NO. 13-

IN THE

Supreme Court of the United States

ABDUL AL QADER AHMED HUSSAIN,

Petitioner,

v.

BARACK OBAMA, President of the United States;
CHARLES T. HAGEL, Secretary of Defense;
JOHN BOGDAN, Colonel, U.S. Army;
RICHARD W. BUTLER, Admiral, U.S. Navy.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals failed to apply the governing preponderance of the evidence standard in affirming the denial of Petitioner's habeas corpus petition, thus denying him the meaningful review mandated by this Court in *Boumediene v. Bush.*

Whether the Court of Appeals improperly shifted the burden of proof to Petitioner to disprove affiliation with al Qaeda or the Taliban at the time of his capture.

PARTIES TO THE PROCEEDING

Petitioner

Abdul Al Qader Ahmed Hussain (ISN 690) ("Hussain" or "Petitioner") is one of several petitioners in the civil action captioned *Issam Hamid Ali Bin Al Jayfi, et al. v. Barack H. Obama, et al.*, No. 05-2104, filed October 27, 2005. Hussain is the real party in interest and petitioner in this Court.

Respondents

- Barack Obama, President of the United States.
- Charles T. Hagel, Secretary of Defense.
- Army Col. John Bogdan, Commander, Joint Detention Group, Guantánamo Bay.
- Admiral Richard W. Butler, United States Navy, Commander, Joint Task Force-GTMO.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hussain respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The June 18, 2013 opinion of the Court of Appeals is reported at 718 F.3d 964 (D.C. Cir. 2013) and is reproduced at page 1 of the appendix to this petition ("App."). The October 12, 2011 opinion of the District Court is reported at 821 F. Supp. 2d 67 (D.D.C. 2011) and is reproduced at App.23a.

JURISDICTION

A timely petition for panel rehearing and a timely petition for rehearing *en banc* were denied by the Court of Appeals for the District of Columbia on August 21, 2013. (App.52a-55a) The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 § 2(a) (2001) provides:

> [t]hat the President is authorized to use all necessary and appropriate force against

> those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Hussain is a Yemeni citizen who has been detained in Guantanamo Bay for 11 of his 29 years. The District Court upheld and the Appellate Court affirmed Hussain's indefinite detention based solely on findings of fact concerning his travels North of Kabul, Afghanistan while a teenager, certain individuals he resided near while north of Kabul, time spent in certain mosques, and his possession of a rifle, all occurring months before his capture in March 2002. The District Court made no findings that Petitioner planned, authorized, or committed terrorist attacks or directly aided those who did. The District Court based its decision on the following findings of fact, which the District Court deemed uncontested.

Hussain traveled to Quetta, Pakistan in 1999 and stayed in a mosque run by Jama'at al-Tablighi ("JT"). After three months, Hussain traveled from Quetta to Afghanistan, where he spent another three months before returning to a JT mosque in Quetta.

Hussain made another trip to Afghanistan in or about June 2000, returning to Quetta a month later to stay at a JT mosque. (App.2a)

In November 2000, Petitioner took a longer trip to Afghanistan, staying for 10 months in an area north of Kabul near the battle lines between the Taliban and the Northern Alliance. While there, Hussain stayed with three individuals who identified themselves as Taliban guards, provided him with an AK-47 rifle, and showed him how to operate it. (App.3a) The court did not find that he ever carried or used the weapon or otherwise assisted the Taliban guards in any respect.

After leaving Afghanistan in August/September 2001, Hussain stayed at a JT mosque in Lahore, Pakistan in September 2001. In March 2002, he was captured in Faisalabad, Pakistan. He was transferred to Guantanamo shortly thereafter and has remained there ever since. (App.3a) The District Court made no findings of fact concerning Hussain between his brief stay at the JT mosque in September 2001 and Hussain's capture in March 2002.

B. Proceedings Below

1. Habeas Petition

On October 27, 2005, the undersigned counsel filed a Petition for Writ of Habeas Corpus on behalf of Hussain and five other Yemeni detainees, in the action captioned *Al Jayfi, et al. v. Obama, et al.,* Case No. 05-CV-2104. On January 31, 2007, the District Court entered an order staying the case pending the

resolution of jurisdictional questions raised by the Military Commission Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 236-37 (2006) on appeal in *Boumediene v. Bush,* 533 U.S. 723 (2008). On June 30, 2008, following this Court's issuance of its decision in *Boumediene*, Hussain moved for an order to lift the stay to permit his case to proceed on the merits. The District Court granted that motion and reopened the case on July 3, 2008.

2. District Court Proceeding

District Judge Reggie B. Walton conducted a three-day merits hearing in May 2010, with closing arguments in September 2010. (App.24a) The court issued its decision and order on October 12, 2011. *Id.*

The court was charged with determining if, "by a preponderance of the evidence that the petitioner was a 'part of ' al Qaeda or the Taliban at the time of his apprehension." (App.42a) The court found that this test was satisfied based on three factual findings. *Id.* at 43a-49a. First, relying on *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), the court found that Hussain's stay at JT mosques was probative evidence weighing in favor of his detention. (App.45a) Second, the court found that Petitioner's association with Taliban members as well as his temporary possession of a rifle with which they had provided him was "probative, if not conclusive" evidence in support of detention. *Id.* Finally, concluding that his professed motives for his travels after he left Afghanistan were not credible, the court found that Hussain's unsatisfactory explanations were "further justification for his detention." *Id.* at 49a. Mindful that the court should not "view each

piece of evidence in isolation," the court found that these three findings, taken together, "presented sufficient evidence to justify the petitioner's detention." *Id.* at 42a, 44a. On April 23, 2012, Hussain appealed Judge Walton's denial of his habeas petition to the Court of Appeals for the District of Columbia.

3. Appellate Proceedings

On June 18, 2013, a three-judge panel of the Court of Appeals of the District of Columbia affirmed the District Court's decision, based on a conclusion that the District Court's three findings of fact were sufficient to support denial of Hussain's habeas petition. *See* App.2a. Judge Harry T. Edwards filed a separate opinion concurring in the judgment, in which he wrote that Petitioner's plea "for habeas relief should be granted, but his claim is doomed to fail because of the vagaries of the law." (App.14a) Judge Edwards found "no evidence [that Hussain aided those engaged in terrorism] in the record before the court." *Id.* Judge Edwards explained that the Court of Appeals for the District of Columbia has, in its Guantanamo jurisprudence, repeatedly "recited the 'preponderance of the evidence' standard while in fact requiring nothing more than substantial evidence to deny habeas petitions." (App.15a) Here, Judge Edwards concluded that the District Court's factual findings were insufficient to satisfy the preponderance of the evidence standard. *Id.* This was particularly evident in that none of the District Court's findings concerned Mr. Hussain's conduct or status as of the time of his capture; indeed, all concerned his conduct and status months, even

years, prior to capture. (App.16a-17a) Accordingly, Judge Edwards concluded that the Court of Appeals had affirmed on the basis of less than a preponderance standard—in fact applying the substantial evidence standard—but concurred in the judgment because the decision was consistent with the Court of Appeals' precedents in the Guantanamo habeas cases. (App.19a)

Hussain filed a motion for rehearing or, in the alternative, rehearing *en banc*, which the court denied on August 21, 2013. (App.52a-55a)

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS REVIEWED THE DISTRICT COURT'S FACTUAL FINDINGS UNDER A LESS RIGOROUS STANDARD THAN A PREPONDERANCE OF THE EVIDENCE, DENYING PETITIONER MEANINGFUL REVIEW OF HIS DETENTION.

Indeed, over the course of the Guantanamo habeas cases since *Boumediene*, the Court of Appeals has eroded the preponderance of the evidence standard and effectively transitioned to a substantial evidence standard. Given the significance of this issue to Hussain and other Guantanamo petitioners, this Court should grant certiorari to review the Court of Appeals' application of the standard of review to Hussain and clarify the proper standard applicable to the Guantanamo habeas cases.

The Authorization for Use of Military Force (the "AUMF") permits the President to detain individuals who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). Throughout its Guantanamo habeas jurisprudence, the Court of Appeals for the District of Columbia has repeatedly held that under the AUMF, detention is proper if the government shows, by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture.[1] Yet, as these Guantanamo habeas cases have progressed since *Boumediene*, the Court of Appeals has, in practice, departed from the preponderance standard and effectively adopted a less rigorous substantial evidence standard. The Court of Appeals committed this error in Hussain's case.

Under the preponderance of the evidence standard, as defined by this Court, a court must find

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[1] Although the Court of Appeals has left open the question of whether a preponderance of the evidence standard is constitutionally required, district courts have uniformly applied the preponderance of the evidence standard in Guantanamo detention cases as required by the Case Management Order entered by Judge Hogan on November 6, 2008. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, at 4 (D.D.C. Nov. 6, 2008). In this case, the District Court found that the government satisfied that burden of proof, and the Court of Appeals affirmed on that basis. *See* App.49a (concluding that "the government has provided more than enough evidence to meet its burden of proof in this case"); (App.2a) (holding that the "facts support the conclusion that appellant was more likely than not a part of enemy forces at the time of his capture").

that the "existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (citations omitted). Despite recognizing preponderance of the evidence as the governing standard, the Court of Appeals effectively applied the less rigorous substantial evidence standard, which requires a court to find only that "a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion." (App.15a) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999)). In his concurring opinion, Judge Edwards notes that this case "fits the mold of a number of the decisions of [the D.C. Circuit Court of Appeals] that have recited the 'preponderance of the evidence' standard while in fact requiring nothing more than substantial evidence to deny habeas petitions." *Id.*; *see also Almerfedi*, 654 F.3d 1, 6-7 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400, 404-08 (D.C. Cir. 2011); *Esmail v. Obama*, 639 F.3d 1075, 1077-78 (D.C. Cir. 2011) (Silberman J., dissenting) (suggesting that the preponderance of the evidence standard is "unrealistic" and admitting that, in practice, at least some members of the Court of Appeals are reviewing Guantanamo habeas petitions only for "some evidence.") Wittes, Chesney, and Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking, Harvard Law School National Security Research Committee*, 24 (May 12, 2011) available at http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes (noting that "increasingly-bare fact patterns have been held sufficient to establishing by a preponderance of evidence that an

individual was 'part of' Al-Qaeda, the Taliban, or other associated force."); William R. Payne, *Cleaning Up "The Mess": The D.C. Circuit Court of Appeals and the Burden of Proof In The Guantanamo Habeas Cases*, HARV. J. LAW & PUB. POL. Vol 36. At 893-94 (describing the willingness of the Court of Appeals to "interpret flexibly the preponderance standard to accommodate even relatively modest showings by the government.") The Court of Appeals' practice of conflating these two legal standards in its Guantanamo jurisprudence denies detainees the protection of a properly applied preponderance standard and, in turn, the benefit of a meaningful review of their detention as required under *Boumediene v. Bush*, 553 U.S. at 783.

