No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi,

Petitioners-Appellees,

v.

DONALD RUMSFELD, Secretary of Defense, and
COMMANDER W.R. PAULETTE, Norfolk Naval Brig

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Robert G. Doumar, Senior District Judge

BRIEF SUBMITTED ON BEHALF OF THE CENTER FOR CONSTITUTIONAL RIGHTS, 140 LAW PROFESSORS AND 19 INTERESTED ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING YASER ESAM HAMDI'S REQUEST FOR AFFIRMANCE

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

No. 02-7338 *Yaser Esam Hamdi et al. v. Donald Rumsfeld, et al.*

Pursuant to FRAP 26.1 and Local Rule 26.1, amici curiae the Center for Constitutional Rights, National Lawyers Guild, National Immigration Project of the National Lawyers Guild, National Lawyers Guild New York Chapter, Human Rights Watch, Southern Poverty Law Center, Unitarian Universalist Service Committee, Puerto Rican Legal Defense and Education Fund, Inc., National Coalition to Protect Political Freedom, First Amendment Foundation, National Lawyer's Guild / Maurice & Jane Sugar Law Center for Economic & Social Justice, Civil Liberties Monitoring Project, Association of Legal Aid Attorneys, U.A.W. Local 2325, Partnership for Civil Justice, Trial Lawyers for Public Justice, Freedom Socialist Party, Jewish Alliance for Law and Social Action, The Innocence Project at the Benjamin N. Cardozo School Of Law, Ella Baker Center for Human Rights, and the American Friends Service Committee make the following disclosure:

1. Are amici publicly held corporations or other publicly held entity?
[ ] Yes [X] No

2. Do amici have any parent corporations?
[ ] Yes [X] No

3. Is 10% of the stock of any amicus owned by a publicly held corporation or other publicly held entity?
[ ] Yes [X] No

4. Is there any other publicly held corporation that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
[ ] Yes [X] No

5. Is any amicus a trade association?
[ ] Yes [X] No

_____ _____
Barbara Olshansky date

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The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of citizens accused of seditious behavior (*e.g.*, H. Rap Brown, the Chicago Seven) or thought to pose a national security threat during wartime, *see, e.g.*, *United States v. United States District Court*, 407 U.S. 297 (1972); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975). As part of its advocacy on behalf of those whose civil, constitutional and human rights have been violated, CCR represents several British and Australian citizens detained at Camp Delta in the Guantanamo Bay Naval Station. *See Rasul v. Bush*, 2002 WL 1760825, 2002 U.S. Dist. LEXIS 14031 (D.D.C. July 30, 2002), currently on appeal to the D.C. Circuit.

The National Lawyers Guild is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has a long history of representing individuals who the government has deemed a threat to national security. The Guild represented the Hollywood Ten, the Rosenbergs, and thousands of individuals targeted by the House Un-American Activities Committee. Guild members argued *United States v. United States District Court*, the Supreme Court case that established that Richard Nixon could not ignore the Bill of Rights in the name of national security and led to the Watergate hearings and Nixon's resignation. Guild members defended FBI-targeted members of the Black Panther Party, the American Indian Movement, the Puerto Rican independence movement and helped expose illegal FBI and CIA surveillance, infiltration and disruption tactics (COINTELPRO) that the U.S. Senate "Church Commission" hearings detailed in 1975-76 and which led to enactment of the Freedom of Information Act and other specific limitations on federal investigative power.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices.

The Southern Poverty Law Center ("The Center"), founded in 1971, is a national, non-profit organization dedicated to combating intolerance and discrimination through litigation and education. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, immigrants, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before the United States Supreme Court, including a case last term, *Hope v. Pelzer*, 122 S. Ct. 2508 (2002). The Center recently represented immigrant children in a case challenging the Immigration and Naturalization Service's failure to provide counsel to indigent children facing removal proceedings. *See Gonzalez-Machado v. I.N.S.*, CS-02-0066-FVS (E.D. Wash.).

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a social justice bar organization whose members regularly practice before the Executive Office of Immigration Review, the Board of Immigration Appeals, and the federal courts. The National Immigration Project provides technical assistance and training to state and federal public defender organizations, the private immigration bar, and international human rights organizations. It authors *Immigration Law and Crimes* (West Group 2002), a treatise on the intersection of criminal and immigration laws. The National Immigration Project has previously appeared as *amicus curiae* before the Fourth Circuit in *Asliyalfani v. INS*, 208 F.3d 208 (4th Cir. 2000); *Kofa v. INS*, 660 F.3d 1084 (4th Cir. 1995); *De Osorio v. INS*, 10 F.3d 1034 (4th Cir. 1993); *M.A. A26851062 v. INS*, 899 F.2d 304 (4th Cir. 1990).

Grounded in Unitarian Universalist principles that affirm the worth, dignity and human rights of every person, and the interdependence of all life, the Unitarian Universalist Service Committee is a voluntary, nonsectarian organization working to advance justice throughout the world. The case of *Hamdi v. Rumsfeld* tests one of the basic rights that any person can expect—the right to a fair and transparent legal forum in which to defend oneself.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. It seeks to ensure the equal protection of the laws and to protect the civil rights of Latinos and/or immigrants through litigation and policy advocacy. Since its inception PRLDEF has participated both as counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws, including the equal protection and due process clauses of the United States Constitution.

The National Lawyers Guild/Maurice & Jane Sugar Law Center for Economic & Social Justice (Guild Law Center/GLC) is a national non-profit litigation/policy project of the National Lawyers Guild. The mission of the GLC is to provide legal advocacy and support to the powerless, the oppressed, the disenfranchised, and those seeking social change. The underlying principle which has directed the GLC since its founding in 1990 is the belief that economic rights and civil rights are inseparable. The government's extraordinary position in this case, seeking to deny basic constitutional protections to a U.S. citizen solely on the executive's bald assertion that he is an "enemy combatant," threatens the rights of all working and oppressed people, especially of those who openly express disagreement with our government and its policies.

The purpose of the Civil Liberties Monitoring Project is to monitor, document, advocate and educate about civil rights and civil rights abuses by law enforcement and other government agencies. The aim of CLMP is to encourage public awareness of constitutional rights and encourage involvement of the whole community in preserving and protecting them.

The First Amendment Foundation is a sixteen year old constitution rights organization. Its purpose is to educate the public about the fluid nature of First Amendment rights; to maintain these rights the public must actively defend them. It uses the historical experience of its sister group, NCARL, to share lessons about the J. Edgar Hoover/McCarthy era, COINTELPRO and other abuses against large sectors of individuals and organizations.

The National Coalition to Protect Political Freedom is a 4 year old group of national and regional organizations and many individuals. It is dedicated to protecting due process and First Amendment rights. Among its member organizations are the American Arab Anti-Discrimination Committee, Sikh Mediawatch, American Muslim Council, Irish Northern Aid Committee, National Association of Criminal Defense Lawyers, Arab American Institute, Chicago Committee to Defend the Bill of Rights, Tampa Bay Coalition for Justice and Peace, Council on American Islamic Relations, and the National Committee Against Repressive Legislation.

