No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI et al.,

Petitioners-Appellants

v.

DONALD RUMSFELD et al.,

Respondents-Appellees

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

BRIEF SUBMITTED ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS *AMICI CURIAE*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, The American Civil Liberties Union, who is the amicus curiae, makes the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

( ) YES (X) NO

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

( ) YES (X) NO

If the answer is YES, state the name of the entity and its relationship to the party:

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (See Local Rule 26.1)?

( ) YES (X) NO

If the answer is YES, state the name of the entity and the nature of its financial interest:

Rebecca K Glenberg — 10/25/02

(Signature of counsel) **(date)**

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(Signature of counsel) **(date)**

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Constitution. The American Civil Liberties Union of Virginia is the ACLU affiliate for the State in which the petitioner is being detained. Since its founding in 1920, the ACLU has consistently taken the position that civil liberties must be respected, even in times of national emergency. In support of that position, the ACLU has appeared before the Supreme Court and other federal courts on numerous occasions, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The ACLU has also opposed arbitrary and indefinite detention as a violation of due process in many different contexts. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001). The proper resolution of the issues raised in this case is of critical importance to the ACLU and its members.

INTRODUCTION

Yaser Esam Hamdi, a United States citizen, has now been detained in a Virginia naval brig for more than six months, denied access to an attorney and never charged or tried for any offense. The government maintains that it has the authority to detain Hamdi indefinitely and *incommunicado* without ever subjecting him to prosecution – civilian or military – solely because it has designated him an "enemy combatant." But, as *amici* demonstrate below, the label "enemy combatant" does not and cannot by itself authorize Hamdi's indefinite detention.

According to the government, the events leading to the detention of Hamdi in a military brig, without charges, trial, access to counsel or prospect of release, are as follows. Hamdi went to Afghanistan at some point before September 2001. He was still present in Afghanistan after the United States and coalition forces subsequently began military operations in that country. The Northern Alliance captured Hamdi in Afghanistan in late 2001. The government maintains that Hamdi was "associated" with Taliban forces, for which he would fight "if necessary," and that, at the time of his capture, he was carrying a firearm that he turned over to Northern Alliance forces.

In Afghanistan, the Northern Alliance held Hamdi in two different prisons that it maintained. At the second, a U.S. interrogation team interviewed him. Thereafter, a U.S. military officer ordered his transfer to a U.S. detention facility in

Kandahar. After another "military screening" in January 2002, Hamdi was taken to the Naval Base at Guantanamo Bay, Cuba. In April 2002, based on records demonstrating Hamdi's U.S. citizenship, the government removed him from Guantanamo Bay, separating him from other persons captured in Afghanistan, and transferred him to the Norfolk Naval Brig, where he has since been held without access to counsel.

Petitioner's papers and other *amici* address the full range of issues raised by the government's appeal. The issue *amici* address here is not whether Hamdi is properly designated as an "enemy combatant," but rather whether his detention is authorized *even assuming* the designation were upheld.

In its prior opinion in this case, the Court observed in *dicta* that the "government's present detention of [Hamdi] is a lawful one" if he "is indeed an 'enemy combatant.'" *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). However, that question was not before the Court.[1] In fact, the determination of "enemy combatant" status does not establish the legality of Hamdi's detention.

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[1] Contrary to the government's suggestion, the Court's *dicta* is not the law of the case. *See, e.g., 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."); *United States v. Barnes*, 251 F.3d 251, 258 (1st Cir. 2001) ("[T]he language which the appellant embraces is classic dictum – it can be removed from the opinion without either impairing the analytical foundations of the court's holding or altering the result reached – and we do not consider ourselves bound by it.").

There is a critical difference between *lawful* and *unlawful* combatants, a distinction the Court did not consider, and that the government has obscured. If Hamdi is a "*lawful* combatant," he is entitled to the rights and protections afforded to prisoners of war. If the government has reason to believe he engaged in unlawful conduct, he may be charged and tried as an "*unlawful* combatant." The government is doing neither. It has affirmatively abjured prisoner of war status for Hamdi, *see* Brief of Respondents-Appellants at 41, and it has expressly acknowledged that "Hamdi has not been charged with any crime, or even any specific offense under the laws of war." *Id.* at 21. In short, the government has invented a new category of detainee: an enemy combatant who is neither detained as a prisoner of war nor charged and tried as an unlawful combatant for violating any law. As a result, Hamdi is isolated in a military jail without any prospect of release, or ever being brought to trial. Far from being authorized by the relevant precedent, this detention directly contravenes 18 U.S.C. § 4001 and is wholly at odds with the due process clause.

