13-768

No. __-____

IN THE
Supreme Court of the United States

MUKHTAR YAHIA NAJI AL WARAFI,

Petitioner

v.

BARACK OBAMA, ET AL.,

Respondents

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

PETITION FOR A WRIT OF CERTIORARI

David H. Remes
Appeal For Justice
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508

S. William Livingston
Counsel of Record
James McCall Smith
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

December 23, 2013

Counsel for Petitioner

BLANK PAGE

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") authorizes the President to detain, indefinitely and possibly for the rest of his life, an individual who did not participate in hostilities against the United States, but instead was exclusively and consistently engaged as a medical worker both when the United States entered into hostilities in Afghanistan and at the time of his seizure and imprisonment.

2. Whether the First Geneva Convention and Army Regulation 190-8 allow the Government to detain indefinitely individuals exclusively engaged as medical personnel merely because they do not possess or display a medical armlet or other "official" medical identification.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellant in the court below is Mukhtar Yahia Naji al Warafi.

Respondents in this Court and the appellants in the court below are Barack Obama, President of the United States; Chuck Hagel, Secretary of Defense; Richard W. Butler, Commander, Joint Task Force, GTMO; and John V. Bogdan, Commander, Joint Detention Group, JTF GTMO.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, TREATY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 7

1. Initial District Court Decision 7

2. Initial Court of Appeals Decision 9

3. District Court's Remand Decision 10

4. Court of Appeals' Second Decision 10

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 22

APPENDIX

1. Court of Appeals Decision [May 24, 2013] 1a

2. Court of Appeals Judgment [May 24, 2013] 14a

3. Unclassified District Court Remand Opinion [August 31, 2011] 16a

4. District Court Remand Order [August 31, 2011] 39a

5. Court of Appeals Per Curiam Judgment [February 2, 2011] 40a

6. District Court Opinion [March 24, 2010] 43a

7. District Court Order [March 24, 2010] 67a

8. Court of Appeals Order Denying Rehearing En Banc [August 26, 2013] 68a

TABLE OF AUTHORITIES

Cases **Page**

Almerfedi v. Obama,
654 F.3d 1 (D.C. Cir. 2011),
cert. denied, 132 S. Ct. 2739 (2012) 16, 17

Boumediene v. Bush,
553 U.S. 723 (2008) 11, 14, 15, 22

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 18

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) (O'Connor, J.)
(plurality opinion) 11, 12, 14, 22

Latif v. Obama,
677 F.3d 1175 (D.C. Cir. 2011),
cert. denied, 132 S. Ct. 2741 (2012) 15

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 2 ..... 1, 15

Statutes

28 U.S.C. § 1254(1) 1

Authorization for Use of Military Force,
Pub. L. No. 107-40, § 2(a), 115 Stat.
224 (2004) ..... i, 1, 11, 12, 14, 15, 16

National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1561 (2011) 16

Other Authorities

Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) ..... i, 4, 10, 16

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 ("First Geneva Convention") ..... i, 2, 9, 10, 16, 17, 21, 22

1 Int'l Comm. of the Red Cross, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 79 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2009) 20

Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions* 20

Jean S. Pictet, et al., *Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) ("Red Cross Commentary") 17, 18, 19, 21

Jean S. Pictet, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) ("Red Cross Commentary Protocol I") 19, 21

BLANK PAGE

OPINIONS BELOW

The decision of the court of appeals, *see* Appendix ("App.") la, was issued on May 24, 2013. It is published at 716 F.3d 627. The district court's initial opinion denying the writ of habeas corpus was issued on March 24, 2010, and released to the public on April 8, 2010, *see* App. 43a. It is published at 704 F. Supp. 2d 32. The per curiam judgment of the court of appeals was issued on February 2, 2011, *see* App. 40a. It is reported at 409 F. App'x 360. The district court's classified remand decision was issued on August 31, 2011, *see* Classified App. Supplement. A correctly redacted version of the classified remand opinion was released on December 7, 2012, *see* App. 16a. A more redacted version of the remand opinion is published at 821 F. Supp. 2d 47.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2013. *See* App. 14a. A petition for rehearing en banc was denied on August 26, 2013, *see* App. 68a.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, TREATY, AND REGULATORY PROVISIONS INVOLVED

1. Suspension Clause, U.S. Const. art. I, § 9, cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) 115 Stat. 224, 224 (2004):

> [T]he President is authorized 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

3. 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 at 3132–36 (First Geneva Convention), arts. 24, 28, 30, and 40:

Article 24

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Article 28 [in pertinent part]

> Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. * * *

Article 30

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 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.

