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, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to deprive citizens of their liberty, hold them incommunicado, and severely limit their access to the courts to seek redress, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE

The petitioner, Yaser Esam Hamdi, is an American citizen. He is presently confined in a military brig in the United States. A petition for a writ of habeas corpus has been filed on his behalf and that petition alleges that Mr. Hamdi's imprisonment is contrary to the law.

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

The Government claims that Mr. Hamdi is an "enemy combatant" – a soldier affiliated with the Taliban, the former government of Afghanistan. Mr. Hamdi appears to have been initially seized by the Northern Alliance forces in Afghanistan and he was thereafter turned over to the U.S. military. Mr. Hamdi was then transferred to a U.S. military base in Cuba where prisoners from the war in Afghanistan are being held. In April 2002, the Government moved Mr. Hamdi to a naval brig in Norfolk, Virginia.

For almost two years, the Government has denied Mr. Hamdi any access to legal counsel. The Government claims that the Executive has unilateral authority to identify "enemy combatants" and to hold them incommunicado indefinitely. Because it is physically impossible for a prisoner to file a writ of habeas corpus in such circumstances, an attorney must file a "next friend" petition on the prisoner's behalf. The Government's position is that such petitions must be "properly filed" even though the attorney has not been able to meet with the prisoner to discuss the Government's allegations. The Government also maintains that properly filed petitions should be summarily dismissed if the prisoner has been deemed by the executive authorities to be an "enemy combatant."

SUMMARY OF ARGUMENT

Since the September 11th terrorists attacks, the Federal Government has made several sweeping constitutional claims – that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation (including with legal counsel), and, in effect,

deny the prisoner access to Article III judges to seek the habeas "discharge" remedy. As long as the Executive has issued "enemy combatant" orders to his Secretary of Defense, the Government claims, the process comports with the Constitution – regardless of whether the prisoner is an American citizen or whether the arrest-seizure takes place overseas or on American territory. Repeatedly, the Government conflates three distinct issues: seizure of citizens, detention of citizens, and trial of citizens. In effect, the Government is using the "enemy combatant" label to revive Attorney General James Speed's claim that when the country is at war, the president becomes "the supreme legislator, supreme judge, and supreme executive." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866) (Argument for the United States). This Court should reject that claim in the most emphatic terms.

The constitutional issue before the Court is not complicated. If the writ of habeas corpus has not been suspended, the writ retains its full legal force. The problem in this case is that the court below dismissed the habeas petition too casually. The prisoner, Yaser Esam Hamdi, has not had an opportunity to meet with counsel in order to respond to the Government's allegations. This Court should reverse the ruling below and remand this case for further proceedings.

ARGUMENT

I. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE FOURTH AMENDMENT

The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend IV.

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573 (1980). The amendment shields the citizenry from overzealous government agents by placing limits on the powers of the police. The primary "check" is the warrant application process. That process requires the police to apply for arrest warrants, allowing impartial judges to exercise independent judgment regarding whether sufficient evidence has been gathered to meet the "probable cause" standard of the Fourth Amendment. *McDonald v. United States*, 335 U.S. 451 (1948). When government agents seize a citizen without an arrest warrant, the prisoner must be brought before a judicial magistrate within 48 hours so that an impartial judicial officer can examine the government's conduct and discharge anyone illegally seized. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Although there is no Fourth Amendment issue before the Court in the instant case, it would be useful for this Court to craft its ruling in such a way as to clarify

precisely which legal matters have and have not been settled. This is important because the Government has been selectively quoting caselaw from this Court in an attempt to turn dicta into holdings. For example, the Government has been employing language from *Ex Parte Quirin,* 317 U.S. 1 (1942), which is a case involving *trial procedures* for enemy combatants, to make sweeping claims about the Executive's power to *seize* citizens on American soil. *See*, *e.g.*, Respondent's Brief on Motion To Dismiss Amended Petition for Writ of Habeas Corpus, at 5-6, *Padilla v. Rumsfeld* (S.D.N.Y.) (No. 02-4445) (2002) ("The authority [of the Executive] to *capture* and detain is not diminished by the fact that the enemy combatant is an American citizen. See *Quirin*, 317 U.S. at 37-38.") (Emphasis added). The import of such selective quotations is to suggest that this Court has considered and approved an Executive power to conduct arrests outside of the Fourth Amendment's framework in those instances where a suspect has been deemed an "enemy combatant."[2]

