No. 13-768

In the Supreme Court of the United States

MUKHTAR YAHIA NAJI AL WARAFI, PETITIONER

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly determined that petitioner was a part of Taliban forces when captured.

2. Whether the courts below correctly held that petitioner has failed to establish that he was permanent and exclusive medical personnel in Afghanistan under Article 24 of the First Geneva Convention.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 716 F.3d 627. The unclassified opinion of the district court (Pet. App. 16a-38a) is reported at 821 F. Supp. 2d 47.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on May 24, 2013. A petition for rehearing was denied on August 26, 2013 (Pet. App. 68a). On November 13, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 24, 2013, 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 Guantánamo Bay, Cuba, under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). He filed a petition for a writ of habeas corpus. The district court denied the writ, and the court of appeals affirmed. Pet. App. 1a-13a, 16a-38a.

1. a. 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." § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both al Qaeda terrorist forces and the Taliban regime that harbored them in Afghanistan. Armed conflict with al Qaeda and the Taliban remains ongoing, and in connection with those military operations, some persons captured by the United States and its coalition partners have been detained at Guantánamo.

In Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1562 (10 U.S.C. 801 note), Congress "affirm[ed]" that the authority granted by the AUMF includes the authority to detain, "under the law of war," any "person who was a 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."

b. In *Boumediene* v. *Bush*, 553 U.S. 723 (2008), this Court held that individuals detained by the President

under the AUMF and held at Guantánamo have the right to challenge the lawfulness of their detention by filing petitions for writs of habeas corpus in federal courts. See *id.* at 771, 792. Since *Boumediene*, the federal courts in the District of Columbia have adjudicated a number of habeas petitions filed by detainees at Guantánamo.

Section 5 of the Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 120 Stat. 2631 (28 U.S.C. 2241 note), bars habeas petitioners from directly invoking the Geneva Conventions as an independent source of rights. See *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011). But as the Executive has made clear, see Memorandum Regarding Government Detention Authority (Mar. 13, 2009),[1] and as Congress confirmed in the NDAA, the detention authority conferred by the AUMF is informed by the laws of war. See NDAA § 1021(c)(1), 125 Stat. 1562 (affirming President's authority to order "[d]etention under the law of war * * * until the end of the hostilities authorized by the [AUMF]"); *id.* § 1024(b), 125 Stat. 1565 (10 U.S.C. 801 note) (referring to "detention under the law of war pursuant to the [AUMF]"). The laws of war include the First Geneva Convention.

As relevant here, Article 24 of the First Geneva Convention recognizes that "[m]edical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, * * * [and] staff exclusively engaged in the administration of medical units and establishments * * * shall be respected and protected in all circumstances."

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[1] www.justice.gov/opa/documents/memo-re-det-auth.pdf.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3132, 75 U.N.T.S. 31, 48.[2] Article 24 medical personnel receive special protection from being made the object of attack at all times. See Int'l Comm. of the Red Cross, *Commentary*, 1 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 220 (Jean S. Pictet, ed. 1952) (*GCI Commentary*). If captured, they "shall be retained only in so far as the state of health * * * and the number of prisoners of war require." First Geneva Convention, art. 28, 6 U.S.T. 3134, 75 U.N.T.S. 50. But to qualify for Article 24 status, the personnel "must be exclusively employed on the duties" of "the search for and collection, transport and treatment of the wounded and sick, and the prevention of disease," *GCI Commentary* 218, and that "assignment must be permanent," *id.* at 219.

In addition, Article 40 of the First Geneva Convention provides that Article 24 medical personnel must be issued proper identification in the form of an armband and a special identity card. See *GCI Commentary* 310-315. Those forms of identification make it possible for Article 24 personnel to "prove that [they are] * * * member[s] of the medical * * *

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[2] The United States is not taking a position in this case with respect to which provisions of the 1949 Geneva Conventions, including Article 24, directly apply to the ongoing armed conflict against the Taliban. Likewise, it is unnecessary to address how other issues, such as the character of the armed conflict here, would affect the application of the laws of war through the AUMF. As explained below, even if Article 24 were to apply to the present conflict, petitioner would not fall within that provision. See pp. 15-23, *infra*.

personnel" and therefore "enjoy the status accorded to [them] under the Convention." *Id.* at 312. Both the armband and the special identity card must be issued and stamped by the relevant military authority and bear the distinctive emblem of the medical service (a red cross or a red crescent on a white background). See First Geneva Convention, arts. 38, 40, 6 U.S.T. 3140, 3142, 75 U.N.T.S. 56, 58; *GCI Commentary* 310-315. Furthermore, "the use of the emblem must clearly be controlled by an official military authority fully aware of its responsibility." *GCI Commentary* 311.