The Association of Legal Aid Attorneys, UAW Local 2325 ("ALAA") is the oldest and largest union of attorneys in the United States. Its membership consists of 650 staff attorneys at The Legal Aid Society of New York who annually represent over 200,000 indigent clients, most of them criminal defendants. ALAA is deeply committed to defense of civil and constitutional rights, many of which have eroded since September 11, 2001.

Partnership for Civil Justice, Inc. ("PCJ") is a public interest law firm that litigates on behalf of individuals and organizations advancing constitutional and civil rights claims challenging discrimination and advocating the right to engage in political dissent. PCJ represents many political activists and organizations in defending and securing their constitutional rights to due process and First Amendment freedoms of speech and association.

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless.

The Freedom Socialist Party ("FSP") is a national political party that organizes for the full liberation of humanity through the replacement of capitalism with socialism. The FSP engages in electoral campaigns, educational endeavors such as forums, classes, and publications, and community organizing. The party fought for and won protections for the civil liberties of political dissenters in *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990). Recently, the FSP won the right to appear on the Oregon ballot in the party's full name. *Freedom Socialist Party v. Bradbury*, 182 Ore. App. 217, 48 P.3d 199 (Or. Ct. App. 2002).

The Jewish Alliance for Law and Social Action is a Boston-based human rights organization, inspired by Jewish teachings and values, committed to social justice, civil rights, and civil liberties. Inheriting an eighty year old tradition of advocacy and pursuit of progressive public policy in the United States, the members of JALSA are committed to a defense of civil liberties. JALSA is concerned about the erosion of civil liberties since September 11 and works to protect all Americans from the loss of constitutional protections.

The Innocence Project at the Benjamin N. Cardozo School of Law is a nonprofit legal clinic which represents prisoners whose claims of innocence can be proved through DNA testing, and works to educate the public about how to reduce the risk that innocent persons will be convicted of crimes they did not commit. The Innocence Project's pioneering litigation has thus

far led to the exoneration of 114 wrongfully convicted persons in the United States. These exonerations have vividly documented the increased risk of error that results when criminal defendants are denied a full and fair opportunity to contest the charges against them, or to obtain meaningful judicial review of their convictions. In recent years, the Innocence Project has also litigated several landmark federal actions regarding the constitutional right of access to exculpatory evidence, including before this Court. *See Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); *id. at 303* (Luttig, J.).

The Ella Baker Center for Human Rights documents, exposes and challenges human rights abuses in the United States criminal justice system. It combines policy reform, media advocacy, public education, grassroots organizing, direct-action mobilizing, cultural activism and legal services to accomplish these tasks. Included in its struggle against the criminal justice system's devastating inequities and shortcomings is work toward a public consensus for a domestic human rights agenda for the 21st century.

The American Friends Service Committee, a practical expression of the faith of the Religious Society of Friends, is a not for profit organization based in the US that has worked to understand and address the root causes of war, poverty, and injustice for eighty-five (85) years. The AFSC supports communities and groups to secure human and civil rights for people in the US and internationally. During the McCarthy era and movements for civil rights for disenfranchised groups and individuals, the AFSC provided financial and material assistance that enabled people to remain in their locales and to continue their civil rights efforts. The AFSC also provides immediate aid and long-term development for needy people on all sides of war.

The 140 legal scholars who have attached their names to this brief include among their number leading experts in constitutional law, criminal law and procedure, international law and international human rights.

Introduction

In the case at hand, the government has taken the extraordinary position that a United States citizen, detained within the United States far from the field of battle, may be denied all the protections of the Constitution and Geneva Conventions if the executive designates him an "enemy combatant." Furthermore, the government asserts that its production of an administration official's affidavit in support of its as-yet-undefined "enemy combatant" designation is conclusive and not subject to further judicial review. Thus, the government's position is that the President has complete discretion to suspend the application of the Bill of Rights and the writ of *habeas corpus* to American citizens on American soil, without the authority of Congress or the oversight of the courts. Little imagination is required to see how such a precedent could extend to justify terrifying levels of executive discretion over the domestic detention of citizens.

Amici curiae consist of a group of 140 law professors and numerous interested individuals and public interest organizations united in urging this court to reject the government's position 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." *Hamdi v. Rumsfeld*, 296 F.3d 278, 293 (4th Cir. July 12, 2002). We urge this court to declare, now and for future generations, that American citizens have a right not to be detained indefinitely without due process, and that substantive judicial review is indispensable to the Constitution's guarantee of these rights.

I. Citizens have the right not to be held unlawfully

Citizens of the United States[1] have the right not to be held unlawfully. This right subsumes the right to a lawyer,[2] the right against self-incrimination,[3] and the right not to be held indefinitely[4] without being charged with a crime.[5] These rights are anchored in the Fourth, Fifth and Sixth Amendments to the Constitution, and in the provisions of the Constitution guaranteeing the availability of habeas corpus at all times, except where Congress has suspended the writ in "Cases of Rebellion or Invasion" where "the public Safety may require it."

"The Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person ... of ... liberty ... without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), citing *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). "Government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States* v. *Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and 'narrow' non-punitive 'circumstances,' *Foucha*, *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical

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[1] Indeed, mere presence in the United States brings with it certain rights. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

[2] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

[3] The government argues that since Hamdi has not been charged with any crime his Fifth Amendment right against self incrimination is not implicated by his current detention and interrogation. *See* Gvt. Br. at 23. However, indefinite detention allied with constant interrogation may constitute a violation of substantive due process even without the introduction of incriminating statements in a criminal proceeding. *See Cooper v. Dupnik*, 963 F.2d 1220, 1245 (9th Cir. 1992) (en banc); *Martinez v. City of Oxnard*, 270 F.3d 852, 857 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

[4] *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Due Process Clause).

[5] *See* U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy the right ... to be informed of the nature and cause of the accusation....")

restraint.' *Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997)." *Zadvydas*, 533 U.S. at 690. Any government restraint on liberty must be accompanied by procedural safeguards (including in most cases the right to counsel) and a burden of proof proportionate to the importance of the liberty interest at stake. *See In re Gault*, 387 U.S. 1, 36-37 (1967). Potentially indefinite preventative detention is particularly suspect, and will be allowed only where exceptional circumstances create grave dangers, and even then only with a heightened evidentiary burden on the government. *See Salerno*, 481 U.S. at 747, 750-52.

The Supreme Court has held that certain narrowly-delimited categories of enemy belligerents—essentially, violators of the law of war—may be held without this full array of constitutional protections even if they are citizens. *See Ex parte Quirin*, 317 U.S. 1 (1942). The *Quirin* Court dubbed these "enemy combatants," and today they would not be considered "lawful combatants" entitled to the full protections of the 1949 Geneva Conventions. However, the *Quirin* Court held that, even in these rare cases involving violations of the law of war, searching judicial review will be undertaken to determine whether the factual predicates exist to place a detainee in this "enemy combatant" status. Without this level of searching judicial review, mandated by the Supreme Court, the guarantee that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances" is a dead letter. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 120-21 (1866).