[2] The point here is *not* that the Government relied upon some "inherent" Article II power when it took Mr. Padilla into custody. Rather, the point is that the Government has been implying that it *can* bypass the Fourth Amendment and judicial scrutiny whenever it claims to be pursuing "enemy combatants." *See* Timothy Lynch, "Breaking the Vicious Cycle," Cato Institute Policy Analysis (June 26, 2002), pp. 8-9. The Government has searched American homes on such dubious "inherent" Article II legal theories, but the legality is rarely scrutinized in reported decisions because homeowners typically agree to a plea bargain and thus drop the Fourth Amendment objection. *See*, *e.g.* R. Jeffrey Smith, "Administration Backing No-Warrant Spy Searches," *Washington Post,* July 15, 1994 (noting the warrantless search of the home of Aldrich Ames).

To be sure, this Court has never suggested that Fourth Amendment principles and procedures apply to the battlefield, but it is equally clear that this Court has never sanctioned executive arrests warrants of citizens on U.S. soil. The Government's inferences to the contrary can be very misleading.

II. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE LAW OF HABEAS CORPUS

A.

The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. Clearly, the Constitution contemplates exigent circumstances in which "public Safety" will require the Executive to move swiftly against persons who are perceived to be dangerous.[3] In those situations, it is likely that the Executive will not be able to comply with constitutional norms for every search, arrest, and imprisonment. The suspension of the writ will thus excuse otherwise illegal arrests and dragnet tactics because emergency circumstances can warrant such actions.

As long as the writ of habeas corpus is *not* suspended, however, the Executive must follow constitutional norms.

[3] Since the Suspension Clause appears in Article I, the implication is that the legislative branch of government is empowered to suspend the writ. Since the Government is not making any claims with respect to suspension in the instant case, no further discussion of this point seems necessary.

"Thus, it has been held that in the absence of Congressional action a writ of habeas corpus cannot be denied in a proper case even in wartime." 39 Am. Jur. 2d, Habeas Corpus, § 5, p. 206 (citing *Ex Parte Stewart,* 47 F.Supp. 410 (1942)).

Thus far, the resolution of this case is straightforward and uncomplicated. If the writ of habeas corpus has not been suspended, it retains its full legal force. The prisoner here, Mr. Hamdi, is an American citizen and the petition that has been filed on his behalf complains that his confinement is unlawful. The startling fact that Mr. Hamdi has not been able to meet with an attorney to fully present a habeas petition appears to be plain error. The Government, however, denies the force of this contention. Having conceded the major premise – that the writ has not been suspended – the Government challenges the minor premise – that the writ retains its full legal force. On the Government's view, the Constitution requires improvised habeas procedures for "enemy combatants."

The Government advances two arguments to support this theory. The first argument is that Article III courts may not "second-guess" the Executive's "enemy combatant" determination – even in habeas corpus petitions that have been properly filed on behalf of American citizens. Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895). That shocking assertion strikes at the heart of habeas corpus.

The right to habeas corpus is, in essence, a right to judicial protection against lawless incarceration by executive authorities. If the judiciary could not "second-guess" and reject the Executive's initial decision to imprison a

citizen, the writ would never have acquired its longstanding reputation in the law as the "Great Writ." By way of background, here is how Justice Story defined the writ in his treatise on constitutional law:

> *Habeas Corpus*, literally, Have you the Body. The phrase designates the most emphatic words of the writ, issued by a Judge or Court, commanding a person, who has another in custody, or in imprisonment, to have his body (Habeas Corpus) before the Judge or Court, at a particular time and place, and to state the cause of his imprisonment. The person, whether a sheriff, gaoler, or other person, is bound to produce the body of the prisoner at the time and place appointed; and, if the prisoner is illegally or improperly in custody, the Judge or Court will discharge him. Hence it is deemed the great security of the personal liberty of the citizen against oppression and illegal confinement. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 396 (1840).

