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 and W.R. PAULETTE, Commander,
Respondents.

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

BRIEF OF AMICI CURIAE HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HERBERT J. STERN, HON. HAROLD R. TYLER, JR., SCOTT GREATHEAD, ROBERT M. PENNOYER, AND BARBARA PAUL ROBINSON IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici intend to address the third question presented in the petition for certiorari:

> Whether the separation of powers doctrine precludes a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification for its indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant"?

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INTRODUCTION

Yaser Hamdi's father claims his son was a civilian relief worker. The executive claims he was an enemy combatant. The decision of the U.S. Court of Appeals for the Fourth Circuit holds that federal courts have no role to play in determining who is correct, and consigns an American citizen to indefinite detention without charges or trial. That decision misapplies the separation-of-powers doctrine and abdicates the courts' historic role in habeas corpus cases to inquire into the factual basis for executive detention. This Court should therefore reverse the dismissal of the habeas corpus petition and direct that the district court "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243 (2000).[1]

STATEMENT OF INTEREST OF AMICI

Amici, the former federal judges and attorneys listed below who have devoted their careers to promoting the rule of law as implemented in our nation's courts, have an abiding interest in the independence of the judiciary as a check on the actions of the executive branch.

Judge Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

Judge Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress.

1. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk. No counsel for the parties has authored this brief in whole or in part. No person other than amici and their counsel has made a monetary contribution to the preparation or submission of this brief.

Judge William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Judge H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Judge Herbert J. Stern served as a judge on the United States District Court for the District of New Jersey from 1973 to 1987. He also served as the United States Judge for Berlin from 1979 to 1980.

Judge Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Scott Greathead is a member of the New York bar and an international human rights advocate. He has traveled to more than a dozen countries to advocate the rights of persons under executive detention.

Robert M. Pennoyer is an attorney in private practice in New York City. He has served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, the Assistant to the General Counsel of the Department of Defense, and the Special Assistant to the Assistant Secretary of Defense for International Security Affairs.

Barbara Paul Robinson is an attorney in private practice in New York City. She is a former President of the Association of the Bar of the City of New York.

STATEMENT OF THE CASE

As the case comes to this Court, the facts that the panel below considered to be dispositive are either not supported by evidence or very much in dispute. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 360-61 (4th Cir. 2003) (hereinafter *Hamdi IV*) (Luttig, J., dissenting from denial of rehearing en banc). For example, while the decision here on review embraces as dispositive that Mr. Hamdi was "captured on the battlefield," *Hamdi v. Rumsfeld*, 316 F.3d 450, 468, 471 (4th Cir. 2003) (hereinafter *Hamdi III*), neither the petition for habeas corpus, the Mobbs Declaration, nor anything else in the record, sets forth where Mr. Hamdi was apprehended. The Mobbs Declaration alleges that Mr. Hamdi was not captured by United States forces, but was handed over to the U.S. military in Afghanistan by unnamed members of the Northern Alliance. J.A. at 149 (Mobbs Decl. ¶¶ 4, 7). How and where the Northern Alliance apprehended Mr. Hamdi are not disclosed. Further, while the Mobbs Declaration asserts that Mr. Hamdi "was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control," no information is provided as to what those criteria are or the facts to which those criteria were applied in Mr. Hamdi's case. *Id.* (Mobbs Decl. ¶ 7).

Mr. Mobbs asserts that all "individuals associated with al Qaeda or Taliban were and continue to be enemy combatants," *id.* (Mobbs Decl. ¶ 6), and that Mr. Hamdi was "affiliated with a Taliban military unit," *id.* at 148 (Mobbs Decl. ¶ 3), but does not explain what the words "associated" and "affiliated" mean in this context. Although the Government asserts to this Court that the President has "conclusively determined" that Mr. Hamdi is an "unlawful combatant" (Opp. to Cert Pet. at 29), the Mobbs Declaration does not use the term "unlawful combatant," and only asserts that the U.S. military has determined that Mr. Hamdi is an "enemy combatant." J.A. at 149 (Mobbs Decl. ¶¶ 6, 7). No facts were presented to the habeas court to establish that the

petitioner has committed offenses under any criminal or military code. There is no suggestion that Mr. Hamdi has any connection with al Qaeda or has committed acts of terrorism.

For all that appears in the record, Mr. Hamdi might be (1) a lawful combatant entitled to all the protections afforded such a person by the Geneva Convention,[2] which the Government concededly has not granted him; (2) an "unlawful" combatant based on some as yet undisclosed evidence as applied to some as yet undisclosed standard of conduct; (3) a civilian in the wrong place at the wrong time.[3]

In the face of these uncertainties, the decision below holds that "any effort [by the courts] to ascertain the facts" would invade the executive's "war efforts." *Hamdi III*, 316 F.3d at 474-75. Instead, the only permissible judicial inquiry is whether the facts alleged by the Government in support of the prisoner's detention would, "*if accurate*," provide a valid basis for the detention. *Id.* at 473 (emphasis added). The court below therefore accorded conclusive effect to the two-page hearsay Mobbs Declaration that purported to set forth the facts pertaining to Mr. Hamdi's apprehension and detention. The habeas petition was dismissed without a hearing, without any judicial inquiry into the veracity of the allegations by the Government, and without the petitioner having been informed of the factual allegations on which he has been held or afforded access to his court-appointed counsel to apprise counsel whether the facts alleged in the Mobbs Declaration are true.[4]

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2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter "Geneva Convention").

