[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 09-5051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GHALEB NASSAR AL BIHANI,
Petitioner-Appellant,

v.

BARACK H. OBAMA, ET AL.,
Respondents-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND SUMMARY

In his petition for rehearing *en banc*, petitioner argues that he must be released because the conflict in which he was captured has ended. This Court correctly rejected that argument. *See Al-Bihani v. Obama*, 590 F.3d 866, 873-75 (D.C. Cir. 2010). Petitioner asks the full Court to revisit the ruling on that issue, asserting that the Court improperly ignored the laws of war. On this issue, however, the Court did examine petitioner's laws of war argument and rejected it on the merits, recognizing that the conflict is ongoing. *Id*. at 873-74. The Court also went on to hold that, under controlling Supreme Court precedent, the determination whether hostilities have ended is one for the Executive and not the courts. *Id*. at 874-75. Both rulings are plainly correct and do not warrant further review.

Petitioner cites the panel majority's statement that the "premise that the war powers granted by the [Authorization for Use of Military Force, 115 Stat. 224 (2001) (AUMF)] and other statutes are limited by the international laws of war * * * is mistaken." 590 F.3d at 871. The Government agrees that this broad statement does not properly reflect the state of the law. The Government interprets the detention authority permitted under the AUMF, as informed by the laws of war. That interpretation is consistent with the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2006), and with longstanding Supreme Court precedent that statutes should be construed as consistent with applicable

international law. As noted above, however, none of this changes the outcome as to the primary legal issue raised in the petition. The panel majority specifically addressed and properly rejected petitioner's argument under international law. That unanimous ruling is correct and does not warrant rehearing or rehearing *en banc*.

Al-Bihani's contention that the Government must prove that he poses a future threat also does not warrant further review. The Supreme Court has recognized that the authority to detain enemy forces is not dependent upon an individualized threat assessment, and the determination whether there remains a need to detain such an enemy held during an armed conflict is one for the Executive and not the courts.

Finally, the amici's argument that the Court improperly decided certain procedural issues is incorrect. Petitioner correctly does not assert those arguments. Even assuming the appropriateness of considering rehearing based on issues not pressed by a party, those issues were squarely presented by al-Bihani in his briefs before the panel, and were properly and correctly decided by the Court.

Accordingly, the petition should be denied.

ARGUMENT

I. AL-BIHANI'S CONTENTION THAT THE CONFLICT HAS ENDED IS WITHOUT MERIT.

This Court properly rejected al-Bihani's contention that he must be released because the "particular conflict" in which he was captured has ended. The Court

correctly concluded that al-Bihani's argument misread the Geneva Conventions and that the issue is one for the Executive and not the courts in any event. *Al-Bihani*, 590 F.3d at 874-75. Al-Bihani challenges that holding, arguing (Pet. 2-10) that the panel majority improperly ignored the laws of war and misunderstood the "particular conflict" in which al-Bihani was captured. These contentions are without merit and do not warrant rehearing.

A. Al-Bihani's contention that the panel's holding ignores the laws of war on this issue is incorrect. In fact, the panel looked to the laws of war, and held that the Geneva Conventions did not support al-Bihani's contention that the conflict in which he was captured has ended and been replaced by a different conflict. *See* 590 F.3d at 874-75. Concluding that "even the laws of war upon which he relies do not draw such fine distinctions," the panel recognized that the Geneva Conventions "codify what common sense tell us must be true: release is only required when the fighting stops." *Id*. at 874.

As the plurality in *Hamdi* explained, "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. at 520 ; *cf.* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364, Article 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active

hostilities"). The *Hamdi* plurality held, based on its understanding of "longstanding law-of-war principles" that "Congress' grant of authority for the use of 'necessary and appropriate force'" should be construed "to include the authority to detain *for the duration of the relevant conflict*." *Hamdi*, 542 U.S. at 521 (emphasis added).

Here, as the panel recognized, the "relevant conflict" is still ongoing. It is difficult to argue that the conflict with the Taliban and al Qaeda in Afghanistan is over when, as the panel noted, there are over 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan engaged in active hostilities against those very same enemies. 590 F.3d at 874.