Justice Story was hardly alone in holding that the writ was a "great security" for individual liberty. The writ was widely lauded on both sides of the Atlantic. William Blackstone, for example, said the writ of habeas corpus was "the most celebrated writ in English law." 3 Blackstone Commentaries 129.

Although the judiciary may not "second-guess" the Executive when the writ of habeas corpus has been suspended, this Court should firmly reject the Government's attempt to get around habeas review by employing the "enemy combatant" designation against citizens. The law of habeas corpus cannot be so easily evaded.

The Government's second argument is simply a variation of the first, and is basically a fall-back position. The claim is that Article III courts can "only require the military to point to some evidence supporting *its* [enemy combatant] determination." Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895) (Emphasis in original). The "evidence" means nothing in the context of habeas review if an Article III judge has no authority to examine it. The Government attempts to justify this improvised habeas procedure because this case involves the conduct of agents who report to the Executive's Secretary of Defense, not the Executive's Attorney General. This argument must also fail. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. . . . The very nature of the writ demands that it be administered with the initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson,* 394 U.S. 286, 290-291 (1969). In the words of Justice Holmes, "habeas corpus cuts through all forms."[4]

The Government is extending an invitation to this Court to "balance" the Executive's power to detain persons it perceives to be dangerous against a citizen's plea for a formal judicial hearing to argue that his detention is illegal. The Government proposes to strike that "balance" by submitting affidavits by a Pentagon official that purport to justify the prisoner's detention (the document in

[4] *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). The principles advanced by Justice Holmes in his dissent were later adopted by this Court in *Moore v. Dempsey*, 261 U.S. 86 (1923).

this case is the "Mobbs Declaration.") If such a procedure is deemed constitutional, one could expect such affidavits to invariably accompany a Government motion to dismiss the prisoner's habeas petition summarily. But a petition should not be dismissed, on motion, where the court cannot determine the legality of the petitioner's confinement. *Corpus Juris Secondum,* Vol. 39A, § 302, pp. 64-65.

The problem with this line of argument is that the Constitution has already struck the "balance" at issue here.[5] Once the Government admits that the writ of habeas corpus has not been suspended, as it must, the law is clear. Habeas proceedings are habeas proceedings. And that means evidentiary hearings may well be required to properly consider habeas petitions in the military context. *See Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("[T]he power of inquiry on federal habeas corpus is plenary.") (citation and internal quotation marks omitted). And it most certainly means that a citizen must be able to meet privately with his attorney. It would be a mockery of justice to say that a prisoner's habeas corpus rights have been honored when the attorney preparing the petition has not even had the opportunity to meet with the

[5] To paraphrase Justice Scalia, the Government is urging an "interest-balancing" analysis where the text of the Constitution does not permit it. *See Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 65-66 (1991) (Scalia, J., dissenting) (noting that it would be a mistake to follow England's detention policies since British policymakers need not follow a higher law – that is, the American Constitution.) As this Court noted in *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

prisoner to hear his side of the story. The prisoner's "day in court" becomes farcical in such circumstances. How can the prisoner's attorney respond to the Government's allegations when he has not been given a chance to elicit any information or explanations from the prisoner? *See Harris* at 291-292.

B.

The Government is correct in arguing that – an American citizen who chooses to join enemy forces and fight against the U.S. military must live with the consequences of that decision. Such a person can be killed on the battlefield or, should he surrender, be taken into custody as a prisoner of war. Since the privilege of citizenship does not immunize a person from such battlefield captures, such persons need not be indicted with formal criminal charges. While a treason prosecution is certainly a possibility, such persons may also be detained as POWs.

The case of Gaetano Territo is instructive. *See In re Territo*, 156 F.2d 142 (1946). Mr. Territo was serving in the Italian Army during World War II when he was taken prisoner by the U.S. Army. After his capture, he was transferred from a prison facility in Italy to a prison facility on American soil. At some point after his arrival in the U.S., Mr. Territo filed a petition for a writ of habeas corpus. The gravamen of his petition was that, because he had been born in the U.S., his imprisonment on American soil, without formal criminal charges, was contrary to law.

