No. 03-6696

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, Secretary of Defense, et al.,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Whether the Constitution permits 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"?

II. Whether 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" is permissible under applicable congressional statutes and treaty provisions?

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

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, J.A. 415-55,[1] is reported at 316 F.3d 450 (4th Cir. 2003). The opinion of the United States District Court for the Eastern District of Virginia, J.A. 282-99, is reported at 243 F. Supp. 2d 527 (E.D. Va. 2002). The denial of the petition for rehearing, J.A. 458-533, 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), J.A. 332-44, and at 294 F.3d 598 (4th Cir. 2002).

[1] "J.A." refers to the joint appendix filed with this brief.

JURISDICTION

The district court had jurisdiction over this civil habeas corpus proceeding pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b). That court denied a timely petition for rehearing on July 9, 2003. J.A. 459. Petitioners filed their petition for certiorari on October 1, 2003, which this Court granted on January 9, 2004. J.A. 534, 124 S. Ct. 981. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 8, Clause 10 of Article I of the Constitution provides that Congress possesses the power "[t]o define and punish . . . Offenses against the Law of Nations."

2. Section 8, Clause 11 of Article I grants Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

3. Section 9, Clause 2 of Article I 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."

4. Section 2, Clause 1 of Article II provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."

5. The Fifth Amendment to the Constitution provides: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

6. 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."

7. 28 U.S.C. § 2241 extends the writ of habeas corpus to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States."

8. 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."

9. 28 U.S.C. § 2248 provides that "allegations of a return . . . if not traversed, shall be accepted as true except to the extent that the judge finds . . . they are not true."

10. The Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001), authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

11. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

STATEMENT OF THE CASE

The United States military seized an American citizen, Yaser Esam Hamdi, almost two and a half years ago. For much of that time, it has detained him essentially incommunicado at Navy prisons in Virginia and South Carolina.[2] Hamdi is not a member of the U.S. military, has not been charged with a crime, and his detention is pursuant to no provision of the U.S. Code. While this matter was pending in the lower courts, Hamdi was not permitted access to counsel, has never appeared at any hearing related to his imprisonment, and was not permitted to submit his version of the events leading up to his seizure.[3]

A. Factual Background

Hamdi is an American citizen by birth. J.A. 110-11. His father, acting as "next friend," alleged in a petition for writ of habeas corpus that his son was seized by the government abroad and subsequently unlawfully detained in a Navy brig in Norfolk, Virginia. J.A. 102-08. The lower courts appointed the Federal Public Defender ("FPD") to represent Hamdi. J.A. 113-16.

The court of appeals held that facts contained in a nine-paragraph declaration by a government official, Michael Mobbs, J.A. 148-50 ("Mobbs declaration"), must serve as the

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[2] Hamdi has been forbidden any contact with fellow prisoners and the outside world, with the exception of a visit by a representative of the International Red Cross and the infrequent exchange of censored letters with his family. On February 3, 2004, Hamdi was allowed to meet counsel for the first time. Restrictions imposed by the military on the conditions under which this meeting was permitted did not allow confidential communications.

[3] From his seizure through completion of litigation below, Hamdi was denied the ability to review the petition or any other materials related to this case.

exclusive factual basis for judicial review of the detention. The declaration is based entirely on third-hand hearsay. J.A. 148 ¶ 2.[4]

Mobbs alleges that in July or August 2001, Hamdi traveled to Afghanistan where he became "affiliated" with a Taliban unit. *Id.* ¶ 3. Mobbs asserts that on an unspecified date in late 2001, Hamdi's unit surrendered to Northern Alliance forces. J.A. 149 ¶ 4. "[C]lose inspection of the declaration reveals that Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban." J.A. 295, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 534 (E.D. Va. 2002). Indeed, Mobbs makes no explicit claim that Hamdi was seized in Afghanistan, that he was ever engaged in any fighting, or that he was seized in a "zone of active combat." Moreover, Mobbs makes no claim that Hamdi was a member of al Qaeda or that he planned, authorized, committed, or aided the terrorist attacks which occurred on September 11, 2001, or that he harbored any person or organization that did.

Mobbs does state that Hamdi was transported, without saying whether he was a prisoner at that time, with the Taliban unit from Konduz, Afghanistan, to a Northern Alliance prison in Mazar-e-Sharif, Afghanistan. Although Hamdi was apparently allowed to keep his weapon at the beginning of the journey, Mobbs says he was subsequently directed en route to surrender it and that he did so. After a prison uprising at Mazer-e-Sharif, in which Mobbs does not allege Hamdi

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[4] Information that Hamdi "affiliated" with the Taliban, for example, originated with an unknown person in the Northern Alliance, who communicated it to someone in the U.S. military, who put it in a military record, which was then reviewed by Mobbs. *See* J.A. 442, 316 F.3d at 471.

was involved, the Northern Alliance transferred Hamdi to its prison at Sherberghan, Afghanistan. *Id.* ¶ 4.

While at Sherberghan, Hamdi was interviewed by a U.S. interrogation team. *Id.* ¶ 5. Mobbs does not state whether Sherberghan was then within a "zone of active combat." Mobbs says Hamdi identified himself to the 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' paraphrase of Hamdi's statement permits the inference that Hamdi "was not fighting for the Taliban when he was surrendered to the Northern Alliance forces." J.A. 296, 243 F. Supp. 2d at 534. Nevertheless, Mobbs says that "[b]ased upon [Hamdi's] interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant." J.A. 149 ¶ 6.

Mobbs avers that on an unspecified date in Sherberghan, a U.S. military screening team determined that Hamdi met the criteria for transfer to U.S. custody. *Id.* ¶ 7. Mobbs describes neither the screening process nor the criteria. However, based on the screening team's determination, Hamdi was moved from Northern Alliance control at Sherberghan to "the U.S. *short-term* detention facility in Kandahar." *Id.* (emphasis added).

According to Mobbs, it was then determined that Hamdi met unspecified and undisclosed criteria set by the Secretary of Defense for transfer to Guantanamo Bay, Cuba. *Id.* ¶ 8. Mobbs states that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave

his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* ¶ 9.

Although not set forth in the Mobbs declaration, after Hamdi was moved with other detainees to Guantanamo Bay, Hamdi alone was singled out and moved to Norfolk, Virginia. Following the Fourth Circuit's dismissal of Hamdi's petition, Hamdi was moved to a Navy brig located in Charleston, South Carolina, where he remains a prisoner held indefinitely in solitary confinement.

No competent military tribunal has ever been convened to determine his status as a detainee as required by U.S. regulations. *See* J.A. 288 n.2, 243 F. Supp. 2d at 531 n.2. The Mobbs declaration does not explain why Hamdi is detained in a prison. Nor does it allege that Hamdi committed any violation of the law of war.

B. Proceedings Below

On May 10, 2002, the FPD signed and filed a habeas petition pursuant to 28 U.S.C. § 2241 for Hamdi to challenge his detention. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) (*Hamdi I*).[5] The district court then ordered the respondents to grant the FPD access to Hamdi.[6] Respondents appealed the access order. *Hamdi I*, 294 F.3d at 602. On June 26, 2002,

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[5] The FPD initially believed that Hamdi was brought to the United States for prosecution. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[6] First, a federal magistrate ordered Respondents to grant counsel's access request. J.A. 46-47. On appeal to the district judge, and after another hearing on the access issue, J.A. 48-96, the district judge likewise ordered immediate access to Hamdi. J.A. 97-101.

the court of appeals held that the FPD could not file a petition on Hamdi's behalf because he had never met him, and remanded the case for dismissal. 294 F.3d at 603-07.

