No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

LAWRENCE R. LEONARD
Managing Assistant United States Attorney

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-4283

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution and statutes:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-7338

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

INTRODUCTION

Petitioners take issue with the central teachings of this Court's prior decision in this case. Thus, they claim that courts owe "no deference" to the quintessential military judgment at issue, Pet. Br. 25; defend "the district court's suspicions" in reviewing the Mobbs declaration, Pet. Br. 39; and call for a full-blown evidentiary proceeding in which the district court, applying "a de novo standard of review," Pet.

Br. 41, may second-guess the military's determination that an individual is an enemy combatant, even when, as here, the individual was captured with an enemy unit while armed with an AK-47 in an active combat zone half-way around the world.

Yet, despite all that, petitioners reiterate that they do not challenge the "military determination" to detain Hamdi in Afghanistan. Pet. Br. 44; see Pet. Br. 27. But Hamdi is just as much an enemy combatant now as he was when he surrendered with his Taliban unit, and Hamdi's detention in Norfolk is just as lawful as it was in Afghanistan. Even the district court did not doubt that Hamdi "went to Afghanistan to be with the Taliban," "had a firearm," and "was there to fight." Aug. 13, 2002 Hrg. 51, 72 (JA 374, 395). This Court should reject petitioners' invitation for further judicial examination of the fundamental military determination underlying Hamdi's wartime detention. Under any constitutionally appropriate standard of review, respondents have established that Hamdi's detention is lawful.[1]

---

[1] Petitioners argue (at 19-20) that the standard of review that applies to the district court's August 16 Order is "abuse of discretion," pointing to habeas cases involving challenges to evidentiary findings. But as we have explained (Resp. Br. 15-16), the issues presented by this appeal are legal in nature and, thus, subject to de novo review by this Court. Indeed, even the district court certified its question in terms of "[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law * * *." JA 464 (emphasis added).

Robel did not involve the wartime detention or military trial of enemy combatants, but instead a First Amendment challenge to a statute that prohibited any member of a communist-action organization from "engag[ing] in any employment in any defense facility." 389 U.S. at 260. The Supreme Court recognized that it accords "broad deference to the exercise of [the constitutional war] power," but nonetheless concluded that the statute at issue unconstitutionally impinged on the right to association. Id. at 263; see id. at 264-265. In so holding, the Court emphasized that "[w]e are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake." Id. at 267. In short, Robel in no way touches upon, much less purports to restrict, the exercise of the core war powers here – i.e., the "capture and detention" of enemy combatants in time of war. Quirin, 317 U.S. at 31.

Petitioners criticize respondents' reliance on Justice Douglas's concurring opinion in Hirota v. MacArthur, 338 U.S. 197 (1948). See Pet. Br. 21-22. But Justice

---

judicial review in a habeas action challenging a prisoner of war's conviction and death sentence before a military commission. In rejecting that habeas petition, the Court "emphasized" at the outset "that on application for habeas corpus [in this situation] we are not concerned with the guilt or innocence of the petitioners." Id. at 8. Rather, the Court continued, "[w]e consider here only the lawful power of the commission to try the petitioner for the offense charged." Ibid. Although this case does not involve the military trial or punishment of prisoners of war for war crimes, both Quirin and Yamashita support the conclusion that the Court's review of the instant petition is of the most limited scope.

Douglas clearly recognized that "the capture and control of those who were responsible for the Pearl Harbor incident" was a matter that the Constitution leaves to the "President as Commander in Chief, and as spokesman for the nation in foreign affairs," and not the courts. 338 U.S. at 215. Petitioners also point out (at 21) that Justice Douglas joined the dissenters in Johnson v. Eisentrager, 339 U.S. 763 (1950), but that hardly advances their "no deference" position in this case.

In both Eisentrager and Hirota, the majority of the Court found that the Court lacked jurisdiction to consider the claims. The positions adopted by Justice Douglas in Eisentrager and Hirota are instructive because even the minority of the Justices who found jurisdiction to be present recognized the need to give substantial deference to the Executive, especially in the context of ongoing hostilities. Accordingly, not only did Justice Douglas recognize in Hirota that the "capture and control" of those responsible for Pearl Harbor was a matter for the Commander in Chief, he also joined Justice Black's Eisentrager dissent, which recognized the need for courts to defer to the judgments of our military forces in the "theatre of operations" where, as here, "hostilities are still in progress." Id. at 796 (Black, J., joined by Douglas and Benton, dissenting); see ibid. ("It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations."). In stark contrast, petitioners urge this

Court to dismiss those concerns – not to mention the record in this case (see JA 145-147 (Woolfolk declaration)) – and proceed as if the "immediate release" (Pet. Br. 18, 56) of a captured enemy combatant while hostilities are still active would have no bearing on the ongoing war effort. See Pet. Br. 27.[4]

Petitioners dismiss this Court's acknowledgment of the need for deference to the armed forces in Thomasson v. Perry, 80 F.3d 915 (4th Cir.), cert. denied, 519 U.S. 948 (1996), and other cases involving American soldiers, because Hamdi does not "serve[] in the United States military." Pet. Br. 25 n.16. In Thomasson, this Court reviewed the constitutional, historical, and practical reasons that courts act with great deference when called upon to review the exercise of military powers by the President and Congress, and upheld rules governing American military personnel in peacetime. 80 F.3d at 924-926. There is no support in law or logic for a regime in which courts must defer to military decisions concerning our own forces in peacetime, but may

---

[4] Fleming v. Page, 50 U.S. (9 How.) 603 (1850), on which petitioners also rely (Pet. Br. 21), further underscores the tremendous deference owed to the Executive in this area. In Fleming, the Supreme Court emphasized that the President, "[a]s commander-in-chief, * * * is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming, 50 U.S. (9 How.) at 615 (emphasis added). The detention of armed combatants who surrender with the enemy on the battlefield is one of the oldest and most obvious means of seeking to "conquer and subdue the enemy."

second-guess military decisions concerning the enemy in wartime.[5]

Petitioners claim for the first time on appeal that deference is not warranted in this case because Hamdi initially surrendered to Northern Alliance forces under "unknowable conditions." Pet. Br. 29; see also Pet. Br. 37 ("[T]he only individuals with knowledge regarding Hamdi's relation to the Taliban are members of the Northern Alliance."). But to the extent that there are any "uncertainties" (Pet. Br. 29) concerning, inter alia, whether United States armed forces should rely on information provided by or the actions of allied forces with respect to individuals who initially

---

[5] Petitioners also claim (at 28-29) that the Ninth Circuit's decision in In re Territo, 156 F.2d 142 (9th Cir. 1946), supports their "no deference" rule. That is incorrect. The only relevant question in Territo was whether the detainee's claim of American citizenship rendered his wartime detention unlawful. See id. at 145 ("Petitioner claims on appeal, as he claimed in the district court, that he is and always has been an American citizen and because of that fact the circumstances of the case do not make him legally a prisoner of war. But for that claim of United States citizenship, petitioner does not question that he was taken as a prisoner of war."). The court squarely rejected that argument, explaining that "[w]e have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the battlefield." Ibid. The Ninth Circuit's decision in Territo notes that there was a hearing in the district court, id. at 143, but the court of appeals' ultimate disposition of the appeal rested, not on the particular facts of the case, but on the now well-settled conclusion that, as a matter of law, a claim of U.S. citizenship is irrelevant to the propriety of detaining "one captured on the battlefield." Id. at 145. In any event, as we have explained, there is no need for any further evidentiary development in this case. See Resp. Br. 24-32. And that is particularly true given that the petition's central claim is that Hamdi's wartime detention is unconstitutional because he is "an American citizen." Pet. ¶22 (JA 13). That claim fails as a matter of law here for the same reasons that it did in Territo. See Resp. Br. 19.

surrendered to allied forces, they should be resolved by our military forces on the ground in Afghanistan, who have first-hand knowledge of the conflict. More fundamentally, judgments about the extent to which to rely on allies, and their actions, in undertaking joint operations in the theatre of operations need to be made definitively by the commanders in the field, and not by courts which lack the tools to make such classic military determinations. See Resp. Br. 26-27.

