MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**AE 502JJJ (GOV)** **Government Motion** To Adopt a Legal Standard to Determine What Constitutes "Part of Al Qaeda" For Purposes of Establishing Jurisdiction 12 December 2017

1. Timeliness

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rules of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Military Commission recognize and adopt the legal standard articulated by the United States Court of Appeals for the District of Columbia in *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010), for determining whether a person is "part of al Qaeda."

3. Burden of Proof

As the moving party, the Prosecution must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On September 11, 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately slammed American Airlines Flight #11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally flew United Airlines

Flight #175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight #77, into the Pentagon in Northern Virginia. A fourth hijacked airliner, United Airlines Flight #93, crashed into a field in Pennsylvania after passengers and crew fought to reclaim control of the aircraft. As a result of these attacks, 2,976 people were murdered, and numerous other civilians and military personnel were injured.

On 31 May 2011, charges of Conspiracy, Attacking Civilians, Attacking Civilian Objects,[1] Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi by an Army Warrant Officer subject to the Uniform Code of Military Justice alleging the charges were true to the best of his belief. These charges are all enumerated offenses contained in the Military Commissions Act of 2009 ("M.C.A."). All of the sworn charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as Alien Unprivileged Enemy Belligerents ("AUEBs"). All of the sworn charges allege that the Accused's conduct was committed in the context of, and associated with, hostilities.

On 4 April 2012 sworn charges were all referred jointly to this capital Military Commission. All referred charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as Alien Unprivileged Enemy Belligerents. All of the referred charges allege that the Accused's conduct was committed in the context of, and associated with, hostilities.

During the December 2017 hearings, the Prosecution presented evidence to support a finding that the Commission has jurisdiction over Mr. Hawsawi for his purposeful and material

[1] Attacking Civilian Objects and Destruction of Property in Violation of the Law of War were later dismissed by the Military Commission in AE 251J. The United States is currently appealing this decision to the United States Court of Military Commissions Review.

support to the attacks on September 11, 2001, as well as the fact that he was "part of al Qaeda" at the time of the alleged offense, pursuant to 10 U.S.C. §948a.(7)(B)-(C).

During Defense counsel's argument against jurisdiction, Detailed Military Defense Counsel for Mr. al Hawsawi argued for the narrowest possible definition of who would constitute a "part of al Qaeda;" an argument that has been soundly rejected by established case law on this very issue in the D.C. Circuit and the D.C. District Court.

5. Law and Argument

I. Congress Has Determined that Military Commissions Have Jurisdiction Over Alien Unprivileged Enemy Belligerents Who Were *Part of Al Qaeda* at the Time of their Alleged Offense.

As set forth in the Military Commissions Act ("M.C.A.") of 2009, any AUEB is subject to trial by a military commission. *See* 10 U.S.C. § 948c. This military commission may exercise jurisdiction over AUEBs for violations of the law of war and other offenses triable by military commission. *See* 10 U.S.C. § 948b(a). An "Alien" is defined as an individual who is not a citizen of the United States. *See* 10 U.S.C. § 948a.(1). An "Unprivileged Enemy Belligerent" is defined as an individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; *or was part of al Qaeda* at the time of the alleged offense. *See* 10 U.S.C. §948a.(7) (emphasis added).

II. The United States Court of Appeals for the District of Columbia Has Adopted a Functional Legal Standard for Determining Who is Part of Al Qaeda.

As the United States began detaining enemy belligerents following September 11, 2001, the United States Court of Appeals for the District of Columbia (D.C. Circuit) had occasion to craft an individualized, functional approach in determining membership in hostile organizations in the context of detainee habeas petitions:

> [I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is "part of" al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization. That an individual

> operates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is "part of" the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it (there are ways other than making a "command structure" showing to prove that a detainee is "part of" al Qaeda), but the purely independent conduct of a freelancer is not enough.

Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (citing *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010)); *see also Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010).

The standard articulated by the D.C. Circuit in *Bensayah* is applicable and helpful to resolving the jurisdictional challenge raised in the AE 502 series because in both cases the courts are answering the common question of when a person is properly deemed to be a "part of" al Qaeda. Moreover, the legal posture of a habeas petition before the D.C. Circuit parallels the legal posture of the jurisdictional decision before the Commission, in that both issues are mixed questions of fact and law. For instance, in habeas challenges, whether a detainee is "part of" al Qaeda is a mixed question of law and fact, since whether alleged conduct "justifies [a detainee's] detention under the Authorization for the Use of Military Force (AUMF) is a legal question" and "whether the government has proven that conduct" is a factual one. *Barhoumi v. Obama*, 609 F.3d 416, 428 (D.C. Cir. 2010). Likewise, the jurisdictional question at issue in the AE 502 series is a mixed question of fact and law. *Cf.* AE 502C (GOV), Government Response to Motion to Dismiss for Lack of Personal Jurisdiction.