Meanwhile, on June 11, 2002, a separate habeas petition on Hamdi's behalf was filed by his father. *Id.* at 600 n.1. The new petition was consolidated with the prior case. J.A. 113-16. Having already ordered access to counsel after a full hearing prior to consolidation, the district court again ordered Respondents to allow access. *Id.*

Respondents again appealed and obtained a stay of the access order. *See* J.A. 10-11. The Fourth Circuit again reversed, finding that the district court ordered access "without adequately considering [its] implications . . . and before allowing the United States even to respond [to the newly filed petition]." J.A. 333, *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002) (*Hamdi II*). The court also advised the district court to proceed cautiously in its inquiry into the propriety of Hamdi's detention. J.A. 343, 296 F.3d at 284. Then, in a separate order lifting its previously-entered stay and directing immediate issuance of its mandate in *Hamdi II*, the Fourth Circuit instructed the district court that it must first consider the sufficiency of the Mobbs declaration as "an independent matter" before considering any other questions in the case. J.A. 352-53.

On August 13, 2002, the district court conducted a hearing to determine solely whether the Mobbs declaration "standing alone" provided a sufficient factual basis for purposes of meaningful judicial review, J.A. 191, 287,[7] and ruled on August 16 that it did not. J.A. 298, 243

[7] At the hearing, the district court offered to allow Respondents to conduct a proceeding to determine Hamdi's status as a detainee in accordance with applicable military regulations. *See* Army Regulation 190-8,

F. Supp. 2d at 535. Respondents obtained certification of that order, which also directed the government to produce documentary information, and the Fourth Circuit authorized interlocutory review. *See* J.A. 18.

On January 8, 2003, the Fourth Circuit again reversed. It held that the Mobbs declaration provided a sufficient basis for concluding that Hamdi was properly detained pursuant to the war power entrusted to the Executive by the Constitution, that Hamdi could not contest the factual basis for his detention because separation of powers principles prohibited a federal court from looking behind Mobbs' formal statements, and that Hamdi's petition therefore should be dismissed without further proceedings. J.A. 415-55, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*). Petitioner sought rehearing and rehearing en banc. By a vote of eight to four, and over dissenting opinions of Judges Luttig and Motz, the court denied rehearing. *See* J.A. 458-533, *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (*Hamdi IV*).

On October 1, 2003, Hamdi filed his Petition for a Writ of Certiorari. On January 9, 2004, this Court accepted for review the three questions presented in Hamdi's Petition.

SUMMARY OF ARGUMENT

"Executive power to detain an individual is the hallmark of the totalitarian state." *United States v. Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (Stevens, J., dissenting). The Fourth Circuit's opinion uncaged that power by (1) denying Hamdi the protection of the Great Writ and

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Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) ("AR 190-8"). Respondents rejected this invitation. J.A. 263-65.

refusing him a meaningful hearing to challenge his detention; (2) recognizing a nonexistent executive power to indefinitely detain citizens; and (3) implying authority to detain citizens that Congress has not granted.

Hamdi's habeas petition challenges his indefinite detention – not his initial seizure by the Northern Alliance or transfer to U.S. custody. Almost two years have elapsed since the petition was filed, and during that time Hamdi has been held not as a prisoner of war but in solitary confinement, indefinitely detained in the United States without charge, conviction, or a factual hearing of any kind. Although this is a case about process and executive power, not conditions of confinement, Hamdi's conditions of confinement amount to punishment, and therefore bear on the process due.

The detention of any citizen may not be imposed without affording a meaningful and timely hearing. Moreover, punishment is prohibited in the absence of criminal proceedings. In addition, both the Geneva Convention and U.S. military regulations require that individuals held as combatants and not afforded prisoner of war status must be given a hearing. When Hamdi's habeas petition was filed in the district court, no such hearings had taken place. To this day, Hamdi has never been allowed to present a claim of innocence, respond to the allegations against him, or attend a hearing of any kind. The Fourth Circuit's opinion discarded these basic protections against the arbitrary deprivation of liberty.

Notwithstanding the absence of any judicial process supporting Hamdi's detention, the Fourth Circuit rejected statutory procedures, set forth at 28 U.S.C. §§ 2241, 2243, 2246,

and 2248, meant to fulfill the promise of habeas review. According to the Fourth Circuit, Hamdi simply had no right to traverse the allegations advanced against him or to adduce facts of his own to challenge his detention. As if this were not enough, the Fourth Circuit also held that Article III courts have no authority to assess the accuracy of the government's factual basis for the detention of a citizen as long as the government submits facts that suggest a valid exercise of the Executive's war power.

To distinguish Hamdi's case from the petitioner in *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027), a case involving a U.S. citizen seized by the military in New York City, the Fourth Circuit found it "crucial" to its decision that it was "undisputed that Hamdi was captured in a zone of active combat operations in a foreign country." J.A. 443, 448, 316 F.3d at 471, 473. The Fourth Circuit therefore sought to limit the scope of its ruling by seizing upon a fact – the location of Hamdi's initial seizure – found nowhere in the Mobbs declaration. The Fourth Circuit found this fact to be "undisputed" even though Hamdi was held incommunicado throughout the proceedings below. The location of Hamdi's seizure thus could not fairly be characterized as "conceded in fact, nor susceptible to concession in law, because Hamdi ha[d] not been permitted to speak for himself or even through counsel as to those circumstances." J.A. 494, *Hamdi IV*, 337 F.3d at 357 (Luttig, J., dissenting from denial of reh'g).

Under the Fourth Circuit's decision, Hamdi was not entitled to challenge the factual basis for his detention because such proceedings would interfere with the Executive's war power.

Hamdi was denied the most basic constitutional protections against the arbitrary deprivation of liberty, according to the Fourth Circuit, because to do otherwise would require the court "to wade further into the conduct of war than [it] consider[ed] appropriate." J.A. 447, 316 F.3d at 473. It thereby radically misconstrued the separation of powers doctrine to effect the concentration, rather than separation, of government power in a single branch.

Judicial review of executive detention is demanded by, not contrary to, the separation of powers. Indeed, "[a]t 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).

Moreover, the Fourth Circuit recognized and deferred to a non-existent unilateral executive power to indefinitely detain citizens. The Executive admittedly has plenary power in areas of actual fighting, and may detain citizens seized in those areas temporarily without specific statutory authority or judicial review. But this authority extends only as far as required by military necessity. Once the citizen is removed from areas of actual fighting, the Executive cannot detain the citizen indefinitely without statutory authorization. Congress has enacted criminal statutes, in fact, designed to provide precisely this authority – but these statutes have not been invoked here.

Ex parte Quirin, 317 U.S. 1 (1942), provides no precedent for unilateral executive detention of citizens. The military authority at issue in *Quirin* that the Court permitted to be exercised over a citizen was explicitly authorized by Congress. No such congressional authorization exists here. Further, *Quirin* pre-dates 18 U.S.C. § 4001(a), a statute which

specifically prohibits executive detention of citizens without congressional authorization. Nor does the law of war discussed in *Quirin* independently authorize the detention of citizens. The Executive's power is derived not from international law but from the Congress and the Constitution. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814). The authority to indefinitely detain Hamdi is sanctioned by neither.

