No. 03-_____

IN THE

SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
***Petitioners*,**

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,
***Respondents*.**

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Constitution permit Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an "enemy combatant"?

2. Is the indefinite detention of an American citizen seized abroad but held in the United States solely on the assertion of Executive officials that he is an "enemy combatant" permissible under applicable congressional statutes and treaty provisions?

3. In a habeas corpus proceeding challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant," does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification of the detention?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Fourth Circuit:

Yaser Esam Hamdi and Esam Fouad Hamdi, as next friend, were the appellees below. Donald Rumsfeld, United States Secretary of Defense, and W.R. Paulette, Commander of the Norfolk Naval Brig, were appellants below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-28a) is reported at 316 F.3d 450 (4th Cir. 2003). The opinion of the district court (App. 29a-38a) is reported at 243 F. Supp. 2d 527 (E.D. Va. 2002). The denial of the petition for rehearing (App. 39a-67a) is reported at 337 F.3d 335 (4th Cir. 2003).

Earlier opinions in this proceeding are reported at 296 F.3d 278 (4th Cir. 2002), and 294 F.3d 598 (4th Cir. 2002).

JURISDICTION

The Court of Appeals' judgment was entered on January 8, 2003. By a vote of eight to four, the full court denied a petition for rehearing on July 9, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension Clause of Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."
2. Section 8, Clause 11 of Article I provides that Congress possesses the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."
3. Section 2, Clause 1 of Article II provides in pertinent part: "The President shall be Commander in Chief of the Army and Navy of the United States . . . ."
4. The Fifth Amendment to the Constitution provides in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."
5. 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."
6. 28 U.S.C. § 2241 provides for the issuance of the writ of habeas corpus if a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."
7. 28 U.S.C. § 2243 authorizes habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material facts," and provides that courts "shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

8. 28 U.S.C. § 2246 provides that "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition . . . ."

STATEMENT OF THE CASE

This case involves the indefinite and virtually incommunicado[1] detention of an American citizen, Yaser Esam Hamdi ("Petitioner" or "Hamdi"), by the military based on its assertion that he is an "enemy combatant"—a soldier affiliated with the Taliban, the former government of Afghanistan. To date, Hamdi has been detained for almost two years without access to counsel or to any court, military or civilian. Since April 2002, he has been held in a U.S. Navy jail in the United States.[2]

The Court of Appeals for the Fourth Circuit ruled that the military's indefinite detention of Hamdi was not only lawful but also virtually immune from factual inquiry by the judiciary, in large measure because of the location—"a zone of active combat" in Afghanistan—where Hamdi was purportedly seized. By a vote of eight to four, and over dissenting opinions of Judges Luttig and Motz, the *en banc* court declined to rehear this decision.

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[1] Hamdi has been forbidden any contact with the outside world with the exception of a visit by a representative of the International Red Cross and the delivery of infrequent letters to his family.

[2] Recent news reports suggest that Hamdi has been moved from a Navy brig in Norfolk, Virginia, to a brig located in Charleston, South Carolina. *U.S. Man Caught With Taliban Is Moved to Brig*, L.A. Times, Aug. 24, 2003, at 16; *cf.* Fed. R. App. P. 23(a); Sup. Ct. R. 36(1).

This case presents fundamental questions about the right of American citizens to be free from indefinite detention by the government without charge or trial, the power of the Executive branch to abbreviate due process of law during wartime, and the role of the federal courts in resolving these issues. The appropriate balance between the rights of citizens and the Executive power to defend against threats to national security is an old question, *see, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and one that was answered by the Fourth Circuit in a fundamentally alarming way.

By refusing to permit judicial review of the facts related to the seizure of an American citizen, the lower court not only embraced an unchecked Executive power to indefinitely detain American citizens suspected of being affiliated with enemies, but it also abandoned procedural safeguards designed to promote truth and fairness. *Cf. Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("This system is premised on the well-tested principle that truth — as well as fairness — is 'best discovered by powerful statements on both sides of the question.'") (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984)). Once the Executive branch asserts that a person is an enemy combatant, the Fourth Circuit ruled, no factual testing of that determination is allowed.

The Fourth Circuit's opinion cannot be squared with this Court's rulings regarding the scope of judicial review of military seizures and the rights of detainees

to obtain access to the courts. Nor is the Fourth Circuit's ruling consonant with constitutional and congressional prohibitions against the unbridled detention of citizens by the Executive branch. For these important reasons, this Court should accept review of Petitioner's case.

I. Factual Background

Petitioner is an American citizen who resided in Afghanistan in the Fall of 2001. Petitioner was apparently seized by Northern Alliance forces and turned over to the U.S. military during that time, and has been in U.S. custody ever since—a period fast approaching two years. From April 2002 until recently, Hamdi was imprisoned in a naval brig in Norfolk, Virginia. Counsel has not been permitted access to Petitioner, and Petitioner has not been permitted to appear in court or otherwise participate in these proceedings. Petitioner may not even be aware of the existence of the litigation bearing his name.

In support of Petitioner's detention, the government submitted a two-page, nine-paragraph declaration by Michael Mobbs, a special advisor to the Under Secretary of Defense for Policy. (J.A. 61.)[3] Mobbs asserts that Petitioner traveled to Afghanistan in July or August of 2001.[4] Mobbs further asserts that Petitioner

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[3] Citations to "(J.A.)" refer to the Joint Appendix in the Court of Appeals. Citations to "(App.)" refer to the appendices attached to this petition.

[4] The Mobbs declaration is based entirely on hearsay. Mobbs has no first-hand knowledge of any of the facts contained in the declaration. (J.A. 61, ¶ 2.)