3. The assertion that Mr. Hamdi was a civilian relief worker is noted at *Hamdi IV*, 337 F.3d at 346 n.3 (Traxler, J., concurring in denial of rehearing en banc).

4. The Mobbs Declaration implies that the declarant or others within the U.S. military have in their possession evidence, such as (Cont'd)

The Fourth Circuit's ruling has placed Mr. Hamdi in a legal limbo. He has not been charged with any crime in either the civilian or military justice systems and the Government disclaims any obligation to so charge him at any time. (Opp. to Cert. Pet. at 24.) Mr. Hamdi has not been accorded prisoner-of-war status and has not been afforded the protections of the Geneva Convention, including the right to have a "competent tribunal" determine his status.[5] The Government disclaims any obligation to invoke such a hearing because petitioner's status is, at least in the military's mind, "not in doubt" (*id.* at 29) and has refused the district court's suggestion that it conduct a hearing before a military tribunal to confirm Mr. Hamdi's status (*see* Pet. for Cert. at 9 n.7). Even if the Government were to acknowledge an obligation to release him (or to charge him for war crimes) when hostilities end,[6] given the nature of the present conflict, hostilities may continue indefinitely. In short, if the Government's position were accepted, Mr. Hamdi, and anyone similarly situated, could be detained for life without hope of access to any forum – civilian

(Cont'd)
statements of Mr. Hamdi and others, that supports their assertions as to Mr. Hamdi's status, and there is no claim of inability to marshal that evidence. *See* J.A. at 149-50 (Mobbs Decl. ¶¶ 5, 8, 9). The fact-gathering difficulties hypothesized by the Fourth Circuit, *Hamdi III*, 316 F.3d at 473-74, appear to be absent.

5. Geneva Convention, art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

6. Geneva Convention, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Geneva Convention, art. 119 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment.").

or military – with authority to inquire into the factual basis of his detention.

The panel below countenanced that result despite its recognition that "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." *Hamdi III*, 316 F.3d at 473. Indeed, reports of bounty hunting by Northern Alliance members cast in doubt the alleged circumstances of any prisoner handed over to the U.S. authorities by the Northern Alliance.[7] The United States to date has released some 87 Guantanamo detainees,[8] several of whom have asserted that they were mistakenly identified as enemy combatants.[9] In addition, in the wake of the September 11 attacks, there have been other instances in which persons wrongly have been accused of terrorist associations or activities.[10] Those reports

7. *See* Indira A.R. Lakshmanan, *Freed Detainees Cite Rewards, Beatings Ex-Prisoners Talk of Treatment at Guantanamo Bay*, The Boston Globe, March 26, 2003, at A6 (reporting that a released detainee "said he was forcibly conscripted by the militia and captured by a notorious warlord, General Abdul Rashid Dostum, who 'sold us to the U.S.'"); *see also* Carlotta Gall, *A Nation at War: Kabul; U.S. Sends 18 at Guantanamo to Afghanistan to be Freed*, The New York Times, March 25, 2003, at B13.

8. *See World in Brief*, The Washington Post, February 15, 2004, at A25.

9. The first four detainees released in October 2002 included a 71-year-old man who was captured while traveling to visit a doctor and who claimed he never fought for the Taliban; in fact, he was from a village that fought against the Taliban. Liz Sly, *"I didn't do anything wrong," aged former detainee says*, Chicago Tribune, October 30, 2002, at N3. One of the juveniles released on January 29, 2004, has stated that he was arrested by Afghan militia soldiers and turned over to the Americans while he was simply looking for work. Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantanamo*, The New York Times, February 11, 2004, at A3.

10. One well-publicized casualty of the "war on terror" is Abdallah Higazy, an Egyptian national who was falsely accused of possessing an (Cont'd)

underscore the inevitability of some error in the factual determinations that underlie detention decisions, even by agents acting in complete good faith, that proper judicial review may correct. They also remind us, however, that habeas corpus is the ultimate protection of the people against executive officers *not* acting in good faith, who can misuse their awesome powers to deprive innocent persons of liberty for illegitimate reasons.

SUMMARY OF ARGUMENT

The Fourth Circuit decision misapplies the separation-of-powers doctrine by elevating to a preferred position the executive's military prerogatives, while surrendering a core attribute of judicial power: the power to find the facts that are determinative of a specific dispute before the court. This Court has refused to give effect even to congressional enactments that purported to eliminate the federal courts' ability to decide dispositive factual disputes in specific cases properly before them. Here, where congressional enactments have instructed the courts to "determine the facts" presented in habeas petitions, 28 U.S.C. § 2243, and authorized them to reject the executive's factual representations, 28 U.S.C. § 2248, executive power to demand a different procedure is at its weakest.

