No. 11-7020

IN THE SUPREME COURT OF THE UNITED STATES

MUSA'AB OMAR AL-MADHWANI, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the courts below correctly determined that petitioner, who attended an al-Qaida training camp, traveled around Afghanistan with al-Qaida members while armed with a rifle, and was captured while hiding in Pakistan with al-Qaida members, is subject to military detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 642 F.3d 1071. The opinion of the district court (Pet. App. 103-116) is reported at 696 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2011. On August 17, 2011, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including October 24, 2011, and the petition was filed on that date. 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. 1-12.

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 that conflict, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

In Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1561 (2011), Congress "affirm[ed]" that the authority granted by the AUMF includes the authority to detain, "under the law of war," any "person who was part of or substantially supported al-Qaeda, the

Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

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 the district court has jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After Boumediene, the government filed an amended factual return to the habeas petition, and petitioner filed a traverse. Pet. App. 105.

3. Following a hearing at which petitioner testified, the district court denied the petition. Pet. App. 103-116. The court held that the government bore the burden of establishing "that it is more likely than not that [petitioner] was a 'part of' al-Qaida." Id. at 107. In determining that the government had satisfied that burden, the court relied primarily on petitioner's own statements. It gave no weight to various "interrogation reports and summaries of [petitioner's] statements" that it found to be "tainted by coercion," id. at 110, instead relying on petitioner's testimony in the habeas hearing and his statements to a military Combatant Status Review Tribunal and Administrative Review Board, which it found to be unaffected by earlier coercion, id. at 110-111.

The district court found that petitioner had "voluntarily attended an al-Qaida training camp," al-Farouq, where he "learned to use multiple firearms and received theoretical instruction on" rocket-propelled grenades. Pet. App. 114. Near the end of his training, petitioner heard Osama bin Laden speak, ibid., and on September 11, 2001, he "was told that the camp was closing because it might be bombed by United States forces," id. at 112, 114. He then "chose to follow trainers from the al-Qaida training camp around Afghanistan," and he "moved into an apartment in Karachi where members of al-Qaida lived and visited." Id. at 114-115. When Pakistani authorities came to the apartment, two of petitioner's associates, including a roommate, engaged in a two-and-a-half hour firefight in which one of them was killed. Id. at 114. The court therefore concluded that "the Government demonstrated by a preponderance of the evidence that [petitioner] was 'part of' al-Qaida." Id. at 115.

4. The court of appeals affirmed. Pet. App. 1-12. The court held that the district court's factual findings were not clearly erroneous and that the evidence was sufficient to support them. Id. at 5-10. The court of appeals explained that petitioner's attendance at an al-Qaida guesthouse and training camp "constitutes 'overwhelming' evidence that the United States had authority to detain" him. Id. at 7 (quoting Al-Adahi v. Obama, 613 F.3d 1102, 1109 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001

(2011)). The court added that petitioner's "connections to al-Qaida * * * did not stop there" because he was "guided by two 'trainers' at the camp" after September 11, 2001; carried a "rifle from the camp's armory," and traveled on "a dizzying odyssey across Afghanistan," including a trip to Kabul "just three days before the capital fell to the advancing forces of the Northern Alliance." Id. at 7-8. And it observed that the "circumstances surrounding petitioner's capture nearly one year later indicate a continuing association with al-Qaida," given that "two of his associates fought to the death rather than be taken alive." Id. at 8-9. Based on those facts, the court "conclude[d] that a preponderance of the evidence unmistakably showed petitioner was 'part of' al-Qaida when he was captured." Id. at 10.

The court of appeals also rejected petitioner's procedural challenges to the district court's consideration of his habeas petition. Petitioner argued that the district court had violated his rights under the Due Process Clause by relying on a newspaper article that was not in the record. Pet. App. 10. The court of appeals noted its precedent establishing that Guantanamo detainees "possess no constitutional due process rights." Id. at 11 (quoting Kiyemba v. Obama, 561 F.3d 509, 518 n.4 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010)). It went on to explain, however, that there was no need to "address the underlying legal basis for [petitioner's] objection" because the district court had not

"'relied' on the newspaper at all: no mention of it appears in the district court's written opinion and order." Ibid. The court of appeals added that even if petitioner had a constitutional right to due process, and even if "the district court violated it by relying on evidence outside the record," any "error would be 'harmless beyond a reasonable doubt,' given the conclusive weight of the record evidence linking [petitioner] to al-Qaida." Ibid. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)) (citation omitted).

