No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ANSWER FOR RESPONDENTS-APPELLANTS TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

The panel decision in this case is unanimous, carefully reasoned, and correct. Hamdi v. Rumsfeld, 316 F.3d 450 (2003) (Hamdi III). Appellees do not identify any conflict between the panel decision and any decision of this Court or of the United States Supreme Court. Instead, appellees contend that the panel committed three case-specific errors of law or fact. See Pet. 4-5. As explained below, none of those

arguments has merit and, in any event, none of those arguments warrants en banc consideration. See Fed. R. App. P. 35(b)(1); 4th Cir. R. 35. Accordingly, the petition for rehearing and suggestion for rehearing en banc should be denied.

DISCUSSION

I. THERE IS NO REASON FOR THE COURT TO REHEAR THE UNANIMOUS PANEL DECISION IN THIS CASE EN BANC

This case involves a next-friend habeas petition brought on behalf of a presumed American-born individual, Yaser Esam Hamdi, who was captured by allied forces in Afghanistan in the fall of 2001 after he surrendered with a Taliban unit while armed with an AK-47. Hamdi III, 316 F.3d at 459-462, 459-460. The lengthy procedural history of this case, which includes three expedited appeals to this Court in the past nine months, is summarized by the panel decision, id. at 459-462, and provides an important backdrop to that decision. See also Hamdi v. Rumsfeld, 296 F.3d 278 (2002) (Hamdi II); Hamdi v. Rumsfeld, 294 F.3d 598 (2002) (Hamdi I). The instant appeal arose after the district court ruled that the government's return and supporting declaration are insufficient to justify Hamdi's detention, and ordered the military to produce numerous additional materials concerning Hamdi's detention, including copies of statements and notes from intelligence-gathering interviews of Hamdi in Afghanistan. See 316 F.3d at 459, 470; J.A. 425-426 (8/16/02 Order).

The panel decision at issue holds that, "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat," the declaration supporting the government's return "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," and the habeas petition seeking Hamdi's release accordingly should be dismissed. Hamdi III, 316 F.3d at 459; see id. at 476. Although this case arises in an extraordinary context, the panel's decision is grounded on a faithful application of long-settled principles recognizing the authority of the military to capture and detain combatants in wartime, and the highly deferential standard governing the judicial review of such a quintessential executive function. See id. at 462-466; see also Hamdi II, 296 F.3d at 281-283.

As detailed by the panel decision (see Hamdi III, 316 F.3d at 462-466), the military detention challenged in this case is supported by the Constitution, Art. II, § 2; express statutory authorization, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); settled Supreme Court precedent, see, e.g., Ex parte Quirin, 317 U.S. 1, 30-31 & n.8 (1942); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); and historical practice, see, e.g., International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952); W. Winthrop, Military Law and Precedents 788-789 (2d ed. 1920). In addition, as the panel explained, the challenged detention is

supported by a sworn affidavit explaining the circumstances surrounding Hamdi's capture and detention. See Hamdi III, 316 F.3d at 472-473.

Furthermore, as appellees themselves acknowledge (Pet. 3), the panel was "painstaking in its effort" to resolve only the case before it. In light of that fact, and the settled authority and practice supporting the military detention at issue, it is not surprising that appellees do not identify any conflict between the panel decision in this case and any prior decision of this Court, another federal court of appeals, or of the Supreme Court. Thus, although the panel decision is undeniably important insofar as it reaffirms the military's authority to detain individuals, such as Hamdi, who are captured on the battlefield in a foreign land, appellees have not raised any issue that meets the traditional criteria for rehearing en banc, see Fed. R. App. P. 35; 4th Cir. R. 35, or that otherwise warrants consideration by the full court.

II. APPELLEES' SPECIFIC OBJECTIONS TO THE PANEL DECISION IN THIS CASE ARE WITHOUT MERIT

Nor is there any reason to grant panel rehearing in this case. In their petition, appellees make three case-specific objections to the panel decision. First, appellees argue (Pet. 5-7) that the panel exceeded its jurisdiction under 28 U.S.C. 1292(b) in considering certain arguments. Second, appellees argue (Pet. 7-13) that a remand is required to consider the legal effect of certain military regulations and whether Hamdi

was in fact captured in a zone of active combat. Third, appellees argue (Pet. 13-15) that the panel erred in concluding that Hamdi is being detained in connection with ongoing hostilities. None of those objections has merit.

