No. 02-6895

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

BRIEF FOR RESPONDENTS-APPELLANTS

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

ALICE S. FISHER
Deputy Assistant Attorney General

GREGORY G. GARRE
Assistant to the Solicitor General

LAWRENCE R. LEONARD
(757) 441-6331
Managing Assistant United States Attorney

United States Department of Justice
950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530-0001

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JURISDICTIONAL STATEMENT

Petitioners invoked the jurisdiction of the district court under 28 U.S.C. 2241. The district court entered an order on June 11, 2002 (reproduced in the addendum hereto), requiring, inter alia, respondents to provide the federal public defender with private, unmonitored access to the detainee. Respondents filed a timely notice of appeal of that order on June 13, 2002, and an emergency motion for a stay pending

appeal. The Court granted respondents' stay request on June 14, 2002. This Court has jurisdiction under 28 U.S.C. 1292. In addition, the Court would have jurisdiction under 28 U.S.C. 1651. See Jamison v. Wiley, 14 F.3d 222, 234 (4th Cir. 1994) (court may treat notice of appeal as petition for a writ of mandamus).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court properly ordered the United States military to allow the federal public defender to meet with the detained enemy combatant in private and without military personnel present.

STATEMENT OF THE CASE

This habeas action, and the related habeas actions pending on appeal before this Court in No. 02-6827, seek the release of Yaser Esam Hamdi, an enemy combatant in the control of the United States military. Hamdi was captured and taken into control of the United States military in Afghanistan in connection with the military campaign that was launched by the President, with the statutory backing of Congress, in the wake of the savage September 11 attacks on this Nation and its citizens. The military has determined that Hamdi should be detained as an enemy combatant in accordance with the laws and customs of war, and he is currently being detained as such at the Naval Station Brig at Norfolk, Virginia. Respondents in this action are the Secretary of Defense and Commander of the Norfolk Naval Brig.

Initial Actions. On May 10, 2002, the federal public defender for the Eastern District of Virginia, Frank W. Dunham, Jr., filed a petition for habeas corpus in the District Court for the Eastern District of Virginia, naming as petitioners Hamdi and the public defender as "next friend" for Hamdi, with whom the public defender concededly has no relationship. Hamdi v. Rumsfeld, E.D. Va. Civ. Action No. 2:02:cv348 (No. 348). On May 24, 2002, a second habeas petition was filed on behalf of Hamdi by Christian A. Peregrim, a non-lawyer, who also has acknowledged that he has no relationship with Hamdi. Hamdi v. United States Navy, E.D. Va. Civ. Action No. 2:02:cv382 (No. 382); see June 3, 2002 Letter from C. Peregrim to District Court (attached to Resps.' Emergency Mot. for Stay Pending Appeal).

On May 29, 2002, following a hearing, the district court entered an order allowing the appointment of the public defender as counsel for Hamdi in the first action, and ordering that such action was properly filed by the public defender as "next friend." May 29 Order at 2-3. The district court further consolidated the first action with the Peregrim action, and ordered respondents to answer the petitions by June 13, 2002. In addition, the district court ordered that "Hamdi must be allowed to meet with his attorney because of the fundamental justice provided under the Constitution of the United States"; that such meeting must be allowed to take place in "private" and "without military personnel present"; and that such "meeting must be

allowed to go forward as of 1 p.m. on Saturday, June 1, 2002." Id. at 3-4.

Respondents appealed the district court's May 29 Order and requested a stay of that order from this Court pending appeal. In particular, respondents argued that the district court lacked jurisdiction to issue its May 29 Order, because neither the public defender nor Peregrim has "next-friend" standing to file a habeas petition on behalf of Hamdi, see Whitmore v. Arkansas, 495 U.S. 149 (1990), and that the district court's access order was premature and unfounded on the merits. See No. 02-6827 Resps.' Emergency Mot. for Stay Pending Appeal at 8-16. On May 31, 2002, a panel of this Court (Chief Judge Wilkinson, with the concurrence of Judge Wilkins and Judge Traxler) issued a stay of the district court's order until "further order of this Court," and scheduled oral argument on the district court's order for June 4, 2002. The argument was held on June 4, and the appeal (No. 02-6827) remains pending.[1]

This Action. On June 11, 2002, while the appeal in No. 02-6827 was pending, the district court issued an order in a third habeas action filed on behalf of Hamdi, this time by Hamdi's father, Esam Fouad Hamdi, as "next friend." Hamdi v. Rumsfeld, E.D. Va. Civ. Action No. 2:02:cv439 (No. 439). Before respondents had been served

[1] As explained in respondents' stay motion in this appeal (at 7 & n.5), neither the district court's June 11 Order nor the filing of the latest habeas petition moots the appeal in No. 02-6827, or in any way lessens the need for this Court's resolution of the important jurisdictional issues raised by that appeal.

with the petition (or had any notice of it), the district court found that Hamdi's father "is a proper next friend" and ordered "the petition filed." June 11 Order at 2. The court further ordered the consolidation of the new action with the prior actions, while stating that, "[i]t further appearing that the matters involved in this case are currently on appeal before the United States Court of Appeals for the Fourth Circuit," the consolidation was "subject to the [Fourth Circuit] allowing such consolidation." Id. at 2 (emphasis added). The court also ordered, pursuant to 18 U.S.C. 3006A, the appointment of the public defender as "counsel for the Petitioner." Id. at 2-3.

In addition, the district court ordered that, "for the same reasons articulated in [its] May 29, 2002 Order," respondents were required to allow the public defender to meet with Hamdi in "private * * * without military personnel present." June 11 Order at 3. The court stated that such private, unmonitored access to Hamdi was required "within seventy-two hours of the entry of this Order or immediately following the elimination of any stay of this Order." Ibid. However, the court stayed its June 11 Order "until 5:00 p.m. on Friday June 14, 2002 to allow the Respondents an opportunity to appeal this Order, or if the United States Court of Appeals for the Fourth Circuit allows the consolidation of this matter with the other pending cases, until further Order of the Court of Appeals." Id. at 3-4. Finally, the court ordered respondents to answer the consolidated petitions by June 17, 2002. Id. at 3.

