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# HOW TO BE A TERRORIST WITHOUT REALLY TRYING: A COMMON LAW TEST FOR DETERMINING WHO IS “PART OF” A TERRORIST GROUP

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**Abstract:** This Comment critiques the D.C. Circuit Court of Appeals’s practice of utilizing a case-by-case approach to determining whether an individual detained at the military facilities of Guantanamo Bay, Cuba is considered “part of” the Taliban or al-Qaeda. The 2010 case of *Bensayah v. Obama* was among the first to grant a writ of habeas corpus to a Guantanamo detainee and therefore acts as an outer boundary in determining a more concrete standard for determining who is “part of” the Taliban or al-Qaeda. In articulating such a standard, this Comment proceeds first by analyzing previous case law and examining the four indicia commonly used to determine a detainee’s status. In light of this case law, including the recent *Bensayah* decision, this Comment then proposes a balancing test to replace the current case-by-case method as a more reliable and predictable means of determining whether a detainee is “part of” the Taliban or al-Qaeda.

## INTRODUCTION

In the wake of the September 11th terrorist attacks, which caused the deaths of nearly 3000 innocent civilians, Congress enacted the Authorization for Use of Military Force (AUMF).<sup>1</sup> This legislation gave the President powers to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . .”<sup>2</sup>

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<sup>1</sup> See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

<sup>2</sup> *Id.*; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). Section 2(a) of the AUMF states in its entirety:

That 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

Acting pursuant to the AUMF, President George W. Bush deployed military forces in Afghanistan and later in Iraq, capturing many alleged insurgents who took up arms in opposition to the United States, and detained them indefinitely as “unlawful enemy combatants.”<sup>3</sup> Many of the alleged enemy combatants detained at the Guantanamo Bay detention facility in Cuba challenged their detention by petitioning the courts for writs of habeas corpus.<sup>4</sup> The law addressing the unique circumstances of a Guantanamo detainee has evolved since the enactment of the AUMF in 2001 as the courts have heard more habeas corpus petitions from a varied pool of alleged unlawful enemy combatants.<sup>5</sup> In 2008, the United States District Court for the D.C. Circuit adopted the current definition of “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces.”<sup>6</sup> The courts have experienced problems determining who is “part of” terrorist organizations such as al-Qaeda because these organizations do not “issue member-

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any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a).

<sup>3</sup> See *Boumediene v. Bush* (*Boumediene II*), 553 U.S. 723, 788 (2008), *rev'g*, 476 F.3d 981 (D.C. Cir. 2007); *Hamdan*, 548 U.S. at 568; Thanassis Cambanis & John Donnelly, *Ground Troops Push Into Iraq; Missiles Batter Baghdad Again Copter Crash in Kuwait Kills 12 Britons, 4 US Soldiers*, BOSTON GLOBE, Mar. 21, 2003, at A1; Colin Nickerson, *Taliban Scoff at 'Second Chance' to Hand Over Bin Laden*, BOSTON GLOBE, Oct. 14, 2001, at A29. For a detailed discussion of the definition of “enemy combatant” that controlled prior to the Obama administration, as well as a proposal for a more inclusive definition, see Christina D. Elmore, Comment, *An Enemy Within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism*, 57 U. KAN. L. REV. 213, 242–43 (2008).

<sup>4</sup> See *Boumediene II*, 553 U.S. at 723. The writ of habeas corpus acts “to bring a party before a court.” BLACK’S LAW DICTIONARY 778 (9th ed. 2009). The initial question in the Guantanamo detainee habeas corpus petitions was whether the U.S. Constitution allowed those detained outside of the United States to be heard in its courts. See *Rasul v. Bush*, 542 U.S. 466, 473 (2004). The Supreme Court extended the writ to Guantanamo detainees by examining the means by which the United States leased Guantanamo Bay’s military facility from Cuba, holding that the agreement extended de facto sovereignty over the land. See *id.* at 480–81, 484.

<sup>5</sup> See *Bensayah v. Obama*, 610 F.3d 718, 720–21, 724–25 (D.C. Cir. 2010) (describing the procedural history of the habeas petition with regard to Guantanamo detainees and the effects of the Obama administration’s new policies).

<sup>6</sup> *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008). The Supreme Court set out the full definition of an enemy combatant as follows:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

*Id.*

ship cards or uniforms” and establishing membership outside of an organized command structure is difficult.<sup>7</sup> When President Barack Obama took office in 2009, the accepted definition became even more significant because the Obama administration ended the practice of using the President’s constitutional authority as Commander-in-Chief to justify the detentions.<sup>8</sup> Thus, the determining factor for the Guantanamo detainees’ freedom is now whether they are “part of” the Taliban or al-Qaeda forces—a determination made on a case-by-case basis.<sup>9</sup> With the recent decision of *Bensayah v. Obama*, which was among the first cases to grant a writ of habeas corpus to a Guantanamo detainee, it is now possible to set an outer boundary for who is considered “part of” the Taliban or al-Qaeda.<sup>10</sup>

This Comment critiques the courts’ practice of using a case-by-case approach to determining whether a detainee is “part of” the Taliban or al-Qaeda. Part I gives an overview of the Guantanamo detention process and the application of the writ of habeas corpus to detainees. Part II analyzes the current case-by-case method. Part III then examines this method in light of the specific facts from important cases in the area to extrapolate the indicia upon which courts rely in finding a peti-

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<sup>7</sup> See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2108–17 (2005) (discussing the vagaries of defining who is part of a terrorist “organization” and the issue of associated forces).

<sup>8</sup> See *Bensayah*, 610 F.3d at 722; Press Release, Dep’t of Justice, Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees (Mar. 13, 2009), *available at* <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>. The Obama Administration also ceased all use of the term “enemy combatant,” though it did continue to detain individuals who were “part of” the Taliban or al-Qaeda. See Press Release, Dep’t of Justice, *supra*.

<sup>9</sup> See *Bensayah*, 610 F.3d at 725. In ending the practice of using the constitutional authority of the Commander-in-Chief to justify the detentions, the Obama Administration also greatly increased the burden of proof required to show that a habeas petitioner “supported” the Taliban or al-Qaeda, thereby making paramount the determination of whether a habeas petitioner is “part of” the Taliban or al-Qaeda. See *id.* at 722; Press Release, Dep’t of Justice, *supra* note 8.