A. The Panel Properly Exercised Jurisdiction Under 28 U.S.C. 1292(b)

Appellees argue (Pet. 5-7) that, under 28 U.S.C. 1292(b), the panel was limited solely to considering the sufficiency of the Mobbs declaration, the question certified by the district court. That is incorrect. As the panel explained, under Supreme Court precedent, "an appellate court may address any issue fairly included within the certified order, because 'it is the order that is appealable, and not the controlling question identified by the district court.'" Hamdi III, 316 F.3d at 466 (quoting Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996)). That is well-settled law. See 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, at 388 (1996) (In exercising jurisdiction under Section 1292(b), the court of appeals "may * * * consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court.").

As noted above, in its August 16, 2002, Order, the district court rejected the government's argument that the return and supporting declaration are sufficient as a matter of law to justify Hamdi's detention and, instead, ordered the production of

substantial materials concerning Hamdi's capture and detention. See Hamdi III, 316 F.3d at 462; see J.A. 425-426. Accordingly, under Yamaha, in considering this appeal, the panel necessarily had jurisdiction to conclude as a matter of law that the government's return and supporting declaration are sufficient to justify Hamdi's detention without the need for further proceedings, much less the extraordinary inquiry into military decision-making ordered by the district court.[1]

In addition, as the panel decision explains, in considering this appeal the panel could consider appellees' own legal arguments that Hamdi's detention is unlawful, regardless of whether the government's declaration is factually sufficient. See Hamdi III, 316 F.3d at 466; see also Br. for Appellees 56 ("[E]ven if the Court accepts the facts as reflected in the Mobbs Declaration, Hamdi is entitled to immediate release."). Indeed, appellees have renewed that argument in their petition for rehearing. See Pet. 15 ("There being no allegation that Hamdi has committed any war crime or that he is a member of al-Qaeda * * * , Hamdi is entitled to release."). In short, as the panel

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[1] Indeed, even the district court recognized the dispositive nature of the issues raised by its August 16 Order. In its August 21, 2002, Order certifying an appeal from that order, the court stated: "If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current detention is foreclosed." J.A. 472.

concluded, "any purely legal challenges to Hamdi's detention are fairly includable within the scope of the certified order." Hamdi III, 316 F.3d at 467 (citing Juzwin v. Asbestos Corp., 900 F.2d 686, 692 (3d Cir.), cert. denied, 498 U.S. 896 (1990)).[2]

Appellees suggest (Pet. 7) that the panel decided this case "[w]ithout the benefit of developed argumentation in the district court." But the panel limited its decision to "purely legal challenges to Hamdi's detention," which, the panel explained, "are fairly includable within the scope of the certified order." Hamdi III, 316 F.3d at 467. Those legal issues were extensively briefed by the parties, including appellees, not to mention by the numerous amici who also filed briefs in this case. There is no need to remand for any further development of such legal arguments.

[2] Nothing in Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970), on which appellees rely (Pet. 7), is to the contrary. Indeed, in Garner, the court of appeals rejected leave to appeal a transfer order under Section 1292(b). See 433 F.2d at 120 ("We are of the view that § 1292(b) review is inappropriate for challenges to a judge's discretion in granting or denying transfers under § 1404(a)."). Appellees in this case have never suggested that the district court's August 16 Order (and issue certified based on that order) was not subject to appeal under Section 1292(b). More broadly, to the extent that appellees rely on pre-Yamaha lower court decisions advocating a more constrained role in Section 1292(b) appeals than the one recognized by the Supreme Court in Yamaha, that reliance is misplaced in the wake of Yamaha.

B. The Panel Properly Concluded That There Was No Need For Any Further District Court Proceedings In This Case

For two reasons, appellees claim that the panel erred in not remanding this case for an "evidentiary hearing" in the district court. See Pet. 7-13.