Congress alone has the power to define and punish offenses against the law of nations and to define criminal conduct. Only Congress has the power to suspend the Great Writ. And historically it is Congress that has authorized the detention of both enemy aliens and citizens in the United States. Accordingly, only Congress can authorize the prolonged detention of citizens, as 18 U.S.C. § 4001(a) makes clear.

No statute, including the post-September 11 authorization for the use of force and an appropriations provision cited by the Fourth Circuit, specifically endows the Executive with the unilateral power to indefinitely detain citizens. Without such clear and unmistakable statutory authorization, no authority to indefinitely detain citizens may be implied. *Ex parte Endo*, 323 U.S. 283, 300 (1944).

Because the Executive has no power to make law, has no inherent authority outside the battlefield to indefinitely detain U.S. citizens, and because Congress has specifically prohibited such executive detentions without statutory authority, Hamdi's current detention is illegal. The indefinite detention of Hamdi, quite simply, is predicated on impermissible executive law-making.

By deferring to the Executive's "enemy combatant" determination as the basis for the indefinite detention of a citizen, the court of appeals violated the separation of powers it says it was trying to uphold. The result is that Article III courts are impotent to review the unilateral executive detention of citizens in the name of the war power. This is a dangerous precedent that must be reversed.

ARGUMENT

I. HAMDI CANNOT BE IMPRISONED FOR TWO YEARS WITHOUT MEANINGFUL REVIEW BY HABEAS CORPUS, A HEARING, OR ACCESS TO COUNSEL

A. The Fourth Circuit Denied Hamdi Meaningful Habeas Review

The Executive has detained Hamdi as an "enemy combatant" for well over two years, much of that time in solitary confinement at military prisons in the United States. While no one disputes 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," J.A. 443, 316 F.3d at 471, the proceeding permitted by the Fourth Circuit is a habeas proceeding in name only. The Fourth Circuit's decision effectively stripped Hamdi of this entitlement by denying him any meaningful opportunity to challenge the basis for his detention.

The Suspension Clause ensures that the Executive cannot discard the judicial process and imprison citizens at its pleasure. *See Ex parte Merryman*, 17 F. Cas. 144, 152-53 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.); *cf. In re Yamashita*, 327 U.S. 1, 9 (1946). Well-acquainted

with the danger posed by the government's power to effect detention, the Founders enshrined the suspension power in Article I and limited its exercise to cases of rebellion or invasion. U.S. Const. art. I, § 9.

Habeas corpus remains the most basic protection against unbridled detention by the Executive. According to the congressional scheme, courts are required to "hear and determine the facts" related to a petitioner's detention, and petitioners are allowed to "deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. §§ 2243, 2246. Furthermore, 28 U.S.C. § 2248 provides that even if the government's factual allegations are not challenged, district courts may reject them if they "find[ ] from the evidence that they are not true."

Not one of these statutory provisions was honored by the Fourth Circuit. Indeed, the Fourth Circuit limited the factual record in this case to the Mobbs declaration and rejected the district court's effort to obtain more information. J.A. 439-47, 316 F.3d at 470-71. Furthermore, Hamdi was held "not entitled to challenge the facts presented in the Mobbs declaration." J.A. 452, 316 F.3d at 476. Finally, the Fourth Circuit ruled that federal courts may not engage in "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant." J.A. 449, 316 F.3d at 474.

Not surprisingly, Hamdi's petition for habeas corpus was denied. J.A. 455, 316 F.3d at 477. The Fourth Circuit did violence to the scheme established by Congress to effect habeas review and should be reversed.

B. The Due Process Clause Guarantees a Meaningful Hearing and Access to Counsel to Any Citizen Detained Indefinitely

1. Hamdi Was Entitled to, But Denied, a Meaningful Hearing

Hamdi's detention is offensive to the most basic and unimpeachable rule of due process: that no citizen may be incarcerated at the will of the Executive without recourse to a timely proceeding before an independent tribunal to determine whether the Executive's asserted justifications for the detention have a basis in fact and a warrant in law. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Demore v. Kim*, 123 U.S. 1708, 1732-33 (2003) (Souter, J., dissenting in part); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972); *Shaughnessy v. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting).

Under the Fourth Circuit's ruling, the Executive's indefinite detention of a citizen under the war power need not be predicated on any judicial process whatsoever. In addition, as contemplated by the Fourth Circuit's ruling, any habeas proceeding to challenge this extra-judicial detention begins and ends with the submission of an affidavit based on third-hand hearsay that may not be questioned. Even in the context of the seizure of property, the submission of a one-sided affidavit in support of a seizure fails to satisfy due process. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 73-74, 82-83 (1972). The Fourth Circuit's holding that nothing more was required to support the indefinite incarceration of a citizen is untenable.

At bottom, the Due Process Clause embraces a requirement of fundamental fairness. *See In re Oliver*, 333 U.S. 257, 273-78 (1948); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). A habeas proceeding that allows Respondents not only to define the entire factual record but also to hold Petitioner incommunicado so that he cannot participate is no proceeding at all.

The Fourth Circuit held that ordinary habeas procedures were not required on the ground that Hamdi is being held pursuant to "well-established laws and customs of war." J.A. 450, 316 F.3d at 475. Nonetheless, the Fourth Circuit refused to consider whether Respondents have actually complied with those laws in detaining Hamdi.

The government has acknowledged, and the conditions of confinement confirm, that Hamdi is not being held as an ordinary prisoner of war.[8] On the contrary, his prolonged indefinite solitary confinement amounts to punishment as a criminal serving an indeterminate sentence without a trial or due process. Before detaining him as anything but a prisoner of war, however, Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and United States military regulations designed to implement the GPW, require that Hamdi's status be "determined by a competent tribunal" if any doubt arises whether he is entitled to prisoner of war status. *See* AR 190-8, § 1-6(a).[9] At a minimum, such

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[8] Prisoners of war generally cannot be held in correctional facilities, AR 190-8, § 3-2(b), separated from their fellow soldiers, *id.* § 3-4(b), quartered under conditions less favorable than U.S. troops, *id.* § 3-4(e), or restricted from receiving mail, *id.* § 3-5(a).

[9] Even if Hamdi was fighting on behalf of the Taliban, a fact suggested but never stated by the Mobbs declaration, an emerging consensus of scholarship establishes that he should be entitled to treatment as a prisoner of war. *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*,

a hearing would have permitted Hamdi to assert that he was not a combatant at all. *See id.* § 1-6(e)(10)(c).

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. J.A. 436-38, 316 F.3d at 468-69. The habeas statute itself, however, authorizes review of detention in violation of treaties. 28 U.S.C. § 2241(c)(3). No other implementing legislation is necessary in order for a habeas petitioner to claim that his detention violates the GPW.

As for the military 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) (discussing federal regulation appointing special prosecutor); *accord Billings v. Truesdell*, 321 U.S. 542, 551 (1944) (War Department regulation regarding induction of soldiers); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942) (military regulation regarding post exchanges). Hamdi's indefinite detention without a hearing therefore is inconsistent with the Constitution, international law, and military regulations designed to implement international law.