Pending their return, they shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War. They shall continue to fulfil[l] their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong.

On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.

Article 40

The personnel designated in Article 24 and in Articles 26 and 27 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 16, shall also carry a special identity card bearing the

distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his finger-prints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In case of loss, they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

4. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), § 3-15 and Glossary:

3-15 Retained personnel [in pertinent part]

a. Enemy personnel entitled to a retained status should have on their person at the time of capture a special identity card attesting to their status. * * *

b. Enemy personnel who fall within any of the following categories, are eligible to be certified as RP [retained personnel]:

(1) Medical personnel who are members of the medical service of their armed forces.

(2) Medical personnel who are exclusively engaged in:

(a) The search for or the collection, transport, or treatment of the wounded or sick.

(b) The prevention of disease.

(c) Staffs exclusively engaged in administering medical units and establishments. * * *

t. RP will wear on their left sleeve a water resistant arm band bearing the distinctive emblem (Red Cross, Red Crescent) issued and stamped by the military authority of the power with which they have served. Authorized persons who do not have such armbands in their possession will be provided with Geneva Convention brassards.

w. RP will be retained only insofar as the state of health, the spiritual needs, and the number of EPW require. Persons whose retention is not required will be repatriated as soon as military requirements permit. Nothing precludes reasonable measures to prevent such persons from carrying information of strategic or tactical value. Should they come into possession of such information, their return to their own armed force may be delayed until the information is of no significant value. * * *

Glossary

* * *

EPW

Enemy Prisoner(s) of War * * *

RP

Retained Personnel * * *

STATEMENT OF THE CASE

Appellant Mukhtar Yahia Naji Al Warafi filed a petition for a writ of habeas corpus in 2004. A native of Yemen, Al Warafi worked as an assistant in his brother's medical clinic in Yemen before traveling to Afghanistan in the late summer of 2001. App. 45a. There Al Warafi volunteered to work in a medical clinic run by a Saudi doctor. App. 47a. He began work in the clinic before the United States began military action in Afghanistan in October 2001. App. 47a, 60a. At the clinic, and later at another clinic and a hospital, Al Warafi cleaned wounds, drew blood, and treated the sick and injured. At no time did Al Warafi engage in military combat. *Id.* When forces of the Northern Alliance overran his area in November 2001, Al Warafi, the Saudi doctor, and hundreds of others were imprisoned. During an uprising at the prison, Al Warafi was shot, and the Saudi doctor, like the great majority of prisoners, was killed. App. 48a. Al Warafi was soon transferred to U.S. military custody in Kandahar, then moved in the spring of 2002 to Guantanamo Bay, where he has been ever since.

1. Initial District Court Decision

In the district court, the Government did not assert that Al Warafi had been affiliated with al Qaeda, but argued that he could be detained because he allegedly was "part of the Taliban." App. 43a-44a. Al Warafi denied any affiliation with the Taliban, claiming that he was a civilian who worked in clinics in Afghanistan. The district court found that Al Warafi had been a medical worker in clinics "run by a Saudi doctor, Dr. Abdullah Aziz," App. 47a, but

nonetheless concluded that he "more likely than not served as a medic on as needed basis within the command structure of the Taliban." App. 62a.

The district court found that Al Warafi went to a front area after arriving in Afghanistan, where he spent "approximately one to two weeks." App. 46a. "While there, he received training on an AK-47," but he did not engage in any combat. App. 47a. According to the court, Al Warafi then volunteered to work at the clinic "run by" Dr. Aziz, where he received first-aid training. *Id.* The court found that Al Warafi was no longer at the front "when the United States invaded Afghanistan on October 7, 2001." App. 60a. The court found that Al Warafi transferred from the first clinic to a second clinic, also "run by" Dr. Aziz, and then later worked at a hospital when the clinic's area became unsafe. App. 47a. The district court did not find that Dr. Aziz was a member of the Taliban, that Dr. Aziz's clinics were run by the Taliban, or that Al Warafi's activities at the clinics were directed by Taliban personnel.