This eroded protection is evident in several aspects of the Court of Appeals' decision, perhaps most acutely in its evaluation of evidence that Hussain spent several months in 2000-2001 in an area near the battle lines, residing with Taliban members and learning to use a rifle. The Court of Appeals concluded that the evidence satisfied the "walks like a duck" test and may alone "compel . . . the conclusion that [Hussain] was loyal to [enemy] forces." (App.7a-8a) But, as Judge Edwards reasoned:

> This is not a proper application of the preponderance of the evidence test with respect to the matter in dispute. And it is quite invidious because, arguably, any young, Muslim man traveling or temporarily residing in areas in which terrorists are known to operate would pass

> the 'duck test.' That is exactly why the Court should faithfully apply the proper evidentiary standard. (App.17a-18a)

The Court of Appeals found this evidence to be "damning," (App.7a), notwithstanding that the District Court made no findings that Hussain used the gun, engaged in battle, or otherwise supported the activities of al Qaeda or the Taliban. *See* App.17a. Given these omissions in the District Court's findings, evidence of Hussain's stay north of Kabul is not "sufficiently reliable and sufficiently probative to *demonstrate the truth of the asserted proposition* with the requisite degree of certainty" that Hussain was "part of" an enemy organization. (App.18a) (quoting *Concrete Pipe*, 508 U.S. at 622). Concluding that such evidence tends to prove that Hussain more likely than not was "part of" either the Taliban or al Qaeda is entirely inconsistent with a proper application of the preponderance of the evidence standard.

The error in the Court of Appeals' application of the preponderance of the evidence standard is also apparent in its reliance on Hussain's visits to JT mosques as evidence supporting his detention. Relying on *Almerfedi*, the Court of Appeals held that the District Court had correctly found that Hussain's stays in JT mosques supported his detention. *See* App.10a-11a. But both the Court of Appeals and the District Court ignored significant differences between the factual circumstances in *Almerfedi* and Hussain's case that undermine any claim that Hussain's stays at JT mosques are suggestive of membership in an enemy force as opposed to an

innocent affiliation common among young Muslim travelers. For example, the District Court made no finding that Hussain had visited the JT headquarters or even had contact with JT leaders or others who operated the organization. Although the Court of Appeals denied that the District Court had applied a "categorical rule" that "any contact with the JT organization suggests an affiliation with al Qaeda," (App.11a), nothing in the District Court's findings distinguishes Hussain from the thousands of other Muslim travelers who regularly stayed at JT mosques in the relevant time frame.

As a direct result of its misapplication of the preponderance of the evidence standard, the Court of Appeals affirmed the denial of Hussain's habeas petition. This effective application of a lower standard denied Hussain the "meaningful review" of his detention mandated by this court in *Boumediene v. Bush*, 553 U.S. at 783. A grant of certiorari is appropriate and necessary here, not only because Hussain faces the very real prospect of life in prison as a result of the denial of his habeas relief based on a watered-down burden of proof, but because the Court of Appeals' decisions in other habeas cases have followed the same flawed construction of the preponderance standard. Accordingly, this Court should grant this petition, reverse the decision of the Court of Appeals, and require the Court of Appeals to faithfully apply the preponderance of the evidence standard.

II. THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY SHIFTED THE BURDEN OF PROOF TO HUSSAIN, REQUIRING HIM TO PROVE NON-MEMBERSHIP IN AL QAEDA AND THE TALIBAN.

The District Court correctly identified the task before it as "determining whether the government has met its burden of proving by a preponderance of the evidence that the petitioner was 'part of' al-Qaeda or the Taliban *at the time of his apprehension*." (App.42a) (emphasis added). Nonetheless, as discussed above, the District Court made factual findings with respect to Hussain's status only through approximately August 2001, at which point Hussain discontinued his stay north of Kabul—the centerpiece of the District Court's and the Court of Appeals' finding that he was "part of" an enemy organization. (App.7a-8a, 45a) The District Court made no factual findings with respect to the period between approximately August 2001 and March 2002, when Hussain was captured in Faisalabad. Despite the temporal gap in the District Court's factual findings, in affirming the District Court's decision the Court of Appeals found that the "facts support the conclusion that appellant was more likely than not a part of enemy forces *at the time of his capture*." (App.2a) (emphasis added). In so holding, the Court of Appeals effectively shifted the burden of proof to Petitioner, requiring him to demonstrate that he had "affirmatively cut those ties" with enemy forces. (App.11a) Placing the burden on Hussain to disprove an affiliation with an enemy organization is "not an appropriate

application of the preponderance of the evidence standard," (App.18a-19a) and effectively deprived him of a meaningful review of his detention.

The Court of Appeals found that Hussain failed to take the type of "concrete, affirmative steps" required to prove disassociation from an enemy force. (App.12a) The court held that "there [was] no evidence to suggest that leaving his Taliban housemates in Afghanistan marked a turning point from Hussain's old ways and an end to his connection with enemy forces." (App.11a)

Furthermore, the Court of Appeals attempted to bridge the gap in the District Court's factual findings by holding that the purportedly fabricated narrative Hussain told with respect to his conduct in the months preceding his capture provided affirmative evidence of his continued affiliation with enemy forces. (App.10a) As Judge Edwards explained, by treating Hussain's false exculpatory statements as affirmative evidence of his membership in enemy forces "the majority implicitly shifts the burden of proof from the Government to Hussain." (App.18a) Consequently, "Hussain's petition is rejected because he could not offer a coherent story about his whereabouts during the times in question, not because the government proved by a preponderance of the evidence that Hussain was 'part of ' al Qaeda, the Taliban, or associated forces" when he was captured. *Id.* The Court of Appeals thus effectively sanctioned the indefinite detention of Hussain on the basis of his inability to coherently describe an undoubtedly stressful and confusing period of his teenage years. *See* App.19a ("Is it really surprising

that a teenager, or someone recounting his teenage years, sounds unbelievable?").

The District Court made no factual findings with respect to Hussain's status at the time of his capture, the critical moment for evaluating whether he is legally detained under the AUMF. Instead, the District Court relied on Hussain's failure to prove disassociation in the months preceding his capture to sustain his detention. The District Court's failure to make findings of fact about Hussain's status at the time of his capture, and the Court of Appeals' affirmance in the absence of such findings, cannot be squared with the preponderance of the evidence standard or the requirement of "meaningful review" mandated by this Court in *Boumediene*.

The issue before this Court is not simply the misapplication of a legal standard to the facts in Mr. Hussain's case; rather, it is an illustration of the flawed construction of the preponderance of the evidence standard across all Guantanamo habeas cases. Therefore, this Court should grant this Petition for a Writ of Certiorari and direct the Court of Appeals to require the government to carry its burden of proof—specifically, to establish by a preponderance of the evidence affiliation with an enemy organization *at the time of capture.*

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a writ of certiorari should be granted.

Respectfully Submitted,

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November 19, 2013

APPENDIX

APPENDIX A

OPINION OF THE DISTRICT OF COLUMBIA CIRCUIT

718 F.3d 964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 18, 2012 – Decided June 18, 2013

No. 11-5344

ABDUL AL QADER AHMED HUSSAIN,

Appellant,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*

Appellees.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Opinion filed by *Senior Circuit Judge* EDWARDS, concurring in the judgment.

GRIFFITH, *Circuit Judge*: The district court denied appellant's petition for a writ of habeas corpus challenging his detention at Guantanamo Bay. We affirm the district court because its findings of fact were not clearly erroneous, and those facts

support the conclusion that appellant was more likely than not a part of enemy forces at the time of his capture.

I

The background of this case is set forth in the district court's thorough opinion, *see Hussein v. Obama*, 821 F. Supp. 2d 67, 68-75 (D.D.C. 2011), on which we rely to recite those facts relevant to this appeal. Appellant Abdul al Qader Ahmed Hussain[1] is a citizen of Yemen detained at the United States Naval Base at Guantanamo Bay. Sometime in 1999, Hussain left his home in Yemen for Pakistan. He initially spent a few weeks in Karachi and then traveled to Quetta, where he stayed for about three months. While in Quetta, he lived in a mosque run by the Jama'at al-Tablighi (JT) organization. From Quetta, Hussain traveled to Afghanistan, where he spent approximately three months. After that, Hussain returned again to a JT mosque in Quetta in April or May of 2000 until about June, when he left for Kabul, Afghanistan. In approximately August 2000, he returned once again to Quetta for another three-month stay at a JT mosque. Then, in November 2000, Hussain moved to Afghanistan and settled for ten months in an area north of Kabul that was ravaged by war between the Taliban and the Northern Alliance. Hussain lived near the front lines with three armed Taliban guards. Hussain's Taliban

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[1] The district court spelled petitioner's name "Hussein." We use "Hussain," the spelling employed by both parties on appeal.

housemates supplied him with an AK-47 rifle and trained him in its use. After al Qaeda attacked the United States on September 11, 2001, Hussain fled Afghanistan and returned to Pakistan where he lived at yet another JT mosque in Lahore. He was captured in Faisalabad in March 2002,[2] and was transferred to Guantanamo Bay soon thereafter.

Seeking to challenge his detention, Hussain filed a petition for a writ of habeas corpus with the district court on October 27, 2005. Uncertain of its jurisdiction to hear habeas petitions from detainees at Guantanamo Bay, the district court stayed the case in January 2006. In the wake of the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the district court heard Hussain's petition, but denied him relief. The district court concluded that Hussain was part of al Qaeda or the Taliban at the time of his capture, based on evidence of what he did and with whom he stayed in Pakistan and Afghanistan as well as his efforts to explain away that evidence, which the court found implausible. *See Hussein*, 821 F. Supp. 2d at 79. Hussain now appeals.

We review the district court's factual findings for clear error. We review *de novo* the ultimate legal determination of whether those facts support detention. *See Barhoumi v. Obama*, 609 F.3d 416,

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[2] The district court incorrectly refers to "May 23, 2002," as the date of Hussain's capture. But on appeal, Hussain acknowledges that he was captured in "March 2002" after being in Pakistan for "approximately six months."