1. First, appellees claim that a remand is necessary to determine "the legal effect of existing military regulations" concerning the handling of prisoners of war. Pet. 8 (emphasis added). That is incorrect. The regulations cited by appellees – which are not cited in the habeas petition, J.A. 8-15 – apply only to persons who enjoy prisoner-of-war status under the Geneva Convention (and those for whom there is doubt as to whether they qualify as such prisoners of war). See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-5(a)(2) (Oct. 1, 1997) ("All persons taken into custody by the U.S. forces will be provided the protections" afforded prisoners of war under the Geneva Convention "until some other legal status is determined by competent authority.") (emphasis added); id. § 1-6(a) ("[I]f any doubt arises as to whether a [detainee qualifies for prisoner-of-war status] * * *, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."). The President, however, has conclusively determined that al Qaeda and Taliban detainees, such as Hamdi, do not qualify for

such prisoner-of-war status. See United States v. Lindh, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002) ("On February 7, 2002, the White House announced the President's decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions."); White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002 (<www.whitehouse.gov/news/releases/2002/02/20020207-13.html>).

Furthermore, the provisions of the military regulations (§§ 1-5(a)(2) and 1-6(a)) on which appellees rely track the pertinent provisions of the Geneva Convention governing the treatment of prisoners of war. The panel decision specifically addresses – and rejects – appellees' arguments that "Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent 'by a competent tribunal.'" Hamdi III, 316 F.3d at 468; see id. at 468-469. And appellees have not sought rehearing with respect to that portion of the panel decision. In addition, any argument that the military regulations, but not Article 5 itself, provide a basis for habeas relief in this case ignores the entire thrust of the panel's decision, which recognizes that rights under the Geneva Convention are to be fixed diplomatically, not through a private right to petition. Id. at 468-469. That analysis is not altered because the military embodies its view of

treaty obligations in a regulation.[3]

2. Second, appellees claim that a remand is necessary "to determine factually whether Hamdi actually was seized in a zone of active combat operations." Pet. 13. But it is "undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there." Hamdi III, 316 F.3d at 461; see id. at 458, 473, 476.

From the outset of this litigation, appellees have acknowledged that Hamdi was in Afghanistan – a zone of active combat operations – when he was captured and, indeed, have made clear that they do not challenge the military's detention of Hamdi in Afghanistan. See J.A. 9 ("When seized by the United States Government, Mr. Hamdi resided in Afghanistan.") (Petition for Habeas Corpus); J.A. 64 (The habeas petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan.") (Petitioners' Traverse and Response to Respondents' Motion to Dismiss); J.A. 432 ("Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge.") (8/16/02 Order); see also Tr. of June 25, 2002 Arg. in Hamdi II,

[3] Even if Hamdi's detention were somehow inconsistent with the military regulations, that would not entitle Hamdi to the relief sought in this habeas action, much less to his release. That is particularly true given that the military regulations, even if applicable, would primarily relate to the conditions of Hamdi's confinement. Yet petitioners have made clear throughout these proceedings that "Hamdi is not contesting the conditions of his confinement." J.A. 71 (Pet. Traverse); cf. Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

4th Cir. No. 02-6895, at 33 ("Now, we again are not challenging the battlefield determination, decision to detain individuals in the theater of combat."); J.A. 153-154 (8/5/02 Letter from Petitioner Esam Fouad Hamdi, Hamdi's father, to Senator Patrick J. Leahy, stating that Hamdi went to and was in Afghanistan when he was captured). Similarly, although the government emphasized in its opening brief that "[p]etitioners admit that Hamdi was in Afghanistan – a zone of active military operations – when he was captured," Gov't Br. 3; see also, e.g., id. at 44-45, appellees did not object to that characterization in their responsive brief.