ARGUMENT

THE INDEFINITE DETENTION OF HAMDI IN A MILITARY JAIL WITHOUT CHARGES, TRIAL, OR ACCESS TO COUNSEL IS UNAUTHORIZED BY LAW AND VIOLATIVE OF FUNDAMENTAL PRINCIPLES OF DUE PROCESS

The Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Freedom from physical restraint "has always been at the core of the liberty

protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The most basic principles of due process dictate that executive officials cannot impose detention – whether it be based upon an accusation of wrongdoing or a desire to prevent future harm – without demonstrating its propriety at an adversarial proceeding at which the government bears a heavy burden of proof and at which any penalties imposed have been prescribed by the legislature.

Moments of crisis and national anxiety, however legitimate, cannot be permitted to negate these constitutional principles. "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. . . . [But] when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall & Brennan, JJ., dissenting). The Supreme Court has consistently held that, even in times of war, constitutional principles respecting the rule of law warrant judicial review of executive action and further demand that the executive branch respect constitutional norms. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Endo*, 323 U.S. 283 (1944); *Raymond v. Thomas*, 91 U.S. 712 (1875); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

Accordingly, Hamdi's detention must satisfy the requirements of due process. In the absence of any statutory authority, and given the affirmative prohibition of 18 U.S.C. § 4001 as well as the severe deprivation of liberty to which Hamdi is subjected, his detention is unconstitutional. There is simply no legal authority for the detention that the government is imposing in this case.

I. The Enemy Combatant Designation Does Not Authorize the Government's Indefinite Detention of Hamdi

The government posits that its unilateral designation of Hamdi as an "enemy combatant" authorizes his *incommunicado* detention in a naval jail and ends any further inquiry into his detention. But no case supports that proposition. Of critical importance is that an enemy combatant may be either *lawful* or *unlawful*. *See Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction . . . between those who are lawful and unlawful combatants."). The government's use of the "enemy combatant" label obscures the question of whether the detention is authorized because that designation, even if allowed, is merely the first step in determining whether to treat a combatant as a prisoner of war if he is "lawful" or instead as an "unlawful combatant" who is charged and tried for violating the law.

The government argues that *Quirin* authorizes the detention at issue here. But neither as a matter of law nor logic can *Quirin* be read as support for the broad claim of entitlement to detain Hamdi indefinitely without any trial at all. Whatever

else may be said about *Quirin*, the defendants in that case were tried.[2] The *Quirin* petitioners, in sharp contrast to Hamdi, were charged with violations of the law less than three weeks after they surreptitiously left a German submarine and came ashore in the United States. *See id.* at 18-24. *Quirin* emphasized the distinction between lawful combatants, "who are subject to capture and detention as prisoners of war," and unlawful combatants, "who are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31.[3]

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[2] In fact the only question before the *Quirin* Court was "whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." *Quirin*, 317 U.S. at 29; *accord id.* at 18-19.

The government also cites *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), which, like *Quirin*, dealt with the question of whether a military commission had jurisdiction to try the petitioner for specific violations of the law of war. The charges against petitioner in *Colepaugh* indicated:

> (1) that during November 1944, the petitioner . . . acting for the German Reich, secretly passed through, in civilian dress, contrary to the law of war, the military and naval lines of the United States for the purpose of committing espionage, sabotage and other hostile acts; and (2) that the accused . . . appeared and remained in civil dress, contrary to the law of war behind the military lines of the United States for the purpose of committing espionage, sabotage and other hostile acts.

Id. at 431. Nowhere in its opinion does the Court suggest that the government could have detained the petitioner indefinitely as an unlawful combatant without some form of trial.

[3] The government seizes on language in *Quirin* to the effect that both lawful and unlawful combatants are subject to "capture and detention." Properly understood, that phrase refers to detention as a prisoner of war – a status that Hamdi has been denied. *Quirin* does not authorize the government to detain him indefinitely where he is neither charged nor treated as a prisoner of war.

