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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMEDOU OULD SALAHI :
 :
 :
 Petitioner, : Civil Action No. 05-CV-0569
 v. :
 :
 BARACK H. OBAMA, et al., :
 :
 Respondents. :

MEMORANDUM ORDER

Mohammedou Ould Salahi (ISN 760), a Mauritanian national, alleges that he is illegally detained at Guantanamo Bay Naval Base and petitions this court for a writ of *habeas corpus* to secure his release.

Salahi has been in custody, without being charged with any crime, since November 2 2001. He was first taken into custody by 1 on suspicion that he had been involved in the failed "Millennium Plot" to bomb the Los Angeles International Airport. The United States 1,2 transported him to Guantanamo Bay in August 2002, Traverse Exhibit ("Tr. Exh.") BBB, ¶ 50. He has been there ever since. He filed this petition in 2005, but his case, like all other habeas corpus petitions from Guantanamo Bay, was put on hold until the Supreme Court decided that Guantanamo detainees have a right to habeas proceedings and

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that this court has jurisdiction to hear them. Boumediene v. Bush, 128 S.Ct. 2229 (2008). With Judge Hogan's omnibus Case Management Order as a guide, I heard the merits of Salahi's petition and of the government's response on August 27 and 28, 2009, and on December 14 and 15, 2009. Salahi appeared and testified by video feed from Guantanamo. After the hearing, Salahi and the government filed post-hearing briefs.

The government's case, essentially, is that Salahi was so connected to al-Qaida for a decade beginning in 1990 that he must have been "part of" al-Qaida at the time of his capture. The allegations are that Salahi was a recruiter for al-Qaida - that indeed he recruited two of the men who became 9/11 hijackers and a third who became a 9/11 coordinator; that he actively supported his cousin, who is or was one of Osama Bin Laden's spiritual advisors; that he carried out orders to develop al-Qaida's telecommunications capacity; and that he had connections with an al-Qaida cell in Montreal.

Salahi concedes that he traveled to Afghanistan in early 1990 to fight jihad against communists¹ and that there he swore bayat to al-Qaida. He maintains, however, that his association with al-Qaida ended after 1992, and

¹ The Soviet Union had withdrawn from Afghanistan in 1989.

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that, even though he remained in contact thereafter with people he knew to be al-Qaida members, he did nothing for al-Qaida after that time. Tr. Exh. BBB.

The government's case relies heavily on statements made by Salahi himself, but the reliability of those statements - most of them now retracted by Salahi - is open to question.

I. Legal Standards

If the government has any authority to detain Salahi without charging him with a crime, its source is the Authorization for Use of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

"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."
Authorization for Use of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

That purpose, the "prevent[ion of] any future acts of international terrorism," has the Supreme Court's seal of approval, see Boumediene, 128 S.Ct. at 2277 ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.") - those who, as the government argued in Hamdi v. Rumsfeld,

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124 S.Ct. 2633, 2639 (2004), were "part of or supporting forces hostile to the United States or coalition partners . . . and who engaged in an armed conflict against the United States." (internal quotations omitted).

A. "Part of" and "substantial support"

Following Hamdi and Boumediene, the President's power to detain, and the development of tests to determine who was "part of" al-Qaida or the Taliban and what constituted "substantial support" were left to the lower courts.

In this case, until very recently, the government has focused entirely on its assertion that Salahi was "part of" al-Qaida,² relying on evidence of Salahi's pre-capture support of al-Qaida only to bolster that assertion. In an eleventh hour brief, the government has invoked the "purposeful[] and material[] support" standard that was approved in Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010), inviting the denial of Salahi's petition on that basis as well - or in the alternative. Respondents' Response to Petitioner's Closing Brief, at 12-13.³

² The government also argued at first that Salahi was also detainable under the "aided in 9/11" prong of the AUMF, but it has now abandoned that theory, acknowledging that Salahi probably did not even know about the 9/11 attacks.

³ I have reconsidered my order striking that brief.

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The "purposeful[] and material[] support" standard is a non-starter. As the following discussion will make clear, Salahi may very well have been an al-Qaida sympathizer, and the evidence does show that he provided some support to al-Qaida, or to people he knew to be al-Qaida. Such support was sporadic, however, and, at the time of his capture, non-existent. In any event, what the standard approved in Al-Bihani actually covers is "those who purposefully and materially supported such forces in hostilities against U.S. Coalition partners." 530 F.3d at 872 (emphasis added). The evidence in this record cannot possibly be stretched far enough to fit that test.⁴ I will consider the evidence of Salahi's "support" to the extent that it is relevant to proving that he was "part of" al-Qaida, and I will give it such weight in that regard as I consider appropriate.

The test now applied by most judges of this court for determining who is or was "part of" al-Qaida was first articulated by Judge Bates: "whether the individual functions or participates within or under the command

⁴ The Al-Bihani panel extracted the test from the 2006 and 2009 Military Commission Acts, both of which made such "purposeful[] and material[] support" triable offenses. The panel concluded that "the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority." 530 F.3d at 872. Where, as here, the government clearly has no triable criminal case of "purposeful and material support" against Salahi, the logic of that conclusion escapes me.