<sup>10</sup> See *Bensayah*, 610 F.3d at 725 (relying on the same four indicia discussed in Part III of this Comment); see also *Al Odah v. United States*, 611 F.3d 8, 16–17 (D.C. Cir. 2010) (denying a detainee’s habeas petition because he received a small amount of military training at a Taliban training camp); *Barhoumi v. Obama*, 609 F.3d 416, 418, 425, 427 (D.C. Cir. 2010) (denying habeas corpus to a petitioner, who allegedly trained at an al-Qaeda camp to assist the Chechen army against the Russians, in part because he later traveled and associated with those linked to al-Qaeda); *Awad v. Obama*, 608 F.3d 1, 9, 11 (D.C. Cir. 2010) (denying habeas corpus to a petitioner with no weapons training or association to al-Qaeda because he entered an existing al-Qaeda barricade and battled alongside other al-Qaeda fighters); *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (denying habeas corpus to an al-Qaeda cook found with a brigade-issued weapon); *infra* Part III.

tioner is “part of” the Taliban or al-Qaeda. Finally, Part IV proposes a categorical balancing test for determining which individuals are “part of” the Taliban or al-Qaeda.

## I. BACKGROUND

Congress enacted the AUMF just seven days after the terrorist attacks of September 11, 2001.<sup>11</sup> President Bush subsequently deployed troops in Afghanistan and Iraq and began the practice of detaining captured “enemy combatants” at the military facility in Guantanamo Bay, Cuba.<sup>12</sup> In 2002, the Supreme Court addressed the President’s authority to detain enemy combatants and the ability of citizen-combatants to contest their detentions in *Hamdi v. Rumsfeld*.<sup>13</sup> Although the Court found the detention in *Hamdi* lawful, it also held that the detainee, who was a U.S. citizen, had a right to constitutional due process.<sup>14</sup> On the same day that the D.C. Circuit Court of Appeals affirmed the district court’s dismissal for lack of sovereign jurisdiction, the Supreme Court in *Rasul v. Bush* first decided the issue of jurisdiction with respect to non-citizen detainees held at Guantanamo.<sup>15</sup> The Supreme Court reversed, finding jurisdiction and thus laying the foundation for future habeas corpus petitions.<sup>16</sup>

In response to these decisions, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) for the purpose of determining if Guantanamo detainees were rightfully held according to the definition of the term “enemy combatant” set forth by the Department of Defense.<sup>17</sup> The government intended these CSRTs

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<sup>11</sup> Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

<sup>12</sup> See *Boumediene v. Bush (Boumediene II)*, 553 U.S. 723, 723 (2008), *rev’g*, 476 F.3d 981 (D.C. Cir. 2007); Cambanis & Donnelly, *supra* note 3; Nickerson, *supra* note 3; Kenneth Roth, Op-Ed., *Human Rights in the War on Terror*, BOSTON GLOBE, Sept. 22, 2004, at A15.

<sup>13</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521, 533 (2004).

<sup>14</sup> See *id.* at 518, 535. The detention of these individuals is not explicitly authorized by the AUMF, but the Supreme Court held that detention is “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 518. The Court also held, however, that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 533.

<sup>15</sup> See *Rasul v. Bush*, 542 U.S. 466, 472–73 (2004), *rev’g*, 321 F.3d 1134 (D.C. Cir. 2003).

<sup>16</sup> See *id.*

<sup>17</sup> See *Boumediene II*, 553 U.S. at 732–33. The definition set forth by the Department of Defense and used during the CSRT proceedings is the same definition adopted on remand by the D.C. District Court in a memorandum order. See *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008); *supra* note 6.

to be an adequate substitution for constitutional due process, but challenges to their efficacy caused a split within the United States District Court for the D.C. Circuit.<sup>18</sup> Before the matter could reach the Supreme Court, Congress passed the Detainee Treatment Act of 2005 (DTA) with the intent of stripping the courts of jurisdiction over habeas corpus petitions.<sup>19</sup> The Supreme Court, however, held in *Hamdan v. Rumsfeld* that the DTA was inapplicable to cases pending when the DTA was enacted.<sup>20</sup> Therefore, in an attempt to correct the apparent statutory deficiencies with respect to stripping the courts’ jurisdiction to hear habeas petitions from non-citizens detained at Guantanamo, Congress enacted the Military Commissions Act of 2006 (MCA).<sup>21</sup>

In *Boumediene v. Bush* (*Boumediene II*), the Supreme Court held that the MCA did indeed strip courts of their jurisdiction over habeas corpus petitions, but that it did so unconstitutionally.<sup>22</sup> On remand, the district court denied to petitioner Belkacem Bensayah a writ of habeas corpus because of his alleged connections to a senior al-Qaeda facilitator and his likely support of al-Qaeda (*Boumediene III*).<sup>23</sup>

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<sup>18</sup> See *Boumediene II*, 553 U.S. at 732–33; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), *rev’d sub nom. Boumediene II*, 553 U.S. 723 (2008) (holding that the CSRT process violated the due process rights of non-resident aliens detained at Guantanamo Bay); *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), *rev’d sub nom. Boumediene II*, 553 U.S. 723 (2008) (holding that constitutional due process was not guaranteed for non-resident aliens detained outside of the sovereign United States in Guantanamo Bay, Cuba).

<sup>19</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(c), 119 Stat. 2741, 2742–43 (codified as amended at 28 U.S.C.A. § 2241 (West 2006 & Supp. 2010)); see *Boumediene II*, 553 U.S. at 732.

<sup>20</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–76 (2006).