This Court has repeatedly indicated that the judicial power does not disappear in times of war. There is no reason to believe that federal courts would unduly interfere with military operations or compromise national security by performing a role in which the courts are expert – resolving factual disputes – and

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aviation radio on September 11, 2001 at a hotel near the World Trade Center, arrested by the FBI as a material witness, and held in solitary confinement for 31 days before being released. A United States District Judge later stated that "[t]he court . . . was apparently seriously misled on two occasions in connection with the detention of Mr. Higazy as a material witness. . . ." *See* Christine Haughney, *Judge Orders Inquiry Into Detainment of Egyptian*, The Washington Post, August 17, 2002, at A02.

numerous cases involving substantial national security concerns have been successfully processed by the courts. The Fourth Circuit's mistrust of the courts' ability to do so should be rejected.

The history and purpose of the writ of habeas corpus are also contrary to the decision below. The power to question facts alleged by the executive as support for a petitioner's detention, particularly when there have been no prior judicial or quasi-judicial findings, is essential if the writ is to fulfill its purpose as a bulwark against unlawful executive detention. To hold, as the court below did, that the habeas court is powerless to look behind the government's representations of fact would have the same effect as suspending the writ, which can properly be done only by Congress.

ARGUMENT

THE DECISION BELOW MISAPPLIES SEPARATION-OF-POWERS DOCTRINE AND UNDERMINES THE HISTORIC FUNCTION OF HABEAS CORPUS AS A CHECK ON EXECUTIVE OVERREACHING

A. The Decision Below Violates the Separation of Powers by Intruding on the Article III Judicial Power

The Fourth Circuit decision acknowledges that the separation of powers is a means of protecting the liberty of the people. *Hamdi III*, 316 F.3d at 462-63. From that unassailable premise, however, the decision quickly goes astray in recognizing and elevating to a preferred position a "right of the people" collectively to enjoy the benefits of an executive power immunized from "trespass" by the judicial branch. *Id*. at 463. The three branches of government are separate, but co-equal. The people have as much right to collectively enjoy the benefits of an independent judiciary as they do to enjoy the benefits of a wise legislature and an effective executive. In short, the principle of separation of powers does not immunize executive actions

from judicial scrutiny. The decision below, far from protecting the executive from unwarranted "trespass" by the judiciary, violates the separation of powers by causing an unwarranted surrender of the judicial power in Article III of the Constitution.

Article III creates a federal judiciary that "stand[s] independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remain[s] impartial." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). An essential element of the federal judiciary's responsibility and power under Article III is the "judicial duty to exercise an independent judgment." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936). Neither Congress nor the executive branch may constitutionally prevent the judiciary from fulfilling that duty, for both lack the authority to require "the federal courts to exercise '[t]he judicial Power of the United States,' U.S. Const., art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995) (holding that Congress violated the separation of powers by retroactively commanding the federal courts to reopen final judgments).

Throughout its history, often in cases other than habeas corpus, this Court has carefully guarded the judiciary's power to make independent judgments by reserving to Article III courts the power to determine whether the evidence is sufficient to support a specific claim properly before the court. And properly so, because "[h]ow the facts are found will often dictate the decision of federal claims." *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 416-17 (1964).[11]

11. The Court has held that under the "demands of due process and the constraints of Art[icle] III," a federal district court cannot constitutionally abdicate its duty to find facts, and can only defer to a record developed by a non-Article III officer when "the entire process (Cont'd)

The principle that a coordinate branch cannot tell an Article III court how to determine the outcome of a specific cause properly before it is central to the separation of powers envisioned in the Constitution. The paradigm is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where the Court held unconstitutional a congressional enactment that required federal courts to find a former Confederate citizen's acceptance of a general presidential pardon to be conclusive evidence of prior disloyalty to the Union. The statute effectively determined the outcome of claims brought by those citizens under an act that allowed those who could prove their loyalty to recover property confiscated by federal troops during the war. The Court rejected this statute as an attempt by Congress to "forbid[the court] to give the effect to evidence which, in its own judgment, such evidence should have," and held it to be an unconstitutional violation of the separation of powers. *Id.* at 147 (stating that Congress "inadvertently passed the limit which separates the legislative from the judicial power"). Since *Klein*, the Court has continued to hold that Congress cannot "require federal courts to exercise the judicial power in a manner that Article III forbids" by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Plaut*, 514 U.S. at 218.

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), is a recent example of this Court's skepticism of attempts to compel Article III courts to rubber-stamp factual determinations of the executive branch. The question was whether the Attorney General's statutorily-authorized certification that a federal

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takes place under the district court's total control and jurisdiction." *United States v. Raddatz*, 447 U.S. 667, 681, 683-84 (1980) (holding constitutional the provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (2000), that permits a federal judge to determine and decide a motion to suppress evidence based on the record developed before a magistrate judge, because "the magistrate acts subsidiary to and only in aid of the district court").

employee was acting within the scope of his employment, which would be determinative of a tort claim against the government, was conclusive on the court. *Id*. at 420. This Court observed that the notion that Congress could "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate," *id.* at 430, is contrary to the "traditional understandings and basic principles . . . [that] executive determinations generally are subject to judicial review and . . . mechanical judgments are not the kind federal courts are set up to render." *Id.* at 434. In a case with stakes far lower than the indefinite loss of personal liberty here, the Court therefore refused to read the statute as requiring the judiciary to be bound by the Attorney General's certification, because such a reading "would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Id.* at 426.