"affiliated" with a Taliban military unit prior to the September 11 attacks on the United States. Petitioner allegedly remained with that unit after the September 11 attacks and after October 7, 2001, when the United States began military operations against the Taliban. (J.A. 61, ¶ 3.)

Mobbs alleges that on an unspecified date in late 2001, Northern Alliance forces were engaged in battle with the Taliban. Mobbs also asserts that Petitioner possessed a rifle and that the unit with which he was affiliated surrendered to Northern Alliance forces. Mobbs does not say where or when this occurred or what Petitioner was doing at the time of his capture.

While under the control of Northern Alliance forces, Petitioner was interviewed by a U.S. interrogation team. (J.A. 61, ¶ 5.) According to Mobbs, Petitioner identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban." *Id.* Mobbs does not assert that Petitioner was a member of al-Qaeda.

The Mobbs declaration then says that U.S. military screening teams determined that Petitioner met the criteria for enemy combatants over whom the U.S. was taking control, and that he also met the criteria for transfer to Guantanamo Bay, Cuba. (J.A. 62, ¶¶ 7, 8.) Mobbs does not set forth what those criteria were or explain why Hamdi met them. The declaration finally asserts that a "subsequent interview of Hamdi

confirmed that he surrendered and gave his firearm to Northern Alliance Forces which supports his classification as an enemy combatant."

II. Proceedings Below

A. Initial Proceedings in the District Court

This litigation began on May 10, 2002, when the Federal Public Defender, endeavoring to act as next friend, filed a habeas corpus petition pursuant to 28 U.S.C. § 2241 challenging Defense Secretary Donald Rumsfeld and Commander W.R. Paulette's ("Respondents") detention of Yaser Esam Hamdi. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) (*Hamdi I*).[5] After several hearings, the district court ordered Respondents to permit counsel to have access to Petitioner.[6]

B. Interlocutory Appeals Related to "Next Friend" Standing and Access to Counsel

Respondents immediately appealed the access order to the Fourth Circuit, which entered a stay on May 31, 2002. *Hamdi I*, 294 F.3d at 602. On June 26, 2003, the court dismissed the petition in *Hamdi I*, holding that the Federal Public Defender

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[5] All of the lower courts that have considered this case have appointed the Federal Public Defender to represent Hamdi. The Federal Public Defender initially believed that Hamdi, like John Walker Lindh, had been brought to the United States for prosecution. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[6] A federal magistrate judge first ordered Respondents to grant counsel's request for access to Hamdi. (J.A. 202.) Respondents then appealed the magistrate judge's access order to the district court. After another full hearing on the issue of access (J.A. 207-56), the district court likewise ordered Respondents to provide counsel immediate access to Hamdi. (J.A. 257.)

did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d at 603-07.

On June 11, 2002, while the appeal in *Hamdi I* remained pending, a separate habeas petition was filed by Hamdi's father acting as next friend, *id.* at 600 n.1, and the district court consolidated that petition with the petition in *Hamdi I.* (J.A. 30-33.) Two full hearings having already been held on the issue of counsel's access to Hamdi in *Hamdi I*, the district court, without further hearing, again ordered Respondents to allow counsel to have access to Hamdi. *Id.*

Respondents appealed this order, and obtained a second stay from the Fourth Circuit. (J.A. 3, 148.) The Fourth Circuit then reversed, finding that the district court ordered access to Hamdi "without adequately considering [its] implications . . . and before allowing the United States to respond [to the newly filed petition by Hamdi's father]." *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*). The court remanded the case to the district court and directed it to design appropriate procedures that would govern the inquiry into the propriety of Hamdi's detention. *Id.* at 283-84. In a subsequent order dissolving the stay and directing the immediate issuance of the mandate, however, the Court of Appeals instructed the district court that the sufficiency of the Mobbs declaration must be considered first as "an independent matter" before the district court considered any other questions in the case. (J.A. 149.)

C. Ruling on the Sufficiency of the Mobbs Declaration and Subsequent Interlocutory Appeal

On August 13, 2002, in accordance with the Fourth Circuit's instruction, the district court conducted a hearing to consider whether the Mobbs declaration, "standing alone," provided a sufficient factual basis for purposes of meaningful judicial review. (J.A. 326-27.)[7] On August 16, 2002, the district court issued an order finding that the Mobbs declaration, by itself, did not permit meaningful judicial review of Petitioner's detention. (App. 29a-38a.) The district court arrived at this conclusion at least in part because information in the declaration was drawn from hearsay supplied by the Northern Alliance, a loose coalition led by what the court characterized as feudal "warlords." (J.A. 390, 394); (App. 36a.)[8] Instead of ordering access to Petitioner, however, the district court thereafter ordered production of additional documentary information. (App. 38a.) Respondents obtained certification

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[7] At the hearing, the district court exhibited extraordinary deference to the Executive by offering to allow Respondents to conduct a military tribunal to determine Hamdi's status as a detainee in accordance with applicable military regulations for treatment of prisoners. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) ("EPW Regulations") (J.A. 91-126). Respondents rejected this invitation. (J.A. 405-06.)

[8] The district court's concern in this regard was well-founded. *See* Jan McGirk, *Fighting Terror*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

of that order and the Fourth Circuit panel authorized interlocutory review pursuant to 28 U.S.C. § 1292(b).