<sup>21</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>22</sup> See *Boumediene II*, 553 U.S. at 792. The Supreme Court in *Boumediene II* held that Article I, Section 9, Clause 2 of the Constitution reaches to Guantanamo Bay and, if jurisdiction is to be stripped, Congress must meet the requirements of the Suspension Clause—something it did not do with the MCA. See *id.* at 771. Therefore, the Court allowed the detainees to be heard on their habeas petitions and, on remand, the district court ordered the release of five of the six petitioners. See *id.* at 773; *Boumediene v. Bush* (*Boumediene III*), 579 F. Supp. 2d 191, 198–99 (D.D.C. 2008), *rev’d sub nom. Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

<sup>23</sup> See *Boumediene III*, 579 F. Supp. 2d at 198. Bensayah was one of the six petitioners in *Boumediene II*. See *Bensayah*, 610 F.3d at 720–21. Bensayah is an Algerian citizen who traveled to Bosnia using a falsified passport, allegedly in order to escape persecution. *Id.* at 727. He and five other Algerian men were arrested in Bosnia for an alleged attempt to attack the U.S. Embassy in Sarajevo. *Id.* at 720. When Bosnian authorities failed to uncover any evidence of the plot, the Supreme Court of the Federation of Bosnia and Herzegovina ordered that Bensayah and the five other prisoners be released. *Id.* They were then turned over to U.S. forces and brought to Guantanamo Bay as suspected terrorists. *Id.* Although the other five petitioners from *Boumediene II* were granted habeas on remand by the court in *Boumediene III*, the government elected to present extra evidence against Bensayah dur-

In 2009, President Barack Obama took office and changed the manner in which the government handles habeas corpus petitions.<sup>24</sup> The Department of Justice began relying solely on the AUMF to provide authorization for detaining individuals at Guantanamo Bay, eschewing the use of the term enemy combatant, and ending the detentions of those who insubstantially support the Taliban or al-Qaeda.<sup>25</sup> These policy changes impacted Bensayah because the district court in *Boumediene III* rejected his petition for a writ of habeas corpus due only to his alleged “‘support’ [of al-Qaeda] within the meaning of the ‘enemy combatant’ definition governing [the] case.”<sup>26</sup> Consequently, the Department of Justice changed its stance and began arguing for Bensayah’s continued detention because he was “part of” al-Qaeda.<sup>27</sup> Bensayah once again petitioned for a writ of habeas corpus, claiming that he was not “part of” al-Qaeda, and the D.C. Circuit Court of Appeals found insufficient evidence on record to hold the petitioner to have been “part of” the organization.<sup>28</sup>

## II. THE CASE-BY-CASE METHODOLOGY

Under the Bush administration, the Department of Justice was able to use the AUMF in conjunction with the President’s inherent constitutional authority to detain any individual who could have pro-

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ing the classified proceedings. *See Boumediene III*, 579 F. Supp. 2d at 193, 199. The evidence was an alleged link to a senior al-Qaeda official, documents establishing a history of travel using false passports, and information tending to undermine Bensayah’s credibility. *See Bensayah*, 610 F.3d at 722. Since the decision in *Boumediene III*, a number of other detainees have filed habeas corpus petitions. *See Al Odah v. United States*, 611 F.3d 8, 16–17 (D.C. Cir. 2010) (denying a detainee’s habeas petition because he received a small amount of military training at a Taliban training camp); *Barhoumi v. Obama*, 609 F.3d 416, 418, 425, 427 (D.C. Cir. 2010) (denying habeas corpus to a petitioner, who allegedly trained at an al-Qaeda camp to assist the Chechen army against the Russians, in part because he later traveled and associated with those linked to al-Qaeda); *Awad v. Obama*, 608 F.3d 1, 9, 11 (D.C. Cir. 2010) (denying habeas corpus to a petitioner with no weapons training or association to al-Qaeda because he entered an existing al-Qaeda barricade and battled alongside other al-Qaeda fighters); *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (denying habeas corpus to an al-Qaeda cook found with a brigade-issued weapon); *infra* Part III.

<sup>24</sup> *See* Press Release, Dep’t of Justice, *supra* note 8; Amanda Rugerri, *President Obama’s First Day: Reversing Key Bush Policies on Detainees, Information Access*, U.S. NEWS & WORLD REPORT (Jan. 22, 2009), <http://politics.usnews.com/news/obama/articles/2009/01/22/president-obamas-first-day-reversing-key-bush-policies-on-detainees-information-access.html>.

<sup>25</sup> *See* Press Release, Dep’t of Justice, *supra* note 8.

<sup>26</sup> *See Boumediene III*, 579 F. Supp. 2d at 198; Press Release, Dep’t of Justice, *supra* note 8.

<sup>27</sup> *See Bensayah*, 610 F.3d at 722.

<sup>28</sup> *See id.* at 720, 727.

vided minimal support to al-Qaeda.<sup>29</sup> The analysis regarding who may be considered “part of” al-Qaeda has remained stagnant since *Boumediene II*, with courts continuing to employ a case-by-case method using a “functional rather than formal approach” to determine a detainee’s relationship to al-Qaeda.<sup>30</sup> Under this functional approach, a court looks not only to an individual’s involvement in al-Qaeda’s “command structure,” but also to other unnamed indicia that may be present in the facts of a particular case.<sup>31</sup>

The case-by-case methodology used to determine whether a detainee is “part of” al-Qaeda indicates that the courts are not concerned with the possibility of providing insufficient legal protection to these individuals.<sup>32</sup> The Supreme Court often uses broad, overprotective, bright-line rules when the enforcement of an individual’s constitutional rights is paramount.<sup>33</sup> A case-by-case method of analysis does not provide enough protection to individuals because of the subjectivity of

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<sup>29</sup> See Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1209–10, 1209 n.194 (“[T]he government applied a much broader definition of enemy combatants [through the CSRTs] than the Supreme Court approved in *Hamdi*.”); Press Release, Dep’t of Justice, *supra* note 8.

<sup>30</sup> See *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); see, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (stating that the court’s approach is “more functional than formal, as there are no settled criteria for determining who is a ‘part of’ an organization such as al Qaeda”); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 54 n.7 (D.D.C. 2009) (employing a case-by-case analysis). One of the difficulties with the case-by-case analysis is that “it is impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al Qaeda.” *Bensayah*, 610 F.3d at 725.