Second, the *Bensayah* standard is helpful to deciding the jurisdictional challenge because in both a habeas petition and a jurisdictional challenge where the Prosecution relies on 10 U.S.C. § 948a.(7)(C), the Government must prove that a person was "part of" al Qaeda at the time of the offense by a preponderance of the evidence. Importantly, the D.C. Circuit has regularly held that a preponderance of the evidence standard suffices in the habeas context. *See, e.g.*, *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010) ("A preponderance of the evidence standard satisfies constitutional requirements."); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) ("Our narrow charge is to determine whether a preponderance standard is unconstitutional.").

Furthermore, *Bensayah* represents a perfected legal standard, having considered and rejected narrower approaches initially used at the district court level that limited the inquiry to those involved in the "command structure" or serving as a combatant in "active hostilities." Because neither the "command structure" nor the "active hostilities" argument offered a complete explanation for what constitutes as "part of al Qaeda," the D.C. Circuit rejected these narrow approaches, opting instead for a functionalist model that forecloses the above arguments.

In particular, the command structure test has been regularly dismissed by the court as conflating necessary with sufficient conditions. Critically, neither the M.C.A. nor the AUMF *require* that an Accused or detainee be part of the command structure. *Awad*, 608 F.3d at 27 ("Nowhere in the AUMF is there a mention of command structure."). Such involvement, to be sure, would qualify someone as being part of an organization, but it is not the exclusive means of doing so. *Id*. ("[I]f a group of individuals were captured who were shooting at U.S. forces in Afghanistan, and they identified themselves as being members of al Qaeda, it would be immaterial to the government's authority to detain these people whether they were part of the 'command structure' of al Qaeda."). *Awad* ultimately held that the command structure standard was too demanding, and later courts have agreed with its proposition that there is "no legal authority" that requires otherwise. *Id*. at 29; *see also Hussain v. Obama*, 718 F.3d 964, 967 (D.C. Cir. 2013) ("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.").

Similarly, the D.C. Circuit has rejected the notion that individuals must actively engage in hostilities in order to be part of a hostile organization under the AUMF. In *Al-Bihani*, the court upheld the detention of the petitioner referenced above on the grounds that the AUMF covers "those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." 590 F.3d at 872. A role in a hostile organization can sufficiently make someone "part of" that organization, even if that role is not immediately violent. *See generally Barhoumi*, 609 F.3d

at 423. Panels have built upon this logic in subsequent cases, also emphasizing how the realities of warfare undermine the practicality of such an approach. *See, e.g., Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012) ("In modern warfare, 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."); *see also Al-Bihani*, 590 F.3d at 875 ("Even so, we do not rest our resolution of this issue on international law or mere common sense. The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.").

In disapproving of the narrow standards offered by various petitioners, the D.C. Circuit gradually came to adopt a more flexible, case-specific test to evaluate detention challenges. Although the *Bensayah* panel did not provide an all-inclusive list for "indicia" of hostile organization membership, the opinion endorses an individualized, functional approach to determining membership in hostile organizations. The Prosecution requests that the Military Judge use this approved method for making his personal jurisdictional determination regarding whether the Accused was "part of al Qaeda at the time of the alleged offense." The below explores the individualized functional approach in action, delineating the key indicia that have emerged within the circuit since *Bensayah*.

III. The D.C. Circuit's *Besnayah* Standard Embraces a Holistic Approach to Proving Al Qaeda Membership.

In applying the functional, case-specific approach used in *Bensayah*, the D.C. Circuit generally lists the evidence against the detainee (*see, e.g., Alsabri v. Obama*, 684 F.3d 1298, 1299 (D.C. Cir. 2012), *Uthman v. Obama*, 637 F.3d 400, 404 (D.C. Cir. 2011)) and then determines whether, taken as a whole, it indicates that the detainee was more likely than not "part of" al Qaeda or a supporting force. *Hussain v. Obama*, 718 F.3d at 968 (referencing "the infamous duck test" to explain how the court takes a commonsense, holistic view of the evidence: if it walks like a duck, and quacks like a duck, then it must be part of al Qaeda).