2. a. Petitioner is a Yemeni national who was captured in Afghanistan in November 2001. See Pet. App. 44a, 48a. He filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia challenging the legality of his detention at Guantánamo under the AUMF. See *id.* at 43a-44a.

The district court held a hearing and reviewed exhibits submitted by the parties. Pet. App. 44a. The court then found that petitioner (i) traveled to Afghanistan to fight with Taliban forces; (ii) received weapons training at the Khoja Khar line, where the Taliban was fighting the Northern Alliance; (iii) was stationed on the front line and remained on the Northern Front until the Taliban fell to coalition forces; and (iv) traveled to Mazar-e-Sharif with other Taliban fighters to surrender to the Northern Alliance on his Taliban commander's orders. See *id.* at 56a-63a, 65a. Based on those findings, the district court concluded that the government may lawfully detain petitioner under the AUMF because "petitioner more likely than not was part of Taliban forces." *Id.* at 44a.

The district court further held that petitioner could not validly invoke the Geneva Conventions in this habeas proceeding as a source of rights, citing Section 5 of the 2006 MCA. See Pet. App. 44a, 64a-65a & 64a n.3. The court accordingly denied petitioner's habeas petition. *Id.* at 66a.

b. The court of appeals affirmed the district court's finding that petitioner was more likely than not a part of the Taliban at the time of his capture. See Pet. App. 41a.

With respect to petitioner's argument under Article 24 of the First Geneva Convention, the government argued in the court of appeals that it was "unnecessary to address precisely how Article 24 might inform the scope of the government's detention authority under the AUMF because [petitioner] is not comparable to the permanent medical personnel addressed in that provision." Gov't C.A. Br., 2010 WL 4720750, at *19 (Oct. 12, 2010). The court of appeals, however, determined that "the district court did not explicitly address whether [petitioner] was permanently and exclusively medical personnel within the meaning of Article 24 of the First Geneva Convention and Army Regulation 190-8, § 3-15(b)(1)-(2), assuming arguendo their applicability." Pet. App. 41a.[3] It

[3] Army Regulation 190-8 implements the aspects of the Geneva Convention that pertain to this case. The petition does not suggest that further review is warranted here on any ground related to that regulation. In any event, even assuming that Army Regulation 190-8 establishes any judicially enforceable rights, it would not establish rights, obligations, or standards that differ from those set forth in the Geneva Conventions. See Army Regulation 190-8, at i; *id.* § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

therefore "remand[ed] the case to the district court to consider (or reconsider) [petitioner's] argument he was permanently and exclusively engaged as a medic and to make a finding on this issue." *Id.* at 42a.

c. On remand, the government produced unrebutted evidence showing that, in 2001, Taliban forces did not maintain a dedicated medical service for treatment of their wounded; did not designate members of their forces as permanent and exclusive medical personnel; and did not issue identity cards or badges to identify medical personnel. See Pet. App. 21a-22a. Petitioner argued that such identification was unnecessary to establish his Article 24 status and that the court was required instead to conduct a "functional assessment of whether he was exclusively engaged as a medic." *Id.* at 35a.

The district court rejected petitioner's argument and therefore concluded that he could not invoke Article 24. Pet. App. 16a-38a. Consistent with the government's unrebutted evidence, the court found that "the Taliban neither maintained an established medical corps nor had any practice of identifying or otherwise designating members of its forces as permanent medical personnel within the meaning of Article 24" and that petitioner did not bear the required armband or identity card at the time of his capture. *Id.* at 33a-34a. The court further concluded that petitioner's proposed functional analysis would constitute an "unworkable standard" that would conflict with the express terms of the First Geneva Convention, which requires "official identification demonstrating that [an individual] is entitled to protected status under Article 24." *Id.* at 37a. Accordingly, the district court held that petitioner had failed to establish that he served

as exclusive and permanent medical personnel when he was captured. See *id.* at 34a.