On January 8, 2003, the Fourth Circuit panel reversed the district court's August 16, 2002, order, and ruled not only that the Mobbs declaration was sufficient, without more, to sustain Hamdi's detention, but also that Hamdi's petition should be dismissed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*) (App. 1a-28a.) Specifically, the panel found that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." (App. 10a.) In short, the Fourth Circuit ruled that when the Executive branch asserts that it has seized an American citizen in a zone of active combat and also asserts that the citizen is an enemy combatant, that citizen may not challenge or otherwise dispute those assertions. In fact, the citizen may be indefinitely incarcerated even though the assertions were made by an official who has no personal knowledge of the underlying facts.

Petitioner sought rehearing and rehearing en banc. By eight to four, and over dissenting opinions of Judges Luttig and Motz, the court denied rehearing. *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (*Hamdi IV*) (App. 39a-67a.) Judge Luttig would have granted rehearing because the panel erroneously characterized the

location of Hamdi's seizure as "undisputed" and then relied upon that fact as critical to its decision. (App. 54a (Luttig, J., dissenting from denial of rehearing).) Circumstances related to Hamdi's seizure, Judge Luttig explained, cannot be characterized as "conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." (*Id.*)

Agreeing with Judge Luttig that the panel's characterization "collapses entirely upon examination," (App. 63a), Judge Motz also reasoned that the panel permitted "appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of individual freedoms guaranteed all citizens." (App. 61a (Motz, J., dissenting from denial of rehearing).) The Fourth Circuit's ruling, Judge Motz observed, "marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation." (App. 62a.) "Neither the Constitution nor controlling precedent," Judge Motz wrote, "sanction this holding." (*Id.*)

REASONS FOR GRANTING THE PETITION

This case presents the question whether the Executive branch may indefinitely detain an American citizen purportedly seized in a zone of armed combat and

declared to be an "enemy combatant" without providing any opportunity for the citizen to meet with counsel, challenge the military's allegations, or otherwise be heard in a federal habeas corpus proceeding. Petitioner seeks review because the judgment below: (1) involves issues of fundamental national importance; (2) conflicts with this Court's decisions authorizing judicial review of military seizures during wartime and protecting the right of detainees to court access; and (3) works a radical change in the balance between the three branches of government by condoning an open-ended Executive power to imprison American citizens at the expense of constitutionally protected liberties and congressional authority.

"The power of the executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgment of his peers," Winston Churchill said, "is in the highest degree odious, and is the foundation of all totalitarian government . . . ." A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 Loy. L. Rev. 629, 631 (1996). In fact, the Court of Appeals' recognition of a novel Executive power to indefinitely detain American citizens and disregard fundamental constitutional rights based almost entirely upon the purported location of seizure is flatly contrary to this Court's decisions upholding the rights of citizens against military authority even in areas of alleged armed conflict. Moreover, the Fourth Circuit's ruling violates the Suspension Clause and fails to protect the basic elements

of process due under the Fifth Amendment to the Constitution. Finally, Congress has prohibited the indefinite detention of an American citizen in the absence of explicit statutory authority. For these reasons, it is profoundly important for this Court to resolve the questions posed by Hamdi's case.[9]

I. This Case Presents Issues of Fundamental Importance

At stake is the indefinite detention of an American citizen held by the military without charge for almost two years. As Judge Luttig noted, however, this case "has implications beyond the particular dispute." (App 54a.) The lawfulness of Hamdi's indefinite imprisonment turns on "the boundaries between military and civilian power," *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946), and presents questions

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[9] A petition for habeas corpus filed by another American citizen designated as an "enemy combatant," Jose Padilla, is pending review in the Court of Appeals for the Second Circuit. No. 03-2235(L). Because the Executive branch has imprisoned Mr. Padilla in South Carolina, it contends that jurisdiction is not proper in the Second Circuit. *See Padilla v. Rumsfeld*, 256 F. Supp. 2d 218, 222 (S.D.N.Y. 2003) (granting application for certification under 28 U.S.C. § 1292(b)). Oral argument apparently will take place the week of November 17, 2003.

The government evidently has erected a special facility designed to hold citizens designated as "enemy combatants" in South Carolina. Jess Bravin, *More Terror Suspects May Sit in Limbo*, Wall St. J., Aug. 8, 2002, at A4 (J.A. 320-22). Consequently, apart from the *Padilla* case pending in the Second Circuit, the questions raised by this case may never be addressed by another court of appeals. *See, e.g*, *Al-Marri v. Bush*, No. 03-1220, 2003 WL 21789542, at *7 (C.D. Ill. Aug. 1, 2003) (dismissing for lack of venue habeas petition filed on behalf of person declared "enemy combatant" after criminal charges were dismissed and petitioner was moved to South Carolina). Like Padilla and al-Marri, Hamdi reportedly has been moved to the same facility in South Carolina. *See supra* note 2.

integral to our constitutional design rarely equaled in national importance. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-19 (1866) ("No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people."). It is not surprising, then, that judges of the Fourth Circuit described this case as "momentous," (App. 48a (Traxler, J., concurring in denial of rehearing)), acknowledged the"overarching importance" of the issues of law, (App. 60a (Luttig, J.)), and characterized the ruling below as "breathtaking," "unprecedented," "extraordinary," and "chilling." (App. 63a, 64a (Motz, J.)).[10]

The upshot of the Fourth Circuit's ruling is that the separation of powers precludes substantial judicial inquiry into the indefinite detention of a citizen asserted to be an "enemy combatant" by the Executive branch and allegedly seized within an area asserted to be a "zone of active combat." What constitutes a "zone of active combat," and who may be designated as an "enemy combatant," were left by the Fourth Circuit to the discretion of the Executive branch. Indeed, the appellate court not only left both terms undefined, it also refused to allow Petitioner a voice as to

[10] The indefinite detention of so-called "enemy combatants" also has generated an expanding volume of commentary. *See, e.g.*, *U.S. Nationals Detained as Unlawful Combatants*, 97 Am. J. Int'l L. 196 (2003); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. Jrnl. 503 (2003); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 Yale L.J. 961 (2003).

where he was seized or what he was doing at the time. The Fourth Circuit thus imposed virtually no restriction on the Executive branch's power to indefinitely imprison citizens without charge and without access to counsel or the courts.