Moreover, the panel correctly held that the question whether hostilities have ended is one for the political branches and not the courts. *Id*. at 874-75; *Ludecke v. Watkins*, 335 U.S. 160, 168-70 (1948). As President Obama recently stated in a letter to Congress regarding the War Powers report, the hostilities are ongoing:

> Since October 7, 2001, the United States has conducted combat operations in Afghanistan against al-Qa'ida terrorists and their Taliban supporters * * *. These operations and deployments *remain ongoing* and were previously reported consistent with Public Law 107-40 and the War Powers Resolution.[1]

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[1] Letter from the President to the Speaker of the House and the President Pro Tempore of the Senate (Dec. 16, 2009) (available at http://www.whitehouse.gov/the-press-office/letter-president-regarding-war-powers-report) (emphasis added).

Consistent with *Ludecke*, 335 U.S. at 168-70, there is no basis for second-guessing the President's judgment that the conflict is ongoing.

While Al-Bihani continues to argue that this Court should declare the conflict over, he can escape neither the reality of the ongoing conflict nor the controlling force of *Ludecke*. In any event, Al-Bihani's argument depends upon a distinction – between an "international" conflict between two nations and a non-international conflict – that says nothing about whether the "relevant conflict" has ended such that captured detainees must be released. Al-Bihani cites the phrase "particular conflict" from *Hamdi*, 542 U.S. at 518, but then proceeds to ignore the plurality's identification of the relevant conflict: "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Id*. at 521. The plurality held that "[t]he United States may detain for the duration of *these hostilities*, individuals legitimately determined to be Taliban combatants * * *." *Ibid*. (emphasis added). The plurality then made clear that, consistent with its reading of the Geneva Conventions, "[i]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF." *Ibid*. Thus, the panel's decision that the relevant conflict is ongoing and its reading of the Geneva Conventions are fully consistent with *Hamdi*.

Al-Bihani argues (Pet. 9) that the panel's ruling is in tension with President Bush's determination that the conflict with the Taliban was an "international" conflict. But that determination is entirely beside the point. The authority to detain al-Bihani does not rest upon how one defines the nature of the conflict at any given point; it rests upon whether hostilities in that conflict have ceased. Changes in the *nature* of an ongoing conflict do not definitively address whether hostilities in that conflict have ceased. Under al-Bihani's approach, however, any time the nature of the conflict changes, it becomes an entirely new conflict. But warfare is not susceptible to such definitional niceties. A conflict can change from an international one to an insurgency – and back again – without a cessation of active hostilities between the relevant parties. Al-Bihani's definition of the "particular conflict" ignores both reality and common sense and finds no support in the law. The panel's decision on this issue is correct and fully supported by *Hamdi*.

B. To support his claim for further review on this issue, Al-Bihani cites to the panel's more general statements that the laws of war do not limit the President's authority under the AUMF. *See* 590 F.3d at 871 (the "premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war * * * is mistaken"). The Government agrees that this broad statement does not

properly reflect the state of the law. As it announced on March 13, 2009,[2] the Government interprets its detention authority under the AUMF to be informed by the laws of war. That interpretation is consistent with longstanding Supreme Court precedent that, generally, statutes should be construed, if possible, as consistent with international law. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"); *see also MacLeod v. United States*, 229 U.S. 416, 434 (1913) ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law"); *Port Authority of New York and New Jersey v. Department of Transp.*, 479 F.3d 21 (D.C. Cir. 2007) (Brown, J.) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (*quoting Charming Betsy*, 6 U.S. at 118); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("courts will not blind themselves to potential violations of international law where legislative intent is ambiguous"); *South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987). Notably, in *Hamdi*, the plurality applied this approach specifically to the AUMF. The plurality

[2] *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. 175, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Nos. 05-0763,05-1646,05-2378,(D.D.C. Mar. 13, 2009) ("March 13, 2009 filing").

discussed the Third Geneva Convention and other law-of-war sources when addressing detention authority under the AUMF and explained: "we understand Congress' grant of authority for the use of 'necessary and appropriate force' [in the AUMF] to include the authority to detain for the duration of the relevant conflict, and our understanding is *based on longstanding law-of-war principles*." 542 U.S. at 520-521 (emphasis added). Consistent with *Hamdi*, the United States interprets the detention authority granted by the AUMF, as informed by the laws of war.[3]

