as well as his credibility at trial.

In spite of discussing these standards, the district applied them to only one statement: The court considered a statement Salahi “made in December 2004” to the CSRT, concluding that it was made a “year after his coercive interrogation and after he had disavowed earlier incriminating statements.” JA 263-64. The district court therefore appeared to conclude that this statement, at least, was free from coercion and reliable. *Id.*

But the court failed to perform this analysis of *any* of the nearly 70 other statements Salahi made before or after December 2004. Moreover, other than stating generally that Salahi’s “credibility is undermined,” JA 274, the court did not assess whether this lack of credibility applied to his recantations. Presumably, statements

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made after December 2004 would share the reliability characteristics of Salahi's CSRT

statements that the district court found persuasive – they would have been made at least a “year after his coercive interrogation” and after the time when he “disavowed earlier incriminating statements.” JA 263-64. But the district court did not address these later-made statements.

Indeed, by the summer of 2004, Salahi was receiving unique privileges at Guantanamo. *See* JA 2389-90 (Salahi was “permitted to plant a garden outside” and “given books and . . . allowed to play music and watch movies”). Salahi’s primary concerns by this time were not mistreatment, but maintaining his own preferential treatment. Issues such as this, however, are confronted regularly in the criminal justice system. *See, e.g.*, JA 929-30 (SIR 3/23/05) (negotiating with interrogators that “the quality I [Salahi] bring to the table is one of inside analysis of members of AQ”).

But rather than assess Salahi’s reliability, the court ignored several highly inculpatory statements Salahi made both before and after December 2004. Most notably, the court entirely disregarded a series of FBI interviews conducted in the summer of 2005 by FBI agents from Ohio under circumstances where there was no claim of improper treatment, and where Salahi made several inculpatory admissions that were corroborated by other evidence in the record. It was error to order Salahi’s release without considering the reliability of these statements. *See Bihani*, 590 F.3d at

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C. The District Court Failed To Assess The Reliability Of Several Inculpatory Statements Salahi Made in 2005, After His CSRT Testimony.

Salahi's 2005 interviews with the FBI, JA 450 & JA 874-909, addressed several of his activities, and were disregarded by the district court without addressing their reliability or corroboration. These statements, and others in the same period would, if credited, further show Salahi's continued activities in fulfillment of his oath to al-Qaida.

First, Salahi shed more light on his work with Chris Paul during those FBI interviews. He told the FBI that he recruited with Paul because he was "a man of great respect in Al Qaeda." JA 881. Salahi also explained that he was more involved than merely sending a fax: he "donated money for [one recruit's] travel" to jihad; and followed up, learning that he had become a heavy artillery trainer. *Id.* Even before Salahi was shown the Paul fax, he told the FBI interviewer that "'that was something we did to facilitate getting brothers to fight, to get them moving,'" JA 877 – a statement that is not "filigree," JA 268, but indicative that Salahi more frequently engaged in the type of recruiting of which the facsimile was just one example. And, of course, the facsimile itself corroborated Salahi's statements – particularly the explanation above which Salahi provided *before* interrogators showed him the

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facsimile. Salahi also told the FBI he had visited an al-Qaida safehouse in Frankfurt “obtain[] false travel documents” that recruits needed to travel to jihad, at “Paul[s] suggest[ion],” JA 896.

Similarly, Salahi told the FBI about other recruiting and facilitation activities that he had engaged in – but which the district court did not mention in dismissing Salahi’s recruiting as “sporadic.” JA 280. He told that FBI that he had “collect[ed] money, about 10,000 DM” to “help[] Kirane go to jihad”; Kirane became “a big guy in Al Qaeda.” JA 893-94. Salahi also “helped Mahas go to jihad by collecting money.” JA 895. Salahi also stated during a May 2005 interview (which was not with the FBI) that he “gave money directly to Ashraf al Nahass for people to go to Afghanistan,” and he “supported both of . . . Ganczarski’s trips to Afghanistan in Aug 99 and Dec 99.” JA 1013-14.

In sum, these statements show Salahi recruiting frequently; fundraising; and obtaining fake documents – far more than a mere “refer[ral]” to Paul. JA 269.

Second, the district court failed to address the reliability of a statement in which Salahi admitted that the Hafs money transfers were for al-Qaida. JA 275. The district court, citing a statement made in March 2004, concluded that the government was relying “on nothing but Salahi’s . . . coerced statements to conclude that the money transfers were done on behalf of and in support of al-Qaida. *Id.* (citing JA 533-43). In

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fact, Salahi told the same story a year later, in March 2005, several additional months

after the time at which the court was willing to rely on Salahi's statement to the CSRT because it had been "a year [since] his coercive interrogation." JA 263.

