No. 03-6696

IN THE SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that respondents have established the legality of the military's detention of Yaser Esam Hamdi, a presumed American citizen who was captured in Afghanistan during the combat operations in late 2001, and was determined by the military to be an enemy combatant who should be detained in connection with the ongoing hostilities in Afghanistan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 316 F.3d 450. The order of the court of appeals denying rehearing (Pet. App. 39a-67a) is reported at 337 F.3d 335. The opinion of the district court (Pet. App. 29a-38a) is reported at 243 F. Supp. 2d 527. Prior opinions of the court of appeals are reported at 296 F.3d 278 and 294 F.3d 598.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2003. The court of appeals denied rehearing on July 9, 2003 (Pet. App. 39a). The petition for a writ of certiorari was filed on

October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On September 11, 2001, the al Qaeda terrorist network launched a savage, coordinated attack on the United States, killing approximately 3000 persons. In response, the President, in his capacity as Commander in Chief, took steps to protect the Nation from another attack and prevent related threats. Congress promptly backed the President's use of "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." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (C.A. J.A. 20).[1] In addition, Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

In the fall of 2001, the President dispatched the armed forces of the United States to Afghanistan to seek out and destroy the al Qaeda terrorist network and Taliban regime. In the course of that

[1] Respondents have provided the Clerk's Office with copies of the Joint Appendix filed by the parties in the court of appeals, which contains pertinent record materials cited herein.

campaign -- which remains ongoing -- the United States and its allies have captured or taken control of numerous individuals. As in virtually every other major armed conflict in the Nation's history, the military has determined that many of those captured in connection with the hostilities in Afghanistan are enemy combatants who should be detained during the ongoing conflict. The time-honored practice of detaining captured enemy combatants serves the vital wartime objectives of preventing combatants from continuing to aid the enemy and gathering intelligence to further the overall war effort. See L. Oppenheim, International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952); W. Withrop, Military Law and Precedents 788 (2d ed. 1920); Pet. App. 16a-17a.

b. The detainee at issue in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He went to Afghanistan before September 11, 2001, and stayed there after the United States and coalition forces began military operations in that country in the fall of 2001. In late 2001, while Northern Alliance forces were engaged in battle with the Taliban near Konduz, Afghanistan, Hamdi surrendered -- while armed -- along with his Taliban unit, and was taken to a prison maintained by the Northern Alliance in Mazar-e-Sharif. C.A. J.A. 61 (Mobbs Decl. ¶¶ 3-4). Hamdi was subsequently transferred to a Northern Alliance prison in Sheberghan, where he was interviewed by a United States Interrogation Team. Ibid. (Mobbs Decl. ¶ 5).

Based on interviews with Hamdi in Afghanistan and his association with the Taliban, the United States military determined that Hamdi is an enemy combatant. C.A. J.A. 62 (Mobbs Decl. ¶ 6). In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. Id. at 61 (Mobbs Decl. ¶ 5). Subsequent interviews with Hamdi likewise confirmed his status as an enemy combatant. For example, Hamdi himself has stated that he surrendered to Northern Alliance forces and turned over his Kalishnikov (i.e., AK-47) assault rifle to them. Id. at 62 (Mobbs Decl. ¶ 9).

United States military authorities concluded that Hamdi met criteria established by the Department of Defense for determining which of the captured combatants in Afghanistan should be placed under United States military control. C.A. J.A. 62 (Mobbs Decl. ¶ 7). Pursuant to an order of the United States Land Forces Commander in Afghanistan, Hamdi was transferred from Sheberghan to a United States facility in Kandahar. Ibid. Following a separate military screening in January 2002, Hamdi was transferred from Kandahar to the Naval Base at Guantanamo Bay, Cuba. Ibid. (Mobbs Decl. ¶ 8). In April 2002, after military authorities learned of records indicating that Hamdi was born in Louisiana, Hamdi was transferred to the Naval Brig in Norfolk, Virginia. On July 29, 2003, Hamdi was transferred to the Naval Brig in Charleston, South

Carolina, where he is currently detained.[2]

2. a. On June 11, 2002, the detainee's father, Esam Fouad Hamdi, filed this next-friend habeas action on behalf of his son in the District Court for the Eastern District of Virginia.[3] The petition avers that, "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." C.A. J.A. 9 (Pet. ¶ 9). In addition, the petition claims that, "[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution," and that Hamdi's detention without charges or counsel "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." Id. at 13 (Pet. ¶¶ 22, 23).[4] The petition seeks

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[2] Petitioners suggest (Pet. 3 n.3) that Hamdi's transfer to South Carolina may have implicated Rule 36.1 of the Rules of this Court or Rule 23(a) of the Federal Rules of Appellate Procedure. However, because Hamdi was transferred after the court of appeals issued its mandate (July 9, 2003) and before the petition for a writ of certiorari was filed in this Court (October 1, 2003), neither of those rules governed the transfer.

[3] Two previous next-friend habeas petitions were filed on behalf of Hamdi. Those petitions were ordered to be dismissed for lack of jurisdiction, see Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Pet. App. 11a, and are not at issue here.

[4] The petition states only one other claim: that, "[t]o the extent that [the President's Military Order of November 13, 2001 (see C.A. J.A. 22-27)] disallows any challenge to the legality of [Hamdi's] detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ." Id. at 13 (Pet. ¶ 25). As respondents have explained (see id. at 47), that claim is without merit. By its terms, the President's Military Order (§ 2(a)) applies only to non-citizens whom the President determines "in writing" to be subject to the Order. The Military Order accordingly does not apply to a presumed American citizen such as Hamdi, and in any event the President has not made any determination that Hamdi is subject to the Order.

Hamdi's immediate release and other relief. Id. at 14 (Pet. 7).

