No. 10-7814

IN THE SUPREME COURT OF THE UNITED STATES

GHALEB NASSAR AL-BIHANI, PETITIONER

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly rejected petitioner's argument that he must be released from military custody because the conflict in Afghanistan in which he was captured has ended.

2. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, permits the military detention of an individual who served in a combat unit that fought alongside the Taliban while it was harboring al-Qaida and fighting against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 590 F.3d 866. Opinions concurring in the denial of rehearing (Pet. App. B1-B54) are reported at 619 F.3d 1. The unclassified version of the opinion of the district court (Pet. App. C1-C10) is reported at 594 F. Supp. 2d 35.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2010. A petition for rehearing was denied on August 31, 2010 (Pet. App. B1). The petition for a writ of certiorari was filed on

November 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. A1-A21.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * 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." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those conflicts, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in Boumediene v. Bush, 553 U.S.

723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After Boumediene, the government filed a factual return to the habeas petition, and petitioner filed a traverse. The district court then held a hearing. Pet. App. C3-C5.

3. The district court denied the petition. Pet. App. C1-C10. The court found that petitioner, a citizen of Yemen and a native of Saudi Arabia, traveled to Afghanistan in May 2001 to fight in support of the Taliban against the Northern Alliance. Id. at C2. Petitioner joined a paramilitary unit, the 55th Arab Brigade, that engaged in combat against the Northern Alliance. Id. at C2-C3. In November 2001, petitioner retreated with his unit, which eventually surrendered to the Northern Alliance. Id. at C3. Petitioner was transferred to United States forces in June 2002. Ibid.

In evaluating the petition, the district court focused on three categories of evidence. First, based on "certain statements of the petitioner that the Court [found] credible and certain classified documents that help establish the most likely explanation for, and significance of, petitioner's conduct," the court determined that petitioner had stayed at "al Qaeda affiliated guesthouses in Afghanistan." Pet. App. C6-C7.

Second, the district court considered the government's allegations that petitioner attended two al-Qaida training camps.

The court noted that petitioner had "consistently acknowledged in numerous interrogation sessions that he had attended" those camps "as a part of his preparation to join the 55th Arab Brigade," and that he had "described in significant detail the training regimen[], method of instruction, and instructors at these camps." Pet. App. C7. In a statement in June 2006, however, petitioner denied ever receiving military-style training. Ibid. Later, he reversed course and again admitted attending the camps. Ibid. Although the court noted that it could credit, "as a matter of common sense, [petitioner's] longstanding and consistent admission," it saw no need to do so "in light of the overwhelming and consistent testimony of the petitioner in support of the Government's third allegation." Id. at C8.

Third, the district court concluded that "petitioner, as a member of the 55th Arab Brigade fighting unit, 'supported' the Taliban in its fight against the Northern Alliance both prior to and after the initiation of force by the U.S. in October 2001." Pet. App. C8. Petitioner contended that his service in that unit "was limited to serving as a cook," but the district court rejected the suggestion that petitioner was therefore not detainable. Ibid. Emphasizing that petitioner retreated "in response to an order from his commander," that he did so "with Taliban forces, in Taliban trucks, and armed with his Taliban-issued Kalashnikov rifle," and that he went "to a designated guesthouse where the unit went to

regroup in preparation for its next mission," the court concluded that "faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient 'support'" to make petitioner subject to detention. Id. at C8-C9.

4. The court of appeals affirmed. Pet. App. A1-A21.

a. The court of appeals began by stating "that the war powers granted by the AUMF and other statutes are [not] limited by the international laws of war." Pet. App. A7. The court expressed the view that, "while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers." Id. at A8 (citation omitted).

The court of appeals then held that petitioner's activities were sufficient to justify his detention under "the text of [the] relevant statutes and controlling domestic caselaw." Pet. App. A8. The court noted that "Al Qaeda members participated in the command structure of the 55th Arab Brigade, making the brigade an Al Qaeda-affiliated outfit," and that "the 55th fought alongside the Taliban while the Taliban was harboring Al Qaeda." Id. at A9. The court then concluded that petitioner's "connections with the 55th therefore render him detainable," noting petitioner's actions in

"accompanying the brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and retreating and surrendering under brigade orders." Id. at A9.