423 (D.C. Cir. 2010) ("Determining whether a detainee was 'part of' an associated force is a mixed question of law and fact" because "whether a detainee's alleged conduct . . . justifies his detention under the AUMF is a legal question" and "whether the government has proven that conduct" is a factual one. (internal citations omitted)).

II

The Authorization for Use of Military Force (AUMF), enacted in response to the terrorist attacks of September 11, 2001, permits the President to detain individuals who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons." Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001); *see Hamdi v. Rumsfeld,* 542 U.S. 507, 519 (2004) (stating that the AUMF "clearly and unmistakably authorized detention" of enemy combatants). As we have stated repeatedly, this authority justifies holding a detainee at Guantanamo if the government shows, by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture. *See Khairkhwa v. Obama*, 703 F.3d 547, 548 (D.C. Cir. 2012); *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011); *Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir. 2010); *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).[3] Hussain

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[3] Our concurring colleague takes issue with our extensive precedent in detainee habeas appeals, arguing that we have not

challenges this standard on two grounds, which he acknowledges we have rejected before. Appellant Br. 15 n.2. We do so again.

Hussain argues that the government must show that he was involved in the "command structure" of al Qaeda or the Taliban, rather than merely "part of" these organizations. But "[n]owhere in the AUMF is there a mention of command structure." *Awad*, 608 F.3d at 11. While such a showing would be enough to sustain Hussain's detention, it is not necessary. *Id.* We have long held that requiring proof that a detainee was part of the "command structure" is too demanding; the sweep of the Executive's detention authority under the AUMF is broader. *See Uthman*, 637 F.3d at 403; *see also Salahi*, 625 F.3d at 751-52 (quoting *Bensayah*, 610 F.3d at 725).

Hussain also argues that the government must show that he personally picked up arms and engaged in active hostilities against the United States. But again, this argument demands more than the AUMF requires. *See Khairkhwa*, 703 F.3d at 550 (collecting cases that reject the notion that a detainee must

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always kept to the preponderance of the evidence standard we have thus far invoked. But he is mistaken to say that we have "required" the standard. *Post*, at 1 (Edwards, J., concurring). In *Al-Adahi* we wrote that although the standard is "constitutionally permissible . . . we have yet to decide whether [it] is required." *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (citation omitted). Furthermore, nothing about this case requires us to settle the question because the preponderance standard is easily met here. This case is a fastball down the middle, not a curveball low and away. It is well within the strike zone.

have engaged in hostilities); *Awad*, 608 F.3d at 11 (Once the government demonstrated that the detainee was part of al Qaeda, "the requirements of the AUMF were satisfied."); *Al-Bihani*, 590 F.3d at 869 (permitting the detention of a detainee who "worked as the [55th Arab B]rigade's cook and carried a brigade-issued weapon, but never fired it in combat"). As we noted in *Khairkhwa*, permitting detention only for those detainees who engaged in active hostilities would be inconsistent with the realities of "modern warfare" in which "commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; supply-line forces, critical to military operations, may never encounter their opposition." *Khairkhwa*, 703 F.3d at 550. Nothing has changed since we rejected these arguments only months ago. We are bound by our precedent and therefore reject Hussain's challenges. Having done so, we offer a brief overview of how we evaluate evidence in these cases.

We have adopted no categorical rules to determine whether a detainee is "part of" an enemy group. Instead, we look at the facts and circumstances in each case. *See Bensayah*, 610 F.3d at 725 ("It is impossible to provide an exhaustive list of criteria for determining whether an individual is "part of" al Qaeda."). We look at each piece of evidence "in connection with all the other evidence" in the record, and not in isolation. *Almerfedi v. Obama*, 654 F.3d 1, 4 (D.C. Cir. 2011); *see also Salahi v. Obama*, 625 F.3d at 753 ("Merely because a particular piece of evidence is insufficient, standing alone . . . does not mean that the evidence may be

tossed aside . . . . The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof." (internal citation and quotation marks omitted)). The facts the district court found and the inferences the district court drew from them support the conclusion that Hussain was a part of al Qaeda or the Taliban when he was captured.

III

Perhaps the most damning evidence supporting the district court's conclusion that Hussain was part of an enemy force when he was captured is his ten-month stay near the front lines of battle in war-torn Afghanistan. Hussain does not contest that he lived near the battlefront with Taliban warriors who gave him an AK-47 and taught him how to use it. Evidence that Hussain carried an assault rifle given him by Taliban forces while living among Taliban forces near a battle line fought over by Taliban forces brings to mind the common sense view in the infamous duck test. *See, e.g.*, *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 n.2 (D.C. Cir. 1989) (adopting the "now-infamous 'duck-test,' dressed up in appropriate judicial garb: 'WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.'").[4] Evidence

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[4] Our concurring colleague thinks such an inference is "quite invidious because, arguably, any young, Muslim man traveling in areas in which terrorists are known to operate would pass the 'duck test.'" *Post*, at 4 (Edwards, J., concurring). But the objectionable profiling our colleague fears played no part in the conclusion of the district court and is nowhere present in our

that Hussain bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites–and may very well compel–the conclusion that he was loyal to those forces. We have repeatedly affirmed the propriety of this common-sense inference. *Alsabri v. Obama*, 684 F.3d 1298, 1306 (D.C. Cir. 2012) ("[I]t is difficult to believe that Taliban fighters would allow an individual to infiltrate their posts near a battle zone unless that person was understood to be a part of the Taliban." (internal quotation marks omitted)); *see also Suleiman v. Obama*, 670 F.3d 1311, 1313-14 (D.C. Cir. 2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (D.C. Cir. 2011). Hussain suggests a more benign inference. He argues that his Taliban housemates gave him the AK-47 for protection from wild animals and thieves, and that they were not living all that close to the lines of battle anyway. But the district court permissibly rejected this version of the uncontested facts in favor of the government's far more plausible explanation. *See Hussein*, 821 F. Supp. 2d at 78. That finding was not clear error.[5]

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reasoning. The district court cared not a whit whether Hussain is Muslim (or not). Neither do we. The innocent wayfaring teenager our colleague invokes bears no resemblance to Hussain, who was not simply in the wrong place at the wrong time. He was in the wrong place, at the wrong time, with the wrong people, doing the wrong things. Our precedent, to say nothing of common sense, supports the inference that the district court drew and which we affirm.

[5] The concurrence attempts to downplay Hussain's possession of the weapon. This misconstrues the district court's legal reasoning. Mere possession of the weapon – or carrying it

Although the parties disagree about precisely when Hussain finally left Afghanistan, there is no dispute that he had left his Taliban housemates near the battlefront, returned to Kabul by September 11, 2001, and fled to Pakistan thereafter. The district court found Hussain's story of his movements after he left Kabul unbelievable. He claimed, somewhat inconsistently, that he left Afghanistan both to return to Yemen to be with his family and possibly to marry, and to live in Pakistan to study, either computers or the Koran. But the record lends no support to either story. Once he left Afghanistan, Hussain stayed in Pakistan until his capture, and although he moved from Lahore to Faisalabad, he made no effort to return to Yemen or to attend any school. We agree with the district court that "all of the petitioner's explanations seem to be little more than *post hac* [sic] attempts to present goals that change as necessary to support his presence in one part of the world or another. The sum of the petitioner's inexplicable explanations for his actions renders his testimony completely incredible." *Id.* at 79. That finding was not clear error and, under our precedent, provides evidence of Hussain's continued affiliation with enemy forces after leaving Afghanistan. In other detainee cases, we have found

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around – was not the critical point. The district court's conclusion that Hussain was loyal to enemy forces turned on the fact that Taliban soldiers gave him an AK-47 while he lived among them near the battle lines. Under our precedent, that alone demonstrates loyalty to a shared cause, even if Hussain never brandished the weapon in combat. *AZ-Bihani*, 590 F.3d at 869.

that false cover stories, like those spun by Hussain, "are evidence—often strong evidence—of guilt." *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010); *see Uthman*, 637 F.3d at 407. In *Almerfedi*, we stated that "'false exculpatory statements' amount to *evidence in favor of the government*." *Almerfedi*, 654 F.3d at 7 (quoting *Al-Adahi*, 613 F.3d at 1107) (emphasis added).

The district court also relied on Hussain's "extended stays at two Jama'at al-Tablighi mosques." *Hussein*, 821 F. Supp. 2d at 77. As we have already recited, on two separate occasions, Hussain lived at a JT mosque in Pakistan for about three months. As we noted in *Almerfedi*, JT is "an Islamic missionary organization that is a Terrorist Support Entity closely aligned with al Qaeda." *Almerfedi*, 654 F.3d at 6 (internal quotation marks omitted). Although evidence of association with the JT mosques alone "presumably would not be sufficient to carry the government's burden because there are surely some persons associated with Jama'at Tablighi who are not affiliated with al Qaeda," we held in *Almerfedi* that extended affiliation with the group over time "is probative." *Id.* The district court concluded that Hussain's multiple stays at JT mosques between his sojourns to Afghanistan suggests an affiliation with al Qaeda. Because *Almerfedi* plainly permits such an inference, we see no error in the district court having drawn it.[6] Hussain faults the district court for

[6] Hussain stayed at JT mosques for two other, shorter, periods. Although these short stays may not in and of themselves establish an affiliation with al Qaeda, repeated visits to JT mosques, coupled with his extended stays there, support the inference that Hussain was affiliated with the terrorist group.

holding that any contact with the JT organization suggests an affiliation with al Qaeda. But Hussain misstates the district court's analysis. As we have just shown, the district court did not rely on such a categorical rule, but engaged in the type of fact-specific inquiry we require to reach its conclusion that Hussain's repeated and extended stays at JT mosques suggest an affiliation with al Qaeda. *See Bensayah*, 610 F.3d at 725.[7]

Having been "part of" enemy forces while living in northern Afghanistan at least through August 2001, Hussain makes no argument that he affirmatively cut those ties before his capture only six months later. And there is no evidence to suggest that leaving his Taliban housemates in Afghanistan marked a turning point from Hussain's old ways and an end to his connection with enemy forces. Nothing in the record shows the type of concrete, affirmative steps to dissociate that we look to when those once part of an enemy group claim they have left. *See Alsabri*, 684 F.3d at 1307 (noting that the detainee "proffers no evidence that he took steps to dissociate himself from those groups in the months between his

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[7] The government declared in the district court that it would not seek to prove Hussain's formal affiliation with JT. Red. Br. Addendum at 17. And the district court did not rely on any formal affiliation between Hussain and JT. It concluded only that his repeated stays at the JT mosques, irrespective of any formal affiliation, suggest that Hussain was "part of" al Qaeda. As this inference does not rest on a formal affiliation between Hussain and JT, the government's declaration below is simply irrelevant. Moreover, it was made before *Almerfedi* explained the significance of those stays.

departure from the battle lines and his capture"); *Al-Adahi*, 613 F.3d at 1109 (noting that "there was no evidence that [the detainee] ever affirmatively disassociated himself from al-Qaida," even when he was expelled from the group). In fact, the evidence points the other way. After living for ten months at the battlefront in Afghanistan with Taliban guards who armed him, Hussain fled to Pakistan, where he remained until his capture shortly thereafter, and, when asked to explain his actions in the interim, Hussain lied to the court. *See Almerfedi*, 654 F.3d at 7 ("'[F]alse exculpatory statements' amount to evidence in favor of the government." (quoting *Al-Adahi*, 613 F.3d at 1107)).