At the outset, it is important to note that the government's use of the "enemy combatant" terminology in this case has been intentionally inconsistent. The government fails to define the term, and often uses it descriptively as if any "combatant fighting with the enemy" is an "enemy combatant," rather than using it as a term of art meaning only "violators of the law of war" (or

"unlawful combatants") as in the *Quirin* opinion. However, when it comes to describing the rights of such "combatants fighting with the enemy," the government claims these rights are limited in a manner consistent with the treatment of the unlawful combatants in *Quirin*, ignoring any rights such ordinary prisoners of war ("POWs") might have as "lawful combatants" under the Geneva Conventions.

This court has followed the government's confused usage in its statement that "it has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." 296 F.3d at 283. If Hamdi is no more than a soldier with the enemy captured during hostilities, then his current detention is not lawful under the Geneva Conventions. It is uncontroversial that enemy belligerents captured during the course of hostilities are subject to military, rather than civilian, detention until hostilities cease. They may be held without formal charge for the duration as prisoners of war, subject to repatriation at the end of hostilities.[6] However, even as a person detained during battle Hamdi would have the right under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III")[7] to a determination of his status (as lawful or unlawful combatant) by a competent tribunal,[8] and, if found to be a lawful combatant, the right to visits by the International Committee of the Red Cross,[9] and to communicate with family

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[6] Geneva III, *infra* note 7, Art. 118.

[7] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, T.I.A.S. 3364, 75 U.N.T.S. 135.

[8] Geneva III, Art. 5. Such a tribunal might, for instance, decide whether Taliban combatants like Hamdi were part of an regular or irregular force, a factor significant to a determination of whether a combatant is "lawful" or "unlawful" for the purposes of establishing prisoner of war status under the Geneva Conventions.

Until determined otherwise by a competent tribunal, every captured individual is presumed to be a prisoner of war. Geneva III, Art.5. Such a tribunal might also find, of course, that an individual was actually a civilian rather than a combatant. The government states that "even if Hamdi had not been armed when he surrendered, it would still have been proper for the military to detain him" as a non-combatant who was part of the enemy force; again, this determination of status is properly left to a competent tribunal under the Geneva III.

[9] Geneva III, Art. 126, ¶ 4. While the government has allowed some such visits *as a privilege* to, e.g., detainees on Guantanamo, the Geneva Conventions allow for such visits *as of right* and not at the discretion of the detaining power.

and relatives.[10] Furthermore, while lawful combatants may submit to voluntary interrogation, coercive interrogation is forbidden, as is "disadvantageous treatment" for refusal to respond to questioning.[11] "Confinement" (essentially, criminal-style detention, as opposed to "internment"[12]) of prisoners of war is limited to instances involving judicial investigation or where essential to national security, and even then is specifically limited to a maximum of three months.[13] These rights are guaranteed by the Geneva Conventions and by numerous other sources of international law. The fact that Hamdi has been denied both these rights under international law and his rights as a citizen under the Constitution means that his "present detention" is not "a lawful one" under any circumstances—whether he is a prisoner of war or bears some other status, as yet undetermined by any tribunal.

II. Judicial review is the sole meaningful guarantee of rights granted by the Constitution and Geneva Conventions

The guarantee of these rights is in judicial review of any detention. The government, in proposing a newly-invented, indeterminate "enemy combatant" status for Hamdi, has argued not only that it may hold Hamdi in conditions far more restrictive than those guaranteed by the Geneva Conventions to prisoners of war, but also that no court should be allowed to delve into the jurisdictional facts underlying its determination that Hamdi is an "enemy combatant" (and not a POW or some other status). However, separation of powers principles and the fundamental

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[10] Geneva III, Arts. 70 (right within one week of capture), 71 (continuing right; "not less than two letters and four cards monthly"). The authoritative commentary on the Geneva Conventions indicates that these communications rights are forfeited by spies or saboteurs ("enemy combatants" within *Quirin*'s definition). *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY—IV GENEVA CONVENTION 52 (Jean S. Pictet, ed. 1958).

[11] Geneva III, Art. 17 ("no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to).

[12] *See United States v. Noriega*, 808 F. Supp. 791, 800 (S.D. Fla. 1992).

[13] Geneva III, Sec. II ("Internment of Prisoners of War"); Art. 21 (distinguishing "close confinement" from ordinary expected conditions of confinement, and restricting circumstances where close confinement is allowed); Art. 103 (prisoners of war "shall not be confined" unless "essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.").

dictates of due process mandate judicial review of such determinations. Meaningful judicial review in turn requires that a court first determine a detained person's status, and then determine the protections that are to be granted to the detainee based on his status. The executive and military have attempted to cut short both stages of review in the present case, unconstitutionally limiting independent inquiry into the lawfulness of Hamdi's detention.

Citizens detained by the military have a right of access to civilian courts

The principle that judicial courts have jurisdiction over citizens detained by the military was established definitively during the worst domestic crisis in our history. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court held that a citizen arrested during civil war for "holding communication with the enemy," "conspiring to seize munitions" and "liberate prisoners of war," and inciting rebellion, *id.* at 6-7, nonetheless may not be tried by military courts, with their abbreviated process, while the civilian courts are open:

> It is said that the jurisdiction [over Milligan is based on] the "laws and usages of war."
>
> It can serve no useful purpose to inquire what these laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of government [i.e. are not in rebellion], and where the courts are open and their process unobstructed.

71 U.S. at 121. This principle preceded *Milligan*[14] and has been reinforced since in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). *Duncan* involved two trials of ordinary offenses in military courts in Hawaii during World War II, despite the fact that the civilian courts were open. Although the government tried to distinguish *Milligan* by arguing that Hawaii was near the

[14] See the list of executive branch pronouncements and civil war cases given in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 853 n.7 (Reprint ed. 1920) (1886).

theater of war and constantly under threat of invasion,[15] the Supreme Court reversed both convictions.

The rule of *Milligan*—that no citizen may be denied the jurisdiction of civilian courts while they are operating—was qualified[16] to exclude a narrowly-defined class of citizens in *Ex parte Quirin*, 317 U.S. 1 (1942). *Quirin* involved eight German saboteurs, trained by the German military, who landed ashore in the United States from submarines, discarded their military uniforms, and headed off on a mission that allegedly included plans to destroy both war industries and civilian targets such as bridges and department stores. [17] The German military had selected these eight men because they all had lived in the United States for some period of time before the war, and in fact one of them, Herbert Haupt, was the child of two parents naturalized to American citizenship and therefore was arguably[18] a citizen himself. One of the saboteurs (George Dasch) turned the group in to the FBI. The President issued two executive orders establishing military commissions with jurisdiction to try the saboteurs, and the entire group was charged, detained and tried by military commission (within the United States) and convicted and sentenced to death. Habeas proceedings followed in federal court.

The Supreme Court upheld the sentences. In reconciling *Milligan* with the citizenship claim of Haupt,[19] the Court distinguished his status from Milligan's by pointing out that he was

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15 *See* 327 U.S. at 339 n.1 (Burton, J., dissenting).

16 Indeed, language elsewhere in the *Milligan* majority opinion left some room for qualification , e.g.: "no usage of war could sanction a military trial [in a state] for any offense whatever of a citizen in civil life, in nowise connected with the military service." 71 U.S. at 121-22.

