No. 02-7338

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI et al.,

Petitioners / Appellees,

v.

DONALD RUMSFELD et al.,

Respondents / Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Civil Action No. 2:02CV439

BRIEF OF THE PETITIONERS / APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to FRAP 26.1 and Local Rule 26.1, Yaser Esam Hamdi and Esam Fouad Hamdi, who are appellees, make the following disclosure:

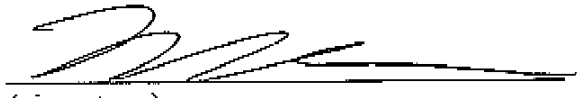
1. Is party/amicus a publicly held corporation or other publicly held entity?
( ) YES (X) NO

2. Does party/amicus have any parent corporations?
( ) YES (X) NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
( ) YES (X) NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
( ) YES (X) NO
If yes, identify entity and nature of interest:

5. Is party a trade association?
( ) YES (X) NO
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:



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10/18/05

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COUNTER STATEMENT OF JURISDICTION

Yaser Esam Hamdi, (hereafter referred to as "Hamdi" or "the Petitioner"), by next friend, filed a Petition for Writ of Habeas Corpus challenging his detention in

solitary confinement in the Navy Brig in Norfolk, Virginia.[1] (J.A. 8-15.)[2] The district court has jurisdiction under 28 U.S.C. § 2241.

On August 8, 2002 , this Court entered an Order dissolving a stay in connection with a prior appeal in this case, (J.A. 198), *see Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002). In its August 8 Order, this Court directed the district court on remand to first give "independent" consideration to the "sufficiency" of a two-page declaration by Michael Mobbs (hereafter "Mobbs declaration"), submitted by Respondents Rumsfeld and Paulette ("Respondents"). The district court then conducted a hearing at which it considered whether the Mobbs declaration, "standing alone," provided a sufficient factual basis for purposes of meaningful judicial review. (J.A. 326-27.)

The district court rejected Respondents' contention "that the Mobbs declaration . . . in and of itself with no further evidence of any kind [is] a sufficient factual basis to provide the court with information adequate to dismiss [the petition]." Order of August 16, 2002 (J.A. 425-39.) However, adhering to this Court's admonition to first pursue the least intrusive means of resolving this case , the district court did not then order that Hamdi's counsel be allowed access to his client. (J.A. 437.) The district

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[1] As far as counsel is aware, Yaser Esam Hamdi himself has no knowledge that this Petition was filed or that this Petition is pending.

[2] "J.A." refers to the joint appendix.

court alternatively directed the government to provide previously requested documents for *ex parte, in camera* review. (J.A. 426.)[3]

The government opted to seek another interlocutory appeal. The district court granted the government's request and certified the following question from its August 16 Order:

> Whether the Mobbs declaration, *standing alone*, is sufficient as a matter of law to allow meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

(J.A. 464 (emphasis added).)

On September 12, 2002, this Court granted Respondents' petition to appeal and directed the parties "to address the question as certified by the district court as well as any other issues fairly included within the certified order." (Sept. 12, 2002, Order.) There is only one other issue fairly within the certified order. That issue is whether the district court, having found the Mobbs declaration insufficient, properly required the government to provide additional information for *ex parte, in camera* review. This Court has jurisdiction over these two issues under 28 U.S.C. § 1292(b).

The discretionary appellate review of an interlocutory order authorized under 28 U.S.C. § 1292(b) is limited to the order certified. "The court of appeals may not

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[3] Further reflecting the caution suggested by this Court, the district court permitted the government to redact from those documents any national security information not directly related to petitioner's legal status. (J.A. 141.)

reach beyond the certified order to address other orders made in the case." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996); *accord United States v. Stanley*, 483 U.S. 669, 677 (1987). Likewise, jurisdiction under § 1292(b) does not encompass issues that the district court failed to rule upon. *See S.E.C. v. U.S. Environmental, Inc.*, 155 F.3d 107, 113 (2d Cir. 1998); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1550 (3d Cir. 1988).

This Court therefore lacks jurisdiction to address Respondents' challenge to the district court's August 21, 2002, Order. (Resp. Br. at 20-21 (characterizing August 21, 2002, Order as containing "clear error").) Similarly, the Court has no jurisdiction to consider either Respondents' argument that the district court denied their motion to dismiss *sub silencio*, (Resp. Br. at 50-55), or the merits of the underlying dispute.

Counsel for Petitioner requested that the district court address additional outstanding issues that were not addressed in the August 16 Order before deciding whether to certify that Order for interlocutory appeal. These issues include: (1) whether 18 U.S.C. 4001(a) precludes the detention at issue; (2) whether the Executive branch has declared that the conflict with the government in Afghanistan has ended; and (3) whether Hamdi must have an opportunity to respond to Respondents' allegations. Because the district court did not address these issues in the order appealed from, these issues cannot be said to be fairly included within the certified order.

STATEMENT OF ISSUES

I. Whether a two-page declaration by someone without personal knowledge of the underlying facts, standing alone, is sufficient as a matter of law to permit meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

A. Whether the district court's order to produce documents containing information relevant to the determination of Hamdi's legal status, some of which may be classified, for *ex parte, in camera* review was an overly intrusive means of attempting to gain an adequate factual basis for meaningful judicial review of the legality of the challenged detention?

STATEMENT OF THE CASE

This case raises the issue of whether the Executive branch may indefinitely detain an American citizen in solitary confinement in the United States by labeling that citizen an "enemy combatant," and supporting that allegation with nothing more than a two-page declaration containing hearsay allegations authored by a person who has done nothing more than review documents related to the case, while at the same time depriving that citizen of all means, opportunity, and ability to challenge the label and the allegations.

On May 10, 2002, the Federal Public Defender, endeavoring to act as next friend, filed a habeas petition challenging the Respondents' detention of Yaser Esam

Hamdi. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) ("*Hamdi I*"). A federal magistrate judge initially gave Respondents nine days to respond. (J.A. 190.)[4] Respondents moved for a twenty-one day extension. At a hearing on that request, counsel for Petitioner requested that the court order access to the Petitioner. After considering Respondents' arguments as to why Hamdi should not have access to counsel, the court ordered the requested access. (J.A. 202.) Respondents appealed the magistrate judge's order to the district court, and a hearing was held on May 29, 2002. After another full argument on the issue of access to Mr. Hamdi, the district judge also ordered that access be permitted. (J.A. 209-47.)

Respondents immediately appealed the access order to this Court, and the Court entered a stay on May 31, 2002. *See Hamdi I*, 294 F.3d at 602. On June 11, 2002, while the appeal in *Hamdi I* remained pending, a separate habeas petition was filed by Hamdi's father acting as next friend, *id.* at 600 n.1, and the district court consolidated that petition with the petition in *Hamdi I*. Because two full hearings had already been held on the issue of counsel's access to Hamdi in *Hamdi I*, the district court again ordered Respondents to allow counsel access. (J.A. 2.) Respondents appealed this order. *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) ("*Hamdi II*").

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[4] That statute allows only three days unless enlarged by the Court.

This Court reversed the access order in *Hamdi II*, finding that it was entered "without adequately considering [its] implications . . . and before allowing the United States to respond [to the newly filed petition in *Hamdi II*]." 296 F.3d at 284.[5] In doing so, this Court likewise rejected Respondents' contention that courts may not review the Executive branch's designation of an American citizen as an enemy combatant. The Court specifically declined to dismiss the petition, and refused to embrace a proposition which it described as "sweeping," *i.e.*, "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." 296 F.3d at 283. This Court directed the district court on remand "to consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 283-284. The Court declined to provide more specific guidance, however, explaining that "[t]he standards and procedures that should govern the case . . . are not for us to resolve in the first instance." *Id.* at 283.