ARGUMENT

Petitioner argues (Pet. 7-19) that the standard applied by the court of appeals in evaluating his military detention under the AUMF was overly broad and that an individual who was part of al-Qaida may not be detained unless the government makes some further showing. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Contrary to petitioner's suggestion (Pet. 19-28), this case is not an appropriate vehicle to consider the application of the Due Process Clause to aliens held at Guantanamo Bay. Further review is not warranted.

1. The lower courts have properly performed the task that this Court assigned them in Boumediene v. Bush, 553 U.S. 723 (2008) -- they have developed "procedural and substantive standards," id. at 796, for habeas proceedings for military detainees. This Court

has declined to review numerous decisions applying those standards, and there is no reason for a different result in this case.

As relevant here, the court of appeals has repeatedly held that an individual may be detained under the AUMF if he was part of al-Qaida at the time of his capture. See, e.g., Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010) ("The government may * * * hold at Guantanamo and elsewhere those individuals who are 'part of' al-Qaida, the Taliban, or associated forces."), cert. denied, 131 S. Ct. 1001 (2011); accord Al Odah v. United States, 611 F.3d 8, 10 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1812 (2011); Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); accord NDAA § 1021, 125 Stat. 1561 ("affirm[ing] the authority of the President to * * * detain" any "person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners").

The court of appeals has emphasized that the determination whether a person is part of al-Qaida should be made "on a case-by-case basis * * * using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." Salahi v. Obama, 625 F.3d 745, 751-752 (D.C. Cir. 2010) (quoting Bensayah v. Obama, 610 F.3d 718,

725 (D.C. Cir. 2010)). That test appropriately takes account of the nature of al-Qaida. In particular, many of al-Qaida's operations are carried out by terrorist cells made up of volunteers acting with significant autonomy but taking direction from al-Qaida leadership. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2109 (2005). Moreover, individuals who are part of al-Qaida often seek to hide their association. They typically do not wear uniforms or carry "official membership card[s]," and they may purposefully attempt to disguise their connection to the organization. Al-Bihani, 590 F.3d at 873; see Bradley & Goldsmith, 118 Harv. L. Rev. at 2113. Accordingly, the fact "[t]hat an individual operates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is 'part of' the organization." Bensayah, 610 F.3d at 725; accord Awad, 608 F.3d at 11. Instead, "[i]ndicia other than the receipt and execution of al Qaeda's orders may prove 'that a particular individual is sufficiently involved with the organization to be deemed part of it.'" Uthman v. Obama, 637 F.3d 400, 403 (D.C. Cir. 2011) (quoting Bensayah, 610 F.3d at 725), petition for cert. pending, No. 11-413 (filed Aug. 29, 2011). Under that functional test, proof of attending an al-Qaida training camp, staying at al-Qaida guest houses that were not open to the public, and travel and close association with other al-Qaida fighters are highly probative of

whether a detainee is properly deemed as having been part of al-Qaida. See, e.g., Al Alwi v. Obama, 653 F.3d 11, 17 (D.C. Cir. 2011), petition for cert. pending, No. 11-7700 (filed Dec. 5, 2011); Barhoumi v. Obama, 609 F.3d 416, 427 (D.C. Cir. 2011); Awad, 608 F.3d at 9-10.

Conversely, the court of appeals has correctly recognized that not everyone having some association with al-Qaida is "part of" that organization. For example, the court has held that "the purely independent conduct of a freelancer is not enough" to show that he is "part of" al-Qaida. Salahi, 625 F.3d at 752 (quoting Bensayah, 610 F.3d at 725). Similarly, "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." Awad, 608 F.3d at 9. At bottom, the inquiry is whether "a particular individual is sufficiently involved with the organization to be deemed part of it." Bensayah, 610 F.3d at 725.

2. In this case, the court of appeals engaged in a careful analysis and unanimously determined that the district court's factual findings and other uncontested evidence demonstrated that petitioner was part of al-Qaida when captured. The district court found that petitioner had stayed at an al-Qaida guesthouse and then "voluntarily received weapons training at al-Farouq," al-Qaida's flagship training camp. Pet. App. 112-113. And as the court of appeals explained, petitioner's "connections to al-Qaida * * * did not stop" when the camp closed: he was "guided by two

'trainers' at the camp"; carried a "rifle from the camp's armory"; and traveled on "a dizzying odyssey across Afghanistan," including a trip to Kabul "just three days before the capital fell to the advancing forces of the Northern Alliance." Id. at 7-8.