On June 13, 2002, respondents appealed the district court's June 11 Order, and filed an emergency motion for stay pending appeal of that order. That same day, this Court issued a temporary stay to consider respondents' stay motion. On June 14, 2002, the Court issued an order staying the district court's June 11 Order and "all proceedings before the district court in connection with this detainee until resolution of this appeal and appeal No. 02-6827." In addition, the Court directed the parties to brief the merits of the instant appeal.

STATEMENT OF FACTS

On September 11, 2001, the al Qaida terrorist network launched a large-scale attack on the United States, killing approximately 3,000 persons, and specifically targeting the Headquarters of the Nation's Department of Defense. The September 11 attacks inflicted the loss of more American lives than the attack at Pearl Harbor, and were followed by a major military response. Shortly after the attacks, Congress authorized the President to use "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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). In authorizing such force, Congress emphasized

that the forces responsible for the September 11 attacks pose an "unusual and extraordinary threat to the national security and foreign policy of the United States," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President, acting pursuant to his authority as Commander in Chief and with express congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network. The ongoing military operations in Afghanistan – which are being conducted not only by thousands of men and women of the United States armed forces, but also by coalition forces of our international allies and members of the Northern Alliance and other local forces – have resulted, inter alia, in the destruction of al Qaida training camps, removal of the Taliban regime that supported al Qaida, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous members of the military forces sent to Afghanistan have lost their lives, and many others have suffered casualties as part of the campaign, which remains active and ongoing. See generally www.army.mil/enduringfreedom.

In the course of the military campaign, United States and allied forces have captured or taken control of thousands of enemy combatants. Consistent with the

settled laws and customs of war (see Part II.A, infra), and with the practice followed in virtually every other major armed conflict in the Nation's history, the United States military has determined to detain many of the enemy combatants captured in Afghanistan. Such detention serves the obvious yet vital objective of preventing combatants from continuing to aid our enemies. In addition, the detention of such enemy combatants is critical to gathering intelligence in connection with the overall war effort in order to aid military operations and prevent additional attacks on the United States or its allies. See Affidavit of Col. Donald D. Woolfolk (Woolfolk Aff.), attached to Resps.' Emergency Mot. for Stay.

The detainee at issue in this case, Yaser Hamdi, was seized as an enemy combatant and taken into control of the United States military in Afghanistan, after the Taliban unit he was with surrendered. The military determined that Hamdi should be detained as an enemy combatant with potential intelligence value. Hamdi was transported by the United States military from Afghanistan to the Naval Base at Guantanamo Bay, Cuba, and was later transferred to the Naval Brig in Norfolk, Virginia, where he is currently detained. Hamdi appears to be a Saudi national who, records indicate, was born in Louisiana. "Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaida training and operations." Woolfolk Aff. at 2.

SUMMARY OF ARGUMENT

I. The extraordinary context in which this case arises informs virtually every aspect of the controversy before this Court. As this Court has observed, "[o]f the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense." Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991). This case involves a challenge to the actions of the Commander in Chief and the military in providing for the "national security and defense" by capturing and detaining enemy combatants in war time. The challenged exercise of authority falls within the President's core war powers, comes with the statutory authorization of Congress, and directly implicates vital national security interests in defending the Nation against an unprincipled, unconventional, and savage enemy. All the traditional sign posts, in short, call for a court to act with special care in reviewing the challenge in this case. The district court below, however, has approached this case (and the actions on appeal in No. 02-6827) in just the opposite fashion. In doing so, it has issued an order – requiring the United States military to provide an attorney with private and unmonitored access to a captured enemy combatant – that not only is unprecedented, but has no foundation at all.

II. The district court's access order is flawed on several different levels. First, at the most basic level, the question whether an attorney is entitled to meet with

a detained enemy combatant is bound up with that individual's status as an enemy combatant. As explained below, it is well-settled that the military has the authority to capture and detain individuals whom it has determined are enemy combatants in connection with hostilities in which the Nation is engaged, including enemy combatants claiming American citizenship. Such combatants, moreover, have no right of access to counsel to challenge their detention.

Second, at a bare minimum, the district court's access order in this case was fatally premature. The district court ordered that the public defender could have unfettered access to the enemy combatant immediately upon the filing of the public defender's habeas petition on the detainee's behalf – before the court had even evaluated the government's return. As the habeas statute itself recognizes, however, a habeas petition may raise "only issues of law." 28 U.S.C. 2243. In the return, the government may point out dispositive defects in a habeas petition (such as lack of jurisdiction) that necessitate dismissal of the petition at the outset of the action. Similarly, after the return is filed, it may be apparent that the only issues to be resolved are legal in nature, for example, whether the existence, or not, of a congressional declaration of war negates the government's authority to capture and detain enemy combatants. The indisputable fact that any given habeas petition may be disposed of solely on the papers on questions of law (which would obviate any need for access)

is, in itself, a sufficient reason for this Court to overturn the district court's order requiring the United States military to provide an attorney with access to an enemy combatant upon the mere filing of a habeas action.

Third, courts have an extremely narrow role in reviewing the adequacy of the government's return in a habeas action, such as this, challenging the quintessentially military judgment to detain an individual as an enemy combatant in a time of war. A court's inquiry should come to an end once the military has shown in the return that it has determined that the detainee is an enemy combatant. Although counsel may argue that that status is not a legally sufficient reason to justify the individual's detention (a flawed argument in light of the military's clear authority to detain such enemy combatants), the Court may not second-guess the military's enemy-combatant determination. At the very most, given the separation of constitutional powers in this unique area, a court could only require the military to point to some evidence supporting its determination. Either way, no evidentiary hearing is required to dispose of a habeas petition in this military context.