Petitioners claim (at 30) that deference to such battlefield determinations is "even less warranted when the Executive acts outside of Congressional sanction." Here, however, the military, under the direction of the Commander in Chief, is acting with the express statutory backing of Congress. And, here too, petitioners' position fails to account for this Court's decision in the prior appeal. This Court already has recognized that "where as here the President does act with statutory authorization from Congress, there is all the more reason for deference." Hamdi, 296 F.3d at 281 (emphasis added); see id. at 283 (discussing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

3. Petitioners also ignore the Court's recognition that "[t]he unconventional aspects of the present struggle do not make its stakes any less grave," and that "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than

the protection of Americans, both military and civilian, against additional unprovoked attack." Hamdi, 296 F.3d at 283. Instead, petitioners belittle the present struggle as "the so-called war against terrorism," Pet. Br. 16, and, quite remarkably, claim that the fact "that hostilities remain 'ongoing' is irrelevant," Pet. Br. 55.[6]

II. THE MOBBS DECLARATION PROVIDES A SUFFICIENT BASIS TO GRANT THE MOTION TO DISMISS THAT IT SUPPORTS

Petitioners defend the district court's "suspicious" and "searching review" (Pet. Br. 35, 42) of the Mobbs declaration on two different levels. First, they argue that the district court has just as much leeway "to consider the sufficiency of the factual record and to order the expansion of that record" as it would in any other habeas case. Pet. Br. 31; see Pet. Br. 30-33, 42-46. Second, they try to "pick * * * apart" (Aug. 13 Hrg. at 32 (JA 355)) the Mobbs declaration in the same fashion as the district court. Pet. Br. 9-14, 34-41. Those efforts should be rejected.

---

[6] In a similar vein, petitioners suggest (at 54) that Hamdi, and any other Taliban detainee, must be released on the ground that "the international armed conflict with the Taliban has concluded." For support, petitioners cite (at 55) to certain economic regulations that in no way amount to a cessation of hostilities. The United States need not wait for hostilities with the Taliban to cease before it begins its efforts to assist the new government in Afghanistan from overcoming the deleterious consequences of the Taliban regime. Moreover, as we have explained (Resp. Br. 51), combat operations are ongoing in Afghanistan with respect to both al Qaeda and Taliban fighters. In addition, given the relationship between the Taliban and al Qaeda, detainees such as Hamdi may have intelligence that will aid in the ongoing effort to destroy the al Qaeda terrorist network. See JA 145-146.

A. Petitioners' De Novo Standard Of Review Is Unfounded

1. In the prior appeal, this Court made clear that "[s]eparation of powers principles must * * * shape the standard for reviewing the government's designation of Hamdi as an enemy combatant"; that "[a]ny standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation"; and that "[t]he development of facts may pose special hazards of judicial involvement in military decision-making that argument of questions of pure law may not." Hamdi, 296 F.3d at 283-284. The inquiry called for by petitioners here could scarcely be more at odds with those principles.

Citing only general habeas cases or provisions, petitioners argue that the district court in this case enjoyed the same "broad discretion to order evidentiary hearings," "expand the record," and "order that additional factual materials be submitted" as in any other habeas action. Pet. Br. 32; see Pet. Br. 31-33. What is more, petitioners suggest that, once the district court is satisfied that "an adequate factual record exists in this case, it should be allowed to review those facts under a de novo standard of review." Pet. Br. 41. Those arguments run directly counter to this Court's prior decision in this case, which was founded on both the recognition that this was not an ordinary habeas petition and the fundamental separation of powers principles that limit the role of the courts in this extraordinary area of

executive decisionmaking. See Hamdi, 296 F.3d at 283-284; Resp. Br. 16-17, 25-27.

2. As we have explained (see Resp. Br. 28-30), in considering habeas challenges to executive determinations outside the special constitutional context in which this case arises, courts have refused to second-guess the factual accuracy of such determinations, and instead have only called upon the Executive to show "some evidence" supporting its determination. As petitioners themselves recognize, "'[a]scertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached . . . .'" Pet. Br. 44 (quoting Superintendent v. Hill, 472 U.S. 445, 455-456 (1985)) (emphasis added)).

Petitioners claim (at 44) that the some evidence standard "has no place in a proceeding that could provide judicial authorization for the indefinite incarceration of an American citizen." But as their "no deference" position underscores, petitioners give virtually no weight to the extraordinary context in which this habeas proceeding arises, the Constitution's commitment of the warmaking powers first and foremost to the political branches, or the "special hazards" that the "development of facts may pose" with respect to "judicial involvement in military decision-making." Hamdi, 296 F.3d at 284. Moreover, the Supreme Court has applied the some-evidence

standard in reviewing executive determinations that affect individual liberties, including the liberty to remain free of mandatory military service. See Eagles v. Samuels, 329 U.S. 304, 312 (1946); see also Hill, 472 U.S. at 447 (revocation of good time credits that extended prison sentence).

Petitioners argue (at 45) that the some evidence standard "has been applied only in circumstances that are not analogous to those at issue here, and only in circumstances in which there has been a prior fact-finding process." But if anything, the need for deference is greater – indeed, much greater – with respect to the executive determination here, i.e., the wartime detention of an individual captured on a battlefield in a foreign land. There is no precedent for any "prior fact-finding process" requirement in these circumstances. And imposing such a requirement would unnecessarily, and recklessly, divert the military's resources and attention from the ongoing war. Cf. Eisentrager, 339 U.S. at 779 (Habeas "trials would hamper the war effort and bring aid and comfort to the enemy").[7]

As the Mobbs declaration explains in this case, the military's determination to detain Hamdi was made by military personnel in Afghanistan under the direction of

[7] Thus, the Administrative Procedure Act, for good reason, expressly exempts "military authority exercised in the field of war or in occupied territory," 5 U.S.C. 701(b)(1)(G), in recognition that decisionmakers in the theatre of operations must make definitive judgments unadorned by elaborate administrative process.

the Commander of the United States Central Command, during the midst of active combat that continues to this day. See JA 61-62. There is no place in that combat zone for a judicially imposed, administrative fact-finding process that circumstances might permit in other settings, such as deportation. Nor, especially while it is still fighting a war, should the military be required to attempt to recreate the circumstances surrounding a combatant's capture and detention in a post hoc, fact-finding process if and when a detainee is moved from the combat zone. Such post hoc recreations would necessitate either elaborate record-keeping concerning all detainees in case they are ultimately transferred to the United States, or efforts to call back military forces from the front to recreate the circumstances of capture. Either prospect runs afoul of Eisentrager's warning about distracting the military from its primary responsibility in the field of battle. Accordingly, a sworn declaration such as the Mobbs declaration, which sets forth both the circumstances surrounding an individual's capture and detention and the basis for the military's enemy-combatant determination, should provide an adequate factual basis to justify the military's wartime detention under a constitutionally appropriate standard.[8]

[8] Judicial imposition of such a "fact-finding process" also could raise significant practical problems. The decision to detain a captured combatant is one of the most common decisions made during hostilities. During World War II, for example, hundreds of thousands of captured combatants were removed from the theatre of operations in Europe and detained in this country, including thousands of

Petitioners suggest that application of the some evidence standard in this case would result in an unconstitutional suspension of the writ, Pet. Br. 46, and similarly argue that "[e]ven in the most deferential of contexts, the Executive branch cannot unilaterally decide what information is sufficient for purposes of judicial review," Pet. Br. 33. But as this habeas proceeding underscores, there has been no suspension of the writ. Respondents have filed their return and, with supporting evidence, explained why Hamdi's detention is lawful. The district court below reviewed the sufficiency of the return and accompanying declaration and held that they were insufficient to warrant dismissal of this action. That issue is now before this Court. More fundamentally, the writ remains available for legal challenges to detention of the kind made and rejected in Quirin, and raised in the petition here (see JA 13).

3. Petitioners claim that "[t]he searching review of the factual record in this case by the district court was entirely consistent with the independent review applied by the Supreme Court to the pre-trial commitment of Aaron Burr's co-conspirators." Pet. Br. 42 (citing Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807)). Petitioners' reliance on Bollman is misplaced for the same reasons that the district court erred in relying on criminal law and procedure cases. See Resp. Br. 21. Bollman involved

---

individuals who originally surrendered to allied forces. Judicial imposition of either an on-the-spot, or post hoc, fact-finding process with respect to such determinations would be unprecedented and could significantly hamper the Nation's defense.

a challenge to the detention of individuals who had been charged with treason and were jailed by a District of Columbia court while awaiting trial on those charges, not review of the military's determination to detain a captured combatant in wartime. Bollman has no more relevance than the more recent criminal procedure precedents cited by the district court, and resort to Bollman only underscores the paucity of support for petitioners' position that de novo review is appropriate here.[9]

B. Petitioners' Objections To The Mobbs Declaration Are A Product Of Their Fundamentally Flawed Standard Of Review

1. Petitioners' objections to the sufficiency of the Mobbs declaration, like the district court's, are largely if not entirely the product of their fundamentally mistaken view of the appropriate standard of review in this proceeding. See Pet. Br.