Before respondents were served with a copy of the petition, the district court appointed the federal public defender as counsel for Hamdi and ordered respondents to allow the public defender unmonitored access to Hamdi. Pet. App. 11a. Respondents appealed the district court's access order and, on July 12, 2002, the court of appeals reversed the district court's order and remanded. 296 F.3d 278. The court of appeals "sanctioned a limited and deferential inquiry into Hamdi's status, noting that 'if Hamdi is indeed an 'enemy combatant' who was captured during the hostilities in Afghanistan, the government's present detention of him is a lawful one.'" Pet. App. 12a (quoting Hamdi, 296 F.3d at 283 (citing, e.g., Ex parte Quirin, 317 U.S. 1, 31, 37 (1942)). The court remanded for consideration of whether Hamdi is indeed such an enemy combatant, admonishing that "the district court must consider the most cautious procedures first" in undertaking such inquiry. Ibid. (quoting Hamdi, 296 F.3d at 284).

b. On July 18, 2002, before the court of appeals had lifted a stay of the district court proceedings or issued its mandate in the prior appeal, the district court ordered respondents to file their return. Respondents filed a response to, and motion to dismiss, the petition. The filing included the sworn declaration of the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, who has been substantially involved with

issues related to the detention of enemy combatants in connection with the current war. In the declaration, Mr. Mobbs confirmed that Hamdi was seized in Afghanistan in the fall of 2001, and explained the basis for the military's determination to detain him as an enemy combatant. See C.A. J.A. 61-62; pp. 3-5, supra.

On July 31, 2002, the district court set a hearing on the government's return. In addition, the court directed respondents to produce, prior to the hearing, "for in camera review by the Court," specified materials concerning "Hamdi's legal status," including "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi"; the names and addresses of "all the interrogators who have questioned Hamdi"; "statements by members of the Northern Alliance regarding [Hamdi]"; a list of "the date of Hamdi's capture" and "all the dates and locations of his subsequent detention"; and the identity of the government official, or officials, who made certain determinations with respect to Hamdi's detention as an enemy combatant. C.A. J.A. 141-142. Respondents moved the district court for relief from its production demands, arguing that the demands were unnecessary and unwarranted.

On August 13, 2002, before ruling on respondents' motion for relief from the production order, the district court held a hearing on respondents' response to the petition. C.A. J.A. 325-424 (Tr. of 08/13/02 Hrg.). During the hearing, the district court repeatedly stated its intent to take the Mobbs Declaration and

"pick it apart." Id. at 364; see id. at 332, 350, 354. The court went on to question virtually every aspect of the declaration, including matters such as whether there is "anything in the Mobbs' Declaration that says Hamdi ever fired a weapon?," id. at 332, and whether Mr. Mobbs was even a United States government employee, id. at 333; see Pet. App. 13a. At the same time, however, the district court stated during the hearing that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that he "had a firearm" when he surrendered. Id. at 374; see id. at 395 ("He was there to fight. And that's correct.").

c. On August 16, 2002, the district court issued an order (Pet. App. 29a-38a) holding that respondents' return and supporting declaration is "insufficient" to justify Hamdi's detention. Id. at 30a. The court stated that "[a] thorough examination of the Mobbs declaration reveals that it leads to more questions than it answers," id. at 35a, and that it is "necessary to obtain the additional facts requested," id. at 38a. The court further ordered respondents to produce for ex parte, in camera review the materials demanded by its July 31 order, together with the screening criteria that respondents had offered to provide the court in their return (C.A. J.A. 36 n.1) but had explained were not necessary for it to review to dispose of the case. Pet. App. 30a; see id. at 13a.

On August 21, 2002, the district court certified its August 16 order for an interlocutory appeal pursuant to 28 U.S.C. 1292(b),

and the court of appeals subsequently granted respondents' petition for an interlocutory appeal. Pet. App. 13a.

3. The court of appeals, in an opinion authored by all three panel members, reversed and remanded with instructions to dismiss. Pet. App. 1a-28a. The court explained that the Constitution vests the President, as Commander in Chief, with broad authority to wage war, including "the authority to detain those [enemy combatants] captured in armed struggle." Id. at 14a & n.3 (citing, e.g., Quirin, 317 U.S. at 26). In addition, the court explained that Congress expressly affirmed the President's constitutional authority to capture and detain enemy combatants in connection with the current conflict when it enacted the Authorization for Use of Military Force (see p. 3, supra). See Pet. App. 18a.

The court of appeals further held that, as a presumed American citizen, Hamdi is entitled to judicial review of his military detention in this habeas action. Pet. App. 15a; see ibid. ("The detention of United States citizens must be subject to judicial review."). As the court stated, "[d]espite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited." Id. at 15a. At the same time, however, the court held that "[j]udicial review of battlefield captures in overseas conflicts is a highly deferential one." Id. at 28a; see id. at 16a-17a, 22a-23a.

Applying that understanding, the court of appeals "conclude[d]

that Hamdi's petition fails as a matter of law." Pet. App. 20a. The court explained that "[w]here, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the detention." Id. at 27a. The court also rejected petitioners' purely legal objections to Hamdi's detention based on 18 U.S.C. 4001(a) and Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention or GPW), Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135. See Pet. App. 18a-20a.

The court of appeals similarly rejected the district court's demand for additional proceedings to "test[] the factual basis of Hamdi's enemy combatant status." Pet. App. 20a. As the court explained, the district court's extraordinary production order not only was unfounded, but, "if enforced, would present formidable practical difficulties" for the military, which is still engaged in military operations in Afghanistan and "has been charged by Congress and the executive with winning a war, not prevailing in a possible court case." Id. at 20a-21a. Indeed, the court continued, "[t]he logistical effort to acquire evidence from far away battle zones might be substantial," and "these efforts would profoundly unsettle the constitutional balance." Id. at 22a.