1. According to the Fourth Circuit, "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant" would violate the separation of powers. (App. 25a.) For this reason, the judicial review endorsed by the Fourth Circuit "actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated [Hamdi] as an enemy combatant." (App. 55a (Luttig, J.).) The Fourth Circuit's refusal to engage in this inquiry is, as both Judge Luttig and Judge Motz recognized, irreconcilable with its promise to provide "meaningful judicial review." (App. 55a (Luttig, J.), 65a (Motz, J.).)

More ominously, Judge Motz perceptively warned that an Executive power to designate citizens as "enemy combatants" that is unhinged from judicial review "threatens the freedoms we all cherish." (App. 67a.) Because the Fourth Circuit's opinion denies any ground for judicial inquiry into the Executive's designation of a citizen as an enemy combatant, Judge Motz explained, the decision sanctions indefinite detention on the basis of "no credible evidence supporting the Executive's designation [of a citizen] as an enemy combatant." (App. 65a.)

2. The significance ascribed by the Fourth Circuit to the purported location of Hamdi's seizure offers little protection against the exercise of this unchecked power.

As the Fourth Circuit put it, the "political branches are best positioned to comprehend this global war in its full context, . . . and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches." (App. 15a.) Accordingly, as Judge Motz pointed out and Judge Traxler conceded, the Fourth Circuit's opinion suggests that the definition of a "zone of active combat" is effectively non-justiciable. (App. 64a n.3 (Motz, J.), 50a (Traxler, J.).)

Left to the Executive branch, the outlines of a "zone of active combat" in the "war on terrorism" are without limit. Indeed, the Executive branch has never been conservative about designating territory to be within the theater of armed conflict. *Cf. Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 239, 274-76 (1960) (military bases in foreign countries); *Duncan*, 327 U.S. at 311 (Territory of Hawaii); *Korematsu v. United States*, 323 U.S. 214, 220, 223 (1944) (western United States); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 126 (Indiana). And the present "war on terrorism," to be sure, is even less constrained than prior conflicts by national borders or traditional definitions of combat.[11] Moreover, outside the context of military

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[11] "The war on terrorism is a global campaign against a global adversary . . . . The war on terrorism began in Afghanistan . . . but it will not end there. It will not end until terrorist networks have been rooted out, wherever they exist." *Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan*, Washington, D.C., July 31, 2002, *at* http://www.defenselink.mil/speeches/2002/s20020731-secdef.html.

operations, and within the United States, the Executive branch has employed the threat of "enemy combatant" designation to secure guilty pleas in criminal cases. *See, e.g.*, Michael Powell, *No Choice but Guilty*; *Lackawanna Case Highlights Legal Tilt*, Wash. Post, July 29, 2003, at A01; Eric Lichtblau, *Threats and Responses*, N.Y. Times, June 20, 2003, at A1.

3. The Fourth Circuit also refused to permit Petitioner to speak to counsel with regard to the location of his seizure, much less to any other issue. Petitioner therefore "has never been given the opportunity to dispute any facts," (App. 63a (Motz, J.)), including the Executive branch's assertion that he was seized within a zone of active combat. Because the Fourth Circuit allowed the Executive branch to define what constitutes a "zone of active combat" and denied Petitioner the right to challenge whether or not he was seized within it, the appellate court's geographic limiting principle is, as Judge Motz noted, "in truth a chimera." (App. 64a.)

4. Read narrowly, as Judge Luttig and Judge Motz point out, the Fourth Circuit's ruling exposes any number of American citizens abroad—from embedded journalists to humanitarian aid workers to "unwitting tourists"—to indefinite incommunicado detention based on the thinnest of factual grounds. (App. 55a (Luttig, J.), 64a (Motz, J.).) Any citizen, in fact, that the Executive branch decides to label as "hostile" and "arrayed against our troops," (App. 18a), "could be imprisoned indefinitely without being charged with a crime or afforded legal counsel,

if the Executive asserted that the area [in which they were seized] was a zone of active combat." (App. 64a (Motz, J.).)

Read more broadly, the "zone of active combat" that defines the range of the Fourth Circuit's extraordinary refusal to inquire into a citizen's indefinite detention is not confined by any readily cognizable boundaries of place, time, or circumstances.[12] It permits, as Judge Luttig observed, "superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant." (App 58a.) If not reversed, the Fourth Circuit's opinion may "have opened the door to the indefinite detention, without

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[12] As the Fourth Circuit noted, the Executive branch's authority to detain combatants exists only "during the duration of hostilities." (App.14a.) However, because the government represented "that American troops are still on the ground," the Fourth Circuit concluded that the armed conflict remained ongoing and rejected Petitioner's argument that the duration of the conflict must be determined by public pronouncements made by the political branches. (App.27a.) *Cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts empowered to construe public statements by political branches to determine end date of armed conflict); *Lincoln v. United States*, 197 U.S. 419, 429 (1905) (holding taxes collected on goods exported to Philippines and imposed pursuant to war power invalid after peace treaty notwithstanding ongoing insurrection); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871) (looking to "public act[s]" of the political departments to ascertain the beginning and end dates of the Civil War).