17 The extent of the planned attacks is a matter of historical controversy; the Supreme Court's opinion says only that the eight were targeting war industries. *See Quirin*, 317 U.S. at 37.

18 The government argued that he had renounced his citizenship by willingly undergoing training for the mission in Germany; ultimately, as detailed below, the Court did not find it necessary to resolve the issue. *See id.* at 20.

19 It appears that the FBI, under the leadership of J. Edgar Hoover, decided to claim credit for the capture of the eight by concealing the role played by Dasch. As part of this effort, the military commission proceedings were held in secret, and the government pressed the Court to rule quickly on the validity of the military commission's death sentences. Several Justices met with lawyers for the parties over the summer break on Justice Owen Roberts' farm in Pennsylvania, and agreed to hear the case in a special summer session. A day after argument, the Court

an "unlawful" combatant—that, by fighting behind the lines out of uniform he was in violation of the laws of war, and thus subject to the jurisdiction of military courts.[20] In doing so the court introduced to the American legal lexicon[21] the term "enemy combatant": the saboteurs were not "lawful combatants subject to capture as prisoners of war," but rather

> unlawful combatants ... subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines ... or an enemy combatant who without uniform comes through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but ... [are] subject to trial and punishment by military tribunals.

317 U.S. at 31; *see also id.* at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort *have violated the law of war*.") (emphasis added).

Obviously, the individualized factual determination that Haupt and the other defendants were "unlawful combatants"[22] was essential to the determination that they were subject to the

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issued a short *per curiam* ruling against petitioners, *see* 317 U.S. at 48, and six were electrocuted before the full opinion, dealing with the problematic citizenship claim of Herbert Haupt, was issued. Arguably, then, the entire discussion was an attempt to explain the execution of a citizen which had already been carried out at the time the opinion was issued. The government now attempts to define a new category of citizen detainee, broader than that put forward in *Quirin*, and based solely on its precedent. There can be no better reminder that "[a]ctions taken today will serve as precedents forever," ABA Task Force on Treatment of Enemy Combatants, *Preliminary Report*, at 20. On the history of the *Quirin* case, *see generally* Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 Harv. L. Rev. 806 (1956); David J. Danelski, *The Saboteurs' Case*, 1996 J. of Sup. Ct. Hist. 61 (1996); G. Edward White, *Felix Frankfurter's 'Soliloquy' in* Ex Parte Quirin, 5 Green Bag 2d 423 (2002).

[20] *See Quirin*, 317 U.S. at 37-38 ("Citizenship 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. ... unlawful belligerency is the gravamen of the offense of which [Petitioner Haupt] is accused.").

[21] There appear to be no uses of the phrase in the federal or state case law prior to *Quirin*.

[22] It is possible to read *Quirin*'s military jurisdiction as limited to situations involving *only* spies and/or saboteurs, as all broader statements in the opinion are dicta. This view takes the case of Major John André (convicted and hanged for conveying information to Benedict Arnold) as establishing a historical precedent for a very limited exception to the criminal process protections of the Bill of Rights, contemporaneous with their passage. This appears to have been President Roosevelt's view of the case as well. *See* Danielski, *supra* note 19, at 65 (Roosevelt stating that the eight defendants were "an absolute parallel of the case of Major Andre in the Revolution and of Nathan Hale. Without splitting hairs, I can see no difference."); *see also Quirin*, 317 U.S. at 42 n.14.

jurisdiction of military courts,[23] including of course their pretrial detention outside the protections of the Fifth and Sixth Amendments[24] based on offenses charged before the military commissions. The *Quirin* defendants had their status as "unlawful combatants" determined by a properly-formed military commission, authorized by statute.[25] Furthermore, they had access to counsel throughout the proceedings in both military and judicial courts, and were able to seek review of the findings of the former in the latter. In contrast, Hamdi has not had any initial determination of his status by a competent tribunal. The government fails to acknowledge that an "unlawful combatant" determination by a competent tribunal is the only possible basis for Hamdi's detention outside the scope of ordinary POW detention under Geneva III. *See* Gvt. Br. at 40 ("the military's authority to detain Hamdi is not dependent on the fact that he is an unlawful, rather than lawful, combatant.").

At the very least, *Quirin* establishes that the civilian courts will undertake a searching judicial review in cases where the government alleges that ordinary civilian jurisdiction is inapplicable due the petitioner's status as an "unlawful (enemy) combatant." This review will

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[23] The 1929 Geneva Convention would have granted protections to the *Quirin* petitioners had they been *lawful* combatants. It essentially grants identical substantive protections to those in the current Geneva III treaty *except for the right to a determination of status by a competent tribunal*. Of course, the *Quirin* defendants were granted such a determination (first before the military commission, and later the federal courts); Hamdi was not.

In re Territo, 156 F.2d 142 (9th Cir. 1946), cited by the government to the effect that "it is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States," 156 F.2d at 144, Gvt. Br. at 19, does not undermine our contentions. Territo was held as a prisoner of war; in attempting to challenge that status, he was without the benefit of the right to a status determination under the 1929 Geneva Convention; this right was introduced under the current (1949) Geneva Conventions. (Of course, the district court in *Territo* did in fact conduct an extensive inquiry into the facts underlying the POW status determination in the course of evaluating Territo's habeas petition. *See id*. at 143-44.)

Similarly, the government's citation of *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) ("petitioner's citizenship ... does not confer upon him any constitutional rights not afforded any other belligerent under the laws of war"), Gvt. Br. at 19, is off-point: Colepaugh was an unlawful combatant, having landed in Maine from a German submarine, as did the *Quirin* saboteurs.

[24] *See Quirin*, 317 U.S. at 40-41; id. at 44 (amendments inapplicable irrespective of citizenship).

[25] The Articles of War, 10 U.S.C. §§ 1483, 1486 (1940), predecessor to the contemporary Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (2002); *see Quirin*, 317 U.S. at 27-28 ("Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

extend to an independent determination of the facts underlying military jurisdiction (including military confinement outside of the bounds of the Fourth, Fifth and Sixth Amendments).

III. The scope of Article III review must not be limited in this case

Judicial review of executive detention under habeas is fundamental to our Anglo-American system of justice. To Blackstone, the Habeas Corpus Act of 1679 was a "second magna carta"[26]; Hamilton, in the Federalist Papers, called it "the bulwark of the British Constitution."[27]

> "[T]he most celebrated writ in the English law[," habeas corpus] is "a writ antecedent to statute, and throwing its root deep into the genius of our common law." ... Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, incorporated in the first grant of federal court jurisdiction, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege."..."We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution."
>
> These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment....

Fay v. Noia, 372 U.S. 391, 400-02 (1963) (footnotes and citations omitted). Historically it has been available to "remedy any kind of government restraint contrary to fundamental law," *id.* at 405, without exceptions for exigent circumstances; *Milligan* and *Quirin* both were brought as habeas cases. The searching review of jurisdictional facts actually undertaken by the federal

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[26] 1 Commentaries 133.

