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

BRIEF FOR THE RESPONDENTS

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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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This next-friend habeas action challenges the authority of the Commander in Chief and the armed forces under his command to detain an individual, Yaser Esam Hamdi, who was captured by coalition forces in Afghanistan in late 2001 when he surrendered with a Taliban unit while armed with an AK-47 assault rifle. The U.S. armed forces in Afghanistan determined that Hamdi is an enemy combatant who should be detained in connection with the ongoing hostilities. The military later obtained records indicating that Hamdi, a Saudi national, was born in the United States. Hamdi is now detained at the Naval Consolidated Brig in Charleston, South Carolina. The court of appeals correctly held that respondents have demonstrated the legality of Hamdi's wartime detention, and that this habeas action should be dismissed.

STATEMENT

1. a. On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, striking the World Trade Center buildings in New York City and the headquarters of the Nation's Department of Defense at the Pentagon, and attempting but failing to strike another target in Washington presumed to be the White House or the U.S. Capitol. Approximately 3,000

people were killed, thousands more were injured, hundreds of millions of dollars of property was destroyed, and the U.S. economy was severely damaged. It was the deadliest foreign attack on American soil in one day in the Nation's history.

In response, the President, acting as Commander in Chief, took action to defend the country and to prevent additional attacks. Congress supported 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 [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224. Congress also 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.*

The President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. Following major military operations, U.S. and coalition forces have removed the Taliban from power and "seriously degrad[ed]" al Qaeda's training capability. Office of the White House Press Secretary, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Mar. 20, 2004) <www.whitehouse.gov/news/releases/2004/03/20040322-3.html>. However, "[p]ockets of al Qaeda and Taliban forces remain a threat to U.S. and coalition forces and to the Afghan government and Afghan people," and U.S. and coalition forces "continue to conduct the U.S. campaign to eliminate the primary source of support to the terrorists who viciously attacked our Nation on September 11." *Ibid.* See *DCI's Worldwide Threat Briefing* at 19-20 (Mar. 9, 2004) <www.senate.gov/~armed_services/statemnt/2004/March/Tenet.pdf> (discussing continuing threat posed by al Qaeda and Taliban in Afghanistan).

An American force of approximately 11,500 soldiers and a NATO-led force of several thousand additional troops remain stationed in Afghanistan and engaged in active military operations. United States and coalition forces have just launched another major offensive. Pamela Constable, *U.S. Launches New Operation in Afghanistan*, Wash. Post, at A22 (Mar. 14, 2004). At the same time, al Qaeda and Taliban fighters continue to launch attacks on U.S. and coalition troops, foreign aid workers, and Afghan government officials; Osama bin Laden and his top deputies have called on al Qaeda and its supporters to continue their terrorist holy war, or jihad, against the United States and coalition partners; and the United States and allied nations have been subject to deadly attacks tied to al Qaeda throughout the world. See *Purported Zawahiri Tape Condemns Musharraf*, Wash. Post, at A16 (Mar. 26, 2004); *Rasul* v. *Bush*, Nos. 03-334 & 03-343, U.S. Br. 3 & nn.1-2 (03-334 & 03-343 U.S. Br.) (citing reports).

b. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. Those taken into U.S. control are subjected to a multi-step screening process to determine if their continued detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." Dep't of Defense, *Fact Sheet: Guantanamo Detainees* <www.defenselink.mil/news/Feb2004/d20040220det.pdf.> (*Guantanamo Detainees*). Individuals who are not enemy combatants are released.

Individuals who are determined to be enemy combatants are sent to a centralized facility in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews with the detainee. That

screening team looks at the circumstances of capture, assesses the threat that the individual poses and his potential intelligence value, and determines whether continued detention is warranted. Detainees whom the U.S. military determines have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, or to another facility. A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and *released* from U.S. custody. See *Guantanamo Detainees*, *supra*.

c. In late 2001, while Northern Alliance forces were engaged in battle with the Taliban near Konduz, Afghanistan, Hamdi surrendered to Northern Alliance forces—while armed—along with a Taliban unit and was taken to a prison operated by the Northern Alliance in Mazar-e-Sharif. J.A. 148-149 (Mobbs Decl. ¶¶ 3-4). Hamdi was transferred to a Northern Alliance prison in Sheberghan, where he was interviewed by a U.S. Interrogation Team. J.A. 149 (¶ 5). Based on interviews with Hamdi in Afghanistan and his association with the Taliban, the U.S. military determined that Hamdi was an enemy combatant. J.A. 149 (¶ 6).

In Afghanistan, Hamdi identified himself as a Saudi citizen who was born in the United States and who had entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. J.A. 149 (Mobbs Decl. ¶ 5). He affiliated with a Taliban unit and received weapons training, and remained with the unit following the September 11 attacks and after the U.S. and coalition forces began military operations in Afghanistan. J.A. 148 (¶ 3). Subsequent interviews with Hamdi have 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. J.A. 150 (¶ 9).

U.S. military authorities concluded that Hamdi met the criteria established by the Department of Defense for determining which captured enemy combatants should be placed in U.S. control. J.A. 149 (Mobbs Decl. ¶ 7). Pursuant to an order of the U.S. Land Forces Commander in Afghanistan, Hamdi was transferred from Sheberghan to a U.S. detention facility in Kandahar. *Ibid.* Following a separate military screening in January 2002, Hamdi was transferred from Kandahar to the U.S. Naval Base at Guantanamo Bay, Cuba. J.A. 150 (¶ 8). At Guantanamo, the military obtained records indicating that Hamdi, a Saudi national, was born in Baton Rouge, Louisiana, and therefore might be a United States citizen. As a result, in April 2002, the military transferred Hamdi to the U.S. Naval Brig in Norfolk, Virginia.

On July 29, 2003, Hamdi was transferred to the U.S. Naval Consolidated Brig in Charleston, South Carolina, where he is currently detained. The military has determined that the facilities in Charleston are more appropriate for the detention of enemy combatants. Three enemy combatants are detained at the Charleston Naval Brig (Hamdi, Jose Padilla, and Ali Saleh Kahlah al-Marri).[1]

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.[2] The petition avers that, "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghani-

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[1] Throughout his detention, Hamdi, like the other detainees, has been treated humanely. In addition, he has been permitted limited mail privileges and has been visited by the International Committee for the Red Cross. In any event, as petitioners acknowledge (Br. 6), the habeas petition challenges only the legality of Hamdi's detention, and "not conditions of confinement."

[2] Two earlier habeas petitions were filed on behalf of Hamdi by the federal public defender and by another individual. However, the court of appeals ordered the dismissal of those petitions on the ground that neither petitioner possessed next-friend standing. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002). It is undisputed that Hamdi's father has next-friend standing.

stan." J.A. 104 (Pet. ¶ 9). The petition—which has never been amended—claims that Hamdi is "an American citizen," and that his detention without charges or counsel "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." J.A. 107 (Pet. ¶¶ 22, 23).[3] The petition seeks Hamdi's release and other relief. J.A. 108-109.

Before respondents were served with the petition, the district court appointed the federal public defender as counsel for Hamdi and ordered that he be given unmonitored access to Hamdi. J.A. 333. Respondents immediately appealed the district court's order and the court of appeals reversed that order. J.A. 332-344. The court "sanctioned a limited and deferential inquiry into Hamdi's status, noting that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." J.A. 421 (citing *Ex parte Quirin*, 317 U.S. 1, 31, 37 (1942)). The court remanded for further proceedings on that issue, admonishing that "the district court must consider the most cautious procedures first." J.A. 343.

b. On remand, respondents filed a response to, and motion to dismiss, the habeas petition. J.A. 117-150. The filing included the sworn declaration (J.A. 148-150) of the Special Advisor to the Under Secretary of Defense for Policy, Michael H. Mobbs, who has been substantially involved with issues related to the detention of enemy combatants in the current conflict. The declaration confirmed that Hamdi was seized in Afghanistan in the fall of 2001, and explained the factual basis for the military's determination to detain him as an enemy combatant. See pp. 4-5, *supra*.

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[3] Petitioners have abandoned the only other claim stated in the petition—that the President's Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (2001), "constitute[s] an unlawful suspension of the Writ." J.A. 108 (Pet. ¶ 25). In any event, that claim is without merit because, by its terms, the President's Military Order does not apply to a presumed United States citizen such as Hamdi. See J.A. 132-133.

On July 31, 2002, the district court set a hearing on the government's return for August 13, 2002, and further directed respondents to produce, prior to the hearing, "for in camera review by the Court," 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]"; and a list of "the date of Hamdi's capture" and "all the dates and locations of his subsequent detention." J.A. 185-187. Respondents moved for relief from that order, at least until the court had ruled on the motion to dismiss.