Finally, the district court's premature access order unnecessarily jeopardizes compelling national security interests in at least two basic respects. First, mandating private access to counsel for enemy combatants is likely to interfere with if not irreparably harm the military's ongoing efforts to gather intelligence that may protect

American interests and lives in the war effort and help protect the home front from further attacks. The moment that counsel is inserted between an enemy combatant and his captors, the relationship of dependency on which fruitful interrogation depends may be destroyed. Second, the enemy in the current war has trained its members, and in all likelihood its supporters, to pass concealed messages through unwitting intermediaries if they are taken into custody. Before issuing its order, the district court in this case did not provide the government with any opportunity to be heard with respect to the national security interests against allowing attorney access to enemy combatants. That failure, alone, is reversible error.

III. The district court's June 11 Order suffers from two additional errors. First, the district court erred in purporting to consolidate this habeas action with the prior habeas actions on appeal in No. 02-6827, and in issuing another access order – in the same "consolidated" action – while the validity of the district court's initial access order was pending before this Court in No. 02-6827. Second, the district court erred in appointing the federal public defender as counsel for the enemy combatant, pursuant to 18 U.S.C. 3006A, without adequately inquiring into the necessity of requiring the taxpayers to pay for that representation. Those errors underscore the district court's departure in this case from the customary manner in which courts approach challenges in sensitive constitutional areas, such as military affairs.

STANDARD OF REVIEW

This Court reviews de novo the entry of a preliminary injunction when, as here, the propriety of that decision raises only a legal question. Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191 (4th Cir. 2002); accord Eisenberg v. Montogomery County Pub. Schs., 197 F.3d 123, 128 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000); NationsBank Corp. v. Herman, 174 F.3d 424, 428 (4th Cir.), cert. denied, 528 U.S. 1045 (1999).

ARGUMENT

THE DISTRICT COURT'S JUNE 11 ORDER SHOULD BE SET ASIDE

I. THE DISTRICT COURT IMPROPERLY DISREGARDED SETTLED PRINCIPLES OF JUDICIAL RESTRAINT IN REVIEWING THE EXERCISE OF CORE CONSTITUTIONAL WAR POWERS

The Constitution vests the President with exclusive authority to act as Commander in Chief and as the Nation's sole organ in foreign affairs. See U.S. Const. Art. II, § 2; Dames & Moore v. Regan, 453 U.S. 654, 660-661 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); Madsen v. Kinsella, 188 F.2d 272, 274 (4th Cir. 1951), aff'd, 343 U.S. 341 (1952). This case directly involves the President's core functions as Commander in Chief in wartime: the capture, detention, and treatment of the enemy and the collection and evaluation of intelligence vital to national security.

Furthermore, the President here is acting with the added measure of the express statutory backing of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-637 & n.2 (1952) (Jackson, J., concurring).

Courts are normally circumspect when asked to act in disputes that touch upon or may interfere with sensitive matters of foreign policy or national security. See, e.g., Dames & Moore v. Regan, 453 U.S. at 660-661; see also Youngstown Sheet & Tube Co., 343 U.S. at 635 (Jackson, J., concurring). And of particular importance here, courts have long handled challenges to the conduct of military operations with special care and, indeed, have concluded that numerous areas of military affairs are not amenable to judicial review at all. See, e.g., Stewart v. Kahn, 78 U.S. 493, 506 (1870); United States v. The Three Friends, 166 U.S. 1, 63 (1897); The Prize Cases, 67 U.S. (2 Black) at 670; see also Tiffany v. United States, 931 F.2d 271, 275 (4th Cir. 1991) ("Because providing for the national security is both a duty and a power explicitly reserved by the Constitution to the executive and legislative branches of government, the judiciary must proceed in this case with circumspection."), cert. denied, 502 U.S. 1030 (1992).

In Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996), this Court reviewed in depth the constitutional, historical, and practical

reasons that the courts – in accordance with their assigned constitutional role – act with great deference when called upon to review the exercise of military powers by the President and Congress, as well as by the military personnel "who 'have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy.'" Id. at 926. Thomasson involved a challenge to the "exercise of military authority" in peacetime. Id. at 919-920. The fundamental considerations that framed the Court's analysis in Thomasson apply with equal, if not much greater, force to the challenged exercise of military authority at issue here – i.e., the capture and detention of the enemy in a time of active war.

Indeed, in Johnson v. Eisentrager, 339 U.S. 763, 779 (1950), the Supreme Court recognized the unique concerns inherent in entertaining habeas petitions filed on behalf of enemies held by our military in time of hostilities:

> The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.
>
> Those same concerns are pressing here, and frame the nature of the habeas

litigation now before this Court in this appeal and in No. 02-6827. While this case does not come within the strict application of Eisentrager's jurisdictional rule, the fact that the detainee at issue in this case – unlike those in Eisentrager – claims American citizenship and is now being held by the military in this country does not lessen the concerns identified in Eisentrager with allowing judicial interference with ongoing military operations: diminishing the prestige of our commanders; diverting their attention from the war effort and possibly requiring them to return from abroad to be called into account in our courts; and risking a conflict of military and judicial opinion. The same considerations that led the Court to find habeas completely unavailable in Eisentrager limit the scope of the writ here and counsel in favor of deference to military judgments here. Moreover, the litigation in this case raises the added risk – underscored by the judicial orders at issue in this appeal and in No. 02-6827 – of interfering with a critical component of the ongoing military campaign: gathering intelligence from our enemies to aid in prosecuting the overall war effort.[2]

Nonetheless, far from approaching this litigation with the customary deference accorded by the courts in reviewing matters affecting national security and ongoing

[2] The ongoing nature of hostilities underscores the need for deference to military judgments. Even the dissenters in Eisentrager recognized the perils of judicial second-guessing of active military operations. See 339 U.S. at 796 (Black, J., dissenting).

military operations, the district court has repeatedly demonstrated the opposite tendency. In the first two habeas petitions now on appeal in No. 02-6827, the district court disregarded as "technicalities" (see May 29 Order at 3) the clear jurisdictional defects tainting those petitions – which divested the court of any authority to act with respect to those petitions – and it took the unprecedented step of ordering the United States military to allow an attorney to have private and unmonitored access to an enemy combatant in the very earliest stages of the litigation, before the government had even filed a return explaining why the detainee is being lawfully held.