The court of appeals stated that, given the nature of the issues involved, "any broad or categorical holdings on enemy combatant designations would be especially inappropriate." Pet. App. 16a. The court explained that, "[w]e have no occasion, for example, to address the designation as an enemy combatant an American citizen captured on American soil or the role that counsel might play in such a proceeding." Pet. App. 16a (citing Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), appeal pending (argued Nov. 17, 2003)). In addition, the court stated that "[w]e shall, in fact, go no further in this case than the specific context before us -- that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces." Ibid.; see id. at 10a, 27a-28a.

4. The court of appeals denied rehearing and a suggestion for rehearing en banc by an 8-4 vote. Pet. App. 29a-67a.

a. Judge Wilkinson and Judge Traxler filed separate opinions concurring in the denial of rehearing en banc. See Pet. App. 42a-45a (Wilkinson); id. at 45a-54a (Traxler). Their opinions responded to the arguments made by Judge Luttig and Judge Motz, who filed opinions dissenting from the denial of rehearing en banc. See id. at 54a-61a (Luttig); id. at 61a-67a (Motz).

b. Judge Luttig objected to the panel's "refusal to rest decision on the proffer made by the President of the United States,

and its insistence instead upon resting decision on a putative concession by the detainee." Pet. App. 54a. In Judge Luttig's view, by not applying a more deferential standard of review, the panel's decision "all but eviscerates the President's Article II power to determine who are and who are not enemies of the United States during times of war." Ibid. Although he disagreed with the panel's approach and reserved "ultimate judgment" on the issue, Judge Luttig stated that he "would likely conclude * * * that the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard for the President's designation of an enemy of the United States." Id. at 61a.

c. Judge Motz concluded that "the record shows no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant." Pet. App. 65a. In Judge Motz's view, respondents should be required either to produce additional materials explaining the circumstances surrounding Hamdi's capture and detention, such as those ordered by the district court, "for judicial review, ex parte and in camera if necessary," or Hamdi should be permitted, "with the aid of counsel, to proffer affirmative evidence of his 'non-combatant' status." Id. at 66a.

ARGUMENT

After careful consideration and multiple appeals, the court of appeals concluded that respondents have established the legality of

Hamdi's detention, and that Hamdi therefore is not entitled to habeas relief. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. To the contrary, the military detention at issue in this case is consistent with this Court's precedents recognizing the President's authority to capture and detain combatants in wartime, Congress's express statutory backing of the President's use of all necessary and appropriate military force in connection with the current conflict, and the time-honored laws and customs of war.

At the same time, the court of appeals' decision is painstakingly grounded on the particular circumstances of Hamdi's detention, including his acknowledged capture and initial detention in Afghanistan. Even apart from the sworn account of Hamdi's battlefield surrender with a Taliban unit while armed with an AK-47, Afghanistan was undeniably an active theater of combat when Hamdi was captured, and to this day American forces remain engaged in deadly conflict with al Qaeda and Taliban fighters there. The court of appeals' decision in this case accordingly could not possibly have the far-reaching consequences hypothesized by petitioners. Further review is not warranted.

A. The Court Of Appeals Correctly Held That Respondents Have Established The Lawfulness Of Hamdi's Wartime Detention

After carefully examining the record before it, the court of appeals correctly determined that Hamdi's wartime detention is lawful, and that petitioners are not entitled to habeas relief.

1. As the court of appeals explained (Pet. App. 13a-14a), the Constitution vests the political branches and, in particular, the President, as Commander in Chief, with broad authority to wage war. See U.S. Const. Art. II, § 2. It is well-settled that the President's war powers include the authority to capture and detain enemy combatants at least for the duration of a conflict. See Ex parte Quirin, 317 U.S. 1, 30-31 & n.8 (1942); see also Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); Pet. App. 14a n.3; Hamdi, 296 F.3d at 281-283; Oppenheim, supra, at 368-369. As the court of appeals stated, the capture and detention of enemy combatants "'is neither punishment nor an act of vengeance," but rather 'a simple war measure.'" Pet. App. 16a (citing Withrop, supra, at 788). As discussed, the detention of captured enemy combatants serves the vital war objectives of preventing the combatant from rejoining the enemy and continuing to fight and enabling the collection of intelligence about the enemy. See ibid.; p. 3, supra.[5]

Moreover, it is settled that the military's authority to detain enemy combatants in wartime is not diminished by a claim, or even a showing, of American citizenship. See Pet. App. 19a;

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[5] The practice of capturing and detaining enemy combatants is as old as war itself, see A. Rosas, The Legal Status of Prisoners of War 44-45 (1976), and is ingrained in this Nation's military history, see Lt. Col. G. Lewis & Capt. J. Mewha, History of Prisoners of War Utilization by the United States Army 1776-1945, Dep't of the Army Pamphlet No. 20-213 (1995). In modern times, the detention of enemy combatants generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy. Rosas, supra, at 59-80.

Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful"); In re Territo, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) (same), cert. denied 352 U.S. 1014 (1957). To be sure, the fact that a detained combatant has American citizenship may enable him to proceed with a habeas action that could not be brought in the United States courts by an alien held overseas (cf. Johnson v. Eisentrager, 339 U.S. 763 (1950)), but it does not affect the military's settled authority to detain him once it has determined that he is an enemy combatant. Pet. App. 26a.