Finally, Hussain argues that the district court erred by failing to determine whether he affiliated with al Qaeda, the Taliban, or both. Both are enemy forces, and affiliation with either justifies detention. *See Al Alwi v. Obama*, 653 F.3d 11, 18 (D.C. Cir. 2011) (affirming the district court's denial of the writ where it was clear that petitioner was "'part of' the Taliban *or* al Qaeda" (emphasis added)). In any event, membership in these two groups sometimes overlaps, for example, when Taliban forces bring Arabic-speaking al Qaeda-affiliated members into their ranks. *See Al-Bihani*, 590 F.3d at 872 (noting that the 55th Arab Brigade was "an Al Qaeda-affiliated outfit . . . [fighting] alongside the Taliban while the Taliban was harboring Al Qaeda"). The government's evidence fits this pattern. Hussain associated with Taliban guards in Afghanistan and an al Qaeda affiliated group in Pakistan. In sum, there was no error in the district court's failure to

distinguish between when Hussain was a part of al Qaeda and when he was a part of the Taliban.

IV

For the foregoing reasons, we *affirm* the district court's denial of Hussain's petition for a writ of habeas corpus.

So ordered.

APPENDIX A-1

CONCURRENCE OF EDWARDS, J.

Edwards, *Senior Circuit Judge*, concurring in the judgment:

Abdul al Qader Ahmed Hussain was a teenager when he was taken into custody and sent to Guantanamo Bay. He has been confined in Guantanamo Bay for eleven years. His petition for habeas relief should be granted, but his claim is doomed to fail because of the vagaries of the law.

Under the applicable law, the President is authorized to detain individuals who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons." Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). The Government cannot plausibly contend that Hussain planned, authorized, or committed terrorist attacks. The only real question in this case is whether Hussain "aided" those who engaged in terrorist attacks. I can find no evidence of this in the record before the court.

To hold a detainee at Guantanamo, we have required that the Government show, by a *preponderance of the evidence*, that the detainee was a "part of" al Qaeda, the Taliban, or associated forces at the time of his capture. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) ("Although we doubt . . . that the [Constitution] requires the use of the preponderance standard, we will not decide the

question in this case. As we [have done previously], we will assume *arguendo* that the government must show by a preponderance of the evidence that [the detainee] was part of al-Qaida."). Under the preponderance of the evidence standard, "the factfinder must evaluate the raw evidence, [and] find[] it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993). The evidence in this case may satisfy the lesser substantial evidence standard, *see Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (the substantial evidence standard requires a reviewing court "to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion"), but it does not meet the preponderance of the evidence test.

The result in this case is unsurprising because, in my view, it fits the mold of a number of the decisions of this court that have recited the "preponderance of the evidence" standard while in fact requiring nothing more than substantial evidence to deny habeas petitions. I do not mean to sound self-righteous in offering this observation–it is merely my considered judgment. In truth, the Guantanamo detainee cases have presented extraordinary challenges for the judiciary. This reality has drawn rueful commentary in judicial opinions, scholarly articles, speeches by members of the Legislative Branch, pronouncements from the Executive Branch, and media reports. Any knowledgeable person who looks carefully at the

applicable legislative enactments and the Supreme Court decisions affecting Guantanamo detainees, and the resulting progeny of district court and court of appeals opinions, will comprehend how the preponderance of the evidence and substantial evidence standards have come to be conflated. I think it is important to at least acknowledge what is happening in our jurisprudence.

The facts relied upon by the Government in this case are quite simple. (I have blocked the statement of facts merely to highlight it, not to suggest that it is quoted material.)

Sometime in 1999, when he was a teenager, Hussain left his home in Yemen and headed for Pakistan. He initially spent a few weeks in Karachi and then traveled to Quetta, where he stayed for about three months. While in Quetta, he lived in a mosque run by the Jama'at al-Tablighi ("JT") organization. There is nothing to indicate that he was a part of the organization. From Quetta, Hussain traveled to Afghanistan, where he spent approximately three months. After that, Hussain returned again to a JT mosque in Quetta in April or May of 2000 until about June, when he left for Kabul, Afghanistan. There is nothing to indicate what he did during his brief stay at the mosque. In approximately August 2000, he returned once again to Quetta for another three-month stay at a JT mosque. Again, there is nothing to indicate what he did during his brief stay at the mosque. Then in November 2000, Hussain moved to Afghanistan where he remained for ten months in an area north of Kabul not far from where the Taliban and the

Northern Alliance had engaged in battles. Hussain lived near the front lines with three fellow Arabic speakers who were Taliban guards. Hussain's housemates supplied him with an AK-47 rifle and trained him in its use. However, there is nothing to indicate that Hussain used the weapon for any purpose; there is nothing to indicate that he even carried the gun around with him while residing in the area north of Kabul; and there is nothing to indicate that he ever engaged in any acts of war or terrorism during his temporary residence in the area north of Kabul. Indeed, there is no evidence that Hussain ever engaged in any acts of war or terrorism. When al Qaeda attacked the United States on September 11, 2001, Hussain was on his way from Afghanistan to Pakistan, where he lived at yet another JT mosque in Lahore. Again, there is not one iota of evidence as to what he did while at the mosque. Hussain wandered around for a brief time between September 2001 and March 2002, but there is nothing to indicate that he was affiliated with enemy forces or engaged in acts of war or terrorist activities. He was taken into custody in Faisalabad in March 2002 and was transferred to Guantanamo Bay soon thereafter.

That's it.

The majority invokes the "walks like a duck" test to conclude that the evidence "at least invites–and may very well compel–the conclusion that [Hussain] was loyal to [enemy] forces." This is not a proper application of the preponderance of the evidence test with respect to the matter in dispute. And it is quite invidious because, arguably, any young, Muslim man

traveling or temporarily residing in areas in which terrorists are known to operate would pass the "duck test." That is exactly why the court should faithfully apply the proper evidentiary standard. Hussain says that he was given a weapon for his own self-protection. The Government does not contend nor did the District Court find that Hussain carried the weapon around with him during his stay in the area north of Kabul or that he used the weapon for any purpose; nor does the Government contend that Hussain ever joined with enemy forces on the front lines. Therefore, without more, the fact that Hussain moved to Afghanistan where he remained for ten months in an area north of Kabul is not "sufficiently reliable and sufficiently probative to *demonstrate the truth of the asserted proposition* with the requisite degree of certainty" that Hussain "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Concrete Pipe*, 508 U.S. at 622 (emphasis added).

The majority also concludes that the District Court did not commit clear error in finding that "Hussain's continued affiliation with enemy forces after leaving Afghanistan" was sufficient to make out the case against him. But in doing so, the majority implicitly shifts the burden of proof from the Government to Hussain. Under the approach adopted by the majority, Hussain's petition is rejected because he could not offer a coherent story about his whereabouts during the times in question, not because the Government proved by a preponderance of the evidence that he was "part of" al Qaeda, the Taliban, or associated forces. Respectfully, this is not an appropriate application of

the preponderance of the evidence standard. It was the Government's burden to show that Hussain "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and this burden was not met by Hussain's failure to explain his whereabouts. Hussain is not presumed to be guilty under the applicable law merely because he was taken into custody and transferred to Guantanamo.

Is it really surprising that a teenager, or someone recounting his teenage years, sounds unbelievable? What is a judge to make of this, especially here, where there is not one iota of evidence that Hussain "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons"? I do not mean to suggest that a teenager cannot be a terrorist or an enemy combatant or that, if so, he should get a pass because of his age. Rather, the salient point is quite simple: the burden of proof was on the Government to make the case against Hussain by a preponderance of the evidence. In my view, it failed to carry this burden.

This said, I am constrained by the law of the circuit to concur in the judgment of the court. The majority opinion is unassailable in holding that our precedent (which conflates the preponderance of the evidence and substantial evidence standards) supports the result reached. I have no authority to stray from precedent. However, when I review a record like the one presented in this case, I am disquieted by our jurisprudence. I think we have strained to make sense of the applicable law, apply

the applicable standards of review, and adhere to the commands of the Supreme Court. The time has come for the President and Congress to give serious consideration to a different approach for the handling of the Guantanamo detainee cases.

APPENDIX A-2

ENTRY OF JUDGMENT

718 F.3d 964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed on June 18, 2013

No. 11-5344

September Term, 2012

ABDUL AL QADER AHMED HUSSAIN,

Appellant,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*

Appellees.

Before: HENDERSON and GRIFFITH, *Circuit Judges,* and EDWARDS, *Senior Circuit Judges*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is **ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein

this date.

Per Curiam

FOR THE COURT:

/S/ Mark J. Langer
Clerk

Date: June 18, 2013

APPENDIX B

OPINION OF THE DISTRICT OF COLUMBIA CIRCUIT

821 F.Supp.2d 67

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

October 12, 2011

Civil Action No. 05–2104(RBW)

ABDUL AL QADER AHMED HUSSAIN,

Detainee,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*
Appellants.

REGGIE B. WALTON, District Judge.

Currently before the Court is Abdul Qader Ahmed Hussein's (ISN 690)[1] petition for a writ of habeas corpus, in which he argues that he should be

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[1] "ISN" is the acronym for "Internment Serial Number." *Al–Harbi v. Obama*, Civil Action No. 05–2479(HHK), 2010 WL 2398883, at *3 n. 2 (D.D.C. May 13, 2010). Each of the detainees currently housed at Guantanamo Bay has been assigned an ISN. *Id.*

released from the United States detention facility in Guantanamo Bay, Cuba because his detention is not statutorily authorized under the Authorization for the Use of Military Force (the "AUMF"), Pub.L. No. 107–40, § 2(a), 115 Stat. 224 (2001).Petition for Writ of Habeas Corpus ("Pet.") 3. The government opposes the petitioner's habeas petition on the grounds that, among other things, he "traveled to Afghanistan to join al-Qaida, the Taliban, [ ]or associated forces," thereby rendering him detainable under the AUMF. Joint Pre–Trial Statement ("Joint Stmt.") at 1. After carefully considering the evidence presented by both parties and the arguments of counsel during the merits hearing that commenced on May 25, 2010, and concluded on September 1, 2010, as well as the various documents that have been filed by the parties in this matter and the exhibits attached to these filings,[2] the Court concludes for the following reasons that the petitioner's petition for a writ of habeas corpus must be denied.