While sanctioning a military trial for unlawful combatants,[4] *Quirin* does not hold that the government could have indefinitely detained them without charges, trial, counsel, or prisoner of war status.

Similarly, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), provides no support for Hamdi's detention. In contrast to the unlawful combatants in *Quirin*, Territo was a combatant detained as a prisoner of war. He was an American-born Italian Army private captured in Italy by U.S. military forces during World War II. The Court reviewed the legality of the detention and held that Territo "was properly held as a prisoner of war." *Id.* at 146. While *Territo* might sanction Hamdi's detention as a prisoner of war[5] – an option that the government has expressly rejected in this case – it does not remotely suggest that the government can deny him prisoner of war status and still detain him without charges or trial.[6]

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[4] Notwithstanding its affirmation of military trials for the *Quirin* petitioners, the Court acknowledged that "there are some acts regarded . . . as offenses against the law of war which would *not* be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." *Quirin*, 317 U.S. at 29 (emphasis added).

[5] Notably, the court adjudicated Territo's habeas corpus challenge to his detention as a prisoner of war and reviewed the factual underpinnings of his internment. Far from supporting Respondents' position, then, *Territo* demonstrates that someone in Hamdi's position is entitled to a judicial determination of the legality of his detention as a prisoner of war.

[6] No other case cited by the government supports a detention other than as a prisoner of war or as an unlawful combatant who is charged and tried. Although the government cites *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946), that

In short, the law presents the government with two choices even if Hamdi is an "enemy combatant."[7] It may detain him as a prisoner of war for the duration of active hostilities,[8] or it may charge him with a violation of the law and bring him to trial. The government has rejected both courses. It refuses to accord him the status and attendant protections of a prisoner of war.[9] And it has declined to charge him with any crime, be it a violation of federal or international law.[10]

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case, which held that the Hawaiian Organic Act did not authorize military tribunals for civilians, is not remotely on point. Its passing reference to *Quirin* and *In re Yamashita*, 347 U.S. 1 (1946) (upholding use of military commission after end of hostilities to try enemy alien for law-of-war violations committed before the cessation of hostilities), in noting what the case was *not* about is hardly relevant authority.

The government's reliance on *Ex parte Toscano*, 208 F. 938 (S.D. Cal. 1913), is also misplaced. In *Toscano* foreign soldiers were interned evidently as prisoners of war in "honorable detention and internment" in neutral territory, pursuant to the express authorization of the Hague Treaty.

[7] Because Hamdi's detention is unauthorized even if he is an enemy combatant, *amici* do not address at this stage the propriety of that designation for Hamdi or the Judiciary's power to review the designation.

[8] This is not to say that the government can deem those hostilities to continue indefinitely on the ground that the country is engaged in a potentially endless "war" against terrorism.

[9] Among the protections that must be afforded prisoners of war are the right to communicate with family members, limitations on criminal-like incarceration, and restrictions on coercive interrogation. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 17, 21-22, 70-71; *see also United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (reviewing detention conditions required for prisoners of war).

[10] As noted, *amici* do not address the separate question of whether, if charges were brought, the requisite trial could be conducted by a military tribunal because

II. Hamdi's Detention is Contrary to Congressional Enactments

The Supreme Court has long recognized that the due process clause places both substantive and procedural limits on the government's ability to restrain individual liberty. As a threshold matter, in our system of divided government, the executive may not act alone, even in times of war. *See Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). At a minimum, before the government imposes a restraint on liberty, the legislated authority to do so must be clear and unambiguous, even for restraints on liberty that are far less serious than the isolation and imprisonment to which Hamdi has been subject for more than six months. *See Kent v. Dulles*, 357 U.S. 116 (1958). Moreover, pursuant to traditional canons of statutory construction, any claimed authority should be

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the President has already announced that American citizens will not be subject to military tribunals, even if properly designated as "unlawful combatants." *See* 66 Fed. Reg. 57833-36 (Nov. 13, 2001). We note the recent observation of the Human Rights Chamber for Bosnia and Herzegovina:

> [T]he U.S. President's Military Order and the Military Commission Order No. 1 establish tribunals whose independence from the executive power is subject to deep-cutting limitations. The rights to trial within a reasonable time, to a public hearing, to equality of arms between prosecution and defence and to counsel of the accused's choosing are all severely curtailed. Moreover, the applicants are discriminatorily deprived of the guarantees enshrined in the Bill of Rights of the Constitution.