Furthermore, although appellees now seek a remand "to determine factually whether Hamdi actually was seized in a zone of active combat operations," Pet. 13, the district court itself, as the panel decision notes, "did not have 'any doubts [that Hamdi] had a firearm' or that 'he went to Afghanistan to be with the Taliban.'" Hamdi III, 316 F.3d at 470 (emphasis added); see id. at 462. More fundamentally, the type of evidentiary proceeding that appellees seek would raise precisely the same problems concerning judicial oversight of military operations overseas that the panel properly concluded is not only unwise, but unauthorized under our constitutional scheme. See Hamdi III, 316 F.3d at 474-475 ("Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and

undertaken by the executive branch."); see also Johnson v. Eisentrager, 339 U.S. 763, 779 (1950); Al Odah v. United States, slip op. 8 (D.C. Cir. Mar. 11, 2003).

C. The Panel Correctly Concluded That The Hostilities In Afghanistan Are Ongoing

Finally, appellees renew their argument that "Hamdi is entitled to release" on the ground that "the armed conflict with the Taliban has ended." Pet. 15; see id. at 13-15. The panel, however, properly rejected that argument, explaining that, by any measure, "hostilities have not yet reached their end" in Afghanistan. Hamdi III, 316 F.3d at 476. As the panel noted, "American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right." Ibid. The situation has not changed. See, e.g., Marc Kaufman, U.S. Troops Strike at Afghan Targets, Washington Post Foreign Service, Mar. 20, 2003 (<www.washingtonpost.com/wp-dyn/articles/A60432-2003Mar20.html>); Jamey Keaton, Five Attackers Killed in Afghan Gunfight, Associated Press, Mar. 13, 2003 (<www.washingtonpost.com/wp-dyn/articles/A18771-2003Mar13.html>); Marc Kaufman, U.S. Forces Comb Mountains for Militants, Washington Post Foreign Service, Jan. 30, 2003 (<www.washingonpost.com/ac2/wp-dyn?pagename=article &node=&contentId=A63313-2003Jan29¬Found=true>).

The executive orders cited by appellees, which appellees also relied upon in their merits brief (Br. 54-55), are not to the contrary. Those orders simply take steps to recognize the new government in Afghanistan and eliminate certain legal restrictions that had applied to the Taliban regime. The orders in no way alter the fact that the United States armed forces are still actively engaged in hostilities with al Qaeda and Taliban fighters in Afghanistan and taking steps to eradicate the terrorist infrastructure left in place by the Taliban regime. Appellees' suggestion that the Court must defer to the inapposite executive statements on which they rely when both the situation overseas and the executive branch in its briefs and other actions make clear that hostilities are ongoing finds no support in case law or common sense.

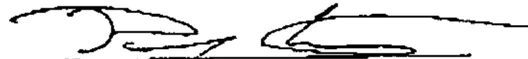
More fundamentally, as the panel observed (Hamdi III, 316 F.3d at 476), the Supreme Court has recognized that the determination when armed hostilities have ceased is not suited for judicial resolution. See Ludecke v. Watkins, 335 U.S. 160, 170 (1948); The Three Friends, 166 U.S. 1, 63 (1897); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862). The Judiciary not only lacks institutional experience and expertise in such matters, but subjecting such a determination to judicial proceedings would divert the attention and resources of the military from prosecuting the war and needlessly enmesh the courts in quintessential military and foreign affairs determinations. See Hamdi III, 316 F.3d at 470-471.

In any event, the panel in this case did not reach the question "[w]hether the timing of a cessation of hostilities is justiciable," because it concluded that, under any definition, the hostilities in Afghanistan have not ceased. Hamdi III, 316 F.3d at 476. That conclusion is both legally and factually unassailable.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be denied.

Respectfully submitted,



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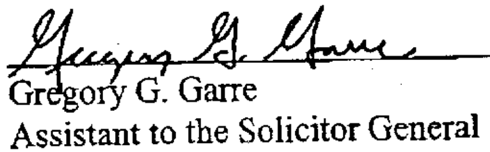
MARCH 2003

CERTIFICATE OF COMPLIANCE

Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the foregoing Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing En Banc is no longer than 15 pages.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing En Banc was served, this 20th day of March, 2003, by hand delivery, to:

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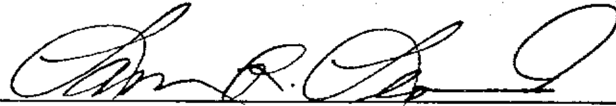

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