By making its own factual determination as to the duration of the conflict instead of relying on the public statements of the political branches as required by this Court's precedents, the Fourth Circuit eliminated any clear limitation on the duration of Hamdi's detention. Furthermore, as Judge Motz observed, the court blurred the distinction between Afghanistan and any other "part of the world where American troops are present—e.g., the former Yugoslavia, the Philippines, or Korea," with regard to the definition of a "zone of active combat." (App. 64a.)

access to a lawyer or the courts, of any American citizen, even one captured on American soil." (App. 65a n.5 (Motz, J.).) The Fourth Circuit's ruling, in sum, is little different from the "sweeping" proposition initially rejected by the same court: "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II*, 296 F.3d at 283. It is essential that this Court grant certiorari to address the nationally important issues raised by Petitioner's case.

II. The Court of Appeals' Ruling Conflicts with Decisions of this Court

A. Review Is Warranted Because the Ruling Conflicts with This Court's Opinions on the Power of Article III Courts to Examine Executive Detentions by Means of Habeas Corpus

The Fourth Circuit's holding that the separation of powers precludes the judiciary from engaging in any factual inquiry into military seizures alleged to take place within a zone of active combat, (App. 23a), is an invention out of whole cloth. It also directly conflicts with *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), and a line of other decisions establishing that the factual circumstances related to Executive seizures during wartime are subject to judicial review. Most importantly, however, the Fourth Circuit's opinion is inconsistent with cornerstone principles of our Republic, dating from well before the American Revolution, that evolved in resistence to the exercise of unchecked Executive power.

1. "At its historical core, the writ of habeas corpus has served as a means of

reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *accord Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Indeed, the unbridled power of the Executive to detain citizens by fiat was repudiated in England and its colonies, and replaced by the guarantee of independent judicial inquiry by means of the writ of habeas corpus. *See* 3 William Blackstone, Commentaries *129-38. In the aftermath of the reign of Oliver Cromwell, for example, the English Parliament passed the Habeas Corpus Act of 1641 authorizing the issuance of the writ of habeas corpus in favor of those imprisoned by the King's command. Dallin Oaks, *Legal History in the High Court–Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966). This tradition of judicial review of executive detention was embraced by the colonies. *See* A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 Am. Hist. Rev. 18, 26 (1902); *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1045 (1970).

Following American independence, this Court had occasion to secure the importance of this tradition in the United States. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court reviewed the pre-trial commitment of Aaron Burr's co-conspirators who had been detained on the basis of affidavits and a message from President Jefferson. *United States v. Bollman*, 24 F. Cas. 1189, 1195-96 (C.D.C.

1807) (No. 14,622). The Court, however, did not defer to the evidence presented by the government, but engaged in "an examination of the evidence upon which the commitment was grounded." 8 U.S. (4 Cranch) at 125. After scrutinizing the evidence marshaled against the detainees, the Court ordered their discharge on the ground that the government had failed to establish probable cause to detain the petitioners for trial on charges of treason. *Id.* at 136-37. *Ex parte Bollman* reveals that federal courts are well-positioned to evaluate the Executive branch's justification for detention even in cases involving the most sensitive threats to national security.

In contrast, the Fourth Circuit failed to cite a single court in the history of habeas corpus jurisprudence that has limited judicial review because of the separation of powers. *Cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 100 (1869) (rejecting argument that Court did not have jurisdiction to review military's imprisonment of citizen in Mississippi). That is because federal courts are fully equipped to evaluate conduct by the military that affects the rights of citizens, and determine whether that conduct is consistent with the Constitution. *See Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875); *Mitchell v. Harmony*, 54 U.S. (13 How.) at 134.

Congress, of course, has affirmatively authorized federal courts to "hear and determine the facts" in habeas corpus proceedings, and allowed habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material

facts." *See* 28 U.S.C. §§ 2243, 2246. By empowering federal courts to inquire into the nature of a person's confinement in a habeas corpus proceeding, Congress has ensured that the Judiciary can serve as a check against unauthorized Executive detentions.

Habeas corpus proceedings thus constitute part and parcel of the separation of powers between our branches of government. Urging ratification of the Constitution, James Madison stated that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48. The writ of habeas corpus is an instrument of this design. *See Parisi v. Davidson*, 405 U.S. 34, 49 (1972) (Douglas, J., concurring) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

2. The Fourth Circuit's analysis of the separation of powers doctrine, drawn almost exclusively from its reading of "the warmaking powers of Article I and II" of the Constitution, (App. 21a), ignores the language in Article I most directed to

Hamdi's predicament: the Suspension Clause.[13] Indeed, the Suspension Clause refutes the Fourth Circuit's unsupported view that Article III courts have no role in reviewing facts attending the indefinite seizure of an American citizen during wartime.

The Suspension Clause spells out two inalterable circumstances under which the suspension power may be exercised, and contemplates judicial review by means of habeas corpus proceedings in every other case—at least to the extent authorized in 1789. *St. Cyr*, 533 U.S. at 301; *see also Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1267 (1970). The Judiciary Act of 1789 enabled federal courts to issue writs of habeas corpus to prisoners in custody by "the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The dimension of this statutory authority, however, was rooted in the common law. *See Ex parte Bollman*, 8 U.S. (4 Cranch) at 94-95. And under the common law, judicial review of the return was least deferential in the context of executive detentions. *See* Rollin Hurd, *The Writ of Habeas Corpus* 271 (2d ed. 1876) (noting that in cases of noncriminal imprisonment, the exceptions to the general rule against controverting the return were "governed by a principle sufficiently comprehensive to

[13] Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

include most . . . cases"); Jonathan Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2526 (1998) ("at common law executive detentions . . . triggered a broad scope of review on habeas").