In cases such as *Klein* and *Gutierrez de Martinez*, the Court has preserved inviolate the power of the federal courts to engage in independent fact-finding in the face of assertions that Congress had shifted the power to adjudicate facts out of the courts' control. If in the present case Congress had enacted legislation that directed the federal habeas court to accept as conclusive a declaration by a member of the Department of Defense certifying the enemy combatant status of the detainee, the attempted dilution of the courts' adjudicatory power by the legislature would present a serious constitutional issue. In the present case, however, Congress has not so legislated. Nor has it remained silent. Were the federal habeas court to accept as conclusive an executive representation of the facts that purport to justify the petitioner's confinement, as the Fourth Circuit has instructed it to do, it would disobey congressional enactments that place the fact-finding power in the habeas court.

In the Judicial Code, Congress has directed courts to "summarily hear and determine the facts" involved in a habeas petition. 28 U.S.C. § 2243. The petitioner may deny the facts of the government's return or allege facts on his own. *Id*. The Court may glean the facts from depositions, affidavits, or oral testimony, but when affidavits of the government are accepted, as in the present case, the petitioner has the right to propound written interrogatories on the government's affiant. 28 U.S.C. § 2246 (2000). Finally, even if the petitioner does not traverse the facts alleged in the return, the court may refuse to accept the facts asserted by the government if it "finds from the evidence that they are not true." 28 U.S.C. § 2248. Nothing in these enactments carves out cases involving terrorism, warfare, or other aspects of national security for different treatment.

The decision below ignores the significance of these provisions in the separation-of-powers analysis. The executive's claim here of a constitutional right to displace the fact-finding prerogatives of the habeas court misunderstands separation-of-powers principles as surely as did the executive's claim that was rejected in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Among the fundamental teachings of *Youngstown* is that the executive's assertion of power deriving from the President's role as Commander-in-Chief is at its weakest when it is opposed, not supported, by act of Congress. *Id.* at 587; *see also id.* at 646 (Jackson, J., concurring). Or, as Justice Clark's concurrence put it, such an exercise of purported executive power cannot be sustained where "Congress had prescribed methods to be followed by the President in meeting the emergency at hand," but the executive utilizes other methods of its own devising. *Id.* at 662. Here, too, the executive claims power to intrude upon the adjudicatory function of the habeas court in derogation of explicit statutory commands that repose the fact-finding function in the court itself.

B. The Power Of Judicial Review Does Not Disappear In Times Of War

The Fourth Circuit diminished the scope of judicial review to the vanishing point because the nation is at war, and because "the President is given the war power." *Hamdi III*, 316 F.3d at 471. Of course, it is not completely true that the President is given the "war power," a phrase that is not used in the Constitution. Governmental powers pertaining to the declaring and making of war are apportioned carefully among the legislative and executive branches.[12] And, here the executive power is asserted without legislative authorization to restrict the scope of habeas corpus review.

This Court has repeatedly held that the judicial power does not disappear when the nation is at war or military prerogatives of the executive are exercised. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. 115 (1851) (military officers' seizure of U.S. citizen's

12. The Constitution's only reference to the Executive's "war power" is found in Article II, section 2, clause 1, which declares the Executive to be "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." In contrast, the Constitution grants Congress a wide variety of powers governing the nation's ability to make war. *See* U.S. Const., art. I, § 8, cl. 1 (granting Congress the power to "collect taxes . . . to . . . provide for the common defense . . . of the United States"); U.S. Const., art. I, § 8, cl. 10 (granting Congress the power to "define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations"); U.S. Const., art. I, § 8, cl. 11 (granting Congress the power to "declare war" and to "make Rules concerning Captures on Land and Water"); U.S. Const., art. I, § 8, cl. 12 (granting Congress the power to "raise and support Armies"); U.S. Const., art. I, § 8, cl. 13 (granting Congress the power to "provide and maintain a Navy"); U.S. Const., art. I, § 8, cl. 14 (granting Congress the power to "make Rules for the Government and Regulation of the land and naval Forces"); U.S. Const., art. I, § 8, cl. 16 (granting Congress the power to "provide for the organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States").

property in foreign country was subject to court challenge, including jury determination of the facts); *see also, e.g.*, *Youngstown*, 343 U.S. at 587 ("It is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."); *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946) (describing the "philosophy embodied in the Petition of Right and Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power"); *Crowell v. Benson*, 285 U.S. 22, 58 (1932) ("When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined de novo upon habeas corpus."); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

The executive's supposed primacy in "war making" therefore does not support the surrender of the judicial power wrought by the decision below.[13] Nor does the Fourth Circuit's reliance on the alleged (but unproved) fact that Mr. Hamdi was seized in a "war zone" justify his continued detention without