This Court later instructed the district court that the sufficiency of the Mobbs declaration must be first considered as "an independent matter" before proceeding

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[5] In a separate opinion, the Court dismissed the petition in *Hamdi I*, holding that the Federal Public Defender did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d at 603-07.

further. (J.A. 148.) In its August 16 Order, the district court found the Mobbs declaration to be an insufficient factual basis, standing alone, upon which to provide meaningful judicial review of Petitioner's detention. The district court thereafter ordered production of additional documentary information. (J.A. 425). The instant appeal follows the district court's certification of that order for review by this Court pursuant to 28 U.S.C. § 1292(b).

COUNTER STATEMENT OF FACTS

The district court held a hearing at which it limited its consideration of facts to a review of the Mobbs declaration. (J.A. 326-327). With a liberty interest at stake, the district court, while deferential, refused to be a rubber stamp.[6]

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[6] The district court remarked, "I can't do a thing other than look at this declaration. And if I look at the declaration, then I find that there are certain omissions that seem substantial. . . . It is [as] important to determine what is left out as well as what is put in." (J.A. 373, 350.) The district court also observed: "[Y]ou know, generally . . . when people hide things you can generally assume if it were advantageous to them they wouldn't hide it, would they?" (J.A. 362.) These observations are consistent with the rationale behind the missing witness instruction, *i.e.*, "'[I]f a party has it peculiarly within his [or her] power to produce witnesses whose testimony would elucidate the transaction, the fact that he [or she] does not do it creates the presumption that the testimony, if produced, would be unfavorable.'" *United States v. Rollins*, 862 F.2d 1282, 1297 (7th Cir. 1988); *United States v. Brooks*, 928 F.2d 1403, 1412 (4th Cir. 1991) (citing *Rollins*). There has never been a case where one side had it more "peculiarly" in its power to present evidence.

According to the Mobbs declaration, Mr. Mobbs is a special advisor to the Under Secretary of Defense for Policy. (J.A. 61, ¶ 1.)[7] There is no indication in his declaration that Mr. Mobbs is a member of the military or that he has any authority to make classification decisions regarding whether a particular individual is an "enemy combatant" or to review the classification decisions of others. (J.A. 434-35.) Further, Mr. Mobbs does not indicate that he has any personal knowledge of any facts concerning Hamdi's detention. All of his knowledge appears to be hearsay derived from a review of what Mr. Mobbs considers to be the relevant records and reports. (J.A. 61, ¶ 2.) Alleging that he is "familiar" with military policies and procedures "applicable to the detention," as well as the control and transfer of Taliban personnel in Afghanistan during an undefined "relevant period," Mr. Mobbs does not reveal what those policies are or whether the detention at issue has been conducted in accordance with those policies. (J.A. 61, ¶¶ 1, 2.) The Mobbs declaration also paraphrases statements allegedly made by Hamdi. (J.A. 61, ¶¶ 5, 6, 9.) Mr. Mobbs

[7] Although Mobbs maintains in his declaration that he has been substantially involved with detainee operations since mid-February, 2002, the Federal Register indicates that his position was not created until April 24, 2002. 67 Fed. Reg. 35596 (May 20, 2002). Hamdi had already been detained and transferred to Norfolk by that time.

neither provided these statements to the district court as attachments, nor explained why he failed to do so.[8]

Mr. Mobbs says that Hamdi traveled to Afghanistan in July or August 2001 prior to the attacks of September 11. He then says Hamdi "affiliated" with a Taliban military unit prior to the September 11 attacks on the United States.[9] Mr. Mobbs further says that Hamdi received weapons training prior to September 11, but does not say from whom the training was received, where it was received, or the nature and extent thereof. (J.A. 435.) According to Mr. Mobbs, Hamdi remained with that unit after the September 11 attacks and after October 7, 2001, when the United States began military operations against the Taliban. (J.A. 61, ¶ 3.) Mr. Mobbs does not identify the Taliban unit, state whether this unit wore uniforms, describe its function, or provide any other details.

Mr. Mobbs reports that on an unspecified date in late 2001, Northern Alliance Forces were engaged in battle with the Taliban. Mobbs does not say that the Taliban

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[8] Reports of interviews of Hamdi were deemed exculpatory by United States District Judge Ellis in *United States v. John Phillip Walker Lindh*, Crim. No. 02-37-A (E.D.Va., Alexandria Division, 2001) on the issue of whether Lindh was an "enemy combatant." These interview reports are non-classified, and were turned over to counsel for Lindh in that case who have said that it is not unreasonable to infer that Hamdi's statements are exculpatory to him as well on the enemy combatant issue. (J.A. 307-15.)

[9] The district court observed that "[t]he declaration is silent as to what level of 'affiliation' is necessary to warrant enemy combatant status." (J.A. 435.)

unit with which Hamdi had "affiliated" was engaged in battle with the Northern Alliance. (J.A. 435.) Mobbs does say that Hamdi's unit surrendered to Northern Alliance forces, but does not say where or when this occurred or what activity Hamdi was engaged in at this time. At the time of this surrender, Hamdi apparently was allowed to keep his weapon.[10] As the district court observed, "this does not sound like he was expected to fight or escape," *i.e.*, the Northern Alliance Forces did not expect Hamdi to act like an enemy combatant.[11] Later, while being transported from Konduz to Mazar-e-Sharif, Afghanistan, Hamdi was directed to surrender his weapon to Northern Alliance Forces. Mr. Mobbs does not state whether it was Northern Alliance Forces or a mrmber of Hamdi's unit who gave this direction. After a prison uprising in Mazar-e-Sharif, Hamdi was transferred by Northern Alliance Forces to a prison at Sheberghan, Afghanistan which was also under the control of Northern

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[10] The government places great emphasis on the fact that Hamdi was armed in reaching its conclusion that there is sufficient evidence to establish that he was an enemy combatant. However, if Petitioner were allowed to present evidence, Petitioner would conclusively show that carrying a weapon in Afghanistan is commonplace and does not support an inference that one is a combatant. People in Afghanistan even take weapons to weddings and fire celebratory shots in the air. Eric Schmitt, *U.S. Describes Ground Fire From Afghan Wedding*, N.Y. Times, July 4, 2002, at A6. The Washington Post described this as "the traditional, exuberant spraying of rifle fire in the air." Pamela Constable, *Before Attack, "We Never Heard the Sound of the Planes*," Wash. Post, July 4, 2002, at A16.

[11] The district court further stated, "whether the forces [Hamdi] surrendered to [were] led by a 'war lord' or the unidentified unit to which he was 'affiliated' was led by a 'war lord' or whether the war lords changed sides is not set forth." (J.A. 436.)

Alliance Forces. (J.A. 61, ¶ 4.) There is no allegation that Hamdi took part in the prison uprising.

While under the control of Northern Alliance Forces, Hamdi was interviewed by a U.S. interrogation team. (J.A. 61, ¶ 5.) Mr. Mobbs does not indicate whether or not coercive measures are used by the Northern Alliance on persons under their control or whether or not such measures were used on Hamdi. According to Mr. Mobbs, Hamdi identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." *Id.* (emphasis added).[12] The Mobbs declaration does not elaborate on what Hamdi meant by "if necessary."

Paragraphs 2 and 6 of the Mobbs declaration, (J.A. 61-62), refer to the terrorist group, al-Qaeda. Yet nowhere in the declaration does Mr. Mobbs assert or even suggest that Hamdi was a member of al-Qaeda.

The only definition of the term "enemy combatant" in the Mobbs declaration is as follows: "individuals associated with al Qaida or Taliban were and continue to be enemy combatants." (J.A. 62.) "Associated with" can refer to someone who is no

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[12] The district court was concerned that the Mobbs declaration "does not quote from the alleged admission from Hamdi, but instead appears to be paraphrased." (J.A. 436.) The district court further noted that a permissible inference from Hamdi's statement, even as paraphrased, is that he was not fighting with Taliban forces when he surrendered himself to the Northern Alliance Forces. *Id.*

more than a friend or companion. The Mobbs declaration says, however, that based upon interviews of Hamdi, he was considered to be an enemy combatant. (J.A. 62.) The district court observed that the Mobbs declaration did not make clear whether this determination was made by Northern Alliance Forces based on Northern Alliance interviews and Northern Alliance criteria or whether it was a U.S. military determination. (J.A. 436-437.) The Mobbs declaration gives no indication that whoever made the determination was authorized to do so or that anything more was determined as to Hamdi other than that he was a friend or companion of a Taliban member.