As noted above, the evidence does not need to show the detainee was part of al Qaeda's command structure (*see Al-Madhwani v. Obama*, 642 F.3d 1071, 1073 (D.C. Cir. 2011)); rather, it may include "indicia other than the receipt and execution of al Qaeda's orders." *Uthman*, 637 F.3d at 403. While it is not necessary that an individual be part of al Qaeda's command structure in order to be "part of" the group, establishing that the detainee was part of the command structure is sufficient to satisfy the requirement of the AUMF. *See, e.g.*, *Uthman*, 637 F.3d at 403; *Awad*, 608 F.3d at 11; *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010). Once this showing has been made, the court need not consider any further evidence about the detainee's involvement. *See Awad*, 608 F.3d at 11.

A review of court opinions reveals several recurring factors that the D.C. Circuit consistently considers when evaluating whether an individual was "part of" a hostile organization. In line with *Bensayah*'s functional approach, the court considers these indicia as a whole, rather than in isolation, to determine if the government has met its preponderance of the evidence burden. *See Hussain*, 718 F.3d at 968 ("We look at each piece of evidence 'in connection with all the other evidence' in the record, and not in isolation.") (citations omitted).

A. Al Qaeda-Affiliated Guesthouses and Training Camps

In *Al-Bihani v. Obama*, the court noted that an alien's attendance at either an al Qaeda guesthouse or an al Qaeda training camp "would seem to overwhelmingly, if not definitively, justify the government's detention of such a non-citizen." 590 F.3d 866, 873 n.2 (D.C. Cir. 2010). Subsequent cases have consistently cited and reaffirmed the weight such attendance carries. *See, e.g.*, *Al-Adahi*, 613 F.3d at 1109, 1111; *Al-Madhwani*, 642 F.3d at 1075; *Esmail v. Obama*, 639 F.3d 1075, 1076 (D.C. Cir. 2011) (per curiam); *Uthman*, 637 F.3d at 406; *Alsabri*, 684 F.3d at 1303. Attendance at training camps is clearly strong evidence because it is directly related to al Qaeda's operations. *See Al-Adahi*, 613 F.3d at 1109 ("[The detainee's] attendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that he was part of al-Qaida."). Attendance at guesthouses is "powerful" because they generally are not open

to the public, and those who stay there would therefore be known to the al Qaeda operators. *See, e.g., Al-Adahi*, 613 F.3d at 1108; *Alsabri*, 684 F.3d at 1302. This, in turn, makes it very likely these visitors are affiliated with the group. *See, e.g., Al-Madhwani*, 642 F.3d at 1075. These two attendance factors have thus played a role in many decisions denying habeas petitions. *See, e.g.*, *id.* at 1107–09 (attending training camp and guesthouse used as a staging area for recruits); *Barhoumi*, 609 F.3d at 427 (attending training camp and being captured at a guesthouse); *Al Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011) (attending training camp and multiple guesthouses); *Uthman*, 637 F.3d at 404 (detainee seen at a guesthouse); *Al-Madhwani*, 642 F.3d at 1072 (attending training camp and guesthouse used as a staging area for recruits); *Esmail*, 639 F.3d at 1076 (attending training camp); *Alsabri*, 684 F.3d at 1302, 1304 (attending training camp and guesthouses). In sum, attendance at an al Qaeda-affiliated guesthouse or training camp is powerful evidence that a detainee was "part of" al Qaeda.[2]

B. Travel Patterns

The D.C. Circuit has found that detainees' travel patterns can be evidence of al Qaeda connections, such as when detainees have traveled along certain paths used by al Qaeda members. *See Uthman*, 637 F.3d at 405 ("This Court has stated that traveling to Afghanistan

[2] It is unclear whether such attendance would be sufficient evidence on its own. All of the cases involving guesthouses and training camps involve other indicia as well, and the court, while noting the significance of the attendance evidence, still includes it in the functional consideration of all the evidence. However, in *Al-Adahi*, the D.C. Circuit rejected the district court's determination that "the guesthouse evidence is not in itself sufficient":

> The district court dealt with this evidence in the following way: "the guesthouse evidence is not in itself sufficient to justify detention." *Mem. Op.* at *8. Note the "not in itself." Again the court erred. Al–Adahi's voluntary decision to move to an al-Qaida guesthouse, a staging area for recruits heading for a military training camp, makes it more likely—indeed, very likely—that Al–Adahi was himself a recruit. There is no other sensible explanation for his actions. This is why we wrote in *Al–Bihani* that an individual's attendance at an al-Qaida guesthouse is powerful—indeed "overwhelming [ ]"—evidence that the individual was part of al-Qaida. 590 F.3d at 873 n.2.