<sup>31</sup> See *Bensayah*, 610 F.3d at 725. As the D.C. Circuit has declared, the fact that “an individual operates within al Qaeda’s formal command structure is surely sufficient” for the government to hold that person under the AUMF. *Id.* In less clear cases, though, alleged enemy combatants may still be “part of” al-Qaeda without falling within its command structure; and it is in this grey area that courts conduct the case-by-case analysis. See *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (using a case-by-case, fact-intensive approach to deny habeas corpus to the petitioner).

<sup>32</sup> See *Bensayah*, 610 F.3d at 725; cf. Donald Koblit, Note, “*The Public Has a Claim to Every Man’s Evidence*”: *The Defendant’s Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1239 n.127 (1978) (stating that a case-by-case analysis does not properly protect a defendant’s right to evidence); Sarah E. Snyder, Note, *Experimental or Demonstrable: Has DNA Testing Truly Emerged from the Twilight Zone? An Assessment of Washington’s Response to DNA Identification*, 31 WILLAMETTE L. REV. 201, 202 (1995) (stating that case-by-case analyses fail to protect criminal defendants from the introduction of improper evidence); Aletra P. Williams, *Insurers’ Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved*, 55 DRAKE L. REV. 541, 564 (2007) (discussing how case-by-case analyses lack certainty and hamper a litigant’s ability to adequately protect himself or herself).

<sup>33</sup> Cf. David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1349 (2005) (noting the “inadequacy of case-by-case adjudication to protect constitutional rights”).

judges, the inherent difficulty in making subtle distinctions, and the vagueness of the current standard.<sup>34</sup>

Whatever the underlying reason, the case-by-case approach creates far too much uncertainty in this critical area of law by leading to different conclusions on identical issues.<sup>35</sup> A case-by-case analysis is also generally not ideal because of the difficulty inherent in making subtle distinctions between similar cases.<sup>36</sup> Furthermore, within an individual petitioner's set of circumstances, a number of factors could sway the court depending on the amount of weight given to each piece of evi-

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<sup>34</sup> See *Gherebi*, 609 F. Supp. 2d at 71 (discussing distinctions of "minimal if not ephemeral character" and lamenting the implementation of the vague term "support" within the AUMF); cf. William B. Fisch & Robert S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. SUP. 437, 449 (1998) (stating that, in the context of criminal procedure, the subtle distinctions required in case-by-case analyses lead to many appeals and Supreme Court cases); Gans, *supra* note 33, at 1349–50 (discussing the problems inherent in a case-by-case approach to examining confessions for voluntariness). Compare *Naji Al Warafi v. Obama*, 704 F. Supp. 2d 32, 44–45 (D.D.C. 2010) (holding that a detainee may be held despite no longer posing a threat to the United States), with *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 129–30 (D.D.C. 2009) (granting habeas corpus to a petitioner because he no longer posed a threat to the United States). One well-known example of the issue of vagueness is the Supreme Court case of *Jacobellis v. Ohio*, where Justice Stewart famously tackled the issue of hard-core pornography:

[U]nder the First and Fourteenth Amendments[,] criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

378 U.S. 184, 197 (1964) (Stewart, J., concurring) (footnotes omitted).

<sup>35</sup> See *Naji Al Warafi*, 704 F. Supp. 2d at 44–45; *Al Ginco*, 626 F. Supp. 2d at 129–30. For example, on the question of whether, after some passage of time or intervening events, a detainee who was once "part of" al-Qaeda can be considered sufficiently estranged from the organization and thus granted habeas relief, Judge Leon of the district court responded in the affirmative. See *Al Ginco*, 626 F. Supp. 2d at 129. The petitioner in *Al Ginco v. Obama* had traveled to Afghanistan to take up arms against the Northern Alliance and trained with the Taliban for a number of days before they accused him of being a spy for Coalition forces. See *id.* at 127. The Taliban officials then tortured him, made him admit that he was a U.S. spy, and imprisoned him for eighteen months. See *id.* Although Judge Leon found that he was once "part of" the Taliban or al-Qaeda, the Taliban's torture and imprisonment of the petitioner effectively demonstrated that he was no longer a "part of" either of these organizations. See *id.* at 129. This opinion, however, directly conflicted with that of Judge Leon's fellow district court judge Royce C. Lamberth in *Naji Al Warafi v. Obama*, which explicitly stated that "one factor the Court will not consider is whether petitioner presently poses a threat to the national security of the United States." See 704 F. Supp. 2d at 38.

<sup>36</sup> See *Gherebi*, 609 F. Supp. 2d at 71; cf. Fisch & Kay, *supra* note 34, at 448–49 (discussing the pitfalls of a case-by case methodology, including "increas[ed] uncertainty" and heightened need for intervention from appellate courts).

dence.<sup>37</sup> The case-by-case approach also allows for differing findings in strikingly similar situations when the standard being applied is too vague.<sup>38</sup> Despite the shortcomings of a case-by-case method, courts continue to state that there are no established criteria for determining who is “part of” the Taliban or al-Qaeda.<sup>39</sup>

### III. THE FOUR INDICIA

In order to propose a potential standard for determining whether a petitioner is “part of” the Taliban or al-Qaeda, the basic facts from each of the cases decided between *Boumediene II* and the present must be analyzed.<sup>40</sup> Looking at the facts of each case, it is apparent that there are only four established indicia that a petitioner is “part of” the Taliban or al-Qaeda: (1) the individual received weapons training from the Taliban or al-Qaeda; (2) the individual possessed weapons during

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<sup>37</sup> See *Naji al Warafi*, 704 F. Supp. 2d at 42–43. For example, the petitioner in *Naji al Warafi* served primarily as a medic for Taliban forces fighting on the front lines. See *id.* at 42. The court, in holding that he was “part of” the Taliban, made a distinction between acting as a medic within the command structure of the military organization and acting as a medic on his own volition. See *id.* at 42–43. Such minute distinctions will cause confusion among courts attempting to follow precedent through application of a case-by-case method of analysis. See *id.*; *Gherebi*, 609 F. Supp. 2d at 71.

