No. 10-1383

In the Supreme Court of the United States

TOFIQ NASSER AWAD 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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QUESTION PRESENTED

Whether the courts below correctly determined that petitioner, an alien captured overseas who conceded that he was part of al-Qaida and that he participated in al-Qaida military training, is subject to military detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2011. The petition for a writ of certiorari was filed on May 11, 2011. 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 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. 1a-2a.

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, the United States and its allies have captured many persons who are part of al-Qaida or Taliban forces (or substantial supporters thereof) and detained a small fraction of them 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. Pet. App. 10a-11a.

3. After holding a hearing at which petitioner testified, the district court denied the petition. Pet. App. 3a-25a.

The district court found that petitioner, a national of Yemen who was raised in Saudi Arabia, traveled to Afghanistan via Pakistan in 2000. During his travels, peti-

tioner stayed in guesthouses run by or associated with al-Qaida. After arriving in Afghanistan, petitioner received military training, including weapons training, from al-Qaida at its al-Farouq training camp. In July 2001, he left al-Farouq and traveled within Afghanistan, again staying at al-Qaida guesthouses and associating with al-Qaida operatives. After the United States military operation in Afghanistan began later that year, petitioner joined a group of men traveling from Afghanistan to Iran through Pakistan. Once in Iran, petitioner was apprehended in the company of an al-Qaida operative, returned to Afghanistan, and transferred to United States custody. Pet. App. 4a-10a.

Petitioner conceded that he was part of al-Qaida for at least five months in early 2001 during his training at the al-Farouq camp. He also conceded that he continued to stay in al-Qaida guesthouses and to associate with al-Qaida members following his departure from al-Farouq. On that basis, the district court concluded that the government had satisfied its burden of establishing its prima facie case supporting the lawfulness of petitioner's detention. Pet. App. 15a-16a.

The district court determined that petitioner had failed to rebut the government's prima facie case. Because petitioner acknowledged that he had been part of al-Qaida, the court determined that it was necessary for him to "show[] that he took affirmative actions to abandon his membership." Pet. App. 16a-17a (citation omitted). Petitioner identified no such affirmative steps. The court rejected petitioner's hearing testimony that he intended to leave Afghanistan and return to Saudi Arabia, finding that "numerous material inconsistencies * * * completely undermine his credibility." *Id.* at 23a. The court concluded that "the inherent incongruity in

the petitioner's account strongly suggests that he is providing 'false exculpatory statements' to conceal his association with al-Qaeda, and such statements 'are evidence—often strong evidence—of guilt.'" *Ibid.* (quoting *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011)).

The district court pointed specifically to petitioner's "inconsistent statements regarding his motivation for traveling to Afghanistan, and his desire to engage in *jihad* while in Afghanistan." Pet. App. 18a. At the hearing, petitioner testified that his travel to Afghanistan was "motivated by nothing more than his desire to change his lifestyle," while in an earlier statement submitted to the court, he had admitted that "the purpose of his travel to Afghanistan was to train to fight jihad." *Ibid.* (internal quotation marks, brackets, and emphasis omitted). The court concluded that petitioner's "self-serving" testimony at the hearing cannot be credited when weighed against "his prior inculpatory statements." *Id.* at 19a.

The district court also noted inconsistencies in petitioner's statements about his decision to remain in Afghanistan following his departure from the al-Farouq training camp. Before the attacks on the United States on September 11, 2001, petitioner could have left Afghanistan either the same way he entered that country—by using public transportation—or by traveling in a car and walking, as he did later. Pet. App. 20a. Because he did not seriously pursue obvious means of leaving Afghanistan before September 11, 2001, the court found "that the petitioner had no real desire to travel to Pakistan" to return home, as he claimed in his hearing testimony. *Id.* at 21a.