The court of appeals rejected petitioner's argument that he must be released because the conflict in which he was captured -- an "international" conflict between the United States and the Government of Afghanistan -- has now ended. Pet. App. A10. The court observed that tens of thousands of American troops are still serving in Afghanistan, and it explained that accepting petitioner's argument "would trigger an obligation to release Taliban fighters captured in earlier clashes," meaning that "the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs." Ibid. Observing that "the laws of war upon which [petitioner] relies do not draw such fine distinctions," the court recognized that the Geneva Conventions "codify what common sense tells us must be true: release is only required when the fighting stops." Ibid. In any event, the court concluded, "[t]he determination of when hostilities have ceased is a political decision" calling for deference "to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration." Ibid.

b. Judge Brown filed a concurring opinion in which she suggested that Congress should consider prescribing standards to govern Guantanamo habeas proceedings. Pet. App. A17-A18.

c. Judge Williams concurred in part and concurred in the judgment. Pet. App. A18-A21. He believed that petitioner's detention was "legally permissible by virtue of facts that he himself has conceded," id. at A18, and he concluded that it was unnecessary to consider the extent to which the war powers granted under the AUMF are limited by the laws of war, id. at A20.

5. Petitioner filed a petition for rehearing en banc, and the court of appeals denied the petition. Pet. App. B1. Joined by six other members of the court, Judge Sentelle filed a concurring opinion in which he stated: "We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits." Ibid. Judges Brown, Kavanaugh, and Williams also filed separate concurring statements. Id. at B1-B8, B8-B51, B51-54.

ARGUMENT

Petitioner renews his contentions (Pet. 18-24) that his detention is unlawful because the conflict in which he was captured has ended and (Pet. 24-29) that his membership in the 55th Arab Brigade, a paramilitary unit that fought alongside the Taliban and al-Qaida and against the United States, is insufficient to make him detainable under the AUMF. The court of appeals correctly rejected petitioner's contentions, and the court's resolution of those

issues does not conflict with any decision of this Court or any other court of appeals. Petitioner also argues (Pet. 7-17) that the court of appeals erred in stating that the international law of war does not affect the interpretation of the Executive's detention authority. Although the court of appeals misunderstood the appropriate role of international law in construing the AUMF, a majority of the en banc court recognized that the panel's discussion of that issue was unnecessary to the disposition of this case. Further review is not warranted.

1. Petitioner asserts (Pet. 18-24) that his detention is unlawful because the conflict in which he was captured has ended. According to petitioner, he was captured as part of an "international" conflict between the United States and the Government of Afghanistan (then controlled by the Taliban), but the ongoing conflict against the Taliban is a new conflict, independent of the previous hostilities, and he therefore can no longer be detained. As the court of appeals correctly recognized, that argument lacks merit. Pet. App. A10-A11.

Petitioner contends (Pet. 7-18) that the court of appeals incorrectly ignored the laws of war when it rejected his argument. In fact, the court expressly recognized that its judgment was consistent with the laws of war, explaining that the Geneva Conventions "codify what common sense tell us must be true: release is only required when the fighting stops." Pet. App. A10.

That holding is consistent with this Court's decision in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), in which the plurality noted that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." Id. at 520; see Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, Article 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.") (emphasis added). The Hamdi plurality held, based on its understanding of "longstanding law-of-war principles," that "Congress' grant of authority for the use of 'necessary and appropriate force'" should be construed "to include the authority to detain for the duration of the relevant conflict." Hamdi, 542 U.S. at 521.

Here, as the court of appeals recognized, "active hostilities" are still ongoing. Pet. App. A10. Substantial numbers of United States combat troops remain in Afghanistan, engaged in combat operations against both the Taliban and al-Qaida. As of December 15, 2010, the total number of U.S. forces in Afghanistan was approximately 97,500. Letter from the President to the Speaker of the House, Dec. 15, 2010, http://www.whitehouse.gov/the-press-office/2010/12/15/letter-president-regarding-consolidated-war-powers-report (Afghanistan Letter). Those forces "are actively

pursuing and engaging al-Qa'ida and Taliban fighters in Afghanistan." Ibid.

Petitioner's argument to the contrary (Pet. 18-19) depends upon a distinction -- between an international conflict between two nations and a non-international conflict -- that sheds no light on whether the conflict has ended such that captured detainees must be released. The authority to detain petitioner does not depend on how the conflict is defined at any given time; it rests upon whether hostilities in that conflict have ceased. A conflict can change from an international one to a counter-insurgency -- and back again -- without a cessation of active hostilities between the relevant parties, and complex modern conflicts often contain both international and non-international elements. Petitioner's definition of the "particular conflict" ignores common sense and finds no support in the law.