[27] Federalist 84 (Hamilton).

courts in *Quirin* and the general principles of executive accountability underlying habeas both indicate that the courts must probe more deeply into the facts behind Hamdi's detention than the government would allow.

The government's showing before the district court consisted primarily[28] of a two page document, a "declaration of facts" from Michael H. Mobbs, a Defense Department special advisor. The district court found this "Mobbs Declaration" inadequate to establish Hamdi's status as "enemy combatant" for numerous reasons: its failure to identify who Mobbs was and the nature of his authority to make such determinations for the executive, its failure to specify in detail the nature of Hamdi's affiliation with the Taliban, and the generally conclusory nature of the declaration, which omitted almost all of the specific evidence on which its conclusions rested. The order on appeal here called for the government to produce more information underlying the designation of Hamdi as "enemy combatant" and why he must be held incommunicado, including the identity of the executive officials responsible for making the determination of Hamdi's enemy combatant status. This information would then be reviewed confidentially *in camera* by Judge Doumar. Such a demand is consistent with the historical notion that the executive must *justify* its detention in habeas proceedings, by not only producing an explanation for the detention but also meeting some factual standard of proof that ensures the explanation matches reality.

Judicial independence and due process mandate that courts look beyond the Mobbs Declaration.

Equally fundamental to our system of justice is the principle that courts decide their own jurisdiction. *See Marbury v. Madison*, 5 U.S (1 Cranch) 137, 173-75, 177 (1803). Closely related is the power to determine "jurisdictional facts," that is, factual determinations necessary to a

[28] A second affidavit by Col. Donald D. Woolfolk adds little, as detailed in Section IV., below.

court's conclusion that it does or does not have jurisdiction over an issue. As the modern administrative state has grown, it has become increasingly necessary for executive and independent agencies to make factual judgments previously reserved to the judiciary. Courts have therefore had frequent occasion to consider the issue of whether these agency findings of fact should bind them. This question is especially controversial when applied to "jurisdictional facts" that would either remove an issue from a court's jurisdiction or would place an issue within a sphere of exclusive executive or agency discretion.

The Supreme Court confronted these issues in *Crowell v. Benson*, 285 U.S. 22 (1932). In that case an Act of Congress allowed "employees" to receive workman's compensation, but put conclusive factfinding powers as to whether a claimant was an "employee" in the hands of an agency. Nonetheless, the district court held a trial de novo on the issue of employment, and overturned the agency finding. Affirming the district court, the Supreme Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved," 285 U.S. at 60-61, and held that "the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine ... an issue [of agency jurisdiction or 'the authority of executive officers'] upon its own record and the facts elicited before it." *Id.* at 64 (bracketed quotation, *id.* at 58). *Crowell* thus established the principle that some judicial tribunal must independently review jurisdictional facts implicating constitutional rights.

Crowell's jurisdictional facts doctrine is rooted in both separation of powers doctrine and the due process rights of affected parties. *Crowell* is often interpreted in terms of the "legitimacy deficit" of agencies, that their distance from electoral accountability on the one hand, and lack of

Article III independence on the other, meant that they were "disabled from conclusively determining constitutional facts." The dissent agreed that some factual findings cannot be made by adjunct factfinders, on the ground that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." 285 U.S. at 87 (Brandeis, J., dissenting); the majority said the case involved more: not "simply the question of due process in relation to notice and hearing," but "rather a question of the appropriate maintenance of the Federal judicial power." 285 U.S. at 56. The majority's "de novo review requirement, however, had its origins in cases implicating not Article III but rather the due process clause."[29] *See, e.g., Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

There is therefore a broad overlap between the "due process" and "judicial power" bases for *Crowell*'s jurisdictional facts doctrine. While the passage of years has somewhat diminished the Court's view of the necessity of reviewing agencies on separation of powers grounds, the due process end of *Crowell*'s argument has not lost vitality. For example, the Court has consistently required de novo review of factfinding in administrative deportation proceedings, deeming "the personal liberty interest too important to permit an administrative body to determine the facts upon which the interest rested."[30] Similarly, appellate courts are required to exercise "independent judgment" in conducting searching review of "constitutional facts" relating to fundamental constitutional rights (such as First Amendment rights in libel and obscenity suits,[31] and criminal due process rights against introduction of coerced confessions[32]). As the Court

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[29] Judah A. Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 Colum. L. Rev. 1483, 1487 (1988).

[30] *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922). The Court has more recently indicated its continuing approval of *Ng*, *see Agosto v. INS*, 436 U.S. 748, 753 (1978).

[31] *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

[32] *See Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966) (habeas); *Ashcraft v. Tennessee*, 322 U.S. 143, 147-48 (1944) (direct review); *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987).

recently opined: "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.' The Constitution demands greater procedural protection even for property. The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious." *Zadvydas*, 533 U.S. at 692 (citations omitted). Where fundamental constitutional rights are at stake, federal courts will always be required to undertake searching review of jurisdictional facts.

Quirin stands as the prime example of such review.[33] No civilian court made a first review of the jurisdictional facts there. But the Supreme Court did engage in a substantive review of the underlying factual record that was first developed in adversary proceedings before military tribunals. Hamdi, in contrast, has not had the benefit of a status determination from any competent tribunal, civilian or otherwise. "Taken together, *Crowell* and *Quirin* strongly suggest that it is not enough for the military simply to tell the courts what factual conclusions it has drawn in determining that a citizen is subject to its jurisdiction. The courts must be given access to a substantial part of the evidentiary record as well."[34]

The instant effort to curtail judicial review is not isolated to cases involving those bearing arms with the enemy in Afghanistan. Rather it is consistent with a pattern of argument by the

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[33] The government cites *Moyer v. Peabody*, 212 U.S. 78 (1909), and a variety of less significant cases for the principle that the "limited scope of judicial review of ...executive determinations [that a detainee is a danger to public safety] are only magnified when the determination at issue is the military's decision that someone seized in the midst of active hostilities in a foreign land is an enemy combatant." Gvt. Br. at 30. *Moyer* is also cited for the principle that the executive is "the final judge" and cannot be sued for "not [having] reasonable ground for his belief" that a preventative detention was necessary, *id.*, and as a limit on the historical ambit of Due Process challenges to "enemy combatant" detentions. Gvt. Br. at 23.

If *Moyer* stands for any enduring principle, it is that the *Lochner*-era court was unflinchingly hostile to the rights of labor. The case involved the military detention, under martial law declared in response to a miners' strike, of a labor leader. *Moyer* is a discredited case, *see, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 248-49 (1974), with no relevance to any informed constitutional analysis. *See* Joanne Mariner, *Indefinite Detention: Using Outdated Precedents To Defend Unjust Policies*, findlaw.com (Sep. 17, 2002).