On August 13, 2002, the district court held a hearing on the government's return. J.A. 190-281. At the hearing, the district court repeatedly stated its intent to take the Mobbs Declaration and "pick it apart." J.A. 218; see J.A. 214, 227. The court went on to question almost every aspect of the declaration, including whether there is "anything in the Mobbs' Declaration that says Hamdi ever fired a weapon," J.A. 197, and whether Mobbs was even a United States government employee, J.A. 198; see J.A. 227. At the same time, the district court stated 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. J.A. 236; see J.A. 255 ("He was there to fight. And that's correct.").

c. On August 16, 2002, the district court issued an order (J.A. 282-299) holding that respondents' return was "insufficient" to justify Hamdi's detention. J.A. 283. The court stated that "[a] thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers," J.A. 292, and that it is "necessary to obtain the additional facts requested," J.A. 299. The court ordered respondents to produce for its *ex parte*, in camera review the materials demanded by its earlier production order, together with screening criteria that respondents had previously offered (J.A. 119-120 n.1) to provide the court. J.A. 283.

3. The court of appeals, in an opinion jointly authored by all three panel members, reversed and remanded with instructions to dismiss. J.A. 415-455. The court explained that the President is authorized under the Constitution and Congress's statutory backing in the current conflict "to detain those [enemy combatants] captured in armed struggle." J.A. 425 & n.3, 435. The court further held that, as a presumed United States citizen, Hamdi is entitled to judicial review of his military detention in a habeas proceeding. J.A. 428-429. However, the court stressed that judicial "review of battlefield captures in overseas conflicts is a highly deferential one." J.A. 455; see J.A. 429-432.

Applying that understanding, the court of appeals "conclude[d] that Hamdi's petition fails as a matter of law." J.A. 439. The court held "that there is no purely legal barrier to Hamdi's detention" under the Constitution, 18 U.S.C. 4001(a), or the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. No. 972 (GPW). J.A. 439, 434-439. The court also rejected petitioners' challenge to the military's determination that Hamdi is in fact an enemy combatant, explaining 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 petitioner's detention." J.A. 452-453. Any additional fact-finding, the court held, could "profoundly unsettle the constitutional balance." J.A. 442.

4. On December 2, 2003, the Department of Defense announced that, as a matter of policy, it will permit an enemy combatant who is a presumed citizen and detained in the United States to have access to counsel after the military has determined that such access will not compromise national security and it has either completed intelligence collection from the detainee or determined that access to counsel

would not interfere with such efforts. See <www.defenselink.mil/releases/2003/nr20031202-0717.html>. The Department of Defense also announced that Hamdi would be permitted access to counsel under that policy, subject to appropriate security constraints. *Ibid.* Hamdi has met with counsel for petitioners on February 2 and March 2, 2004, at the Charleston Naval Brig. The latter visit was unmonitored.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Hamdi's wartime detention is lawful and that this next-friend habeas action therefore should be dismissed.

I. Petitioners' purely legal challenges to Hamdi's wartime detention are without merit. In our constitutional system, the responsibility for waging war is committed to the political branches. In time of war, the President, as Commander in Chief, has the authority to capture and detain enemy combatants for the duration of hostilities. That includes enemy combatants presumed to be United States citizens. *Ex parte Quirin*, 317 U.S. 1 (1942). The U.S. military took control of Hamdi and determined that he was an enemy combatant in Afghanistan while waging a military campaign launched by the President with the express statutory backing of Congress. The military's authority to hold such a captured enemy combatant in connection with ongoing hostilities is well-established.

Nothing in 18 U.S.C. 4001(a) affects the Executive's authority to detain enemy combatants in wartime. Moreover, Congress has authorized such detentions by, *inter alia*, expressly backing the President's use of "all necessary and appropriate force" in the current conflict. 115 Stat. 224. Nor is Hamdi's detention inconsistent with Article 5 of the GPW. The GPW is not self-executing and therefore does not confer any private rights that may be enforced in a habeas action. In any event, Article 5 applies only when there is "doubt" as to whether a detainee is entitled to prisoner-of-war (POW) privileges under the GPW. No such doubt exists here because the President has conclusively determined that al

Qaeda and Taliban detainees are *not* entitled to those privileges. Neither the GPW nor the military's own regulations provide for any review of the military's determination that an individual is an enemy combatant in the first place.

II. Petitioners' challenge to the military's determination that Hamdi is an enemy combatant is also without merit. An enemy combatant who is a presumed citizen and who is detained in this country is entitled to judicial review of his detention by way of habeas corpus. In such a proceeding, a habeas petitioner may raise legal challenges to the individual's detention, such as petitioners' arguments that the Commander in Chief does not have the authority to detain a captured enemy combatant who is an American citizen, or that such a detention is barred by 18 U.S.C. 4001(a). However, the scope of judicial review that is available concerning the military's determination that an individual is an enemy combatant is necessarily limited by the fundamental separation-of-powers concerns raised by a court's review or second-guessing of such a core military judgment in wartime.

Applying an appropriately deferential standard of review, the court of appeals correctly concluded that the record adequately demonstrates that Hamdi is indeed an enemy combatant. The sworn declaration accompanying the government's return explains that Hamdi surrendered with an enemy unit in a theater of combat operations while armed with an AK-47, and that he is therefore a prototypical enemy combatant. Moreover, petitioners have repeatedly acknowledged that Hamdi was in Afghanistan—an area of extensive combat operations—when he was captured. Taking account of petitioners' own admissions and arguments in determining whether the challenged exercise of executive authority is lawful is consistent with the settled rule of restraint that a court should go no further than necessary to decide a sensitive constitutional issue before it.

III. The necessarily limited scope of review that is available in a habeas proceeding in this extraordinary context is consistent both with the Constitution and federal

habeas statutes. The habeas statutes do not require a court to conduct evidentiary proceedings when, as here, a court may determine on the record before it that there is no cause for granting the writ. *Walker* v. *Johnston*, 312 U.S. 275 (1941). Nor does the Constitution guarantee captured enemy combatants an automatic or immediate right of access to counsel in a habeas proceeding such as this. A captured enemy combatant who is being detained during the conflict —and has not been charged with any crime—has no right under the law of war to meet with counsel to plot a legal strategy to secure his release. The Due Process Clause—which is interpreted in the light of that long-settled rule—does not supply any different guarantee. Moreover, granting enemy combatants an automatic right of access to counsel would interfere with the military's compelling interest in gathering intelligence to further the war effort.

The Department of Defense has adopted a policy to allow enemy combatants who are presumed United States citizens and detained in this country access to counsel once the military has determined that such access will not interfere with intelligence gathering. In light of that policy, the fact that Hamdi now enjoys access to counsel under the policy, and the canon of constitutional avoidance, the Court may wish to reserve the counsel issue for another day. If the Court reaches the issue, however, it should affirm the court of appeals' conclusion that Hamdi was not entitled to immediate access to counsel in this habeas action.

IV. Any attempt at further factual development concerning the military's enemy-combatant determination would present formidable constitutional and practical difficulties. Attempting to recreate the scene of Hamdi's capture is inconsistent with the practical reality that the troops in Afghanistan are charged with winning a war and not preparing to defend their judgments in a U.S. courtroom. In addition, any fact-finding concerning Hamdi's capture could require locating the American soldiers who interviewed Hamdi in Afghanistan, not to mention the Northern Alliance

forces to whom Hamdi surrendered. Such efforts would divert the military's attention from the ongoing conflict in Afghanistan, and it would be demoralizing for American troops to be called to account for their actions in a federal courtroom by the very enemies whom they have been ordered by the political branches to reduce to submission.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT HAMDI'S WARTIME DETENTION IS LAWFUL AND THAT THIS ACTION SHOULD BE DISMISSED

The next-friend habeas petition in this case challenges the authority of the Commander in Chief and the armed forces under his command to detain an enemy combatant who was undisputedly captured in an active combat zone in a foreign land in connection with a military campaign that is still ongoing. This case does not present the threshold jurisdictional obstacle in *Rasul* v. *Bush*, Nos. 03-334 & 03-343, because the detainee at issue is a presumed American citizen and is being held in the United States. The U.S. courts therefore have jurisdiction to consider this habeas action and, in particular, have authority to hear legal challenges to Hamdi's detention. As the court of appeals recognized, however, the nature of judicial review available with respect to the military's enemy-combatant determination is limited by the profound separation-of-powers concerns implicated by efforts to second-guess the factual basis for the exercise of the Commander in Chief's authority to detain a captured enemy combatant in wartime. Guided by those considerations, the court of appeals correctly held that the government has demonstrated the legality of Hamdi's detention.

I. PETITIONERS' LEGAL CHALLENGES TO HAMDI'S WARTIME DETENTION ARE WITHOUT MERIT

Petitioners challenge Hamdi's detention on the purely legal grounds that the Executive lacks authority to detain an enemy combatant who is a presumed United States citizen; that such a detention is barred by 18 U.S.C. 4001(a); and that

Article 5 of the GPW entitles such a detainee to a tribunal. Those arguments should be rejected.