Judicial review of executive detentions by way of habeas corpus historically was more searching than review of criminal convictions because of the absence of any prior judicial determination of the petitioner's rights. *See, e.g.*, Hurd, *supra*, at 268; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963); Hafetz, *supra*, at 2535-36. Under the guise of the separation of powers doctrine, however, the Fourth Circuit simply eliminated the extensive judicial review of Executive detentions protected by the Suspension Clause in favor of Executive power.

3. The Fourth Circuit's ruling also is entirely inconsistent with this Court's long experience with the review of Executive branch seizures. In *Mitchell v. Harmony*, this Court reviewed and rejected the military's seizure of a citizen's property in Mexico during the Mexican-American war. 54 U.S. (13 How.) at 128-29. The plaintiff, a naturalized American businessman, filed an action against a U.S. colonel to recover the value of his property seized by the military. The government responded that the businessman had a "design" to trade with the enemy, and that the decision of the military commander to seize the property "must be entitled to some respect." *Id.* at 118, 120.

Rejecting these arguments, Chief Justice Taney's opinion for the Court found the government's defense to be based on "rumors which reached the commanding officer." *Id.* at 133. "Mere suspicions of an illegal intention," the Court stated, "will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence." *Id.* If an Article III court, consistent with separation of powers principles, can inquire into the seizure of a citizen's property by the military within a country at war with the United States as in *Harmony*, these same principles surely pose no barrier to an inquiry into the seizure of the citizen himself.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court rejected the virtually identical argument accepted by the Fourth Circuit that the "constitutional allocation of war powers," (App. 25a), precludes the judiciary from reviewing the circumstances related to the exercise of such powers. *Sterling* involved the authority of the governor of Texas to restrict the production of private oil wells in areas declared to be under martial law. Acknowledging the governor's license to maintain order, the Court stated:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power, to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The

> contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

287 U.S. at 400-01 (citing *Harmony*, 54 U.S. (13 How.) at 134). The Executive branch's authority with respect to the war powers and national security, in other words, does not make immune from judicial inquiry actions by the Executive branch in the name of war powers or national security. *See New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring); *United States v. United States Dist. Court*, 407 U.S. 297, 331-32 (1972); *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Nor is the Fourth Circuit's decision supported by precedent addressing similar facts. Like this case, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), involved a habeas corpus petition filed by an American citizen to challenge his detention as a prisoner during World War II. Although the respondent filed a return "setting out . . . that Territo was captured in Italy upon the field of battle, and that he was at the time of capture a soldier in the enemy Italian Army," *id.* at 142-43, the district court held an evidentiary hearing—at which the petitioner was represented by counsel and allowed to testify—and subsequently issued factual findings. *Id.* at 142-43; *see also* Jess Bravin, *How a Ditchdigger for Mussolini Plays A Role in Terror War*, Wall St. J., Oct. 28, 2002, at A1, A11.

Even the Fourth Circuit suggested that its opinion constituted a departure from prior doctrine. (*See* App. 17a ("In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability.").) By holding that the military's indefinite detention of an American citizen, held far from any theater of combat, is immune from factual inquiry in a habeas corpus proceeding, however, the Fourth Circuit abdicated its role as an independent check on the Executive branch. Review by this Court is warranted because the Fourth Circuit's decision is both foreign to this Court's settled jurisprudence and contrary to the guarantee of independent habeas corpus review rooted in the Anglo-American legal tradition.

B. Review Is Warranted Because the Ruling Conflicts with This Court's Decisions Upholding the Fundamental Right to Court Access

Although the Fourth Circuit acknowledged that "Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention," (App. 22a), the court denied Petitioner the opportunity to participate in the proceeding or to have access to his appointed lawyer.[14] By refusing

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[14] According to the Fourth Circuit, "no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch." (App. 24a.) For this reason, the Fourth Circuit refused to permit Hamdi to "be heard in an Article III court to rebut the factual assertions that were

to permit either, the Fourth Circuit transformed Hamdi's entitlement into a fundamentally hollow exercise, and violated a line of this Court's precedents that support the constitutional guarantee of access to the courts.

The right of access to the courts is undeniably "well-established" by this Court's precedent, *Lewis v. Casey*, 518 U.S. 343, 350 (1996), and in its most basic form requires that "the state and its officers may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). Likewise, the government may not interfere with a habeas petitioner's assertion of legal claims. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."); *accord Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

By refusing to allow Petitioner to participate in a habeas proceeding filed on his behalf, the Fourth Circuit's decision is incompatible with these bedrock principles expressed in this Court's precedent. As Judge Motz observed, "[d]enied the most basic procedural protections, Hamdi could not possibly mount a challenge to the

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submitted to support the 'enemy combatant' designation." (*Id.*) Likewise, the Fourth Circuit steadfastly refused to permit Hamdi to meet with appointed counsel. *See Hamdi II*, 296 F.3d 278, 284 (4th Cir. 2002).

Executive's designation of him as an enemy combatant." (App. 63a.) Without the ability to speak to the allegation that one is an "enemy combatant," in other words, Petitioner has had no meaningful opportunity to assert the claim that his imprisonment is unlawful.

By the same token, the Fourth Circuit's refusal to allow Petitioner to have access to appointed counsel is equally inconsistent with this Court's precedent ensuring the right to court access. In *Procunier v. Martinez*, 416 U.S. 396, 419, 421-22 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court struck down a ban on the use of law students and paralegals to interview inmates because it "constituted an unjustifiable restriction on the right of access to the courts." Inmates "must have a reasonable opportunity to seek and receive the assistance of attorneys," the Court explained, in order to vindicate the right to access to courts guaranteed by the Due Process Clause. *Id.* at 419; *see also Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Ex parte Hull*, 312 U.S. at 549.