For at least two reasons, the President's constitutional authority to capture and detain enemy combatants in wartime is at its height with respect to the detainee in this case. First, as explained above, Congress has expressly backed the President's "use [of] all necessary and appropriate force" in connection with the events that led to the President's deployment of military force in Afghanistan. 115 Stat. 224; cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-637 & n.2 (1952) (Jackson, J., concurring). As the court of appeals recognized, as a matter of textual construction and common sense, that authorization must

extend to the capture and detention of enemy combatants in connection with the conflict. Pet. App. 18a. Second, Hamdi is a classic battlefield detainee -- captured in Afghanistan, an area of active combat, with an enemy unit. Id. at 12a-13a.[6]

2. The Executive's determination that an individual is an enemy combatant is a quintessentially military judgment, especially when it comes to an individual, like Hamdi, captured in an active combat zone. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander in Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948); Eisentrager, 339 U.S. at 789. As the court of appeals explained, "the designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities

[6] As a practical matter, it follows that Afghanistan -- a country that thousands of United States armed forces personnel had entered for the purpose, inter alia, of ousting the Taliban regime -- was an active combat zone in late 2001. See Pet. App. 50a n.9 (Traxler, J.). The Commander in Chief's own executive orders underscore that common sense conclusion. On December 12, 2001, the President issued the Afghanistan Combat Zone Executive Order, which designated, for purposes of 26 U.S.C. 112 (combat zone pay for members of the armed forces), "Afghanistan, including the air space above, as an area in which Armed Forces of the United States are and have been engaged in conflict." The order further designated "September 19, 2001, as the date of the commencement of combatant activities in such zone." See www.whitehouse.gov/news/releases/2001/12/20011214-8.html. Furthermore, as explained below, the conflict in Afghanistan is ongoing. See note 13, infra.

during the conduct of hostilities." Pet. App. 17a.

Moreover, the military -- unlike Article III courts -- has a unique institutional capacity to make enemy combatant determinations. In the course of hostilities, the military through its operations and intelligence-gathering has an unmatched vantage point from which to learn about the enemy, and make judgments as to whether those seized during a conflict are friend or foe. See Hamdi, 296 F.3d at 283 ("The political branches are best positioned to comprehend this global war in its full context."); see also Rostker v. Goldberg, 453 U.S. 65-66 (1981). At the same time, under our Constitution, the Executive -- unlike the courts -- is politically accountable for the decisions made in prosecuting war, and in defending the Nation. See Pet. App. 14a-15a.

Respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit courts to the consideration of legal attacks on detention of the type considered in Quirin, and raised by the petition in this case (see C.A. J.A. 13). At most, however, in light of the fundamental separation-of-powers principles recognized by this Court's decisions and discussed above, a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant. The court of appeals appropriately exercised such a role, taking account of the

constitutionally sensitive nature of the determination at issue.[7]

3. The court of appeals correctly concluded that the current record establishes "a sufficient basis on which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution," and that "[n]o further factual inquiry is necessary

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[7] As the government explained in the court of appeals (Gov't C.A. Br. 28-30), in evaluating habeas challenges to executive determinations in less constitutionally sensitive areas, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call on the Executive only to show "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The court of appeals stated that it was "not necessary for [the court] to decide whether the 'some evidence' standard is the correct one to be applied in this case because [it was] persuaded for other reasons [stated in its decision] that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate." Pet. App. 25a. To be clear, however, the detention at issue also would be lawful under a "some evidence" standard. See Pet. App. 60a-61a (Luttig, J.).

or proper." Pet. App. 10a. As the court of appeals emphasized, the record establishes beyond dispute that Hamdi was in Afghanistan when he was seized by the military. Hamdi's next-friend habeas petition avers that Hamdi "resided in Afghanistan" when he was seized. C.A. J.A. 9 (Pet. ¶ 9). Hamdi's father, the next-friend who brought this habeas action, has publicly reiterated that fact. Id. at 153-154 (08/05/02 Letter from Esam Foud Hamdi to Senator Patrick J. Leahy). Throughout this litigation, petitioners have made clear that they are not challenging Hamdi's initial capture and detention in Afghanistan. Pet. App. 43a & n. 2. And, what is more, the certiorari petition itself acknowledges (Pet. 5) that Hamdi was in Afghanistan when he was captured.

Moreover, the sworn declaration voluntarily submitted by respondents not only confirms that Hamdi was seized in Afghanistan, but explains that the military has determined that Hamdi surrendered with a Taliban unit while armed with an AK-47. C.A. J.A. 61-62 (Mobbs Decl. ¶¶ 3-5, 9). An individual who surrenders with enemy forces in an active theater of combat while armed with a military assault weapon is an archetypal enemy combatant. Cf. Quirin, 317 U.S. at 38 ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.") (emphasis added); L. Oppenheim, International Law 223 (5th ed. 1935) (Citizens of even

neutral states, "if they enter the armed forces of a belligerent, or do certain other things in his favour, * * * acquire enemy character."); id. at 224 ("[D]uring the World War hundreds of subjects of neutral States, who were fighting in the ranks of the belligerents, were captured and retained as prisoners").

Indeed, even if Hamdi had not been armed when he surrendered, his detention would still be authorized. It is settled under the laws and customs of war that the military's authority to detain individuals in wartime extends to non-combatants who enter the theater of battle as part of the enemy force, including clerks, laborers, and other "civil[ian] persons engaged in military duty or in immediate connection with an army." Withrop, supra, at 789; GPW art. 4(A)(4), 6 U.S.T. 3316 (recognizing that individuals who can be detained as prisoners of war include "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); Hague Convention of 1907, art. 3, 36 Stat. 2277 ("The armed forces of the belligerent parties may consist of combatants and non-combatants" who in "case of capture" may be detained as prisoners of war).[8]

[8] Moreover, as Judge Traxler explained, although not necessarily determinative, under "the time-honored rule of law in wartime," "significant consequences" may attach based simply on the fact that an individual is a resident of an enemy country. Pet. App. 50a (citing Juragua Iron Co. v. United States, 212 U.S. 297,

4. The court of appeals also correctly appreciated the hazards of attempting to engage in additional fact-finding concerning Hamdi's capture and detention. Pet. App. 20a-22a. The acknowledged fact that Hamdi was seized in Afghanistan means that any further fact-finding -- especially the sort of unprecedented production demands imposed by the district court, see p. 7, supra -- would present "formidable practical difficulties." Pet. App. 20a. The materials demanded by the district court implicate sensitive national security matters concerning the conduct of an ongoing war. In addition, even attempting to compile such materials would require locating and contacting American soldiers or allied forces abroad. "The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded." Id. at 22a; cf. Eisentrager, 339 U.S. at 779 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."). The court of appeals appropriately refused to order further factual development, or fact-finding, concerning the military's conduct of an overseas war -- an inquiry that, as the court aptly observed, "would profoundly unsettle the constitutional balance." Pet. App. 22a.