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structure of the organization - i.e., whether he receives and executes orders or directions." Hamliily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009); see Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (appeal pending).

A detainee may fit within or under al-Qaida's "command structure" even if he never actually fights for al-Qaida. Al-Bihani, 590 F.3d at 872. Detention is lawful under the "part of" prong, if the detainee has received and executed al-Qaida's orders, even if he has only been a cook in an al-Qaida camp. Id., accord, Gherebi v. Obama, 609 F. Supp. 2d 43, 69, n. 19 (D.D.C. 2009). It has been suggested that an al-Qaida sympathizer who is outside the command structure must have "take[n] a direct part in the hostilities" to be detainable, Gherebi, 609 F. Supp. 2d at 69. Al-Bihani appears to have rejected that suggestion, but neither Al-Bihani nor any other case provides a bright-line test for determining who was and who was not "part of" al-Qaida at the time of capture. The decision, in other words, depends on the sufficiency of the evidence.

B. Temporal issue and burden of proof

The question of when a detainee must have been a "part of" al-Qaida to be detainable is at the center of this case, because it is clear that Salahi was at one point a sworn al-Qaida member.

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The government had the burden of proving the lawfulness of the detention under the AUMF - i.e., detention without criminal charges or trial - by a preponderance of the evidence.⁵ In re Guantanamo Bay Detainee Litig., Misc. No. 08-442, CMO § II (A); Awad, 646 F. Supp. 2d at 23-24. The government also had to show that Salahi's detention was lawful at the time of his capture. See, Gherebi, 609 F. Supp. 2d. at 71; Respondents' Supplemental Memorandum Regarding the Temporal Scope of the Government's Detention Authority, at 2. The government was not required to produce evidence of some affirmative "part of al-Qaida" act by the petitioner that took place after 9/11.⁶ A mechanical requirement of that kind would lead to the illogical and dangerous result that a proven "sleeping agent" who was actually sleeping on and after 9/11 could not be detained. Gherebi, 609 F. Supp. 2d at 67.

It is undisputed that Salahi swore *bayat* and was a member of al-Qaida in 1990, but the government had to show that he was still (or again) within its command structure when he was captured on November 2 2001.

⁵ The Court of Appeals has rejected a constitutional challenge to the preponderance standard in these detainee habeas cases, Al-Bihani v. Obama, 590 F.3d at 878 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004)).

⁶ To the extent Salahi's arguments about temporal scope rest on principles of the international law of war, they must be rejected after Al-Bihani, 590 F.3d at 871.

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Salahi's admission that he once was part of al-Qaida but that he severed his ties after 1992 raises burden-of-proof questions: May the burden lawfully be shifted to Salahi to prove his dis-association? If so, at what point does the burden shift? Judge Leon did not address burdens of proof when he found that a petitioner had "vitiated" his relationship with al-Qaida. See, Al Gingo v. Obama, 626 F. Supp. 2d 123, 128-30 (D.D.C. 2009). Nor did Judge Urbina, when he granted the writ in part because there was evidence that the detainee had severed his relationship with al-Qaida by leaving al-Farouq training camp early. Hatim v. Obama, 2009 WL 5191429, at *10, 12 (D.D.C. Dec. 15, 2009).

In Al-Bihani, however, the Court of Appeals clearly indicates that there is nothing unconstitutional about shifting the burden to a detainee to rebut a credible government showing "with more persuasive evidence," 590 F.3d at 878, citing Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004). Such a requirement, the Al-Bihani court says, "mirrors a preponderance standard." Id.

If that is the rule, one might reasonably ask, how can Guantanamo detainees - locked up for years on a remote island, cut off from the world, without resources, with only such access to intelligence sources and witnesses as the government deigns to give them - how can such people

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possibly carry the burden of rebuttal, even against weak government cases? The answer, unfortunately for detainee petitioners, is that they are indeed at a considerable disadvantage, and that successful rebuttals of credible government cases will be rare events. The Court of Appeals has acknowledged this imbalance and approved it: "[P]lacing a lower burden on the government defending a wartime detention - where national security interests are at their zenith and the rights of the alien petitioner at their nadir - is . . . permissible." Id.

A habeas court must consider the government's factual showing of probable cause and look to the petitioner for rebuttal when that showing is both credible and significant. It is only fair to the petitioner, however - and, considering the government's built-in advantage, not unfair to the government - to view the government's showing with something like skepticism, drawing only such inferences as are compelled by the quality of the evidence.⁷

⁷ I have rejected the government's broadest assertion, that Salahi's concession of al-Qaida membership in the early 1990's shifted the burden of proof, requiring that he prove affirmative acts of dis-association to show that he was not a member in 2001. It is true, as I observed at the close of the hearing, Hr. Tr. 644-45, 651, that Salahi has adduced no evidence that he "rejected" al-Qaida - that he acted affirmatively to sever his ties - but I have been persuaded, see Petitioner's Closing Br. at 13-14, that he did not need to. The criminal law of withdrawal from a conspiracy has no place in this proceeding, and in any case, the al-Qaida that Salahi joined in 1991

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C. Coerced statements and hearsay

There is ample evidence in this record that Salahi was subjected to extensive and severe mistreatment at Guantanamo from mid-June 2003 to September 2003, Tr. Exh. C, D, I, P, BB - HH, JJ, LL, OO, PP, QQ, RR, SS, BBB; AFR Exh. 93; Hr. Tr. 411-436. Salahi's position is that every incriminating statement he made while in custody must therefore be disregarded.⁸ Salahi made most, if not all, of the statements that the government seeks to use against him during the mistreatment or during the 2 years following it.