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[2] In addition to the evidence and arguments presented by the parties at the merits hearing, the Court considered the following documents in reaching its decision: (1) the government's Factual Return; (2) the petitioner's Traverse; and (3) the parties' Joint Pre–Trial Statement ("Joint Stmt.").

I. Background[3]

The petitioner is "a native of Al–Mukullah, Yemen." Joint Stmt. at 2, 12. Around the time when he was finishing his "last year in middle school," *id.* at 14:14, when he was approximately fourteen-years old, *id.* at 19:22, the petitioner contends he desired to leave Yemen and travel to Pakistan, *see id.* at 14:22–24 (testimony by the petitioner that he "traveled to Pakistan" after he "got the results" of his final exams in September 1999 and "knew [he had] passed"), because (1) he wanted "to learn and memorize the Koran," 5/26/10 Hr'g Tr. at 16:7, (2) he wanted "to learn about . . . computers," *id.* at 16:8, and (3) he wanted "to get involved in some rescue activities," such as "helping the Afghani poor people," *id.* at 16:9–10. Of those three reasons, the petitioner's "main goal was to memorize the Holy Koran," 5/26/10 Hr'g Tr. at 27:11–12, because, according to the petitioner, "memorizing the Koran is something that is highly appreciated[;] . . . it teaches you to have a good moral character," and "[i]t teaches you to treat people well," *id.* at 27:20–23. Furthermore, the petitioner reasoned that because he did not "speak

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[3] This section provides a summary of the petitioner's admissions that were submitted to the Court through his testimony at the merits hearing, the undisputed facts set forth in the parties' Joint Pre–Trial Statement, and his two declarations, which were designated as Exhibits 200 and 201 in the Petitioner's Exhibits Binder. As discussed below, however, the Court does not credit all of these admissions and, in fact, believes that many of these admissions constitute "false exculpatory statements" that will be weighed against the petitioner. *See infra* at 78.

the Pakistani language, . . . [he would] have . . . a lot of time . . . to learn the Koran." *Id.* at 17:14–15. With regard to his alleged desire to assist poor Afghanis, the petitioner states that his interest in such charitable work stemmed from his childhood experience, when he "used to help [his] father . . . work [at a] charity organization" and assist "Somali refugees" by "distributing food[and] clothes" to those individuals. *Id.* at 16:15–22. As to his interest in computers, the petitioner viewed Pakistan as a place to pursue his studies because it "was a very cheap country and[,] . . . from [a] technological point of view, it[is] more advanced than Yemen." *Id.* at 17:10–12.

Despite his interest in traveling to Pakistan, the petitioner did not conduct any research about the country. *Id.* at 18:3–4. According to the petitioner, the travel habits of individuals in the Middle East differ from those of Americans; specifically, the petitioner claims that unlike "the culture . . . in America," where people "plan . . . what they are going to do" prior to traveling, the petitioner asserts that people from "Yemen and [other] Arab countries" do not engage in such planning; rather, they simply "take enough money to [travel]," and they bring with them any necessary phone numbers and identification. *Id.* at 18:7–17. And, while the petitioner had interest in being involved with charitable projects in Pakistan, he did not conduct any research on any organizations; rather, he contends he planned to locate "humanitarian . . . or human rights organizations" that assisted Afghani refugees once he arrived in Pakistan. *Id.* at 18:22–25. The petitioner did discuss his travel plans with his

father, who "accepted" and "welcomed" the idea of the petitioner traveling to Pakistan. *Id.* at 17:18–23. Thus, "[i]n [September] 1999," *id.* at 14:6–8, the "[p]etitioner traveled from Sana'a, Yemen to Karachi, Pakistan," Joint Stmt. at 12. The petitioner's father "paid for the trip," 5/26/10 Hr'g Tr. at 17:17, and thereafter provided the petitioner with money while he was living in Pakistan, Pet'r's Exhibits, Ex. 200 (First Declaration of Ahmed Abdul Qader Hussein ("First Pet'r's Decl.")) ¶ 4.

Upon arriving in Karachi, the petitioner decided "to do some sightseeing." *Id.* at 24:25–25:1. He testified he spent two weeks in Karachi, *id.* at 23:21–22, before deciding to travel to Quetta, *id.* at 25:2–3, where he understood that a charity devoted to assisting Afghani refugees was located, *id.* at 26:21–22. He then took a group bus from Karachi to Quetta, *id.* at 26:24, where he "liv[ed] in the Jama'at [a]l-Tabligh[i] mosque" for the three-month period he was living in Quetta, Pet'r's Exhibits, Ex. 200 (First Declaration of Abdul Ahmed Qader Hussein ("First Pet'r's Decl.")) ¶ 17, 5/26/10 Hr'g Tr. at 27:2–3; *see also* 5/26/10 Hr'g Tr. at 27:5 (testimony by the petitioner that he stayed at "a mosque known by the name of the Tablighi").

While in Quetta, the petitioner asserts that he wanted to learn about "how [he] could join . . . a charity organization."[4] *Id.* at 29:6–7. The petitioner

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[4] The petitioner testified at the merits hearing that when he "got to" Pakistan, he "said to [him]self" that because he was "very young at that point, ... nobody [would] hire [him] to work." 5/26/10 Hr'g Tr. at 19:2–3. The petitioner then "said to [him]self" that he should instead conduct "a comprehensive

would ask questions of "people that would come into the mosque," *id.* at 29:17–18, about "ways to start working and helping Afghani refugees," *id.* at 29:6–7. From those conversations, he learned that the standard of living "in Afghanistan . . . was much cheaper than Pakistan." *Id.* at 29:9–10. Thus, the petitioner was told that "if [he] wanted to help Afghani refugees, . . . it would be much better" to provide such assistance in Afghanistan[5] *Id.* at 29:11–13.

One of the individuals he spoke with about his desire to assist Afghani refugees was an individual by the name of Sayed Khan, *see* Joint Stmt. at 12 ("Before crossing the [Pakistani–Afghani] border, [the petitioner met a man named Sayed Khan."]); *but see* 5/26/10 Hr'g Tr. at 29:25–30:2 (testimony by the petitioner that he traveled to Afghanistan with "Mr. Khan," but did not know his first name), who he spoke with on "many" occasions and from whom he

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study of the situation" involving the Afghani refugees, *id.* at 19:6, after which he would return "to Yemen and make a proposal to ... a charity organization there," with the hope that the organization would "be willing to help [and] offer support," *id.* at 19:16–18. It is not clear to the Court when during his stay in Pakistan the petitioner came to realize that he could not perform volunteer work for a charitable organization due to his age, given his other testimony at the merits hearing that while in Karachi, he decided to travel to Quetta after learning about a charitable organization in that city devoted to assisting Afghani refugees, *id.* at 26:21–22, and that while in Quetta he spoke to individuals about how to join a charitable organization in Quetta, *id.* at 29:6–7.

[5] The petitioner testified he had no intention to travel to Afghanistan prior to leaving Yemen for Pakistan in September 2000. 5/26/10 Hr'g Tr. at 20: 18–20.

received "advice," 5/26/10 Hr'g Tr. at 31:15. The petitioner understood Khan to be involved in the sale of electronics in Pakistan, *see id.* at 30:16–31:4 (explanation by the petitioner regarding Khan's sale of electronics), and that he had no affiliation with al-Qaeda or the Taliban, *id.* at 31:7–9. The petitioner learned that Khan "was going to Afghanistan" and asked whether he could travel with Khan, to which Khan agreed. *Id.* at 31:16–19; *but see id.* at 30:8–9 (question posed by his counsel as to whether Khan "discuss[ed] the word 'Afghanistan' with you," to which the petitioner responded "No"). Then, in approximately February 2002, the petitioner and Khan traveled to Kabul, Afghanistan, Joint Stmt., at 12, by way of a "transportation taxi,"[6] 5/26/10 Hr'g Tr. at 32:12, with transfers at the Pakistani–Afghani border and Kandahar, Afghanistan, *id.* at 32:7–10.

Upon his arrival in Kabul, the petitioner stayed at "a very ordinary hotel" for a few days, *id.* at 33:19–22, before "rent[ing] . . . a very small apartment in one of the neighborhoods" in Kabul, *id.* at 33:24–25. The apartment was located in a two-story building, with a small family living on the second floor. *See id.* at 35:2–3 (testimony by the petitioner that "an older man lived [on the second floor] with his family and children"). The petitioner stayed at this apartment

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[6] Based on the petitioner's description of a "transportation taxi" during his testimony, the Court assumes that this mode of transportation is more akin to a bus or shared vanpool, rather than a private taxi service that is commonly used in other parts of the world. *See* 5/26/10 Hr'g Tr. at 32:12–14 (testimony by the petitioner describing a "transportation taxi" as "a taxi that ... fills up with people and then ... takes off").

for "[a]bout three months."[7] *Id.* at 35:9–10. According to the petitioner, Khan did not stay with the petitioner in Kabul, *id.* at 33:12–13, and the petitioner has not heard from Khan since they arrived in the city, *id.* at 34:18–19.