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96 Am. J. Int'l L. 891, 897-98 (2002); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127, 143-150 (2003); Manooher Mofidi and Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 87-88 (2002); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 333-34 (2003); Evan Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander*, 2003 Army Law. 18, 21-26 (2003). *But see* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int'l L. 328, 335 (2002).

2. Hamdi Was Entitled to, But Denied, Access to the Courts and to Counsel

The Fourth Circuit also fundamentally erred by denying Hamdi the opportunity to participate in the underlying habeas proceeding and by disposing of the case without allowing Hamdi to meet his counsel. Without these rights, Hamdi had no meaningful opportunity to challenge his detention.

The idea that citizens have a right to consult with an attorney in connection with the assertion of their legal rights breaks no new ground. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Moreover, a person held incommunicado and denied the opportunity to meet with a lawyer plainly has not been given the right to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In the context of a habeas proceeding, the significance of these elementary principles is greatly magnified. This Court has repeatedly maintained that the Due Process Clause prohibits the government from impairing habeas petitioners' ability to challenge the legality of their incarceration. *See Ex parte Hull*, 312 U.S. 546, 549 (1941); *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Denying Hamdi the ability to respond to the asserted basis for his detention is flatly incompatible with a meaningful opportunity to be heard. *Cf. Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring).

Similarly, the Fourth Circuit's refusal to allow Hamdi to have access to counsel is inconsistent with this Court's decisions ensuring the right to court access. *See Procunier v.*

Martinez, 416 U.S. 396, 419, 421-22 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977); *Ex parte Hull*, 312 U.S. at 549. Indeed, Hamdi's "right to pursue a remedy through the writ would be meaningless if he had to do so alone." *Padilla v. Rumsfeld*, 352 F.3d 695, 732 (2d Cir. 2003) (Wesley, J., dissenting in part), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027).

C. Indefinite Imprisonment in Solitary Confinement of a Citizen Alleged to Be an "Enemy Combatant" Violates Substantive Due Process

"[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 component of due process prohibits detention "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, . . . or, in certain special and 'narrow' non-punitive 'circumstances.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). Intrinsic to the lawfulness of punishment, in other words, is the principle that it may not be imposed outside of criminal proceedings. *International Union, UMW of Am. v. Bagwell*, 512 U.S. 821, 826 (1994); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

Hamdi's indefinite incarceration in solitary confinement, to be sure, constitutes a criminal punishment, *see In re Medley*, 134 U.S. 160, 168-71 (1890), and apparently has been imposed

because Respondents allege, but have not charged, that Hamdi has engaged in criminal conduct. *Cf.* U.S. Const. art. III, § 3 (authorizing Congress to punish treasonous conduct); 18 U.S.C. § 2381; 50 U.S.C. 1705(b); *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002). Even if no further procedures were required to establish Hamdi's status as an "unlawful combatant," the extra-judicial indefinite incommunicado imprisonment of a citizen is contrary to basic values underlying American society. Because his detention is punitive, it cannot be imposed by executive fiat. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-70 (1963).

II. THE FOURTH CIRCUIT MISAPPLIED THE SEPARATION OF POWERS DOCTRINE TO FRUSTRATE JUDICIAL REVIEW AND A STATUTORY PROHIBITION ON THE UNILATERAL INDEFINITE DETENTION OF CITIZENS BY THE EXECUTIVE

Driven by its interpretation of the separation of powers, the Fourth Circuit refused to permit "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant." J.A. 449, 316 F.3d at 474. It thereby limited the power of Article III courts to review the factual basis for any war-time detention of a citizen by the Executive. This is a dangerous misconstruction of the division of powers among the branches of our government. Under its ruling, the Fourth Circuit ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely, thereby allowing the separation of powers doctrine to be used as a means to concentrate, not separate, power in a single branch.

It was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), an insight that finds repeated expression in the United States Reports.[10] Use of separation of powers doctrine to justify the indefinite deprivation of a citizen's liberty upon the essentially unilateral and unreviewable determination of the Executive stands that principle on its head.

According to the court of appeals, any citizen designated by the Executive as an "enemy combatant" and seized in a "zone of active combat" may be detained indefinitely without a charge that the citizen violated any act of Congress as long as "the factual assertions set forth by the government would, *if accurate*, provide a legally valid basis for [that citizen's] detention under [the war] power." J.A. 444, 316 F.3d at 472 (emphasis added). Although noting that factual circumstances submitted by the Executive may support the detention of citizens only "if accurate," the Fourth Circuit, in a quintessential Catch-22, also held that "[the citizen] is not entitled to challenge the facts presented," J.A. 452, 316 F.3d at 476, and that Article III courts likewise may not assess their accuracy, J.A. 449, 316 F.3d at 474-75. The Executive therefore has the first and

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[10] *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Clinton v. Jones*, 520 U.S. 681, 699-700 (1997); *Loving v. United States*, 517 U.S. 748, 756-57 (1996); *INS v. Chadha*, 462 U.S. 919, 949, 951-59 (1983); *United States v. Brown*, 381 U.S. 437, 442-43 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14, 629 (1952) (Frankfurter, J., & Douglas, J., concurring); *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 91 (1947); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878).

final word as to whether the military may detain an American citizen. *Cf*. J.A. 340-41, 296 F.3d at 283.

The danger posed by the collection of power in one branch was of paramount importance to the Founders. *See, e.g.*, *The Federalist No. 47*, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."). The constitutional protections against this danger therefore were specifically designed to withstand the opposing momentum caused by war and national crises. As this Court has recognized, "[t]hey knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866); *accord Youngstown*, 343 U.S. at 650 (Jackson, J., concurring) ("They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."). The Fourth Circuit's decision authorizes the accumulation of an awesome power of government, the power to indefinitely deprive a citizen of his liberty, in a single branch. That is precisely what the separation of powers was designed to prevent.

A. The Separation of Powers Doctrine, the Suspension Clause, and Precedent Require Meaningful Judicial Review

1. Judicial Review Is Essential to the Separation of Powers

Constitutional protections against illegitimate executive detention would mean little without the opportunity to secure judicial review of the basis upon which the Executive claims the power to detain. The Great Writ, in fact, was designed to guarantee precisely this type of review. *See 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."); *see also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in part and concurring in judgment) ("A doctrine that allowed transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention.").

The Fourth Circuit's refusal to permit "any inquiry," J.A. 448, 316 F.3d at 473, into the factual circumstances related to Hamdi's indefinite detention is flatly contrary to this historic function and effectively eviscerates habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless" executive detention. *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). The lower court's ruling, in fact, guarantees a judicial rubber-stamp rather than an independent check on the Executive's power to engage in unauthorized detentions, a result plainly at odds with the separation of powers. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 145-47 (1871).

Moreover, the Suspension Clause prevents the drastic limitation of judicial review required by the Fourth Circuit. Only Congress has the power to suspend judicial review of detention, and even then only in the event of rebellion or invasion. U.S. Const. art. 1, § 9, cl. 2. Independently of statutes designed to implement habeas review, the Suspension Clause preserves the right to habeas review, at the very least, as it existed in 1789 under the common law. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1267 (1970).