The government acknowledges that Salahi's abusive treatment could diminish the reliability of some of his statements. But abuse and coercive interrogation methods do not throw a blanket over every statement, no matter when given, or to whom, or under what circumstances.

Allegations of mistreatment certainly taint petitioner's statements, raising questions about their reliability.

See, e.g., Mohammed v. Obama, 2009 WL 4884194, * 24-27

was very different from the al-Qaida that turned against the United States in the latter part of the 1990s.

⁸ Dr. Vincent James Iacopino, M.D., Ph.D., reviewed Salahi's medical records and gave his opinion that Salahi's allegations are consistent with the physical and psychological evidence documented in his medical records and that the mistreatment "likely compromised the accuracy of the information he has provided to interrogators." Hearing Transcript ("Hr. Tr.") 255, 292-293, 298-301; Tr. Exhs. F, SS. Dr. Iacopino was earnest and well-meaning, but he can hardly be described as independent. I found his testimony to be biased and unpersuasive, particularly as the subject of his testimony was not the subject of his professional training.

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(D.D.C. Dec. 16, 2009); Al Rabiah v. United States, 2009 WL 3083077, *21 (D.D.C. Sept. 17, 2009) (citing U.S. v. Karake, 443 F. Supp. 2d 8, 87-88 (D.D.C. 2006)). But at some point - after the passage of time and intervening events, and considering the circumstances - the taint of abuse and coercion may be attenuated enough for a witness's statements to be considered reliable - there must certainly be a "clean break" between the mistreatment and any such statement. Karake, 433 F. Supp. 2d at 87; accord, Anam v. Obama, 2010 WL 58965, *4 (D.D.C. January 6, 2010). Here, it is the government's burden to demonstrate that a particular statement was not the product of coercion, and that it has other indicia of reliability. Anam, 2010 WL 58965 at *5.

The government submits that the only statements of Salahi's on which it relies were made after a clean break, and after the passage of enough time to attenuate any taint, and that they are corroborated by documentary evidence and the statements of other persons (some of them detainees). Salahi attacks corroborating statements as unreliable hearsay, or subject to the same coercive tactics described above, or both. My approach here, as in Awad, has been to formally "receive" all the evidence offered by

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either side, and to give it the weight I believe it deserves. See Awad, 646 F. Supp. 2d at 23.

II. The Evidence

A. Timeline

Date	Activities
1988	Began studying at the University of Duisberg in Germany. (Tr. Exh. BBB)
1990	Travelled to Afghanistan, trained for six weeks at al-Farouq, swore bayat to al-Qaida, and was given the kunya "Abu Musab." (Tr. Exh. BBB)
1991	Returned to Germany to continue his studies.
Feb-92	Returned to Afghanistan with 3 friends (including Karim Mehdi and Ely Taleb al-Qadr), met with al Bahrani, and went to fight in the battle at Gardez as member of al-Qaida. Met Christopher Paul in Afghanistan.
Mar-92	Returned to Germany to complete his studies, after the communist government, led by Mohammed Najibullah and supported by the Soviet Union, fell. Wife joined him in Germany.
Mar-93	Christopher Paul may have visited Mehdi in Germany for three weeks. Salahi may have seen him during this time.
Aug-93	Returned to Mauritania to visit family. Went to an Al-Qaida safehouse in Mauritania with Abu Hafs, may have seen a Libyan al-Qaida member, al-Lidi, there.
May-95	* Graduated from University of Duisburg with degree in electrical engineering. ⁹
May-95	* Began working at 6 [REDACTED] as a process engineer (in Reutlingen, Germany).
Dec-95	Hosted Abu Hajar al-Iraqi in Germany, may have received information about an al-Qaida telecommunications project in Sudan.
Jan-96	Hosted Abu Hajar al-Iraqi again in Germany, may have discussed the al-Qaida project in Sudan.
May-96	* Began working on obtaining an unlimited visa and work permit to stay in Germany; simultaneously began trying to get landed immigrant status in Canada (at Hosni Mohsen's suggestion).
Dec-96	* Stopped working at 6 [REDACTED]
Jan-97	* Began working as a consultant for the 6 [REDACTED] in Esson, Germany.
Jan-97	Sent a fax to Christopher Paul, requesting information about where to send would-be jihadists. (AFR Exh. 70)
Dec-97	Transferred \$4,000 for Abu Hafs.
Dec-97	Created a jihad website, but there is no proof that it advocated violence, and Salahi claims it did not.
Jan-98	* Drove Paul to the airport, after Paul visited Mehdi for several weeks.