3. a. The court of appeals affirmed. Pet. App. 1a-15a. The court first explained that it was "undisputed that [petitioner] wore no * * * armlet and carried no [identity] card." *Id.* at 5a. The court then held that the First Geneva Convention establishes special protection only for medical personnel who are "'*exclusively engaged* in the administration of medical units and establishments,'" *id.* at 7a (emphasis in original) (quoting Article 24, 6 U.S.T. 3132, 75 U.N.T.S. 48), and that "[n]either the Convention nor the commentary provide for any * * * means of establishing that status" other than the armband and identity-card requirements, *ibid.* The court therefore concluded that "without the mandatory indicia of status, [petitioner] has not carried his burden of proving that he qualified as permanent medical personnel." *Ibid.* (internal quotation marks omitted). The court made clear that it was "not addressing the conceivable circumstance in which a detainee claiming medical personnel status offers evidence that he had been issued the necessary identifiers but was deprived of them by his captors or inadvertence." *Id.* at 9a n.1.

The court of appeals went on to explain that "[w]hile not necessary to its decision, the district court, in addition to its legal conclusion that the identification requirements of Article 24 constitute a *sine qua non* for protected status under Article 24, found as fact that petitioner had been stationed in a combat role before serving in a clinic" and that he "was captured with a weapon." Pet. App. 8a (internal quotation marks omitted). For that reason, the court continued, "[a]lthough the district court believed, and we

agree, that military personnel without appropriate display of distinctive emblems can never" establish that they are permanent medical personnel, "it also found facts—*e.g.*, the prior combat deployment—inconsistent with that role." *Id.* at 8a-9a. Noting that those factual findings were to be reviewed for "clear error," the court stated that "[t]he evidence in the record gives credence to the view that [petitioner] is unable to provide the proof required under the Convention because he was not a medic" within the scope of Article 24. *Ibid.*

b. Judge Brown issued a concurring opinion. Pet. App. 11a-13a. She explained that "Article 24 reflects an intricate regulatory scheme that implicates a unique balancing of interests," and that "[c]ompliance" with its requirements "is a necessary condition to invoke Article 24 protections." *Id.* at 13a.

ARGUMENT

Petitioner challenges the authority of the President to detain him under the AUMF. The court of appeals, however, correctly held that petitioner was detainable because he was part of Taliban forces when he was captured in Afghanistan. That conclusion rested on petitioner's admissions that he traveled to Afghanistan to fight with Taliban forces, received weapons training and was assigned to a fighting unit at the front line of the battle with the Northern Alliance, and was captured, while armed, along with other Taliban fighters while surrendering at his Taliban commander's direction. Petitioner contends (Pet. 16-22) that he was a permanent and exclusive medic within the meaning of Article 24 of the First Geneva Convention. But he has not claimed that he was issued the armband or special identity card that the Convention

requires parties to provide their Article 24 medical personnel. In any event, petitioner does not challenge in his certiorari petition the district court's factual findings demonstrating that he was not exclusively employed as a medic. The decision below does not conflict with a decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's finding that petitioner "more likely than not was part of the Taliban" at the time of his capture. Pet. App. 41a, 65a.

a. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. See Pet. App. 41a; see also, *e.g.*, *Uthman* v. *Obama*, 637 F.3d 400, 401-402 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011); *Awad* v. *Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); accord NDAA § 1021(a) and (b)(2), 125 Stat. 1562 ("affirm[ing] * * * the authority of the President to * * * detain" any "person who was a 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 D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces 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." *Uthman*, 637 F.3d at 403 (citation omitted). Proof that an individual engaged in

fighting, *Khairkhwa* v. *Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012), or that an individual was part of either organization's "command structure," *Awad*, 608 F.3d at 11, is sufficient, but not necessary, to demonstrate that an individual is part of enemy forces. As the D.C. Circuit has explained, permitting detention only for those detainees who engaged in active hostilities would be inconsistent with the realities of "modern warfare," in which "commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; [and] supply-line forces, critical to military operations, may never encounter their opposition." *Khairkhwa*, 703 F.3d at 550.