In 2005, Salahi explained the methods al-Qaida uses to "exchange money" through a "third country courier," and stated that "*I personally did this at least twice* that I can remember for Abu Hafs." JA 566 (emphasis added). Salahi also explained that "Abu Hafs uses several persons at the same time for the purpose of splitting the amount of money" to avoid "mak[ing] the operation [look] suspicious." *Id.* This statement is corroborated both by the suspicious nature of the transaction and the fact that the transaction did, in fact, occur, JA 275; Salahi's knowledge about the methods al-Qaida used; and the fact that many of Salahi's other activities for Hafs were al-Qaida related.

Third, the district court did not evaluate the reliability of Salahi's September 2005 statement implicating himself directly in Ganczarski's 1999-2000 al-Qaida telecommunications project. *See* JA 273. The district court observed that Salahi had told the FBI, in September 2005, that computer files at his employer, BITS, reflected a sale of radio equipment for al-Qaida. *Id.* During the September 2005 FBI interview, Salahi was shown receipts showing the sale of CODAN products from his work at BITS, and "[h]e inferred that these documents related to the purchase and shipping of

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radio equipment used to setup the radio system for AQ between Kandahar and Quetta,”

JA 455 (FBI LHM 9/14/05), *i.e.*, the project that Ganczarski was working on.

But the district court nowhere addressed the reliability of this admission, even though several factors corroborate the statement and show it to be reliable. First, while Salahi’s trial declaration disclaimed this one particular statement, JA 2396, it generally endorsed his veracity during this interview. JA 2397 (in September 2005, he “met with the FBI” and “tried to cooperate with them”). The declaration also makes clear that Salahi retracted the statements he made in that interview not because they were inaccurate, but because he thought the FBI interviewers were being “demeaning.” *Id.*

The statement was also self-corroborating, given the highly technical details of the al-Qaida project that Salahi provided, along with a sketched diagram of the radio equipment being used. *See* JA 450-57. It was also near the time of this al-Qaida project that Salahi began working outside his field of expertise for BITS, a Mauritanian telecommunications company that sold the exact type of radio encryption equipment – made by CODAN – that al-Qaida sought for the project. *See* JA 565-66, 1350-51; *see also* JA 605-06 (SIR 3/3/05) (Salahi knew al-Qaida used CODAN equipment “because [of] my experience with AQ and the type of equipment they were looking for through my friend Ganczarski”). Indeed, the district court observed that BITS records showed that the company sold the same type of equipment Ganczarski was seeking on behalf of

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al-Qaida JA 273. The court also stated that the credibility of Salahi's testimony regarding BITS was "undermined by his insistence that his computer was accessed by several other BITS employees" – a statement he made at trial that tended to suggest he knew that BITS was being used to cover up activities for al-Qaida. JA 274.³

In sum, the district court erred in ordering Salahi's release without considering the reliability of these and other inculpatory statements made by Salahi during his [REDACTED] detention.

³ The district court also failed to address an earlier corroborating statement – made in November 2003 – where Salahi admitted he had done computer and telecommunications work for al-Qaida. JA 1861-63. Salahi submitted this statement with his traverse and has repeatedly held it up as a sign of his truthfulness, Tr. 384; it therefore should have been treated as reliable.

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~~SECRET//NOFORN~~**CONCLUSION**

For the forgoing reasons, this Court should reverse the judgment and direct the district court to enter an order denying the writ of habeas corpus, or vacate the judgment and remand for further proceedings.

Respectfully submitted,

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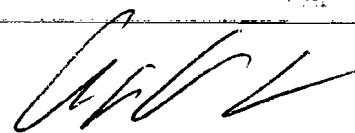
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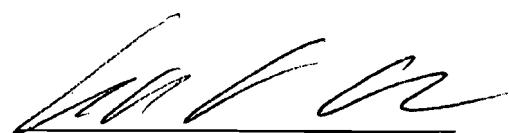
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I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 13,784 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).


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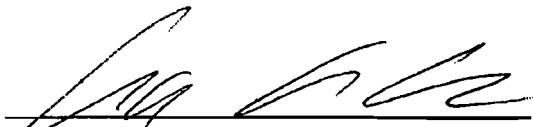
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I hereby certify that on May 21, 2010, I filed and served the foregoing Corrected Brief for Respondents-Appellants by delivering an original and seven copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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