A. The Challenged Wartime Detention Falls Squarely Within The Commander In Chief's War Powers

The Constitution vests the political branches and, in particular, the Commander in Chief, with the power necessary to "provide for the common defense," U.S. Const. preamble, including the authority to vanquish the enemy and repel foreign attack in time of war. See *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (listing the enumerated war powers). That power is fully engaged with respect to the armed conflict that the United States is now fighting against the al Qaeda terrorist network and its supporters in the mountains of Afghanistan and elsewhere; is supported by the statutory backing of Congress; and applies equally to an enemy combatant, like Hamdi, who is a presumed United States citizen.

1. Article II, § 2, Cl. 1 of the Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As this Court observed in *Johnson* v. *Eisentrager*, 339 U.S. 763, 788 (1950), it is "of course" the case that the textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." See also *Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to repel and defeat the enemy."); *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) (President has authority, *inter alia*, to "employ [the U.S. armed forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."); accord *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870); J.A. 425.[4]

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[4] The Framers appreciated the importance of giving the Executive unquestioned authority to defend against foreign attack. As Hamilton wrote in *The Federalist No. 70*, "[d]ecision, activity, secrecy, and dispatch" are characteristic of a unitary executive power and are "essential to the protection of the community against foreign attacks." Forty-five years later, Justice Story, in discussing the Commander-in-Chief Clause, reaffirmed that: "Of all the cases and concerns of government, the direction of

It is well-settled that the President's war powers include the authority to capture and detain enemy combatants in wartime, at least for the duration of a conflict. See *Quirin*, 317 U.S. at 30-31 & n.8; see also *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); 2 L. Oppenheim, *International Law* 308-309 (H. Lauterpacht ed., 5th ed. 1935); William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920); J.A. 425-426. Indeed, the practice of capturing and detaining enemy combatants in wartime not only is deeply rooted in this Nation's history, see Lt. Col. G. Lewis & Capt. J. Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, *Dep't of the Army Pamphlet No. 20-213* (1955), but as old as warfare itself, see Allan Rosas, *The Legal Status of Prisoners of War* 44-45 (1976).

In *Quirin*, the Court explained that the "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces." 317 U.S. at 30-31. "Unlawful combatants are likewise subject to capture and detention" for the duration of the conflict, "but *in addition* they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31 (emphasis added); see also *Eisentrager*, 339 U.S. at 786 ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such

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war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power." *Commentaries on the Constitution of the United States* § 767, at 546-547 (Ronald D. Rotunda & John E. Nowak eds. 1987). Although petitioners object (Br. 23) to "[t]he danger posed by the collection of power in one branch," the Constitution leaves no doubt that there is only one Commander in Chief. Petitioners' reliance on separation-of-powers cases in which there was no such singular textual constitutional commitment of power is misplaced.

forces, * * * enemy belligerents, [and] prisoners of war.'") (quoting *Kahanamoku*, 327 U.S. at 313-314). As a matter of practice, moreover, the mere detention of opposing forces as enemy combatants or prisoners of war without military punishment has been the rule, and detention and prosecution of enemy combatants for specific war crimes the exception.

The U.S. military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including more recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of POWs in the United States (some of whom were, or claimed to be, American citizens) without trial or counsel. See Lewis & Mewha, *supra*, at 244. During the Civil War, the United States detained hundreds of thousands of confederate combatants—who remained United States citizens. *Id.* at 27-28. As the court of appeals recognized, the military's settled authority to detain captured enemy combatants in wartime applies squarely to the global armed conflict in which the United States is currently engaged, in which—as the September 11 attacks demonstrate—the stakes are no less grave. J.A. 341, 427.

The detention of captured enemy combatants serves vital military objectives. First, "detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies." J.A. 430; see *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Second, detention enables the military to gather vital intelligence from captured combatants concerning the capabilities, internal operations, and intentions of the enemy. See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l Law Studies 108-109 (U.S. Naval War College 1977); J.A. 347-351 (Woolfolk Decl.). Such intelligence-gathering is especially critical in the current conflict because of the unconventional way in which the enemy operates. See Part III.B, *infra*. The detention of captured combatants during an ongoing armed conflict "'is neither a punishment nor an act of

vengeance,' but rather a 'simple war measure.'" J.A. 431 (quoting Winthrop, *supra*, at 788).[5]

Petitioners repeatedly characterize Hamdi's detention as "indefinite." But the detention of enemy combatants during World War II was just as "indefinite" while that war was being fought. It is true that, given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement, but that does not mean that Hamdi will not be released. The military has made clear that it has no intention of holding captured enemy combatants any longer than necessary in light of the interests of national security, and scores of captured enemy combatants have been released by the United States or transferred to the custody of other governments. See 03-334 & 03-343 U.S. Br. 47-49.

2. The only claim raised in the habeas petition in this case and still being pressed by petitioners is that, "as an American citizen," Hamdi's detention as an enemy combatant violates the Due Process Clause. J.A. 107 (Pet. ¶ 22); see p. 5, *supra*. The court of appeals correctly rejected that purely legal argument. J.A. 450.

The military's authority to detain enemy combatants in wartime is not diminished by a claim, or even a showing, of

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[5] Petitioners assert (Br. 20) that Hamdi's detention is "criminal punishment." But, as discussed above, the detention of enemy combatants has not "historically been regarded as a punishment" and is not designed to "promote the traditional aims of punishment." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Hamdi is being held for the classic non-punitive purposes of wartime detention, and has not been charged with any war crime or domestic offense. In that respect, Hamdi's situation is unlike that of the so-called "American Taliban" to whom petitioners compare Hamdi. See Pet. Br. 40 (arguing that John Walker Lindh's case is "indistinguishable" from Hamdi's). Unlike Hamdi, Lindh was charged with criminal offenses based on his association with the Taliban and, after pleading guilty to aiding the Taliban and using a weapon with the Taliban, Lindh was sentenced to 20 years' imprisonment. See <www.cnn.com/2002/LAW/10/04/lindh.statement>. Because Hamdi is not serving any criminal punishment, he may be released after the current hostilities end or at any point that the military determines such release is appropriate.

American citizenship. See J.A. 451-452. As this Court observed more than 50 years ago in *Quirin*, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." 317 U.S. at 37; see *Territo*, 156 F.2d at 144 ("[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); Levie, *supra*, at 75-76. To be sure, the fact that a detained enemy combatant is a presumed American citizen may enable him to proceed with a habeas action that could not be brought by an alien held overseas (cf. *Johnson* v. *Eisentrager*, *supra*), but—as this Court squarely held in *Quirin*—it does not affect the military's settled authority under the law of war to treat him as an enemy combatant. J.A. 451-452.

Petitioners suggest that a presumed United States citizen should be relieved of the consequences of his status as an enemy combatant when it comes to *detention*, as opposed to trial and *punishment* for a war crime. See Pet. Br. 12, 36-37. That is incorrect. *Quirin* involved a challenge to the "detention and trial of petitioners." 317 U.S. at 25; *id.* at 18-19. Moreover, if, as this Court held in *Quirin*, citizenship does not relieve an enemy combatant of the most severe consequences of violating the law of war—a military commission and punishment up to death—then citizenship does not relieve an enemy combatant of the normal and less drastic consequence of capture by opposing forces, *i.e.*, detention during the conflict. *Id.* at 37-38.

The *Quirin* Court's discussion of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), reinforces the conclusion that citizens, no less than aliens, who are "part of or associate[] with the armed forces of the enemy" may be held accountable under the law of war for their status or actions as enemy belligerents. *Quirin*, 317 U.S. at 45. *Milligan* involved a citizen who was seized by the military and was convicted by a

military commission on charges that he conspired against the Union in the Civil War. 71 U.S. (4 Wall.) at 6-7. He challenged the military's authority to proceed against him, arguing that he was not a member of the U.S. armed forces and was not "within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war." *Id.* at 7. The Court found that Milligan was "in nowise connected with the military service," and held that he therefore was not subject to punishment under the law of war. *Id.* at 121-122.

The presumed American in *Quirin*, Herman Haupt, argued that the law of war did not apply to him under the rationale of *Milligan*. In rejecting that claim, the *Quirin* Court emphasized that *Milligan*'s "statement as to the inapplicability of the law of war to Milligan's case" was limited to "the facts before it." 317 U.S. at 45. In particular, the *Quirin* Court stressed, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Ibid.* Haupt, unlike Milligan, associated with the forces of the enemy and therefore was an "enemy belligerent." *Id.* at 37. As a result, the *Quirin* Court held, Haupt was fully subject to the law of war even though he was a presumed American. *Ibid.* Hamdi, who surrendered in Afghanistan with a Taliban unit while armed with an AK-47, is, like Haupt, a prototypical enemy belligerent subject to the law of war. See Part II.B, *infra*.[6]

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[6] Petitioners rely (Br. 30-31) on other cases to support their claim that no citizen may be subject to military authority outside of an active battlefield. Those cases, however, involved the military trial of *civilians* for ordinary crimes, and not the wartime detention of an *enemy combatant* like Hamdi. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (ex-serviceman charged with murder); *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality) (wife of serviceman charged with murder); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) (wife of serviceman charged with murder); *Raymond* v. *Thomas*, 91 U.S. 712 (1875); cf. *In re Stacey*, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (military commander "assum[ed] criminal jurisdiction over a private citizen").