⁹ Asterisk indicates that the month of the event is estimated.

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Jun-98	* Obtained landed immigrant status in Canada.
Sep-98	Visited Hosni Mohsen in Canada.
Dec-98	Transferred \$4,000 for Abu Hafs.
Jan-99	* Received phone call from Abu Hafs, which was allegedly made from bin Laden's satellite phone.
Oct-99	* Ganczarski returned to Germany from Afghanistan and may have delivered a message to Salahi about a project for improving internet access in Pakistan and Afghanistan. Salahi may have received passports from him. Salahi claims that he received passports from Abu Hafs only.
Oct-99	Met with al-Shibh and two other men, allegedly encouraged them to go to Afghanistan instead of Chechnya and to get Pakistan visas.
Nov-99	Housed al-Shibh and two other men for one night, and drove them to the train station in the morning.
Nov-99	* Stopped working at Ceylan.
Nov-99	Moved from Germany to Canada; lived with [REDACTED] and then at the Al Sunna Mosque, where he was an imam. Registered for and began taking classes at Polytechnique de Montreal; [REDACTED] "bad friends" visited the apartment -- [REDACTED] (head of al-Qaida cell in Montreal) and [REDACTED] (financier for al-Qaida) (AFR Exh. 14); [REDACTED] had connections with Ressay, who was arrested in the Millennium Bomb plot.
Dec-99	* In Canada, Laabidi asked him to transfer money, but Salahi did not do so. Observed al-Qaida members giving Mohsen bags of "equipment for the brothers" before his trip to Chechnya. Called Christopher Paul twice.
Dec-99	Ahmed Ressay was arrested in connection with the Millennium Plot.
Dec-99	Salahi was questioned [REDACTED] regarding the Millennium Plot, moved into the mosque. Sent Moshen a Tunisian passport.
Jan-00	Family called to inform him that his mother was sick. Decided to return to Mauritania.
Jan-00	Flew from Canada to Senegal, where brothers met him to take him to Mauritania; he and brothers were seized by 3 [REDACTED] authorities, and were questioned about the Millennium plot. An American came and took pictures; then, someone he presumed was American flew him to Mauritania, where he was questioned further by Mauritanian authorities about the Millennium plot.
Feb-00	Interrogated by 3 [REDACTED] re Millennium plot.
2/14/2000	* 3 [REDACTED] released him, concluding there was no basis to believe he was involved in the Millennium plot.
Apr-00	Returned to Germany, but was arrested upon arrival because of unemployment fraud issue
May-00	Was released, and returned to Mauritania. 3 [REDACTED] authorities took away his passport and put him under "house arrest." Began working at 6 [REDACTED] in Mauritania.
Jan-01	Gave one of the fraudulent passports he received from Abu Hafs to his wife, whom he was divorcing.
Apr-01	Still in contact with Ganczarski, through emails and phone calls.
May-01	Still in contact with Karim Mehdi, through emails and phone calls.
Jun-01	Gave male passport to 6 [REDACTED], who claimed to be its owner.
Jul-01	Stopped working at 6 [REDACTED]; began working at 6 [REDACTED] in Nouakchott
Sep-01	Authorities seized computer at BITS.
9/29/2001	Arrested in Mauritania; authorities told him 1 [REDACTED] arrest because Salahi was allegedly involved in Millennium plot.

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10/12/2001	While he was detained, agents performed a search at his house, seizing tapes and documents.
10/15/2001	Released by 3 [REDACTED] authorities.
11/2/2001	1 [REDACTED] took him into custody.

B. Initial Relationship with al-Qaida

Salahi admits that he trained at the al-Farouq training camp in Afghanistan in late 1990 and early 1991; that he swore bayat in 1991, see Hr. Tr., 370-71;¹⁰ and that he returned to Afghanistan in early 1992 to fight in the battle at Gardez as a member of an al-Qaida mortar battery. See, AFR at 8 (ISN 760 FD-302); Hr. Tr. at 372-374.

In Salah's submission, this is where his connection to al-Qaida ends. He testified that he was "part of" al-Qaida only to join the struggle against the communists, and that, after his final trip to Afghanistan in 1992, he severed ties with al-Qaida and provided no further support to the organization.¹¹ Tr. Exh. BBB, ¶¶ 99, 101; Hr. Tr. at 378. In a statement made in December 2004, about a year after his coercive interrogation and after he

¹⁰ The government asserts that Salah swore the oath to Osama bin Laden, and did so at the same time as Noumane Ould Ahmed Ould Boullahy, who went on to become one of bin Laden's bodyguards. AFR at 7. There is no evidence that Salah maintained, or that he ever had, any relationship with Boullahy. Salah maintains that he swore bayat to Iz Eldin al-Bahraini, or to the organization as a whole. Tr. Exh. BBB, ¶ 99, 105; Hr. Tr. at 498-500.