13. None of the cases relied on by the Government, or by the Fourth Circuit, supports the contention that because this nation is at war a federal habeas court may be bound by the executive's assertion of the jurisdictional facts underlying its authority to detain the petitioner. In particular, in both *Ex parte Quirin*, 317 U.S. 1, 20, 38 (1942), and *In re Territo*, 156 F.2d 142, 145-46 (9th Cir. 1946), petitioners did not dispute the factual findings underpinning the determination of their status. Nonetheless, they had full access to a tribunal in which any disputed facts could be tried. Indeed, in *Quirin*, this Court reached the merits of the habeas petitions despite a presidential order that purported to deny the petitioners access to the U.S. courts. 317 U.S. at 23. In *Territo*, the district court held a hearing on the habeas petition and made the factual findings necessary to confirm that petitioner was properly designated a prisoner of war. *Id.* at 143.

effective judicial review.[14] If the place of the petitioner's capture *were* determinative, all the more reason that this vital jurisdictional fact be subjected to court review. The notion that the scope of court review of a habeas corpus petition should depend upon whether the petitioner was captured on a battlefield is, in any event, fundamentally wrong. The place and circumstances of the petitioner's capture may be relevant to the determination whether he was properly seized, and to his classification as a prisoner of war, unlawful combatant, or otherwise. But the place where the petitioner was captured bears no logical relationship to a federal district court's competence to adjudicate his habeas corpus petition.

Far from being diminished due to alleged military necessity, a habeas court's fact-finding power should be at its strongest in a case such as this, where an important liberty interest is at stake and the petitioner had no opportunity to contribute to the factual record upon which the executive based its determination. Habeas is not being used here as a post-conviction remedy to relitigate facts found adversely to the petitioner by any tribunal. This Court's willingness to permit Article III courts to defer, in some situations other than habeas, to an executive agency's factual determinations has been limited to situations where the agency made the determinations "in a judicial capacity," resolving "disputed issues of fact properly before it which the parties . . . had an adequate opportunity to litigate." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *see also St. Joseph Stock Yards Co.*, 298 U.S. at 52-53 (acknowledging that the "judicial duty to exercise an independent judgment does not require or justify disregard of

14. In addressing only Question 3 presented to this Court, amici take no position as to whether capture in a war zone is a sufficient basis for executive detention. The contention here is that, assuming those, or some other set of defined, circumstances would permit detention consistent with the Constitution, the connection with military activity does not require the courts to cede their power to verify whether in a particular case the requisite circumstances were present.

the weight which may properly attach to findings *upon hearing and evidence*") (emphasis added). If the Government had criminally prosecuted petitioner in a civilian or military court[15] or granted him an "Article 5" hearing under the Geneva Convention to determine his status,[16] any habeas petition filed thereafter by Mr. Hamdi would be in the nature of a collateral attack and the appropriate degree of judicial review of the prior tribunal's fact-finding would present a different question than that posed by this case. Absent such a prior judicial or quasi-judicial proceeding, the federal court's power and obligation to find facts of jurisdictional and constitutional significance must be plenary. *See Crowell*, 285 U.S. at 64; *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496-97 (1991) (because litigants alleged that the INS's procedures for making deportation decisions "do not allow applicants to assemble adequate records," judicial review of the litigants' constitutional claims could not be confined to the record created by the INS).

The Court of Appeals' reluctance to entertain judicial inquiry into the facts that underlie Mr. Hamdi's detention was largely premised on assumptions about interference with military activities and second-guessing of military decisions. *Hamdi III*, 316 F.3d at 473-74. Its approach, however, betrays a mistaken mistrust of the federal courts' ability to engage in the sensitive balancing of executive needs and individual rights. In *Webster v. Doe*, 486 U.S. 592, 604 (1988), for example, this Court observed that district courts are capable of balancing a plaintiff's discovery needs in a wrongful termination case "against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." Similarly, in *Zadvydas v. Davis*, 253 U.S. 678 (2001), the Court

15. This brief does not address the question of whether a military tribunal would be a proper tribunal in which to try Mr. Hamdi's alleged status as unlawful combatant.

16. *See* footnote 5, *supra*.

acknowledged the significant administrative, as well as policy-based, reasons to defer to the executive in implementing the nation's immigration laws. Nonetheless, the Court "believe[d] that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id*. at 700.

Cases involving the military raise similar concerns but should elicit a similar response. A habeas court can defer to the Commander-in-Chief where deference is due without relinquishing its historic role. For example, we would not expect a court to second-guess the determination of the U.S. military to enter Afghanistan, to identify the Taliban as its foe, to work with the Northern Alliance, and to conduct the war as it deemed fit. We would expect a habeas court to be empowered to ascertain whether, for example, the evidence on which the military claims to have relied in branding Mr. Hamdi an "affiliate" of the Taliban really exists. We would also expect a habeas court to hear Mr. Hamdi's side of the story and judge, as courts are expert in doing, whether it is credible. Indeed, independent review of the facts alleged by the government to justify his detention would be particularly meaningful in correcting unwarranted detentions when the initial capture occurs on a battlefield, where the opportunity for deliberation and accurate assessment of a person's identity and status is least likely.