The Mobbs declaration then says that U.S. military screening teams determined that Hamdi met the criteria for enemy combatants over whom the U.S. was taking control, and that he also met the criteria for transfer to Guantanamo Bay, Cuba. (J.A. 62, ¶¶ 7, 8.) These "screening" criteria, and why Hamdi met them, are not set forth in the declaration. Further, Mr. Mobbs does not say that either of these screening teams determined that Hamdi was an enemy combatant. As Respondents state in their brief, the screening teams determined which individuals would be taken into United States custody and which would then be transferred to Guantanamo Bay, Cuba (Resp. Br. at 40), not which individuals were enemy combatants.

The declaration finally asserts that a "subsequent interview of Hamdi confirmed that he surrendered and gave his firearm to Northern Alliance Forces

which supports his classification as an enemy combatant." (J.A. 62, ¶ 9.) The district court again expressed preference for review of the statement itself in lieu of a summary. (J.A. 437.)

The Mobbs declaration does not offer any factual support or explanation for Hamdi's current detention in solitary confinement in the Navy Brig in Norfolk. It is silent on why he was separated from all other detainees at Guantanamo Bay and moved to his current location. The Mobbs declaration does not indicate that Hamdi's change of status in this regard was the product of a determination by a competent military tribunal. This omission is significant because it is the current detention in solitary confinement in Norfolk that is challenged by the Petitioner.[13] Further, the

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[13] The government suggests in its brief that the transfer of Hamdi from Guantanamo to the Navy Brig in Norfolk was because he is a United States citizen (Resp. Br. at 7). The Virginia Pilot reports that Hamdi was flown from Guantanamo Bay, Cuba to Dulles Airport in Chantilly, Virginia, a curious place to take him if his destination was Norfolk. *U.S. Born Taliban Held in Norfolk*, Virginia Pilot, April 6, 2002, J.A. 316-319. The article further reports that the military would have preferred to turn him over at Dulles to U.S. Marshals for prosecution. *Id.* However, when the Department of Justice was not prepared to move forward with charges, Hamdi was then diverted to the Navy Brig in Norfolk. *Id.* It does not take a cynic to conclude that the real reason for Hamdi being brought from Guantanamo Bay to the United States was to prosecute him like John Walker Lindh for being an American fighting with the Taliban, a notion that, according to the article, is still not out of the question.

Mobbs declaration does not set forth facts or reflect determinations made by others which would support treating Hamdi as if he were an unlawful combatant.[14] Finally, the Mobbs declaration does not provide any factual basis for the notion that granting Hamdi's counsel access to Hamdi would pose any problems for national security, would interfere with United States intelligence gathering efforts in any way, or that Hamdi's current detention in Norfolk has anything at all to do with intelligence gathering.[15]

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[14] Although the Mobbs declaration is silent on this point, the government suggests that Taliban detainees are "unlawful combatants" based on a Presidential determination that all Taliban detainees are unlawful combatants. *See* Resp. Br. at 19, n. 6. Respondents, however, say that this Court need not reach the issue of whether Hamdi is an unlawful combatant. (Resp. Br. at 41.) Under the Geneva Convention Relevant to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (J.A. 263-306) and under current United States military regulations, (J.A. 91-127), such determinations must be made on an individual basis by a competent tribunal. Because the government's detention is punitive, (*e.g.*, jail-type institution which houses criminals; solitary confinement separated from all other members of his unit), Hamdi is being treated as an unlawful combatant without first having a competent tribunal determine that status. Therefore, his current detention is unlawful.

[15] While there may be other evidence on this point, the district court's task was to consider only the contents of the Mobbs declaration.

SUMMARY OF ARGUMENT

Respondents seek to discard fundamental constitutional protections guaranteed to every citizen on the ground that this case involves a different "paradigm," (Resp. Br. at 22), in which the Constitution has no place. Respondents are wrong, and their arguments are dangerous. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). It is precisely because Respondents have asserted a vast power to imprison American citizens almost without review by the courts, and more importantly without any right on the part of the citizen to have counsel or otherwise be heard, that the observance of constitutional safeguards is so important in this case.

Respondents seek to establish in this appeal that the indefinite detention of a U.S. citizen can be established solely on the basis of a two-page, nine paragraph declaration by someone who has no personal knowledge of the underlying facts, and without providing the citizen any opportunity to contest the facts set forth in the declaration. What is more, Respondents assert that Hamdi's detention is authorized until the conclusion of the global fight against a non-state terrorist organization, al-Qaeda. In other words, Respondents maintain that Hamdi may be detained indefinitely. Because the so-called war against terrorism, just like the war against poverty and the war on drugs, will not end, the authority asserted by Respondents is breathtaking.

Respondents seek to justify this unprecedented expression of Executive power over an American citizen on the basis of an affidavit rather than legal process, an affidavit that Respondents contend is owed extraordinary deference by the federal courts. Deference by the judiciary in this case, however, would present substantial constitutional problems. In particular, the deference advocated by Respondents would violate the separation of powers.

Although Respondents maintain that Hamdi's petition "directly implicates the national defense," Hamdi's claims do not challenge the conduct of armed conflict overseas, seek review of foreign policy decisions, or even request review of Respondents' treatment of Hamdi. The critical questions in this case concern not Respondents' conduct of foreign affairs or the exercise of the President's authority under Article II, but rather the actions of Mr. Hamdi.

Cognizant of its important role as a counterweight to executive power, the district court acted well within its discretionary authority in the August 16, 2002, Order. District courts enjoy a great deal of discretion to expand the record in habeas proceedings, particularly when it appears that the government is withholding material information. Given the absence of any meaningful way to assess the reliability of the sparse information supplied by Mr. Mobbs in his declaration, the district court appropriately found that the two-page declaration, by itself, was an insufficient basis upon which to engage in meaningful judicial review. Its August 16 Order constitutes

a limited ruling as to the adequacy of the record, and did not purport to reach the merits of the controversy. Nonetheless, Respondents have consistently sought the premature dismissal of this litigation, and this appeal is no different.

Should this Court find that it is within its jurisdiction to address the merits, it should find that Hamdi's imprisonment violates the Constitution. First, the broad authority asserted under international law to detain combatants is inapplicable to American citizens by virtue of a statute, 18 U.S.C. § 4001(a), that speaks directly to the authority to detain citizens.

Apart from this statute, the Constitution does not permit the indefinite imprisonment of an American citizen without process. Just as the Supreme Court recently recognized that the indefinite detention of an alien without process would violate the Constitution, and just as it has long recognized that the seizure of property on the basis of a conclusory affidavit violates the Constitution, the indefinite seizure of Hamdi without process violates the Constitution.

Finally, even if Hamdi actually was "affiliated" in a meaningful way with the Taliban, our nation's conflict with the government of Afghanistan has ended. Therefore Petitioner is entitled to immediate release.

Because we believe that this Court's jurisdiction is limited to review of the August 16 Order, the district court should be affirmed and this matter remanded for further proceedings.

ARGUMENT

STANDARD OF REVIEW

This interlocutory appeal involves review of a district court's determination regarding the adequacy of the factual record and the district court's decision to expand that record. In the context of habeas corpus, courts have broad discretion to order the expansion of the record not only to expedite proceedings but also to "preserv[e] the important right of those raising serious habeas questions to have their claims thoroughly considered by the district court." *See Lonchar v. Thomas*, 517 U.S. 314, 326 (1996). The district court's decisions regarding the adequacy of the factual record therefore are subject to review for abuse of discretion. *See, e.g., Townsend v. Sain*, 372 U.S. 293, 318 (1963) (stating that in every case, a district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim"), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Raines v. United States*, 423 F.2d 526, 530-31 (4th Cir. 1970) (holding that decision to hold evidentiary hearing "is best left to the common sense and sound discretion of the district judges;" and "[l]etters, exhibits and other evidence not previously a part of the record may be considered by the court as part of the record in determining the necessity for an evidentiary hearing"); *see also Wilkins v. Bowersox*, 145 F.3d 1006, 1016 (8th Cir. 1998) (decision to hold evidentiary hearing within discretion of district court); *Flamer v. Delaware*, 68 F.3d

710, 735 (3d Cir. 1995) (reviewing district court's decision regarding expansion of record for abuse of discretion).