And under that common law, the review of executive detentions was far greater than that allowed by the Fourth Circuit in this case. Executive detentions are characterized by the absence of prior judicial process, and in particular the absence of a trial by which a jury has assessed the detainee's guilt or innocence. *Cf. Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting that jury trial serves to protect against arbitrary government detention). Consequently, judicial review of the return in a habeas proceeding under the common law was least deferential in the context of executive detentions. *See* Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 271 (Da Capo Press ed. 1972) (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 include most . . . cases"); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2526 (1998) (stating that "at common law executive detentions . . . triggered a broad scope of review on habeas").

Without muscular judicial review of executive detention, the Great Writ cannot fulfill its historic common law role as a "bulwark" against the threat of arbitrary government. *See The Federalist No. 84* (Alexander Hamilton). The Fourth Circuit's ruling not only failed to acknowledge that habeas review is an essential part of the separation of powers, but it also effectively eliminated meaningful judicial review of executive detention in violation of the Suspension Clause.

2. The Fourth Circuit's Refusal to Permit Review of the Basis for Hamdi's Detention Is Without Precedent

The Fourth Circuit concluded that "any inquiry" in the circumstances of Hamdi's detention "must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch." J.A. 448, 316 F.3d at 473. But other than the decision below, no court has refused to engage in a factual inquiry in a citizen's habeas proceeding on the ground that such an inquiry would unconstitutionally encroach on the Executive's authority. In fact, the case law is entirely to the contrary.

The separation of powers doctrine did not, for example, preclude this Court from rejecting the government's argument that a habeas petitioner was a prisoner of war in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). Similarly, in *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 396-97 (Pa. Ct. C.P. 1788), the court addressed and rejected the plaintiff's claim that "the proceeding against him was as an enemy, and not as a traitor."

The Fourth Circuit was also concerned that the "logistical effort to acquire evidence from far away battle zones . . . would profoundly unsettle the constitutional balance." J.A. 442, 316 F.3d at 471. But this Court has not hesitated to review the factual circumstances related to a military seizure overseas during wartime, including the government's claim that a citizen had a "design" to trade with the enemy. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133 (1851). The location of a seizure, in other words, has absolutely nothing to do with a court's ability to exercise judicial review. As this Court has noted without geographic reservation, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U.S. 378, 400 (1932); *see also United States v. Lee*, 106 U.S. 196, 219-21 (1882).

Judicial authority to review the propriety of military seizures overseas during wartime has been repeatedly illustrated, in particular, in cases involving the law of prize. *See The Dashing Wave*, 72 U.S. (5 Wall.) 170 (1866); *The Springbok*, 72 U.S. (5 Wall.) 1 (1866); *United States v. Guillem*, 52 U.S. (11 How.) 47 (1850); *see also* C. John Colombos, *A Treatise on the Law of Prize* 49-107 (1926). Likewise, in the aftermath of the Civil War, courts regularly reviewed the entitlement of claimants under the Captured and Abandoned Property Act to recover compensation for property seized by the military in "zones of armed combat." *See, e.g., Briggs v. United States*, 143 U.S. 346 (1892); *Lamar v. Brown*, 92 U.S. 187, 194-95 (1875); *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1864). In sum, the separation of powers has never before precluded federal courts from reviewing the propriety of military seizures, even if overseas.

B. The Executive Has No Power to Authorize the Indefinite Detention of Citizens

The court of appeals found that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the [Mobbs] 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." J.A. 417-18, 316 F.3d at 459. The Fourth Circuit's conclusion rests on at least two mistaken premises: (1) the Commander-in-Chief Clause empowers the President to detain citizens indefinitely; and (2) this Court's opinion in *Ex parte Quirin*, 317 U.S. 1 (1942), establishes the President's authority to detain "enemy combatants" under the law of war.[11] These premises are inconsistent with both the Constitution and precedent.

1. The Commander-in-Chief Clause Does Not Permit the Indefinite Detention of Citizens Outside of Areas of Actual Fighting

The Constitution gives the Executive no inherent power to detain citizens indefinitely during war or peace. While the Commander-in-Chief Clause necessarily entails plenary executive authority in areas of actual fighting, the power over citizens incident to this authority is only

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[11] A third mistaken premise is that it is "undisputed" that Hamdi was seized in a "zone of active combat," when Hamdi was denied any voice in the entire proceeding, *see* J.A. 494, 337 F.3d at 357 (Luttig, J., dissenting from denial of reh'g), and Mobbs, the only person who did have a voice, never explicitly alleged that Hamdi was seized in such a location. This gap in the factual record on an issue evidently "crucial" to the Fourth Circuit's opinion, J.A. 443, 316 F.3d at 471, is the consequence of the denial of meaningful judicial review.

temporary. The Executive enjoys the authority to detain citizens seized in areas of actual fighting without specific statutory authority or judicial review for only a limited period of time as required by military necessity. Once the citizen is removed from the area of actual fighting, the Constitution requires statutory authorization to hold that citizen indefinitely.

Article II, Section 2, Clause 1 of the Constitution invests the President with the commander-in-chief power. This "power [is] purely military." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). It involves the power to deploy and direct the movement of troops in the field. *Id.*; *accord The Federalist No. 69*, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (commander-in-chief power "amount[s] to nothing more than the supreme command and direction of the military and naval forces"). The President's power as Commander in Chief "is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment." *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

On the contrary, war powers outside of the command of the military and the conduct of military operations are entrusted to Congress. Congress is invested with the authority "not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war . . . [including] all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

To be sure, military commanders in areas of actual fighting have plenary authority in those areas. *See United States v. Diekelman*, 92 U.S. 520, 526 (1875) ("Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed."). Accordingly, "in the place where actual military operations are being conducted, the ordinary rights of citizens must yield to paramount military necessity." *Duncan v. Kahanamoku*, 327 U.S. 304, 344 n.3 (1946) (Burton, J., dissenting). But Hamdi's habeas petition challenges his indefinite detention as an "enemy combatant" outside of areas of actual fighting, not the Executive's authority to initially apprehend him overseas.

Outside of the area of actual fighting, the Court often has had occasion to reject assertions of military authority over citizens. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955). Indeed, the scope of military authority permitted over citizens has been narrowly cabined to allow evacuation from an area in the face of an imminent invasion, jurisdiction incident to temporary military government, jurisdiction over members of the armed forces, and jurisdiction to conduct timely, congressionally authorized military prosecutions of citizens charged with violating the laws of war. *See Duncan*, 327 U.S. at 313-14; *see also Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942).

Apart from these exceptions to civil jurisdiction, the Court has confined military authority over citizens solely to areas of actual fighting. In *Ex parte Milligan*, after acknowledging that occasions may arise in which "martial rule can be properly applied" to permit military rule over

citizens, the Court explained that military authority to impose martial rule is "confined to the locality of actual war." 71 U.S. (4 Wall.) at 127. Similarly, in *Reid v. Covert*, Justice Black noted that "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront." 354 U.S. 1, 33 (1957) (plurality opinion). As in *Milligan*, however, Justice Black made clear that "[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists." *Id.* at 35; *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of civilian citizen accompanying military abroad). In sum, the principle that "the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires," is established under our system of government as "an unbending rule of law." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875).