Petitioner emphasizes (Pet. 18) that the Hamdi plurality used the phrase "particular conflict," 542 U.S. at 518, but he ignores the plurality's identification of the relevant conflict: "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan," id. at 521. The plurality made clear that, consistent with its reading of the Geneva Conventions, "[i]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are

authorized by the AUMF." Ibid. As the court of appeals explained, that is precisely the situation here.

In any event, petitioner's claim fails for a further reason: as the court of appeals correctly held, Pet. App. A10-A11, the question whether hostilities have ended is one for the political Branches and not the courts. In Ludecke v. Watkins, 335 U.S. 160 (1948), this Court held that the President retained the war power to deport enemy aliens notwithstanding the surrender of Germany in World War II, because the President had determined that a state of war still existed. Id. at 168-170. Noting that the law does not "lag behind common sense," the Court recognized that war does not necessarily end with a cease-fire order; rather, war "may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act." Id. at 168-169. The Court explained that "[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." Id. at 169; see id. at 170 ("These are matters of political judgment for which judges have neither technical competence nor official responsibility."); The Three Friends, 166 U.S. 1, 63 (1897); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

The President recently informed Congress that "combat operations in Afghanistan against al-Qa'ida terrorists and their

Taliban supporters * * * remain ongoing." Afghanistan Letter. Under Ludecke, there is no basis for second-guessing that judgment.

2. To the extent petitioner suggests (Pet. 23-24) that the Executive's detention authority is dependent upon showing, to the satisfaction of a court, that an individual is a threat to return to the battlefield, that suggestion is incorrect. As Hamdi made clear, the AUMF permits the detention of enemy belligerents for the duration of the conflict. 542 U.S. at 518, 521 (plurality opinion). That holding is controlling here. Consistent with Hamdi, the court of appeals has recognized that whether such a detainee "would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF." Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010), petition for cert. pending, No. 10-736 (filed Nov. 30, 2010). The Third Geneva Convention supports that view, providing for the release and repatriation of detained belligerents "without delay after the cessation of active hostilities," without requiring an ongoing threat assessment during hostilities. Third Geneva Convention, Art. 118, 6 U.S.T. at 3407 (emphasis added).

Of course, the Government has no interest in holding any detainee longer than necessary. Accordingly, on January 22, 2009, the President issued an Executive Order providing for review of the appropriate disposition of Guantanamo detainees by an interagency

group of cabinet-level review participants led by the Attorney General. Exec. Order No. 13,492, 3 C.F.R. 203 (2010). The Executive Order established a rigorous process to determine appropriate dispositions for the Guantanamo detainees, including "whether it is possible to transfer or release * * * individuals [detained at Guantanamo Bay] consistent with the national security and foreign policy interests of the United States." Id. § 4(c)(2). As a result of that process, 126 detainees were approved for transfer, of whom 67 have already been transferred. The determinations, however, are not subject to judicial review, and whether the transfer or release of petitioner would be consistent with national security is a question for the Executive Branch and not the courts. Cf. Ludecke, 335 U.S. at 170.

3. Petitioner contends (Pet. 24-29) that his activities with the 55th Arab Brigade do not justify his detention under the AUMF. Although petitioner acknowledges that the AUMF authorizes the use of force against al-Qaida (which planned and carried out the September 11 attacks) and the Taliban (which harbored al-Qaida), he asserts that the 55th Arab Brigade is not covered by the AUMF because it merely aided the Taliban and did not itself harbor al-Qaida. That argument lacks merit.

As an initial matter, petitioner ignores the evidence showing not only that the 55th Arab Brigade fought alongside the Taliban while the Taliban was harboring al-Qaida and fighting the United

States, but also that the Brigade was effectively part of al-Qaida and Taliban forces and included al-Qaida commanders as part of its command structure. Pet. App. C8 ("Petitioner has * * * admitted to serving under an al Qaeda military commander."); id. at A9 (noting petitioner's concession "that the 55th was aided, or even, at times, commanded, by al-Qaeda members") (internal quotation marks omitted). Petitioner's efforts to characterize the 55th Arab Brigade as an "independent militia" (Pet. 27) that just happened to ally itself with the Taliban are unsupported by the evidence.