In the present action, the district court went even further. While the same matters were pending on appeal to this Court in No. 02-6827, the district court purported to consolidate the new petition filed on behalf of the detainee with the jurisdictionally flawed petitions in No. 02-6827, and to issue another access order – with a new 72-hour deadline – requiring the United States military to provide the public defender with private and unmonitored access to the detainee. June 11 Order at 2-3. What is more, the district court did so sua sponte, immediately upon the filing of the new petition – before the government had even been served with the petition, much less had an opportunity to answer it. And the district court took these unprecedented steps despite the fact that the latest habeas petition filed by the public defender – unlike the initial petition, which specifically requested the district court to "Order

Respondents to permit counsel to meet and confer with Mr. Hamdi in private and unmonitored communications," No. 348 Pet. at 7 – omits any request for access.

As explained below, the district court's extraordinary access order is without precedent or foundation. But equally important, the district court's actions contradict the necessary and customary deference exercised by the courts when asked to intervene in sensitive constitutional areas and, in particular, when asked to review military decisions in a time of war. In resolving this appeal, the Court should make clear the appropriate framework for the lower courts to apply in considering matters with such national security implications, i.e., the framework set forth in this Court's en banc decision in Thomasson. See 80 F.3d at 924-926. The district court's actions to date in this litigation are far removed from that paradigm.

II. THE DISTRICT COURT ERRED IN ORDERING RESPONDENTS TO PROVIDE THE PUBLIC DEFENDER WITH PRIVATE AND UNMONITORED ACCESS TO THE DETAINEE

In failing to approach this case with the traditional care exercised by the courts in reviewing challenges to military decisions, the district court issued an extraordinary mandate – requiring the military to provide an enemy combatant with private and unmonitored access to counsel – that not only is unprecedented but is the product of several distinct legal errors requiring reversal of that order.

A. Under Settled Law, Enemy Combatants Are Subject To Detention Without Access To Counsel To Challenge Their Detention

1. It is well-settled that the United States military may seize and detain enemy combatants, or other belligerents, at least for the duration of a conflict. For example, in Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added and footnotes omitted), the Supreme Court stated as follows:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful 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 which render their belligerency unlawful.

See also id. at 31 n.8 (citing authorities); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913); L. Oppenheim, International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952).[3]

As the court of appeals explained in the Territo case, "[t]he object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from

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[3] The practice of capturing and detaining enemy combatants is as old as war itself. See A. Rosas, The Legal Status of Prisoners of War 44-45 (1976). In modern conflicts, the practice of detaining enemy combatants and hostile civilians generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy on the battlefield. Id. at 59-80.

then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released." 156 F.2d at 146 (footnotes omitted). The capture and detention of enemy combatants also serves other vital military objectives, including the critical and age-old objective of obtaining intelligence from captured combatants to aid in the war effort. See Woolfolk Aff. at 2. At the same time, once individuals are taken into control as enemy combatants, they are protected from harm or other reprisals, given medical care and treated humanely, and may be visited by the International Committee of the Red Cross.

It also is settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See, e.g., Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful"); In re Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957). To be sure, the fact that a detainee has American citizenship may enable him to proceed with a habeas action that could not be brought

by an alien (cf. Eisentrager), but it does not affect the military's settled authority to detain him once it has determined that he is an enemy combatant.

The United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including more recent conflicts such as the Gulf, Vietnam, and Korean wars. It plainly has authority to do so in connection with the present conflict as well.

2. There is no right under the laws and customs of war for an enemy combatant to meet with counsel concerning his detention, much less to meet with counsel in private, without military authorities present. That is true with respect to enemy combatants who are captured and detained on the battlefield in a foreign land; enemy combatants who are captured overseas and brought to the United States for detention (like hundreds of thousands of prisoners of war during World War II); and enemy combatants who are captured and detained in this country (like the saboteurs in Quirin). Even under the Third Geneva Convention – which does not afford protections to unlawful enemy combatants, such as the detainee here – prisoners of war have no right of access to counsel to challenge their detention. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.

3317, 75 U.N.T.S. 135 (GPW), Article 105.[4]

The Constitution does not supply any different guarantee. The Sixth Amendment by its terms applies only in the case of "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of any enemy combatant who – like the vast majority of such combatants – has not been charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial."). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added). The only possible remaining source of such an access right is the Due Process Clause.

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of a right of access to

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[4] Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that general trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

counsel by those held as enemy combatants in similar circumstances. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993); Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909); see also Colepaugh, 235 F.2d at 432; Ex parte Toscano, 208 F. at 943. Indeed, as the Supreme Court emphasized in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." Moreover, in conducting such a due process analysis under the Fifth Amendment, the Court would have to balance the creation of such a right of access against the government's own interests, including the President's plenary authority as Commander in Chief and the important national security interests implicated by allowing access to counsel to enemy combatants.