¹¹ Salah admits to attempting to travel to Bosnia-Herzegovina through Slovenia in December 1992 to join the jihad there, but ultimately returned to Germany because travel was too difficult. AFR Exh. 22; Hr. Tr. at 378. But, he claims he did not do so at the request of al-Qaida. Hr. Tr. at 379.

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had disavowed earlier incriminating statements, he recalled telling Abu Hafs that he wanted "work a little bit." AFR Exh. 5. The inference the government seeks to draw from this snippet is that Salahi wanted to continue working for al-Qaida, cf. Hr. Tr. 453-4, but the words are few enough, and ambiguous enough, that the inference must be declined.

B. Recruiting

Not only did Salahi not sever his ties with al-Qaida after 1992, the government maintains, but he "actively recruited" for al-Qaida from 1991 to at least 1999. The evidence for that proposition includes: (1) statements by Salahi that, in 1999, he provided lodging and advice to three men who were later involved in the 9/11 attacks; (2) a January 1997 fax from Salahi to a known al-Qaida operative, Christopher Paul, asking where to send al-Qaida recruits; (3) general statements of Salahi, made while in custody, that he was a recruiter; and (4) statements of another alleged terrorist - [REDACTED] - implicating Salahi as an al-Qaida recruiter.

The most damaging allegation against Salahi is that, in October 1999, he encouraged Ramzi bin al-Shibh, Marwan al-Shehhi, and Ziad Jarrah to join al-Qaida. Bin al-Shibh has been identified as the primary contact for the organizers of the 9/11 hijackers, and al-Shehhi and Jarrah

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became two of the hijackers. Under coercive interrogation, Salahi confessed to facilitating travel for "several of the 9/11 hijackers to Chechnya," justifying his assistance as "just" jihad. AFR Exh. 45 (August 2, 2003). Salahi's testimony now is that he did nothing more than give bin al-Shibh and his friends lodging for one night. Tr. Exh. BBB, ¶¶ 111-118.

The government's proffered corroboration for Salahi's 2003 statements about recruitment consists of statements by [REDACTED] Karim Mehdi. AFR Exh. [REDACTED] 56, 59. Those statements, if credited, would establish that Salahi met with bin al-Shibh and two other men in October 1999; that he encouraged them to travel to Afghanistan for training - rather than Chechnya as they had intended; that he housed them for at least one night [REDACTED] that he gave them instructions for traveling to Afghanistan and contacts for their arrival; and that he drove them to the train station the next morning. Tr. Exh. BBB, ¶¶ 111-118.; [REDACTED] AFR Exh. 56 (Statement of Karim Mehdi).¹² [REDACTED]

[REDACTED]

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[REDACTED]

Seeking to undermine this evidence about the 9/11 hijackers, Salahi emphasizes that his contact with these men occurred two years before the actual attacks. He also points to 1.5 [REDACTED] in which he said that the two men accompanying bin al-Shibh were not al-Shehhi and Jarrah, and that he did not convince bin al-Shibh to travel to Afghanistan instead of Chechnya. AFR Exh. 37. Salahi also argues that the statements of [REDACTED] [REDACTED] Mehdi are too unreliable to serve as corroboration, [REDACTED]

[REDACTED]

that Mehdi's statements were coerced by mistreatment, AFR

[REDACTED]

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Exh. 53-62 (sleep deprivation); that Mehdi was fed information by his interrogators, AFR Exh. 64, 65, 66; and that Mehdi has admitted to lying, AFR 59, 61, 64. In addition, some of Mehdi's information is inconsistent with the statements of Salahi [REDACTED] Mehdi said that they met more often than twice, including a meeting that took place at Salahi's house at a time when Salahi was in custody. Upon learning that fact, Mehdi withdrew his statement about the meeting. Mehdi's statements indicate only that Salahi knew bin al-Shibh and Jarrah were going to Afghanistan for training, not that Salahi encouraged them to do so. AFR Exh. 56. [REDACTED]

[REDACTED]

[REDACTED] The application of appropriate judicial skepticism to this jumble of evidence yields the following finding: The government has

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credibly shown, and Salahi has not rebutted the showing, that [REDACTED] Salahi provided lodging for three men for one night at his home in Germany, that one of them was Ramzi bin al-Shibh, and that there was discussion of jihad and Afghanistan.

The government's other key piece of evidence about Salahi's alleged recruitment for al-Qaida is a January 26, 1997 fax from Salahi, using his kunya "Abu Musab," to Christopher Paul, a.k.a. Abdul Melik, to ask for help to find "a true Group and Place" for "some Brothers want to make Djihad." AFR Exh. 70. The fax bears Salahi's kunya, Salahi's handwriting and home telephone number, and was faxed from a store near Salahi's home. Hr. Tr. at 187-88, 628. Salahi admitted to sending the fax to this acknowledged "man of great respect in Al-Qaida", AFR Exh. 75, as a way to "facilitate getting the brothers to fight," AFR Exh. 74, but later disavowed those statements, and said that he had never seen the fax until interrogators questioned him about it. I find that the fax appears to be authentic and speaks for itself, and that the filigree the government seeks to add (facilitating getting the brothers to fight, AFR Exh. 74; standing with Mehdi during a telephone conversation, Hr. Tr. at 631; the uncorroborated statement that the person about whom Salahi wrote the fax,

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Moussa, went on to fight in Afghanistan, AFR Exh. 75) is unnecessary to understand its meaning: that Salahi continued to be in touch with people he knew to be al-Qaida members, and that he was willing to refer would-be jihadists to them when the opportunity arose.