Under the D.C. Circuit's functional test, proof that a detainee traveled with or maintained a close association with al Qaeda or Taliban fighters, carried a weapon issued by al Qaeda or the Taliban, or received training by al Qaeda or the Taliban is highly probative of whether the detainee is properly deemed to have been part of one of those groups. See, *e.g.*, *Suleiman* v. *Obama*, 670 F.3d 1311, 1314, cert. denied, 133 S. Ct. 353 (2012); *Alsabri* v. *Obama*, 684 F.3d 1298, 1306 (2012); *Al Alwi* v. *Obama*, 653 F.3d 11, 17 (2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Madhwani* v. *Obama*, 642 F.3d 1071, 1075-1076 (2011), cert. denied, 132 S. Ct. 2739 (2012). But the D.C. Circuit has also recognized that not everyone having some interaction with al Qaeda or Taliban forces is "part of" either organization. "[T]he purely independent conduct of a freelancer," it has explained, "is not enough to establish that an individual is 'part of' al-Qaida." *Salahi* v. *Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Similarly, the

D.C. Circuit has held that "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether "a particular individual is sufficiently involved with the organization to be deemed part of it," an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (citation omitted).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. The court concluded that petitioner was part of Taliban forces when captured based on the district court's detailed findings, none of which petitioner contends were clearly erroneous. See Pet. 13-14 nn.2-3. Specifically, the district court found that "the reliable evidence in the record shows that petitioner more likely than not * * * went to Afghanistan to fight with the Taliban; received weapons training while stationed at the Khoja Khar line; volunteered to serve as a medic when the need arose; and surrendered on his commander's orders," at which time petitioner was carrying a weapon. Pet. App. 63a, 65a. Although petitioner states that he served as a "full-time medical worker" in clinics not "owned or operated by the Taliban" after October 7, 2001, Pet. 13, the district court expressly found that "like a soldier volunteering for a special duty, petitioner remained in the command structure of the Taliban and served as a medic only on an as needed basis," Pet. App. 61a. Given those findings, the court of appeals correctly concluded that petitioner "was more likely than not a part of the Taliban." *Id.* at 2a-3a, 41a.

b. Petitioner argues (Pet. 11-16) that because he did not actually engage in combat against the United States, his detention exceeds the authorization provided by the AUMF as construed by the plurality opinion in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). According to petitioner, the *Hamdi* plurality interpreted the AUMF as permitting detention only of "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" Pet. 11-12 (quoting *Hamdi*, 542 U.S. at 521 (opinion of O'Connor, J.)). Petitioner misunderstands both the AUMF and the *Hamdi* plurality opinion.

Neither the AUMF nor the NDAA requires proof that a detainee personally took part in combat against the United States. To the contrary, the NDAA specifically affirms that the President's detention authority encompasses any person "who was a 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" and is not limited merely to those committing "a belligerent act." § 1021(b)(2), 125 Stat. 1562.

Nor does the law of war, which informs the AUMF, limit the President's detention authority to individuals who personally engaged in combat against the United States. See Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4, Aug. 12, 1949, 6 U.S.T. 3320, 3322, 75 U.N.T.S. 138, 140 (defining different categories of prisoners of war, without regard to whether the individual had personally engaged in combat). As the D.C. Circuit has explained, a rule requiring proof that a detainee "actively engaged in combat" is "untena-

ble" because in "modern warfare, * * * supporting troops behind the front lines do not confront enemy combatants face to face." *Khairkhwa*, 703 F.3d at 550.