<sup>38</sup> See David Costa Levenson, *Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective*, 10 AM. BANKR. INST. L. REV. 291, 310 (2002) (criticizing a case-by-case method of analysis as “being unpredictable, vague and open-ended”); see also *Gherebi*, 609 F. Supp. 2d at 70–71 (noting that the court will adhere to its interpretation of the government’s revised standard for detention on a case-by-case basis); Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L. J. 131, 144–45 (2006) (noting that one vague standard may be applied in many different ways depending on the judge who hears the case and the court where that judge is sitting).

<sup>39</sup> See *Naji al Warafi*, 704 F. Supp. 2d at 37–38. It is sufficient but not necessary for a person to be within the command structure of the Taliban or al-Qaeda because there are other ways of showing that an individual is “part of” these organizations. See *Awad*, 608 F.3d at 11.

<sup>40</sup> See generally *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (granting habeas corpus to a petitioner accused of facilitating travel for Taliban or al-Qaeda members because of the absence of direct evidence linking him to those organizations); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (finding petitioner to be “part of” al-Qaeda because he trained with organizations and traveled with individuals associated with al-Qaeda); *Naji al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (finding the petitioner to be “part of” the Taliban because, though he was a medic, he also received weapons training from the Taliban at the front lines); *Boumediene v. Bush (Boumediene III)*, 579 F. Supp. 2d 191 (D.D.C. 2008), *rev’d sub nom.* *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (granting habeas corpus to five petitioners because they did not support and were not “part of” the Taliban or al-Qaeda). Whereas the government no longer relies on the “support” justification, proving Guantanamo detainees are “part of” the Taliban or al-Qaeda has become the crux of the Department of Justice’s attempts to continue holding them. See Press Release, Dep’t of Justice, *supra* note 8.

the relevant period of time; (3) the individual traveled or associated with members of the Taliban or al-Qaeda; or (4) the individual was intentionally present alongside members of the Taliban or al-Qaeda in battle or at the front lines.<sup>41</sup>

#### A. Weapons Training

The receipt of weapons training from military camps operated by the Taliban, al-Qaeda, or their affiliates weighs heavily in courts' determinations that individuals are "part of" such organizations.<sup>42</sup> For example, in *Al Odah v. United States*, the court made special note that the petitioner had attended a Taliban-run military training camp for a single day to practice target shooting with a Kalashnikov AK-47 machine gun.<sup>43</sup> The court disregarded the petitioner's defense that he was merely following the orders of a civilian official in a foreign country.<sup>44</sup> Other courts have also followed the maxim that military training in any capacity is indicative of being "part of" the Taliban or al-Qaeda.<sup>45</sup> To date, all

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<sup>41</sup> See *Al Odah v. United States*, 611 F.3d 8, 16–17 (D.C. Cir. 2010) (denying a detainee's habeas petition because he received military training at a Taliban training camp); *Barhoumi*, 609 F.3d at 418, 425, 427 (denying habeas corpus to a petitioner in part because he traveled and associated with those linked to al-Qaeda); *Awad v. Obama*, 608 F.3d 1, 9, 11 (D.C. Cir. 2010) (denying habeas corpus to a petitioner solely because he entered an existing al-Qaeda barricade and battled alongside other al-Qaeda fighters); *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (denying habeas corpus to an al-Qaeda cook found with a brigade-issued weapon); *supra* Part II. With the recent decision in *Bensayah* supplying an outer boundary for this standard, at least one of the four indicia must be present to find a petitioner is "part of" the Taliban or al-Qaeda under the AUMF. See 610 F.3d at 727 (granting habeas corpus to the petitioner when none of the four indicia were found); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (finding that the AUMF grants the President the power to detain "individuals legitimately determined to be Taliban combatants").

<sup>42</sup> See *Al Odah*, 611 F.3d at 10; *Barhoumi*, 609 F.3d at 418; *Naji al Warafi*, 704 F. Supp. 2d at 36; *Anam v. Obama*, 696 F. Supp. 2d 1, 12 (D.D.C. 2010). The case law in this area indicates that courts are willing to consider even a small amount of military training as sufficient to deny a habeas corpus petition. See *Al Odah*, 611 F.3d at 16–17.

<sup>43</sup> *Al Odah*, 611 F.3d at 10.

<sup>44</sup> See *id.* at 15–16.

<sup>45</sup> See *Barhoumi*, 609 F.3d at 427; *Naji al Warafi*, 704 F. Supp. 2d at 42, 44; *Anam*, 696 F. Supp. 2d at 12–13, 16. In *Naji al Warafi*, the court found it irrelevant that a petitioner, who was a medic for Taliban forces on the front line, trained on an AK-47 but did not engage in any active combat. See 704 F. Supp. 2d at 36. Although the courts have said that a cleric or doctor who gives support to Taliban or al-Qaeda fighters will not be considered "part of" those organizations, this doctrine is limited to those who act in no other capacity. See *id.* at 44; *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009). Those who act both as a medic or cleric and as a fighter will be subject to detention under the AUMF. See *Naji al Warafi*, 704 F. Supp. 2d at 41–42. Thus, despite minimal contact with weapons, the court in *Naji al Warafi* still weighed the medic's weapons training heavily in its consideration, ultimately finding the petitioner was "part of" the Taliban. See *id.* at 42, 44.

petitioners with weapons training have been denied writs of habeas corpus.<sup>46</sup>

### B. Weapons Possession

In addition to weapons training, the courts have placed particular emphasis on the fact of a petitioner’s carrying weapons during the time he was allegedly “part of” the Taliban or al-Qaeda.<sup>47</sup> For example, the petitioner in *Al-Bihani v. Obama* was a cook for Taliban-associated forces on the front lines.<sup>48</sup> The Court implied that merely acting as support for the troops might not have been enough to warrant continued detention under the AUMF, but the fact that the petitioner was found with a brigade-issued weapon when he was captured furthered the inference that he was in fact “part of” that brigade and, by association, the Taliban.<sup>49</sup> A court may also find that the mere possession of a weapon, in the presence of other indicia, indicates that a petitioner is “part of” the Taliban or al-Qaeda.<sup>50</sup>

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<sup>46</sup> See *Barhoumi*, 609 F.3d at 418; *Naji al Warafi*, 704 F. Supp. 2d at 42, 44; *Anam*, 696 F. Supp. 2d at 12. The one factor that may operate to negate this general rule is temporal disassociation. See *Naji Al Warafi*, 704 F. Supp. 2d at 38; *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009); *supra* note 35. If an individual was once “part of” the Taliban or al-Qaeda, his detention may no longer be necessary if subsequent events and the passage of time clearly demonstrate his dissociation from the group. See *Naji Al Warafi*, 704 F. Supp. 2d at 38; *Al Ginco*, 626 F. Supp. 2d at 129; *supra* note 35.