I. THE SEPARATION OF POWERS DEMANDS MEANINGFUL JUDICIAL REVIEW OF RESPONDENT'S INDEFINITE DETENTION OF PETITIONER HAMDI, REVIEW THAT IS NOT AVAILABLE AS A MATTER OF LAW WHEN BASED SOLELY ON THE MOBBS DECLARATION

Respondents maintain that the role of federal judicial review in this case is "extremely limited," and that the "Executive's determination that an individual is an enemy combatant is a quintessentially military judgment." (Resp. Br. at 25). These arguments are not only wrong as a matter of constitutional law, but also represent the very danger that the separation of powers is designed to prevent.

A. Constitutional Interests at Stake

The Constitution contains a number of provisions that bear on the issues raised in this case. As an initial matter, Hamdi enjoys the right to be free from imprisonment by the Government unless that imprisonment is imposed in accordance with due process. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Indeed, it has long been settled that the military has no general right to discard the judicial process and imprison citizens at its pleasure. *See Ex parte Merryman*, 17 F. Cas. 144, 152-53 (C.C. Md. 1861) (No. 9,487) (Taney, C.J.); *cf. In re Yamashita*, 327 U.S. 1, 9 (1946) ("[Congress] has not withdrawn, and the Executive branch of the Government could

not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.").

At the same time, the President possesses the constitutional responsibility of preserving and maintaining the security of the United States. Specifically, Article II, Section 2, Clause 1 of the Constitution invests the President with the commander-in-chief power. This "power [is] purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

Respondents wrongly suggest that the federal judiciary has a limited role in evaluating Hamdi's claims in light of the President's power as Commander-in-Chief. As an initial matter, Respondents misquote Justice Douglas's concurring opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948), for the proposition that the enemy combatant determination is a "military judgment" rather than one subject to judicial review. (Resp. Br. at 25). A dissenter in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), Justice Douglas explained in *Hirota*:

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. . . . It is our Constitution

> which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation.
>
> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of habeas corpus can effect a release from that custody.

338 U.S. at 204. In *Hirota*, the President had entered into an agreement with the Allied Powers to establish an International Military Tribunal, and the petitioners therefore were not held by "an American General." Because the President had "made arrangements with other nations for [the petitioners'] trial, he act[ed] in a political role on a military matter." *Id.* Justice Douglas thus concluded that the President's "discretion cannot be reviewed by the judiciary." *Id.* at 209. Justice Douglas concluded that review was unavailable because the petitioners were tried by an international tribunal, not because they were imprisoned by the military.

In fact, Respondents' claim that the Executive branch possesses almost unreviewable discretion in matters related to national security has been repeatedly rejected by the Supreme Court. *See United States v. Nixon*, 418 U.S. 683, 706-07 (1974); *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971); *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Sterling v. Constantin*, 287 U.S. 378, 398 (1932); *cf. United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002) (rejecting

argument that President's determination that defendant was unlawful combatant was not subject to judicial review). "Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.").

The writ of habeas corpus provides the most basic means by which the judiciary can serve as a check to the Executive branch. Indeed, imprisonment without process is the archetypal wrong for which the writ of habeas corpus was designed to remedy. *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."); *accord INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.").

Accordingly, it is for the federal courts, not the Executive branch, to decide whether Hamdi's imprisonment is consonant with the Constitution. *See Nixon*, 418

U.S. at 704 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."). As the Court explained in *Laird v. Tatum*, 408 U.S. 1, 15-16 (1972): "When presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."

B. No Deference Is Due the Executive Branch

This Court has observed that courts owe deference to the political branches "when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi II*, 296 F.3d 278, 281 (4th Cir. 2002). Moreover, this Court has stated that courts must accord deference to military judgments of combatant status. *Hamdi II*, 296 F.3d at 281-82 (citing *Ex parte Quirin*, 317 U.S. 1, 25 (1942), and *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862)). Respondents similarly contend that deference is due in this case because the question whether Hamdi can be legally detained "directly implicates the national defense, not

to mention the safety of American soldiers still stationed in the zone of conflict, and falls at the heart of the military's ability to conduct war." (Resp. Br. at 27).[16]

For five reasons, no deference is due the Respondents in this case. First, Respondents continue to imprison Hamdi in violation of a statute, 18 U.S.C. § 4001(a). Section 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." § 4001(a). This statute "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). Conduct by the Executive branch that is contrary to this statute is the "most vulnerable to attack and in the least favorable of possible constitutional postures." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 640 (1952) (Jackson, J., concurring). Accordingly, little deference is due the Executive branch on this basis.

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[16] *Minns v. United States*, 155 F.3d 445 (4th Cir. 1998), *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), and *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), all cited by Respondents, are inapposite—unless Respondents are concealing the fact that Hamdi serves in the United States military. These decisions involve a line of cases involving challenges to military regulations and tort claims brought by military personnel, and rely upon the significance of the military as "a specialized society separate from civilian society." *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). The analysis in these cases has no relation to Hamdi, a civilian whose claims do not ask for judicial interference in the relationship between soldiers and their superiors.

Second, the refusal to provide due process to an American citizen imprisoned indefinitely by the military requires particular attention by the federal courts. "It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875). Indeed, the war "power is the most dangerous one to free government in the whole catalogue of powers.... Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-47 (1948) (Jackson, J., concurring).[17]

The fact that this case arises in the context of the exercise of military power in defense of our country should not obscure the absence of any limiting principle that

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[17] In *Ex Parte Quirin*, the Supreme Court stated 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*." 317 U.S. at 37 (emphasis added). The fact that a military tribunal may provide constitutionally sufficient process in cases in which a defendant is charged with a violation of the law of war does not mean that imprisonment without process—even if sanctioned by international law—is equally satisfactory under the Constitution. Nor does it mean that the Constitution has as little concern for citizens as it does for enemy aliens. *See Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (distinguishing rights of citizens from those of enemy aliens).

would restrict the deference applied to Respondents' asserted authority to imprison American citizens.

> [The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

Robel, 389 U.S. at 264. Given the breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants, their claims deserve careful scrutiny rather than deference. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) (citing *Korematsu v. United States*, 323 U.S. 214, 235-240 (1944) (Murphy, J., dissenting)) (criticizing "blind judicial deference to legislative or executive pronouncements of necessity").

Third, Hamdi's claims do not challenge the conduct of foreign policy, military decision-making, or even the propriety of his initial detention in Afghanistan. *Cf. Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991) (R. Ginsburg, J.) ("We confront at this time not a dispute over military strategy or discipline, not one between soldiers and their superiors . . . ."). Instead, Hamdi challenges the legality of his indefinite detention in a Norfolk naval brig without due process. It is Respondents who have

raised an affirmative defense, that Hamdi is an "enemy combatant," thereby introducing the issue of national security into this case.

Fourth, no court addressing similar circumstances has applied deference to the degree requested here. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court rejected the Government's argument that the petitioners should be denied access to the courts, and proceeded to consider the question whether the petitioners could be tried by a military tribunal. *Id.* at 24-25. The Court did not address "any question of the guilt or innocence of petitioners," and therefore did not defer to any factual findings related to guilt or innocence. *Id.*

Likewise, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), contains no suggestion that courts should afford any particular deference to the military in the context of a properly filed habeas petition. *Territo* involved an American citizen who challenged his detention as a prisoner of war in the United States. *Id.* at 142-43. And like the circumstances here, the respondent filed a return "setting out . . . that Territo was captured in Italy upon the field of battle, and that he was at the time of capture a soldier in the enemy Italian Army . . . ." *Id.* at 142-43.