In Middendorf v. Henry, 425 U.S. at 42-43, for example, the Supreme Court rejected the argument that "the due process standards of the Fifth Amendment" required that servicemen be entitled "to counsel in summary court-martial proceedings," even though, the court recognized, individuals subject to such proceedings "may be subjected to loss of liberty." In undertaking its Fifth Amendment analysis, the Court emphasized at the outset that whether due process "embodies a right to counsel [in such circumstances] depends upon an analysis of the

interests of the individual and those of the regime to which he is subject." Id. at 43. More to the point, in concluding that no generalized right to counsel attached in such circumstances, the Court emphasized the unique interests of the military in avoiding the addition of counsel to such court-martial proceedings. See id. at 45-46; id. at 49-51 (Powell, J., joined by Blackmun, J., concurring).

Moreover, the Supreme Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); see also United States v. Gouveia, 467 U.S. 180 (1984) (no right to counsel during period of administrative detention). Likewise, there is no tradition or practice of providing those held as enemy combatants with access to counsel to challenge their detention by way of a habeas action. Indeed, at least at common law, "a prisoner of war has no standing to apply for the writ of habeas corpus." R.J. Sharpe, The Law of Habeas Corpus 112 (1976) (citing authorities). To be sure, in more recent times, courts have entertained habeas petitions filed on behalf of those held in this country as enemy combatants. See, e.g., Territo, supra. But as explained below, the scope of review in those proceedings is limited, and does not support the creation of a "due process" right of access to counsel in this context.

Accordingly, even the most general due process analysis does not support the

creation of the sort of free-floating right of an enemy combatant to access to counsel recognized by the district court. But in any event, even assuming that the Fifth Amendment did confer upon enemy combatants some right of access to counsel to challenge their detention (or, indeed, a right of counsel to have access to someone being detained as an enemy combatant), such a right would be available only to the extent that it was necessary to enable a court to resolve a proper habeas petition, and only to the extent that recognizing such a right did not unduly burden the compelling interests of the President as Commander in Chief or the military in detaining captured enemy combatants. In other words, any such right would take its form from the constitutional, procedural, and national security limitations on a habeas proceeding in this particular context. As explained below, an analysis of those factors demonstrates that the access order at issue in this case must be set aside.[5]

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[5] The public defender states that "[t]he District Court ordered that Respondents provide access to Petitioner pursuant to its authority to appoint counsel under 18 U.S.C. 3006A. Appellees' Resp. to Resps.' Emergency Mot. to Stay at 5 (emphasis added). That is incorrect. In its June 11 Order, the district court ordered access to counsel "for the same reasons articulated in the May 29, 2002 Order." June 11 Order at 3. That is, the district court ordered such access based on "fundamental justice provided under the Constitution of the United States." May 29 Order at 4; see ibid. ("Fair play and fundamental justice require nothing less."). In any event, as explained below, the public defender was not properly appointed in this case under Section 3006A. Moreover, even if his appointment were proper, nothing in the text or history of Section 3006A suggests that Congress sought to confer upon detainees (or properly appointed counsel) a

B. At A Bare Minimum, The District Court's Access Order Was Entirely Premature In The Context Of This Habeas Proceeding

Putting to one side the constitutional and practical limitations on a habeas proceeding of this kind (see infra), the district court's access order is insupportable from a purely procedural standpoint. The district court ordered the United States military to provide the public defender with private, unmonitored access to an enemy combatant based solely on the filing of this habeas petition – before even evaluating the government's return. As is true in any habeas action, however, the government's return might make clear either that the petition must be dismissed or that "only issues of law" remain in adjudicating the writ. 28 U.S.C. 2243. In either event, there would be no need for any evidentiary proceedings. See Walker v. Johnston, 312 U.S. 275, 284 (1941) (a court may find on the face of the pleadings in a habeas action "that no issue of fact is involved"; "useless grant of the writ * * * may be avoided where from undisputed facts or incontrovertible facts * * * it appears, as a matter of law, no cause for granting the writ exists"). That understanding is consistent with the special role assigned by the habeas statute to the answer or return. 28 U.S.C. 2248.

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right to the extraordinary type of access to counsel mandated by the district court in this case. And even if there were any basis to argue a contrary position, the longstanding constitutional-avoidance canon of construction would counsel strongly against interpreting Section 3006A in that manner.

For example, as the pending petitions in No. 02-6827 illustrate, a habeas petition filed on behalf of an individual being detained as an enemy combatant might be jurisdictionally defective at the outset. A return pointing out such a defect would eliminate the need for any further proceedings, including any evidentiary proceedings. Similarly, a habeas petition asserting that an enemy combatant is not being lawfully detained because he was captured by allied forces, and not United States forces, would raise only the legal question of whether such a distinction made any difference as a matter of law with respect to the military's authority to detain the individual under the laws and customs of war. There are countless other scenarios in which it might be clear with the benefit of the government's return that no evidentiary inquiry at all is required to dispose of a habeas petition. Because it is possible that any given case may be resolved as a matter of law (i.e., in a manner that does not give rise to a need for counsel to meet with the detainee), a right of access to counsel cannot be triggered by the mere filing of a habeas petition on behalf of an enemy combatant.

Indeed, in Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) – the high water mark of due process in the right-to-counsel context – the Court refused to adopt an automatic right to counsel covering parole and probation revocation hearings. Instead, the Court adopted a "case-by-case" approach, reasoning that "[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally

unnecessary in most revocation hearings, there will remain certain cases in which" the Fifth Amendment requires that such counsel be provided. Ibid. (emphasis added). In Middendorf, the Supreme Court declined to extend Gagnon to the "military context." 425 U.S. at 43. Yet, the district court's access order in this case goes even further than the due process rationale of Gagnon. The district court ordered access based on the mere filing of the petition before there was any practical opportunity to evaluate the desirability or necessity of conferring a right of access to counsel in this proceeding.