In any event, even if the Brigade were technically considered distinct from but allied with al-Qaida or Taliban forces, petitioner errs in suggesting that military action against (and detention of) "associated forces" goes beyond the authority granted in the AUMF. The plain text of the AUMF authorizes military action against the "organizations" and "persons" that "planned, authorized, committed, or aided" the September 11 attacks, "or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. As petitioner acknowledges, that language obviously authorizes military action against al-Qaida and the Taliban. But as Judge Williams recognized in his concurring opinion, because "[t]he 55th Brigade fought to preserve the Taliban regime in Afghanistan even as the Taliban was harboring al Qaeda in Afghanistan," the 55th Arab Brigade, itself, is "an organization

that 'harbored' al Qaeda within the meaning of the AUMF." Pet. App. A18. In other words, Congress authorized military action "aimed at removing the Taliban from the seat of government and minimizing its ongoing influence in Afghanistan, including * * * attacks on ancillary forces aiding the Taliban." Id. at A19.

Significantly, the AUMF does not limit the "organizations" it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order "to prevent any future acts of international terrorism against the United States," AUMF § 2(a), 115 Stat. 224, the AUMF gives the Executive the authority to detain individuals who, in analogous circumstances in a traditional conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency. See Hamlily v. Obama, 616 F. Supp. 2d 63, 74 (D.D.C. 2009); John P. Grant & J. Craig Barker, Encyclopaedic Dictionary of International Law 84 (2d ed. 2004) (defining co-belligerents as states "engaged in a conflict with a common enemy, whether in alliance with each other or not"); Curtis A. Bradley and Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2112-2113 (2005) ("Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, [or] systematically provide military resources to al Qaeda

* * * are analogous to co-belligerents in a traditional war."). That authority extends to the 55th Arab Brigade.[1]

4. Petitioner devotes much of his petition to challenging (Pet. 7-18) the court of appeals' statement concerning the international laws of war and the President's authority under the AUMF. Pet. App. A7-A8 (The "premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war * * * is mistaken."). The government does not agree with the court's statement. Instead, the government interprets its detention authority under the AUMF to be informed by the laws of war. See Resps.' Mem. Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litig., No. 1:08-mc-00442-TFH, Docket entry No. 1690 (D.D.C. Mar. 13, 2009). That interpretation is supported by longstanding precedent of this Court establishing that statutes generally should be construed to be consistent, rather than inconsistent, with international law. See Murray v. Schooner

[1] Because the AUMF clearly authorizes petitioner's detention, this Court need not address petitioner's contention (Pet. 27-28) that the Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2574, and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, do not expand the scope of the AUMF. While the court of appeals stated that those statutes would permit the detention of persons who "purposefully and materially supported hostilities against the United States or its coalition partners," Pet. App. A8 (internal quotation marks omitted), the court made clear that petitioner is also lawfully detained under the standard put forth by the Government, ibid. Accordingly, there is no need to consider other statutes in this case.

Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). It is also supported by Hamdi, in which the plurality emphasized that its interpretation of "Congress' grant of authority for the use of 'necessary and appropriate force'" in the AUMF was "based on longstanding law-of-war principles." 542 U.S. at 520-521.[2]

As discussed above, however (at pp. 8-10), as to the primary legal issue raised in the petition, the court of appeals specifically addressed and correctly rejected petitioner's argument under international law. Moreover, the court upheld the Executive's detention standard, which petitioner does not challenge here -- a standard that is informed by the laws of war. Pet. App. A8. And the panel recognized that petitioner is lawfully detained under that standard. Id. at A10-A11.

Accordingly, as a majority of the court of appeals noted in denying rehearing en banc, identifying the precise role of the law of war in informing the Executive's authority under the AUMF "is not necessary to the disposition of the merits" of this case. Pet. App. B1 (Sentelle, J., concurring in the denial of rehearing en banc); accord id. at A20 (Williams, J., concurring) ("[T]here is no need for the court's pronouncements, divorced from application to

[2] Of course, insofar as the application of the laws of war is unclear, or analogies to traditional international armed conflicts are inapt, a court should accord substantial deference to the political Branches in determining how the laws of war apply to this nontraditional conflict and how they inform the powers conferred by the AUMF.

any particular argument."). The issue therefore does not warrant this Court's review. See California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2011

* The Acting Solicitor General is recused in this case.