B. Hamdi's Detention Is Bolstered By, And By No Means Contrary To, The Actions Of Congress

1. Petitioners argue (Br. 13) that "Congress alone" has the power to authorize the detention of a captured enemy combatant who is a presumed American citizen. See also Pet. Br. 29-30, 41-42. That is incorrect. Especially in the case of foreign attack, the President's authority to wage war is not dependent on "any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). The Nation was viciously attacked on September 11, 2001; the President dispatched the armed forces with orders to destroy the organizations and individuals responsible for that attack; and, as Commander in Chief, the President may employ the armed forces "in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming*, 50 U.S. (9 How.) at 615; see p. 13, *supra*. That includes the authority to engage in the time-honored and humanitarian practice of *detaining* enemy combatants captured in connection with the conflict, as opposed to subjecting such combatants to the more harmful consequences of war.

Petitioners acknowledge (Br. 12) that the Executive has "plenary power" to capture and detain enemy combatants like Hamdi "in areas of actual fighting," but argue that once a "citizen is removed from the area of actual fighting," the Executive cannot detain the citizen without "statutory authorization." See Pet. Br. 29. That argument is misguided. This Court has long recognized that the commander-in-chief power "is not limited to victories in the field and the dispersion of the insurgent forces," but "carries with it inherently the power to guard against the immediate renewal of the conflict." *Stewart*, 78 U.S. at 507; see *In re Yamashita*, 327 U.S. 1, 12 (1946). One of the most conventional and humane ways of protecting against the "immediate renewal" of fighting in connection with an ongoing conflict is to detain captured combatants so that they may not rejoin the enemy.

Moreover, the general practice of the U.S. military—and the practice called for by the GPW (art. 19, 6 U.S.T. at

3334)—is to evacuate captured enemy combatants from the battlefield and to a secure location for detention. That protects both U.S. soldiers and detainees. Once the military makes a determination that an individual is an enemy combatant who should be detained in connection with the conflict, the *place* where the combatant is detained in no way affects the legality of that determination, much less the circumstances that led to the determination in the first place.

2. In any event, Congress *has* affirmed the type of classic wartime detention at issue in this case. As explained above, immediately following the September 11 attacks, Congress not only recognized by statute that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," but explicitly backed the President's use of "all necessary and appropriate force" in connection with the current conflict. 115 Stat. 224. As the court of appeals explained, "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." J.A. 435; see 03-1027 U.S. Br. 38-44, *Rumsfeld* v. *Padilla* (discussing authorization).

Capturing and detaining enemy combatants is a quintessential and necessary aspect of the *use* of military force, not to mention a customary and necessary means of *defeating* the enemy. See *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."). American troops are still engaged in active combat against al Qaeda and Taliban fighters in Afghanistan, and have just launched a new offensive against the enemy. See p. 2, *supra*. The President's authority to use military force in Afghanistan and elsewhere in the global armed conflict against the al

Qaeda terrorist network must include the authority to detain those enemy combatants who are captured during the conflict; otherwise, such combatants could rejoin the enemy and renew their belligerency against our forces.

Accordingly, far from being at odds with Congress's actions, the classic wartime detention at issue comes with the express statutory backing of Congress. And the President's constitutional authority in these matters therefore is at its apogee. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

3. Although they did not raise the claim in their habeas petition, petitioners argue (Br. 43-48) that Hamdi's detention is barred by 18 U.S.C. 4001(a). The court of appeals properly rejected that argument. J.A. 434-436. As the government has fully explained in *Padilla* (see 03-1027 U.S. Br. 44-49), 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) confirms that it was enacted to repeal the Emergency Detention Act of 1950, 50 U.S.C. 811 *et seq.* (1970), which was addressed solely to *civil* detentions. The fact that Section 4001(a) does not apply to military detentions is bolstered by subsection (b) of Section 4001, which is addressed to "control and management of Federal penal and correctional institutions," and *exempts* "military or naval institutions." 18 U.S.C. 4001(b).

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. J.A. 435. First, as discussed, the challenged executive action in this case falls 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).

The canon of constitutional avoidance counsels against interpreting Section 4001(a) in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime. See *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466 (1989). In *Quirin*, 317 U.S. at 37, this Court held that citizenship does not relieve an enemy combatant of the ordinary consequences of his belligerency. Congress is presumed to have been aware of *Quirin* when it enacted Section 4001(a) in 1971. Yet, as the court of appeals observed, "[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." J.A. 436.[7]

C. Hamdi's Detention Is Consistent With Article 5 Of The GPW And The Military's Own Regulations

Although they did not raise the claim in their habeas petition, petitioners argue (Br. 17-18) that Hamdi's detention is barred by Article 5 of the GPW, 6 U.S.T. at 3322. That is

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[7] Nothing in *Ex parte Endo*, 323 U.S. 283 (1944), on which petitioners rely (Br. 48), is to the contrary. In *Endo*, the government conceded that Endo "present[ed] no problem of espionage or sabotage," 323 U.S. at 302, whereas here the Executive has determined that Hamdi is an enemy combatant. More to the point, in *Endo*, this Court 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. To the extent that petitioners suggest (Br. 48) that *Endo* required "explicit" statutory language to authorize the Executive Branch's use of the war powers, they also 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.

incorrect. To begin with, the GPW supplies no basis for granting habeas relief because it is not self-executing. J.A. 436; see *Eisentrager*, 339 U.S. at 789 n.14; 03-334 & 03-343 U.S. Br. 39 (citing authorities). Moreover, 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 an alleged violation of a non-self-executing treaty like the GPW, which does not confer any privately enforceable rights. J.A. 437-438.

In any event, petitioners' Article 5 claim fails for the same reason as their claim that Hamdi's detention is inconsistent with the military's regulations concerning POWs and other detainees. Br. 17-18 (citing Army Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997) (C.A. App. 91-128)). Both Article 5 and the military's regulations call for a military tribunal only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges, and not as to each and every captured combatant. See Reg. 1-5a(2) (C.A. App. 96) ("All persons taken into custody by the U.S. forces will be provided the protections" afforded POWs "until some other *legal* status is determined *by competent authority*.") (emphases added).[8] In the case of Hamdi and the other al

[8] The commentary accompanying Article 5 states that it was added to address the concern "that decisions which might have the gravest consequences should not be left to a *single* person, who might often be of *subordinate* rank." Int'l Comm. of the Red Cross, Commentary III, *Geneva Convention Relative to the Treatment of Prisoners of War* 77 (Jean S. Pictet & Jean de Preux eds. 1960) (Commentary III) (emphases added). As discussed above, individuals, such as Hamdi, who have been taken into U.S. control in Afghanistan and ultimately designated for continued detention by the military are subjected to a detailed and multi-layered screening process. Moreover, as discussed in the text below, the President himself has made the only determination that is legally relevant for purposes of Article 5—*i.e.*, that al Qaeda and Taliban detainees are not entitled to POW privileges under the GPW. See also No. 03-334 & 03-343

Qaeda and Taliban detainees in the current conflict, there is no such doubt. The President—the highest "competent authority" on the subject—has conclusively determined that al Qaeda and Taliban detainees, including Hamdi, do not qualify for POW privileges under the GPW. J.A. 438-439.[9]

Furthermore, neither Article 5 nor the military's regulations apply to the threshold determination whether an individual is in fact subject to capture and detention. As explained, they apply only to the determination whether a captured combatant is entitled to POW privileges under the GPW, which in turn is based on whether the combatant is a lawful or unlawful combatant. As the court of appeals explained, for purposes of this habeas petition, that is "a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case." J.A. 438; see *Quirin*, 327 U.S. at 30-31.

II. UNDER ANY CONSTITUTIONALLY APPROPRIATE STANDARD, THE RECORD DEMONSTRATES THAT HAMDI IS AN ENEMY COMBATANT

Petitioners also challenge the military's determination that Hamdi is an enemy combatant. The court of appeals properly rejected that argument and held that no further factual development is warranted.

Br. for Amici Law Professors, Former Legal Advisers of the Department of State and Ambassadors et al. 20-24 (discussing Article 5 of GPW).