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308 (1909); Lamar, Executor v. Browne, 92 U.S. 187, 194 (1875)).

B. None Of Petitioners' Renewed Objections To Hamdi's Wartime Detention Provides Any Basis For Granting Certiorari

Petitioners devote the bulk of their petition to re-airing their objections to the legality of Hamdi's detention. The court of appeals correctly rejected those objections, and they provide no basis to grant further review in this Court.

1. As a threshold matter, petitioners argue (Pet. 23-24) that Hamdi's detention and the form of judicial review provided by the court of appeals violates the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, a claim that they made in only "an abbreviated form" (Pet. App. 18a) in the court of appeals. That contention is without merit. As the court of appeals explained, "the fact that [it did] not order[] the relief Hamdi seeks is hardly equivalent to a suspension of the writ." Pet. App. 18a. To the contrary, the court of appeals considered and rejected petitioners' challenges to Hamdi's detention, including not only their argument that the Mobbs Declaration is insufficient, but also petitioners' "purely legal grounds for relief." Ibid.; see id. at 18a-20a.

To be sure, petitioners have in mind a much different type of habeas proceeding, one that would completely ignore the special circumstances in which this case arises. For example, they demand that Hamdi not only "be allowed to challenge his * * * detention," but that he be permitted to "meet with counsel, present evidence, and participate in his habeas proceeding," Pet. 39, as if this were an ordinary habeas action. As evidenced by its extraordinary

production demands and access orders, the district court envisioned a similar type of proceeding. But while holding that Hamdi's detention "must be subject to judicial review," Pet. App. 15a, the court of appeals appropriately concluded that the shape of this habeas proceeding must reflect the unique circumstances in which it arises and the core Executive interests involved.[9]

2. Petitioners argue (Pet. 30) that the military's detention of Hamdi without charges or counsel is "inconsistent with the requirements of the Due Process Clause." See Pet. 31-34. However, as the court of appeals explained, the special context in which this case arises -- wartime detention of combatants, not criminal punishment -- significantly diminishes the due process rights that Hamdi enjoys, even as a presumed American. See Pet. App. 26a-27a.

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[9] In a similar vein, petitioners suggest (Pet. 19-20 (citation omitted)) that the court of appeals' decision upholding the legality of Hamdi's detention is inconsistent with the "historical core" of "the writ of habeas corpus." As a historical matter, however, the writ generally was not extended to prisoners of war. See R.J. Sharpe, The Law of Habeas Corpus 112 (1976) (Under the writ's common law tradition, "a prisoner of war has no standing to apply for the writ of habeas corpus."); see also, e.g., Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) ("The courts of England * * * will not even grant a habeas corpus in the case of a prisoner of war * * *. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious."); Ex parte Liebmann, 85 K.B. 210, 214 (1915) ("It is * * * settled law that no writ of habeas corpus will be granted in the case of a prisoner of war."). In any event, respondents have not argued -- and the court of appeals did not hold, see Pet. App. 15a-16a -- that the writ of habeas corpus is unavailable to challenge Hamdi's detention. Rather, respondents have argued -- and the court of appeals held, see id. at 28a -- that while Hamdi is entitled to judicial review by habeas, he is not entitled to habeas relief in this case.

As the Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

There is no obligation under the laws and customs of war for the military to charge captured combatants with any offense and, indeed, the vast majority of combatants seized during war are detained as a simple war measure without charges. Similarly, there is no general right to counsel under the laws and customs of war for those who are detained as enemy combatants. Under the GPW, prisoners of war are not entitled to a right to counsel to challenge their detention unless charged and tried for an offense. See GPW art. 105, 6 U.S.T. 3316. Unlawful combatants, such as Hamdi (see pp. 29-30, infra), who are not held as prisoners of war do not enjoy any greater right of access to counsel under the GPW.[10]

Furthermore, any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or

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[10] The captured combatants in Quirin were charged with violations of the laws of war and of the Articles of War -- offenses punishable by death -- and tried before a military commission. 317 U.S. at 22-23. Accordingly, the saboteurs were provided counsel by the military to aid in preparing a response to those charges. Hamdi, by contrast, has not been charged with any offense and has not been subjected to any military trial or punishment. Rather, as discussed, he is simply being detained during the conflict as a captured combatant.

counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993) (looking to "[h]istorical practice" in evaluating scope of "Fourteenth Amendment's guarantee of due process" in criminal procedure context); see also Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909). As discussed above, for ages it has been recognized that the military's detention of captured enemy combatants is lawful at least for the duration of the conflict.