C. The History and Purpose of Habeas Corpus Prohibit the Unquestioning Acceptance of Executive Representations as Adequate Grounds for Detention

The decision below is not only inconsistent with this Court's holdings that protect judicial independence as an integral element of the separation of powers, but also with the singular history and purpose of habeas corpus as a check on the executive branch. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301 (2001).

1. *Early English courts regularly inquired into the factual basis for confinement*

In *St. Cyr*, this Court held that the Suspension Clause of the Constitution at minimum protects the writ as it existed in 1789. *Id.* Habeas corpus practice at the time of adoption of the Constitution permitted courts to look behind the factual averments of the Government that were offered to justify detention.

Early English cases granting habeas relief to prisoners detained without process by individual Privy Council[17] members held that a return merely claiming the executive's authority to hold a detainee, without more, was insufficient to justify continued incarceration. *See, e.g.*, *Hellyard's Case*, 74 Eng. Rep. 455 (C.P. 1587); *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1587). With small initial steps such as these, the common law courts began to claim for themselves the power to require that executive detentions conform to law, rather than to the whim or caprice of those in power.

In 1628, Parliament enacted the Petition of Right, which abolished the sovereign's right to arrest and detain without showing cause. 3 Car. 1, ch. 1 (1628). This Court has observed that the Petition of Right was prompted by attempts by the monarch to employ martial law as a means of visiting summary punishment on civilians. *See Duncan*, 327 U.S. at 320. The same act also abolished the Court of Star Chamber, which had been widely reviled as an instrument of the arbitrary – and unappealable – exercise of executive power. Its abolition underscored Parliament's recognition that a tribunal that existed merely to place a rubber stamp of judicial imprimatur on decisions of the executive presented a threat to the meaningful exercise of the right to habeas corpus. After the Restoration,

17. The Privy Council was the predecessor to an executive agency: the "organ through which the King [or Queen] carried on the work of government." WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 40 (1980) (hereinafter DUKER).

Parliament enacted the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (1679), with additional provisions designed to prevent avoidance of the writ by the executive. The right to a factual inquiry into the causes stated in the return was not made statutory until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100 (1816), but earlier courts applying the common law writ recognized the necessity of meaningful consideration of the factual basis for confinement. Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535 (1998).

For example, in the well-known *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), the Court of Common Pleas rejected the argument that it must accept as true the allegations in the return, stating that "we ought not implicitly think the commitment was re vera, for cause particular and sufficient enough . . . our judgment ought to be grounded on our own inferences and understandings. . . ." *Id.* at 1007-08. *See also Sommersett's Case*, 20 Howell's State Trials 1 (K.B. 1772) (holding a factual hearing on the return); *Rex v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761); *King v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (considering "divers affidavits" from both sides in deciding habeas petition).

Habeas cases involving the military were not treated differently. In *Goldswain's Case*, 96 Eng. Rep. 711 (K.B. 1778), the petitioner claimed wrongful impressment into the navy. The court held that neither "the court [n]or the party are concluded by the return of a habeas corpus, but may plead to it any special matter necessary to regain his liberty." *Id.* at 712. Further, the judges stated "that they could not willfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Id. See also Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (relying on petitioner's affidavit to establish facts that entitled him to exemption from impressment).

At the time the U.S. Constitution was adopted, the English courts thus bequeathed a legacy of increasingly independent factual inquiry in resolving habeas petitions.

2. *The Framers recognized the vital importance of the writ as a meaningful check on executive power*

Deprived of the full protections of the writ, the colonies chafed under "arbitrary detention [of colonists] by royal governors and other officers of the executive branch" throughout New England and New York. Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 393 (1998). The colonists recognized the importance of habeas corpus to their personal freedoms and individual liberty. Cotton Mather, instructing Massachusetts's agents in London to request for Massachusetts the protections of the 1679 Act, wrote that without those protections "we are slaves. . . ." DUKER, *supra*, at 101. Alluding to the lack of meaningful review of, in particular, detentions ordered by the military, the colonists listed in the Declaration of Independence among their enumerated grievances the complaint that the King had "affected to render the military independent of, and superior to, the civil power," and "depriv[ed] us, in many cases, of the benefit of trial by jury." THE DECLARATION OF INDEPENDENCE para. 14, 20 (U.S. 1776).

The Framers were aware of the dangers of unchecked executive power, and viewed the separation of powers as the ultimate assurance of a just government, with the "separate and distinct exercise of the different powers of government . . . essential to the preservation of liberty." THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison). Further, the Framers recognized the essential power of habeas corpus as a check on unbridled executive power to arrest and detain. Quoting Blackstone, Alexander Hamilton wrote of the writ in Federalist No. 84:

> The practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable

> instruments of tyranny . . . "to bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly carrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a MORE DANGEROUS ENGINE of arbitrary government."