[9] The President's determination is based on the fact that al Qaeda and Taliban fighters systematically do not follow the law of war and therefore do not qualify as lawful combatants under Article 4 of the GPW, 6 U.S.T. at 3320, entitled to POW privileges. See Office of the White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo* (Feb. 7, 2002) <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>; Dep't of Defense, *Briefing on Detainee Operations* (Feb. 13, 2004) <www. defenselink.mil/transcripts/2004/tr20040213-0443.html>; 03-34 & 03-343 U.S. Br. 45 n.18. The determination whether captured enemy combatants are entitled to POW privileges under the GPW is a quintessential matter that the Constitution (not to mention the GPW) leaves to the political branches and, in particular, the President.

A. The Executive's Determination That An Individual Is An Enemy Combatant Is Entitled To The Utmost Deference By A Court

As this Court has observed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). The customary deference that courts afford the Executive in matters of military affairs is especially warranted in this context.

A commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority. 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. In this case, that determination was made by U.S. armed forces in Afghanistan acting under the directives of the U.S. Land Forces Commander in Afghanistan. J.A. 149. As the court of appeals explained, "[t]he designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the conduct of hostilities." J.A. 432.

Especially 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. As the court of appeals stated, "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and "[t]he political branches are best positioned to

comprehend this global war in its full context." J.A. 341; see also *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981); J.A. 464 (Wilkinson, J., concurring in the denial of rehearing). At the same time, the Executive—unlike the courts—is politically accountable for the decisions made in prosecuting war and in defending the Nation. See *Chicago & So. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948); J.A. 426-427.

Respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict may well limit courts to the consideration of legal attacks on the detention of captured enemy combatants, such as those made by petitioners here and addressed in Part I above. This Court's precedents are consistent with that understanding. For example, in *In re Yamashita*, *supra*, this Court considered the scope of judicial review in a habeas action challenging an enemy alien's conviction and death sentence before a military commission. In rejecting that petition, the Court "emphasized" at the outset—relying on *Quirin*—"that on application for habeas corpus [in these circumstances] we are not concerned with the guilt or innocence of the [captured enemy combatants]." 327 U.S. at 8. Rather, the Court continued, "[t]he courts may inquire whether the detention complained of is *within the authority of* those detaining the petitioner," and not whether the proper military authorities "have made a wrong decision on disputed facts." *Ibid.* (emphasis added). See *Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (Judicial review of military charges "is of most limited scope"; "[w]e ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged.").

A court's review of a habeas petition filed on behalf of a captured enemy combatant in wartime is of the "most limited scope," and should focus on whether the military is authorized to detain an individual that it has determined is an enemy combatant. That is, the central question for a court is whether "the detention complained of"—here, the

detention of a presumed American who the military has determined surrendered with an enemy unit in an active combat zone in a foreign land—"is within the authority of [the military]." 327 U.S. at 8. If such a classic wartime detention is authorized (and it is, for the reasons discussed above), the courts do not inquire whether the military authorities "have made a wrong decision on disputed facts." *Ibid.*

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 an adequate basis for the military's determination that an individual is an enemy combatant. In particular, the court can ensure that the Executive's articulated basis for detention is a lawful one and, for example, that the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*. The court of appeals appropriately exercised such a role in this case and thereby avoided embroiling the courts in a factual dispute about a battlefield capture halfway around the world.

B. The Record Demonstrates That Hamdi Is An Archetypal Battlefield Combatant

1. The record in this case amply supports the military's determination that Hamdi is an enemy combatant who may be detained by the military while our forces are still engaged in combat. The Mobbs Declaration (J.A. 148-150) voluntarily submitted by respondents in support of their return explains the factual basis for the military's enemy-combatant determination that Hamdi is an enemy combatant. The declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; stayed with the Taliban after the U.S. and coalition forces had launched the military campaign in Afghanistan; and surrendered with his Taliban unit to—and, indeed, laid down arms to—coalition forces. J.A. 148-149 (Mobbs Decl. ¶¶ 3-5, 9). It further explains that Hamdi's own statements confirm that he

affiliated with an enemy unit and was armed when he surrendered. J.A. 150 (¶ 9); see J.A. 445-446.[10]

An individual who surrenders while armed with an enemy unit in an active combat zone undeniably qualifies as an enemy combatant. Indeed, such a person is an archetypal battlefield 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); Oppenheim, *supra*, at 223 (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 ("during 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, he still would qualify as an enemy combatant. It is settled under the law of war that the military's authority to detain individuals extends to non-combatants who enter the theater of battle with the enemy force, including clerks, laborers, and other "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, *supra*, at 789; see William E.S. Flory, *Prisoners of War* 35 (1942) ("The American orders of 1863 provided that persons who accompany an army may be made prisoners of war."); GPW art. 4(A)(4), 6 U.S.T. at 3320 ("[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

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[10] As Judge Luttig observed, the declaration not only was "made under penalty of perjury by the appointed representative of the government," but "the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security." J.A. 516 (dissenting from the denial of rehearing).

armed forces," may be detained); 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.); Ingrid Detter, *The Law of War* 135-136 (2d ed. 2000).

Even the district court, which stated bluntly that it was "challenging everything in the Mobbs Declaration," J.A. 227, taking it "piece by piece," J.A. 214, and trying to "pick it apart," J.A. 218, declared that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," J.A. 236, that he "had a firearm," *ibid.*, that he was "present with a Taliban unit," J.A. 229, and that "[h]e was there to fight," J.A. 255. In other words, even the district court—which microscopically reviewed the wording of the Mobbs Declaration, see Gov't C.A. Br. 33-42—recognized that the record established all that was necessary, and indeed much more, to show that Hamdi is an enemy combatant captured in connection with the ongoing hostilities in Afghanistan.

2. The record supports the military's enemy-combatant determination in another compelling respect: "it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country." J.A. 418, 448, 453; see also J.A. 461 ("Hamdi's own filings make clear that he was seized in a zone of active combat operations.") (Wilkinson, J., concurring in the denial of rehearing); J.A. 461-463 & n.2 (discussing record); J.A. 474-475 ("The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was captured there by our military.") (Traxler, J., concurring in the denial of rehearing); J.A. 473-476 (same).

The next-friend habeas petition in this case avers that Hamdi "resided in Afghanistan" when he was seized. J.A. 104 (Pet. ¶ 9). Hamdi's father, the next-friend who filed this action, reiterated that fact in a letter that petitioners placed into the record. J.A. 188-189 (Aug. 8, 2002 Letter from E. Hamdi to Sen. Leahy). Throughout this litigation, petitioners have made clear that they are not challenging

Hamdi's capture and detention in Afghanistan. J.A. 462-463 n.2 (listing representations made by petitioners' counsel). The certiorari petition itself acknowledges that Hamdi was in Afghanistan when he was captured. See Pet. 5 ("[Hamdi] resided in Afghanistan in the Fall of 2001."). And, as discussed, that fact is affirmed by the sworn declaration submitted by respondents. J.A. 148-150.

Under the law of war, an individual's residence in hostile territory in a time of war may have important legal effect. Indeed, in a traditional war between nation states, *all* inhabitants of enemy territory have been presumed to be enemies. See *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 310-311 (1870) ("It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); *Lamar* v. *Browne*, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies."); *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 308 (1909) (Those who reside in enemy territory "are adhering to the enemy so long as they remain within his territory."); *Brown* v. *Hiatts*, 82 U.S. (15 Wall.) 177, 184 (1872) ("[T]he inhabitants of the Confederate States * * * and of the loyal States * * * became * * * reciprocally enemies to each other [during the Civil War]"); J.A. 481-483 (Traxler, J., concurring in the denial of rehearing) (citing authorities).

Even in a traditional war, the fact that an individual resides in enemy territory does not mean that he necessarily is subject to capture, detention, or violence under the law of war. But at a minimum, the Commander in Chief's constitutional authority to make determinations about who is an enemy combatant is at its height when that authority is exercised with respect to individuals who are present in a combat zone in a foreign land, not to mention present with enemy forces. As Judge Traxler explained, courts are "compelled, by the nature of war and by dint of the separa-

tion of powers * * * to give deference to the Executive to determine who within a hostile country is friend and who is foe." J.A. 482 (concurring in the denial of rehearing).

The unconventional nature of the current armed conflict only makes such deference more appropriate. In a traditional war, the combatants of the belligerent nation would wear distinctive insignia and follow the laws and customs of war. See *Quirin*, 317 U.S. at 35. The enemy in the current conflict purposely blurs the lines between combatants and non-combatants by refusing to wear a uniform or distinctive insignia and attempting to blend into the civilian population. Therefore, the armed forces should be entitled, if anything, to more deference in this conflict than in a traditional conflict in determining who among those present in a theater of active combat operations qualify as enemy combatants.

Furthermore, the acknowledged fact that Hamdi was seized in Afghanistan means that attempting to conduct any evidentiary proceedings concerning the military's enemy-combatant determination would place the courts in an untenable position. Attempting to reconstruct the scene of Hamdi's capture during the battle near Konduz, Afghanistan in late 2001 would require, *inter alia*, locating and contacting American soldiers, Northern Alliance members, or other allied forces, many of whom may remain engaged in active combat overseas. As discussed in Part IV below, any such evidentiary inquiry into the Executive's conduct of an ongoing war would raise grave constitutional problems.