None of this, however, provides any reason to grant further review here. As discussed above, as to the primary legal issue raised in the petition, the panel majority specifically addressed and properly rejected petitioner's argument under international law. Moreover, the panel majority *upheld* the Executive's detention standard (which petitioner does not challenge here) – a standard that was formulated by the Executive and informed by the laws of war. Further, the panel majority recognized the power of the Executive to craft such a "workable legal [detention] standard." 590 F.3d at 872, 874. Notably, the panel recognized that al-Bihani is

[3] Where the laws of war are unclear or analogies to traditional international armed conflicts are inapt, a court should accord substantial deference to the political branches in construing how the laws of war apply to this nontraditional conflict. *See* March 13, 2009 filing, at 6 n.2 ("courts should defer to the President's judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle him to treat members of irregular forces as state military forces are treated for purposes of detention").

lawfully detained under that standard. Likewise, the concurrence recognized that "[t]he petitioner's detention is legally permissible by virtue of facts he himself has conceded." *Id*. at 883 (Williams, J., concurring). Thus, the panel unanimously and correctly held that petitioner is lawfully detained. That ruling does not warrant rehearing or rehearing *en banc*.

II. THE EXECUTIVE'S DETENTION AUTHORITY DOES NOT REQUIRE THE GOVERNMENT TO PROVE THAT AN INDIVIDUAL IS A FUTURE THREAT.

Al-Bihani contends that this Court erred in refusing to require that the Government prove, to the satisfaction of the courts, that al-Bihani is a threat to return to the battlefield. This contention is legally flawed and does not warrant rehearing. As explained above, the panel correctly held that, consistent with the Geneva Convention and the laws of war, the Government's authority to detain enemy forces continues until the conclusion of hostilities.

The AUMF states that the President is authorized to use necessary and appropriate force "in order to prevent any future acts of terrorism against the United States * * *." 115 Stat. 224, § 2. That provision, however, does not require an individualized, judicially reviewable threat determination as a condition for detaining enemy forces. Indeed, as noted above, the *Hamdi* plurality interpreted the very same provision and held that the AUMF permits the detention of the enemy for

the duration of the conflict. *Hamdi*, 542 U.S. at 518, 521. That holding is controlling here.

Of course, the Government has no interest in holding any detainee longer than necessary. Accordingly, on January 22, 2009, the President issued an Executive Order providing for review of the appropriate disposition of Guantanamo detainees by an interagency group of cabinet-level review participants led by the Attorney General. *See* Executive Order No. 13,492, 74 Fed. Reg. 4897 (2009). To implement that Order, the Attorney General established the Guantanamo Review Task Force, which was composed of career-level employees from multiple agencies, as well as a senior-level Guantanamo Review Panel of officials who were delegated authority from each of their agencies to make determinations on the basis of recommendations from the Guantanamo Review Task Force. The Executive Order provided that the "[r]eview shall determine" *inter alia*, "whether it is possible to transfer or release * * * individuals [detained at Guantanamo Bay] consistent with the national security and foreign policy interests of the United States." *Id.* § 4(c)(2), 74 Fed. Reg. at 4899. The Task Force throughly reviewed the records available regarding each detainee and made recommendations as to whether further detention is necessary or whether transfer or prosecution could be appropriate. The Review Panel then reviewed those recommendations and either made disposition decisions

or, in some instances, referred cases to the cabinet-level officials identified in the Executive Order for a determination.

Those determinations, however, are not subject to judicial review. Whether transfer or release of petitioner is consistent with national security is a question for the Executive and not the courts.[4] *Cf. Ludecke*, 335 U.S. at 170 (analyzing enemy detainees' "potency for mischief" is a matter of political judgment "for which judges have neither technical competence nor official responsibility").

III. THE PROCEDURAL ISSUES RAISED BY *AMICUS* DO NOT WARRANT REHEARING.

Al-Bihani does not challenge the panel's holding that the procedures employed by the district court were sufficient under the Constitution. The *amici,* however*,* contend that the panel's approach to procedural issues is "wrong," "unwarranted," and mandates rehearing. Amicus Br. 6. Even assuming the appropriateness of considering rehearing based on issues not pressed by a party, *see McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991), this contention is without merit.