Three states, Georgia, Massachusetts, and North Carolina, included habeas corpus guarantees in their own constitutions prior to the Philadelphia Convention in 1787, and courts of all of the states recognized the common law writ. DUKER, *supra*, at 103, 106, 115. At the Convention, affirmations of the right to habeas review similar to those in the state constitutions were proposed, but were eventually rejected. Instead, its availability was presumed and debate focused on whether *any* grounds for suspension should be authorized. *Id.* at 127-131. The writ finally was made subject only to the limited restrictions of the Suspension Clause of Article I, section 9: "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." The First Congress passed the Judiciary Act of 1789, which granted the federal courts statutory authority to issue writs of habeas corpus to prisoners "in custody, under or by color of the authority of the United States." 1 Stat. 82 (1789).

3. *United States habeas decisions and legislation emphasize the vital role played by judicial inquiry into the factual justifications for confinement*

This Court soon had the opportunity to consider cases challenging confinement by the executive without findings in any tribunal to justify the action. In *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806), the habeas petitioner was committed to

prison on the basis of a meeting of several justices of the peace, at which (the warrant recited) it was decided "from the information, testimony and complaint of many credible persons, . . . that [petitioner was a] disturber of the peace." *Id.* at 450-51. Burford sought habeas relief from the Circuit Court, which ordered him remanded to custody. On appeal, this Court discharged him, stating that the representations of fact in the warrant were insufficient to support his confinement: "The fact, ought to have been established by testimony, and the names of the witnesses stated." *Id*. at 452. The essential deficiency in the Circuit Court's ruling was its uncritical acceptance of what amounted to bare allegations, rather than proof, adduced by the prosecutorial agency, the justices of the peace.

Ex parte Bollman, 8 U.S. (3 Cranch) 75 (1807), decided by the Marshall Court in the same year, involved a habeas petition brought by two alleged co-conspirators of Aaron Burr, who were held in military detention on the charge of treason. This Court refused to accept the facts alleged by the government, and engaged in a lengthy examination of the evidence presented by both sides, including affidavits and testimony, eventually determining that the evidence did not support petitioners' continued detention and ordering them released. *Id.* at 133-37.

Similarly, in several wrongful impressment habeas cases decided during the War of 1812, state and lower federal courts inquired into the factual basis of confinement, taking testimony beyond the return. *See, e.g.*, *Commonwealth v. Harrison*, 11 Mass. (1 Tyng) 63, 65 (1814) (examining evidence showing that the enlistee was a minor, stating "[t]his Court has authority – and it will not shun the exercise of it on proper occasions – to inquire into the circumstances under which any person brought before them by writ of *habeas corpus* is confined or restrained of his liberty"); *In re Stacy*, 10 Johns. 328 (N.Y. 1813) (examining multiple affidavits provided by the habeas petitioner, and stating, "we must act, as the courts have always, of necessity, acted, in like cases, upon the return itself and the accompanying

affidavits of the complainant"); *United States v. Bainbridge*, 24 F. Cas. 946, 952 (C.C.D. Mass. 1816) (No. 14,497) (where a factual question arises regarding a parent's consent to the enlistment of his minor son, it would be "necessary to have required more explicit affidavits than have been made").

The Habeas Corpus Act of 1867, in the midst of Reconstruction, further expanded the scope of habeas review. First, the writ was made available to prisoners held under color of state law to challenge confinement in violation of the federal Constitution or federal law. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867)) (hereinafter "1867 Act"). Second, and more pertinent here, Congress provided that petitioners could "deny any of the facts set forth in the return" and "allege any fact to show that the detention is in contravention of the constitution or laws of the United States." *Id.* Congress instructed that the court then "proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested." *Id*.

When Congress overhauled the Judiciary Code in 1948, it added two new provisions that it believed codified existing procedures in habeas matters. *See* H.R. REP. NO. 80-308, at A179 (1948). Congress allowed either party to submit affidavits in lieu of oral testimony, which could then be answered by affidavits or interrogatories from the opposing party. 28 U.S.C. § 2246. In addition, Congress intended that the allegations in the government's return to the habeas petition should be critically reviewed, and not assumed true if "the judge finds from the evidence that they are not true." 28 U.S.C. § 2248.

Those provisions not only give courts a variety of mechanisms by which they may find the facts, but impose upon them a duty to engage in factual inquiry rather than uncritically accept the executive's representations. Were the rule otherwise, the Great Writ would be toothless. Just three Terms ago, for example, this Court held that the habeas court was not required to "accept the Government's view about whether the

implicit statutory limitation [on the executive's power to detain] is satisfied in a particular case, conducting little or no independent review of the matter." *Zadvydas*, 533 U.S. at 699 (citing 28 U.S.C. § 2241).

Similarly, in *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court invalidated a state's determination that a death row prisoner was sane, a determination made unilaterally by state executive appointees. A majority of the Court agreed that such a determination, made by the executive without affording the prisoner any opportunity to be heard, did not comport with due process. *See Ford*, 477 U.S. at 410-11.[18] "[P]erhaps the most striking defect" in the state procedures was the "placement of the decision wholly within the executive branch. . . . In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal." *Id*. at 415-16. As Justice Powell observed, "the Governor's finding is not entitled to a presumption of correctness" because the "essence of a 'court' is independence from the prosecutorial arm of government and . . . the Governor is '[t]he commander of the State's corps of prosecutors.'" *Id.* at 423 (Powell J., concurring in part).