As the court of appeals recognized, the process that Hamdi is due must take its form from the constitutional, procedural, and national security limitations on a habeas proceeding in this unique context. See Pet. App. 14a-16a; Moyer, 212 U.S. at 84 ("[W]hat is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation."). The court of appeals properly concluded that, based on the particular circumstances of this case, the record adequately demonstrates that Hamdi's military detention is lawful, and that additional procedures are not required. Pet. App. 22a-25a.[11]

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[11] Although the court of appeals did not need to reach the issue, see Pet. App. 17a n.4, affording enemy combatants with immediate access to counsel as a matter of right also could impermissibly interfere with the military's efforts to gather intelligence from such combatants in connection with the ongoing war. See Decl. of Col. Donald D. Woolfolk (C.A. J.A. 145-147) (explaining the importance of intelligence gathering in connection with the current conflict and the military's determination that granting Hamdi immediate access to counsel would interfere with such efforts). As a matter of discretion and military policy, the Department of Defense (DOD) has adopted a policy of permitting

3. Petitioners argue (Pet. 35-39) that Hamdi's detention is barred by 18 U.S.C. 4001(a). As the court of appeals explained, that is incorrect. Pet. App. 18a-19a. Section 4001 does not intrude on the authority of the Executive to capture and detain enemy combatants in wartime. To the contrary, Congress placed Section 4001 in Title 18 of the United States Code -- which governs "Crimes and Criminal Procedure" -- and addressed it to the control of civilian prisons and related detentions. Moreover, the legislative history of Section 4001(a) indicates that it was enacted to repeal the Emergency Detention Act of 1950, which specifically empowered the Attorney General to detain individuals under certain circumstances. Both the intent to limit the Attorney General's authority and the provision's location in Title 18 suggest that Section 4001(a) was not designed to apply to military

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access to counsel by an enemy combatant who is a United States citizen and who is detained by the military in the United States, when DOD has determined that such access will not compromise the national security of the United States, and when DOD has determined either that it has completed intelligence collection from the enemy combatant or that granting access to counsel would not interfere with such intelligence gathering. In accordance with DOD's policy and the military's ongoing evaluation of Hamdi's detention, DOD has determined that Hamdi may be permitted access to counsel subject to appropriate security restrictions. See http://www.dod.gov/releases/2003/nr20031202-0717.html. Because the court of appeals properly concluded that the military established the legality of Hamdi's detention, and did not reach the question whether Hamdi's detention without access to counsel was justified by the need for intelligence gathering, the fact that DOD has determined in accordance with its policy that Hamdi may be permitted access to counsel does not affect the correctness of the court of appeals' decision in this case.

detentions. That conclusion is bolstered by Subsection (b) of Section 4001(a), which addresses "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b). Thus, particularly when the provision is read as a whole, there is no reason to conclude that Section 4001 was addressed to the military's detention of captured enemy combatants.

In any event, as the court of appeals explained, the military detention at issue in this case is authorized by at least two different Acts of Congress, and thus would be exempt from Section 4001(a) even if it were otherwise covered. Pet. App. 18a. First, as discussed, the challenged executive actions in this case fall within Congress's statutory Authorization for Use of Military Force in the wake of the September 11 attacks. 115 Stat. 224. Second, Congress has authorized the use of appropriated funds to the Department of Defense to pay for the detention of "prisoners of war" and individuals -- such as enemy combatants -- "similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4).

Furthermore, the canon of constitutional avoidance itself forecloses any interpretation of Section 4001(a), such as the one advanced by petitioners, that would interfere with the well-established authority of the President as Commander in Chief to detain enemy combatants during wartime. See Jones v. United States, 529 U.S. 848, 857 (2000). As the court of appeals put it,

"[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is." Pet. App. 19a.[12]

4. Petitioners argue (Pet. 30) that Hamdi "has not been treated in accordance with Article 5 of the Geneva Convention." The court of appeals correctly rejected that argument on the ground that -- as other courts of appeals have recognized -- "the Geneva Convention is not self-executing." Pet. App. 19a; see, e.g., Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (GPW is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries"). As the court of appeals explained, the fact that the habeas statute permits an individual to challenge his detention based on a violation of a treaty, 28 U.S.C. 2241, does not mean that a habeas petitioner may challenge his detention based on a non-self-executing treaty such as the Geneva Convention. See Pet. App. 20a.

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[12] Nothing in Ex parte Endo, 323 U.S. 283 (1944), on which petitioners rely (Pet. 38), is to the contrary. In that case, this Court specifically distinguished between "civilian" and "military" detentions and stated that, because "Endo is detained by a civilian agency," "no questions of military law are involved." Id. at 298. The detention of the captured battlefield combatant in this case is a classic type of military detention. Moreover, to the extent that petitioners suggest (Pet. 37) that Endo required "explicit statutory language" to authorize the executive branch's use of the war powers, they are mistaken. In Endo, the Court stated that "[t]he fact that the [Congressional] Act and the [accompanying executive] orders are silent on detention does not of course mean that any power to detain is lacking." 323 U.S. at 301.

Moreover, petitioners' Geneva Convention claim fails for the same reason that they err in claiming that Hamdi's detention is inconsistent with the military's regulations concerning the detention of prisoners of war and other detainees. Pet. 30-31 (citing Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997) (C.A. J.A. 91-128)). There is no doubt that Hamdi is not entitled to prisoner-of-war status. Article 5 of the GPW and the military's regulations call for a tribunal only in cases in which there is doubt as to an individual's prisoner-of-war status. See Reg. 1-5(a)(2) (C.A. J.A. 96). In the case of Hamdi and other detainees, there is no such doubt. The President has conclusively determined that al Qaeda and Taliban detainees, such as Hamdi, are unlawful combatants and, as such, are not prisoners of war under the GPW. See White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Sec'y, Feb. 7, 2002 (www.whitehouse.gov/news/releases/2002/02/20020207-13); United States v. Lindh, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002); Pet. App. 20a.