---

[9] In a similar vein, petitioners argue "if Hamdi were challenging the seizure of property rather than his person, it would be clear that Respondents' submission of a one-sided affidavit in support of their seizure would be entirely insufficient." Pet. Br. 33. But that ignores the fundamental importance of the context in which this case arises. Deference would clearly be appropriate if Hamdi were seeking return of the gun that he surrendered on the battlefield. To the extent such property concepts have any relevance here, Juragua Iron Co. v. United States, 212 U.S. 297 (1909), is more to the point. That case involved a claim by an American corporation for destruction by the United States military of property that the company held in Cuba during the Spanish-American War. In rejecting that claim, the Court stated that "[a] neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also in his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation." Id. at 308. Moreover, in view of that long-settled principle, the Court held that "the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war." Ibid.

9-14, 34-41. The Mobbs declaration explains, inter alia, that Hamdi surrendered with a Taliban unit in Afghanistan while armed with an AK-47. JA 61-62. And, as noted, even the district court recognized that Hamdi "went to Afghanistan to be with the Taliban," "had a firearm," and that he "was there to fight." Aug. 13, 2002 Hrg. at 51, 72 (JA 374, 395). Accordingly, under any constitutionally appropriate standard of review, the declaration establishes that Hamdi is a classic enemy combatant subject to capture and detention in wartime. See Resp. Br. 31-32.

2. For largely the same reasons that we have already explained with respect to the district court's review of the Mobbs declaration, see Resp. Br. 33-43, the sundry objections raised by petitioners to the declaration are meritless. For example:

- Petitioners argue that "[t]he Mobbs declaration * * * lacks indicia of reliability," Pet. Br. 34, and state that the district court was correct to be "'suspicious' of Mr. Mobbs statements paraphrasing information allegedly obtained through interrogation of Hamdi," Pet. Br. 35; see Pet. Br. 39 ("[T]he district court's suspicions * * * provide[] an example of why district courts are given broad discretion to determine when to expand the record."). But as we have explained (Resp. Br. 35), such naked distrust for sworn statements is both unfounded and entirely inappropriate in light of the "great deference" owed to "military designations of individuals as enemy combatants in times of active hostilities." Hamdi, 296 F.3d at 281.

- Petitioners appear to acknowledge that whether Hamdi is an unlawful or lawful enemy combatant is "irrelevant" for purposes of determining whether his current detention is lawful. See Hamdi, 296 F.3d at 283 (parenthetical citation to Quirin); Resp. Br. 19 n.6. Petitioners nonetheless object (at 37-38) that the Mobbs declaration does not adequately explain why he is an unlawful combatant. That contention is without merit. See Resp. Br. 40-42.

- Petitioners raise the same type of objections made by the district court as to whether Mobbs is a proper declarant. Those claims are meritless. See Resp. Br. 36-37. Petitioners point out (at 9 n.7) that Mobbs's current position was not recognized in the Federal Register until April 2002. That does not mean that he was uninvolved in detainee operations prior to that time, as the declaration itself indicates. Moreover, petitioners' objections to Mobbs – who has "been substantially involved with matters related to the detention of enemy combatants in the current war," and who has reviewed the "relevant records and reports" with respect "to the capture of [Hamdi] and his detention by U.S. military forces," JA 61 – suggest that they would raise what is essentially a hearsay objection to the testimony of anyone other than the United States and allied military personnel in Afghanistan who interviewed Hamdi in a still active combat zone, individuals for whom the district court already has ordered the military to provide names and addresses. See Resp. Br. 48.

- Petitioners object (at 10-11) to the declaration's use of "affiliated," but as we have explained the declaration more than adequately explains the nature of Hamdi's "affiliation" with the Taliban. See Resp. Br. 37-38. Surrendering while armed with a Taliban unit, in itself, clearly constitutes affiliation. Petitioners suggest (at 34 n.18) that "it may have been impossible [for Hamdi] to enter Afghanistan without 'affiliating' with a Taliban unit in one manner or another." But even if that were true, it would hardly excuse Hamdi from the consequences of his affiliation with the Taliban, especially after September 11, 2001.[10]

- Petitioners suggest (at 10 n.8), based on an unsworn declaration (JA 307-309), that certain materials produced by the government, under Brady v. Maryland, 373 U.S. 83 (1963), in connection with the prosecution in United States v. Lindh, Crim. No. 02-37-A (E.D. Va. 2002), may be "exculpatory" with respect to Hamdi. Petitioners' reliance on those materials is misplaced. Lindh pleaded guilty to supplying services to the Taliban, in violation of federal law, and admitted to receiving "extensive military training" with the Taliban and "fighting in support of

---

[10] Indeed, the Supreme Court has long recognized that the "[d]uty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay." The William Bagley, 72 U.S. (5 Wall.) 377, 408 (1866); see also Gates v. Goodloe, 101 U.S. 612, 617 (1879) (individual who "abandoned his home, and entered the military lines of the enemy * * * was * * * an enemy of the government during his stay within the military lines of the rebellion, liable to be treated as such both as to his person and his property.").

the Taliban" in Afghanistan. Statement of Stipulated Facts ¶¶ 6, 9; see id. ¶¶ 4-10 (available at www.usdoj.gov/ag/statementoffacts.htm). That Hamdi's statements may have had some material exculpatory value to the particular charges against Lindh says nothing about Hamdi, who has not been charged with any criminal offense. Moreover, to the extent that petitioners seek to draw any parallel between Lindh – an admitted Taliban soldier – and Hamdi, that comparison only bolsters the military's determination that Hamdi is an enemy combatant.[11]

- Petitioners state (at 11 n.10) that "carrying a weapon in Afghanistan is commonplace and does not support an inference that one is a combatant." But determining whether an individual who is carrying a gun in an active combat zone is among the enemy is a quintessential military judgment. The fact that arms may be commonplace only heightens the need for deference to military officers in the field. Moreover, in making that determination, it surely is reasonable for the military to rely on the fact that an individual was bearing a military-style assault weapon while surrendering with an enemy unit. See Mobbs Decl. ¶¶ 4, 9 (JA 61-62);

---

[11] More fundamentally, Brady, like other criminal procedure precedents, has no application in this uniquely military setting, and the considerations underlying Brady with respect to determining the guilt or innocence of an individual charged with a crime do not have any application when it comes to the detention of an enemy combatant such as Hamdi. See Resp. Br. 21; see also United States v. Ruiz, 122 S. Ct. 2450, 2454 (2002) (emphasizing that Brady is a "'fair trial' guarantee").

www.kalashnikov.guns.ru (discussing AK-47' s development for military use).

- Petitioners fault (at 13) the declaration for not providing more information about the "screening" criteria used by the military to determine whether to continue to detain certain enemy combatants. But as we have explained, those criteria assist in making distinctions among enemy combatants, but do not pertain to the underlying determination whether an individual is an enemy combatant to begin with. See Resp. Br. 39-40.

- Petitioners complain (at 14) that "[t]he Mobbs declaration does not offer any factual support or explanation for Hamdi's current detention in solitary confinement in the Navy Brig in Norfolk." But petitioners themselves had made clear that they do "not contest[] the conditions of [Hamdi's] confinement." Pet. Traverse 9 (JA 71); see Pet. Br. 17 (Petitioners do not "request review of Respondents' treatment of Hamdi.").

- Petitioners assert (at 15) that the Mobbs declaration does not explain the "national security" interests served by Hamdi's detention. As we have explained, there is no need for the military to provide information concerning any sort of individualized assessments with respect to captured combatants. See Resp. Br. 42. In any event, petitioners themselves acknowledge (at 15 n.15) that there is "other evidence on this point," i.e., the Woolfolk declaration (JA 145-147).