Boudella v. Bosnia and Herzegovina, Case Nos. CH/02/8679, CH/02/8689, CH/02/8690, and CH/02/8691, The Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits, para. 299 (Oct. 11, 2002) (available at www.nimj.org).

narrowly construed to avoid constitutional difficulties. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

To support its actions in this case, the government relies on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), passed right after the September 11th attacks on the World Trade Center and Pentagon. That resolution provides:

> [T]he President is authorized 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 by such nations, organizations or persons.

By its terms, this resolution is not a declaration of war, and there would be serious problems (not addressed in this brief) with any attempt to read it in such broad terms. To the extent that it is construed to establish a "war on terrorism," however, it highlights the potentially limitless duration of the authority the government claims with respect to Hamdi's detention.

More to the point, this congressional resolution, however characterized, does not speak to the detention challenged here.[11] While detention of prisoners of war

[11] In a footnote, the government suggests that Hamdi's detention is also authorized by 10 U.S.C. § 956(5), a standard funding statute that allows the Secretary of Defense to divert funds from one budget line to another. Although this provision would permit funds to be spent for authorized detentions, it is not in itself an authorization for any detentions. Certainly, Section 965, last amended in 1984, does not suggest that the government can lock American citizens in military

might be attendant to the military force it authorizes, the resolution cannot be read to sanction the indefinite detention of an American citizen without charges or trial. *See Zadvydas*, 533 U.S. at 689 (requiring court to ascertain whether statute can be construed to avoid serious doubts as to its constitutionality). As the Supreme Court has cautioned:

> In interpreting a war-time measure we must assume that [the government's] purpose was to allow for the greatest possible accommodation between those liberties [guaranteed by the Constitution] 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, 299 (1944).

In fact, Congress has not been silent on the issue of detention. To the contrary, Congress has passed two statutes explicitly addressing detention, and both are inconsistent with the authority the government now claims. Section 4001 of Title 18 of the United States Code is most directly on point. It provides that "[no] citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This broad statutory prohibition was enacted in 1971 in direct response to the Emergency Detention Act of 1950, Pub. L. No. 81-131, 64 Stat. 987, which in turn was adopted during the

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brigs and throw away the key without due process.

height of the "Red Scare" and permitted the detention, without trial, of even American citizens if the President declared an internal security emergency. In a letter to Congress in 1969, the Justice Department observed that "the continuation of the Emergency Detention Act is extremely offensive to many Americans."[12] Congress acted two years later. As the report of the House Judiciary Committee makes clear, Congress concluded:

> [I]t is not enough merely to repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.

H.R. Rep. No. 92-116 (Apr. 6, 1971), *reprinted in* 1971 U.S.C.C.A.N 1435, 1438. The language of 18 U.S.C. § 4001 contains no exceptions and plainly reflects this congressional intent.

Contrary to the government's assertion, 18 U.S.C. § 4001's import is not confined to the detention of American citizens in civilian prisons and detention facilities. In enacting this provision, Congress explicitly stated 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

[12] Letter from Deputy Attorney General Kleindienst to Chairman Celler of the House Judiciary Committee (Dec. 17, 1969), *quoted in* H.R. Rep. 92-116 (Apr. 6, 1971), *reprinted* in 1971 U.S.C.C.A.N. 1435, 1437.

18." 1971 U.S.C.C.A.N. at 1435 (emphasis added);[13] *accord Howe v. Smith*, 452 U.S. 473, 480 n.3 (1981).

The USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), further confirms that the government lacks the requisite statutory authority for indefinite detentions without charges or trial. The Patriot Act permits the detention of aliens – not citizens – suspected of terrorism, but only for a period of seven days, after which the alien must be charged with either an immigration or criminal

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[13] While noting concerns that the Emergency Detention Act would "permit[] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II," Congress in fact anticipated and intended to address preventive detention of the sort that the government is now maintaining it has the authority to effect. *Id.* at 1436. In evaluating the Emergency Detention Act it was repealing with 18 U.S.C. § 4001, Congress noted:

> [T]he constitutional validity of the statute [being repealed] is subject to grave challenge. The Act permits detention of [] each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage. This criterion would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged. In a number of ways, . . . the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense.