During his three-month stay in Kabul, the petitioner testified that he initiated a study regarding the needs of Afghani refugees, *id.* at 37:16–19, so that he "could go back to Yemen, and[,] . . . with the help of [his] father [,] . . . go and talk to charit[ies]" about his findings. *Id.* at 38:9–11. As part of his study, the petitioner asserts that he wanted to obtain "bills" that would evidence how much money was needed to help the poor, *id.* at 20–22, and determine "the quantity of food or clothes that [an] average family would need . . . on a monthly basis," *id.* at 38:3–4. The study was "very important," according to the petitioner, *id.* at 39:4, because "if [he] returned [to Yemen] with the necessary documents [together] with . . . the stud[y]," then charities in Yemen "would be more than willing to help" him; without a study, the petitioner felt that these charities "would [not] take [him] seriously." *Id.* at 38:17–19. After collecting data for his study, *see id.* at 39:9–14 (testimony by the petitioner that he

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[7] Contrary to the government's position, *see* Joint Stmt. at 1 ("While in Afghanistan, [the p]etitioner worked at an al Qaida[-]associated guesthouse and spent time at another."), the petitioner denies ever staying at a guesthouse in Afghanistan, 5/26/10 Hr'g Tr. at 36:12–14, let alone a guesthouse associated with al-Qaeda, *id.* at 35:11–14. The Court need not resolve this dispute, as other evidence in the record sufficiently demonstrates that the petitioner is detainable under the AUMF.

collected information from food markets in the area), the petitioner decided to return "to Pakistan and pursue [his] study of the Koran," *id.* at 39:15–16. The petitioner then returned to Quetta, *id.* at 39:20, in "approximately April or May 2000" and stayed there for approximately three months, *id.* at 40:2–5, at the Jama'at al-Tablighi mosque, *see* Pet'r's Exhibits, Ex. 201 (Second Declaration of Abdul Ahmed Qader Hussein) ("Second Pet'r's Decl.") ¶ 6 (declaration by the petitioner that on his second trip to Quetta, he stayed, "as described in [his first d]eclaration, . . . in a mosque"); *but see* Pet'r's Exhibits, Ex. 200 (First Pet'r's Decl.) ¶ 18 (declaration by the petitioner that in addition to his initial stay at the Jama'at al-Tablighi mosque, he also stayed there "from May to June 2000").

The petitioner made a second trip to Kabul in or around June 2000. Pet'r's Exhibits, Ex. 201 (Second Pet'r's Decl.) ¶ 5. The petitioner asserts that he continued with his study by examining "location[s]," 5/26/10 Hr'g Tr. at 41:6, as well as how much it would cost to hire personnel for his charity efforts, *see id.* at 41:7–9 (testimony by the petitioner that he wanted to determine "how much it was going to cost [him]" to hire a "guard," a "board," and a "janitor"). He stayed in Kabul "for a few months" before returning to Quetta "in approximately August . . . 2000," *id.* at 41:11–12, where he once again stayed at the Jama'at al-Tablighi mosque, Pet'r's Exhibits, Ex. 200 (First Pet′r's Decl.) ¶ 18.

The petitioner then made his third and final trip to Kabul "around November . . . 2000." 5/26/10 Hr'g Tr. at 42:4–5. He claims that on this trip, he

"wanted . . . to interact with the poor people, . . . [and] to learn the[ir] language."[8] *Id.* at 42:8–9. The petitioner stayed at the same location where he had resided during his first trips to Kabul, *id.* at 42:22, for approximately "ten days to two weeks," *id.* at 42:25–43:1, before he "decided to go to an area located in the northern part of Kabul where there were . . . a large number of Afghani refugees," *id.* at 43:4–6. The petitioner asserts that he decided to visit this area because he "met three Afghani people" at a market, *id.* at 43:9, one of whom he told about his study, *id.* at 43:11–13, who invited him to accompany them to that location, *id.* at 43:23–24. The petitioner admits that the location was "near the battle lines of the fighting between the Taliban and the Northern Alliance," Joint Stmt. at 12; *see also* Pet'r's Exhibits, Ex. 200 (First Pet'r's Decl.) ¶ 22 ("In my last visit to Afghanistan . . . , I went with these young men to an area near the battle lines of the fighting between the Taliban and the North[ern] Alliance . . . . "), and that the three individuals "were Taliban guards," Joint Stmt. at 12; *see also* Pet'r's Exhibits, Ex. 200 (First Pet'r's Decl.) ¶ 21 ("During my stay in Kabul, I bec[a]me friends with some young Afghanis who I understood were Taliban guards.").

During his stay in the northern part of Kabul, the petitioner admits that one of the Taliban guards provided him with a Kalashnikov rifle. 5/26/10 Hr'g

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[8] According to the petitioner, the language spoken by these individuals was Farsi, 5/26/10 Hr'g Tr. at 42:12–14, and that he did in fact learn to speak "a little bit" of the language, *id.* at 17–18.

Tr. at 57:5–6. He asserts that the rifle was given to him by the Taliban guard "for [his] self-protection," *id.* at 57:6–7, because "lots of wild animals" resided in the area, *id.* at 57:7–8, and because he could be "assaulted by two or three Afghanis . . . who kn[e]w that" the petitioner was carrying money at the time, *id.* at 57:11–13. The guard, "in only a few minutes," also "taught [the petitioner] how to use [the rifle] and how to shoot with it." *Id.* at 59:11–12. According to the petitioner, this was his "only experience with weapons in Afghanistan." *Id.* at 60:5–7.

"By August 2001," the petitioner asserts that "the excitement and adventure of traveling in the area and providing aid to war victims had ended." Pet'r's Exhibits, Ex. 201 (Second Pet'r's Decl.) ¶ 8. According to the petitioner, "[t]he conditions in th[e] northern part of Kabul] . . . were quite difficult, and the experience of being in the area of conflict and seeing all the suffering of the poor and those displaced by the war grew draining." *Id.* In addition, the petitioner claims that he "wanted to get married" because "at the age of 16 or 17, people [in the Middle East] will have lots of respect for you[;] they consider that . . . you have become a man, [and that] you are independent." 5/26/10 Hr'g Tr. at 75:20–22. The petitioner testified that he "was ready to return to [his] family and life in Yemen," so he "returned to Kabul in approximately late August 2001, with the goal of continuing to Pakistan to arrange [his] travel home." *Id.*

The petitioner returned from the northern part of Kabul in early September 2001, and he was present in that city "when the United States was

attacked on September 11[th]." Joint Stmt. at 12. He was in Kabul during this stay for approximately two weeks, 5/26/10 Hr'g Tr. at 76:17–18, before traveling to Lahore, Pakistan, *id.* at 77:14–15; *see also id.* at 77:16–17 (testimony by the petitioner that he left Kabul for Lahore approximately "two or three days following the events of September 11[th]"). While in Lahore, the petitioner stayed at the Jama'at al-Tablighi mosque located in that city. *Id.* at 78:15–17. The petitioner's stated intention in Lahore was to make arrangements to travel to Yemen, *id.* at 78:17–18; specifically, he stated that he "was planning on either going to Islamabad [, Pakistan] and purchas[ing] a return ticket to Yemen," or he would try to "fly directly from Lahore to Yemen," *id.* at 78:22–23. However, after "talking to . . . people in the mosque and trying . . . to get good advice on how to get from Pakistan to Yemen," *id.* at 79:3–4, the petitioner asserts that while there were flights from Pakistan to Yemen, they would require "several layovers in some places and the ticket would be expensive." *Id.* at 79:5–6. The petitioner claims that with the limited amount of money available to him, he "was looking . . . to buy [a ticket with] a maximum of one layover." *Id.* at 79:7–8. For these reasons, the petitioner represents that he decided not to travel to Islamabad, *id.* at 78:24–25.

The petitioner had a conversation with another individual at the mosque, during which they discussed the petitioner's interest in "study[ing] the Koran and . . . computer[s]," and how the petitioner "could[not] find a school that would teach [classes on] computer[s] because . . . [his] language was Arabic and the language . . . used to teach [these

classes] was Urdu." *Id.* at 79:20–24. The individual suggested that the petitioner live with "some Yemeni students who attended" the Salafi University in Faisalabad, Pakistan, *id.* at 80:2–4, because he could "just go to [the] university and . . . study the Koran there," *id.* at 80:7–8. Given that "there were some Yemenis that were . . . attending the university and . . . lived in their own apartment," *id.* at 80:11–13, the petitioner felt it was "a very good idea" to look into the possibility of studying at the university, *id.* at 80:18; *see also id.* at 80:14–15 (testimony by the petitioner that the individual offered to "talk [with] the head of the university and tell him about [the petitioner's] wish to study in that university so that [he] could live . . . with the Yemenis"). While at the mosque on another occasion, the same individual informed the petitioner that "[t]he director of the university" had authorized the petitioner to "live with the Yemenis," and that "[i]f he decide[d] to pursue [his] studies, [then] he [could] enroll . . . in the program." *Id.* at 80:23–24. The petitioner then left Lahore and traveled with this individual to Faisalabad, Pakistan. *Id.* at 80:25–81:1.

The petitioner arrived at the house where the university students lived upon his arrival in Lahore, *see id.* at 81:17–19, which he described as being managed by "the head of the university," *id.* at 82:21–22. There, the petitioner "saw some Yemeni guys that were studying at [the] university," and who spent "[m]ost of their time . . . memorizing the Koran." *Id.* at 81:19–21. The petitioner also described another individual, a man named Issa, as "the purchase man" for the house, who "would go buy

potatoes, rice, chicken, meat . . . and leave it at the door" of the house. *Id.* at 15–19.

Despite his stated interest in attending the Salafi University, the petitioner did not enroll in any classes there while living at the Faisalabad house. May 27, 2010 Hearing Transcript ("5/27/10 Hr'g Tr.") at 45:9. The petitioner testified that he did not enroll because the university would "test" him on "how many parts" of the Koran he has already memorized, and thus he wanted to "stay [at] th[e] house [and] memoriz[e] as much as [he] could before . . . go [ing] . . . to enroll." *Id.* at 45:13–16. Furthermore, the petitioner stated that while his "plan was . . . to memorize the Koran," he also wanted to "go back to Yemen and get married." *Id.* at 82:2–3. Nonetheless, the petitioner asserts that "it was important for [him] to memorize the Koran so [that he could] go back to [his] father and tell him that [he had] memorized the Koran." *Id.* at 82:5–7. He also testified that because he "wanted to get the degree," he ultimately decided not to travel to Islamabad. 5/27/10 Hr'g Tr. at 47:9–11.

On May 23, 2002, 5/26/10 Hr'g Tr. at 85:10–12; *see also* Joint Stmt. at 12, the petitioner stated that during the night "someone was knocking at the door" of the house where he was staying, *id.* at 85:14–15. One of the occupants of the house "opened the door[ ] and . . . was [confronted] by the Pakistani police." *Id.* at 85:15–16. The police indicated that they were there to "check on the people who [were] in th[e] house," *id.* at 85:18–19, and they asked everyone to show their passports, *id.* at 85:21. After reviewing their passports, the Pakistani police took the

petitioner and the other occupants into custody. *Id.* at 86:4–5; *see also* Joint Stmt. at 38 (stipulation by the parties that the "[p]etitioner was arrested by Pakistani authorities at a house in Faisalabad, Pakistan"). That same month, the petitioner was "transferred to the custody of the United States . . . , and has remained in the custody of the United States ever since." Joint Stmt. at 12; *see also* 5/26/10 Hr'g Tr. at 8:11–13 (acknowledging that he was "taken into custody by the United States in March 2002").