3. At the same time that they seek to pick apart the Mobbs declaration, petitioners reiterate that they do not challenge the "military determination" to detain Hamdi in Afghanistan. Pet. Br. 44; see Pet. Br. 27. As we have explained, and petitioners do not seriously attempt to refute, petitioners' failure to challenge the military's battlefield determination that he is an enemy combatant puts their challenge to the Mobbs declaration in an even weaker light. See Resp. Br. 44-45. The battlefield is where the enemy combatant determination was made. Hamdi did not become any more or less an enemy combatant when he left Afghanistan.

III. PETITIONERS PROVIDE NO REASON TO UPHOLD THE DISTRICT COURT'S EXTRAORDINARY PRODUCTION ORDER

Petitioners suggest (at 40) that the district court's production order is "modest." That is, however, far from the case. Indeed, as we have explained, the materials demanded by the production order – which include the raw notes from intelligence gathering interviews by military personnel in Afghanistan, as well as the names and addresses of those soldiers – directly implicates sensitive national security materials with respect to the conduct of an ongoing war. See Resp. Br. 45-49.

In defending the production order, petitioners rely almost entirely on the mistaken notion that the district court has the same "discretionary authority to review the adequacy of the factual record and order that additional factual materials be

submitted" (Pet. Br. 32) in this case as it would in virtually any other civil action. As discussed above, such broad-ranging authority is entirely out of step with the separation of powers principles emphasized in this Court's prior decision. Petitioners suggest that respondents' refusal to provide additional materials itself supports the court's production demands. Pet. Br. 40. That is incorrect. Respondents have submitted a sworn declaration explaining the circumstances underlying the military's determination that Hamdi is an enemy combatant. There is no reason to subject them to the additional, and unprecedented, production demands made by the district court.

IV. THE PETITION SHOULD BE DISMISSED OUTRIGHT

If this Court concludes that the Mobbs declaration establishes the legality of Hamdi's detention, it should order outright dismissal of this action. See Resp. Br.50-55. The Mobbs declaration was submitted in support of respondents' motion to dismiss. If that declaration is sufficient, there is no obstacle to ordering that the motion to dismiss be granted. Petitioners claim that this Court cannot dismiss the case because it lacks jurisdiction to consider their additional legal objections to Hamdi's detention. Pet. Br. 4, 47. That argument is incorrect.

As even the district court seemed to recognize (see Aug. 13 Hrg. at 100 (JA 423)), petitioners' added legal objections to Hamdi's detention are precluded by the Court's prior decision in this case, which recognized that "if Hamdi is indeed an

'enemy combatant,'" then his current detention is "lawful." Hamdi, 296 F.3d at 283. Indeed, petitioners specifically argued in the prior appeal – to no avail – that Hamdi's detention is unlawful under 18 U.S.C. 4001(a), see Resp. Br. 52, and that his detention is unlawful on the ground that he is an "American citizen[]" (Pet. Br. 52). See Hamdi, 296 F.3d at 283 (recognizing that, in Quirin, the Supreme Court held "that both lawful and unlawful combatants, regardless of citizenship, 'are subject to capture and detention as prisoners of war by opposing military forces'") (quoting Quirin, 317 U.S. at 31). There is no reason to remand this case for the district court to address legal arguments this Court has already rejected.

Nor is there any jurisdictional impediment to disposing of those arguments and the entirety of the petition in this appeal. In concluding that respondents' return and supporting declaration are insufficient and ordering the production of the additional materials, the district court's August 16 Order necessarily rejected the government's motion to dismiss. As this Court properly recognized, it has jurisdiction here to address all "issues fairly included within the certified order." Sept. 12, 2002 Order at 2. That includes the question whether the district court should have held, instead, that the Mobbs declaration is sufficient to require dismissal of the petition. See Aug. 13 Hrg. at 4, 83-84 (JA 327, 406-407) (requesting court to find that the declaration is sufficient and thus grant government's motion to dismiss).

Finally, as respondents have explained, petitioners' additional challenges to Hamdi's detention are without merit. See Resp. Br. 50-55. That includes petitioners' continued reliance on 18 U.S.C. 4001, which by no means applies to this extraordinary context. See Resp. Br. 52-54. Petitioners' resort (at 48-49) to the "legislative history" of Section 4001 is indicative of how tenuous their statutory foothold is. But, in any event, the legislative history of Section 4001 confirms that "nothing in the [legislation] * * * interferes with [the Commander-in-Chief] power, because obviously no act of Congress can derogate the constitutional power of a President." 117 Cong. Rec. 31,555 (Sept. 13, 1971) (Rep. Mikva; co-sponsor of legislation). Petitioners' reliance (at 51) on Ex parte Endo, 323 U.S. 283 (1944), is similarly misplaced. There, the Court specifically distinguished between "civilian" and "military" detentions, and stated that, because "Endo is detained by a civilian agency," "no questions of military law are involved." Id. at 298.

It should hardly come as a surprise that petitioners' last-ditch arguments fail. Any other conclusion would mean that this Court would be required to heed petitioners' request (at 56) to order Hamdi's "immediate release," even if it concludes, as it should, that Hamdi is indeed an enemy combatant. Nothing in the

Constitution, United States Code, or regulations supports that absurd result.[12]

* * * * *

Petitioners claim (at 16) that reaffirming in this case the Executive's settled authority to capture and detain enemy combatants in wartime would endanger "fundamental constitutional protections guaranteed to every citizen," and create "a vast power to imprison American citizens almost without review by the courts." That argument is overblown. Hamdi is by no stretch of the imagination an everyday American: he surrendered with an enemy unit, armed with a military-style assault rifle, on a foreign battlefield. The Supreme Court long ago held that such an individual, even if he can establish American citizenship by birth or other means, is subject to capture and detention by the military during the conflict. See Quirin, 317 U.S. at 31. That principle has peacefully co-existed with the constitutional rights of ordinary citizens for more than half a century, during which the Nation's armed forces have been engaged in numerous international conflicts.

[12] Petitioners object (at 16) that "Hamdi may be detained indefinitely." It is settled, however, that the military may detain captured combatants for the duration of the hostilities that led to their capture. The fact that it is not clear when those hostilities will end does not mean that Hamdi's current detention is unlawful.

CONCLUSION

For the foregoing reasons, and those in our opening brief, the district court's August 16 Order should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

LAWRENCE R. LEONARD
Managing Assistant United States Attorney

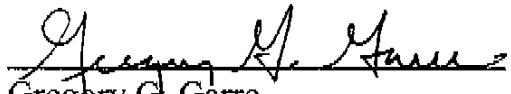
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-4283

OCTOBER 2002

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for Respondents-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6663 words. This count was undertaken by the word-processing system used to prepare the brief.



Gregory G. Garre
Assistant to the Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Respondents-Appellants was served, this 24th day of October, 2002, by facsimile and overnight delivery addressed to:

Frank W. Dunham, Jr.
Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

Gregory G. Garre
Assistant to the Solicitor General

Amici brief of law professors

37 pages

No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, *et al.*,

Petitioners-Appellees,

v.

DONALD RUMSFELD, *et al.*,

Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF AMICI CURIAE SUPPORTING THE UNITED STATES' REQUEST FOR REVERSAL AND THAT THE PETITION FOR WRIT OF HABEAS CORPUS BE DISMISSED

David B. Rivkin, Jr.
Lee A. Casey
Darin R. Bartram
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1731

On behalf of all Amici Curiae

Professor Ruth Wedgwood
Professor Samuel Estreicher
Professor Ronald Rotunda
Professor Douglas W. Kmiec

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, Statutes, Treaties

Treatises, Articles, Statements

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-7338

YASER ESAM HAMDI, *et al.*,

Petitioners-Appellees,

v.

DONALD RUMSFELD, *et al.*,

Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF AMICI CURIAE

INTEREST OF AMICI

Amici are law professors and practitioners specializing in international law, the law of armed conflict, international humanitarian law, and constitutional law. Each has a personal and professional interest in the status and development of these areas. The questions now before the Court are of the highest importance both to the development of international and constitutional law, and for the successful prosecution of the United States'

war against international terror. Amici strongly believe that the Government's return below was legally sufficient to establish its right to detain Yaser Hamdi as an "enemy combatant" or "belligerent."