The district court also found that after training with al-Qaida, petitioner "voluntarily traveled and associated with al-Qaida members in Afghanistan and Pakistan." Pet. App. 114. Petitioner knew that the apartment where he stayed in Pakistan contained weapons, and the evidence showed that petitioner "associated with members of al-Qaida at the apartment," including a roommate who was killed in the firefight that occurred when petitioner was captured. Ibid. As the court of appeals explained, petitioner's "association with enemy forces at the moment of his capture constitutes further evidence that he was 'part of' al-Qaida." Id. at 9.

Petitioner does not challenge any of those factual determinations, but instead argues (Pet. 7-19) that the detention standard applied by the court of appeals was overly broad and that the facts are insufficient to show that he was part of al-Qaida. Those arguments lack merit.

a. Petitioner argues (Pet. 8) that the detention standard applied by the court of appeals improperly lacks "any requirement of intentional conduct." This case is not a proper vehicle for addressing that question because, contrary to petitioner's

suggestion (Pet. 8-9), the district court rejected, as a factual matter, petitioner's assertion that his ties to al-Qaida were involuntary or innocent. Instead, the court found that petitioner's affiliation satisfied any plausible requirement of intentional conduct. See Pet. App. 114 ("Petitioner's actions demonstrate a clear intent to be 'part of' al-Qaida.").

Moreover, contrary to petitioner's argument, the D.C. Circuit has looked to intent as a factor in its functional inquiry. See, e.g., Awad, 608 F.3d at 9 ("[I]ntention to fight is inadequate by itself to make someone 'part of' al Qaeda, but it is nonetheless compelling evidence when, as here, it accompanies additional evidence of conduct consistent with an effectuation of that intent."). Here, where petitioner attended an al-Qaida training camp and continuously associated with al-Qaida operatives, he may be lawfully detained, and no further inquiry into intent is required. See Al-Adahi, 613 F.3d at 1109; In re Territo, 156 F.2d 142, 146 (9th Cir. 1946) (rejecting the argument that habeas petitioner could not be subject to detention because his military service was involuntary). The court of appeals' approach is correct and fully consistent with precedent and established law-of-war norms.

b. Petitioner next argues (Pet. 8) that the court of appeals erred by "rejecting [a] 'command structure' analysis" under which an individual may be detained only if he was part of the "command

structure" of al-Qaida. This Court has previously denied review in a case presenting that question, and the same result is appropriate here. See Awad, 608 F.3d at 11, cert. denied, 131 S. Ct. 1814 (2011). The AUMF does not require evidence of following commands or orders, nor would it be reasonable to impose such a requirement in light of al-Qaida's hidden and frequently shifting organizational framework. See Bensayah, 610 F.3d at 725. In any event, the district court found that petitioner was in fact participating "under the command structure" of al-Qaida. Pet. App. 115. As the courts below observed, petitioner followed al-Qaida orders, including the order to carry a rifle while he moved around Afghanistan guided by al-Farouq trainers after the camp closed. See id. at 7 (petitioner was "'told' to take a rifle from the camp's armory" and carried it even though "he did not want to carry a weapon"); id. at 113 ("the trainers told Petitioner to grab a Kalashnikov rifle, and he complied"); see also id. at 7 (petitioner was "guided by" the two camp trainers).

c. Petitioner next argues (Pet. 13-14) that detention requires proof that he actually participated in battle. According to petitioner (Pet. 14), the court of appeals has erroneously focused on "guilt by association" rather than evidence of fighting. That argument lacks merit.

The AUMF 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." AUMF § 2(a), 115 Stat. 224. The President has determined that al-Qaida was responsible for those attacks and, consistent with that statutory authorization, has since pursued an armed conflict against al-Qaida. The AUMF therefore authorizes the detention of individuals who are part of al-Qaida.

Law-of-war principles properly inform the construction of the AUMF, see Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion), and thus inform the understanding of what actions are "necessary and appropriate" for the President to undertake in waging war against al-Qaida. Those principles leave no doubt that individuals who are part of an enemy force when captured may be detained, whether or not they personally engaged in hostilities. In Ex parte Quirin, 317 U.S. 1 (1942), this Court explained that individuals "who associate themselves with the military arm of the enemy government * * * are enemy belligerents within the meaning of the * * * law of war," even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." Id. at 37-38; see id. at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons."); cf. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3316,