4. The court of appeals affirmed. Pet. App. 1a-2a. On appeal, petitioner did not challenge the district court's factual findings, and he agreed with the government that circuit precedent "foreclose[d] [his] arguments challenging the lawfulness of his detention under the [AUMF] or the laws of armed conflict." *Id.* at 2a (citing *Al-Adahi*, *supra*, and *Al-Bihani* v. *Obama*, 590 F.3d 866 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011)). He therefore filed, together with the government, a motion for summary affirmance, and the court of appeals affirmed without opinion. *Ibid.*

ARGUMENT

Petitioner asserts (Pet. 3-17) that federal law does not permit the detention of an individual who was part of al-Qaida unless he directly participated in hostilities or intended to do so. The courts below have correctly rejected that argument, and the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. 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, and this Court has repeatedly declined to review those decisions. 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). Petitioner admits that he was a part of al-Qaida while attending an al-Qaida training camp in Afghanistan, and he "does not challenge [the district court's] factual finding" that he remained a part of al-Qaida thereafter. Pet. 2. In light of those uncontested facts, the court of appeals correctly held that he may be detained under the AUMF.

2. Petitioner asserts (Pet. 13-17) that being part of al-Qaida is not enough to support detention under the laws of war. In his view, the AUMF permits the detention only of individuals who actually engage in hostilities, and perhaps of those who intend to do so. See Pet. 6 (contending that the relevant inquiry is whether the detainee "participated in or intended to participate in hostile acts against the United States"); Pet. 14 ("Petitioner is not detainable under the laws of armed conflict because he was not participating in hostilities."). Petitioner did not raise that argument in the district court, even to indicate his view that it was foreclosed by circuit precedent. Nor did he seek rehearing en banc in order to give the court of appeals an opportunity to reconsider its precedent. Petitioner's failure to preserve his claim is, by itself, a sufficient reason to deny the petition. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (The Court does not ordinarily decide "questions neither raised nor resolved below.").

In any event, petitioner's 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 statu-

tory authorization, has since pursued an armed conflict against al-Qaida. The AUMF therefore authorizes the detention of individuals who are part of al-Qaida. Petitioner's suggestion that international law requires the President to treat al-Qaida as a collection of "civilians," rather than as an enemy armed force, is misguided.

Law-of-war principles do properly inform the construction of the AUMF, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion), and thus the understanding of what actions are "necessary and appropriate" for the President to undertake in waging war against al-Qaida. But 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 or subjectively intended to fight against the nation that captured them. 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"); *In re Territo,* 156 F.2d 142, 144-145 (9th Cir. 1946) (upholding capture and detention of a private in the Italian Army who performed manual labor in an army engineering corps); 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, 138 (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).

3. Contrary to petitioner's suggestion (Pet. 13), an individual who is part of al-Qaida cannot insulate himself from detention by labeling himself a "civilian." Petitioner's argument rests on the flawed legal premise that enemy forces who refuse to abide by the laws of war—for example, by refusing to wear fixed distinctive signs identifying them—and who therefore fall outside the prisoner-of-war provisions of Article 4 of the Third Geneva Convention, are entitled to special immunity from detention. That is incorrect. As this Court explained in *Quirin*, while "[l]awful combatants" are "subject to capture and detention as prisoners of war," belligerents who fail to qualify for prisoner-of-war status are "likewise subject to capture and detention." 317 U.S. at 31.

Moreover, as this Court has recognized, the conflict with al-Qaida is a "conflict not of an international character." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006). For that reason, Article 4 of the Third Geneva Convention, which defines the categories of persons who are entitled to be treated as prisoners of war in a conflict between state parties to the Convention, does not control. See *Hamlily* v. *Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. 2009). The result is not "civilian status for all, even those who are members of enemy 'organizations' like al Qaeda." *Ibid.* Rather, "the government's claimed authority to detain those who were 'part of' those organizations is entirely consistent with the law of war principles that govern non-international armed conflicts." *Ibid.* Those principles are reflected in Article 3, which "contemplates the 'detention' of '[p]ersons taking no active part in the hostilities, including members of

armed forces who have laid down their weapons and those placed hors de combat.'" *Ibid.* (quoting Third Geneva Convention, Art. 3, 6 U.S.T. 3318, 75 U.N.T.S. 136).[1] Decisions of international tribunals confirm the point that, "in a non-international armed conflict, membership in an armed group makes one liable to attack and incapacitation independent of direct participation in hostilities." *Id.* at 74 (citing decisions of the International Criminal Tribunal for the former Yugoslavia). Petitioner thus made himself subject to military detention when he became part of al-Qaida, regardless of whether he directly participated in hostilities.