Al-Adahi, 613 F.3d at 1108. This suggests the court might consider attendance sufficient for detention under the AUMF.

along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda."); *Al Odah v. United States*, 611 F.3d 8, 16 (D.C. Cir. 2010) ("[Detainee] traveled to Afghanistan on a series of one-way plane tickets purchased with cash in a manner consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda."). Such patterns can include traveling from another country to Pakistan or Afghanistan, or traveling among places in southwest Asia. *See, e.g.*, *Al Odah*, 611 F.3d at 16 (traveling from Kuwait to Afghanistan); *Awad*, 608 F.3d at 4 (traveling from Yemen to Afghanistan); *Al-Adahi*, 613 F.3d at 1102–03 (traveling from Yemen to Afghanistan and within Afghanistan); *Al Alwi*, 653 F.3d at 13, 17 (traveling from Saudi Arabia to Afghanistan and within Afghanistan); *Hussain*, 718 F.3d at 966 (traveling from Yemen to Pakistan and between Afghanistan and Pakistan); *Uthman*, 637 F.3d at 404 (traveling from Yemen to Afghanistan). The court has also found important detainees' presence in certain areas with which al Qaeda has significant ties, such as Tora Bora, where al Qaeda members gathered when the U.S. began its campaign in Afghanistan post-September 11, 2001. *See, e.g.*, *Esmail*, 639 F.3d at 1077 (passing through Tora Bora in December 2001); *Uthman*, 637 F.3d at 404 (captured in the vicinity of Tora Bora); *Al Odah*, 611 F.3d at 16 (marching through the Tora Bora region). Similarly, the timing of travel can be significant; the court has mentioned that the fact a detainee moved around Afghanistan during U.S. operations there helps support the proposition he was "part of" al Qaeda. *See, e.g.*, *Al-Madhwani*, 642 F.3d at 1075 (moving around Afghanistan during military operations); *see also Al-Adahi*, 613 F.3d at 1103 (traveling within Afghanistan while U.S. forces were launching attacks); *Al Alwi*, 653 F.3d at 17 (moving around Afghanistan during U.S. bombing operations); *Esmail*, 639 F.3d at 1077 (remaining in Afghanistan after September 11, 2001). Travel patterns and movements are not sufficient on their own, but can add weight to the government's case when combined with other evidence. *See Al-Madhwani*, 642 F.3d at 1075 ("Madhwani's movements in Afghanistan in the midst of the military conflict between the United States-led coalition and the Taliban and its al-Qaida allies may not be 'conclusive' evidence of association

with enemy forces but the movements 'add to the weight of the government's case.") (citing *Al-Adahi*, 613 F.3d at 1110).

C. Weapons

The fact a detainee carried a weapon provided by an al Qaeda-affiliated person or brigade can help establish that the individual was "part of" al Qaeda. *See, e.g.*, *Al-Bihani*, 590 F.3d at 872–73 (carrying a brigade-issued weapon); *Al Odah*, 611 F.3d at 16 (receiving and carrying an AK-47 when detainee and Taliban associates were being attacked by U.S. warplanes); *Hussain*, 718 F.3d at 966 (receiving and being trained on an AK-47 by Taliban housemates). When a detainee has "'carr[ied] a brigade-issued weapon'[, it] is evidence that in combination with other factors may 'strongly suggest' affiliation with enemy forces." *Al-Madhwani*, 642 F.3d at 1075 (quoting *Al-Bihani*, 590 F.3d at 872–73).

D. Passports and Other Personal Effects

The D.C. Circuit has considered in multiple cases the fact that a detainee left his passport and other belongings at an al Qaeda-affiliated guesthouse when he left for training or traveling. The court has found that leaving passports and possessions was "standard al Qaeda and Taliban operating procedures" (*Al Odah*, 611 F.3d at 15) for those checking into al Qaeda-affiliated guesthouses in Afghanistan. *Uthman*, 637 F.3d at 406. It has therefore been used as evidence, in combination with other indicia, that a detainee was "part of" al Qaeda. *See, e.g.*, *Al-Madhwani*, 642 F.3d at 1075; *Al Alwi*, 653 F.3d at 17; *Alsabri*, 684 F.3d at 1303.