But unlike this case, the district court in *Territo* held an evidentiary hearing and issued factual findings. *Id.* at 143. In other words, the district court did not adjudicate the petition based solely upon the return filed by the respondent, but determined that "the issues of the controversy . . . should be tried at the hearing." *Id.*

Furthermore, nothing in that decision suggests that the petitioner in *Territo* was denied access to counsel or was not allowed the opportunity to adduce testimony at the evidentiary hearing. *Territo* provides no authority for the arguments advanced by Respondents here.

As for *The Prize Cases*, that decision has nothing to say regarding deference to the Executive's factual determinations. In *The Prize Cases*, the question before the Court was "whether a state of war existed." 67 U.S. 635, 665 (1862). To answer this question, the Court explained that "this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670; *accord Ludecke v. Watkins*, 335 U.S. 160, 171 (1948). In other words, because the power to declare war is held by the political branches of government under the Constitution, courts do not have a role to play in declaring war—other than to ascertain whether the political branches have declared war. The Court's holding in *The Prize Cases* cannot be read as affording deference to the Executive branch's enemy combatant determinations. In sum, no authority involving similar circumstances supports the judicial blank check that Respondents seek in this case.

Finally, Respondents are asking that federal courts show deference to a determination made not by the United States military but by the Northern Alliance under unknowable conditions. Given the uncertainties of such information, this Court

should not permit the principle of judicial deference to perpetuate errors made in the imprecise context of a military occupation where it is best to err on the side of caution rather than accuracy. In other words, the deference afforded the military in its initial temporary detention of Hamdi overseas has no place apart from that environment. It is even less warranted when the Executive acts outside of Congressional sanction and the stakes are the indefinite and perhaps permanent detention of an American citizen in a naval jail in the United States.

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN FINDING THE RECORD INADEQUATE FOR THE PURPOSE OF MEANINGFUL JUDICIAL REVIEW

Respondents claim that the district court failed to afford the appropriate degree of deference in its August 16, 2002, Order, because it failed to apply the "some evidence" standard to ascertain whether Hamdi is in fact an "enemy combatant." Respondents are wrong for a number of reasons.

To begin, Respondents' argument regarding the district court's failure to apply the appropriate standard of review is premature. The application of a deferential standard of review presupposes a preliminary determination as to the adequacy of the factual record. *Cf. Hamilton v. Texas*, 497 U.S. 1016, 1019 (1990) ("Both the district court and the Fifth Circuit accorded the state trial court's findings deference despite the procedural inadequacies of the state-court proceedings. . . . [I]t is clearly error for

a federal court to accord deference to state-court findings when the state hearing is procedurally inadequate."). In fact, the district court declined to address substantive issues in the August 16 Order, explaining that consideration of such issues "would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated." (J.A. 430.)

The August 16 Order therefore reflects the district court's effort to assess the adequacy of the factual record in this case. A habeas petitioner's claim is to be measured "[n]ot by the pleadings and the affidavits, but by the whole of the testimony." *Walker v. Johnston*, 312 U.S. 275, 287 (1941). Indeed, "[p]etitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969); *see also Blackledge v. Allison*, 431 U.S. 63, 82 (1977).

District courts therefore enjoy broad discretion to consider the sufficiency of the factual record and order the expansion of that record. 28 U.S.C. § 2243, for example, provides that federal courts entertaining an application for a writ of habeas corpus "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." § 2243. Rule 7 of the Rules Governing § 2254 and § 2255 cases also reflect this discretionary authority by providing that district courts "may direct that the record be expanded by the parties by the inclusion of additional

materials relevant to the determination of the merits of the motion." § 2254 and § 2255 Rule 7. District courts thus have broad discretion to order evidentiary hearings and expand the record to ensure the accurate resolution of a habeas petitioner's claims. *Lonchar*, 517 U.S. at 326; *Raines*, 423 F.2d at 530.

Given that the district court enjoys the discretionary authority to review the adequacy of the factual record and order that additional factual materials be submitted, the question becomes whether the district court properly exercised that discretion in this case. Under circumstances in which Respondents refuse to reveal material and non-confidential evidence, the district court would have abused its discretion by finding that the Mobbs declaration supplied a sufficient record for purposes of judicial review.

In *Townsend v. Sain*, 372 U.S. 293 (1963), the Supreme Court enumerated a number of circumstances in which federal courts were required to hold evidentiary hearings in habeas proceedings, including cases in which: (1) the state fact-finding procedures were inadequate; (2) material facts were not sufficiently developed in the record; and (3) state determinations were not fairly supported by the record. *Id.* at 313. The refusal of a state custodian to permit the development of a meaningful factual record remains a significant issue, and counsels against reliance upon the existing record. *Cf. Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (addressing

construction of 28 U.S.C. § 2254(e)(2) and noting that evidentiary hearing necessary when the custodian seeks to "deny a petitioner meaningful review of a federal claim by refusing to permit development of the factual record.").

Of course, if Hamdi were challenging the seizure of property rather than his person, it would be clear that Respondents' submission of a one-sided affidavit in support of their seizure would be entirely insufficient. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *North Georgia Finishing*, for example, the Court held that the procedural due process necessary to temporarily deprive an individual of any possessory interest in tangible personal property required more than an "affidavit . . . [by someone who] need not have personal knowledge of the facts . . . [and that] need contain only conclusory allegations." 419 U.S. at 607.

Even in the most deferential of contexts, the Executive branch cannot unilaterally decide what information is sufficient for purposes of judicial review. In *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), the Supreme Court rejected an immigration commission's deportation determination because the immigration official simply excluded from the factual record evidence and testimony favorable to the petitioner. *Id.* at 464. "It is the province of the courts, in proceedings for review," the Court explained, "to prevent abuse of this extraordinary power [under the Chinese Exclusion Acts], and this is possible only when a full record is preserved of the

essentials on which the executive officers proceed to judgment." *Id.* Because the record upon which the official made his determination was neither complete nor reliable, the Supreme Court rejected that determination.

The Mobbs declaration similarly lacks indicia of reliability, and is remarkable for what it omits rather than what it reveals. In particular, the declaration is opaque in its description of the sources of Mr. Mobbs's information as well as of the particulars regarding Hamdi's relation to the Taliban. It also gives no assurance that Respondents followed their own policies in determining that Hamdi should be detained as an "enemy combatant." Given Respondents' reticence to be more forthcoming, the district court was entirely justified in finding the record inadequate for purposes of meaningful judicial review and ordering that the record must be expanded.

The most significant allegation contained in the Mobbs declaration for purposes of determining Hamdi's belligerent status is that he "affiliated with a Taliban military unit" shortly after his arrival in Afghanistan in July or August 2001. (J.A. 61.) The district court aptly noted that "affiliation" is not an unambiguous term,[18] and that the language provides no meaningful basis upon which to make a judicial finding that Hamdi fought on behalf of the Taliban. Even if "affiliation" was

[18] At that time, it may have been impossible to enter Afghanistan without "affiliating" with a Taliban unit in one manner or another.

the operative question for purposes of determining Hamdi's status, Respondents have provided no information to permit the district court to assess, deferentially or otherwise, Mr. Mobbs assertion. *See Rowoldt v. Perfetto*, 355 U.S. 115, 120-21 (1957) (holding that record based on petitioner's confession of membership "too insubstantial to support the order of deportation" predicated upon "affiliation" with Communist party).[19]

The district court also stated that it was "suspicious" of Mr. Mobbs's statements paraphrasing information allegedly obtained through interrogation of Hamdi. (J.A. 437.) "The determination to preserve an accused's right to procedural

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[19] Respondents maintain that even if Hamdi was a "non-combatant," his indefinite incarceration would be justified because all individuals who are attached to a belligerent force may be detained as prisoners of war. (Resp. Br. at 32 & n.10). The district court did not rule on this issue in its August 16 Order, so the question is outside of this Court's jurisdiction.