The restriction on access to courts at issue in *Procunier* pales in comparison to the limitation imposed by the Fourth Circuit. As a result of the Fourth Circuit's ruling, Americans alleged to be "enemy combatants" and purportedly found in a "zone of active combat" simply are not entitled to meet with appointed counsel. Although this Court has said that the government "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), the

Fourth Circuit's ruling does so in direct conflict with an established line of this Court's precedent ensuring the right of habeas petitioners to access to the courts.

III. Review Is Warranted Because the Ruling Is Contrary to Constitutional Protections and Congressional Limitations Against Indefinite Detention Without Due Process

A. The Due Process Clause Prohibits Hamdi's Indefinite and Effectively Incommunicado Detention Without a Hearing

The Fourth Circuit's ruling authorizes an unprecedented denial of both procedural and substantive due process to American citizens accused as enemy combatants. By refusing to allow Petitioner to be heard, and by acquiescing to his virtually incommunicado detention, the Fourth Circuit's opinion is flatly inconsistent with the requirements of the Due Process Clause.

The due process interest at stake is manifest. As this Court has remarked, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). And while the Fourth Circuit suggested that Hamdi's imprisonment does not constitute "punishment," but rather is a "simple war measure," (App. 16a), the truth is otherwise. Hamdi is not being treated as an ordinary prisoner of war,[15] and has not

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[15] Prisoners of war generally cannot be held in correctional facilities, EPW Reg. 3-2(b) (J.A. 99), separated from their fellow soldiers, *id.* 3-4(b) (J.A. 100), quartered under conditions less favorable than U.S. troops, *id.* 3-4(e) (J.A. 101), or

been treated in accordance with the Geneva Convention Relevant to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and United States military regulations designed to implement the GPW. *See* EPW Regulations (J.A. 91-126).[16]

1. The right to be heard in opposition to the government's effort to strip a person of his liberty is at the heart of the procedural protections due under the Constitution. *See Lachance v. Erickson*, 522 U.S. 262, 265 (1998); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Hughes v. Rowe*, 449 U.S. 5, 11 (1980); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or

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restricted from receiving mail, *id.* 3-5(a) (J.A. 101.)

[16] The Fourth Circuit held that the GPW was unenforceable because it evinces no intent to provide a right of action and therefore is not self-executing. The habeas statute itself, however, authorizes review of detention in violation of treaties. 28 U.S.C. § 2242(c)(3); *cf.* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995) (explaining that whether treaty confers a right of action is "analytically distinct" from the question of self-execution).

As for the EPW Regulations designed to implement the GPW, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974); *accord Billings v. Truesdell*, 321 U.S. 542, 551 (1944); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942). The EPW Regulations provide that if any doubt exists whether a person is a prisoner of war, the person must be treated as such until his status is determined by a competent tribunal. EPW Reg. 1-6 (J.A. 96).

contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). By refusing to allow Petitioner to be heard in this habeas corpus proceeding, the Fourth Circuit has denied Petitioner this basic constitutional right.

Detention without the opportunity to be heard, moreover, constitutes a paradigmatic affront to the Due Process Clause. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-602 (1953); *accord Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious."). "[The Court] need go no further" to find the Executive branch's treatment of Hamdi unconstitutional. *See Kennedy*, 472 U.S. at 167.

In the absence of review by this Court, the Fourth Circuit's opinion threatens to permit the indefinite and virtually incommunicado imprisonment of innocent Americans by the government. As this Court acknowledged shortly after the Civil War, "military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony." *Lamar v. Brown*, 92 U.S. 187, 196 (1875); *accord* (App. 24a ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake.").) Indeed, such mistakes have been made by our forces in Afghanistan. *See* Carlotta Gall, *U.S. Sends 18 at Guantanamo To Afghanistan to Be*

Freed, N.Y. Times, Mar. 25, 2003, at B13; Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. Times, Dec. 22, 2002, at 1. At the significant risk of indefinitely perpetuating such errors made overseas, the appeals court refused to permit an American citizen—held for the most part within a few miles of an operating United States District Court—to meet with appointed counsel or the opportunity to have a voice in the underlying habeas proceedings in order to establish that a mistake had been made. This aspect of the lower court's decision "deserves repudiation." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

While the government's interest in detaining persons who fought for the former government in Afghanistan is not insubstantial, (*see* App. 16a), the Constitution requires that an American citizen indefinitely detained under that suspicion should be permitted the opportunity to be heard. The Fourth Circuit's contrary conclusion is worthy of review by this Court.

2. "[T]he Due Process Clause [also] contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). This substantive element prohibits, for example, government intrusion into certain intimate private conduct, *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003), interference in the exercise of parental rights, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), egregious and shocking

conduct by the government, *Chavez v. Martinez*, 123 S. Ct. 1994, 2005 (2003); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); and arbitrary deprivations of liberty, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting); *Daniels*, 474 U.S. at 331.

The Executive branch's treatment of Petitioner is comparable to the type of conduct that offends the "decencies of civilized conduct" central to substantive due process. *See Rochin v. California*, 342 U.S. 165, 173 (1952); *cf. Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1726 (2003) (Kennedy, J., concurring) (noting relation between the need for continued detention and prohibition on arbitrary deprivations of liberty). Under the Fourth Circuit's ruling, in the absence of press coverage or an eligible "next friend," an American citizen labeled as an "enemy combatant" may be entirely unknown to the legal system, a possibility that could not be more at odds with the Constitution. *Cf.* The Federalist No. 84 (Alexander Hamilton) ("[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government."). Whether the effectively incommunicado detention and interrogation of an American citizen for almost two years is consistent with the substantive protections afforded by the Due Process Clause deserves plenary review by this Court.