Amici seek leave to participate in the instant case based on the attached Consent Motion for Leave to Participate as Amici Curiae, in which their individual qualifications are detailed. The views expressed herein are those of the individual Amici, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

BACKGROUND

The United States has been at war since September 11, 2001, when agents of the al Qaeda terrorist organization seized four American commercial aircraft, and carried out attacks against the World Trade Center and the Department of Defense's ("DOD") headquarters at The Pentagon. Over three thousand people were killed. Al Qaeda intended to cause civilian casualties numbering in the tens of thousands.

Congress responded to these acts of war by enacting Pub. Law No. 107-40, authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Determining that al Qaeda was responsible for the September 11 attacks, and that the Taliban regime in Afghanistan harbored al Qaeda, the President deployed American military forces, in cooperation with Afghani Northern Alliance troops, to drive the Taliban from power.

Petitioner Yaser Hamdi was taken prisoner in this armed conflict. He is a Saudi Arabian national, and evidently made his home there until traveling to Afghanistan, in the summer of 2001, to join the Taliban. *See* Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy ¶¶ 3, 5 [hereinafter Mobbs Affidavit]. Although Hamdi has never lived in the United States for any extended period of time, he claims American citizenship by virtue of his birth in Louisiana.

After his capture by the Northern Alliance, Hamdi was turned over to American forces, processed and reviewed by U.S. screening teams on several occasions, and then transferred to Guantanamo Bay, Cuba. He was subsequently sent to the U.S. naval brig in Norfolk, Virginia. Because he is a combatant, detained in an international armed conflict, Hamdi's conditions in the Norfolk brig have been monitored by the Geneva-based International Committee of the Red Cross ("ICRC") to assure that they are humane and consistent with the customary law of armed conflict. *See* Government's

Memorandum of Points and Authorities in Support of Respondent's Objections to Magistrate Judge's Order of May 2, 2002, Regarding Access, at 4.

On June 11, 2002, Hamdi's father, Esam Fouad Hamdi, acting as next friend, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division. This petition asserts that Hamdi is a U.S. citizen unlawfully detained by the U.S. military. On the same day, the District Court ordered that the Federal Public Defender be given unmonitored access to Hamdi, even though he was still undergoing lawful intelligence debriefings as a battlefield detainee, without even permitting the Government an opportunity to be heard.

This Court reversed that decision on July 12, 2002, noting that "the June 11 order apparently assumes (1) that Hamdi is not an enemy combatant or (2) even if he might be such a person, he is nonetheless entitled not only to counsel but to immediate and unmonitored access thereto." *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002). The case was remanded for a proper determination of these issues, with unequivocal instructions to the trial judge that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step." *Id.* at 284.

On August 16, 2002, the District Court issued a further order, concluding that the sworn affidavit of senior DOD official Michael Mobbs, setting forth the relevant facts that support Hamdi's classification as an enemy combatant, was insufficient to permit "meaningful judicial review" of the Government's determination that Hamdi was subject to continued detention as a battlefield prisoner. Aug. 16 Order at 7. In addition, the District Court demanded the production of numerous sensitive DOD documents for review, including the screening criteria used by U.S. forces in taking custody of combatants from the Northern Alliance in Afghanistan, and the screening criteria used for their transfer to Guantanamo Bay. The District Court made this demand even though disclosure of the screening criteria may compromise the Government's ability to identify future intelligence sources, and disclose its tactical knowledge of other deployed Taliban or al Qaeda personnel. The instant appeal followed.

ARGUMENT

The principal question before the Court is precise: Whether the Mobbs Affidavit sufficiently explains the President's basis for classifying Hamdi as an enemy belligerent and combatant. The District Court concluded that the Mobbs Affidavit was insufficient to permit a "meaningful" review of the basis for Hamdi's classification, and continued

internment, even though he was captured by allied forces "in a foreign land during a period of ongoing hostilities." August 16 Order, at 8.

In fact, the Mobbs Affidavit clearly articulates a lawful basis for Hamdi's detention in stating that he was "affiliated with a Taliban military unit and received weapons training," and that he was taken into custody by Northern Alliance forces (which were then allied with the United States) when his Taliban unit surrendered. *See* Mobbs Affidavit, ¶¶ 3, 4. As a matter of law, these are sufficient and dispositive factors in determining that Hamdi was, indeed, an enemy combatant who has been lawfully detained.

The writ of habeas corpus is a venerable part of common law guarantees of liberty. However, its proper application in this case is solely to determine whether the Executive Branch has a lawful basis upon which to detain Hamdi as an enemy combatant. It is emphatically not to substitute *de novo* judicial fact-finding and battlefield assessments for the President's well-established authority in the prosecution of an international armed conflict, and in the resulting capture and detention of enemy combatants – even where those belligerents are also American citizens.

I. Hamdi Has Not Been Deprived of a Cognizable "Liberty" Interest.

As this Court already has correctly concluded, if Hamdi was properly detained as an "enemy combatant," then his continued detention until the

end of active hostilities is lawful. *Hamdi v. Rumsfeld*, 296 F.3d at 283. As a battlefield detainee, captured in a war which he willingly joined, Hamdi has been deprived of no cognizable "liberty" interest under the Fifth Amendment, and his petition must fail.[1]

It is settled law that enemy combatants may be detained during the continuation of hostilities – even if they are citizens of the very country they have chosen to oppose on the battlefield. *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention."); *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (U.S. citizen not entitled to habeas relief when held as a prisoner of war).

The law of armed conflict requires that an enemy's surrender be accepted, even though taking prisoners can be hazardous. The premise of

---

[1] The term "enemy combatant" troubled the District Court, which cited the American Bar Association for the claim that "[u]ntil now, as used by the attorney general, the term 'enemy combatants' appeared nowhere in U.S. criminal law, international law or in the laws of war." *See* Certification Order and Stay at 5. This is plainly incorrect. The Supreme Court used the term in *Ex parte Quirin*, 317 U.S. at 31, and repeatedly in *In re Yamashita*, 327 U.S. 1 (1946). It has a long pedigree as part of the laws of war. *See* British War Office, *Manual of Military Law 1929*, Amendments (No. 12), ch. XIV, section III, at 12-13 (The means of reducing an enemy's "powers of resistance are:-- Killing and disabling the *enemy combatants*; constraining

this duty, however, is that the captured enemy combatant will be removed from the battlefield and interned for the duration of the armed conflict -- in order to prevent his return to the fight. This internment can be effected overseas, or in the United States, so long as it does not endanger the detainee's life. Indeed, during World War Two, hundreds of thousands of enemy combatants were captured in Europe and detained, in military custody, in the continental United States.[2]

Under the Constitution and laws of the United States, the capture and detention of enemy combatants is a matter squarely within the President's authority as Commander-in-Chief. As this Court noted in its July 12, 2002 decision: "[t]he authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents." *Hamdi v. Rumsfeld*, 296 F.3d at 281-82.[3] Neither the Constitution nor laws of the

---

them by defeat or exhaustion to surrender, that is taking them prisoners.") (emphasis added) [hereinafter *British Manual*].

[2] *See* George G. Lewis, *History of Prisoner of War Utilization by the United States Army 1776-1945* (Dept. of the Army 1955).

[3] Indeed, during the Civil War, thousands of American citizens, then serving in the Confederate States' armed forces, were imprisoned under the President's authority. In this regard, the first sentence of the District Court's August 16 Order, stating "[t]his case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and

United States prescribe any particular process for such captures, and the determination of who is an enemy combatant, subject to detention, is a matter for the President, and those Executive Branch officials to whom this authority may be delegated. The District Court's attempt to substitute its judgment, for that of the President, is without foundation in precedent or practice.

In particular, the District Court's evident assumption that a determination of "enemy combatant" status must involve due process guarantees, comparable to those required in a criminal proceeding, is incorrect. This determination is in no sense a "criminal" proceeding, and has no penal consequences. It has long been established that "'[c]aptivity [in wartime] is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'" William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920) (quoting British War Office, *Manual of Military Law* (1882)); *see also* Marco Sassoli &

---

subject to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer," is clearly in error. It is also error to claim that Hamdi's internment is "incommunicado" since his conditions have been monitored by the ICRC. Moreover, Hamdi is free to send and receive correspondence and screened packages. *See* Office of the Press Secretary, White House Fact, Feb. 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

Antoine A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 125 (ICRC 1999) ("Prisoners of war may be interned without any particular procedure or individual reason. The purpose of this internment is not to punish them, but only to hinder their direct participation in hostilities and/or to protect them."). As noted by Columbia University Professor Francis Lieber, who was asked to codify the rules of war during the Civil War, "[a] prisoner of war is a public enemy armed or attached to the hostile army ...who has fallen into the hands of the captor." He is "subject to no punishment for being a public enemy, nor is any revenge wreaked upon him."[4] The President's authority to capture and detain enemy personnel is a plenary power of war. In this instance, it also is supported by Congress' authorization for the use of force in Pub. L. No. 107-40.

