No. 10-1383

IN THE
Supreme Court of the United States

TOFFIQ NASSER AWAD AL-BIHANI,

Petitioner,

v.

BARACK H. OBAMA, et. al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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1. The government alleges that petitioner failed to put forward in the district court the argument raised here, *i.e.*, that he may be detained only if he directly participated in hostilities. (Opp. 6). This is simply wrong. In mandatory consolidated briefing in the lower court, petitioner (along with other detainees before Judge Walton) argued that the government's detention position conflicted with the laws of armed conflict precisely because a civilian may be detained only if he "actively and directly participate[d] in hostilities." Pet'rs' Jt. Mem. in Reply to Resp'ts' Mem. of Mar. 13, 2009 at 16, *Sanani v. Obama*, *et. al.*, No. 05-2386 (D.D.C. Mar. 20, 2009). The brief provided attachments (including the declaration of law of war expert Gary Solis (provided to the Court at App. 42a-58a) that elaborate and support this position.

Likewise, at the circuit court, the parties' motion for summary affirmance clearly explained petitioner's position that he cannot be detained because "he did not participate actively and directly in hostilities against the United States, and did not intend to engage in hostile acts against the United States." Jt. Mot. for Summ. Affirmance at 2, *Al-Bihani v. Obama*, No. 10-5352 (D.C. Cir. Jan. 7, 2011). Therein, the government agreed that this position was "foreclosed by established circuit precedent." *Id*. Yet now the government argues that petitioner needed to do more to "indicate[] his view that [his position] was foreclosed by circuit precedent." (Opp. at 6.) This is untenable. The circuit court granted the parties' joint motion for summary affirmance (App. 1a) in the context of a line of precedent that fundamentally refuses to apply the laws of armed

conflict to consider the propriety of the detention of the men in Guantanamo. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010). The court has refused to reconsider that position on a petition for rehearing. 619 F.3d 1 (D.C. Cir. 2010). Petitioner needed to do nothing more than he did.

2. Contrary to the government's assertion (Opp. at 11), the circuit court's unpublished decision to remand the Al Warafi *habeas* petition to the district court in order to determine whether he was a full-time medic (*Al Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011)), cannot overturn its holding in *Al-Bihani* that the laws of war are "inapposite and inadvisable" to use in determining "the limits of the President's war powers." 590 F.3d 866, 871-72. The instruction on remand in *Al Warafi* was to assume for sake of argument that the laws of war applied -- without deciding that they did. *See Al Warafi v. Obama*, No. 09-2368, 2011 U.S. Dist. LEXIS 126798, at 16 (D.D.C. Aug. 31, 2011) (for its part, the government took no position on remand as to whether the laws of war applied). Given the district court's determination that Al Warafi was not a full-time medic, the D.C. Circuit will not be forced to address the applicability of the laws of war on further appeal. This will continue the court's refusal to seriously consider the application of the laws of armed conflict as a meaningful restriction on the Executive's detention power. That is why this Court must intervene.

3. The law-of-war authorities relied on by the government support petitioner. The government cites *Ex parte Quirin*, 317 U.S. 1 (1942), to support its premise that civilians can be detained without regard to their

participation in hostilities. (Opp. at 7.) The petitioners in *Quirin*:

> [B]oarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. [They] were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City.

317 U.S. at 21. An armed commando incursion from a military vessel is an archetypal hostile act. As this Court found, those men were bent on "the commission of hostile acts involving destruction of life or property" and therefore were legitimate targets for military power (whether force or detention). *Id*. at 35. It is nothing less than this "hostile and warlike act" that allowed the Court to find those men to be properly subject to that power. *Id*. at 37. The government's attempts to rely on *Quirin* in the context of this case, where the district court found no evidence of hostile acts, altogether ignore that critical aspect of this Court's most direct authority on the application of the laws of war.

Similarly, the question of whether the conflict in which petitioner was detained was an international or non-international armed conflict (Opp. at 8) is a distraction. Petitioner has not argued that only lawful combatants may be detained. Rather, petitioner relies on long-standing law of armed conflict principles that

dictate when a civilian may be detained in any conflict. *See generally* Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* § 6.4 at 202-06 (2010). Those principles, which are set out in, among other places, U.S. military promulgations, all embrace the fundamental premise that "[a]bsent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant." (App. 50a.) Being part of al Qaida does not change this. (Pet. 16 and authorities cited therein.)

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 6, 2011