The panel decision below violates all the key mandates that Congress wrote into the modern habeas corpus statute. The district court has been stripped of the power to "hear and determine the facts." 28 U.S.C. § 2243. The district court has been directed to accept as conclusive the affidavit of an executive officer, but without affording the petitioner the opportunity to propound interrogatories to the affiant in violation of section 2246. And, the district court has been directed not to permit a traverse by the petitioner of the facts alleged by the government and instead has been directed to accept the facts alleged by the government to be true, in violation of

18. Three concurring Justices agreed on this point with the four Justices who joined the plurality opinion. *See Ford*, 477 U.S. at 424 (Powell, J.); *id* at 430 (O'Connor, J., joined by White, J.).

section 2248. Seen in historical context, the holding below represents an unwarranted refusal to apply congressionally-mandated procedures that embody the long struggle to establish the writ of habeas corpus as an effective means to judicially contest an executive detention.

4. *Absent suspension of the writ by Congress, the habeas court cannot be compelled to accept the executive's allegation of jurisdictional facts*

The Suspension Clause is integral to the separation of powers. Although the Framers recognized that there were some extreme circumstances in which a suspension may be necessary, by limiting the circumstances under which a suspension would be available, they ensured that suspensions would be rare. Further, in vesting the power to suspend in Article I, rather than Article II, the Framers secured an essential element of the delicate system of governmental checks and balances. Because the core purpose of habeas corpus relief was to challenge executive detentions, the Framers ensured that the branch whose actions would be reviewed on a habeas petition was not also the one with the power to suspend habeas protections. *See Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in part and concurring in the judgment) ("transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention"); *see also* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2495 (1998).

In the early days of the Civil War, Chief Justice Taney, sitting as Circuit Justice in *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487), confirmed that only Congress can suspend the writ. John Merryman had been arrested and imprisoned on the charge of treason, without any form of hearing, by a military officer acting at the order of President Lincoln. *Id*. at 147-48. Merryman applied for habeas corpus,

and the Chief Justice ordered the military commander to produce the prisoner. The officer refused to produce Merryman, arguing that he had been authorized by President Lincoln to suspend the writ. *Id*. Chief Justice Taney described the case in terms strikingly similar to the facts presented by Mr. Hamdi, nearly a century and half later:

> [A] military officer . . . without any application to the judicial authorities, assumes to himself the judicial power . . . undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing . . . to close custody, in a strongly garrisoned fort, to be held there, it would seem, during the pleasure of those who committed him.

Id. at 152. The Chief Justice, relying on the English history of habeas corpus and the suspension power, Blackstone's Commentaries, the language of the Suspension Clause itself and its placement in Article I, and *Ex parte Bollman*, concluded that there was "no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of habeas corpus. . . ." *Id.* at 149.

If the executive cannot for reasons of military necessity suspend the writ absent congressional authorization, neither can a court do so in an effort to safeguard the executive's military powers from supposed interference by the judiciary. The Fourth Circuit decision misunderstood why its decision is incompatible with the Suspension Clause. *See Hamdi III*, 316 F.3d at 467 n.5. Its decision suspends the writ not because it refused to grant petitioner relief, but because it limits judicial review of his detention to no more than would apply if the writ were suspended.

Suspension practice in England under the 1679 Act limited the power to Parliament, which could, through an Act with a specific expiration date, empower the Crown to detain a particular individual or class of individuals suspected of High Treason or another specified offense without bail or trial. DUKER, *supra*, at 141-42. The suspension of the writ did not, however, strip the detainee of all right to question the propriety of his detention. A prisoner detained under a suspension order could still apply for habeas relief to determine the sufficiency of the warrant on which he was detained; only if the warrant showed that the detainee was within the class of individuals whose rights to habeas relief were suspended would the court refuse to entertain the petition. *See id.* at 142 & nn.120-21 (citing *Rex v. Earl of Orrery*, 88 Eng. Rep. 75 (1722)). Suspension practice in the United States has followed the same model. *See Ex parte Milligan*, 71 U.S. 2, 130-31 (1866) ("[T]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return . . . the court decides whether the party applying is denied the right of proceeding any further with it.").

Suspension has not been authorized in this case, and could not have been authorized because there has been no rebellion in or invasion of the United States. Nonetheless, the Fourth Circuit has reached a result that is strikingly similar to the more limited judicial function that obtains when the writ has been suspended. The court below based its determination that no habeas relief could be granted solely on the facts alleged in the Mobbs Declaration, holding that the executive's determination that Mr. Hamdi was an "enemy combatant" was conclusive. That is the same limited form of judicial review as would obtain had Congress suspended the writ as to U.S. citizens who are enemy combatants. In reaching that result, the Court below intruded on both the exclusive congressional power to suspend the writ in appropriate cases, and on the judicial power to adjudicate petitions properly before the court.

CONCLUSION

The decision below should be reversed, and the district court directed to hear and determine the facts, and dispose of the matter as law and justice require.

Respectfully submitted,

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