Id. at 1438. As for the prospect that "drastic measures [might] be called for at some future time" Congress indicated that "new and different legislation" could be "tailored to current needs." *Id.* But for a statute such as the Emergency Detention Act, "[t]he concentration camp implications . . . render it abhorrent; there is no compensating advantage to be derived from permitting this law to remain on the

violation. *See* 8 U.S.C. § 1226A. If Congress had intended the Authorization for Use of Military Force to permit the indefinite detention of American citizens, then the Patriot Act's enactment of § 1226A, only weeks after the military force authorization, would make no sense at all, unless one assumed that Congress intended to give aliens suspected of terrorism greater protection against arbitrary detention than citizens. These three congressional actions can only be reconciled by concluding that Congress has not authorized – and, in fact, has expressly prohibited – the detention of citizens, like Hamdi, without charges or trial.

The President cannot rely on proclamations to claim prerogatives for the executive branch that Congress has not authorized. For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Supreme Court ruled that presidential military orders could not expand the power of the military beyond what Congress had statutorily authorized. Similarly, in *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487), the Chief Justice wrote that "[t]he only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty . . . 'that he shall take care that the laws be faithfully executed.'" The President, he added, "certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and

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books." *Id.*

imprisoning a person without due process of law." *Id.*

In rare circumstances, a military emergency might arise that requires an immediate presidential response. But, for these purposes, an emergency is not defined by the gravity of the threat but by whether time would permit Congress to perform its constitutional lawmaking function. Understood in those terms, the President obviously cannot rely in this case on the existence of an emergency to justify the indefinite detention of American citizens without congressional authorization. The Administration has gone to Congress repeatedly since the tragic events of September 11th, and has neither sought nor received the unprecedented authority it seeks to exercise here.

III. Due Process Requires the Government to Prove the Propriety of Detention

Moreover, legislation authorizing indefinite detention without charges or trial would violate the Constitution. The nature and duration of Hamdi's confinement must be taken into account in any substantive due process analysis. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (recognizing that serious constitutional problems would arise if aliens deportable on the basis of a criminal conviction were subject to indefinite detention even when actual deportation is not reasonably foreseeable); *Jackson v. Indiana*, 406 U.S. 715 (1972) (holding that the state could not confine someone as incompetent to stand trial if there was no realistic chance he would soon become competent); *see also Kansas v. Crane*, 534

U.S. 407 (2002); *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Additionally, there must be procedural safeguards that reflect the liberty interests at stake and that impose on the government a burden of proof commensurate with the importance of those interests. *See United States v. Salerno*, 481 U.S. 739 (1987), *In re Gault*, 387 U.S. 1 (1967).

In *United States v. Salerno*, 481 U.S. 739 (1987), for example, the Court held that certain criminal defendants could be detained prior to trial on the basis of dangerousness but only because Congress had carefully limited the scope of the statute to specified crimes, the length of detention was necessarily limited, and the government was required to prove in an adversary hearing with the detainee represented by counsel that there were no other conditions of release that would assure the safety of the public. And, in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court ruled that a criminal defendant who had been found not guilty by reason of insanity was entitled to be released from a mental institution unless the state could prove at an adversary hearing that he remained mentally ill and dangerous.

Here, the government argues for essentially the antithesis of the protections required by *Salerno* and *Foucha* while offering no explanation of why incapacitation of Hamdi as a prisoner of war would not ensure the safety of the public. It insists that its assertion that Hamdi is an "enemy combatant" is entitled to near-total deference and that, solely on the basis of that determination, he can be

held indefinitely in a military jail without charges or trial. Thus, it maintains, Hamdi has no need for counsel and no right to challenge the government's facts. Rather than meet the heightened standard of proof imposed in both *Salerno* and *Foucha*, let alone satisfy the reasonable doubt standard required in criminal cases, the government contends that Petitioner can be confined indefinitely so long as it presents "some evidence" in support of its claims in what amounts to an *ex parte* proceeding. The untenable nature of the government's position is made all the more striking by the lack of any cogent explanation for depriving Hamdi of procedural safeguards that have been afforded to the similarly situated John Walker Lindh, who was allowed to meet with counsel and contest the allegations against him