---

[4] Lieber's codification was issued by President Lincoln as "General Orders No. 100" or "Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War" Arts. 49, 56 (April 24, 1863). It is available at http://www.yale.edu/lawweb/avalon/lieber.htm>. *See also* H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* 431, 434 (1861) ("the captor has the absolute right to keep his prisoners in confinement till the termination of the war."); Emmerich Vattel, *The Law of Nations*, Ch. 8, § 153, p. 531 (Luke White ed. 1792) ("whoever makes a just war has a right, if he thinks proper, to detain his prisoners till the end of the war."). *Accord British Manual, supra* note 1, at 248-49 ("The object of the internment [of prisoners] is solely to prevent prisoners participating further in the war.").

II. The Mobbs Affidavit Fully Supports Hamdi's Classification as an Enemy Combatant.

The Mobbs Affidavit provides an ample basis to support, as a matter of law, the conclusion that Hamdi is an enemy combatant. The Supreme Court has defined an "enemy belligerent" to include "[c]itizens who associate themselves with the military arm of the enemy government." *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The Mobbs Affidavit clearly establishes that Hamdi was a combatant associated with the military arm of an enemy. He underwent military training with the Taliban in Afghanistan, and was assigned to a unit deployed to fight the Northern Alliance and U.S. forces.

Even in peacetime, where the exercise of pacific powers is at issue, such as in immigration and naturalization cases, the courts have required only a rational basis or "some evidence" to support government action. *See INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (deportation order upheld based on "some evidence to support the order," before additional procedures were established in the Immigration and Nationality Act); s*ee also United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir.), *cert denied*, 404 U.S. 943 (1971) (local executive's use of emergency authority, including curfew, upheld where there was "some factual basis" for the decision). The Mobbs

Affidavit would more than meet even this peacetime standard. The District Court's contrary conclusion rests on a number of misconceptions regarding the governing principles to be drawn from the laws and customs of war.

A. *Hamdi's "Affiliation" with the Taliban Was Sufficient To Support His Classification as an Enemy Combatant.*

In particular, the District Court erred in supposing that an individual must be caught in the act of actually firing a gun in battle in order to be classified as an enemy belligerent or combatant. In dismissing the Mobbs Affidavit as "insufficient," it seized upon a phrase stating that Hamdi was "affiliated" with the Taliban. The Court complained that the affidavit was "silent as to what level of 'affiliation' is necessary to warrant enemy combatant status," and that "Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban" and "does not say that the Taliban unit to which Hamdi was 'affiliated' was ever in any battle while Hamdi's [sic] was 'affiliated.'" August 16 Order, at 11.

First, it is important to note that the Mobbs Affidavit provides more than merely an assertion of Hamdi's affiliation with the Taliban. In paragraph 3, the affidavit notes that Hamdi:

> traveled to Afghanistan in approximately July or August of 2001. He affiliated with a Taliban military unit *and received weapons training*. Hamdi remained with *his* Taliban unit following the attacks of September 11 and after the United

> States began military operations against the al Qaeda and Taliban on October 7, 2001. (emphasis added).

The affidavit further notes in paragraph 4 that in

> In late 2001, Northern Alliance forces were engaged in battle with the Taliban. During this time, *Hamdi's Taliban unit* surrendered to Northern Alliance forces and he was transported *with his unit* from Konduz, Afghanistan, to the prison in Mazar-e-Sharif, Afghanistan which was under the control of the Northern Alliance forces. Hamdi was directed to surrender his Kalishnikov assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so. (emphasis added).

In addition, it is noted in paragraph 5 that, in interviews by a U.S. interrogation team, Hamdi "identified himself as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer *to train with and, if necessary, fight for the Taliban."*

Second, the District Court's premise appears to be that enemy belligerents can be detained, during an ongoing and active military conflict, only if the Government can meet the burden of proof applicable in federal criminal cases, through eyewitness testimony to be provided thousands of miles from the field, showing that the belligerent was seized at the height of a pitched battle. This premise is utterly at odds with the realities of warfare, and particularly battlefield conditions, in which combatants may perform many different roles. In any conflict, military contingents may fight, maneuver, be held in reserve, and perform supporting roles that do not

involve actual fighting. Accordingly, the laws of war prescribe that a broad category of belligerents are subject to capture and internment.

In this regard, enemy "combatants" or belligerents include all individuals associated with a hostile force, whether they engage in combat, are merely in training, are in a reserve corps, or are involved in supporting logistical activities that do not require fighting at all. Indeed, it has long been established that a person attached to armed forces who carries out a logistical or support function involving skills also known to civilian life -- such as mechanics repairing military equipment, for example -- may be taken prisoner and detained. *See, e.g.,* Winthrop, *supra* p. 9, at 789 (individuals who may be detained include "also civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways."); *see also* Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* 83-84 (1995) (noting "actual and widespread awareness that armed forces are composed both of persons who fought and of persons who (because of their function) do not take a direct part in the fighting, ... the [so-called] noncombatant, as a member of the armed forces, is not protected from being the object of an attack ... [such] non-combatants are not nor could they under any

circumstances be protected as civilians.")[5] The breadth of enemy belligerents subject to capture was similarly recognized in the Hague Convention No. IV, to which the United States is a party. *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex of Regulations, art. 3, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) ("The armed forces of the belligerent parties may consist of combatants and non-combatants.") [hereinafter "Hague Convention" or "Hague Regulations"]; *see also* United States Department of the Army, The Law of Land Warfare FM 27-10 (1956), at para. 62 ("[t]he armed forces of the belligerent parties may consist of combatants and noncombatants.") [hereinafter "Army Field Manual"]; *British Manual*, *supra* note 1, at ¶ 21("[b]oth combatant and non-combatant members of the armed forces are included in the above categories [defining the armed forces of a belligerent].").

---

[5] *Accord* T.J. Lawrence, *The Principles of International Law* (4th edition 1910) ("Article 3 of the Hague Regulations . . . declares that 'the armed forces of the belligerents may consist of combatants and noncombatants.' Here the noncombatants are a division of the armed forces, and consist apparently of those who perform auxiliary services, such as driving a baggage wagon or working a field telegraph. Such persons carry arms and are expected to use them, if attacked, though they are not placed in the fighting line and as a rule take no active part in the conflict. They should, however, be reckoned as combatants, since they are attached to the combatant forces and do fight on rare occasions.").

Hamdi associated with the Taliban as a belligerent who, by his own admission, was trained and ready "if necessary, [to] fight for the Taliban." This amply qualifies him as an enemy combatant. He was carrying a battlefield weapon at the time of his surrender to Northern Alliance forces. Indeed, his capture as part of the surrender of an armed Taliban unit is itself a sufficient factual predicate upon which to base this classification.[6] Without more, this makes him a belligerent subject to capture and detention until hostilities are over.

B. *Both Lawful and Unlawful Combatants Are Subject to Detention for the Duration of Active Hostilities.*

In considering the sufficiency of the Mobbs Affidavit, it appears that the District Court also confused the question of whether Hamdi is an enemy belligerent with the wholly separate question of whether he is an *unlawful* combatant. The Court noted, for example, that the Mobbs Affidavit "never refers to Hamdi as an 'illegal' enemy combatant" -- although the Government used this term in its supporting brief. August 16 Order, at 10. The District Court also complained that Hamdi did not receive the trial procedures

---

[6] The District Court considered important that Hamdi was initially captured by Northern Alliance forces, fighting as U.S. allies, and opined that "*it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict.*" August 16 Order, at 12-13 (emphasis added). Hamdi, however, has not claimed that he was a member of the

accorded to the criminal defendants in *Ex parte Quirin*, a death penalty case in which eight Germans (at least one of whom claimed American citizenship) were tried by a military commission and condemned as war criminals for the crime of sabotage. *Id.* at 8.