Moreover, in ordering such immediate access to counsel, the district court all but presumed that the government is detaining an individual in violation of law, when the customary burden of proof in habeas proceedings is just the opposite, see Garlotte v. Fordice, 515 U.S. 39, 46 (1995), and when, regardless of the conventional burden, there are compelling separation of powers and national security concerns that demand careful consideration of and in most if not all cases deference to the government's response. The timing of the district court's access order is itself ground for reversal.

C. There Is No Basis For Ordering Attorney Access In Resolving A Habeas Petition Filed On Behalf Of An Enemy Combatant

1. In any event, regardless of the question of timing, given the constitutionally limited role of the courts in reviewing military decisions, courts may

not second-guess the military's determination that an individual is an enemy combatant and should be detained as such. Thus, no evidentiary proceedings are required to resolve a habeas petition filed on behalf of such a detainee and no access between the detainee and counsel for the next-friend is necessary.

As this Court has stated, "the lack of competence on the part of the courts [with respect to military judgments] is marked." Thomasson, 80 F.3d at 926 (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)) (bracketed material added in Thomasson); accord Berry v. Bean, 796 F.2d 713, 716-717 (4th Cir. 1986). This case involves a challenge to one of the most fundamental military judgments of all: the determination that someone who was captured in the theater of battle is an enemy combatant and should be detained as such. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); see also Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come * * * are matters of political judgment for which judges have neither technical competence nor official responsibility"); Eisentrager, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private

litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").[6]

Especially in a time of active conflict, a court considering a properly filed habeas action generally should accept the military's determination that a detainee is an enemy combatant. Going beyond that determination would require the courts to enter an area in which they have no competence, much less institutional expertise, intrude upon the constitutional prerogative of the Commander in Chief (and military authorities acting at his control), and possibly create "a conflict between judicial and military opinion highly comforting to enemies of the United States." Eisentrager, 339 U.S. at 779. See also Tiffany, 931 F.2d at 278 ("Not only do courts lack the expertise to evaluate military tactics, but they will often be without knowledge of the facts or standards upon which military decisions have been based.").[7]

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[6] In a similar vein, Charles Evans Hughes observed that the "war power of the national government is the power to wage war successfully." C. Hughes, War Powers Under the Constitution, 42 A.B.A. Rep. 232, 238. Thus, he continued, it is "not for any court to sit in review of the wisdom of the actions of the Executive or of Congress, or to substitute its judgment for theirs. If the Court could say there was a rational basis for the military decision, it would be sustained." Ibid.

[7] Congress's joint resolution authorizing the use of military force in response to the September 11 attacks is specifically framed in terms of taking action against that the "nations, organizations, or persons [that] he [i.e., the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on

That conclusion does not nullify the writ.[8] As explained above, although a court should accept the military's determination that an individual is an enemy combatant, a court may evaluate the legal consequences of that determination. For example, a court might evaluate whether the military's determination that an individual is an enemy combatant is sufficient as a matter of law to justify his detention even if the combatant has a claim to American citizenship. See Territo, supra. In doing so, however, a court may not second-guess the military's determination that the detainee is an enemy combatant, and therefore no evidentiary proceedings concerning such determination are necessary.[9]

September 11, 2001, or harbored such organizations or persons." 115 Stat. 224 (2001) (emphasis added). Although it falls within his core functions as Commander in Chief, the capture and detention of enemy combatants in connection with the ongoing military campaign is also a vital and common sense component of the military force backed by Congress.

[8] That is certainly true as a historical matter. One of the principal purposes of the writ was to require the executive to explain why it was holding an individual, and not for a court to second-guess the facts underlying that determination. See, e.g., C. Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1094 (1995) ("At common law, the allegations in the 'return' were deemed conclusive and could not be controverted by the prisoner."); D. Oaks, Legal History in the High Court – Habeas Corpus, 64 Mich. L. Rev. 451, 453 (1966).

[9] In In re Yamashita, 327 U.S. 1 (1946), the Supreme Court considered the scope of judicial review in a habeas action challenging a prisoner of war's conviction and death sentence before a military commission. In rejecting that petition, the Court "emphasized" at that outset "that on application for habeas

Furthermore, as this Court observed in the Thomasson case, the hands-off approach taken by the courts when it comes to reviewing military decisions or operations does not mean that the war power may be exercised without check:

> [I]t is no surprise that the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President. See U.S. CONST. art. III. To do so would have placed, in Hamilton's words, a 'constitutional shackle' on the ability of Congress and the President to carry out the duties attendant to national security. Moreover, the virtue of placing military power in the democratic branches was obvious: '[I]f the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it.' Federalist No. 26, at 172 (Alexander Hamilton). The federal judiciary – appointed with life tenure – was not regarded as an appropriate repository for such immense power and accordingly was given 'no influence over either sword or purse.' Federalist No. 78, at 465 (Alexander Hamilton).

80 F.3d at 924. Especially in a case such as this, involving the detention of an enemy combatant who claims American citizenship, the filing of a habeas petition will place

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corpus [in this situation] we are not concerned with the guilt or innocence of the petitioners." Id. at 8. Rather, the Court continued, "[w]e consider here only the lawful power of the commission to try the petitioner for the offense charged." Ibid. See Eisentrager, 339 U.S. at 797 (Black, J., dissenting) (Judicial review of military charges "is of most limited scope"; "[w]e ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged."). Although this case does not involve the trial or punishment of prisoners of war for war crimes, Yamashita supports the conclusion that the Court's review of the instant petition "is of the most limited scope," and is limited to legal issues surrounding the military's authority to detain an individual that it has determined is an enemy combatant.

– and, indeed, has placed – the Executive's actions in the public light. That kind of scrutiny, not judicial scrutiny in a habeas proceeding, was the principal check envisioned by the Framers on any potential Executive abuses in this sphere.