To the extent that the Court reaches this issue, Respondents' argument presumes that Hamdi was a "part of the enemy force," rather than a neutral party. *See United States v. Guillem*, 52 U.S. 47, 60 (1850) (discussing rights of neutral, a French citizen formerly living in Mexico, "in regard to his property, as well as his person"). Moreover, a belligerent party's medical and humanitarian aid personnel may be retained "only in so far as the state of health, the spiritual needs and the number of prisoners of war require," and must be returned as soon as transportation and military requirements permit. Geneva Conv. for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, art. 28, 30. Furthermore, the government has no right, even in a war zone, to indefinitely detain Americans working for the U.N. or non-governmental humanitarian organizations. *See* Lisa Turner & Lynn Norton, *Civilians at the Tip of the Spear*, 51 Air Force L. Rev. 1, 65-76 (2001).

due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes." *Chambers v. Florida*, 309 U.S. 227, 237 (1940). The district court's reluctance to rely upon a paraphrase of Hamdi's alleged statements therefore reflects a well-established jurisprudential distrust of so-called confessions obtained under such suspect circumstances. *See Gallegos v. Colorado*, 370 U.S. 49, 50 (1962) ("Confessions obtained by 'secret inquisitorial processes' are suspect, since such procedures are conducive to the use of physical and psychological pressures.") (citations omitted). The fact that Hamdi has not been charged with any crime does not invest Mr. Mobbs's representation of alleged statements culled from Hamdi's interrogation interviews with any additional guarantee of veracity.

Moreover, Respondents have no reason to refuse the district court's request for *ex parte* production of Hamdi's statements. In fact, the Government has already turned over documents reflecting the results of the interrogation of Hamdi to John Walker Lindh's attorneys. (J.A. 308.) Respondents' refusal to turn over those same documents under seal and for *ex parte* review by the district court is baffling.[20]

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[20] Hamdi does not, in any event, believe that such documents can serve as a basis for his continued incarceration unless they are also disclosed to him and he is given an opportunity to respond.

The Mobbs declaration also reveals that the operative facts in this case relating to Hamdi's status all occurred before Hamdi was transferred to Respondents' control. (J.A. 61.) Accordingly, aside from information obtained through interrogation of Hamdi, the only individuals with knowledge regarding Hamdi's relation to the Taliban are members of the Northern Alliance. Without additional corroborating evidence, the district court therefore refused to rely upon information ultimately derived from the Northern Alliance for purposes of assessing Hamdi's indefinite detention without charge in the United States. (J.A. 436-37.) Whatever the interest in affording deference to Respondents' assessment of Hamdi's status while he remained in Afghanistan, the district court owes no deference to the Northern Alliance.

Mr. Mobbs' declaration also does not support Respondents' assertion that Hamdi was an "unlawful combatant." Indeed, there is no evidence that Hamdi did or did not satisfy the requirements under the Geneva Convention to qualify as a prisoner of war. Furthermore, a finding that Hamdi did not qualify for prisoner of war status solely because he did not possess a sufficiently distinctive shirt or cap so as to identify him as a combatant would risk similar treatment for United States Special Forces in Afghanistan who "have been growing beards and donning local garb in an effort to blend in with the local people and their surroundings." James Brooke, *Vigilance and Memory: Kandahar;Pentagon Tells Troops in Afghanistan: Shape Up*

and Dress Right, N.Y. Times, Sep. 12, 2002, at B21; *cf.* Alan Rosas, The Legal Status of Prisoners of War 344-45 (1976).

While Respondents concede that their accusation of unlawfulness is irrelevant for purposes of this proceeding, their repeated reference to Hamdi as an unlawful combatant bears correction. First, Respondents' citation to *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), fails to acknowledge that the *Lindh* court relied upon "Classified Attachment to Gov't Opposition to Motion #2" in support of its statement that the President had determined that the Taliban militia were "unlawful combatants." *Lindh*, 212 F. Supp.2d at 555 n.25. This "classified attachment" has not been made a part of the record in this case. Second, as the court found in *Lindh*, courts do not have to agree with the President's construction of a treaty. *Id.* at 555-556. Third, the Third Geneva Convention provides that when doubt arises as to the status of an individual under international law, the person is presumed to be a prisoner of war until a competent tribunal determines his status. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, Art. 5. The United States generally has followed this requirement. For example, during the Gulf War, the United States performed approximately 1,196 Article 5 tribunals. Law of War Workshop Deskbook ch. 5, p.11 (Cmdr Brian Bill, JAGC, USN, ed. 2000) (citing DoD Persian Gulf Report at 578). The United States has not followed that

practice here. Accordingly, Hamdi is entitled to be treated at the very least as a prisoner of war.

The district court's August 16 Order also expresses entirely justifiable reticence to rely solely upon a "special advisor" to the Under Secretary of Defense for Policy to establish the facts in this case. The Mobbs declaration contains very little information to establish that the Court should have confidence in representations made by the declarant. As the Court noted, the Mobbs declaration states only that Mr. Mobbs has been "substantially involved with matters related to the detention of enemy combatants . . . since mid-February 2002." (J.A. 61.) The position of "special advisor" to the Under Secretary of Defense for Policy, however, did not come into existence until April 24, 2002, after Hamdi was determined to be an "enemy combatant," transferred to Respondents' custody, and imprisoned in Norfolk, Virginia. Under these circumstances, the district court's decision that it could not rely solely upon the representations of Mr. Mobbs, and that it required some corroboration of his statements, was entirely within its discretion.

While Respondents contend that the district court should have swallowed whole everything that is contained in the Mobbs declaration, the district court's suspicions, based in part upon Respondents' dogged refusal to be forthcoming in this proceeding, provides an example of why district courts are given broad discretion to determine when to expand the record. Put differently, the district court is uniquely

positioned to determine whether Respondents may be concealing material information.

Under these circumstances, the district court's modest requests for additional documentary evidence to corroborate the assertions made in the Mobbs declaration are unobjectionable. While Respondents maintain that the additional information "implicate[s] sensitive national security matters concerning the conduct of an ongoing war," (Resp. Br. at 46), this claim is overbroad and makes little sense given Mr. Mobbs's representations as to Hamdi's minor role as an "affiliate" of the Taliban.

Moreover, the district court's August 16 Order is certainly less burdensome than the factual hearing held by the district court in *Territo*. Indeed, the Order constitutes the very "permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing" recommended by this Court in *Raines v. United States*, 423 F.2d at 529. Consequently, the August 16 Order is designed to express this Court's direction to take the least drastic procedures first in order to promptly resolve Hamdi's case. *Hamdi II*, 296 F.3d at 284.

As for "special hazards" that may be present with respect to the development of the factual record in this case, Hamdi's claims do not require review of Respondents' prosecution of the war effort. As noted earlier, Hamdi's claims do not seek judicial review of the Executive branch's conduct overseas.

To the extent that Hamdi's claims require inquiry into matters that affect national security, the solution is not to abandon the inquiry. Just as a mechanism has been devised to address both constitutional and national security concerns in the institution of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C.A. § 1801 - 1811, the district court is capable of balancing Respondents' concern for national security with Hamdi's right to challenge his indefinite imprisonment. "[T]he very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. Under the circumstances, the district court's August 16, 2002, Order was an entirely appropriate exercise of that discretion.

Should the Court find that the district court cannot expand the factual record in this case by ordering Respondents to produce additional documentary evidence, the absence of additional corroboration of the assertions contained in the Mobbs declaration should be held against Respondents. Because Respondents have asserted that Hamdi is an "enemy combatant" as a defense to his Petition, the lack of sufficient evidence to support Respondents' position warrants a judgment in favor of Hamdi.

III. THE DISTRICT COURT SHOULD INDEPENDENTLY REVIEW THE FACTUAL RECORD IN THIS PROCEEDING

Once the district court finds that an adequate factual record exists in this case, it should be allowed to review those facts under a *de novo* standard of review.