The court found that Al Warafi, Dr. Aziz, and others left Konduz for Kandahar pursuant to a safe passage agreement negotiated by a Taliban commander in the area. App. 47a-48a. Under the agreement, those who surrendered would have safe passage to Kandahar, and would then be returned to their home countries. *Id.* The Northern Alliance, however, detained a large contingent outside of Mazar-e-Sharif and transported them to the Qala-i-Jangi prison. App. 48a. The district court agreed "that the reliable evidence does not explicitly state that petitioner was ordered to surrender," but

nonetheless concluded that Al Warafi "more likely than not" surrendered pursuant to orders because he was with the Taliban commander's troops when seized and imprisoned. App. 63a.

In addition to holding that Al Warafi was "part of" the Taliban, the district court held that Al Warafi could not invoke Articles 24, 28, and 30 of the First Geneva Convention, which require the return of captured medical workers, because Congress had barred the Convention's application in Guantanamo habeas cases. App. 64a-65a.

2. Initial Court of Appeals Decision

Al Warafi appealed. In a per curiam judgment, the court of appeals, without explanation, affirmed the district court's conclusion that Al Warafi "was more likely than not part of the Taliban." App. 41a. The panel, however, did not affirm the district court's holding that Congress blocked consideration of the First Geneva Convention. It remanded the case for a determination as to whether Al Warafi "was permanently and exclusively engaged as a medic" during the relevant period "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." App. 41a-42a. The panel explicitly found that Al Warafi was not carrying a medical identification card or armlet when captured. App. 42a. For this reason, the panel instructed the district court that it "appears that Al Warafi bears the burden of proving his status as permanent medical personnel." *Id.*

3. District Court's Remand Decision

On remand, the district court reaffirmed its finding that, after spending one to two weeks at a front area between the Taliban and the Northern Alliance when he arrived in Afghanistan, Al Warafi thereafter spent his time working as a medic at two clinics run by the Saudi doctor and at a hospital. App. 18a-19a. It also reaffirmed its finding that Al Warafi "'likely did not engage in combat in Afghanistan.'" App. 19a (quoting App. 60a). The court nonetheless held that Al Warafi was not entitled to the protections afforded to medical workers by Article 24 of the First Geneva Convention because he did not have a medical armlet and medical identity card. App. 37a-38a.

4. Court of Appeals' Second Decision

Al Warafi appealed. The second panel, consisting of Judges Brown, Kavanaugh, and Sentelle, held that Al Warafi could invoke "relevant aspects of the Geneva Convention's medical personnel protection," because they "have been expressly incorporated into" domestic law by Army Regulation 190-8. App. 4a. It also held that the only means of establishing protected medical personnel status under Article 24 of the First Geneva Convention is possession of a medical identity card and armlet. App. 7a. Because Al Warafi did not have a card or an armlet, it held

that he was not protected by Article 24.[1] App. 9a-10a.

REASONS FOR GRANTING THE WRIT

1. The court of appeals' decision improperly expands the scope of the Executive's detention authority far beyond any reasonable or lawful bound. The Court should grant the petition for certiorari and reverse the court of appeals in order to provide the Guantanamo detainees with the meaningful habeas remedy promised by *Boumediene v. Bush*, 553 U.S. 723 (2008).

The source of the President's detention authority is the AUMF. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (O'Connor, J.) (plurality opinion). That statute applies to persons who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF, 115 Stat. at 224. This Court in *Hamdi* construed the AUMF as permitting detention of "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"

---

[1] The first panel, as noted, had already found that Al Warafi did not possess a medical armlet and card. That panel would not have remanded the case if, as the second panel believed, their absence was dispositive. The second panel sought to avoid the first panel's decision by maintaining that the first panel had "remained agnostic" as to whether possession of such identification is necessary if a medical worker is to obtain the protections of Article 24. App. 6a-7a.