[34] *See* Michael C. Dorf, *Who decides whether Yaser Hamdi, or any other citizen, is an enemy combatant?* (Aug. 21, 2002), available on findlaw.com.

executive in a variety of recent cases where it has insisted on near-total judicial deference to conclusory statements of FBI agents or other executive officers. *See Padilla v. Bush*, No. 02 Civ. 4445 (MBM) (S.D.N.Y.) (similar to instant case); *United States v. Awadallah*, 202 F. Supp.2d 55, 63 (S.D.N.Y. Apr. 30, 2002) (rejecting government position that issuance of material witness warrant could be based on FBI agent's affidavit, and rejecting detention under material witness statute based on executive averments of materiality of grand jury testimony, which court was in no position to evaluate); *Center for National Security Studies v. Department of Justice*, 2002 U.S. Dist. LEXIS 14168, at *42-*43 (D.D.C. Aug. 2, 2002) (rejecting conclusory FBI agent affidavits as failing to indicate search "reasonably calculated to uncover all relevant documents" in response to FOIA request for names of immigration detainees); *Detroit Free Press v. Ashcroft*, 195 F. Supp.2d 937, 946-47 (E.D. Mich. Apr. 3, 2002), *aff'd*, 2002 U.S. App. LEXIS 17646 (6th Cir. Aug. 26, 2002) (rejecting government's assertion of definitive effect of FBI agents' declarations in establishing compelling interest in closure of deportation hearings to press); *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp.2d 288, 301 (D.N.J. May 28, 2002) (rejecting similar arguments raised by government), *rev'd*, --- F.3d ---, Slip. Op. at 35 (3d Cir. October 8, 2002) (split panel, with majority assigning conclusive effect to FBI agent declaration); 8 C.F.R. § 3.46 (May 21, 2002) (immigration judges, in deciding whether to seal evidence, must "defer[] to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit.") In the face of this unprecedented onslaught, we ask this court to affirm the historical role of the judicial branch as a check on the unimpeded expansion of executive power over citizens.

The executive's view of the scope of judicial review would expropriate Congress' power to suspend habeas

The courts also have an important role to play in protecting legislative prerogatives against executive encroachment. The Constitution explicitly guarantees the legislative branch a role in any curtailment of habeas corpus. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., Art. I, Sec. 9 cl. 2 (the "Suspension Clause"). Courts have consistently refused to recognize executive discretion to add further exceptions to the Constitutional text. During the early days of the Civil War, Chief Justice Taney stated that neither the President's officers nor the President himself could suspend the writ, and that no exception could be made "in any emergency or in any state of things." *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.). "Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger." *Id*.

The modern Court has held that the Suspension Clause, "at the absolute minimum, ... protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). Notably, during the American Revolution, Parliament suspended it as to traitors and pirates, and historically, most Parliamentary suspensions had limited access to the writ only for persons suspected of treason.[35] Obviously no understanding existed at the Founding that these areas were outside of the sphere of habeas protected by a legislative suspension requirement. In immigration, another area that by tradition allows great deference to the executive, and plenary power to Congress, the Court has nonetheless held that "some level of judicial intervention in deportation cases" via habeas is "unquestionably 'required by the constitution'" under the Suspension Clause. *See St. Cyr*, 533

[35] *See* Gerald Neuman, *The Habeas Corpus Suspension Clause after INS v. St. Cyr*, 33 Colum. Human Rights L. Rev. 555, 563 (2002).

U.S. at 300 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). The fact that the present crisis deals with protecting domestic security against unlawful combatants therefore does not remove it from the historical scope of the Suspension Clause.

Congress has affirmatively laid claim to its powers under the Suspension Clause.[36] 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This statute became law in 1971, and the legislative history makes explicit reference to the internment of Japanese-American citizen civilians during World War II. The House Report indicates that the "purpose of the ... bill" was as an initial matter "to repeal the Emergency Detention Act of 1950 ... which both authorizes the establishment of detention camps and imposes certain conditions on their use." H. Rep. No. 92-116 (Apr. 6, 1971) at 2. The Emergency Detention Act[37] had authorized the Attorney General, during internal security emergencies, to apprehend and detain "each person as to whom there is reasonable cause to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[38]

The House Report on § 4001(a) stated that the "mere continued existence" of the Emergency Detention Act had "aroused much concern among American citizens, lest the

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[36] This stands in contrast to, for example, its historical pattern of deferral to the executive in the exercise of its war powers.

[37] Act of Sept. 23, 1950, ch. 1024, Title II, 111, 64 Stat. 1019, codified at 50 U.S.C. §§ 811-26 (1970).

[38] 50 U.S.C. § 813(a) (1970). The legislative findings preceding the Act stated that a "world Communist movement," organized on a conspiratorial basis, and with the support of the most powerful enemy nation of the United States, had sent agents to enter the United States and engage in "treachery ... espionage, sabotage, [and] terrorism." Internal Security Act of 1950, Pub. L. No. 831, 81st Cong. 2d Sess. (Sep. 23, 1950) at §§ 2(1), 2(7), 101(1), 101(6).

"Congress passed the Emergency Detention Act ... to lay the groundwork for any future need to detain large groups of people in times of emergency. A number of the [Japanese-American] detention camps were 'mothballed' for future use." Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 Hawaii L. Rev. 649, 664 (1997).

The Internal Security Act, of which the Emergency Detention Act was a part, further allowed for the Secretary of Defense to order removal of persons from "defense areas," using language drawn from "the executive orders under which the Japanese-Americans were evacuated from the West Coast during World War II." Note, *The Internal Security Act of 1950*, 51 Colum. L. Rev. 606, 651 (1951) (describing ISA § 21).

Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views." H. Rep. No. 92-116 at 2. But § 4001(a) was intended to be more than a negation of the Detention Act:

> it is not enough to merely repeal the Detention Act. The Act, concededly can be viewed as not merely an authorization but in some respects as a restriction on detention. 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.

Id. at 5. In light of this history, the government's continued insistence that the statute applies only to "control of civilian prisons and related detentions"[39]—presumably predicated on the content of subsection 4001(b), passed decades earlier,[40] and the resultant hybrid title of section 4001 as a whole, "Limitation on detention; control of prisons"—is an absurdity.

Obviously, with § 4001(a) Congress expressed a clear public policy against the detention of citizens, even for citizens "likely to engage in espionage or sabotage."[41] Congress did so in a time of war, with widespread domestic dissent focused on that war, and in a climate of major political assassinations and even domestic terrorism. The Supreme Court, addressing the applicability of the statute, has declared that "the plain language of § 4001(a) prescribes detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. United States*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). Nothing in the

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[39] *See* Gvt. App. Br. at 53; *see also* Open letter from William J. Haynes II, General Counsel, Department of Defense, to Alfred P. Carlton, Jr., ABA President, and ABA membership, Sep. 23, 2002, at 3 (act applies only to "the administration of federal civilian prisons").

[40] Current Subsection 4001(b), passed in 1948, *preexisted* 4001(a) (1971) by 23 years. *See* 62 Stat. 847 (June 25, 1948). The 1971 Act "substituted the section heading for one which read 'Control by Attorney General'; designated existing provisions as subsec. (b); and inserted subsec. (a)." *See* 18 U.S.C.S. § 4001 (2002), "Amendments." Current subsection (b) was unchanged. *See* H. Rep. No. 92-116 at 6. Therefore "reference to the immediately surrounding text," Gvt. Br. at 53, is entirely irrelevant to the interpretation of Subsection 4001(a).