Petitioners' repeated assertions (see Br. 12, 29; J.A. 153, 290) that they are not challenging Hamdi's detention as an enemy combatant in Afghanistan also fundamentally limit the nature of their claims. Hamdi's status as an enemy combatant did not change when he was removed from Afghanistan. His detention there was concededly lawful, and it is no less lawful when, consistent with the intent of the Geneva Convention, he is moved from Afghanistan to a safer location. Nor does Hamdi's transfer from Afghanistan require

the military to submit any additional basis in support of his capture—which undeniably occurred *in* Afghanistan.

Taking account of petitioners' own allegations and arguments in this case in determining the scope of the appropriate judicial review also conforms with the settled rule of restraint that a court should go no further than necessary to decide an issue before it. As this Court long ago observed, "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker* v. *Los Angeles County*, 338 U.S. 327, 333 (1949); see also *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable'"). Such restraint is particularly appropriate in light of the extremely sensitive nature of the constitutional challenge here to the exercise of the Commander in Chief's wartime authority to detain enemy combatants.[11]

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[11] The court of appeals' decision to take account of petitioners' own allegations and arguments also is consistent with the fact that subject-matter jurisdiction in this case was dependent on a finding that Hamdi's father is a proper next-friend and, therefore, may bring this action "in his [son's] behalf." 28 U.S.C. 2242. The rigorous test for establishing next-friend standing, see *Whitmore* v. *Arkansas*, 495 U.S. 149, 164 (1990), reflects the need to ensure that the relationship between the next-friend and the underlying claimant is significant enough that the courts can rely on the representations made by the next friend, so that the court does not issue an advisory opinion. As the Fourth Circuit observed in dismissing the initial habeas petition filed on Hamdi's behalf, the significant-relationship requirement is "connected to a value of great constitutional moment": Article III's requirement that "a plaintiff have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 605 (4th Cir. 2002) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The significant relationship that gave the court of appeals jurisdiction to hear this next-friend habeas action required giving effect to the manner in which the next-

3. In this Court, petitioners have not contested that Hamdi was in Afghanistan, nor have they suggested that they challenge his detention in Afghanistan. Instead, they argue in a footnote (Br. 28 n.11) that the court of appeals erred in stating that it was "'undisputed' that Hamdi was seized in a 'zone of active combat.'" In other words, to this day petitioners still do not contest that Hamdi was in Afghanistan in late 2001 when he was captured; rather, they dispute only the narrower issue whether Hamdi was seized within "a zone of active combat" in Afghanistan. The Mobbs Declaration, J.A. 149 (¶ 4), the Afghanistan Combat Zone Executive Order,[12] and contemporaneous accounts of the fierce fighting in Konduz, Afghanistan in late 2001, see Dep't of Defense, *News Transcript* (Nov. 15, 2001) <www.defenselink.mil/news/Nov2001/t11152001_t1115sd.html>; *Konduz Falls to Northern Alliance* (Nov. 26, 2001) <www.cnn.com/2001/WORLD/asiapcf/central/11/26/ret.afghan.konduz/>; *Online Newshour: Military Moves* (Nov.

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friend—Hamdi's own father—has himself "sharpen[ed] presentation of the issues." Moreover, according to the letter that petitioners themselves filed, Hamdi's father had personal knowledge that his son was in Afghanistan. J.A. 188-189.

[12] As a practical matter, Afghanistan—a country that thousands of U.S. armed forces had entered for the purpose, *inter alia*, of ousting the Taliban regime—was an active combat zone in late 2001. See J.A. 482 n.9 (Traxler, J., concurring in the denial of rehearing). In any event, 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.>. Numerous federal laws take effect based on the President's designation of an area as a "combat zone" pursuant to 26 U.S.C. 112(c)(2). See 26 U.S.C. 112 historical notes (listing combat zone orders). The fact that *Congress* defers to the Executive's designation of an area as a combat zone would make it all the more anomalous for a *court* to second-guess that classic executive wartime determination in this case.

9, 2001) <www.pbs.org/newshour/bb/military/July-dec01/military_11-9.html>, all confirm that Hamdi was captured amidst an active combat zone. In any event, the question whether a particular area of foreign territory in which U.S. and coalition forces are heavily engaged in military operations is an active combat zone is precisely the type of issue that the Constitution leaves to the judgment of the military commanders who are fighting the war, and that is not appropriate for evidentiary proceedings or second-guessing in a federal courtroom far removed from the battlefield.

C. The Challenged Wartime Detention At Issue Is Lawful Under A "Some Evidence" Standard

The government also has justified Hamdi's detention under a "some evidence" standard. See J.A. 514-516 (Luttig, J., dissenting from the denial of rehearing en banc). The court of appeals concluded that it was "not necessary for [it] to decide whether the 'some evidence' standard is the correct one to be applied in this case," because it was persuaded for the reasons explained above that further factual development into the circumstances of Hamdi's capture was not necessary and would be inappropriate. J.A. 449. But the some evidence standard nonetheless provides an additional basis on which to affirm the court of appeals' judgment.

Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination. See *Superintendent* v. *Hill*, 472 U.S. 445, 455-457 (1985) (explaining that the "some evidence" standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion" so as to ensure that the "record is not so devoid of evidence that the findings" are "without support or otherwise arbitrary"). This Court has applied the some evidence standard in evaluating habeas challenges to executive determinations in *less*

constitutionally sensitive areas than the wartime detention of captured enemy combatants.[13]

To be sure, in the cases in which the some evidence standard has been applied, the challenged executive determination is typically based on an administrative record developed after an adversarial proceeding. However, the standard also offers an appropriate guidepost in the context of the judicial review of an Executive's enemy combatant determination in wartime in light of the constitutional imperative of ensuring that the courts do not become entangled in matters textually committed by the Constitution to the Commander in Chief. See Part IV, *infra*; J.A. 342 ("Separation of powers principles must * * * shape the standard for reviewing the government's designation of Hamdi as an enemy combatant."). The some evidence standard offers a way to avoid such entanglement while also providing for judicial review of the military's enemy-combatant determination, because it focuses on the factors on which the Executive based the challenged determination.

While necessarily limited in scope, the some evidence standard offers a legal framework for assuring that the

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[13] See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001) (deportation order: Prior to the 1952 Immigration and Nationality Act, "courts generally did not review factual determinations made by the Executive" in a habeas proceeding "other than the question whether there was some evidence to support the order") (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 offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding [of culpability]").

Executive is not detaining an individual arbitrarily. As discussed above, the sworn declaration presented by the government in its return provides a more than ample basis for the military's determination that Hamdi is indeed an enemy combatant and thus satisfies the some evidence standard. If a court disagreed, however, the proper course would be to permit the Executive to present additional evidence concerning its enemy-combatant determination and not, as petitioners suggest, to order discovery or evidentiary proceedings.[14]

III. THE NECESSARILY LIMITED SCOPE OF REVIEW IN THIS EXTRAORDINARY CONTEXT COMPORTS WITH THE CONSTITUTION AND THE FEDERAL HABEAS STATUTES

Petitioners argue that Hamdi is entitled to more "muscular judicial review" (Br. 26) of his wartime detention, a full-blown evidentiary proceeding, and immediate access to counsel. See *id.* at 10-11, 17, 19. The court of appeals correctly rejected those arguments and held that no further proceedings or access to counsel was required to establish the lawfulness of Hamdi's detention.

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[14] The Court has applied a similar inquiry in analogous contexts. For example, in *Moyer* v. *Peabody*, 212 U.S. 78 (1909), the Court rejected the due process challenge of a person who had been detained without probable cause for months by a governor acting in his capacity of "commander in chief of the state forces" during a local "state of insurrection." *Id.* at 82. Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." *Id.* at 85. Likewise, in *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (emphasis added), the Court—citing *Moyer*—stated that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom *the government* believes to be dangerous."