The remaining evidence that Salahi was an active recruiter is less significant. Salahi made several incriminating statements after coercive interrogation that he was a recruiter and spread propaganda about al-Qaida, but in none of those statements did he say he was tasked to do so, nor did he provide detail about any specific recruiting missions he was given. AFR Exhs. 27, ¶ 9; 29, ¶ 62; 96. Finally, the government suggests that a general statement [REDACTED]

[REDACTED]

[REDACTED] They were not specific to al-Qaida, nor do they suggest that Salahi was tasked with an order to recruit al-Qaida members.

The government has not credibly shown Salahi to have been a "recruiter." What its evidence shows is that

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Salahi remained in contact with people he knew to be al-Qaida members at least until November 1999, and that he was willing to make a referral to a known al-Qaida member in 1997.

C. Assistance with al-Qaida telecommunications projects

The government asserts that Salahi accepted assignments to work on a number of al-Qaida telecommunications projects.¹³ This narrative has two parts: that Salahi's cousin and brother-in-law - Abu Hafs al-Mauritanian - tasked him (a) with establishing an international shortwave broadcasting station in Sudan and (b) with establishing greater Internet connectivity between Pakistan and Afghanistan. AFR Exh. 32.¹⁴ Abu Hafs is believed to be one of bin Laden's spiritual advisors and a high-ranking leader of al-Qaida. An undated interrogation report has it that Salahi said that he received orders from Abu Hafs, AFR Exh. 22, and "would have done almost anything that was asked of him." AFR Exh. 24. Salahi has not

¹³ The government, relying on the conclusions of Salahi's FBI interrogators, also asserts that Salahi has "advanced knowledge of what would be required to complete these tasks," AFR Exh. 16, and expertise in al-Qaida internet communications, encryption and cyber-attacks, AFR Exhs. 34, 39, 42. These conclusions, which are too speculative to credit, do not bespeak that Salahi was "part of" al-Qaida.

¹⁴ Salahi also told interrogators that Abu Hafs asked him to assist in counterfeiting US currency, but that he did not do it because he was attempting to obtain Canadian citizenship. AFR Exhs. 33, 28.

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retracted his admission that he knew Abu Hafs to be an al-Qaida member.¹⁵ Hr. Tr. at 514.

The first part of this story, developed entirely from Salahi's statements and completely uncorroborated, is that Abu Hafs gave orders about telecommunications projects to Salahi through Abu Hajar al-Iraqi in 1995 and 1996, AFR 22, Hr. Tr. 458-459. Salahi now admits only that he hosted Abu Hajar al-Iraqi in Germany in 1995 and 1996 and that Abu Hajar spoke to him about the telecommunications equipment he (Abu Hajar) planned to purchase for Sudan. Hr. Tr. 459, 551-52, 628.

The second part of the telecommunications story relates to an alleged 1999 assignment to assist with Internet connectivity between Pakistan and Afghanistan and is more troubling. Under interrogation, Salahi named Christian Ganczarski as the person who gave him this assignment. Ganczarski was returning to Germany from Afghanistan. He gave Salahi passports to assist him in completing the task.¹⁶ Salahi was aware of the equipment

¹⁵ The government makes much of the fact that Salahi may have gone with Abu Hafs to an al-Qaida safehouse in Mauritania in 1993, presumably because the government believes this fact proves Salahi was aware of his cousin's al-Qaida membership. Hr. Tr. 514-5. Salahi disagrees with the government's characterization of the location as a "safehouse," but because Salahi concedes his cousin's membership, I find no reason to belabor the analysis of a single trip to a house nearly eight years before 9/11.

¹⁶ Nobody has attempted to explain how the passports would help with the Internet connectivity project.

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Ganczarski had purchased to work on the project, AFR Exhs. 22, ¶ 15; 85, ¶ 7-A; 98; Tr. Exh. T; Hr. Tr. at 554, 636, and his computer contained a radio antenna sketch that the government unsuccessfully attempts to link to Ganczarski and this project, AFR Exh. 90.