[41] H. Rep. No. 92-116 at 2.

legislative history, the text or its subsequent construction by courts indicates that § 4001(a)'s applicability should be limited to civilians.[42]

The government can only cite, in a footnote, a funding statute and the Authorization to Use Force as appropriate "Acts of Congress" justifying Hamdi's detention in light of § 4001(a). *See* Gvt. Br. at 54 n.17. Given the clear legislative intent to prevent future wartime internments, these "Acts" are clearly insufficient to provide a lawful basis for Hamdi's detention. Congress *has* acted, through the USA PATRIOT Act, to extend detention powers for *aliens* suspected of terrorism,[43] but these powers are carefully limited: an alien's detention may last only seven days before a formal charge must issue. *See* 8 U.S.C. § 1226A(a)(5) (2001). For this court to ignore Congress' explicit actions forbidding nonstatutory detentions in the name of judicial deference to the executive would threaten the separation of powers far more that the minimal factual review undertaken by the district court.

IV. There is no "enemy combatant" status as it is proposed by the government

What the government means by "enemy combatant" is entirely unexplained. The term occurs in only three cases in the United States Reports: *Quirin*, where it refers to unlawful combatants, violators of the law of war, and in *In re Yamashita*, 327 U.S. 1, 7, 11, 13, 19-20 (1946), and *Madsen v. Kinsella*, 343 U.S. 341, 355 (1952), both of which use it in the same manner as *Quirin*. Professor Tribe defines it similarly in the context of defining the jurisdiction of military commissions: "The only exception to [the rule of *Milligan* that military jurisdiction cannot exist when civilian courts are open] concerns enemy combatants. During wartime, court-

[42] Notably, other acts touching on this subject matter have included explicit disclaimers indicating that they do not limit any existing military powers over non-civilians. *See, e.g.*, the 1917 Espionage Act, 50 U.S.C. § 38 (1940). Congress clearly was aware that such language was available, and chose not to invoke it. *Cf. EEOC v. ARAMCO*, 499 U.S. 244, 258 (1991) ("'when it desires to do so, Congress knows how'").

[43] Although *amici* take no position on the issue and the government has not argued the point, arguably one Act of Congress—the Uniform Code of Military Justice—allows for military jurisdiction over violators of the law of war. *See* 10 U.S.C. §§ 818, 821.

martial jurisdiction extends to acts of espionage and sabotage by enemy agents, even if the agents are American citizens." 1 AMERICAN CONSTITUTIONAL LAW 300-01 n.185 (3d ed. 2000) (citing *Quirin*).

None of these factors appears to apply to Hamdi on the facts before this court. According to the Mobbs Declaration, his classification as "enemy combatant" appears to be based on the fact that he fought with the Taliban, "hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners," and that "he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." Mobbs Declaration, ¶¶ 6,9. In fact, these facts seem to indicate nothing more than that Hamdi is an ordinary prisoner of war—albeit one who disclosed to his interrogators that he spoke English and was born in the United States to Saudi parents. *Id.* at ¶5. The only other relevant document in the record states only that Hamdi "could have future value as a source of intelligence," because his "background ... suggest[s] considerable knowledge of Taliban and al Qaida training and operations." Affidavit of Col. Donald D. Woolfolk, Deputy Cmdr., Joint Task Force, Guantanamo Bay, Cuba (June 13, 2002) at 2. This is suggestive of far worse: prolonged detention of a potential witness so that he may be interrogated at length in conditions creating psychological dependency. *See id*. (citing "need to maintain [a] tightly controlled environment ... to create dependency and trust by the detainee.").[44]

If Hamdi is indeed a prisoner of war, a broad array of rights would attach to his detention, at least for the duration of hostilities. This court has stated that "It has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's detention of him is a lawful one," citing *Quirin* for the principle

[44] It goes without saying that such forms of interrogation and "confinement" (as it is used as a term of art in the convention) might violate Hamdi's rights under Geneva III, Arts. 17, 21 and 103. *See* notes 11-13, *supra*.

that both lawful and unlawful combatants are subject to detention as prisoners of war. 296 F.3d at 283. Of course, *Quirin* was decided before Geneva III existed. If Hamdi is not to have the ordinary rights attendant to citizenship, he must have the right, under Geneva III Art. 5, to an initial determination of his status by a competent tribunal; further rights attendant to POW status might follow, depending on the outcome of this first inquiry. The Gulf War saw over one thousand such proceedings before such "Article 5" tribunals to determine the status of the vast number of enemy prisoners who surrendered to advancing coalition forces, and similar proceedings were used during the Vietnam War to distinguish Vietcong from regular forces.[45] Denied even this, Hamdi remains detained with an undefined status, neither citizen nor POW, held *incommunicado*[46] indefinitely.

Of course, if a court undertaking jurisdictional fact review[47] finds Hamdi to be an unlawful combatant under *Quirin*, his case is not out of the hands of civil authorities. The post-*Quirin* Geneva Conventions would allow Hamdi to be "interned"[48] without charge until the end of hostilities. At that point he should be charged with a recognized crime and tried by an impartial tribunal for his violations of the law of war. This tribunal's findings would then be

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[45] *See* INTERNATIONAL OPERATIONAL LAW DEPARTMENT, U.S. ARMY J.A.G. SCHOOL, LAW OF WAR WORKSHOP DESKBOOK, ch. 5 at 11 (Brian Bill, ed. 2000) (1196 Art. 5 tribunals conducted during Gulf War); Judge Advocate General Operation Law Handbook, Ch. 5, p.7 (Eds. M. Lacey & B. Bill 2000) (describing how many Gulf War detainees proved to be displaced civilians and were transferred to refugee camps after Art. 5 determinations); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 Am. J. Int'l. L. 320, 326 (2002) ("During the Vietnam War, the United States developed considerable experience with so-called Article 5 tribunals. During that war, POW status was initially conferred upon the North Vietnamese regular forces but not the Vietcong, a policy that was subsequently reversed when both categories of combatants were granted such status."); Maj. Timothy P. Bulman, *United States Law of War Obligations During Military Operations Other Than War*, 159 Mil. L. Rev. 152, 168 (1999) ("In Panama, U.S. forces detained more than 4100 people during the first few days of the operation. The U.S. Army afforded all detainees the rights and protections of the Geneva Conventions until their precise status was determined following an Article 5 tribunal.").

[46] While the conventions guarantee access to counsel only for those charged with crimes (either war crimes or crimes committed during detention), recall that the right to communicate with family and relations is guaranteed by Geneva III, Arts. 70, 71. *See* note 10, *supra*.

[47] A federal court is, of course, a competent tribunal to make this determination under Geneva III, Art. 5. *See United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992).

[48] *See supra* notes 12-13 and accompanying text for the distinction between "internment" and "detention" under the Geneva Conventions.

subject to civilian (Article III) judicial review, as was the case in *Quirin*. However, for Hamdi's current detention to be legal—and his current conditions of confinement constitute "detention," not "internment," under the Geneva Conventions—he must be charged within a reasonable period of time from when his detention begins.[49] This right to be charged in a reasonable time thus parallels familiar rights under the Constitution, which may also mandate a charge within a reasonable time in such situations.