5. Petitioners object (Pet. 18 & n.12) to Hamdi's detention on the ground that the hostilities in Afghanistan have concluded. That is incorrect. As the court of appeals observed, "American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove

dangerous in their own right." Pet. App. 27a.[13] Moreover, as the court of appeals recognized (Pet. App. 27a), the determination as to when hostilities have ceased is for the political branches and is not appropriate for judicial resolution. See Ludecke, 335 U.S. at 170; United States v. The Three Friends, 166 U.S. 1, 63 (1887).

C. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals

1. Petitioners argue (Pet. 12) that the court of appeals' decision "conflicts with this Court's decisions authorizing judicial review of military seizures during wartime." The decisions on which they rely are readily distinguishable.

In particular, petitioners claim that the court of appeals' decision "directly conflicts" (Pet. 19) with Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851), a case which they did not cite in the court of appeals. The issue in Mitchell was whether, or in what circumstances, a United States military officer may take personal property from a American citizen who is traveling with the military, by order of the military, for military use without

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[13] See, e.g., Afghan Fighting Kills 1, Injures 3, cnn.com, Nov. 17, 2003 (www.cnn.com/2003/WORLD/asiapcf/central/11/12/afghan.fighting.ap/index.html); Bomb Kills U.S. Soldier in Afghanistan, New York Times, Nov. 16, 2003 (www.nytimes.com/2003/11/16/international/asia/16AFGH.html); Pamela Constable, Security Still Elusive in Afghanistan, Washington Post Foreign Service, Nov. 16, 2003 (www.washingtonpost.com/wp-dyn/articles/A46637-2003Nov15.html); Walter Pincus, Attacks in Afghanistan Are on the Rise: Gen. Abizaid Calls Combat Situation 'Every Bit as Difficult' as in Iraq, Washington Post Foreign Service, Nov. 15, 2003 (www.washingtonpost.com/wp-dyn/articles/A42606-2003Nov14.html).

compensation. The plaintiff in Mitchell, Harmony, was an American merchant during the Mexican-American war who voluntarily followed the United States military into Mexico on a trading trip, which was specifically authorized by United States law. Id. at 132. When the military planned a "hazardous expedition" further into Mexican territory, "[Harmony] determined to proceed no further, and to leave the army." Id. at 129. The military, however, compelled Harmony to accompany its forces on the expedition, and during the expedition Harmony's goods were lost. Id. at 129-130.

Harmony brought a civil tort-of-trespass action seeking damages against the officer who executed the order compelling him to remain with the American troops. 54 U.S. at 128. This Court upheld the jury's damage award for trespass. Id. at 137. In so doing, however, the Court had no occasion to address a battlefield decision by the military to detain an enemy combatant. Indeed, the Court emphasized that the question presented "is not as to the discretion [a military officer] may exercise in his military operations or in relation to those who are under his command." Id. at 134. In addition, the civil tort action in Mitchell was brought after the hostilities in Mexico had ended and, thus, the prospect of fact-finding did not require or risk distraction of American soldiers engaged in ongoing combat operations overseas.

Sterling v. Constantin, 287 U.S. 378 (1932), relied on by petitioners (Pet. 25), is also inapposite. That case did not

involve the military's capture and detention of an enemy combatant in wartime, but rather a challenge to the governor of Texas's authority to enforce certain orders limiting the production of oil purportedly due to civil unrest in the territory. Id. at 387. Moreover, in Sterling, "[i]t was conceded that at no time has there been any uprising in the territory [at issue]," and that the area was "not at all in a condition constituting, or even remotely resembling, a state of war." Id. at 390-391.

Nor is there any conflict between the Fourth Circuit's decision in this case and Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), on which petitioners also rely (Pet. 14, 36). In Milligan, this Court rejected the argument that Indiana was part of "the theater of military operations" on the ground that Indiana had not been invaded by the enemy and the troops present in Indiana "were to be employed in another locality." 71 U.S. at 126. Afghanistan was undeniably a theater of military operations when Hamdi was seized there, and it remains so today. Furthermore, as this Court explained in Quirin, 317 U.S. at 45, the petitioner in Milligan was not properly regarded as an enemy belligerent, whereas the detainee in this case is a prototypical battlefield combatant.

Petitioners argue (Pet. 20-21) that the court of appeals' refusal to order additional evidentiary proceedings in this case is inconsistent with Ex parte Bollman, 8 U.S. (4 Cranch) 75, 125 (1807), where the Court called for "an examination of the

evidence." That is incorrect. Bollman involved a challenge to the detention of individuals who had been charged with treason and were jailed by a District of Columbia court while awaiting trial on those charges, not review of the military's determination to detain an individual captured in an active combat zone. Hamdi has not been charged with any offense under domestic law or the laws of war, and he is being detained as a captured enemy combatant during wartime, not as an individual in custody pending a criminal trial.[14]

Petitioners' reliance (Pet. 32) on Zadvydas v. Davis, 533 U.S. 678 (2001), is likewise misplaced. Zadvydas involved aliens convicted of criminal offenses, who were subsequently detained pending removal for immigration violations. Far from opining on the military's detention of enemy combatants in an ongoing war, the Court in Zadvydas emphasized that its decision did not "consider terrorism or other special circumstances." Id. at 696. Indeed, the Court recognized that in such circumstances "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." Ibid.

2. For the first time in this case, petitioners argue that the court of appeals' decision "violated a line of this Court's

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[14] Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869), likewise did not involve a challenge to the detention of an enemy combatant during wartime, but instead concerned the habeas petition of a private citizen in Mississippi who had been detained and tried for murder by the military after the Civil War. Id. at 88.

precedents that support the constitutional guarantee of access to the courts." Pet. 28-29 (citing, e.g., Lewis v. Casey, 518 U.S. 334 (1996); Procunier v. Martinez, 416 U.S. 396 (1974), overruled in part by Thornburg v. Abbott, 490 U.S. 401 (1989); Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941)). This Court does not normally address issues that were not properly raised and developed by the parties below and, thus, are not addressed by the court of appeals. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Taylor v. Freeland & Kronz, 503 U.S. 638, 645-648 (1992). There is no reason to make an exception to that practice here.