Lower courts, likewise, have rejected efforts by the Executive to assert authority over citizens in places where no war exists.[12] Indeed, during the War of 1812, Chancellor Kent

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[12] *See Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487) ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power."); *Ex parte Orozco*, 201 F. 106, 112 (W.D. Tex. 1912) (finding that "arrest upon the mere order of the President" by the military in time of peace is unlawful); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C. D. Va. 1833) (No. 11,558) (Marshall, Circuit Justice) (granting habeas relief to petitioner held in custody by an executive official and stating that executive officials "cannot act on other persons, or on other subjects, than those marked out in the power [granted by statute], nor can they proceed in a manner different from that it prescribes"); *Smith v. Shaw*, 12 Johns. 257, 266 (N.Y. Sup. Ct. 1815) ("If the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority."); *In re Stacy*, 10 Johns. 328, 334 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (ordering issuance of attachment to enforce obedience to writ of habeas corpus issued in favor of citizen held in military camp as an alleged spy). Even in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), where the court found, prior to the enactment of 18 U.S.C. § 4001(a), that international law permitted detention of citizens as prisoners of war, the petitioner was afforded a hearing and access to counsel.

rejected military detention of a citizen in the United States even though the military accused him of providing aid to the British within enemy territory. In *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813), petitioner Samuel Stacy, Jr., was seized by the military and imprisoned in the United States because he purportedly aided British troops "within the territory of the King of Great Britain." *Id.* at 329 (reporter's notes). Nonetheless, "[i]f ever a case called for the most prompt interposition of the court to enforce obedience to its process," Chancellor Kent wrote, "this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the State." *Id.* at 334. The fact that Stacy purportedly assisted the British in enemy territory was irrelevant to the ruling.

The reason that courts scrupulously police efforts by the military to exert its authority over citizens, in contrast to enemy aliens, is because the status of citizenship has undeniable significance under the Constitution. *See Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). Even Respondents apparently recognized this distinction when they singled out Hamdi for transfer from Guantanamo to Norfolk. As this Court has stated, "the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). For this reason, a unilateral authority of the Executive branch to indefinitely detain American citizens has far greater implications for the character of our government than does the detention of enemy aliens.

The Court therefore has taken pains to distinguish between citizens and enemy aliens in the context of the war powers. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court concluded that non-resident enemy aliens convicted by a military commission under the auspices of the Joint Chiefs of Staff of the United States for violations of the laws of war were lawfully detained by the military overseas. 339 U.S. at 766, 790. "Executive power over enemy aliens," the Court found, "has been deemed, throughout our history, essential to war-time security." *Id.* at 774.

Citizens, on the other hand, were carefully distinguished from the enemy alien petitioners. *Id.* at 769. In other words, the rights of citizens stand in a much stronger position with respect to our military, federal courts, and the Constitution, than do those of alleged enemy aliens.[13] This distinction is practical as well – only two U.S. citizens, Hamdi and John Walker Lindh, have been seized as "enemy combatants" in relation to the conflict in Afghanistan. Because "the problem is, relatively, extremely small," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 185 n.42 (1963), the strict limitation on unilateral executive authority over citizens does not threaten to hinder the Executive's effective prosecution of armed conflict.

The Fourth Circuit found no reason to distinguish between the military's authority to detain citizens in an area of combat and those detained in the United States, reasoning that courts are ill-

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[13] The Executive's authority to prosecute in military tribunals those aliens who are "actual enemies, active in the hostile service of an enemy power," *Eisentrager*, 339 U.S. at 778, says nothing about the nature of the protections that must be afforded to those aliens held by the United States who are not of the same character and have received no process at all. *Cf. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (U.S. Nov. 10, 2003) (No. 03-343).

positioned to review such decisions regardless of the location of detention. J.A. 452, 316 F.3d at 475-76. Expanding the scope of military authority over citizens based solely on the location of their initial seizure, however, may result in the indefinite and unreviewable detention of innocent Americans such as journalists or humanitarian workers. "Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding." *United States v. Diekelman*, 92 U.S. 520, 527 (1875); *see also* J.A. 446, 316 F.3d at 473 ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake."). Consequently, the military's decision under exigent circumstances overseas to seize an American citizen is an extraordinarily illegitimate predicate for the indefinite detention of that citizen in the United States.

Furthermore, the scope of the "zone of active combat" that defines the range of the executive power over citizens was committed by the Fourth Circuit to the discretion of the Executive branch. *See* J.A. 427, 316 F.3d at 464; *see also* J.A. 525, 337 F.3d at 372 (Motz, J., dissenting from denial of reh'g) ("[U]nder the panel's holding, any American citizen . . . could be imprisoned indefinitely without being charged . . . if the Executive asserted that the area was a zone of active combat."). Because the Executive can exercise its extraordinary power to detain American citizens anywhere it says it can, the location of Hamdi's seizure permits merely "superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant." J.A. 507, 337 F.3d at 364 (Luttig, J.,

dissenting from denial of reh'g); *cf. Padilla v. Rumsfeld*, 352 F.3d 695, 698-99 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027).

Like the temporary seizure of the nation's steel mills, the indefinite detention of citizens by the Executive "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *See Youngstown*, 343 U.S. at 587. Hamdi is far from any location approximating a battlefield, and courthouses remain open near where he is imprisoned in South Carolina. His continued detention by the military therefore is indistinguishable from the "gross usurpation of power" rejected by this Court in *Ex parte Milligan*. *See* 71 U.S. (4 Wall.) 2, 127 (1866); *see also id.* at 141 (Chase, C.J., concurring).

2. *Ex Parte Quirin* Does Not Eliminate the Distinction Between Citizens and Non-Citizens With Respect to Indefinite Detention by the Military Without Charge

The Fourth Circuit relied upon *Ex parte Quirin*, 317 U.S. 1 (1942), to conclude that citizens are treated no differently than anyone else alleged to "take[ ] up arms against the United States in a foreign theater of war." J.A. 451, 316 F.3d at 475. The court of appeals not only misconstrued the Court's language in *Quirin*, it also ignored plainly applicable statutory language requiring congressional authorization for the detention of citizens.

The petitioners in *Quirin*, including at least one who claimed American citizenship, had been dispatched by the German government to secretly enter the United States to engage in sabotage operations during the Second World War. 317 U.S. at 21. With respect to the

petitioner who alleged citizenship, Herbert Hans Haupt, the Court remarked that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. Accordingly, the Court found that Haupt was entitled to no greater protection from a military trial for violations of the law of war than that afforded to the other petitioners. *Id.*

Nothing in *Quirin*'s dictum, however, permits the indefinite detention of citizens without trial and without statutory authority. Congress had not only explicitly authorized the tribunals in *Quirin*, *id.* at 28, but the Court declined to address the President's power without this authorization, *id.* at 29. *Quirin* therefore cannot support the unilateral exercise of power by the Executive over citizens. *See Padilla*, 352 F.3d at 716.

Furthermore, *Quirin* involved the jurisdiction of military tribunals. The power to detain indefinitely without charge – particularly in the context of a war against terrorism that will never end – is different in kind from the power to subject citizens to a military tribunal for a violation of the law of war. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). A tribunal implies at least some protection for the innocent,[14] and a tangible and codified basis for the imposition of a punishment certain; unreviewable indefinite detention on the word of the Executive branch does not. The power to detain Hamdi without charges, in sum, is a much broader and more dangerous power than that at issue before this Court in *Ex parte Quirin*.

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[14] At the very least, the petitioners in *Ex parte Quirin* were permitted to have a factual hearing and access to counsel.