B. Congress Prohibited the Executive Branch from the Indefinite Detention of American Citizens Without Process

The Constitution provides no inherent authority for the Executive branch to indefinitely detain American citizens in the United States, and Congress has expressly forbidden it in the absence of statutory authorization. Indeed, Congress could not have been more clear in requiring explicit legislative authority for the detention of citizens. *See* 18 U.S.C. § 4001(a). Because the Executive branch possesses power solely by virtue of the Constitution and the Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), and no statute explicitly permits the indefinite detention at issue, the unprecedented expression of Executive power upheld by the Fourth Circuit is illegitimate.

Section 4001(a) of Title 18 states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The statute "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The fact that only Congress may authorize detentions in the United States is not a recent innovation. It is Congress, not the President, that is empowered under the Constitution to suspend the writ of habeas corpus. *Ex parte Merryman*, 17 F. Cas. 144, 149-50 (C.C. Md. 1861). Furthermore, as this Court acknowledged long before

the passage of § 4001(a), "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." *Valentine v. United States*, 299 U.S. 5, 9 (1936); *cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (Chase, C.J., concurring) ("[I]n our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain."). Authorization for the detention of citizens, in other words, is not a subject "within [the President's] domain and beyond control by Congress." *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring).[17]

Even in the context of the exercise of war powers, Congress must supply the authority to detain outside of the environment of actual fighting. One of the earliest statutes passed by Congress, for example, was the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577, which allowed the President to detain and deport enemy aliens found in the United States following a formal declaration of war. *See Ludecke v. Watkins*, 335 U.S. 160, 161 (1948). Any Executive power to indefinitely detain Hamdi in the United States, similarly, must be drawn from congressional authorization.

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[17] To the extent that the Fourth Circuit located an inherent Executive power to detain citizens, such authority is "most vulnerable to attack and in the least favorable of possible constitutional postures." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637, 640 (Jackson, J., concurring). The exercise of such authority could be sustained only if the detention of citizens was "beyond control" by Congress, *see id.*, a proposition plainly contrary to § 4001(a), not to mention the rest of Title 18 of the U.S. Code.

The Fourth Circuit held that, by authorizing the Executive branch to "use all necessary and appropriate force" against the countries, organizations, or individuals that committed the terrorist attacks that took place on September 11, 2001, Authorization for Use of Military Force, Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), Congress *implicitly* authorized the Executive branch to detain belligerents, including citizens, in the absence of a provision that "provide[d] American belligerents some immunity from capture and detention." (App. 19a.) The authorization for the use of force, naturally, is silent with regard to the indefinite detention of American citizens.

Contrary to the Fourth Circuit's ruling, however, implicit wartime powers sustain only the least burdensome restraint on citizens that is demanded by the most explicit statutory language:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, *when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used*.

Ex parte Endo, 323 U.S. 283, 300 (1944) (emphasis added).[18] Accordingly, the Court in *Endo* held that Congress, under the auspices of a statutory evacuation program, had not "clearly and unmistakably" authorized the indefinite detention of citizens of Japanese descent. *Id.* at 303-04.

The Court's holding in *Endo* reflects a long tradition of close scrutiny applied to statutes cited in support of military control over citizens. *See Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress did not intend to supplant civilian court system when it authorized martial law in territory of Hawaii); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (holding that military order annulling judicial order unauthorized by Congress and therefore void); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 135 (Chase, C.J., concurring) (noting that Congress had not authorized Milligan's seizure). The absence of an

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[18] Similarly, this Court found that general congressional appropriations that do not "plainly show a purpose to bestow the precise authority which is claimed" were insufficient to justify the detention of American citizens. *Id.* at 303 n.24. The government in *Endo* made no argument that the congressional declaration of war by itself permitted the indefinite detention of citizens. *See* U.S. Const. art. I, § 8 cl. 11.

explicit congressional grant of authority, in other words, establishes the unlawfulness of military authority over citizens.

The Fourth Circuit's analysis not only presupposes the belligerent character of American detainees—or at least that such character is a unilateral and unreviewable Executive determination—but it also approaches the question of Executive power from the wrong starting place. By asking whether Congress in its authorization for the use of force has expressly withheld from the Executive branch, rather than expressly authorized, the detention of citizens, the Fourth Circuit assumes the existence of a power to indefinitely detain Americans that the Executive branch does not possess.

Because no statute "clearly and unmistakably" authorizes the Executive branch to indefinitely detain Hamdi as required by 18 U.S.C. § 4001(a), his continued detention is unlawful. The Fourth Circuit's authorization of the Executive branch's detention of Petitioner without statutory authority warrants plenary review by this Court.

CONCLUSION

The Constitution requires that Petitioner be allowed to challenge his indefinite detention, meet with counsel, present evidence, and participate in his habeas corpus proceeding. As the Fourth Circuit recognized in *Hamdi II*, 296 F.3d at 283, however, the procedures governing that inquiry must be crafted by the district court in the first

instance and must be designed to both protect the government's legitimate security concerns as well as ensure the court's ability to exercise independent review of Petitioner's detention.

The threat posed by the accumulation of power in one branch of government, an evil well-known to the Founders, is a guiding principle behind the Constitution. In support of ratification, Alexander Hamilton quoted from Montesquieu: "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78. Because the Fourth Circuit's decision requires no separation between the exercise of Executive power and the judgment that leads to the indefinite and effectively incommunicado imprisonment of an American citizen, it poses a grave threat to the liberty of all Americans.

The petition for a writ of certiorari should be granted.

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