Petitioner misreads the plurality opinion in *Hamdi*. That opinion made clear that the plurality sought to answer "only the narrow question before us," which was whether a United States citizen who "was part of or supporting forces hostile to the United States or coalition partners * * * and who engaged in an armed conflict against the United States" in Afghanistan qualifies as an enemy combatant who may be detained under the AUMF. 542 U.S. at 516 (opinion of O'Connor, J.) (internal quotation marks omitted). The plurality concluded that the AUMF authorizes the detention of such persons, see *id.* at 518, 521, but did not suggest that the President's detention authority encompasses only individuals who personally engaged in combat against the United States. To the contrary, the plurality did not find or require that the detainee personally had engaged in combat. Moreover, the plurality stated that "[t]he legal category of enemy combatant has not been elaborated on in great detail," and instructed that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Id.* at 522 n.1. Petitioner thus errs in contending that the plurality opinion in *Hamdi* supports his view that, despite carrying a weapon while serving under the command structure of the Taliban in Afghanistan in 2001, he may not be detained because he did not personally participate in combat against United States forces.

For much the same reason, petitioner is incorrect (Pet. 14-16) that the denial of his habeas petition demonstrates that the courts below deprived him of

the meaningful review required by this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). The decision below did not authorize the detention of an individual who engaged only in "care for the sick and injured." Pet. 15. Rather, the district court, after carefully reviewing the evidence in the record, found that petitioner served as a medic only on an as-needed basis, and the court of appeals affirmed that finding in holding that petitioner was detainable under the AUMF. Pet. App. 61a. No decision of this Court establishes that such members of enemy forces are immune from capture and detention.

2. Assuming that Article 24 of the First Geneva Convention applies here, the court of appeals correctly held that it does not preclude petitioner's continued detention, both because petitioner concededly was not issued and did not possess the requisite indicia of status and because, in any event, the record evidence was entirely inconsistent with his claim that he was exclusively employed as a medic. See Pet. App. 7a-9a.

a. i. Article 24 concerns personnel who are "exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff exclusively engaged in the administration of medical units and establishments." 6 U.S.T. 3132, 75 U.N.T.S. 48. As discussed above, see pp. 3-5, *supra*, the First Geneva Convention provides that Article 24 personnel "shall be respected and protected" at all times, *ibid.*, which means, among other things, that they must not be made the object of attack, see *GCI Commentary* 134-135, 220-221. In addition, if captured, Article 24 personnel have "retained personnel" status under Article 28, which means that they "shall continue to carry out

* * * their medical * * * duties" and "shall be retained only in so far as the state of health * * * and the number of prisoners of war require." First Geneva Convention, art. 28, 6 U.S.T. 3134, 75 U.N.T.S. 50. If their retention is not indispensable for the care of prisoners of war, they "shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit." *Id.* art. 30, 6 U.S.T. 3134, 75 U.N.T.S. 50.

By contrast, "auxiliary personnel" who provide medical services only "should the need arise" are not encompassed by Article 24 and are not entitled to "retained personnel" status. First Geneva Convention, art. 25, 6 U.S.T. 3132, 75 U.N.T.S. 48. Such persons must be "respected and protected" only if they are carrying out medical duties when they come into contact with the enemy, and they are not entitled to be returned as soon as a road is open and military requirements permit. *Ibid.*

The parties to the First Geneva Convention recognized that the special protections afforded to Article 24 personnel create a powerful incentive for abuse. For example, as the *GCI Commentary* notes, if anyone who provided medical assistance were entitled to "retained status" under the Geneva Convention, "[o]ne can well imagine a belligerent giving training as stretcher-bearers to large numbers of the fighting troops of his armed forces, in order to furnish them with a claim to repatriation, should they be captured." *GCI Commentary* 258-259. To guard against such abuse, the Convention provides that Article 24 personnel must be designated as such by military authorities. See First Geneva Convention, art. 40, 6 U.S.T.