The U.S. military, the Department of Justice, and the federal courts treated Mr. Territo's legal petition with respect. There was no dispute over the prisoner's access to counsel. And there was no dispute regarding the interplay

between the Executive's power to seize persons and the Court's power to review the legality of such seizures. Mr. Territo was able to meet with an attorney, and his legal counsel was able to present his grievance to an impartial Article III judge. The Government was, of course, afforded an opportunity to explain the circumstances of Mr. Territo's capture and to argue that his confinement was lawful and appropriate.

After due consideration, both the district court and the appellate court agreed with the Government that citizenship does not alter "the status of one captured on the field of battle." *In re Territo*, 156 F.2d 142, 145 (1946). Mr. Territo's petition for a writ of habeas corpus was thus properly considered and sensibly denied.

The petition that is at issue in this case was dismissed too casually.[6] The prisoner, Mr. Hamdi, has not been heard from. There is no need to burden this Court with a more detailed explanation as to why the ruling below rests upon a flawed foundation. That explanation has already been well-stated by Judge Luttig. *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (Luttig, J., dissenting from the denial of rehearing). This Court should reverse the ruling below and remand the case for further proceedings.

On remand, the prisoner must be allowed to consult with his attorney in a private setting. An evidentiary

[6] "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

hearing should then be held and the prisoner should have an opportunity to address the Court, and his counsel must have an opportunity to rebut the Government's allegations at the hearing. As in *Territo*, the Government should, of course, be given an opportunity to defend the legality of its actions.[7] If the Government can persuade an Article III judge that this detention is lawful and proper, Mr. Hamdi should be remanded to the military brig. If the Government is unable to persuade an Article III judge that this detention is lawful and proper, it has three options: (a) initiate criminal proceedings (where the full panoply of constitutional protections will be afforded the prisoner); (b) initiate deportation proceedings; or (c) release the prisoner from custody.

III. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE SIXTH AMENDMENT

Because this appeal concerns the law of habeas corpus and the Executive's power to hold a citizen incommunicado, the Government's ubiquitous references to *Ex Parte Quirin,* 317 U.S. 1 (1942) are plainly inapposite.

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[7] It is in *this* setting that the judiciary can and should make common sense distinctions between a police arrest and a military capture in a theater of war. This Court should not assume that Article III judges will abuse their discretion by discharging every prisoner who comes forward with a petition that says the U.S. military made a mistake. "But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

The *Quirin* ruling involved prosecution and trial procedures, not detention. And the single most important legal matter to note about *Quirin* is this: *The prisoners in that case did not contest their status as "enemy combatants." See Quirin* at 47 (noting that the petitioners in the case are "admitted enemy invaders.") *See also id.* at 46 (referring to the "conceded facts" in the case). In truth, the *Quirin* ruling does not extend to any situation in which a prisoner *contests* the Government's "enemy combatant" allegation. Despite the sweeping representations of the Government in its various filings, the precedential value of *Quirin* has been, and will continue to be, limited to its facts.

The right to trial by jury is guaranteed in explicit terms by the Sixth Amendment and is further bolstered by this Court's ruling in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, this Court recognized that even when the writ of habeas corpus is suspended, the Executive does not acquire the power to prosecute and execute prisoners. Rather, the suspension of the writ merely expands the power of the Executive to detain persons who are perceived to be dangerous. *See id.* at 125-126.

To be sure, the Government retains the prerogative to revive the unpersuasive arguments that were advanced by Attorney General Speed in his losing bid in the *Milligan* litigation, but such a course of action should be pursued openly and forthrightly. Unfortunately, the Government, in its zeal to change the law, has been misstating the law as it presently stands. Repeatedly, the Government invokes the *Quirin* ruling to conflate three distinct issues: seizure, detention, and prosecution. *Quirin* has no bearing on seizure and detention. And, to the extent that it deals with prosecution and trial procedure, it only applies to

prisoners who do not contest their status as "enemy combatants." Thus, as previously noted, it would be useful for this Court to clarify what has been settled and what remains unsettled as it crafts its ruling in the instant case. Such a clarification will be invaluable to lower courts as related cases arise.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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