Hamdi, of course, is an unlawful belligerent. Under the laws and customs of war, the term of "unlawful combatants" – or "unlawful" or "unprivileged belligerents" – is used to refer to groups and individuals who engage in hostilities but who fail to comply with the four basic criteria: (1) to be commanded by a person responsible for his subordinates; (2) to have a fixed distinctive emblem recognizable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and customs of war. *See United States v. Lindh*, 212 F. Supp. 2d 541, 556-58 (E.D. Va. 2002). Any armed group (including the armed forces of a sovereign state) that fails to meet these requirements can be classified as unlawful belligerents and combatants.[7] They are not entitled to the full

---

Northern Alliance, either mistaken for a Talib or "set up" for some nefarious purpose by his colleagues.

[7] These four requirements apply both to militias and other irregular forces, and to the regular armies of a state. *See United States v. Lindh*, 212 F. Supp. 2d at 557 n. 35; *British Manual, supra* note 1, Ch. XIV at 10 ("[i]t is taken for granted that all members of the army . . . as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces." [footnotes omitted]); International

prerogatives and privileges of lawful combatants under the Geneva Convention III of 12 August 1949 Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and *may* be prosecuted and punished for the "acts which render their belligerency unlawful." *Ex parte Quirin*, 317 U.S. at 31.

Although the President has determined that the al Qaeda *and* the Taliban are unlawful belligerents, because they failed to differentiate themselves from civilians and to obey generally the laws of war, *see United States v. Lindh*, 212 F. Supp. 2d at 556-58 (confirming President's determination that Taliban do not qualify as lawful combatants), it is unclear whether any criminal prosecutions will actually be brought against Hamdi. This question is entirely separate from the issue whether he is an enemy combatant subject to detention, and involves a future exercise of prosecutorial discretion. Even lawful combatants, who have fulfilled all the requirements of the laws of war, are amenable to detention as a purely preventive measure, to keep them from returning to the fight and prolonging

---

Committee of the Red Cross, *The Geneva Conventions of 12 August 1949 Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* 63 (Jean S. Pictet & Jean de Preux eds., 1969) (Geneva Convention does not specifically restate the four criteria in the treaty text concerning "regular armed forces," because the criteria were already "material characteristics" of qualifying as an armed force) [hereinafter ICRC Commentary].

the war. If the United States ultimately decides to prosecute Hamdi for providing material assistance to the Taliban, or for unlawful belligerency, he will be entitled to the appropriate guarantees of criminal procedure in that trial. This is simply a question for another day.[8]

Thus, the purpose of Hamdi's current detention is entirely administrative in character – to keep him from rejoining Taliban and al Qaeda forces in the field, and to de-brief him regarding any intelligence information he may possess. As the detaining power, the United States is entitled to interview Hamdi at length, in order to save the lives of its own forces and civilians by thwarting future belligerent attacks.[9]

Indeed, at this point, the Government's foremost consideration is likely to be the gathering of information to thwart future attacks. This is one practical example of why the laws of war have never required criminal due process rights, such as "access to counsel," for interned enemy belligerents. The first act of any defense counsel would be to tell his "client" to stop

---

[8] The fact that a criminal prosecution has not been undertaken at the present time does not violate Hamdi's rights, despite the District Court's suggestion. There is no particular statute of limitations under the customary law of armed conflict for war crimes trials. Any later question concerning the admissibility of an interned combatant's statements would be a matter for the appropriate criminal forum to determine.

[9] *See* ICRC Commentary, *supra* note 7, at 163-64 ("[A] State which has captured prisoners of war will always try to obtain military information from them. Such attempts are not forbidden…") (footnote omitted).

talking. In a terrorist war involving a conspiracy to use weapons of mass destruction against innocent civilians – including biological, chemical, radiological, or nuclear devices – intercepting future planned attacks may depend crucially on querying captured enemy combatants.

For example, al Qaeda's post-September 11 plan for truck bomb attacks on American embassies and diplomatic residential compounds throughout southeast Asia came to light this past September 2002 after three months of questioning of an al Qaeda conspirator.[10] The intelligence information would not have been available if that al Qaeda belligerent had been released or remained silent on a lawyer's advice. Even a Taliban volunteer may have crucial information concerning routes of recruitment, the locations of safe houses and training camps in Afghanistan and elsewhere around the world, the identity of other Taliban and al Qaeda members met in the course of operations, and even information about planned al Qaeda operations.

---

[10] *Cf.* Raymond Bonner, *Threats and Responses: Detainees; Singapore Announces Arrest of 21 Men Linked to Planned Attacks on U.S. Targets,* N.Y. Times, Sept. 17, 2002, at A17 (al Qaeda operative, Omar al-Faruq, arrested in Indonesia in June 2002 and questioned at American air base in Bagram, Afghanistan, giving information three months later, in September 2002, concerning planned truck bombings against American embassies and diplomatic residences in Indonesia, Malaysia, Philippines, Singapore, and Cambodia, as well as other sites in southeast Asia.).

Of course, all captured enemies, whether they are lawful combatants entitled to the privileges of POWs, or unlawful combatants who are not covered by the GPW, have the right to humane treatment and decent conditions of confinement under the customary law of war. If, at the close of hostilities, a decision is made to prosecute criminally one or more of these individuals, they will be entitled to due process consistent with the forum in which they have been charged. The individuals held by the United States in the present conflict have been accorded humane conditions, including extraordinary medical attention, religiously-appropriate meals, the opportunity to worship, reading materials, correspondence and the means to send mail, and visits by the ICRC.[11] There is, in short, no "rights free" zone at Guantanamo Bay, or in the Norfolk navy brig.

III. The GPW Is Not Enforceable in the Courts and Does Not, in Any Case, Grant Hamdi a Right to Counsel or Judicial Review of His Combatant Status.

In both its August 16 Order, and its August 21 Certification Order and Stay, the District Court placed great weight on the potential application of

---

[11] *See* Office of the Press Secretary, White House Fact Sheet, Feb. 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. The ICRC is a neutral and independent organization. During armed conflict, it monitors the conditions and treatment of detained combatants, and works with the governments involved in the conflict to ensure that such detained combatants are afforded appropriate protections and treatment.

the GPW treaty to Hamdi's case, suggesting that a proper consideration for the court was "[w]hether the Geneva Treaty or Joint Services Regulations [which have been adopted as a means of implementing the requirements of the Geneva Conventions] required a different process" to determine whether Hamdi was an enemy combatant.[12] *See* August 16 Order at 9. This inquiry by the District Court is also mistaken.

The GPW is not generally enforceable by individuals in the U.S. courts. As the Supreme Court explained, with respect to the predecessor 1929 Geneva convention: "[T]he obvious scheme of the Agreement[is] that responsibility for observance and enforcement of these rights is upon *political and military authorities*." *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (denying relief to several German nationals who were tried for criminal breaches of the law of war in U.S. military commissions overseas) (emphasis added). Similarly, the GPW, and the customary law of war, are vindicated by other effective means, including the interest of each State in reciprocity (a state will have to live by the rules it prescribes for others), as well as through diplomatic intervention and the ICRC's good offices.

---

[12] It should be noted that, of the four Geneva Conventions of August 12, 1949, only the third is relevant to Hamdi's case.

Treaties, as this Court has held, "are not presumed to create rights that are privately enforceable," and "[c]ourts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir.), *cert. denied*, 506 U.S. 955 (1992). Like the Hague Convention, which was at issue in *Goldstar* where the Court rejected an effort to recover damages for alleged U.S. violations during the 1991 Panama invasion, the GPW does not "explicitly provide for a privately enforceable cause of action," and, when read as a whole, evinces no intent to create such a right. Under the treaty's explicit terms, disagreements over its application are to be resolved by conciliation and good offices, through the intermediation of a "protecting power" or the ICRC, and by the treaty parties "in a manner to be decided between the interested Parties." *See* GPW, *supra*, arts. 11, 132.[13] No provision is made for judicial enforcement. Moreover, where the most serious violations are concerned, the treaty itself requires parties "to enact any legislation necessary to provide effective penal sanctions." *Id.* at art. 129.

[13] Article 132 provides, in pertinent part: "[a]t the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention."