2. At the very most, in light of the fundamental separation of powers and other considerations discussed above, even if it were appropriate for a court to exercise some limited review over the quintessentially military determination that an individual is an enemy combatant, a court's proper role would be solely to confirm that there was some factual basis to support that determination.

In considering habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit the use of the writ to challenge the factual accuracy of such determinations, and instead only call upon the executive to provide "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the executive.") (emphasis added); Eagles v. United States, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural

irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."); United States v. Commissioner, 273 U.S. 103, 106 (1927) ("Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."). The focus of the inquiry is the executive's determination, and the court's role is limited to confirming that there was a factual basis for that determination. There no role for the court itself to evaluate the underlying question.

Moyer v. Peabody, 212 U.S. 78 (1909), is also instructive. That case involved a due process challenge brought by an individual who had been detained, without probable cause, for months by the governor of Colorado acting in his capacity of "commander-in-chief of the state forces" during a local "state of insurrection." Id. at 82. In rejecting that challenge, Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge

and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." Id. at 85; see also United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.") (citing Moyer).

In United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir.), cert. denied, 404 U.S. 943 (1971) (emphasis added), which involved a similar challenge to state action in response to a local insurrection, this Court looked to Moyer and held that "the scope of our review in a case such as this must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order." See id. at 1282 ("It is enough, we think, that there was a factual basis for the mayor's decision to proclaim the existence of a state of emergency and that he acted in good faith."). Moreover, even in the absence of such exigent circumstances, this Court has taken a similarly deferential approach to reviewing the decisions of military commanders in seeking to maintain discipline and order on a military base. See, e.g., Berry, 796 F.2d at 717, 717 (4th Cir. 1986).

The considerations underlying the limited scope of review of the types of executive determinations discussed above are only magnified in the case of the

Executive's determination to detain an individual as an enemy combatant during a state of active hostilities. Accordingly, at most, in such circumstances, a habeas court should only confirm that the military had any factual basis for its determination that an individual is an enemy combatant. Moreover, because the exclusive focus of the proceedings in such a setting is whether the military's determination has some support in evidence, there is no need for a court to conduct evidentiary hearings with respect to whether that determination is factually disputed by the detainee, or his lawyer. Thus, even under this approach, there would be no need for an attorney to have access to a detained enemy combatant.[10]

D. Allowing Attorney Access To Captured Enemy Combatants Would Threaten Vital National Security Interests

Finally, in considering whether any access to counsel is appropriate in the context of a habeas petition filed on behalf of an enemy combatant, a court also must carefully weigh the government's compelling interest in avoiding such access. As explained in more detail in the Woolfolk Affidavit, permitting counsel to have access, much less private and unmonitored access, to a detained enemy combatant threatens

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[10] In addition, even in the event that a court found the military's factual basis somehow infirm, the remedy would not be to conduct an evidentiary proceeding in the courts, but rather to allow the military authorities to correct any infirmity. Even under such a highly unlikely scenario, the judicial proceedings would not necessitate access to the detainee.

the national security in at least two basic respects. First, such access would directly interfere with – and likely thwart – ongoing efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters. Such intelligence is critical to the successful prosecution of any war effort and, in the present conflict, in all likelihood already has avoided additional harm to American lives or interests on the home front. Second, such access may enable detained enemy combatants to pass concealed messages to the enemy about military detention facilities, the security at such facilities, or other military operations – something that members (and presumably supporters) of al Qaida are trained to do.

Collecting and assessing intelligence is one of the most important duties of the Commander in Chief, especially in wartime. See United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.) ("[g]athering intelligence information" is "within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces"), cert. denied, 409 U.S. 1063 (1972); see also Snepp v. United States, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."). The government's interests in avoiding attorney access to detained enemy combatants, therefore, weigh heavily in any analysis of whether to recognize a right to such access

in habeas proceedings challenging the detention of enemy combatants. The district court below precipitously – and dangerously – dismissed such interests.

III. THE DISTRICT COURT'S JUNE 11 ORDER IS TAINTED BY ADDITIONAL ERRORS

The district court's June 11 Order contains additional defects that further support reversal.

1. The district court erred in purporting to consolidate the instant habeas petition with the petitions currently on appeal in No. 02-6287. As discussed in respondents' stay motion, under the settled rule "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); see United States v. Christy, 3 F.3d 765, 767-768 (4th Cir. 1993) (citing cases). "A district court does not regain jurisdiction until the issuance of the mandate by the clerk of the court of appeals." United States v. Montgomery, 262 F.3d 233, 239-240 (4th Cir. 2001). Although the interlocutory appeal (No. 02-6827) of the district court's May 29 Order did not divest the district court of jurisdiction over the entirety of the underlying habeas petitions, the district court's purported consolidation of this case with the actions in appeal No. 02-6827 is nonetheless error in two different respects.

First, the threshold issue before this Court in appeal in No. 02-6287 is whether the district court had jurisdiction at all with respect to the public defender's and

Peregrim's "next friend" petitions. Although a pending interlocutory appeal may not divest a district court of its jurisdiction with respect to a proposed consolidation in every instance, it should do so where, as here, the central issue on appeal is whether jurisdiction exists in the initial actions. Second, at the same time that it purported to consolidate the cases, the district court awarded precisely the same injunctive relief at issue in No. 02-6287, thereby effectively reentering the same order currently on appeal. See 16 C. Wright et al., Federal Practice and Procedure 3921.2, at 54 (1996) (noting that "power to proceed toward decision of the merits must be distinguished from the power to act on the very order that has been appealed").

Indeed, in issuing its June 11 Order, the district court specifically recognized that "the matters involved in this case are currently on appeal." June 11 Order at 2 (emphasis added). Under the settled rule, the district court therefore lacked "control" (Griggs, 459 U.S. at 58) to act with respect to those matters to the extent that it purported to consolidate this case with the actions appeal in No. 02-6827.