3140, 75 U.N.T.S. 56 (referring to exclusive medical personnel "designated in Article 24"). As the *GCI Commentary* explains, Article 24 refers to the "official medical personnel * * * of the armed forces." *GCI Commentary* 218. Thus, "[i]t is for each Power to decide the composition of its Medical Service and to say who shall be employed in it." *Ibid.*

The First Geneva Convention also specifies the means by which military authorities must designate their official medical personnel. In the case of a medic trained and designated by military authorities, Article 40 provides that individuals designated as Article 24 personnel "*shall* wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority," and that they must be issued a "special identity card bearing the distinctive emblem * * * [and] embossed with the stamp of the military authority." First Geneva Convention, art. 40, 6 U.S.T. 3140, 3142, 75 U.N.T.S. 56, 58 (emphasis added). The armband itself is not sufficient; the individual must also "be in a position to prove that he is entitled to wear it," so "[a] special identity card is * * * necessary." *GCI Commentary* 312. It is the stamp of the military authority, which indicates that the items have "been issued by, and on the responsibility of, the military authority," that renders both the armband and the identity card authentic. *Id.* at 311, 315.

Because petitioner concededly was never issued and did not possess either an armband or an identity card, the court of appeals correctly held that he cannot establish his entitlement to Article 24 status. Even assuming, moreover, that a form of documentation other than those specified in the Convention could

satisfy the identification requirement, petitioner does not contend that he possessed any other form of documentation supporting his Article 24 status. See Pet. App. 33a-34a. Indeed, petitioner does not even claim that Taliban forces designated him as Article 24 medical personnel, and the government's unrebutted evidence demonstrated that Taliban forces did not have any established medical corps in 2001, much less a practice of designating or identifying members of its forces as permanent and exclusive medical personnel. See *id.* at 9a, 34a.

ii. Petitioner argues (Pet. 17-18) that, even if he did not possess any documentation identifying him as Article 24 personnel, he qualified for that status because he worked full-time in medical clinics at some point prior to his capture, assertedly satisfying Article 24's substantive standard. That contention lacks merit. The First Geneva Convention's "mandatory language," Pet App. 9a, requires that Article 24 personnel be formally designated by the relevant party to the conflict, which then must issue the armband and special identity card enabling Article 24 personnel to prove their status. Petitioner's functional approach is inconsistent with that requirement.

Any other conclusion would be impracticable in a battlefield situation. To hold that Article 24 status turns on an individual's activities would leave the capturing party without a means for determining whether the individual should be treated as an Article 24 permanent medic, who qualifies for "retained personnel" status, or instead as a person who is not entitled to that status, such as an Article 25 as-needed medic or other combatant who is simply performing medical duties. See Pet. App. 36a n.8 (noting that

"[t]he necessity of proper identification to distinguish Article 24 personnel is reinforced by the absence of any identification requirements for Article 25 personnel," who provide medical care only should the need arise). As the district court explained, "[r]eliance on a functional evaluation would leave the soldier without the means of determining whether the uniformed individual is a permanent medic entitled to full immunity or an enemy combatant who is simply attending to the wounded *at that time*." *Id.* at 36a. And as discussed above, see pp. 16-17, *supra*, a functional analysis could lead to rampant abuse of the First Geneva Convention because combatants could readily feign Article 24 status upon capture.

Petitioner cites a statement from the International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Claud Pilloud, et al., eds., 1987) (*Additional Protocols Commentary*), that "the means of identification do not constitute the right to protection, and that from the moment that medical personnel . . . have been identified, shortcomings in the means of identification cannot be used as a pretext for failing to respect them." Pet. 19-20 (emphasis omitted) (quoting *Additional Protocols Commentary* 225). That statement does not indicate that an individual can prove Article 24 status through a means other than those specified in the Geneva Convention—*i.e.*, an armband or a special identity card. Rather, it means only that "shortcomings" in those methods of proof (*e.g.*, a failure to include certain required information on the special identity card) do not automatically deprive an individual of Article 24 status. Moreover, the very same section of the *Addi-*

tional Protocols Commentary on which petitioner relies reiterates that "the medical personnel who [are] * * * to be protected" are "only personnel *duly recognized and authorized* by the Parties to the conflict concerned." *Additional Protocols Commentary* 224. As discussed above, petitioner does not allege that he was ever recognized and authorized by the Taliban to be a permanent and exclusive medic, nor could he plausibly so argue on this record, given the unrebutted evidence that the Taliban did not engage in those practices when petitioner was captured.