A. Neither The Suspension Clause, The Habeas Statutes, Nor The Common Law Requires Additional Proceedings

1. Petitioners argue (Br. 25, 41) that Hamdi's detention and the limited scope of judicial review provided by the court of appeals violates the Suspension Clause. U.S. Const. Art. I, § 9, Cl. 2. That argument is without merit. The court of appeals made clear that Hamdi was entitled to judicial review of his detention in this habeas proceeding, and the government has never contested that point. J.A. 429. As the court of appeals explained, "the fact that [it did] not order[] the relief Hamdi requests is hardly equivalent to a suspension of the writ." J.A. 434 n.5. To the contrary, the court of appeals carefully considered and rejected petitioners' challenges to Hamdi's wartime detention. Furthermore, cases like *Quirin* and *Yamashita* demonstrate that appropriate limits on the scope of judicial review available in a habeas proceeding in constitutionally sensitive areas are not tantamount to a "suspension of the writ."[15]

2. Petitioners argue (Br. 10-11, 14-15) that the habeas statute entitles Hamdi to fact-finding in this case. That argument also should be rejected. The habeas statutes allow for presenting facts or taking evidence only when necessary to enable a court to resolve the legality of the challenged detention. As the Court observed in *Walker* v. *Johnston*,

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[15] In *St. Cyr*, 533 U.S. at 301 (internal quotation marks omitted), this Court observed that, at a minimum, "the Suspension Clause protects the writ as it existed in 1789." Generally speaking, one of the purposes of the common law writ was to require the Executive to state why it was holding an individual, and not for a court to review the factual basis for the Executive's decision. See, *e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1094 (1995) ("At common law, the allegations in the 'return' were deemed conclusive and could not be controverted by the prisoner."); Dallin H. Oaks, *Legal History in the High Court–Habeas Corpus*, 64 Mich. L. Rev. 451, 453 (1966). Moreover, as explained below, at common law habeas corpus generally was unavailable for captured enemy combatants.

312 U.S. 275, 284 (1941), "the court may find that no issue of fact is involved" after examining the petition and return, and may conclude "from undisputed facts or from incontrovertible facts" that, "as a matter of law, no cause for granting the writ exists." See, *e.g.*, *Eisentrager*, 339 U.S. at 778 (citing *Walker*); *Quirin*, 317 U.S. at 24 (same). The Court has similarly recognized that a habeas petition may be denied without production of the detainee. See *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494 (1973) (observing that Congress has "codif[ied] in the habeas corpus statute" the Court's decision in *Walker* "whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim") (citing 28 U.S.C. 2243).

Thus, as the court of appeals observed, "[w]hile the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case—whether further factual exploration" is necessary and appropriate in light of the extraordinary constitutional interests at stake. J.A. 440-441. As explained in Part II above, the court of appeals properly concluded that the habeas petition in this case could be disposed of on the current record without "further factual exploration." J.A. 440.

3. Petitioners suggest (Br. 26) that the habeas proceeding in this case was imcompatible with the "common law role" of the Great Writ. They are mistaken. As a historical matter, the writ generally was not extended to enemy combatants. 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 Graber*, 247 F. 882, 886-887

(N.D. Ala. 1918) (consistent with the practices of England and Canada, executive's decision to detain an enemy combatant is unreviewable); *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."). Hamdi, whose wartime detention has been carefully reviewed by the courts, has received much more process in this habeas proceeding than a captured enemy combatant would have received at common law.

B. Hamdi Was Not Entitled To Any Automatic Or Immediate Access To Counsel

Petitioners argue (Br. 19) that Hamdi has "a right to consult with an attorney in connection with the assertion of [his] legal rights," and that he was deprived of due process because he was not granted access to a lawyer immediately upon the filing of this habeas action. That argument should be rejected. Indeed, the notion of requiring the military to afford captured enemy combatants with an attorney to help plot a legal strategy to gain their release by a court is antithetical to the very object of war.[16]

1. There is no right under the law of war for an enemy combatant to meet with counsel to contest his wartime detention. Even lawful enemy combatants who are entitled to POW privileges under the GPW—which does not include the detainees in the current conflict, see note 9, *supra*—are not entitled to counsel to challenge their detention. Rather, Article 105 of the GPW provides only that a POW may be afforded counsel in the event that formal *charges* are initiated against him in a prosecution, underscoring that POWs

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[16] Even the district court—which ordered that Hamdi be given immediate access to counsel—acknowledged that an enemy combatant who was captured during the Battle of the Bulge would not have been entitled to counsel to challenge his detention in Germany or, as was the case for thousands of captured combatants in World War II, in this country. J.A. 213. The unconventional nature of the present conflict—in which America has been attacked by the enemy on a scale greater than the attack on Pearl Harbor—does not warrant any different result.

who have not been charged with specific war crimes enjoy no right to counsel to challenge their detention. 6 U.S.T. at 3317; see also Winthrop, *supra*, at 165 (even with respect to military commissions, "the admission of counsel for the accused in military cases, is not a right but a privilege only").

The enemy combatants in *Quirin* were charged with violations of the law 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, they 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 simple war measure. The vast majority of combatants seized in a war are, like Hamdi, never charged with an offense but instead are detained to prevent them from rejoining the fighting.

2. Nor was Hamdi entitled to access to counsel to challenge his detention under the Due Process Clause of the Fifth Amendment.[17]

a. Recognizing such a generalized right to counsel under the Fifth Amendment could not be squared with the fact that captured enemy combatants have not been guaranteed a right to counsel in similar circumstances. As this 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." That is consistent with the analysis that this Court applies in

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[17] The Sixth Amendment applies only in the case of "criminal prosecutions," U.S. Const. Amend. VI, and therefore does not apply to the detention of any captured enemy combatant who—like the vast majority of such combatants—has not been charged with any domestic crime. Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not apply to this situation. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

determining the scope of the Due Process Clause in other contexts. See *Herrera* v. *Collins*, 506 U.S. 390, 407-408 (1993) (examining "[h]istorical practice" in assessing scope of "Fourteenth Amendment's guarantee of due process"); *Medina* v. *California*, 505 U.S. 437, 445-446 (1992); *Moyer*, 212 U.S. at 84. Because the automatic right of access to counsel that petitioners seek has no foundation in any tradition or practice, the Fifth Amendment could not possibly confer such a right.

b. Moreover, as the court of appeals recognized, any process that Hamdi is due in this proceeding must take its form from the constitutional and national security limitations on a habeas proceeding in this sensitive context. See J.A. 427-430; *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."). Under any constitutionally appropriate standard of review (see Part II, *supra*), there is no cause for a detained enemy combatant to enjoy a generalized right to counsel to challenge the Executive's core Article II judgment that he is an enemy combatant. That is certainly true in this case, where, as the court of appeals correctly held, the record adequately demonstrates the lawfulness of Hamdi's wartime detention.

In *Quirin*, 317 U.S. at 45, this Court observed that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission." So too, the Fifth Amendment does not restrict the Commander in Chief's constitutional authority to detain captured enemy combatants during ongoing hostilities. Granting such combatants access to counsel based solely on the filing of a habeas petition on their behalf would directly interfere with the Executive's war powers by, *inter alia*, thwarting intelligence-gathering efforts. It is difficult to overstate the manner in which bestowing such an extraordinary right on

the enemy could interfere with legitimate—and potentially vital—military objectives in wartime.[18]

c. In addition, any due process analysis would have to account for the Executive's compelling interest—especially during the initial stages of an individual's detention—in preventing a captured enemy combatant from enjoying access to counsel or others. As explained in detail in the Woolfolk Declaration (J.A. 347-351), to a degree perhaps greater than in any prior armed conflict in which the United States has been engaged, "[t]he security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence." J.A. 347.[19] The military has found that a critical source of such intelligence is enemy combatants who are captured in connection with the conflict. J.A. 348. With respect to Hamdi, the military determined that "Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaeda training and operations." J.A. 350.

The military has learned that creating a relationship of trust and dependency between a questioner and a detainee is of "paramount importance" to successful intelligence gather-

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[18] The habeas context in which this case arises is also significant. This Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987); *Murray* v. *Giarratano*, 492 U.S. 1 (1989) (plurality); see also *United States* v. *Gouveia*, 467 U.S. 180 (1984) (no right to counsel during period of administrative detention). A captured enemy combatant is not entitled to a different rule.

[19] Attempting to gather intelligence from captured enemy combatants that may help win the war or prevent additional attacks is a well-established practice in warfare. See Levie, *supra*, at 108-109; Commentary III, *supra*, at 163-164 ("[A] State which has captured prisoners of war will always try to obtain military information from them.") (footnote omitted). The importance of intelligence-gathering in the current conflict is also discussed in the Declaration of Vice Admiral Lowell E. Jacoby filed in the Joint Appendix in *Padilla*, *supra*, 03-1027 J.A. 75-88.

ing. J.A. 349. The formation of such a relationship takes time and varies from one detainee to another, but when such a relationship is formed, critical intelligence may be—and has been—gathered. J.A. 348-349. The intelligence collected to date from captured enemy combatants has proven vital to the strategic military operations that are ongoing in Afghanistan (such as in learning the routes that the enemy uses to travel through difficult terrain) as well as in understanding the manner in which the enemy operates (including how it communicates, recruits members, and obtains funding). See *Guantanamo Detainees*, *supra*.