<sup>47</sup> See *Al Odah*, 611 F.3d at 11; *Al-Bihani*, 590 F.3d at 869.

<sup>48</sup> *Al-Bihani*, 590 F.3d at 869.

<sup>49</sup> See *id.* at 872–73. Courts are reluctant to use the term “support” to describe the petitioner’s job with the military brigade. See Press Release, Dep’t of Justice, *supra* note 8. This reluctance is rooted in the difficulty proving cases using the Obama administration’s “substantial support” terminology and is largely why so many cases have instead focused on whether a petitioner is “part of” the Taliban or al-Qaeda. See *id.* See generally *Bensayah*, 610 F.3d 718 (granting petitioner habeas corpus after finding that he was not “part of” the Taliban or al-Qaeda despite the government’s earlier justification that he supported those organizations); *Barhoumi*, 609 F.3d 416 (finding petitioner to be “part of” al-Qaeda); *Naji al Warafi*, 704 F. Supp. 2d 32 (finding petitioner to be “part of” the Taliban).

<sup>50</sup> See *Al Odah*, 611 F.3d at 10–11. In *Al Odah*, the petitioner was given a Kalashnikov AK-47 machine gun and told to travel through the White Mountains in the Tora Bora region with a large group of men. See *id.* at 11. Some of the men were armed while they were attacked by U.S. warplanes, and this implicated at least two of the other indicia—travel or association with members of the Taliban or al-Qaeda and intentional presence alongside members of the Taliban or al-Qaeda in battle or at the front lines. See *id.*; see also *Barhoumi*, 609 F.3d at 418, 425, 427 (denying habeas corpus to a petitioner in part because he traveled and associated with those linked to al-Qaeda); *Awad*, 608 F.3d at 9, 11 (denying habeas corpus to a petitioner solely because he entered an existing al-Qaeda barricade and battled alongside other al-Qaeda fighters); *infra* Part III.C & D. Despite these potentially more substantial connections to the Taliban, the court placed heavy emphasis on the fact that the petitioner himself was armed during this time. See *Al Odah*, 611 F.3d at 15–16.

C. *Travel or Association with Members of the Taliban or al-Qaeda*

Another main indication that an individual is “part of” the Taliban or al-Qaeda is his travel with other members of those organizations.<sup>51</sup> A number of cases since *Boumediene II* have regarded as incriminating a detainee’s travel and association with members of the Taliban or al-Qaeda; all of these cases coupled this associational inquiry with analysis of the other three indicia described in this Comment.<sup>52</sup> The D.C. Circuit Court of Appeals has made it clear, though, that not every individual who associates with a member of a terrorist organization may be included, ipso facto, among that organization’s members.<sup>53</sup> This distinction shows that travel or association is important in determining whether an individual is “part of” the Taliban or al-Qaeda but should not be given as much weight as the other three indicia.<sup>54</sup>

Despite understanding that association with members of a group does not equate to membership in that group, courts have not granted habeas petitions for individuals who acted both within and outside the protected sphere carved out of the travel and association doctrine.<sup>55</sup> For example, the petitioner in *Naji al Warafi v. Obama* assisted the Taliban as a medic—one of the protected associational activities that does not automatically prove group membership.<sup>56</sup> The court nevertheless denied the petitioner a writ of habeas corpus because he also received weapons training and carried a weapon—conduct outside the sphere of activities excepted from the travel and association doctrine.<sup>57</sup>

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<sup>51</sup> See *Al Odah*, 611 F.3d at 11.

<sup>52</sup> See *id.* at 10–11; *Barhoumi*, 609 F.3d at 418–19; *Al-Bihani*, 590 F.3d at 869; *Naji al Warafi*, 704 F. Supp. 2d at 37; *Anam*, 696 F. Supp. 2d at 12–14; *supra* Part III.A & B; *infra* Part III.D. Therefore, the limits are not clear as to what extent mere travel or association with members of a terrorist organization would implicate one as “part of” that group. See *Gherebi*, 609 F. Supp. 2d at 68.

<sup>53</sup> See *Gherebi*, 609 F. Supp. 2d at 68. The court in *Gherebi v. Obama* carved out a protected sphere from the travel and association doctrine by stating that an individual “tasked with housing, feeding, or transporting al-Qaeda fighters could be detained . . . notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained . . .” *Id.* at 69.

<sup>54</sup> See *id.*; *supra* Part III.A & B; *infra* Part III.D.

<sup>55</sup> See *Naji al Warafi*, 704 F. Supp. 2d at 41.

<sup>56</sup> See *id.* at 40–41; *Gherebi*, 609 F. Supp. 2d at 69.

<sup>57</sup> See *Naji al Warafi*, 704 F. Supp. 2d at 43, 45; see also *Al Odah*, 611 F.3d at 16–17 (denying a detainee’s habeas petition because he received a small amount of military training at a Taliban training camp); *Al-Bihani*, 590 F.3d at 872–73 (denying habeas corpus to an al-Qaeda cook found with a brigade-issued weapon); *supra* Part III.A & B. When the petitioner’s Taliban brigade negotiated a surrender guaranteeing safe passage for the fighters, he was commanded to travel alongside other Taliban members and was later intercepted

Courts have also used travel or association with Taliban or al-Qaeda members as a means of justifying detention when the other indicia provide less support.<sup>58</sup> For example, the petitioner in *Barhoumi v. Obama* claimed to have traveled to Afghanistan to receive weapons training with the express purpose of helping the Chechens fight against the Russians.<sup>59</sup> The court indicated that additional evidence, aside from the petitioner’s receipt of training at a camp associated with al-Qaeda, was necessary to show he was “part of” that organization.<sup>60</sup> The petitioner’s capture by Pakistani police officers in a guesthouse alongside Zubaydah, a known training camp leader who had ties to al-Qaeda, however, was sufficient to implicate him as “part of” al-Qaeda.<sup>61</sup> The court thus used the petitioner’s subsequent travel and association activities to strengthen its rationale for denying the petition for habeas corpus.<sup>62</sup>

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and captured by the Northern Alliance. *See Naji al Warafi*, 704 F. Supp. 2d at 43. It is unclear, however, if the court would have granted a writ of habeas corpus in the absence of weapons training or weapon possession and merely because he traveled under orders with other Taliban members as a medic. *See id.* at 44 (listing a number of factors that indicate petitioner was “part of” the Taliban).