Finally, the determination (for both lawful and unlawful combatant purposes) that hostilities are ongoing is itself bounded by judicial review: under existing precedent, the conclusion that hostilities have ended may require reference to an act of the political branches,[50] but there have been a number of possible presidential acknowledgements of the end of hostilities in Afghanistan. "[R]ecognition of belligerency abroad is an executive responsibility, but if executive proclamations fall short of a definitive answer, courts may construe them...." *Baker v. Carr*, 369 U.S. 186, 212 (1962).

Conclusion

The executive seems to be proposing "enemy combatant" as a permanent legal category, not limited by the scope of the hostilities or the scope of the authorization to use force. It has been widely reported that the Department of Defense is considering creating detention camps for

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[49] *See* Art. 75(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (signed by the U.S. December 12, 1977). While the United States has not ratified the Protocol Additional, it has specifically recognized that Art. 75 is declaratory of customary international law. *See* THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 65 (Clarendon, 1991) (referring to Joint Chiefs of Staff study that states that Article 75 is "already part of customary law.").

The ICRC commentary indicates that "even in time of armed conflict, detaining a person for longer than, say, ten days, without informing the detainee of the reasons for his detention would be contrary to" Art. 75. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I at ¶ 3072 (1977).

[50] *See, e.g.*, *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871).

"enemy combatants."[51] This rightfully evokes memories of *Korematsu*, if for no other reason than to point out what a devastating precedent the case at hand could become. Just as the internment camps were mothballed for future use (eventually empowered under the Emergency Detention Act),[52] these "enemy combatant" camps may become a permanent feature of our legal landscape.

By taking away the most significant constitutional rights incident to citizenship, the "enemy combatant" designation effectively strips designees of their birth citizenship—a power which the Fourteenth Amendment denies to any branch of government.[53] It has the potential to circumvent the Constitution's heightened procedural protections for citizens accused of treason, *see* U.S. CONST. Art. III, § 3, protections that were included in the constitution to counter abuses whereby the executive, through amorphous sedition laws, punished political dissent.[54] And while the Supreme Court has stated that "[c]itizenship *is* man's basic right for it is nothing less than the

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[51] Jose Padilla, an United States citizen, is being held in the naval brig at Goose Creek, South Carolina, which, according to the *Wall Street Journal*, has a special wing that could be used to house up to twenty citizens as "enemy combatants." *See* Jess Bravin, *More Terror Suspects may Sit in Limbo*, WALL STREET JOURNAL (Aug. 8, 2002) at A4. Administration officials have indicated that their ultimate plan may be broader, proposing camps where citizens could be interned and subject to military detention on the decision of a committee of the Attorney General, the Secretary of Defense, and the Director of the CIA. *See* Jonathan Turley, *Ashcroft's Hellish Vision*, L.A. TIMES (Aug. 14, 2002) pt. 2 at 11. Compare the provisions of the 1950 Internal Security Act, described *supra* note 38.

[52] *See* note 38, *supra*.

[53] Enhanced civil judicial process has generally been held adequate to strip naturalized citizenship in certain circumstances, *see Schneiderman v. United States*, 320 U.S. 118, 123, 160 (1943) ("clear and convincing" standard); *cf. Gorbach v. Reno*, 219 F.3d 1087, 1098-99 (9th Cir. 2000) (en banc) (rejecting administrative denaturalization process); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827 (1824) (naturalized citizen "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize Congress to enlarge or abridge those rights*.")

In contrast, loss of birth citizenship is now limited to voluntary renunciation. *See Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (native-born citizen may not be expatriated by Congress involuntarily, overruling *Perez v. Brownell*, 356 U.S. 44 (1958), and affirming "constitutional right to remain a citizen ... unless [the citizen] voluntarily relinquishes that citizenship."); *see also Kennedy v. Martinez-Mendoza*, 372 U.S. 144 (1963) (holding, prior to *Afroyim*, that criminal process guarantees apply to punitive statute stripping citizenship of draft evaders).

On the need for civilian judicial review of the issue of citizenship generally, see *Agosto v. INS*, 436 U.S. 748 753 (1978) ("the Constitution requires that there be some provision for de novo judicial determination of claims to American citizenship in deportation proceedings"); *Smith v. Shaw*, 12 Johnson 257 (N.Y. Sup. Ct. Jud. 1815) (a court-martial has no jurisdiction to try the question of prisoner's citizenship; detaining officer liable in tort for detention without subject-matter jurisdiction).

[54] "It is the observation of the celebrated Montesquieu, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power." 2 WORKS OF JAMES WILSON 663 (McCloskey ed. 1967).

right to have rights,"[55] in today's world the Geneva Conventions and international law convey certain rights irrespective of citizenship. The government has negated all of these rights by invoking the phrase "enemy combatant" without providing a definition for the status or an adequate explanation of why it applies to Hamdi.

The government's position would also do damage to the separation of powers. It threatens the authority of the courts to determine jurisdictional and constitutional facts in cases implicating vital individual rights, and to protect the sole authority of Congress to suspend habeas. The written word of the Constitution guarantees that the President may not suspend the Writ of Habeas Corpus without the authorization of Congress, and even then only in certain specified conditions, the existence of which may be subject to judicial review. The President certainly may not do so by the far simpler expedient of branding prisoners with the nebulously-defined label "enemy combatant." [56]

On the record before this court, Hamdi is either a civilian bearing arms, a lawful combatant (and therefore at worst a POW in current circumstances), or an "unlawful combatant." However, he has not yet been found to be an "unlawful combatant" by any competent tribunal. Should he eventually be found to be an "unlawful combatant" by a tribunal of first instance, that finding would be subject to scrutiny by civilian courts. We urge this court to decide his case accordingly.

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[55] *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

[56] Nor has Hamdi's status been determined, for the purposes of the Geneva Convention, by the President's declaration that all Taliban soldiers are "unlawful combatants," as the government argues, *see* Gvt. Br. at 41-42, for several reasons. First, official executive pronouncements as to the status of Taliban forces have been ambivalent, *see* Ari Fleischer, *White House Briefing* (13:40 EDT Feb. 7, 2002) ("President Bush today has decided that the Geneva Convention will apply to the Taliban detainees, but not to the Al Qaeda international terrorists."). Second, to the extent an "unlawful combatant" determination was made, it was in no event an individualized one as required by Art. 5 of Geneva III. Finally, courts have held the President's pronouncement *not* to be dispositive. *See United States v. Lindh*, 212 F. Supp.2d 541, 555-58 (E.D. Va. July 11, 2002) (rejecting application of political question doctrine to question of John Walker Lindh's unlawful combatant status, similarly rejecting "[c]onclusive deference" to President's determination of status for all Taliban soldiers, and conducting "review of the available record information").

Respectfully submitted,

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I hereby certify that the foregoing Brief for Amici curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions described in Fed. R. App. P. 32(a)(7)(B)(iii), and the signature section's extensive list of amici curiae (which the case manager has indicated would not be counted against the limit), the brief contains 6,305 words. This count was undertaken by the word processing system used to prepare the brief.

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