Along with numerous other detainees, the petitioner filed the petition now before the Court on October 27, 2005, seeking his release from Guantanamo Bay on the grounds that, among other things, he is being held "in violation of the [United States] Constitution, laws[,] and treaties of the United States and customary international law." *See* Pet. ¶ 3. Having "serious questions concerning whether this Court retain[ed] jurisdiction" as a result of Congress's attempt to strip this Court of jurisdiction by passing the Military Commissions Act of 2006, Pub.L. No. 109–366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241) (the "2006 MCA"), the Court stayed the proceedings in these cases until the question of jurisdiction was resolved on appellate review. January 31, 2007 Order at 1, *Al Jayfi v. Bush,* Civil Action No. 05–2104(RBW) (D.D.C. Jan. 31, 2007). The stay in this case was later lifted after the Supreme Court issued its opinion in *Boumediene v. Bush,* 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), July 29, 2008 Order at 2, *In re Guantanamo Bay Detainee Litigation,* Miscellaneous No. 08–442(TFH) (D.D.C.) in which the Supreme Court held that non-United States citizens detained

at Guantanamo Bay are constitutionally entitled to seek habeas relief and that the 2006 MCA's jurisdiction-stripping provision was "an unconstitutional suspension of the writ." *Boumediene,* 553 U.S. at 792, 128 S.Ct. 2229.

In light of the *Boumediene* decision, the members of this Court on July 1, 2008, "resolved by Executive Session to designate" the Honorable Thomas F. Hogan of this Court "to coordinate and manage proceedings in all cases involving petitioners presently detained in Guantanamo Bay, Cuba."[9] July 2, 2008 Order at 1, *In re Guantanamo Bay Detainee Litigation,* Miscellaneous No. 08–442(TFH) (D.D.C). After carefully considering the positions of the various parties in these cases, Judge Hogan issued a case management order on November 6, 2008, which outlined the procedural and substantive contours for resolving these habeas petitions.[10] Pursuant to this order, the government then filed its classified Factual Return in this case on October 31, 2008, in which it proffered the evidence it intended to rely upon in this proceeding to justify the petitioner's detention. In turn, the petitioner responded to the

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[9] As noted in Judge Hogan's July 2, 2008 Order, "[e]xcluded from reassignment are all cases over which Judge Richard J. Leon presides as well as *Hamdan v. Bush,* 04–cv–15I9 (Robertson, J.)." July 2, 2008 Order at 2 n. 1, *In re Guantanamo Bay Detainee Litigation,* Miscellaneous No. 08–442(TFH) (D.D.C).

[10] Judge Hogan subsequently amended his case management order on December 16, 2008, and this member of the Court issued several amendments to the order on December 19, 2008, February 19, 2009, and June 12, 2009.

evidence proffered by the government in his Traverse, which he filed on May 8, 2009. With all discovery having been completed and the matter having been fully briefed, the Court commenced a hearing on May 25, 2010, to consider the merits of the petitioner's petition for a writ of habeas corpus.

II. Standard of Review

The ultimate question to be resolved with regard to the petitioner's habeas petition is whether the government's detention of the petitioner is lawful under the AUMF. While the Supreme Court in *Boumediene* held that individuals detained by the government at Guantanamo Bay are "entitled to the privilege of habeas corpus to challenge the legality of their detention," *Boumediene,* 553 U.S. at 771, 128 S.Ct. 2229, it also concluded that "[t]he extent of the showing required of the Government in these cases [was] a matter [left] to be determined" in future proceedings, *id.* at 787, 128 S.Ct. 2229. The development of the detention standard in these Guantanamo Bay habeas cases was thoroughly explored by this Court in *Sulayman v. Obama,* 729 F.Supp.2d 26 (D.D.C.2010)(Walton, J.), and it need not repeat that analysis here. Suffice it to say that under the law of this circuit, the government may establish the lawfulness of the petitioner's detention by showing that he "engaged in hostilities . . . against the United States," that he "purposefully and materially supported hostilities against the United States or its coalition partners," or that he "is part of the Taliban, al Qaeda, or associated forces." And, the determination of whether an individual is "part of" the Taliban, al Qaeda, or associated forces is one that

"must be made on a case-by-case basis by using a functional rather than a formal approach." Moreover, the government may seek to justify detention by making a showing that the detainee was part of the "command structure" of either the Taliban, al Qaeda, or their associated forces, yet it is not necessary for the government to make such a showing. But, the government must do more than just prove that the detainee was an "independent . . . freelancer."

Id. at 33 (internal citations omitted).

As for the burden of proof required to justify detention, the Court noted in *Sulayman* that the standard set forth in Judge Hogan's case management order—"to wit, that the government has the burden of persuading the Court that the petitioner is detainable under the AUMF by a preponderance of the evidence"—has been accepted by the District of Columbia Circuit.[11] *Id.*; *see also Awad v. Obama,* 608 F.3d 1, 10 (D.C.Cir.2010) (citing *Al–Bihani v. Obama,* 590 F.3d 866, 878

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[11] As the Court observed in *Sulayman,* the District of Columbia Circuit has "left open the question of whether a lower standard of proof could constitutionally suffice as well." 729 F.Supp.2d at 33 n. 5 (citing *Al–Bihani,* 590 F.3d at 878 n. 4); *see also Al–Adahi v. Obama,* 613 F.3d 1102, 1103–04 (D.C.Cir.2010) (noting that it was not "aware of [any] precedents in the eighteenth[-]century English courts [that] adopted a preponderance standard," and that the standard of proof applied in various habeas proceedings ranged from "some evidence to support the order" to "probable cause"). However, given that the government in this case has established the lawfulness of the petitioner's detention by a preponderance of the evidence, the Court need not resolve the standard-of-proof question left open by the Circuit.

(D.C.Cir.2010)) ("We have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo Bay."). This means that the government must convince the Court "to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (internal quotation marks omitted). Accordingly, the government has the initial burden of producing evidence in support of its claim for detention, and should the government produce evidence sufficient to establish a prima facie case for detention, then the burden of producing evidence to rebut the government's case shifts to the petitioner. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 534, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (observing that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria," and that such a "burden-shifting scheme" would not offend the Constitution). After both parties have presented all of their evidence, the Court must weigh the evidence to determine whether the government has met its burden of showing that its evidence "is . . . more convincing than the evidence . . . offered in opposition to it." *Greenwich Collieries v. Dir., Office of Workers' Comp. Programs,* 990 F.2d 730, 736 (3d Cir.1993). If the government is successful in making this showing, then the Court must deny the habeas petition. But, where the petitioner's evidence demonstrates that

his version of the facts is more likely to be true, or where "the evidence is evenly balanced," the Court must rule in favor of the petitioner. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267, 281, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

In weighing the evidence in this case, the Court is mindful of its obligation not to view each piece of evidence in isolation. *Awad v. Obama,* 608 F.3d 1, 7 (D.C.Cir.2010). Thus, "[m]erely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence may be tossed aside and the next piece of evidence may be evaluated as if the first did not exist." *Salahi v. Obama,* 625 F.3d 745, 753 (D.C.Cir.2010). The Court, therefore, must view the government's evidence "in its entirety in determining whether [it] has satisfied its burden of proof." *Id.*

III. Legal Analysis

As noted above, the Court is tasked with determining whether the government has met its burden of proving by a preponderance of the evidence that the petitioner was a "part of" al-Qaeda or the Taliban at the time of his apprehension. To that end, the District of Columbia Circuit's decision in *Almerfedi v. Obama,* 654 F.3d 1, 2 (D.C.Cir.2011), controls the disposition of this case. There, the Circuit confronted the question of whether the district court "fail[ed] to give sufficient weight to the reliable evidence it . . . consider[ed]" in that case, thereby erring in its "conclu[sion] that the government failed to demonstrate by a preponderance of the evidence that [the detainee]

was . . . ' part of' al Qaeda." *Almerfedi,* 654 F.3d at 2. The Circuit started its analysis by examining the significance of the detainee's association with the Jamaat al-Tablighi, "an Islamic missionary organization that is a Terrorist Support Entity 'closely aligned' with al Qaeda." *Id.* at 6. Specifically, the detainee in that case acknowledged staying "for two[-]and[-]a[-]half months at Jama'at [al-]Tablighi" headquarters for free, but that "he refused to join the organization and remained largely incommunicado." *Id.* The Circuit considered this evidence, in conjunction with two additional pieces of circumstantial evidence, as "damning." *Id.* at 6–7. Those other two items of circumstantial evidence were the detainee's travel route, which the Circuit found was "quite at odds with his professed desire to travel to Europe (and brought him closer to the Afghan border where al Qaeda was fighting), and also [the detainee's possession of] at least $2,000 of unexplained cash on his person when captured," *id.* at 6.

The Circuit concluded that Almerfedi's extended cost-free stay at the Jamaat al-Tablighi mosque was "probative, [although] by itself it presumably would not be sufficient to carry the government's burden because there are surely some persons associated with Jama'at [al-]Tablighi who are not affiliated with al-Qaeda." *Id.* The Circuit found, however, that the government's case was on "firmer ground" when the evidence concerning Jamaat al-Tablighi was "add[ed]" together with the government's other two items of circumstantial evidence, *id.* at 5–6, which the Court found "distinguish[ed]" Almerfedi "from the errant tourist, embedded journalist, or local aid

worker," *id.* at 7. The Circuit "conclude[d] that all three facts, when considered together, [were] adequate to carry the government's burden of deploying credible evidence that the habeas petitioner meets the enemy-combatant criteria." *Id.* (internal citation omitted). Accordingly, the Circuit "conclude[d] as *a matter of law* that the district court erred" in the manner in which it applied the preponderance standard, and it reversed the district court's decision to grant the petitioner's petition for a writ of habeas corpus. *Id.*at 7–8 (emphasis added).

Here, the government has also presented sufficient evidence to justify the petitioner's detention.[12] First, the petitioner's extended stays at

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12 The government also relies on numerous summary interrogation reports and intelligence information reports in its case-in-chief. These interrogation reports contain unsworn hearsay statements "that [are] not otherwise admissible under the Federal Rules of Evidence or 28 U.S.C. § 2246 [(2006)]," and thus the government has the burden of "establish[ing] the reliability of those statements" under the two-prong standard set forth by Judge Hogan in his case management order, and as supplemented by the decisions issued by the undersigned member of this Court and thoroughly discussed in *Sulayman,* 729 F.Supp.2d at 41–42. But the Court need not assess whether the government has presented its hearsay "in a form ... that permits the ... [C]ourt to assess its reliability," *Parhat v. Gates,* 532 F.3d 834, 849 (D.C.Cir.2008), because as the Court discusses below, the government's case for detention can be made based on the stipulated facts, the petitioner's sworn declarations, and his testimony.