<sup>58</sup> *See Barhoumi*, 609 F.3d at 424–25 (relying in part upon the petitioner’s travel and association with known al-Qaeda associates to find him to be “part of” that organization).

<sup>59</sup> *Id.* at 418.

<sup>60</sup> *See id.* at 425, 427. Normally, such training would be sufficient to find a petitioner was “part of” the Taliban or al-Qaeda but, because the camp in which the *Barhoumi* petitioner received training was not directly affiliated with the Taliban or al-Qaeda, it is at least plausible he really did intend to assist the Chechens against the Russians, which would put him outside the purview of the President’s power to detain under the AUMF. *See AUMF*, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note (2006)); *Barhoumi*, 609 F.3d at 418, 425; *supra* Part III.A.

<sup>61</sup> *See Barhoumi*, 609 F.3d at 419, 427. The court directly rejected the petitioner’s guilt-by-association defense, holding that his association with Zubaydah after completing his training was enough to show he had an active role within an organization associated with al-Qaeda. *See id.* at 424, 427.

<sup>62</sup> *See id.* at 427, 432. The United States District Court for the D.C. Circuit also applied this reasoning in *Anam v. Obama*, where the petitioner trained at an al-Qaeda facility and subsequently lived in an apartment for a year in close proximity to al-Qaeda members. *See* 696 F. Supp. 2d at 12–13. The petitioner met with Usama bin Laden and lived in close proximity to other high-level al-Qaeda officials. *See id.* at 13. The court rejected the petitioner’s defense that his life would be in danger if he ceased his association with the al-Qaeda members because, at one point in his trip, he attempted to leave for Yemen and was only thwarted because the Iranian border patrol turned him around. *See id.* at 14. Although some courts will accept a petitioner’s defense that he no longer wishes to be part of al-Qaeda, the court in *Anam* found the petitioner’s ample opportunity to leave his comrades dispositive of the issue. *See id.* at 15–16; *Al Ginco*, 626 F. Supp. 2d at 129.

D. *Intentional Presence Alongside Members of the Taliban or al-Qaeda in Battle or at the Front Lines*

Of the four indicia, courts find most compelling a petitioner's intentional presence alongside members of the Taliban or al-Qaeda in battle or at the front lines.<sup>63</sup> Indeed, because intentional presence in battle or at the front lines is so highly indicative of an individual being "part of" the Taliban or al-Qaeda, such presence lessens the importance of the other three indicia.<sup>64</sup> This principle is supported by the holding in *Awad v. Obama*, a case in which, despite the lack of evidence that the petitioner received weapons training or had previous association with al-Qaeda, the court found he was part of the organization because he entered an existing al-Qaeda barricade and battled alongside other al-Qaeda fighters.<sup>65</sup> The petitioner's intentional presence alongside al-Qaeda fighters in battle was sufficient to convince the court that a writ of habeas corpus would be inappropriate.<sup>66</sup>

#### IV. THE BALANCING TEST

From these four indicia, which are common to all petitions for habeas corpus from Guantanamo detainees, it is possible to develop a test to avoid the deficiencies of a case-by-case analysis.<sup>67</sup> The threshold determination a court must make before applying this test is whether the petitioner was part of a formal command structure.<sup>68</sup> If a detainee

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<sup>63</sup> See *Awad*, 608 F.3d at 9; *Anam*, 696 F. Supp. 2d at 14.

<sup>64</sup> See *Awad*, 608 F.3d at 9 (discussing how the petitioner's intent to fight against the United States and allied forces and his effectuation of that intent made him "part of" al-Qaeda); *Anam*, 696 F. Supp. 2d at 14 (noting that the "most inflammatory" piece of evidence against the petitioner was his intentional engagement in a two-and-a-half-hour fire-fight against Pakistani authorities alongside individuals associated with al-Qaeda); *supra* Part III.A–C. As discussed in Part III.C, intentional presence at the front lines or during battle may be excusable if the petitioner was acting only as a cleric or medic. See *Gherebi*, 609 F. Supp. 2d at 69; *supra* note 53.

<sup>65</sup> See *Awad*, 608 F.3d at 7–9, 11. During the period of the two-month siege on the al-Qaeda fighters' barricaded wing of the hospital, the other al-Qaeda fighters surrendered the petitioner because he was in desperate need of medical treatment after having his right leg amputated. See *id.* at 4–5.

<sup>66</sup> See *id.* at 11–12. A finding that an individual is a "part of" the Taliban or al-Qaeda also applies to those who were intentionally present at the front lines even if they were not engaged in battle. See *Al-Bihani*, 590 F.3d at 869, 873–74.

<sup>67</sup> See *Al Odah v. United States*, 611 F.3d 8, 16–17 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 418, 425, 427 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 9, 11 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010); *Fisch & Kay, supra* note 34, at 448–49; *Gans, supra* note 33, at 1350; *Williams, supra* note 32, at 564; *supra* Parts II & III.