Finally, *Quirin*'s dictum must be considered in light of the subsequent enactment of 18 U.S.C. § 4001(a), a statute that draws in unmistakable terms a limitation on the Executive's authority to detain citizens. Regardless of the scope of the Executive's unilateral authority with respect to enemy aliens, section 4001(a) eliminates any doubt as to the Executive's authority to indefinitely detain Hamdi without statutory authorization – it has none. For these reasons, *Quirin* does not support the Fourth Circuit's holding that the Executive branch may treat American citizens and enemy aliens without distinction.

3. The Law of War[15] Does Not Authorize the Executive Branch to Detain Citizens Indefinitely

The Fourth Circuit also held that Hamdi "is being held as an enemy combatant pursuant to the well-established laws and customs of war." J.A. 450, 316 F.3d at 475. The law of war, however, cannot abrogate constitutional and statutory prohibitions against such a unilateral executive power.

Holding that the petitioners in *Quirin* were subject to military commissions, this Court noted that under international law, "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts

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[15] The "law of war" is an old term for the body of customary and treaty-based international humanitarian law that describes internationally-accepted norms related to the waging of armed conflict. *See* William Winthrop, *Military Law and Precedents* 42 (reprint 2d ed. 1920).

which render their belligerency unlawful." 317 U.S. at 31. Because "Congress ha[d] incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war," international law was directly at issue in *Quirin*. *Id.* at 30.

The Fourth Circuit wrongly presumed that the authority to capture and detain combatants under the law of war amounts to a unilateral executive power to exercise military authority over citizens alleged to be combatants. Chief Justice Marshall rejected this argument in *Brown v. United States*, holding that "in executing the laws of war," the Executive could not "seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation." 12 U.S. (8 Cranch) 110, 128, 129 (1814). The law of war does not independently provide the authority for government action without legislation. *Id.*; *accord Conrad v. Waples*, 96 U.S. 279, 285 (1877) ("[Congress] might, undoubtedly, have provided for the confiscation of the entire property, from its being within the enemy's country; but the legislature did not so enact."). In other words, the law of war is not an independent description of executive power. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring) ("[T]he fact that power exists in the Government does not vest it in the President."). The Court's analysis in *Brown* applies with equal force to the indefinite detention of Hamdi.

Unlike at the time that this Court decided *Brown*, however, a statute explicitly confirms that the Executive branch cannot independently authorize the indefinite detention of a citizen. 18 U.S.C. § 4001(a) unambiguously "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). To

the extent that this statute conflicts with long-in-the-tooth customs of war, the thirty-three year old statute states the law. *See Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C. J.) (noting that the Court would be "bound by the law of nations" until Congress passed a contrary enactment).

The Fourth Circuit employed the law of war to sweep aside constitutional and statutory arguments against the unilateral executive detention of citizens. It is well-settled, however, that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263-64 (1967). Because the Executive's power "must stem either from an act of Congress or from the Constitution itself," *Youngstown Sheet & Tube*, 343 U.S. at 585, and the authority to indefinitely detain Hamdi is derived from neither source, his detention is illegal.

The fact that the Executive does not have the power to detain citizens indefinitely without congressional authorization does not leave our nation helpless in the circumstances presented in this case. The only other case that has arisen involving a citizen allegedly found on the opposite side of hostilities in Afghanistan is almost factually indistinguishable from this one. And Congress has already provided the statutory authority that the Executive used successfully to prosecute the other case. *See United States v. Lindh*, 227 F. Supp. 2d 565, 567-69 (E.D. Va. 2002).

C. Congress Possesses the Exclusive Power to Authorize Any Detention of a Citizen That Is More Than Temporary, But Has Not Done So Here

1. The Power to Authorize the Prolonged Detention of Citizens Rests Solely With Congress

A unilateral executive power to indefinitely detain citizens has the potential to jeopardize our democratic system. The structure and text of the Constitution, legislation dating back to the founding of this country, legal precedent, and the plain language of 18 U.S.C. § 4001(a) all demonstrate that the authority to permit the prolonged detention of citizens is entirely entrusted to Congress.

First, the provision of the Constitution that addresses detention without judicial review, the power to suspend the writ of habeas corpus, is contained in Article I. U.S. Const. art. I, § 9, cl. 2. In one of the only overt references to individual rights in the main text of the Constitution, the Suspension Clause ensures judicial review of executive detention unless the Legislature suspends the Great Writ. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487). If the Executive branch possessed an equivalent power by which it could circumvent judicial review of detention on its own authority, the promise of the Suspension Clause would be forsaken.

Second, Congress is assigned the responsibility to define and punish offenses against the law of nations. U.S. Const. art. I, sec. 8, cl. 10; *see Ex parte Quirin*, 317 U.S. 1, 27 (1942). Likewise, it is Congress that must define criminal conduct. *See Liparota v. United States*, 471

U.S. 419, 424 (1985); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). The assignment of these powers to Congress demonstrates that the legislature, not the Executive, is peculiarly entrusted to specify prohibited conduct upon which a citizen may be subjected to indefinite detention. In other words, if the liberty protected by the Due Process Clause "is to be regulated, it must be pursuant to the law-making functions of the Congress." *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

Third, outside of the context of criminal proceedings, Congress has been responsible for authorizing the detention of both enemy aliens and citizens in the United States. In this country's infancy, Congress passed the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (now codified at 50 U.S.C. § 21), which authorizes the President to detain and deport enemy aliens found in the United States following a declaration of war. Moreover, in 1812, Congress enacted an "Act for the safe keeping and accommodation of prisoners of war," which permitted the President to arrange for "the safe keeping, support, and exchange of prisoners of war." Act of July 6, 1812, ch. 128, 2 Stat. 777 (repealed 1817). These statutes "afford[ ] a strong implication that [the President] did not possess those powers by virtue of [a] declaration of war," and that the detention of enemy aliens and prisoners of war in the United States requires statutory authorization. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814).

Similarly, during the Cold War, Congress enacted the Emergency Detention Act of 1950, Pub. L. No. 81-831, Title II, 64 Stat. 1019 (1950) (formerly codified at 50 U.S.C. §§ 811-826 (repealed)), which allowed the President during war or insurrection to detain people suspected of

espionage or sabotage. Like the Alien Enemy Act of 1798 and the Safe Keeping and Accommodation of Prisoners of War Act of 1812, the Emergency Detention Act would have been unnecessary if the Constitution independently granted the President broad war powers to indefinitely detain citizens suspected of acting on behalf of our enemies.

Fourth, this Court on several occasions has indicated that congressional authorization is required for non-criminal detentions as well. In *Brown v. United States*, Chief Justice Marshall, writing for the Court, made clear that in the United States, the government can neither detain prisoners of war nor confiscate enemy property in the absence of congressional legislation. 12 U.S. (8 Cranch) at 126-29. This Court also has rejected the claim that the Executive possesses inherent power to authorize detention pending extradition. In *Valentine v. United States*, the Court stated that "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." 299 U.S. 5, 9 (1936); *see also United States v. Moreland*, 258 U.S. 433, 443 (1922) (Brandeis, J., dissenting) (noting that "imprisonment . . . imposed under an executive order . . . was clearly void under the Constitution, whatever its character or incidents, its duration or the place of confinement").