As for any hearsay evidence that the petitioner relies upon in support of his case-in-chief, this member of the Court observed in *Sulayman* that there remains an open question as to whether the prohibitions against the admission of hearsay evidence should be relaxed for the petitioner's proffered hearsay

two Jama'at al-Tablighi mosques during his visits to Pakistan constitute probative evidence weighing in favor of his detention. *See Almerfedi,* 654 F.3d at 5–6 (finding a single two-and-a-half-month stay at a Jama'at al-Tablighi mosque to be probative). Second, the petitioner's receipt of a Kalashnikov rifle from three Taliban guards in an area near the lines of battle between the Taliban and Northern Alliance, as well as the training he received from one of the Taliban guards regarding how to use the weapon, constitutes probative, if not conclusive, evidence supporting the petitioner's detention. *See Sulayman,* 729 F.Supp.2d at 50 (Walton, J.) (concluding that a detainee's "presence at a 'staging area' " near the zone of battle "is by itself highly probative evidence of the [detainee's] status as 'part of the Taliban' "); *id.* at 51 (ascribing additional weight to a detainee's presence at the battle lines where "he took possession of a powerful weapon during . . . his visits to the 'staging area' "); *Cf. Almerfedi,* 654 F.3d at 6 n. 7 (observing in dicta that "the government could satisfy its burden [of proof] by showing that an individual was captured carrying a[Kalashnikov rifle] on a route typically used by al Qaeda fighters"). Third, the petitioner's actions after the September

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evidence, given that "the Supreme Court mentioned only the possibility of considering hearsay proffered by the *government* in *Hamdi* and *Boumediene*." *Sulayman,* 729 F.Supp.2d at 41 n. 10 (citations omitted and emphasis added). But here, the petitioner does not rely on any hearsay evidence to rebut any of his inculpatory statements set forth in the stipulated facts, his declarations, or his testimony, and thus there is no need for the Court to address this unresolved hearsay question.

11, 2001 terrorist attacks were "quite at odds" with his stated innocent intentions, *cf. Almerfedi,* 654 F.3d at 6 (concluding a detainee's travel route that was "quite at odds with his professed desire to travel to Europe to be 'damning' circumstantial evidence"); specifically, (1) the petitioner testified that he intended to leave Kabul and travel to Pakistan so that he could reunite with his family in Yemen and possibly get married, *id.* at 78:17–18, yet he made no credible effort to leave Pakistan; and (2) the petitioner testified that he did not enroll at the Salafi University, even though he traveled to Faisalabad, Pakistan because of his interest to attend the university, *see id.* at 80:11–15. These facts, when viewed together, are more than sufficient to constitute the level of "damning" circumstantial evidence that is needed to satisfy the government's burden of proof in this case.

The petitioner's attempt to place an innocuous gloss on these incriminating facts is unavailing; in fact, his explanations are nothing more than "false exculpatory statements" that constitute "evidence—often strong evidence—of guilt." *See Al–Adahi v. Obama,* 613 F.3d 1102, 1107 (D.C.Cir.2010). With regard to his interactions with the Taliban guards, the Court is simply not persuaded by the petitioner's explanation that these guards were merely his "friends," *see* Pet'r's Exhibits, Ex. 200 (First Pet'r's Decl.) ¶ 21, and that he was only given the weapon to protect himself from wild animals and potential thieves, 5/26/10 Hr'g Tr. at 57:6–13. As the Court explained in *Sulayman,* the fact that the petitioner received a powerful weapon from a Taliban guard in an area near the battle lines "suggest[s] that the

[guard] trusted the petitioner enough to allow him to take possession of [his] firearm[ ]. More importantly, these facts suggest that th[is] individual[ ] trusted the petitioner because he was loyal to their cause." *Sulayman,* 729 F.Supp.2d at 51. In fact, the petitioner's explanation that he was given the weapon to fend off wild animals and potential thieves is inexplicable because "it would be beyond any sense of reason . . . that [a] Taliban [guard] would allow a noncombatant to be present in" an area near the battle lines with a deadly weapon. *Id.* at 51–52. Thus, the Court finds the petitioner's explanations to be without merit.

The nonsensical explanations provided by the petitioner concerning why he stayed in Pakistan after the events of September 11, 2001, likewise cannot be believed. The petitioner testified at the merits hearing that he sought to leave Afghanistan and return to Yemen because he wanted to get married and return to his family, and that while he was in Lahore he intended to make arrangements to travel to Yemen, *id.* at 78:17–18. Yet, when the petitioner arrived in Lahore and had the opportunity to fly back to Yemen, *id.,* at 78:22–23, he decided not to do so because he purportedly had "limited" amounts of money and was looking to buy a ticket with a "maximum of one layover," but the only flights available from Lahore to Yemen would require "several layovers in some places and the ticket would be expensive," *id.* at 79:5–8. The petitioner cannot expect the Court to accept this explanation. First, there is no corroborating evidence in the record showing that flights from Lahore to Yemen with "several layovers" were more expensive than flights

with less layovers; in the absence of such evidence, this premise strikes the Court as implausible given that the more layovers a traveler must experience to reach his or her final destination generally results in a less expensive ticket for the traveler. Thus, it makes little sense to the Court that the petitioner was dissuaded from traveling home because he could not find a cheaper ticket with fewer layovers. Furthermore, the Court is not convinced that the petitioner would forego reuniting with his family merely because of the inconvenience of having to make several stops to travel from Lahore to Yemen; it is simply implausible that the unavailability of a convenient flight served as an insurmountable barrier to the petitioner in his efforts to return home. This explanation for why he remained in Lahore renders his reasons unworthy of belief.

The petitioner's actions after deciding not to fly back to Yemen from Lahore are even more inexplicable. The petitioner acknowledged at the merits hearing that flights were also available out of Islamabad, Pakistan, 5/26/10 Hr'g Tr. at 78:22–23, but the petitioner made no effort to travel north to Islamabad to find a flight to return to Yemen; instead, he traveled west to Faisalabad. He then claims that he traveled to Faisalabad because he wanted to enroll in the Salafi University, *id.* at 80:2–4, "and . . . study the Koran there," *id.* at 80:7–8. That statement, too, is not worthy of credit. Despite the petitioner's claims that he wanted to study the Koran, and that this new aspiration supplanted his desire to return to Yemen to reunite with his family and possibly get married, the petitioner admits that he never enrolled as a student at the university upon

his arrival in Faisalabad. 5/27/10 Hr'g Tr. at 45:9. The petitioner then attempts to explain why he delayed his effort to enroll in the university by stating that he wanted to "stay[at] th[e] house [and] memoriz[e the Koran] as much as [he] could before" being tested by the university on his knowledge of the Koran. *Id.* at 45:13–16. But, this explanation makes little sense as well, since his stated purpose for attending the university was to learn the Koran. In fact, all of the petitioner's explanations seem to be little more than *post hac* attempts to present goals that change as necessary to support his presence in one part of the world or another. The sum of the petitioner's inexplicable explanations for his actions renders his testimony completely incredible.

In sum, the Court concludes that the government has provided more than enough evidence to meet its burden of proof in this case. Not only has the government satisfied its initial burden of producing evidence that supports its detention of the petitioner, *see Hamdi,* 542 U.S. at 534, 124 S.Ct. 2633, by proffering "damning" circumstantial evidence, *see Almerfedi,* 654 F.3d at 6–7, but the petitioner's nonsensical version concerning his travel from Kabul to Lahore after the events of September 11, 2001, provides further justification for his detention, *see Al Adahi,* 613 F.3d at 1107. Accordingly, the Court is compelled to conclude that the weight of the evidence in this case supports the petitioner's detention under the AUMF.

IV. Conclusion

"Once the government has established by a preponderance of the evidence that [the petitioner]

was 'part of' al Qaeda and Taliban forces, the requirements of the AUMF are satisfied and the government has the authority to detain [the petitioner]." *Odah v. United States*, 611 F.3d 8, 17 (D.C.Cir.2010). The "damning" circumstantial evidence in this case—all of it derived from the petitioner's own admissions—are "sufficient to distinguish [the] petitioner from the errant tourist, embedded journalist, or local aid worker," *Almerfedi,* 654 F.3d at 6, and thus the government has satisfied its burden of establishing the lawfulness of the petitioner's detention. Because the petitioner has failed to put forth persuasive evidence in rebuttal, the Court must deny the petitioner's petition for a writ of habeas corpus.

SO ORDERED this 12th day of October, 2011.[13]

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[13] An Order will accompany this Memorandum Opinion denying the petitioner's petition for a writ of habeas corpus.

APPENDIX B-1

ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

October 12, 2011

Civil Action No. 05–2104(RBW)

ABDUL AL QADER AHMED HUSSAIN,

Detainee,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*
Appellants.

In accordance with the Memorandum Opinion entered this same date, it is hereby **ORDERED** that the petitioner's petition for a writ of habeas corpus is **DENIED. SO ORDERED** this 12th day of October, 2011.

/s/ Reggie B. Walton
United States District Judge

APPENDIX C

ORDER DENYING PETITION FOR PANEL REHEARING BY THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

August 21, 2013

No. 11-5344

September Term, 2012
1:05-cv-02104-RBW

ABDUL AL QADER AHMED HUSSAIN,

Appellant,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*

Appellees.

Before: HENDERSON and GRIFFITH, *Circuit Judges,* and EDWARDS, *Senior Circuit Judges*

Upon consideration of appellant's petition for panel rehearing filed on August 2, 2013, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

/s/ Jennifer M. Clark
Deputy Clerk

Date: August 21, 2013

APPENDIX D

ORDER DENYING PETITION FOR *EN BANC* REVIEW BY THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

August 21, 2013

No. 11-5344

September Term, 2012
1:05-cv-02104-RBW

ABDUL AL QADER AHMED HUSSAIN,

Appellant,

v.

BARACK HUSSEIN OBAMA,
President of the United States, *ET AL.*

Appellees.

Before: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, and Srinivasn, Circuit Judges; Edwards*

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* Senior Circuit Judge Edwards did not participate in this matter.

Upon consideration of appellant's petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

/s/ Jennifer M. Clark
Deputy Clerk

Date: August 21, 2013