2. The district court also erred in appointing the public defender as "counsel for the Petitioner," by which the district court apparently meant the detainee, pursuant to 18 U.S.C. 3006A. June 11 Order at 3. As In re Heidnik, 112 F.3d 105, 112 (3d Cir. 1997), illustrates, when counsel is appointed in a next-friend situation such as this, it is for the next friend, not for the detainee on whose behalf the next friend seeks

relief. That follows from the text of 18 U.S.C. 3006A, which provides that, "[w]henever * * * the interests of justice so require, representation may be provided for any financially eligible person who * * * is seeking relief under section 2241, 2254, or 2255 of title 28." (Emphasis added.). The detainee himself has not sought relief in this case; indeed, one of the necessary predicates for the detainee's father to maintain this next-friend action is that the detainee himself is unable to seek relief on his own behalf. See Whitmore, 495 U.S. at 163.

Moreover, Section 3006A only authorizes appointment of counsel with respect to a "financially eligible person." The district court found that an affidavit submitted by Hamdi's father was "sufficient evidence of financial eligibility to warrant the appointment of counsel under [18] U.S.C. § 3006A." June 11 Order at 2. That affidavit (Attachment D, Exh. D, to respondents' stay motion), however, states only that Hamdi's father "will be unable to provide funds for the legal services." That loosely worded and unsupported statement does not even amount to a clear assertion that the father lacks the financial resources to pay for counsel, and cannot supply the sole basis for appointment of counsel under Section 3006A. See United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992) ("The Criminal Justice Act * * * provides for the appointment of counsel when the judge is 'satisfied after appropriate inquiry that the person is financially unable to obtain counsel.' 18 U.S.C. § 3006A(b). It is

not enough to claim an inability to hire a lawyer and back up the claim with an affidavit; the statute provides for 'appropriate inquiry' into the veracity of the claim."). Indeed, to take one example, the father may only have sworn that he is unable (or disinclined) to federal express or wire funds from overseas.

In any event, even if, in a typical case, language with such wiggle room might suffice for purposes of satisfying Section 3006A's financial-eligibility requirement, it does not do so here. In the course of the actions pending on appeal in No. 02-6827, respondents – in challenging appointment of the same counsel – alerted the district court to press reports indicating that Hamdi's father "holds a prestigious job in a private company in the Jubail Industrial City."[11] Neither the public defender nor the father has ever disputed that report, or sought to explain why, even assuming the father holds such employment, he is financially eligible for the taxpayer-funded services of the public defender to challenge the detention of an enemy combatant. Nevertheless, in appointing the public defender as counsel in this case, the district court never inquired into the matter. That was error. See United States v. Harris, 707 F.2d 653, 661 (2d Cir. 1983) ("[W]here a defendant's inability to afford counsel has been put into doubt, he has the burden of coming forward with evidence," and there is no

[11] A. Almotawa, Saudi seeks release of son from US jail, May 3, 2002 (http://www.arabnews.com/sarticle.asp?sct=esam%20Hamdi&id=14905).

warrant for appointment of counsel if "a defendant fails to come forward with additional evidence instead of relying on a terse form affidavit").

* * * * *

In its June 14 Order, this Court requested the parties to "make plain what action they are requesting that the Court take in this appeal and the reasons for their requests." For the reasons explained above, respondents request the Court to set aside the district court's June 11 Order in its entirety and, in particular, the district court's access order. In addition, as appropriate based on the Court's resolution of this appeal and appeal No. 02-6827, the Court should remand this case with instructions for the district court (1) to conduct any further proceedings necessary with respect to the detainee at issue with the necessary and customary deference exercised by the courts in reviewing military affairs; (2) to require the public defender to show cause why the detainee's father meets the financial eligibility requirements of 18 U.S.C. 3006A, and suspend any further proceedings in this case until a proper showing has been made under Section 3006A; and, if necessary, (3) to permit respondents to file their return to any properly filed habeas petition with respect to the detainee within 5 days of the issuance of this Court's decision, and to refrain from ordering any relief (including access to counsel) until, at a bare minimum, the district court has evaluated the government's return in accordance with the principles set forth

above.

Furthermore, if this Court concludes, for the reasons discussed above, that "precedent dictates a resolution in favor of the government" in this action and that "further remand for consideration on the merits would be futile," the Court not only should dissolve the district court's June 11 injunction, but also remand the case with instructions to dismiss this action outright. Berry v. Bean, 796 F.2d at 719. Given the principles of judicial review set forth above governing the type of habeas action filed in this case on behalf of the detained enemy combatant, and the detainee's status as an enemy combatant, there is no legal basis whatever for granting any of the requested relief in this action. "Though ordinarily a court may not resolve the merits of a dispute on motion for preliminary injunction without notice to the parties, the special circumstances of this case warrant a departure from that requirement." Ibid. The extraordinary, and unfounded, actions taken by the district court to date also support entry of such relief, as an alternative to the prospect of continuing appellate superintending of the district court proceedings.

Finally, in addition to resolving this appeal, the Court should resolve appeal No. 02-6827, and dismiss for lack of jurisdiction the actions pending in that appeal for the reasons explained by respondents in their emergency stay motion in appeal No. 02-6827 and at the oral argument in No. 02-6827.

CONCLUSION

For the foregoing reasons, the district court's June 11 Order should be reversed. In addition, the Court should grant the other relief requested above.

Respectfully submitted,

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

ALICE S. FISHER
Deputy Assistant Attorney General

GREGORY G. GARRE
Assistant to the Solicitor General

LAWRENCE R. LEONARD
(757) 441-6331
Managing Assistant United States Attorney

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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