Hamdi, 542 U.S. at 521. In broader terms, the plurality stated:

> Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization [under the AUMF], Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" *and* "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict.

Id. at 526 (emphasis added).

Even the Attorney General has asserted that the Government's detention authority extends only as follows:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondents' Revised Mem. Re: the Government's Detention Authority Relative to Detainees Held at

Guantanamo Bay, Misc. No. 08-442, at 2 (D.D.C. Mar. 13, 2009).

The United States did not initiate military action against the Taliban until October 7, 2001. At that time, and continuing thereafter until his capture, Al Warafi was a full-time medical worker in clinics and a hospital, under the supervision of a Saudi doctor. App. 47a-48a, 60a. He was not a soldier or a combatant against the United States, either directly or in a supporting role, and had not engaged in combat in Afghanistan at any time, whether before or after October 7, 2001.[2] App. 19a, 60a.

There was no evidence that the clinics where Al Warafi worked were owned or operated by the Taliban. To the contrary, the court specifically found that the clinics were "run by" the Saudi doctor. App. 47a, 60a-61a. There was likewise no evidence nor finding that the doctor was affiliated with the Taliban, or that anything was ever done at the clinics on orders from the Taliban. None of Al Warafi's day-to-day activities after October 7, 2001, involved anything, directly or indirectly, that was hostile or combative to the United States.

The district court recognized that Al Warafi was a medical worker, but characterized him as serving as

---

[2] The district court found that Al Warafi had spent one or two weeks at a front area, where he likely received some training with an AK-47, but that he did not engage in combat. App. 46a-47a. Al Warafi had left the front area and gone to work in a medical clinic before the United States invaded Afghanistan in October 2001. App. 60a.

a "medic," saying that he was "like a soldier volunteering for a special duty." App. 61a. But these characterizations have no relevance under the AUMF, as construed in *Hamdi* or even by the Attorney General. Al Warafi from the outset of the United States war was a medical worker, not a participant in or supporter of combat forces against the United States. It is thus irrelevant that a Taliban leader might have directed that he and the Saudi doctor transfer from one clinic to another, or that they participated in a "safe passage" surrender arranged between a Taliban leader and the Northern Alliance.[3] The fact remains that Al Warafi never came close to "engag[ing] in an armed conflict against the United States," the prerequisite under *Hamdi* for detention under the AUMF. 542 U.S. at 526.

Construing the AUMF to authorize indefinite detention in these circumstances leaves no meaningful bounds on the Executive's detention authority. *Boumediene* emphasized that detainees at Guantanamo "are entitled to the privilege of habeas corpus to challenge the legality of their detention." 553 U.S. at 771. Writing for the Court, Justice Kennedy explained that "the writ of habeas corpus is . . . an indispensable mechanism for monitoring the

---

[3] It is also irrelevant that Al Warafi may have had a weapon when captured. Medical workers are permitted by Article 22 of the Convention to carry arms for self-defense and to protect patients. 6 U.S.T. at 3130. If there was any country in the world at that time where a weapon was necessary for self-defense and to protect patients, it surely was Afghanistan.

separation of powers." *Id.* at 765. "Within the Constitution's separation-of-powers structure," he stated, "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Id.* at 797. Judicial enforcement of the Suspension Clause is therefore necessary to vindicate its purposes: "This Court may not impose a *de facto* suspension [of the writ] by abstaining from these controversies." *Id.* at 771.

Here, the court of appeals and district court have construed the AUMF in a manner that vitiates *Boumediene*'s premise that "[t]he habeas court . . . [will] . . . conduct a meaningful review of . . . the Executive's power to detain." *Id.* at 783. They did so by permitting indefinite detention of a non-combatant whose only activities after October 7, 2001, were as benign as possible—care for the sick and injured. If Al Warafi can be detained indefinitely, it is hard to see any limit to the Executive's detention authority, or any way to have the "meaningful" habeas opportunity promised by *Boumediene*. On any reasonable construction of the AUMF, Al Warafi should be immediately released.