<sup>68</sup> See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009).

is found to be within the command structure of the Taliban or al-Qaeda, then the analysis ends and the petition for a writ of habeas corpus must be denied.<sup>69</sup>

If the petitioner is not within the command structure, however, then a court should analyze the four indicia—weapons training, weapons possession, travel or association with members of the Taliban or al-Qaeda, and intentional presence alongside members of the Taliban or al-Qaeda in battle or at the front lines—to determine who is “part of” the Taliban or al-Qaeda.<sup>70</sup> Because not all the indicia may be present in each petitioner’s case, a balancing test is the appropriate mechanism to determine if a petitioner is “part of” the Taliban or al-Qaeda.<sup>71</sup> The presence or absence of each indicium would allow a court to make a tailored factual determination without succumbing to some of the problems inherent in a case-by-case analysis.<sup>72</sup>

In this balancing test, *Bensayah* acts as an outer boundary for determining who is “part of” the Taliban or al-Qaeda because the court ordered the petitioner’s release without delving into the issue of temporal disassociation from the Taliban or al-Qaeda.<sup>73</sup> Although the decision in *Al Ginco v. Obama* is significant because the court granted the petitioner’s writ of habeas corpus, it did so on temporal disassociation grounds.<sup>74</sup> *Bensayah*, in contrast, was the first in this line of cases to grant a habeas petition after scrutinizing the activities that led to the

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<sup>69</sup> See *id.*

<sup>70</sup> See *Awad*, 608 F.3d at 9; *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Barhoumi*, 609 F.3d at 418,417; *Naji al Warafi v. Obama*, 704 F. Supp. 2d 32, 37 (D.D.C. 2010); *Boumediene v. Bush (Boumediene III)*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008), *rev’d sub nom.* *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); *supra* Part III.

<sup>71</sup> See, e.g., *Awad*, 608 F.3d at 11 (finding evidence of intentional presence alongside al-Qaeda members in battle sufficient to implicate the petitioner as “part of” al-Qaeda).

<sup>72</sup> See *supra* Part II; cf. *Fisch & Kay*, *supra* note 34, at 448–49 (discussing the problems created by a case-by-case approach to adjudicating claims of infringement of suspects’ rights); *Gans*, *supra* note 33, at 1349–50 (discussing the problems inherent in a case-by-case approach to examining confessions for voluntariness); *Williams*, *supra* note 32, at 564 (discussing how case-by-case methods of analysis lack certainty and hamper litigants’ ability to protect themselves adequately). There is, however, still uncertainty in the temporal nature of being “part of” the Taliban or al-Qaeda that cannot be cured by implementing a balancing test. See *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009).

<sup>73</sup> See *Bensayah*, 610 F.3d at 727; see also *Naji Al Warafi*, 704 F. Supp. 2d at 44–45 (allowing for continued detention despite the court’s determination that the petitioner no longer poses a threat to the United States); *Al Ginco*, 626 F. Supp. 2d at 129–30 (granting habeas corpus to a petitioner who, though once “part of” the Taliban, was deemed no longer a threat due to subsequent torture and imprisonment).

<sup>74</sup> See *Al Ginco*, 626 F. Supp. 2d at 129–30.

petitioner's detention.<sup>75</sup> Because the court in *Bensayah* granted the petitioner's writ of habeas corpus in the absence of each of the four indicia, thereby indicating their importance in determining that a detainee is "part of" the Taliban or al-Qaeda, the case allows for the implementation of a balancing test and acts as an outer boundary in that test.<sup>76</sup> More importantly, if such a balancing test were applied to *Bensayah* as well as previous cases, it would tend toward the same outcomes while allowing courts to draw on a body of case law and engage in a more principled mode of analysis than the case-by-case method.<sup>77</sup>

#### CONCLUSION

The practice of using a case-by-case approach to determining whether detainees are "part of" the Taliban or al-Qaeda is no longer necessary because there is sufficient case law from which to derive a balancing test. The reasoning employed in all cases after *Boumediene II* establishes four indicia as to whether a detainee rightfully may be considered "part of" the Taliban or al-Qaeda—weapons training, weapons possession, travel or association with members of the Taliban or al-Qaeda, and intentional presence alongside members of the Taliban or al-Qaeda in battle or at the front lines. In the balancing test, the court would first assess whether the petitioner acted within the command structure of the organization and, if so, deny the petition for habeas

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<sup>75</sup> See *Bensayah*, 610 F.3d at 727. The facts of *Bensayah* establish that the petitioner entered Bosnia from his home in Algeria using a falsified passport to escape persecution. *Id.* at 720, 727. He was tried before the Bosnian courts for the alleged bombing of a U.S. embassy in Sarajevo and was ordered released. *Boumediene III*, 579 F. Supp. 2d at 193–94. Despite the order for release, the petitioner was turned over to Bosnian and U.S. authorities and sent to Guantanamo Bay for detention. *Id.* In response to the petitioner's ultimate petition for a writ of habeas corpus, the government could not prove the petitioner was within the command structure of the Taliban or al-Qaeda or that he traveled or associated with members of the Taliban or al-Qaeda. *Bensayah*, 610 F.3d at 718. Nor did the government contend that he received any sort of military training, carried a weapon, or had any intentional presence in battle or at the front lines. *Id.* at 721 (noting the government based its case that petitioner was "part of" al-Qaeda on classified documents, which allegedly implicated the petitioner as a travel facilitator for al-Qaeda).

<sup>76</sup> See *Bensayah*, 610 F.3d at 727; *supra* Part III. Applying the balancing test to the facts of *Bensayah*, the petition for a writ of habeas corpus would be granted—the same outcome reached using the case-by-case analysis. See 610 F.3d at 727.

<sup>77</sup> See *Bensayah*, 610 F.3d at 727; see, e.g., *Al Odah*, 611 F.3d at 16–17 (denying a detainee's habeas petition in part because he received a small amount of military training at a Taliban training camp); *Barhoumi*, 609 F.3d at 427 (determining the petitioner to be "part of" al-Qaeda because he trained and then traveled with individuals linked to al-Qaeda); *Awad*, 608 F.3d at 11 (finding evidence of intentional presence alongside al-Qaeda members in battle sufficient to implicate the petitioner as "part of" al-Qaeda).

corpus. If the petitioner did not act within the command structure of the organization, then the court would analyze and balance the four indicia to establish whether a writ of habeas corpus is warranted. *Bensayah* would act as the outer boundary of the test such that the absence of all four indicia would demonstrate the propriety of habeas relief. Such a balancing test is a far more principled mechanism for determining whether an individual may be detained as "part of" the Taliban or al-Qaeda under the AUMF, and it would allow for greater consistency and expediency in deciding these very difficult cases.