Although the government cannot cite a single case that sanctions the denial of access to counsel to contest indefinite detention in any context, it nonetheless asserts that Hamdi may not have access to counsel to challenge the factual underpinnings or legal basis of his detention. *Amici* are not aware of any court holding that a detainee – even one characterized as an "enemy combatant" – is precluded from conferring with counsel to prosecute a habeas petition challenging his detention. *Cf. In re Yamashita*, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956); *In re Territo*, 156 F.2d 142 (9th Cir. 1946). The government argues that any right to counsel attaches

only if a combatant is charged – a step the government has refused to take. Simply put, the government cannot use detention without any process as the justification for denying Petitioner access to counsel in order to challenge that detention.

In support of its assertion that "some evidence," in the form of a two-page declaration of hearsay statements, suffices to deprive Petitioner of his liberty, the government mistakenly relies on *INS v. St. Cyr*, 533 U.S. 289, 307 (2001), *Eagles v. Samuels*, 329 U.S. 304 (1946), *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927), and *Fernandez v. Phillips*, 268 U.S. 311 (1925). But in each of those cases, the petitioner sought review of a prior adjudicatory proceeding at which he was able to present evidence and challenge the government's factual allegations. Where a court is reviewing a prior administrative determination in habeas corpus, the "some evidence" standard may be applicable. In this case, of course, Hamdi has been denied any process whatsoever and has had no opportunity to refute the government's assertions or even to communicate with his counsel. The government seeks a judicial rubber stamp of bare and conclusory allegations made in what, due to Hamdi's isolation and inability to provide any rebuttal evidence, amounts to a virtual *ex parte* proceeding. None of the government's cases sanction judicial approval of indefinite detention that is premised on factual allegations that the detainee has never been allowed to contest.

While attempting to insulate its minimal factual assertions from judicial inquiry, the government also asserts unilateral authority to determine the legal consequences that flow from the supposed facts. For the conclusion that Hamdi is an "unlawful combatant," as distinguished from a "lawful combatant," the government relies exclusively on the President's proclamation declaring Taliban militia members to be "unlawful combatants." *See* Brief of Respondents-Appellants at 41-42. With this proclamation, the government seeks not only to avoid the requirement that detention of an American citizen be legislatively authorized, but also to circumvent the proper role of the courts. According to the government, the President's unilateral proclamation constitutes a "conclusive" determination that suffices to impose indefinite detention without due process. In support of this proposition, the government cites *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), notwithstanding its clear observation that "[c]onclusive deference [to the President's unlawful combatant determination], which amounts to judicial abstention, is plainly inappropriate." *Id.* at 556-57.[14]

The government's actions in this case cannot be sustained. Not only has

[14] Unlawful-combatant designation by proclamation would also appear to contravene the government's own military regulation requiring that persons taken into military custody be treated as prisoners of war until some other status is determined by "competent tribunal." *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* Reg. 1-6(a) (1997).

Congress failed to authorize Hamdi's detention, it has prohibited it. That, alone, should be dispositive. In addition, however, the decision to jail Hamdi indefinitely, without charges or trial, goes well beyond what the Supreme Court allowed in *Ex parte Quirin* and fails to comport with well-settled due process standards. The government's interest in incapacitating Petitioner can be fully accomplished by treating him as a prisoner of war. In the alternative, the government can seek to charge him for violations of law. With appropriate procedures, Petitioner can then be held pending trial and, if convicted, imprisoned for the maximum sentence permitted by law. Continuing to hold him without prisoner of war status and without charges or trial is neither necessary nor authorized. In sum, the government has not justified its attempt to depart from our constitutional traditions.

CONCLUSION

For the reasons and authorities stated above, the government's decision to subject Petitioner to indefinite detention, without charges or trial, cannot be sustained. Such detention fails to find any support in the "enemy combatant" case law, and it directly contravenes 18 U.S.C. § 4001 and the due process clause.

Respectfully Submitted,

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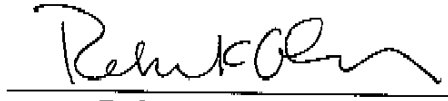

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