This Court has not heard a Guantanamo habeas case for more than five years. In the meantime, the U.S. Court of Appeals for the D.C. Circuit has consistently ruled against detainees, gravely undermining—if not destroying—the "meaningful" habeas remedy established in *Boumediene*. *See, e.g.*, *Latif v. Obama*, 677 F.3d 1175, 1178-85 (D.C. Cir. 2011) (reversing district court's grant of a detainee's habeas petition by creating a "presumption" in favor

of the Government's evidence), *cert. denied*, 132 S. Ct. 2741 (2012); *Almerfedi v. Obama*, 654 F.3d 1, 6-7 (D.C. Cir. 2011) (reversing district court's grant of a detainee's habeas petition and shifting burden of persuasion to the detainee), *cert. denied*, 132 S. Ct. 2739 (2012). The plight of the detainees has assumed great national and international importance, fully meriting this Court's attention. Respectfully, it is time for this Court to intervene and authoritatively to place reasonable limits on the scope of the Executive's detention authority.

2. The First Geneva Convention provides humanitarian protection for medical personnel in armed conflicts.[4] Article 24 mandates that all "[m]edical personnel exclusively engaged in the . . .

---

[4] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("First Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3114, 3132. The Government has conceded that its detention authority under the AUMF is informed by the laws of war. *See* App. 23a. The laws of war include the First Geneva Convention. This Court thus has jurisdiction to apply Article 24 of the Convention in this case, because the AUMF provides the Government's purported authority to detain. The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1561 (2011), affirms the President's detention authority under the AUMF, and states that the detention of an individual is subject to "disposition under the law of war." *Id.* § 1021 (a); *see also id.* §§ 1021(c), 1024(b). In addition, the court of appeals found that Army Regulation 190-8 "expressly incorporates relevant aspects of the Geneva Convention's medical personnel protection," and may be invoked in a habeas case to establish a detainee's right to release. App. 4a.

treatment of the wounded or sick" "shall be respected and protected in all circumstances."

It is *undisputed* that Al Warafi worked full time in medical clinics, so he clearly qualified as "medical personnel exclusively engaged" in treating wounded or sick persons. Medical personnel designated in Article 24 "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. at 3134. If not needed for that purpose, they shall be returned "as soon as a road is open" and "military requirements permit." *Id.* art. 30; Army Regulation 190-8 § 3-15*(w)*. "[R]etention is intended to be the exception" and repatriation "is the rule." Jean S. Pictet, et al., *Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) ("Red Cross Commentary"), at 240, 241.

The court of appeals' conclusion that possession of medical identification is a *sine qua non* for protected status under Article 24 is directly refuted by the plain language of Article 24 as well as by authoritative statements of the International Committee of the Red Cross.

Article 24 provides in its entirety as follows:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall

> be respected and protected in all circumstances.

Article 24 by its terms thus protects all medical workers who are exclusively engaged in medical activities. Nothing in Article 24 suggests that its protections disappear if a medical worker does not have an identity card and an armlet. There also is no other provision in the Convention that purports to place such a precondition on the protections afforded by Article 24.

The official Red Cross Commentary to Article 24 confirms that "[t]he distinguishing feature" of Article 24 medical personnel "is that they are employed exclusively on medical duties." Red Cross Commentary at 221.[5] The Commentary explains that "[t]he words 'in all circumstances' make it quite clear that medical personnel are to be respected and protected at all times and in all places, both on the battlefield and behind the lines, and whether retained only temporarily by the enemy or for a lengthy period." *Id.* at 220.

The Commentary specifies only one condition that deprives an exclusively-engaged medical worker of Article 24 status: "any form of participation—even indirect—in hostile acts." *Id.* at 221. There is no basis for grafting any other precondition to the availability of Article 24's protections. Al Warafi did

---

[5] As this Court has recognized, the Red Cross Commentary to the Geneva Conventions is "relevant in interpreting the Conventions' provisions." *Hamdan v. Rumsfeld*, 548 U.S. 557, 620 n.48 (2006).

not engage in hostile acts, and thus he cannot be deprived of Article 24's protections. *See* App. 19a, 46a-47a, 60a.