3320, 75 U.N.T.S. 135 (contemplating detention of "[m]embers of the armed forces of a Party to the conflict, as well as militias or volunteer corps forming part of such armed forces," without making a distinction based on whether they have engaged in combat). In addition, Congress has confirmed that the authority granted by the AUMF includes the authority to detain any "person who was part of or substantially supported al-Qaeda," without regard to whether they participated in battle. NDAA § 1021, 125 Stat. 1561 (emphasis added).

d. Petitioner next asserts (Pet. 12) that a concurring opinion written by Judge Silberman in another case shows that the court of appeals has adopted a standard permitting detention on "any evidence whatsoever." Petitioner is mistaken. Judge Silberman's suggestion that detention could be based on a showing that it is "somewhat likely that the petitioner is an al Qaeda adherent or an active supporter," Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring), is not the law of the D.C. Circuit. To the contrary, the court of appeals has applied the preponderance-of-the-evidence standard in every Guantanamo habeas case, including this one. See Pet. App. 10 (determining that "a preponderance of the evidence unmistakably showed [petitioner] was 'part of' al-Qaida when he was captured"); accord, e.g., Al-Odah, 611 F.3d at 17; Awad, 608 F.3d at 11; Al-Bihani, 590 F.3d at 878.

e. Petitioner also argues (Pet. 15-16) that the detention standard applied by the court below conflicts with the standard applied in Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), vacated as moot, 555 U.S. 1220 (2009). But petitioner does not explain how the decision in this case conflicts with Al-Marri, and it does not. As petitioner acknowledges (Pet. 15), Al-Marri did not involve the detention standard but rather the question whether a "legal resident of the United States who was originally detained within the United States" could be held under the AUMF at all. That issue is not raised here -- petitioner is not a United States resident, and he was captured in Pakistan. In any event, the Fourth Circuit's decision in Al-Marri has been vacated, so it cannot establish a circuit conflict.

f. Petitioner suggests (Pet. 3) that the district court questioned the appropriateness of his continued detention based on its finding that he was not a threat to the United States. The Executive's detention authority is not dependent upon making an individualized showing that a detainee would re-engage in hostilities if released. Rather, as this Court made clear in Hamdi, the AUMF permits the detention of enemy belligerents for the duration of the conflict. 542 U.S. at 518, 521 (plurality opinion). 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, 608 F.3d at 11. 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 Bay detainees by an interagency group of cabinet-level 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 Bay 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). Those 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 v. Watkins, 335 U.S. 160, 170 (1948).

3. Finally, petitioner argues (Pet. 19-28) that this Court should grant certiorari to consider whether he and other Guantanamo detainees are entitled to rights conferred by the Due Process Clause. Although petitioner presents an extensive discussion of that abstract legal question, he makes little effort to show that it has any relevance to this case. This case is therefore an inappropriate vehicle for considering the issue.

Petitioner's only due process claim on appeal concerned the district court's alleged reliance on a newspaper article that was outside the record. Pet. App. 10-11. In rejecting petitioner's claim, the court of appeals explicitly stated that it had no need to "address the underlying legal basis" for the claim because it lacked any factual basis: the district court made "no mention of [the article] in [its] * * * written opinion and order." Id. at 11. And the court of appeals went on to explain that petitioner's claim failed for the independent reason that, "[e]ven assuming [petitioner] had a constitutional right to due process and assuming the district court violated it by relying on evidence outside the record," any "error would be 'harmless beyond a reasonable doubt,' given the conclusive weight of the record evidence linking [petitioner] to al-Qaida." Ibid. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)) (citation omitted). Petitioner does not contest either of those determinations, nor would such a fact-bound challenge warrant this Court's review. There is accordingly no occasion for this Court to consider whether petitioner may assert rights under the Due Process Clause.*

* In a supplemental brief, petitioner argues that the court of appeals' recent decision in Latif v. Obama, No. 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011), mot. for leave to file a petition for cert. under seal pending, No. 11M67 (filed Jan. 12, 2012), calls for certiorari to be granted in this case. But the legal issue discussed by the majority and dissenting opinions in Latif -- whether a government report in that case was entitled to a presumption of regularity -- has no relevance here. No such presumption was applied in this case, and petitioner does not claim

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys

JANUARY 2012

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otherwise. And while petitioner argues (Supp. Br. 5-8) that Judge Tatel's dissenting opinion in Latif suggests a significant disagreement within the court of appeals, Judge Tatel was on the panel in this case and joined the unanimous decision affirming the district court's finding that "that a preponderance of the evidence unmistakably showed petitioner was 'part of' al-Qaida when he was captured." Pet. App. 10. In any event, even if there were a conflict within the court of appeals, it would not be a basis for this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).