Petitioner also cites (Pet. 20-21) the International Committee of the Red Cross commentary *Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2009). The cited provisions, however, state only that medical personnel should not be subject to "attack" if they are recognized as such, regardless of whether they are wearing the distinctive emblems at the time. See Pet. 20-21. Even aside from the fact that petitioner's claim has nothing to do with a wrongful "attack," he never satisfied the basic requirements for Article 24 status and thus could not properly be "recognized" as enjoying it. Moreover, the fact that "medical and religious personnel and objects are protected because of their function," Pet. 21 (citation omitted), as the commentary explains, does not validate petitioner's functional analysis and does not mean that a captured individual can prove Article 24 status without following the requirements of the First Geneva Convention. See Pet. App. 6a.

iii. Petitioner argues (Pet. 21-22) that further review is warranted because of the "sweeping" scope of the court of appeals' decision. That contention rests

on a misunderstanding of the decision below. Petitioner asserts, for example, that the decision below forecloses medical personnel of the Taliban or any other "irregular forces" from successfully invoking Article 24 status. Pet. 20. That is not so. The court of appeals relied on the district court's finding that the Taliban failed to issue the identification materials mandated by Article 40, see Pet. App. 9a (citing *id.* at 37a-38a), but that finding was based exclusively on the evidence presented in this case. Consequently, the court of appeals' ruling would not foreclose another detainee from submitting evidence that the Taliban did in fact issue identifying documentation that complied with the Convention's requirements. And it certainly would not foreclose such a claim by members of other irregular forces, for whom the district court made no findings. Although the decision below held that individuals without proper identification cannot invoke the protections of Article 24 status, at least where their lack of identification is not attributable to "captors or inadvertence," Pet. App. 10a n.1, that is a consequence of the balance struck in the Convention between protecting medical personnel and ensuring that captured combatants cannot abuse Article 24 by falsely claiming to be medical personnel.

iv. Accordingly, the decision below correctly held that petitioner lacked Article 24 status and thus was properly detainable even assuming Article 24 applies in this proceeding. Because petitioner does not claim that the court's legal conclusion conflicts with any decision of this Court or another court of appeals, further review of the court's holding is not warranted.

b. Even if the question whether failure to possess the requisite indicia of status forecloses Article 24

status warranted further review, this is not a suitable vehicle to address that question. The court of appeals correctly determined that, given the district court's findings, petitioner could not establish that he was a permanent and exclusive Article 24 medic on this record. See Pet. App. 9a (explaining that "[t]he evidence in the record gives credence to the view that [petitioner] is unable to provide the proof required under the Convention *because he was not a medic*" within the scope of Article 24) (emphasis added).

The district court found that petitioner worked as a medic in Afghanistan on an "as needed basis within the command structure of the Taliban." Pet. App. 61a. That finding, which the court of appeals upheld, see *id.* at 41a, would at most support a determination that petitioner was an Article 25 medic—*i.e.*, a combatant specially trained to provide medical services "should the need arise," First Geneva Convention, art. 25, 6 U.S.T. 3132, 75 U.N.T.S. 48. See p. 16, *supra*. Article 25 personnel may be treated as any other combatants when not performing medical functions. Petitioner was not performing medical functions at the time of his capture in 2001. See Pet. App. 62a-63a.

Petitioner's claim would fail for the additional reason that he does not allege that he was committed to the fundamental aspects and limitations of Article 24 status. A necessary component of the requirement that Article 24 personnel be "exclusively engaged" in assisting the wounded is that they must abstain from "any form of participation—even indirect—in hostile acts" against enemy military forces. *GCI Commentary* 219, 221. Petitioner, however, has never claimed that he considered himself to be "at all times outside the fighting" and unavailable for combat duties if the

need should have arisen. *Id.* at 239. And any such claim would be implausible given that the district court found that petitioner "traveled to Afghanistan to fight with the Taliban" and "operate[d] within its command structure." Pet. App. 58a.

Accordingly, even if the court of appeals' holding with respect to Article 24 otherwise warranted further review, this case is not a suitable vehicle to address it because the record evidence would not support petitioner's Article 24 status even under his proposed functional test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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