It is true that Article 40 of the Convention provides that medical personnel "shall" wear an armlet and carry an identity card. The Commentary states that Article 40 provides a means for a military force to put a medical worker "in a position to prove that he is a member of the medical . . . personnel." Red Cross Commentary at 312. But Article 40 identification is not the only way to be in such a position. Al Warafi has successfully demonstrated that he was exclusively engaged in medical work, despite having neither a card nor an armlet. In any event, nothing in Article 40 or the Commentary provides that the penalty for failing to have an identity card and an armlet is outright denial of all Article 24 protections.

In addition, there are authoritative statements by the International Committee of the Red Cross, ignored by the court of appeals, making clear that Article 24 protections extend to *all* exclusively-engaged medical personnel, whether or not they have identification.

First, the Red Cross Commentary to Article 18 of Protocol Additional to the Geneva Conventions of 12 August 1949 states flatly that "the means of identification do not *constitute* the right to protection, and 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." Jean S. Pictet, et al., *Commentary on the Additional Protocols of 8*

June 1977 to the Geneva Conventions of 12 August 1949 (1987) ("Red Cross Commentary Protocol I"), at 225.[6]

Second, the International Committee of the Red Cross has published a set of rules comprising customary international humanitarian law, and the Commentary confirms that medical workers are entitled to protection because of their function, not because they display a medical emblem. *See* 1 Int'l Comm. of the Red Cross, Customary International Humanitarian Law 79 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2009). The Commentary to Rule 30 states:

> Practice also shows that failure to wear or display the distinctive emblems does not of itself justify an attack on medical or religious personnel and objects when they are recognized as such. This is an application of the general principle that the distinctive emblems are intended to facilitate identification and do not, of themselves,

---

[6] The United States has not ratified this Protocol. It has, however, declared that "the principle that medical units . . . should be respected and protected at all times . . . as well as the principle that civilian medical . . . personnel likewise be respected and protected," which "can be found . . . in articles 12 through 20 of the Protocol," should "be observed and in due course recognized as customary law." Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l. & Pol'y 419, 422, 423 (1987).

> confer protected status. In other words, medical and religious personnel and objects are protected because of their function. The display of emblems is merely the visible manifestation of that function but does not *confer protection as such.*

Id. at 103-04.

The ruling by the court of appeals is sweeping in scope. It is not limited to Al Warafi, but explicitly holds that no Taliban doctors, nurses, or other medical workers are protected by Article 24 because the Taliban did not provide identity cards and armlets. App. 6a-7a, 9a. The ruling would also apply to medical personnel for any irregular forces, including forces that the United States has supported, such as the Northern Alliance in Afghanistan, anti-Gaddafi insurgents in Libya, and rebels in Syria. These groups all likely include medical workers with neither cards nor armlets, but in the court of appeals' view such personnel can be detained indefinitely as if they were infantry riflemen.

This is not what the First Geneva Convention says or intends. Rather, the Convention protects *all* medical personnel, because protecting them protects the sick and wounded. The obligation to repatriate is "an absolute one," and it springs "not only from the letter of the Convention, but from its inmost spirit." Red Cross Commentary at 11, 261. To refuse to repatriate medical personnel "would be gravely at variance with the Geneva Convention and the very idea of the Red Cross." *Id.* at 261.

The decision of the court of appeals improperly erodes fundamental protections for medical workers conferred by the First Geneva Convention. The Court should grant certiorari in order to preserve and restore these important protections. In addition, this case presents the Court with an opportunity to reaffirm the applicability of the humanitarian provisions of the Geneva Conventions concerning those detained in wartime, and to bring the United States back into compliance with its responsibilities under the Conventions.

CONCLUSION

Al Warafi, a full-time medical assistant when the United States invaded Afghanistan, has been at Guantanamo Bay since 2002, his entire adult life. Under the decision of the court of appeals, he may be detained indefinitely, perhaps for the rest of his life. The panel's decision to authorize indefinite detention in these circumstances contravenes the Court's decisions in *Hamdi* and *Boumediene*, misinterprets the First Geneva Convention, and erodes bedrock humanitarian protections for medical workers in current and future international conflicts.

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

S. William Livingston
Counsel of Record
James McCall Smith
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

David H. Remes
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508

Counsel for Petitioner

December 23, 2013

BLANK PAGE