E. Circumstances of Capture

The location at which the detainee was captured can be evidence he was "part of" al Qaeda. For example, the court has found in two cases that a detainee's capture near Tora Bora in late 2001 was significant, since that was the area from which al Qaeda forces were fighting the U.S. at that time. *See Al Odah*, 611 F.3d at 11, 16; *Uthman*, 637 F.3d at 404. In another case, the court highlighted the fact that the detainee had been behind an al Qaeda barricade at a hospital just before he was captured. *See Awad*, 608 F.3d at 10. The court has also considered

the people around the detainee at the time of his capture: it can be "highly significant" that a detainee was captured with other al Qaeda or Taliban fighters. *Esmail*, 639 F.3d at 1077 (detainee captured with two other fighters, one of whom had been injured in battle); *see also Uthman*, 637 F.3d at 404 (detainee captured while traveling with two al Qaeda members and a Taliban fighter); *Al-Madhwani*, 642 F.3d at 1076 ("Madhwani's association with enemy forces at the moment of his capture constitutes further evidence that he was 'part of' al-Qaida.").

F. Companions and Associations

The D.C. Circuit has consistently held that "evidence of association with other al Qaeda members is itself probative of al Qaeda membership." *Uthman*, 637 F.3d at 405 (citations omitted); *see also Awad*, 608 F.3d at 9–10 (detainee joined al Qaeda fighters behind a barricade at a hospital); *Hussain*, 718 F.3d at 966 (detainee had Taliban housemates); *Barhoumi*, 609 F.3d at 427 (detainee was in the same places at the same time as known al Qaeda affiliates). Multiple ties to al Qaeda members may mean the detainee was "a trusted member of the organization." *Salahi*, 625 F.3d at 753. For instance, in *Al Adahi*, the court found important the fact that the detainee had stayed with his brother-in-law, who was a close Usama bin Laden associate; met twice with bin Laden; crossed into Pakistan with wounded Taliban fighters; and appeared to have a close connection to al Qaeda leaders because he knew a lot about them. 613 F.3d at 1102–03, 1109–10 ("[T]he evidence derived its power not only from Al-Adahi's family relationships, but also from his meetings with bin Laden. That close association made it far more likely that Al-Adahi was or became part of the organization."). In *Al Odah*, it was significant that the detainee had sought out a Taliban official and then followed him to a Taliban training camp. 611 F.3d at 16. Also relevant is whether the detainee attended or was involved with mosques or religious institutes affiliated with al Qaeda. *See Esmail*, 639 F.3d at 1076 (detainee admitted to taking courses at an al Qaeda-affiliated religious institute); *see also Alsabri*, 684 F.3d at 1303 (detainee regularly visited an al Qaeda-affiliated religious institute while staying at a guesthouse); *Hussain*, 718 F.3d at 966 (detainee spent months in mosques in Pakistan run by Jama'at

al-Tablighi, which can be probative evidence because that organization is aligned with al Qaeda (citing *Almerfedi v. Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011)); *Uthman*, 637 F.3d at 404 ("[Detainee's] journey began at a religious school in Yemen where al Qaeda had successfully recruited fighters.").

G. Intent to Fight

The intent to join al Qaeda and fight can be "compelling evidence when . . . it accompanies additional evidence of conduct consistent with an effectuation of that intent." *Awad*, 608 F.3d at 9–10 (noting that one piece of evidence against the detainee was that he traveled to Afghanistan for the purpose of fighting the U.S.). The court has found such intent to be relevant in several cases as long as there were also corroborative acts. *See, e.g.*, *Alsabri*, 684 F.3d at 1302; *Al Alwi*, 653 F.3d at 17.

H. Fighting or Involvement With a Fighting Unit

One particularly strong piece of evidence that a detainee is "part of" al Qaeda is that he participated in fighting or was part of a fighting unit. Al Alwi, for example, joined a combat unit fighting the Northern Alliance under the leadership of al Qaeda member Abdal-Hadi, and then moved around with the unit as the fighting moved. *Al Alwi*, 653 F.3d at 17. Hussain "liv[ed] with enemy forces on the front lines of a battlefield[, which] at least invites—and may very well compel—the conclusion that he was loyal to those forces." *Hussain*, 718 F.3d at 968–69 (the court then notes that it has "repeatedly affirmed the propriety of this common-sense inference"). Even those who do not directly participate in the fighting, but are still attached to or affiliated with a unit, can be "part of" al Qaeda. *See Al-Bihani*, 590 F.3d at 872–73 ("[Detainee's] acknowledged actions – accompanying the brigade on the battlefield . . . cooking for the unit, and retreating and surrendering under brigade orders – strongly suggest, in the absence of an official membership card, that he was part of the [unit]."). Involvement in a fighting group is therefore probative evidence that has been cited in many cases. *See, e.g.*, *Barhoumi*, 609 F.3d at 427; *Al Odah*, 611 F.3d at 16; *Alsabri*, 684 F.3d at 1303.