Deferential standards of review are appropriate in circumstances in which there has been a prior proceeding that guaranteed at least some measure of due process. In this case, of course, there has been no prior administrative proceeding, and no prior judicial adjudication of guilt. In the absence of the assurance of legality that such a prior judicial or administrative determination would provide, a deferential standard of review is not warranted. *Cf. Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C. D. Va. 1833) (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 than it prescribes" and that the legislation in question "ought, in its construction, [be] strictly confined to its letter").

The searching review of the factual record in this case by the district court was entirely consistent with the independent review applied by the Supreme Court to the pre-trial commitment of Aaron Burr's co-conspirators. In *Ex parte Bollman*, 8 U.S. 75 (1807), the petitioners were faced with no less serious charge than could have been levied against Hamdi. The Supreme Court, however, did not defer to the evidence presented by the Government, but engaged in "an examination of the evidence upon which the commitment was grounded." *Id.* at 125. After scrutinizing the evidence marshaled against the detainees, the Court ordered their discharge on the basis that

the Government had failed to establish probable cause to detain the petitioners for trial on charges of treason. *Id.* at 136-37.

Although *Ex parte Bollman* reveals that federal courts are well positioned to evaluate evidence even in cases involving national security, Respondents make much of the district court's so-called lack of institutional competence to determine the propriety of Hamdi's imprisonment. This position is backwards.

"Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Quarles*, 350 U.S. at 17. Respondents simply are not equipped to provide the procedural guarantees or assurances of accuracy that are required before a civilian can be stripped of his liberty. Deferring to the Executive branch's determination as to who should be imprisoned therefore has had dire consequences. *See Korematsu v. United States*, 584 F. Supp. 1406, 14-18-19 (N.D. Cal. 1984) (granting writ of coram nobis based upon evidence that government withheld material evidence in prior proceedings); *cf.* 50 U.S.C. App. § 1989(a) ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."). That is why the Constitution requires that civilians be tried by civil courts as long as those courts are open. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946).

Respondents seek to avoid this basic point by mischaracterizing Hamdi's claims as an effort to "second-guess[] the military's determination" of his enemy combatant status. (Resp. Br. at 27). On the contrary, the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas on the basis of caution rather than accuracy. The former is a question of due process, the latter a question of reasonableness. Furthermore, Respondents' erroneous characterization of Hamdi's claims is simply a different way of presenting the discredited argument that this case presents a political question.

It is also plain that the "some evidence" standard advanced by Respondents has no place in a proceeding that could provide judicial authorization for the indefinite incarceration of an American citizen. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached . . . ." *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455-56 (1985).

Application of this standard in this context would have several alarming implications. First, Respondents would prevail even if they possessed exculpatory evidence that contradicted evidence proffered to support a detention. Second, application of this standard would prevent or make pointless the introduction of

evidence by a petitioner that would irrefutably establish that the petitioner should be entitled to relief. Third, it is inconsistent with the statutory language originally added in 1867 allowing petitioners to challenge facts set out in a return. 28 U.S.C. § 2243 ("The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts."); *cf.* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (providing that habeas "petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States.").

Fourth, this standard has been applied only in circumstances that are not analogous to those at issue here, and only in circumstances in which there has been a prior fact-finding process. The "some evidence" standard is used in the context of deportation proceedings, for example, an area of law that enjoys fewer constitutional protections in light of Congressional authority to regulate the admission of aliens. *See United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 106 (1927); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). It has also been applied to review of the determination to revoke good time credits. *See Hill*, 472 U.S. at 456. As the Supreme Court noted in *Hill*, the revocation of good time credits is not "comparable to a criminal conviction," and thus did not require comparable degrees of procedural fairness under the Due Process Clause. *Id.*

While Respondents contend that Hamdi's detention is non-punitive, (Resp. Br. at 21; Law Prof. & Practicioners Amici Curiae Br. at 9), a fact we dispute, this argument ignores the fact that Hamdi has not been afforded the privileges of a prisoner of war. Hamdi is being held in solitary confinement, isolated from others similarly situated in Afghanistan and Guantanamo Bay, Cuba, and prohibited from sharing a cell or communicating with other inmates at the Naval Brig. He cannot make contact by telephone. He is prohibited from group prayer and group recreation. In other words, Hamdi has been given few of the rights that form the premise of the argument that detention as a prisoner of war is not analogous to treatment as a criminal. More importantly, this "exclusion from human associations" constitutes solitary confinement, a "punishment of the most important and painful character," and a violation of the Due Process Clause. *See In re Medley*, 134 U.S. 160, 168-71 (1890).

Finally, application of the "some evidence" standard poses a constitutional problem. A standard that authorized indefinite detention of an American citizen on the most insignificant of evidentiary foundations would effectively eliminate the Great Writ, "although no law for its suspension should be enacted." *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95. The Suspension Clause therefore requires a more exacting standard of review. U.S. Const. art. I, § 9, cl. 2.

IV. PETITIONER HAMDI'S IMPRISONMENT VIOLATES THE CONSTITUTION AND IS NOT AUTHORIZED UNDER INTERNATIONAL LAW

The district court did not reach the merits in its August 16 Order. Accordingly, this Court does not have jurisdiction to do so. *See Stanley*, 483 U.S. at 677.

However, should this Court find that it has jurisdiction to address the merits, Hamdi respectfully requests that the Court find that his imprisonment is unlawful. As an initial matter, this Court's statement that Hamdi's detention "is a lawful one" if he is an enemy combatant fails to acknowledge several important caveats.[21]

A. 18 U.S.C. § 4001(a) Obviates the Law of War With Respect to the Detention of U.S. Citizens by the United States

Customary international law is applicable only in the absence of controlling positive law. As Justice Marshall explained in *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), "Till such an act be passed [by Congress], the Court is bound by the law

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[21] The Court's statement certainly is not law of the case. Statements or observations unrelated to a court's holding do not become law of the case. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994)("It is to the holdings of our cases, rather than their dicta that we must attend."); *California v. Rooney*, 483 U.S. 307, 312-14 (1987) (dismissing writ of certiorari as improvidently granted on ground that issue was not squarely before lower court); *Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (noting that dicta does not become law of the case). The legality of Hamdi's detention should he be determined to be an enemy combatant was not before this Court in the prior appeal, and the Court's ruling in *Hamdi II* does not depend upon the Court's statement as to the legality of his detention. Furthermore, this is not a case like *United States v. Aramony*, 166 F.3d 655 (4th Cir. 1999), in which the court was presented with and rejected an identical challenge raised by a co-defendant in a prior appeal. *Id.* at 661.

of nations, which is a part of the law of the land." The Court made the same point regarding the application of customary international law in *The Paquete Habana*, 175 U.S. 677 (1900): "*where there is no treaty, and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations." *Id.* at 700 (emphasis added).

The authorities cited by this Court in support of its statement that Hamdi's detention is a "lawful one" if he is found to be an enemy combatant—*Quirin*, *Duncan*, and *Territo*—were all decided prior to 1971, when Congress enacted 18 U.S.C. § 4001(a). That statute prohibits the detention or imprisonment of citizens by the United States "except" by congressional legislation, and supplants the application of customary international law identified in those authorities at least with respect to citizens, and at least within the United States. *See The Paquete Habana*, 175 U.S. at 700.

The scope of § 4001(a) is unambiguous; it "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe*, 452 U.S. at 479 n.3. Had Congress intended to limit the application of this statute to custody by the Bureau of Prisons ("BOP"), it certainly could have done so explicitly just as it exempted military or naval institutions from the provisions of § 4001(b).

Nevertheless, the legislative history confirms that Congress did not intend to limit the application of § 4001(a). Congress enacted § 4001(a) in 1971 "to prohibit

the establishment of emergency detention camps and to provide that no citizen of the United States shall be committed for detention or imprisonment in any facility of the United States Government except in conformity with the provisions of title 18." H.R. Rep. No.116, 92 Cong., 1st Sess., at 1434 (1971), *available in* 1971 WL 11359. In fact, Congress designed the enabling legislation: "(1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists; and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use." *Id.* In sum, a finding that § 4001(a) should be limited to custody by the BOP or the Attorney General is not borne out by the legislative history.