Petitioner's argument is also factually flawed because he offers no evidence to support his implicit premise that there is a group of individuals properly deemed "civilian" members of al-Qaida. Unlike a sovereign nation with a civilian population, al-Qaida is a terrorist organization engaged in an armed conflict with the United States, and it has no "non-military" wing. In any event, petitioner could not plausibly claim to be part of any such hypothetical "civilian" entity. Petitioner himself testified that he participated in weapons training with al-Qaida for approximately two months in 2001.

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[1] Petitioner relies on Additional Protocol II to the Geneva Conventions, which the United States has not yet ratified. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 U.N.T.S. 609. But Additional Protocol II does not support his argument. To the contrary, by providing "protections for the 'civilian population' in non-international armed conflicts," it suggests the "clear implication" that the Geneva Conventions "recognize[] a class of individuals who are separate and apart from the 'civilian population'—*i.e.*, members of enemy armed groups." *Hamliliy*, 616 F. Supp. 2d at 73-74 (quoting Additional Protocol II, Art. 13, 1125 U.N.T.S. 615).

Pet. App. 6a (citing "testimony by the petitioner that he 'trained on the pistol and [Kalashnikov rifle] and the Becca' while at al-Farouq"). And he likewise conceded that he traveled to Afghanistan to obtain training as preparation for combat. *Id.* at 5a, 18a. He thus cannot argue that his role in al-Qaida was peaceable.[2]

4. Petitioner devotes much of his petition (Pet. 5-13) to arguing that the court of appeals gave insufficient weight to international law. In particular, he points (Pet. 6) to the court's statements in *Al-Bihani* that reference to international law is "inapposite and inadvisable" in determining whether detention is authorized under the AUMF and that "the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war * * * is mistaken." 590 F.3d at 871. The government disagrees with those statements, see Br. in Opp. at 16-17, *Al-Bihani*, *supra* (No. 10-7814), but they have no relevance to this case and do not warrant this Court's review.

Notwithstanding the statements in *Al-Bihani*, the panel in that case looked to and applied international law. See 590 F.3d at 874 (noting that the petitioner's claim that he was entitled to be released was contrary to the Third Geneva Convention, which "require[s] release and repatriation only at the 'cessation of active hostili-

[2] Petitioner appears to contend (Pet. 2) that he never intended to attack forces of the United States or its coalition partners. The court of appeals has correctly rejected the proposition that a detainee's motive for joining al-Qaida is relevant. *Al-Adahi*, 613 F.3d at 1108; see *id.* at 1109 (detainee need not "embrace every tenet of al-Qaida before United States forces may detain him"). Accord *Quirin*, 317 U.S. at 25 n.4 (petitioners' allegation that they did not intend to obey orders from the German High Command was not relevant to their status as belligerents). In any event, the district court found that petitioner's hearing testimony lacked credibility. Pet. App. 19a, 23a.

ties.'") (quoting Third Geneva Convention, Art. 118, 6 U.S.T. 3406, 75 U.N.T.S. 224). 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 was therefore "not necessary to the disposition of the merits" of the case. *Al-Bihani* v. *Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, J., concurring in denial of rehearing en banc); see 590 F.3d at 885 (Williams, J., concurring) ("[T]here is no need for the court's pronouncements, divorced from application to any particular argument.").

Since *Al-Bihani*, the court of appeals and the district court have consistently applied the detention standard articulated by the government (see Pet. 6), which is informed by and consistent with the laws of war. Petitioner nevertheless suggests (Pet. 13) that the lower courts will be precluded from considering arguments based on the laws of war in habeas proceedings. The suggestion is refuted not only by *Al-Bihani* itself but also by another recent case in which the court of appeals remanded for consideration by the district court of a detainee's argument that "he served permanently and exclusively as 'medical personnel' within the meaning of Article 24 of the First Geneva Convention and § 3-15(b)(1)-(2) of Army Regulation 190-8." *Warafi* v. *Obama*, 409 Fed. Appx. 360, 361 (D.C. Cir. 2011) ("assuming arguendo the[] applicability" of those authorities). More importantly, petitioner's argument concerning the role of the laws of war in determining the lawfulness of detention is irrelevant here because, as explained above, the laws of war support his detention based on the facts found by the district court. This case therefore does not present the issue raised by peti-

tioner, and a decision by this Court concerning the role of the laws of war would not benefit him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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