Fifth, Congress has made it unmistakably clear that all detentions of citizens by the federal government must be pursuant to an act of Congress. "No citizen," Congress has stated, "shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). By the enactment of section 4001(a) in 1971, Congress eliminated whatever doubt may have existed before that time that the Executive possessed independent

authority to indefinitely detain U.S. citizens. In the absence of congressional authorization for the indefinite detention of Hamdi, his continued detention is illegal.

2. Congress Has Not Authorized Hamdi's Indefinite Detention

In addition to holding that 18 U.S.C. § 4001(a) was not "intended to overrule the longstanding rule" that an American citizen may be indefinitely detained as an "enemy combatant," J.A. 436, 316 F.3d at 468, the Fourth Circuit held in the alternative that the extraordinary detention of Hamdi was authorized by two congressional acts: a joint resolution known as the Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), and an appropriations provision set forth at 10 U.S.C. § 956(5). Neither of these acts authorize the indefinite detention of citizens.

a. The Authorization for the Use of Military Force Does Not Authorize Hamdi's Indefinite Detention

Passed only one week after the September 11, 2001 terrorist attacks, the AUMF grants the President the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a). The concise terms of the joint resolution say little else except that it constitutes "specific statutory authorization" as required by the War Powers Resolution. *Id.* § 2(b).

By its terms, therefore, the AUMF constitutes no greater authorization of power to the President than if Congress had issued a declaration of war. And a "declaration of war has only the

effect of placing . . . two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results such as a transfer of property, which are usually produced by ulterior measures of government." *Brown*, 12 U.S. (8 Cranch) at 125-26. Indeed, the power to detain prisoners of war in the United States is not granted simply "by virtue of the declaration of war." *Id*; *cf. Caldwell v. Parker*, 252 U.S. 376, 385 (1920) (declaration of war did not make soldiers exclusively subject to prosecution by court-martial).

Moreover, the text and history of section 4001(a) weigh against a finding that the AUMF permits the indefinite detention of citizens. Section 4001(a) prohibits detention "of *any kind* absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981). By virtue of this statute, Congress specifically addressed the precise authority at issue and required that citizens not be imprisoned or otherwise detained by the United States "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The statute was partly in response to the detention of Japanese-Americans in the United States during the Second World War. *See* H.R. Rep. No. 116, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436. Construing section 4001(a) to allow the Executive to detain citizens based solely on a declaration of war runs directly counter to this basis for its enactment.

Under these circumstances, no authorization to detain citizens can be implied from the AUMF. "It is one thing to draw an intention of Congress from general language . . . where Congress has not addressed itself to a specific situation," Justice Frankfurter noted in *Youngstown*,

but "[i]t is quite impossible . . . when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

More specifically, this Court made clear in *Ex parte Endo* that statutory authorization for the detention of citizens requires that it be done in clear and unmistakable 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 war-time 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.

323 U.S. 283, 300 (1944).[16]

The AUMF, of course, does not "use the language of detention." *Id.* Nor does it mention citizens, much less section 4001(a). Given its attention to invocation of the War Powers Resolution, "[i]t is unlikely – indeed inconceivable – that Congress would . . . at the same time[ ] leave unstated and to inference something so significant and unprecedented as authorization to

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[16] In fact, this Court's jurisprudence reveals a healthy skepticism applied to statutes cited to support congressional authorization of the exercise of military control over citizens. *See Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress did not intend to supplant the civilian court system when it authorized martial law in territory of Hawaii); *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (holding that a military order annulling a judicial order was unauthorized by Congress and therefore void); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 135 (1866) (Chase, C.J., concurring) (concluding that Congress had not authorized Milligan's seizure).

detain American citizens under the Non-Detention Act[, 18 U.S.C. § 4001(a)]." *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027). Because the AUMF does not specifically authorize the detention of citizens, it cannot represent a congressional sanction for Hamdi's detention.

b. 10 U.S.C. § 956(5) Does Not Authorize Hamdi's Indefinite Detention

10 U.S.C. § 956(5) provides that department of defense "[f]unds . . . may be used for . . . . expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons . . . whose status is determined . . . to be similar to prisoners of war, and persons detained . . . pursuant to Presidential proclamation." This run-of-the-mill statute does not authorize the indefinite detention of citizens.

As an initial matter, the statutory language says nothing about citizens, much less the authority to detain, and therefore is far from the specific authorization required by section 4001(a). On the contrary, the statute simply permits the use of funds for expenses related to the maintenance of prisoners of war, other detainees, and those detained by Presidential proclamation. Just as the statute does not purport to authorize the President to detain people by proclamation, it does not constitute authorization for detention of any other kind.

In *Ex parte Endo*, this Court explained that authority for the detention of citizens cannot be construed from just such a general appropriation. 323 U.S. at 303 n.24; *see also Greene v. McElroy*, 360 U.S. 474, 505 n.30 (1959). In the absence of language that "plainly show[s] a

purpose to bestow [that] precise authority," an appropriations provision does not constitute authority for the Executive to detain citizens. *Endo*, 323 U.S. at 303 n.24.

In contrast to an area of law "where the Government's freedom to act is clear," extra-judicial detention of citizens requires specific authorization because "explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene*, 360 U.S. at 507. Section 956(5) plainly does not grant to the Executive "the precise authority which is claimed," *Ex parte Endo*, 323 U.S. at 303 n.24, and therefore does not authorize Hamdi's detention. In sum, neither the AUMF nor 10 U.S.C. § 956 authorize the Executive to indefinitely detain citizens as "enemy combatants."

3. The Indefinite Detention of Hamdi Constitutes Impermissible Law-Making by the Executive Branch

In this case, the Fourth Circuit's extraordinary deference to the Executive effectively approved secret law making incident to the creation of undisclosed criteria for determining which citizens the Executive will detain indefinitely. The Mobbs declaration indicates that the Executive determined that any citizen "associated" with the former government of Afghanistan may be designated an "enemy combatant." The Executive also established undisclosed criteria to determine whether a citizen so designated would be subject to indefinite detention. By these acts, the Executive endeavored to make its own secret law.

This Court has rebuffed attempts by the Executive to encroach upon the lawmaking function of the Congress. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down as impermissible lawmaking an Executive Order directing the Secretary of Commerce to take possession of and operate steel mills). The power to make laws was entrusted by "[t]he Founders of this Nation . . . to the Congress alone in both good and bad times." *Id.* at 589. On this point, the Court has observed, "the Constitution is neither silent nor equivocal." *Id.* at 587.

Not only is the separation of powers principle discussed above essential to prevent the accumulation of power by a single branch of government, it is necessary as well to "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Indeed, "[i]t is this concern of encroachment and aggrandizement that has animated [this Court's] separation-of-powers jurisprudence and aroused [the Court's] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta*, 488 U.S. at 382 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)); *see also Clinton v. City of New York*, 524 U.S. 417, 482 (1998); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272-73 (1991); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986). The "[very] safety of our institutions," this Court has noted, "depends in no small degree on a strict observance of this salutary rule." *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878).

Although "the powers of the three branches are not always neatly defined," *Clinton v. Jones*, 520 U.S. at 701, the power to authorize the indefinite detention of citizens by the federal government is, as we have demonstrated above, firmly entrusted to Congress. The court of appeals therefore erred by recognizing an illegitimate power of the Executive to make its own law.

CONCLUSION

For the above-stated reasons, Petitioners respectfully request that this Court reverse the ruling of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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