Respondents protest that under the "longstanding canon of constitutional avoidance," the Court should not construe § 4001(a) so as to "interfere with the well-established authority of the President as Commander in Chief of the armed forces to detain enemy combatants during wartime." (Resp. Br. at 53). This argument is misplaced.

First, Respondents defend Hamdi's continued detention in the United States not on constitutional grounds but on the basis of an international legal principle authorizing the detention of enemy combatants for the duration of the hostilities. (Resp. Br. at 18). The conflict between a congressional statute and a principle of

customary international law does not pose a constitutional question that the Court need avoid.

Second, § 4001(a) does not preclude detention of citizens. It merely requires the government to charge them with a crime first. Third, the detention by the military of American citizens on the ground that they are enemy combatants is not an issue that arises very often. It therefore is difficult to see how § 4001(a) "directly interfere[s]" with the President's power as Commander-in-Chief.[22] And if the issue were to arise more frequently, such circumstances would provide an even more persuasive argument for strict adherence to the plain language of § 4001(a).

Respondents also urge that their incarceration of Hamdi is consistent with § 4001(a) because of the congressional authorization permitting 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, in order to prevent any future acts of international terrorism against the United States . . . ." Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001). Similarly,

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[22] It certainly is possible that § 4001(a) does not apply outside the United States. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"). If that were the case, Respondents themselves have engineered this additional obstacle to the legitimacy of Hamdi's imprisonment.

Respondents suggest that Hamdi's indefinite incarceration is authorized by a statute that appropriates funds related to the detention of prisoners of war. 10 U.S.C. § 956. These arguments are without merit.

Neither of these statutes contain any language explicitly authorizing the detention of citizens. In the absence of language unmistakably authorizing the detention of citizens, these statutes cannot be read to justify Hamdi's imprisonment. As the Supreme Court explained:

> 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.

Ex parte Endo, 323 U.S. 283, 300 (1944). Hamdi's incarceration thus has no congressional sanction.

B. Respondents' Imprisonment of Hamdi Violates the Constitution

Respondents argue that Hamdi was determined to be an enemy combatant while he was in Afghanistan, and that his status has not changed now that he is imprisoned in the United States. This argument ignores the differences between the exigency that governed decision-making in Afghanistan and the concern for accuracy

that should inform these proceedings in the United States. It also ignores the distinct constitutional problem with indefinite detention without due process.

American citizens are entitled to the protections of the Constitution both in the United States and abroad. *See Reid v. Covert*, 354 U.S. 1, 32-33 (1957). The Due Process Clause of the Fifth Amendment therefore prohibits the Government from "depriving" any person of liberty "without due process of law" both inside and outside the country. U.S. Const. amend. V. Indeed, "government detention violates that Clause 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). Accordingly, "the serious constitutional problem" raised by Respondents' asserted power to impose "an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious." *Id.* at 692.

To be sure, the Due Process Clause does not grant a person an absolute right to be free from detention, even when not convicted of a crime. *United States v. Salerno*, 481 U.S. 739, 748 (1987). The Executive branch's temporary detention of citizens during an emergency, for example, may be consistent with the Constitution. *Compare Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (affirming dismissal of wrongful imprisonment action, finding Governer's temporary imprisonment during insurrection reasonable), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952)

(Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").

Whatever the case with respect to temporary detention, however, long term indefinite imprisonment poses a separate constitutional issue. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (noting that case involving extended detention may "raise a different question" then temporary detention at issue); *see also Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133, 1140 n.10 (4th Cir. 1982). That separate issue is presented by Respondents' indefinite imprisonment of Hamdi. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1978). By imposing imprisonment, perhaps indefinitely, without process, Respondents continue to violate the Due Process Clause of the Fifth Amendment.

C. International Law Does Not Authorized Hamdi's Continued Detention

According to the international law invoked by Respondents, they have the authority to detain "enemy combatants" until the conclusion of the underlying international armed conflict. Citing press reports, Respondents maintain that Hamdi's detention remains lawful because "the hostilities in Afghanistan are ongoing." (Resp. Br. at 50-51). This argument impermissibly invites the Court to make an independent determination of the existence of an armed conflict, and confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an

on-going fight against individuals whom Respondents refuse to recognize as "belligerents" under international law.

It is well-settled that federal courts have no authority to declare war or pronounce that hostilities are at an end. *See, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948). Because many legal rights turn on the existence or non-existence of war, however, courts often must determine whether the political branches have spoken on the issue. *See, e.g.*, *Lincoln v. United States*, 197 U.S. 419 (1905); *Dooley v. United States*, 182 U.S. 222 (1901). Even in circumstances where there has been no formal declaration of war, courts look to proclamations by the political branches to ascertain whether a belligerency exists. *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them . . . .").

Because courts do not have the authority to independently investigate whether a belligerency exists, this Court cannot look to the press reports cited by Respondents to determine whether the international armed conflict in Afghanistan remains on-going. Instead, the Court must "refer to some public act of the political departments of the government to fix the dates." *The Protector*, 79 U.S. 700, 702 (1871); *see also The Prize Cases*, 67 U.S. 635, 670 (1862).

According to the public pronouncements by the Executive branch, the international armed conflict with the Taliban has concluded. Indeed, the President

has recognized the change of regimes in Afghanistan in numerous Proclamations as well as a proposed regulation. *See* Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7582 of Aug. 14, 2002, 67 Fed. Reg. 53723 (Aug. 19, 2002); Proclamation 7584 of Aug. 23, 2002, 67 Fed. Reg. 55317 (Aug. 28, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002).

More importantly, the President has terminated the national emergency initially declared by President Clinton specifically to address the Taliban regime in Afghanistan. *See* 64 Fed. Reg. 36759 (July 4, 1999). Pursuant to Executive Order 13268 of July 2, 2002, the President concluded that "the situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban . . . has been significantly altered given the success of the military campaign in Afghanistan." 67 Fed. Reg. 44751. The President therefore "revoke[d] that order and terminate[d] the national emergency declared in that order with respect to the Taliban." *Id.* These public pronouncements demonstrate that the Executive branch has announced the conclusion of the armed conflict with the Taliban.

Respondents' assertion that hostilities remain "ongoing" is irrelevant. Similarly, the conflict with the terrorist organization al-Qaeda has no bearing on the termination of the international conflict with the Taliban. Members of al-Qaeda are

not recognized as "belligerents" under international law—which is why Respondents refused to find that the Geneva Convention applied to al-Qaeda members. And the Supreme Court has specifically held that a continuing conflict with individuals not recognized as "belligerents" does not count for purposes of the exercise of the President's power as Commander-in-Chief. *Lincoln*, 197 U.S. at 429 ("The fact that there was an insurrection of natives not recognized as belligerents in another part of [the Philipines] . . . did not give the President power to impose duties on imports" that he levied pursuant to his powers as Commander in Chief during war with Spain after war's conclusion). For the same reasons, the Executive branch's ongoing efforts to eliminate the terrorist organization al Qaida has no relation to the conclusion of an "international armed conflict" between nation-states that triggered the application of the law of war in the first place. Joan Fitzpatrick, *Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345, 346 (Apr. 2002). Consequently, even if the Court accepts the facts as reflected in the Mobbs declaration, Hamdi is entitled to immediate release.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court affirm the district court's August 16, 2002, Order, and remand this case for further proceedings.

Respectfully submitted this 18th day of October, 2002.

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CERTIFICATE OF COMPLIANCE

1. This brief of the appellee has been prepared using WordPerfect 9 software, Times New Roman font, 14 point proportional type size.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of authorities; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, this brief contains 13,872 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

10/18/02
Date

Frank W. Dunham, Jr.
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Appellee was sent via facsimile, (757) 441-6739, and by Federal Express, standard overnight delivery, to Lawrence R. Leonard, Managing Assistant U.S. Attorney, Office of the U.S. Attorney, 101 West Main Street, Suite 8000, Norfolk, VA 23510, on this the 18th day of October, 2002.

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