I. Identification by Other Sources

Several cases involve documents and eyewitnesses identifying the detainee as part of al Qaeda. Some of these include diaries or documents with the detainee's name listed in rosters of al Qaeda or affiliated members. *See, e.g.*, *Barhoumi*, 609 F.3d at 426–27 (detainee's name on a list of members of an al Qaeda-affiliated militia found in a diary written by another member); *Awad*, 608 F.3d at 10 (detainee's name on a list recovered from an al Qaeda training camp). Another case cites a detainee's written application to attend an al Qaeda training camp in order to engage in jihad. *Alsabri*, 684 F.3d at 1304. And in *Awad*, there was a confluence of identifications: the detainee's name appeared on a list from a training camp, he was identified as being part of an al Qaeda barricade by another person captured at the same time, and there were contemporaneous newspaper articles describing someone who fit his description at the site of the barricade. *Awad*, 608 F.3d at 4–5.

J. Implausible or False Explanations

A detainee's implausible explanations for his actions generally do not lessen the weight of the probative evidence. *See, e.g.*, *Esmail*, 639 F.3d at 1077; *Al-Madhwani*, 642 F.3d at 1075–76 (dismissing the "innocent gloss [detainee] attempt[ed] to graft onto his narrative"); *Uthman*, 637 F.3d at 404; *Hussain*, 718 F.3d at 969. The D.C. Circuit has found that when there is substantial evidence of travel patterns, activities, or relationships with enemy fighters, detainees' attempts to furnish innocent accounts of these actions "strain[ ] credulity":

> It remains possible that [detainee] was innocently going about his business and just happened to show up in a variety of places—a kind of Forrest Gump in the war against al Qaeda. . . . the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda.

Uthman, 637 F.3d at 407.

The court must consider not only the possibility of an alternative explanation, but its probability as well. *See Al Adahi*, 613 F.3d at 1109–10 (discussing "the fallacy of the possible proof"). Additionally, a false explanation is "evidence—often strong evidence—of guilt." *Id.*

at 1107; *see also Hussain*, 718 F.3d at 969; *Uthman*, 637 F.3d at 404, 406; *Almerfedi*, 654 F.3d at 7.

While the above factors are not an exhaustive representation, they serve to illustrate the functional approach that courts must take when determining membership in a hostile organization. Thus, the Prosecution respectfully requests that the Military Judge use the following standard, as well as the guidance articulated in the habeas cases cited above, in determining if the Accused is "part of" al Qaeda:

> [I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is "part of" al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization. That an individual operates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is "part of" the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it (there are ways other than making a "command structure" showing to prove that a detainee is "part of" al Qaeda), but the purely independent conduct of a freelancer is not enough.

Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (citing *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010)); *see also Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010). For purposes of the jurisdictional challenge brought in the AE 502 series, application of this functional standard will assist the Military Judge in evaluating the parties' evidence through a perfected legal test generated over many years of habeas challenges arising from Guantanamo detainees.

6. Conclusion

For the foregoing reasons, the Commission should adopt the legal standard for determining whether a person is part of al Qaeda, as articulated by the United States Court of Appeals for the District of Columbia in *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

7. Oral Argument

The Prosecution does not request oral argument on the Motion, but if the Defense is granted argument, the Prosecution requests an opportunity to be heard.

8. Witnesses and Evidence

The Prosecution does not request witnesses on this issue.

9. Certificate of Conference.

On 8 December 2017, the Prosecution consulted with the Defense regarding the relief requested within the instant motion. Counsel for Messrs. Bin 'Attash, Ali, and Hawsawi stated their objection to relief requested. Counsel for Messrs. Mohammad and Binalshibh did not respond within the 24-hour timeframe established by Military Commissions Trial Judiciary Rule of Court 3.5.k.

10. Additional Information

At this time, the Prosecution does not offer additional information.

11. Attachments

A. Certificate of Service, dated 12 December 2017.

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 12th day of December 2017, I filed AE 502JJJ (GOV), Government Motion To Adopt a Legal Standard to Determine What Constitutes "Part of Al Qaeda" For Purposes of Establishing Jurisdiction, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

_____//s//_____
Christopher M. Dykstra
Major, USAF
Assistant Trial Counsel