This critical source of information would be gravely threatened if this Court held that the moment a next-friend habeas petition is filed on behalf of a captured enemy combatant, a right of access to counsel automatically attaches with respect to the detainee. As Colonel Woolfolk stressed in this case, "[d]isruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic" and, "[s]hould this occur, a critical resource may be lost, resulting in a direct threat to national security." J.A. 349. Colonel Woolfolk further explained that, during the proceedings below, the military had determined that granting Hamdi access to counsel would have "disrupt[ed] the secure interrogation environment that the United States has labored to create" with respect to Hamdi, and would "thwart any opportunity to develop intelligence through this detainee." J.A. 350.

d. Although a captured enemy combatant has no absolute right to counsel to challenge his detention, the Department of Defense has adopted a policy of providing enemy combatants who are presumed United States citizens and detained in this country access to counsel once the military has determined that such access would not interfere with ongoing intelligence-gathering with respect to the detainee. In Hamdi's case, the military determined in December 2003 that such access would be appropriate. Especially in light of the military's adoption of that policy, the compelling national

security interests in permitting the military to engage in such intelligence gathering, and the ordinary canon of constitutional-avoidance, the Court should reject petitioners' argument that Hamdi was entitled to an absolute and immediate right to counsel to challenge his detention. Such access, automatic and as of right, would defeat one of the critical purposes of detaining the enemy.[20]

In this extraordinarily sensitive national security context, the Court should be wary of adopting a means of testing the validity of an enemy combatant's detention that defeats one of the important military functions served by that detention, even when, as here, the Executive has supplied the factual basis for the detention and a court has determined that it is lawful. Rather, the appropriate constitutional balance would allow an immediate opportunity to bring legal challenges to detention in a habeas proceeding such as this, and would afford access to counsel at the point that the commanders who are responsible for gathering intelligence in wartime—as well as defending the Nation from additional attacks and defeating the enemy in an ongoing conflict reach a judgment that such access would not interfere with those vital efforts. Declining to resolve the counsel issue in this case would not foreclose the possibility of entertaining a later challenge to the delay in granting access to counsel.

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[20] The military has a unique institutional capacity to make wartime determinations about when granting such a detainee access to counsel would interfere with intelligence-gathering efforts or other national-security concerns. As Judge Randolph recently observed, "[t]he level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause—these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain." *Al Odah* v. *United States*, 321 F.3d 1134, 1150 (D.C. Cir.) (concurring), cert. granted, 124 S. Ct. 534 (2003).

In any event, particularly in light of the fact that Hamdi now has access to counsel, the Court should avoid any ruling in this case that would attempt to place a particular time limit on the military's efforts to gather intelligence from a captured combatant. Holding that the military must grant a detained enemy combatant access to counsel within a specified period of time could in many cases prove just as damaging in terms of the loss of potential intelligence as holding that a detainee must be granted counsel as soon as he is placed in military custody.[21]

3. Although they did not press the argument below (see Opp. 33-34), petitioners argue (Br. 19) that denying Hamdi access to counsel is inconsistent with decisions of this Court indicating that prison inmates have a "right to court access." But that line of 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 that distinct context, the Court has recognized that any constitutional right 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 fundamentally inconsistent with the law of war, but, as discussed above, it could frustrate the military's efforts to gather potentially critical intelligence from an enemy combatant.

Furthermore, although he has not appeared personally in this action, Hamdi has received access to the courts through his father, as next-friend. The habeas statute expressly

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[21] There is another compelling interest in preventing enemy combatants from enjoying access to counsel before the military determines that such access would not undermine national security. Such access may enable detained enemy combatants to pass concealed messages through unwitting counsel to the enemy which could compromise the war effort— something that members (and presumably supporters) of al Qaeda are trained to do. J.A. 350.

contemplates that a detainee may be inaccessible, and thus authorizes a proper next-friend to bring an action on his behalf. 28 U.S.C. 2241. 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 "inaccessible" (*ibid.*) or incapacitated detainee may effectively gain access to the courts. Through this next-friend action, the legality of Hamdi's wartime detention has been rigorously 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.[22]

IV. THE ALTERNATIVE PROCEEDING ENVISIONED BY THE DISTRICT COURT AND PETITIONERS IS CONSTITUTIONALLY INTOLERABLE

The type of proceeding ordered by the district court and urged by petitioners is fraught with constitutional problems.

1. The district court proceedings offer a glimpse as to what a habeas proceeding might be like under the alternative legal regime urged by petitioners. Pet. Br. 14-20. After the government explains the factual basis for its enemy combatant determination, a habeas petitioner would–

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[22] Hamdi is no longer strictly inaccessible because, since December 2003, he has been permitted to meet with counsel. Nonetheless, the court of appeals' judgment was based on the premise that this was a proper next-friend action. J.A. 419 n.2. In addition, the fact that Hamdi now has access to counsel in no way alters the court of appeals' conclusion that the record in this case is sufficient to support the conclusion that Hamdi's detention is lawful. However, if Hamdi were to file a new direct habeas petition raising new arguments that could not have been brought in this action, the courts could entertain that petition subject to the customary restraints on duplicative litigation and the constitutional considerations discussed above.

as any "capable attorney" could do—"challenge the hearsay nature of the [military's] declaration and probe each and every paragraph for incompleteness or inconsistency." J.A. 446. The district court sought to do that at the August 13, 2002 hearing where it "challeng[ed] everything in the Mobbs Declaration." J.A. 227. Petitioners repeat many of the same challenges. See Pet. Br. 5-6.[23] As the court of appeals explained, however, "[t]o transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch." J.A. 446.

2. The standard of review applied by the district court and requested by petitioners (see Br. 10-11, 15) also inevitably would invite discovery into the military's decision-making in connection with ongoing military operations. The district court below issued an unprecedented production order requiring the military to produce "for in camera review by the Court" materials including:

- "Copies of all Hamdi's statements, and the notes taken from any interviews with Hamdi";
- "A list of all the interrogators who have questioned Hamdi, including their names and addresses"; and
- "Copies of any statements by members of the Northern Alliance regarding [Hamdi]."

J.A. 185-186. What is more, as the court of appeals observed, "[t]he district court indicated that its production order might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status." J.A. 439. The district

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[23] An enemy combatant, armed with court-appointed counsel, would have every incentive to challenge the military's version of events and to encourage an attorney to do so on his behalf. Indeed, members of al Qaeda, and presumably their supporters, are trained to deceive authorities about their identities and their role in the organization. See <www.usdoj.gov/ag/manualpart1_1.pdf.> (reproducing al Qaeda training manual).

court's request for the names *and addresses* of soldiers who interviewed Hamdi suggests that it viewed them as potential witnesses in a full-blown evidentiary proceeding.

Attempting to compile such materials would directly intrude into the military's conduct of an ongoing campaign. As the court of appeals explained:

> The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

J.A. 442; see also J.A. 461-464 (Wilkinson, J., concurring in the denial of rehearing) ("This desire to have the courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.").

Any effort by a court to recreate the scenes of Hamdi's capture and detention are complicated by two particular factors in this case. First, Hamdi was captured half-way around the globe in Afghanistan, a country in which thousands of U.S. armed forces are today engaged in active combat operations against al Qaeda and Taliban fighters. Second, Hamdi initially surrendered with his Taliban unit to Northern Alliance forces. See J.A. 149 (Mobbs Decl. ¶ 4). It is not uncommon for the U.S. military to take control of enemy combatants who have been captured by or who surrender to coalition forces. But the fact that only Northern Alliance forces were present at the moment of Hamdi's

surrender would further complicate any judicial effort to recreate Hamdi's battlefield capture in a habeas proceeding.

This Court itself has recognized the grave practical and constitutional concerns that would arise from enmeshing the courts in such inquiries while the Nation is at war. In *Eisentrager*, the Court observed that habeas proceedings delving into the military's treatment of enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy." 339 U.S. at 779. Indeed, the Court explained, "[i]t 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." *Ibid.* "Nor is it unlikely," the Court continued, "that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

More fundamentally, the evidentiary inquiry ordered by the district court is incompatible with the conduct of war—and the constitutional commitment of the war power to the political branches. When the Commander in Chief has dispatched the armed forces to repel a foreign attack on this country, the military's duty is to subdue the enemy and not to prepare to defend its judgments in a federal courtroom. As Judge Wilkinson observed, subjecting the military's battlefield determination that Hamdi is an enemy combatant to further fact-finding "would ignore the fundamentals of Article I and II—namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war." J.A. 461 (concurring in the denial of rehearing) (citing *The Prize Cases*, 67 U.S. (2 Black) at 670)).[24]

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[24] Petitioners point (Br. 27) to *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851), and *Sterling* v. *Constantin*, 287 U.S. 378 (1932). However, those cases do not support the type of factual development that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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petitioners have in mind with respect to the challenged enemy-combatant determination in this case. See Br. in Opp. 30-32. Moreover, those cases predate the far more relevant observations that this Court made in *Eisentrager*, discussed above. Petitioners' analogy (Br. 27) to the law of prize is also inapt. Discovery in prize proceedings was typically limited in scope to evidence taken from the captured vessel, see, *e.g.*, *The Springbok*, 72 U.S. (5 Wall.) 1, 9-10 (1866), and usually occurred after hostilities had ended.