The *amici*'s suggestion that these procedural issues were "not squarely presented" to the panel (Amicus Br. 9) is incorrect. As the panel's decision makes

[4] Despite Al-Bihani's claim to the contrary, the district court did not hold that the Government "failed to prove" that he is a threat; the court merely held that the Government was not attempting to prove al-Bihani would return to the battlefield because such proof is not required. JA 522-23.

clear, each of the issues it addressed concerned a precise argument made by al-Bihani. *See* 590 F.3d at 875-76 (noting that al-Bihani claimed that the district court erred by, among other things, "adopting a preponderance of the evidence standard of proof" and "admitting hearsay evidence"). There is nothing unusual – or incorrect – in a decision that addresses the standards governing the burden of proof and the admissibility and reliability of the evidence in an appeal challenging the sufficiency of the evidence.

Amici's contention (Am. Br. 6-7) that the panel's decision is inconsistent with *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), is incorrect. *Boumediene* did not, as amici suggest (Am. Br. 6), foreclose courts of appeals from addressing procedural issues. The *Boumediene* Court merely stated that procedural questions should be left to the district courts in the first instance. 128 S. Ct. at 2276 (2008). That is precisely what happened here. The district court made numerous procedural rulings, which were challenged on appeal, and the panel decided those issues. Nothing in *Boumediene* contemplates a different process.

Finally, amici's attack on the panel's procedural holdings is based on a misreading of the panel's decision. The panel did not hold that "there are virtually no procedural requirements in these habeas proceedings" (Amicus Br. 6), nor did it provide a "procedural blank check" to the Government (Amicus Br. 7). And the

panel did not "instruct[] the District Court to presume that no procedural protections are necessary to maintain fair proceedings" (Amicus Br. 8). The panel simply recognized – correctly – that the habeas review mandated by *Boumediene* need not match the procedures that apply to habeas challenges to criminal convictions. 590 F.3d at 875-76. The panel then held that "there was no constitutional defect in the district court's habeas procedure that would have affected the outcome of this proceeding." 590 F.3d at 881.

Amici also incorrectly assert (Am. Br. 8) that the panel's holding permitting the admission of hearsay will allow the Government to "successfully defend a detention by flooding the court with unreliable documents." Nothing in the panel's holding allows, let alone compels, district courts to rely on unreliable evidence. Rather, the panel's opinion merely recognizes "the reality that district judges are experienced and sophisticated fact finders" who "need not be protected from unreliable information * * *." 590 F.3d 866. District courts are quite capable of weeding out the unreliable evidence, and in fact the procedure contemplated by the panel in this case is consistent with the current practice of a majority of district courts presiding over Guantanamo detainee cases. *See, e.g. Al Odah v. United States*, 648 F. Supp. 2d 1, 5 (D.D.C. 2009) ("The Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it

shall make such determinations in the context of the evidence and arguments presented during the Merits hearing").

The panel's decision therefore is entirely consistent with *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008). In that case this Court did not hold that hearsay evidence is in admissible, but, in the context of a challenge under the Detainee Treatment Act, rejected the evidence because it lacked a sufficient indicia of reliability. The panel's decision here permits exactly the same analysis. In this case, as the panel found (590 F.3d at 880), the evidence bore sufficient indicia of reliability because al-Bihani did not contest the truth of the majority of admissions that formed the basis of the district court's decision.

Amici also point to the *Boumediene* Court's criticism of the procedures used in the Combatant Status Review Tribunals (CSRTs), which provided "no limits on the admission of hearsay evidence." 128 S. Ct. at 2269. That criticism, however, involved a process significantly more restricted than habeas proceedings, which offer substantial procedural protections that permit the court to ensure that the evidence is reliable. These procedures provide substantial opportunities for detainees to challenge the Government's assertions and question the evidence. In this case, for instance, the Government filed a factual return and compiled with the broad obligation to disclose exculpatory information. Al-Bihani was allowed

appropriate discovery, his counsel were granted security clearances and given access to classified information, and al-Bihani was given the opportunity to respond to each of the Government's allegations with a traverse. Far from the "procedural blank check" that amici contend exists, the district court's procedures here comply fully with constitutional requirements.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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MAY 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2010, I electronically filed the foregoing Response to Petition for Rehearing en banc with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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