Salahi now disavows any knowledge of whether Ganczarski went to Afghanistan to set up a radio telecommunications system for al-Qaida, and denies that Ganczarski delivered any messages to him about al-Qaida projects. Tr. Exh. BBB, ¶ 124; Hr. Tr. 553. He does acknowledge that around November 1999, Abu Hafs - not Ganczarski - sent him a message encouraging him to return to Afghanistan, and sent him two passports and money for the trip. Hr. Tr. 553. One of the passports had been issued to an unknown male; the other was the passport of Abu Hafs' wife, who was Salahi's wife's sister. Salahi explains that he declined to travel to Afghanistan because he planned to travel to Canada, but he admits that he kept both passports until January 2001, when, he says, he gave the female passport to his then-wife, who he was divorcing. Salahi kept the male passport until June 2001, when its owner, [REDACTED] came to claim it. AFR Exhs. 49 (September 17, 2003), 32. The passport story that Salahi tells now makes more sense than the one he told his

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interrogators, but Salahi's admission that he received and held passports issued to other people raises unanswered questions about the lawfulness of his activities and the nature of his relationship with Abu Hafs.

The record also contains computer records seized in late September 2001 from [REDACTED] a Mauritanian technology equipment retailer and internet service provider and Salahi's employer from May 2000 to July 2001. The [REDACTED] records reflect transactions with a company called [REDACTED] [REDACTED] for the purchase and shipment of radio equipment. On their face, the invoices reflect ordinary course of business transactions, but, when interrogated in September 2005, Salahi did not deny that the radio equipment was used by al-Qaida, AFR Exh. 16. Salahi now retracts any of his statements that might suggest that [REDACTED] provided equipment to al-Qaida. Tr. Exh. BBB, ¶ 125. The invoices appear to be characteristic of what is understood to be [REDACTED] business, and they do not connect Salahi to the transactions in any apparent way. Tr. Exh. DDD.

Also collected from the [REDACTED] computer were emails and documents describing plans for various cyber-attacks. AFR Exhs. 133, 135, 139. Two of the emails appear to be list-serve emails, sent to a large number of recipients, describing steps an individual should take if he wanted to

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engage in an attack, AFR Exhs. 135, 139. The third document is not an email but a separate document - also with specific instructions on implementing an attack. AFR 135. The documents are not evidence that Salahi engaged in the cyber-attacks (materially supported al-Qaida in hostilities), but they do show that he had access to the information. They corroborate statements of Salahi to the effect that he knew about and had some involvement in planning for denial of service computer attacks, AFR Exh. 39 (October 20, 2004) - attacks that, so far as we know, never materialized. Salahi also admitted to attempting to start his web forum for this type of information, but said that he did not do so because Ganczarski discouraged the plan. Id; AFR Exh. 81.

These 6 documents have very little weight. The cyber-attack documents do appear to establish Salahi's knowledge of and interest in planned computer attacks, but they do not show Salahi's active engagement, Tr. Exh. BBB, ¶¶ 122, 123. Nevertheless, Salahi's credibility is undermined by his insistence that his computer was accessed by several other 6 employees. Hr. Tr. 475. That testimony, indeed, suggests that 6 was populated by many al-Qaida sympathizers, something which, if that were true, would surely have been understood by Salahi.

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D. Money Transfers

Salahi acknowledges that he transferred money for Abu Hafs twice - about \$4,000 in December 1997 and another \$4,000 in December 1998. Hr. Tr. 631. Here again, the government relies on nothing but Salahi's uncorroborated, coerced statements to conclude that the money transfers were done on behalf of and in support of al-Qaida. AFR Exh. 29 (describing al-Qaida's process for wiring money through innocent middlemen). Salahi insists now that he was only helping Abu Hafs to send money to his family in Mauritania. Tr. Exh. BBB, ¶ 121. Two money transfers in modest amounts a year apart would not even amount to material support (if support were the issue here, which it is not). What they do show - as the recruiting and telecommunications support narratives did - is that Salahi had an ongoing and relatively close relationship with Abu Hafs, something like that described in Gherebi, a non-al-Qaida member providing housing to his al-Qaida member son, Gherebi v. Obama, 609 F. Supp. 2d 43.

Salahi admitted that he was asked to transfer money for Laabidi, the financier of al-Qaida's Montreal cell,¹⁷ in 1999. He did not admit, nor has it been shown,

¹⁷ Under interrogation, Salahi called Laabidi a terrorist who supported use of suicide bombers, AFR Exh. 48 (September 16, 2003), but he recanted all of his incriminating statements about Laabidi when he

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that he complied with the request. AFR Exhs. 48 (September 16, 2003); 47 (Sept 11, 2003).

F. Connections with Montreal al-Qaida cell

Salahi lived in Canada for two months, from late November 1999 to January 2000. The government claims that, in that period, he developed strong ties to an al-Qaida cell in Montreal. Salahi concedes that he lived with [REDACTED] but he has retracted statements made under interrogation that [REDACTED] friends who visited their shared apartment - [REDACTED] - were "very bad," AFR Exhs. 5, 14, that Hannachi was the leader of the al-Qaida cell in Montreal, and that Laabidi was the cell's financier. AFR Exh. 29.

Another Montreal resident, Ahmed Ressam, was arrested and charged with preparing to carry out the so-called Millennium plot. One document, pocket litter seized from Mohsen upon his arrest, includes both Salahi's name and Ressam's phone number. AFR Exh. 20. That document does link Mohsen, Salahi and Ressam together, but how, and for what, remain unexplained. Salahi almost immediately retracted his statements that implicated him in the Millennium plot. AFR Exh. 5, Tr. Exh. Y. The government

discovered that he would be required 2 [REDACTED]
Tr. Exh. BBB, ¶ 130.