In any event, the court of appeals' decision in this case does not in any way conflict with the right of access recognized by cases such as Casey, Procunier, or Bounds. Those cases arose in the distinctly different context of inmates who had been committed to the criminal justice system to serve sentences of imprisonment. Moreover, even in the Casey line of cases, this Court has recognized that the ability of prisoners to access courts may be limited by state regulation that is reasonably related to legitimate penological interests, such as maintaining prison security or order. See Turner v. Safley, 482 U.S. 78, 89 (1987). Not only is allowing captured enemy combatants access to the courts inconsistent with the laws and practices of war, but, as noted above, there may be vital national security interests in preventing

such access while the military attempts to gather intelligence from an enemy combatant. See note 11, supra.

Furthermore, although he has not appeared personally in this habeas action, Hamdi has received access to the courts through this action. In accordance with the writ's common law history (see Whitmore v. Arkansas, 495 U.S. 149, 162-163 (1990)), the habeas statute expressly contemplates that a detainee may be inaccessible, and thus authorizes a proper next-friend to bring an action on a detainee's behalf. See 28 U.S.C. 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.") (emphasis added). As this Court has held, next-friend standing is available only on a showing, inter alia, that "the real party in interest cannot appear on his own behalf to prosecute the action," and that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate," Whitmore, 495 U.S. at 163. Thus, appointment of a next friend serves as a mechanism by which an otherwise unavailable detainee -- including an "inaccessible" (ibid.) detainee -- may effectively gain access to the courts. Respondents have not contested the next-friend standing of Hamdi's father to maintain this action on his son's behalf. Through this next-friend action, Hamdi's detention has been carefully tested by the courts. That is a traditional function of the next-friend doctrine in habeas actions

and, especially in the unique circumstances of this case, it does not violate any right of access recognized by this Court.

3. Petitioners erroneously suggest (Pet. 26-27) that the decision below conflicts with In re Territo, 156 F.2d 142 (9th Cir. 1946). The only relevant question before the Ninth Circuit in Territo was whether the detainee's claim of American citizenship rendered his detention as a prisoner of war unlawful. See id. at 145. The Ninth Circuit rejected that argument, explaining that "[w]e have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the battlefield." Ibid.

The Ninth Circuit's decision notes that a hearing was held in the district court. 156 F.2d at 143. There is no indication, however, that the military had determined that granting Territo access to a hearing in 1946 -- after hostilities had ceased -- would interfere with the war or any continuing intelligence collection. Moreover, the court of appeals' ultimate disposition rested, not on the particular facts of the case, but on the now well-settled proposition that, as a matter of law, a claim of American citizenship is irrelevant to the propriety of detaining "one captured on the battlefield." Id. at 145. As explained above, the court of appeals' decision in this case is entirely consistent with that ruling. Pet. App. 19a.

D. Petitioners Overstate The Reach Of The Court Of Appeals' Carefully Tailored Decision In This Case

Petitioners erroneously suggest that the court of appeals' decision in this case "poses a grave threat to the liberty of all Americans" (Pet. 40), and "works a radical change" in the separation of powers (Pet. 12). Hamdi is by no means an ordinary American: he went to Afghanistan to train with and if necessary fight for the Taliban; he stayed there after American forces entered the country en masse; and he surrendered on the battlefield in Afghanistan with an enemy unit, armed with an AK-47 military-assault rifle. This Court long ago recognized that such a battlefield combatant, even if he can establish his American citizenship by birth or other means, is subject to capture and detention by the military during the conflict. See Quirin, 317 U.S. at 31. That principle has peacefully co-existed with the constitutional rights of truly ordinary Americans for more than half a century, during which the Nation's armed forces have been engaged in numerous international conflicts.

Furthermore, as petitioners themselves acknowledged in their petition for rehearing in the court of appeals (at 3), the court of appeals was "painstaking in its effort" to resolve only the case before it. Thus, the court of appeals did not adopt "any broad or categorical holdings on enemy combatant designations" and, instead, scrupulously focused on the circumstances before it -- "that of the undisputed detention of a citizen during a combat operation in a

foreign country and a determination by the executive that the citizen was allied with enemy forces." Pet. App. 16a; see id. at 10a, 27a-28a; see also id. at 45a (Wilkinson, J.) ("There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in Korematsu."); id. at 52a-54a (Traxler, J.) (emphasizing the "impropriety of reaching beyond this case to decide another"). In that regard, petitioners overstate the holding of the court of appeals' decision in this case.[15]

In sum, the court of appeals' decision is carefully tailored to the detention of the battlefield combatant at issue in this case. It faithfully applies existing precedent and fundamental separation-of-powers principles. It recognizes the time-honored military practice of detaining captured combatants in wartime. And it accordingly does not warrant further review in this Court.

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[15] Petitioners' reliance on Winston Churchill's remarks is also misplaced. See Pet. 12 (quoting A.W.B. Simpson, Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights, 41 Loy. L. Rev. 629, 631 (1996)). Churchill's remarks were not directed to the wartime detention of those captured on the battlefield, a time-honored military practice of which Churchill was well aware. Churchill himself spent his 25th birthday as a prisoner of war in Pretoria, South Africa, after being captured in a theater of combat by the Boers. Rather, the remarks quoted by petitioners referred to the case of Sir Oswald Ernald, a former Member of Parliament and British fascist leader in 1940, who was arrested in Britain and detained until 1943 pursuant to Defense Regulation 18B, purportedly based on fears about his loyalties, not on his presence in an active combat zone. See 41 Loy. L. Rev. at 631.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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