Accordingly, most of the courts to address the issue have concluded that the Geneva Conventions are not self-executing. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J. concurring), *cert denied*, 470 U.S. 1003 (1985) (noting that the GPW requires states to take measures "through their own laws to enforce its proscriptions [which] evidences its intent not to be self-executing"); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (rights guaranteed under Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War not self-executing); *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996) ("The courts have consistently held that the Geneva Conventions and Protocol I are not self-executing and, thus, provide no basis for the enforcement of private rights in domestic courts."); *Linder v. Portcarrero*, 747 F. Supp. 1452, 1463 (S.D. Fla. 1990), *rev'd on other grounds*, 963 F.2d 332 (11th Cir. 1992); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal 1985) ("[I]t is clear that neither the 1929 Geneva Convention nor the Hague Convention was intended to establish judicially enforceable obligations.").[14]

[14] In the recent criminal prosecution against John Walker Lindh, the District Court rejected his claim to "combat immunity," from prosecution. In reaching this decision, the court ruled that Lindh was an "unlawful combatant" under the customary law of war, and under the GPW. It noted that the relevant portion of the treaty was self-executing "insofar as it is

In any event, even when the courts interpret and apply treaties in appropriate cases, they do so with great deference to the views of the President. *See Sumitomo Shoji America, Inc v. Avagliano*, 457 U.S. 176 (1982); Restatement Third of the Foreign Relations Law of the United States § 326, reporters note (1987). The reasons for such deference are particularly compelling in the case of armed conflict. The United States' interpretation and application of the GPW may depend, in part, upon the interpretation and application adopted by its adversaries. Thus, if a hostile power chooses to interpret the treaty narrowly, in a manner disadvantageous to American prisoners, the President must remain free to consider the appropriate scope of treaty performance, though always respecting minimum standards of humanity.

---

pertinent here." 212 F. Supp. 2d at 553. This, however, solely concerned the treaty's relevance to the availability of a common law defense to criminal prosecution, not an attempt to countermand the President's authority to hold battlefield combatants.

Similarly, in a case concerning the criminal conviction of Panamanian dictator Manuel Noriega, the court stated in *obiter dicta* that, if "given the opportunity to address this issue in the context of a live controversy," it would "almost certainly hold" the "majority of provisions" of the GPW to be self-executing. However, that case also deal with the appropriate treatment of a criminal defendant, in a matter clearly committed to the federal courts. *See U.S. v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). Since the Government had decided to treat Noriega "as if" he were a prisoner of war, the matter was mooted.

This delicate balance would be upset if the courts chose to involve themselves in these questions, requiring the President to accord a level of benefits not reciprocated by the enemy, and depriving him of the critical leverage needed to protect U.S. servicepersons overseas. In this respect, the interpretation and application of the terms of the Geneva Conventions is a prime example of circumstances "where a court's deference to the political branches of our national government is considerable." *Hamdi v. Rumsfeld*, 296 F.3d at 281. The President has, of course, determined that the Taliban, as a group, are unlawful combatants who are *not* entitled to enjoy the particular privileges of the GPW, even though they must be treated humanely.[15]

The District Court also erroneously referenced Article 5 of the GPW, which provides that "[s]hould any doubt arise as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy, belong to any of the categories [entitling them to POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." GPW, *supra* p. 18, art. 5 (emphasis added). However, this article operates only when it is *already established* that an actor has committed a belligerent act, and may be

[15] *See* White House Statement on Guantanamo Bay Detainees, Feb. 7, 2002,

detained for the conflict's duration, and there is still "a doubt" as to whether he is entitled to the privileges of a POW.[16] Its purpose is to get battlefield detainees safely to the rear, and to avoid life and death decisions by individuals of subordinate rank regarding "unlawful combatancy," *see* ICRC Commentary, *supra* note 7, at 77, and it simply has no bearing on the question whether Hamdi can be detained as an enemy combatant in the first instance. And, in any event, the GPW does not require "doubt" to be resolved by a civilian tribunal, and no particular procedure is required. The determination, most certainly, does not involve the appointment of prosecuting and defense counsel. *See* ICRC Commentary, *supra* note 7, at 77-78.[17]

---

available at U.S. Newswire, Feb. 7, 2002, in Lexis/Nexis Library.

[16] With respect to Hamdi's status as an unlawful combatant, who is not entitled to the extra privileges of a POW, there also is no question of "doubt." Hamdi was clearly associated with the Taliban, and the President has determined, in accordance with his constitutional authority to implement treaties and the laws and customs of war, that the Taliban, as a group, do not qualify as lawful combatants. They failed to fulfill the four requirements of lawful combat, most particularly, through a general failure to observe the laws and customs of war. *See* White House Statement of February 2002, *supra* note 15. This is not, then, a case of "doubt" about Hamdi's classification as an unlawful combatant, and there is no basis for a court to countermand the President's theater-wide determination that an adversary force as a whole has failed to qualify as lawful combatants.

[17] Indeed, even in the criminal adjudication of offenses against the laws of war, the treaty privileges *military* tribunals. GPW, *supra* p. 18, art. 84.

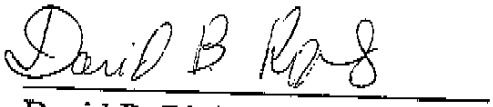
CONCLUSION

Hamdi seeks a form of judicial relief that has never been accorded wartime combatants (even those who are American citizens) detained on the battlefield, namely, a redetermination of his status by a federal district judge. In a conflict involving the capture of thousands of enemy prisoners, this clearly falls outside the purview or competence of federal district courts. It would require the courts to assess battle conditions, and access a welter of sensitive information involving troop deployments, allied chains of command, and cooperating sources of information. To require *de novo* judicial review, featuring the provision of *viva voce* testimony by each commander involved in the original battlefield capture, would interfere with ongoing military operations in a theatre thousands of miles away. Even figuratively sending judges to the battlefield, in search of the fine-grained testimony required in a criminal prosecution, or to insist upon the interpolation of civilian counsel, would mistake a war for multi-district litigation, and could derail the crucial processes of military interview and interrogation of captured prisoners. These interviews are perfectly legal under the laws of war, and have, even in this conflict, permitted the gathering of intelligence that has saved lives and protected American facilities from terrorist attacks.

These compelling reasons for judicial deference aside, there is no basis to believe that Hamdi's detention as an enemy combatant was erroneous, or that any of the rights to which he may be entitled have been violated. The Mobbs Affidavit lays out undisputed facts sufficient to support the Executive Branch's decision to classify him as an enemy combatant. Hamdi also is free to present any information he might wish to military authorities, either directly or through the intermediation of the ICRC, concerning the circumstances of his presence in the battle area. The government of Saudi Arabia, of which he remains a citizen, is also free to champion his cause diplomatically, if it considers that he has been unfairly treated.

For all of the above reasons, Amici urge the Court to reverse the District Court's decision, and to dismiss the petition.

Respectfully submitted,



David B. Rivkin, Jr.
Lee A. Casey
Darin R. Bartram
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1731

On Behalf of all Amici Curiae

Ruth Wedgwood
Professor of Law, Yale University Law
School, and Edward B. Burling Professor of
International Law and Diplomacy,
Johns Hopkins University

Samuel Estreicher
Professor of Law, New York University
School of Law

Douglas W. Kmiec
Dean & St. Thomas More
Professor of Law
Catholic University

Ronald Rotunda
George Mason University Foundation
Professor of Law
George Mason University School of Law

Dated: October 10, 2002

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the foregoing brief of amici curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,922 words as computed by a Word 97 (the software used to prepare the brief) word count program that includes headings, footnotes, quotations, and citations in the count.

David B. Rivkin

David B. Rivkin, Jr.

October 10, 2002

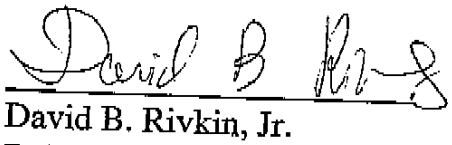
Dated

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of October, 2002, I served true and correct copies of the foregoing Brief of Amici Curiae Supporting the United States Request for Reversal and That the Petition for Writ of Habeas Corpus be Dismissed, by overnight courier, upon the following:

Frank W. Dunham, Jr.
Federal Public Defender
Office of the Federal Public Defender
150 Boush Street,
Suite 403
Norfolk, Virginia 23510

Paul J. McNulty
Paul D. Clement
Gregory G. Garre
David B. Salmons
Lawrence R. Leonard
United Stated Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



David B. Rivkin, Jr.
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1731
Counsel for Proposed Amici Curiae