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does not allege that Salahi participated in the Millennium plot.¹⁸

Other bits of evidence adduced to show that Salahi was involved with the Montreal cell include: (1) the undisputed fact that Salahi acted for a time as an imam at the Alsunna mosque, which gave him the opportunity to "inject propaganda and recruit for jihad"; (2) Salahi's uncorroborated statement that he accompanied several al-Qaida members who were transporting bags of "equipment for the brothers" to [REDACTED] before [REDACTED] traveled to Turkey and Chechnya as a courier for [REDACTED] see AFR Exhs. 88 at ¶¶ 1L, 1 AH; ISN 760 FD-302 7-18-05 at 6; and (3) Salahi's uncorroborated statement that he allowed Laabidi to use his bank account to launder money and that he witnessed Laabidi giving cash to Hannachi. See AFR Exhs. 33, 88 at ¶ 1W. Salahi now retracts those statements.

The Montreal evidence might well be enough to support a criminal charge of providing material support to al-Qaida, if Salahi were criminally charged, and if the evidence were admissible in a criminal proceeding. It does not prove that he "purposeful[] and material[] supported such forces in hostilities," however, nor does it add any

¹⁸ Ressay agreed to cooperate and testify against others involved in the Millennium plot. Ressay provided statements that the government has used in defending detentions in other habeas petitions before this Court, but he conspicuously fails to implicate Salahi. Hr. Tr. 202.

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thing of significance to the proof that Salahi was "part of" al-Qaida.

G. Relationships with known al-Qaida members

The government suggests that Salahi's relationships with the various al-Qaida members referenced throughout this case, however brief those relationships, prove that he is "part of" al-Qaida. Associations alone are not enough, of course, to make detention lawful, see Al-Adahi v. Obama, 2009 WL 2584685, at * 16 (D.D.C. Aug. 21, 2009), but, depending on their nature and duration, they could lend support to a finding of al-Qaida membership.

The government's most damaging evidence with respect to Salahi's associations is his admitted contacts with his cousin and brother-in-law, Abu Hafs. Those contacts include: visiting an al-Qaida safehouse in Mauritania in 1993; telephone and [REDACTED] contact right up to 2001;¹⁹ money transfers; and one request from Abu Hafs for Salahi to travel to Afghanistan, along with the passports for the journey. None of these events or incidents has been shown to have happened within the command structure of al-Qaida.

¹⁹ The government alleges that Abu Hafs called Salahi in December 1998 or January 1999, from the satellite phone of Osama bin Laden. Hr. Tr. 632.

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Salahi's relationships with Karim Mehdi, who was convicted on terror charges in France, and with Christian Ganczarski, another convicted terrorist, are clearly of interest - Salahy was in contact with the two men until at least May 2001 and April 2001, respectively. Hr. Tr. at 502, AFR Exhs. 119, 123. But, the [REDACTED] offered by the government as evidence of the relationships are not themselves incriminating; if anything, they suggest that the men were not in continuous contact. For example, at one point, [REDACTED]

[REDACTED] AFR Exh. 123. Rather, they tend to support Salahy's submission that he was attempting to find the appropriate balance - avoiding close relationships with al-Qaida members, but also trying to avoid making himself an enemy.

Salahy's limited relationships with Christopher Paul, who pled guilty in the United States to conspiracy to use a weapon of mass destruction and received a 20-year sentence; Abu Hajar al-Iraqi, Hr. Tr. 459, 551-52, 628; Hannachi and Laabidi, important figures in al-Qaida's Montreal cell; and al-Libi, a Libyan al-Qaida member, Hr. Tr. at 517, 524-5, are too brief and shallow to serve as an independent basis for detention.

III. Conclusion

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The government had to adduce evidence - which is different from intelligence - showing that it was more likely than not that Salahi was "part of" al-Qaida. To do so, it had to show that the support Salahi undoubtedly did provide from time to time was provided within al-Qaida's command structure. The government has not done so. The government has shown that Salahi was an al-Qaida sympathizer - perhaps a "fellow traveler"; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida.

The government's problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qaida and become a terrorist upon his release. That concern may indeed be well-founded. Salahi fought with al-Qaida in Afghanistan (twenty years ago), associated with at least a half-dozen known al-Qaida members and terrorists, and somehow found and lived among or with al-Qaida cell members in Montreal. But a habeas court may not permit a man to be held indefinitely upon

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suspicion, or because of the government's prediction that he may do unlawful acts in the future - any more than a habeas court may rely upon its prediction that a man will not be dangerous in the future and order his release if he was lawfully detained in the first place. The question, upon which the government had the burden of proof, was whether, at the time of his capture, Salahi was a "part of" al-Qaida. On the record before me, I cannot find that he was.

The petition for writ of habeas corpus is granted. Salahi must be released from custody. It is SO ORDERED.

_____/s/_____
JAMES ROBERSTON
United States District Judge

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